REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURT

JR. MISC. CIVIL APPLICATION NO. 459 OF 2014

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY MPUKO NAHASON MWITI (ADVOCATE)

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ORDER 52 RULE 7 OF THE CIVIL PROCEDURE RULES,

CIVIL PROCEDURE ACT CAP 21, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 57 OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA

REPUBLIC.....APPLICANT

-VERSUS-

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORATION (ICDC)..1ST INTERESTED PARTY

ADVOCATES COMPLAINT'S COMMISSION.....2ND INTERESTED PARTY

EX PARTE: **MPUKO NAHASON MWITI**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd December, 2014, the ex parte applicant herein, **Mpuko Nahashon**

Mwiti, seeks the following orders:

> 1. **That an order of Certiorari do issue to quash the proceedings of the Respondent in the Disciplinary Cause known as Disciplinary Committed Cause Number 9 of 2012 against the *Ex parte* Applicant.**
>
> 2. **That an order of Prohibition to issue, prohibiting the Respondents, Interested Parties or any person acting in their behest from continuing with the Disciplinary Cause known as Disciplinary Committee Cause Number 9 of 2012 against the *Ex parte* Applicant**
>
> 3. **The costs of the application awarded to the *Ex parte* Applicant.**

Ex Parte Applicant's Case

2. The application is based on the Statement of Facts and a Verifying Affidavit sworn by the Applicant 9th December, 2014.

3. According to the Applicant, based on the recommendation by the 2nd Interested Party (hereinafter referred to as "the Commission"), the respondent (hereinafter referred to as "the Tribunal") commenced a disciplinary cause against him on 24th April 2012 in a matter related to the enforcement of a professional undertaking the applicant had allegedly issued to Industrial & Commercial Development Corporation (ICDC), the 1stinterested party herein on or about the 22nd September 1998 which proceedings are still ongoing.

4. According to the applicant, the said proceedings were prejudicial to him and that the respondent upon receipt of the complaint proceeded with the hearing and the proceedings in general as though he had all the facilities to properly defend the claims against him. The notice, he contended required him to reply substantively to the claims levelled against him and it was upon the requirement and insistence of the Commission that he had not responded substantively to the complaint that the matter was referred to the Tribunal.

5. According to the ex parte applicant, he had severally raised the issue of unreasonable delay in bringing the matter to trial and seeking the intervention of the Tribunal as well as indicated his inability to put forward a proper and conclusive defense against the claims levelled against him since he has been unable to trace full documentation of the transaction on account of the delay by the complainant in the disciplinary cause. Further to this, he also raised a preliminary objection before the Respondent but the same was not accorded the due consideration as it ought to have been since it raised key and pertinent issues necessary in a fair trial.

6. It was the applicant's case that it was therefore unfair, unjust and a breach of his rights to a fair hearing by the Tribunal for the Tribunal to entertain the said complaint and to proceed to the trial and determination thereof which was tantamount to visiting the consequences of delay on the part of ICDC on him, some 14 years later.

7. He disclosed that in the complaint to the Tribunal, ICDC alleged that it had forwarded title documents to property on which security was to be created to secure payment of a loan to one of its customer on account of a professional undertaking issued by the interested party (sic), an assertion the applicant vehemently denied. However, it was his contention that even if existent at the time of his dealings with ICDC, the same is incapable of enforcement by the Tribunal as these are issues which are the sole province of the High Court and the respondent was therefore wrongfully seized of the matter.

8. It was the applicant's contention that without proof of the validity of the professional undertaking by the High Court, neither was there a cause of action against him nor was the Tribunal capable of taking any action on the matter.

9. He reiterated that he never breached any professional undertaking and that the documentation available to him indicated that the said title documents were returned to ICDC and its officer. However, due to the unreasonable delay, he was unable to trace the service clerk who delivered the said letter to authenticate the said letter and receipt thereof, which letter is the crux of the proceedings before the Tribunal. The applicant therefore averred that the Tribunal is unlikely to make a fair determination on the matter, as it proceeds on the assumption that the Applicant was able and had indeed adduced all the evidence and documentation on the matter.

10. The Applicant therefore contended that the proceedings were incurably unfair to him and the only remedies available to the Applicant are the orders sought herein. To compound matters further, the Commission had already recommended that a *prima facie* case had been made against him and the mind of the respondent at the time of commencement of the trial in the matter was already biased.

11. It was reiterated that the Tribunal had no jurisdiction to enforce any alleged professional undertaking as this jurisdiction is the province of the High Court as provided under order 52 rule 7 of the ***Civil Procedure Rules 2010***. To him, under the said provisions, enforcement of professional undertaking is special jurisdiction which the Tribunal has no jurisdiction to hear and determine hence any orders likely to be made by the Respondent will be null and void for want of jurisdiction and he will have been dragged through the disciplinary process in vain. He added that the proceedings being conducted by the Respondent were statute barred under section 19 of the ***Limitation of Actions Act***, CAP 22, laws of Kenya, as it related to recovery of monies and interest thereon secured by a mortgage or charge and 12 years had lapsed since the cause of action arose.

12. According to the *ex parte* applicant, here a complaint is filed fourteen (14) years after the event, details of the event may be hazy and to require an advocate to defend himself after such a long period is akin to sabotage hence is a breach of the rules of natural justice.

13. It was submitted based on Order 52 rule 7(1) of the ***Civil Procedure Rules*** that in the absence of a cause of action against the Applicant, there being no proof of the validity of the professional undertaking, the Tribunal is not capable of taking any action in the matter. To the applicant only advocates can enforce professional undertaking and that section 57 of the ***Advocates Act*** does not set out the enforcement or breach of a professional undertaking as a ground for adverse action by clients against their advocates.

14. It was the Applicant' case that under Order 52 rule 7 aforesaid, only the High Court can enforce professional undertaking hence the Tribunal has no jurisdiction to hear and determine questions of validity of professional undertakings hence the proceedings before the Tribunal were premature.

15. It was submitted that since the limitation period for a claim for recovery of money under section 19 of the ***Limitation of Actions Act*** is 12 years the proceedings before the Respondents were time barred.

1st Interested Party's Case

16. In opposition to the Motion, ICDC filed a replying affidavit sworn by **Peter Mugi Kuruga**, its Debt Recovery Manager on 29th January, 2015.

17. According to her, the genesis of this matter was that on or about 22nd September, 1998 the Applicant trading as Mwiti & Company Advocates issued a professional undertaking to settle the outstanding loan account balance held with ICDC by Corik Investment Company Limited upon release to them of the title documents and the respective discharge of charge instruments. Consequently, on 24th September, 1998 the title documents and discharge were released to the firm of Mwiti & Company Advocates which documents were received by one **Hannah Muriungi Gachuhi** from the said firm and who appended her signature on the forwarding letter.

18. However, despite releasing the title documents and the discharges of charge, the said firm did not honour their professional undertaking and on 14th February, 2000 ICDC filed a complaint against the

Applicant before the Commission which complaint was later escalated to the Tribunal.

19. In the ICDC's opinion, the Tribunal is empowered by Section 60(1) of the ***Advocates Act*** to receive a complaint against an advocate of professional misconduct and that the failure to honour a professional undertaking is professional misconduct hence the complaint by ICDC is rightly before the Tribunal which has jurisdiction to hear the complaint.

20. It was averred that the *ex parte* Applicant had been granted and continued to be granted audience by the Tribunal thus any claim of breach of rules of natural justice was misplaced and without any basis. To ICDC, the disciplinary cause no. 9 of 2012 before the Tribunal was still ongoing and the Tribunal had not arrived upon any decision. It was averred that judicial review is concerned with the decision making process not with merits of the decision itself and that this court will concern itself with whether the Respondent had jurisdiction, whether the *ex parte* Applicant was heard by the Respondent and whether the respondent in making its decision took into account relevant or irrelevant matters.

21. ICDC therefore contended that the *ex parte* Applicant had not demonstrated any illegality, irrationality and or procedural impropriety. Since the Tribunal had not arrived upon its final decision, the Court was urged to concern itself with the decision making process.

22. On behalf of ICDC, it was submitted that the Tribunal had carried out its mandate according to the law and that the proceedings were still ongoing.

23. According to ICDC section 60(1) of the ***Advocates Act*** cloths the Tribunal with jurisdiction to hear complaints against an advocates for professional misconduct which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate and that the failure to honour a professional undertaking falls within such conduct. ICDC contended that the Tribunal did not breach the rules of natural justice as alleged by the applicant.

24. On the delay it was submitted that since the undertaking was issues on 22nd September, 1998 and the complaint lodged with the Commission on 14th February, 200 it is unfair and unjust for the applicant to claim that he is unable to prepare his defence.

25. Based on **Republic vs. The Disciplinary Committee exp Wambugu [2008] eKLR** and **T O Kopere vs. The Disciplinary Committee Law Society of Kenya & Another HCCCA No. 461 of 2011**, this Court was urged not to interfere with the Tribunal's proceedings.

Respondent's Case

26. On the part of the Respondent Tribunal, the following grounds of opposition were filed:

> 1. **That the said application is premature, totally incompetent, bad in law and misconceived and an abuse of this honourable court's process as the proceedings being sought to be quashed are not yet complete, as judgment is yet to be delivered and mitigation and sentencing done.**
>
> 2. **That the disciplinary tribunal of the law society of Kenya is legally mandated to entertain matters of professional undertaking under Section 60(1) of the advocates act (cap.16 laws of Kenya) as read together with rule 46 of the law society of Kenya digest of professional conduct and etiquette.**
>
> 3. **That the issue of jurisdiction does not arise in this matter as the professional undertaking forming the basis of the judicial review herein was not given in a suit in the High Court and that by virtue of also Section 60(9) of the Advocates Act (Cap.16 Laws Of Kenya) the disciplinary tribunal is empowered to enforce the professional undertaking as regards the sums forming part of the undertaking.**

4. **That the orders of certiorari and prohibition being sought are premature and thus an interference of the lawful procedure laid down by the Advocate's Act (Cap.16 laws of Kenya) and the rules of procedure promulgated to guide the proceedings before the advocate's disciplinary tribunal.**

27. The Respondent also filed a replying affidavit sworn by **Apollo Mboya**, its secretary on 11th March, 215.

28. In the said affidavit it was deposed that a complaint was received by the Commission against the *ex parte* Applicant herein from the ICDC vide a letter dated 3rd August, 2011 based on the failure to honour the professional undertaking vide a letter dated 22nd September, 1998to settle the outstanding balance of Kshs.2,379,213.05 plus accrued interest at the rate of 26% until payment in full on a loan account of M/S Corik Investment Co. Ltd held by the 1st interested party.

29. Upon receipt of the said complaint the Commission communicated the particulars thereof to the *ex parte* Applicant vide a letter dated 17th August, 2011 to which the *ex parte* Applicant duly responded by his letter dated 25th August, 2011 acknowledging receipt thereof and stating that the professional undertaking having been given over 12 years ago, the *ex parte* Applicant needed more time to trace the records regarding the same so as to make a comprehensive response on the said subject matter. Also in the said letter, the *ex parte* Applicant indicated that upon receipt of the letter from Commission forwarding the letter of complaint from ICDC, the *ex parte* Applicant had gotten in touch with ICDC and at the appropriate time would seek a round table discussion with a view to seeking a solution.

30. It was disclosed that upon receipt of the said response from the Commission forwarded the same to ICDC who responded vide a letter dated 21st September, 2011 indicating that the matter remained unresolved and their loan account continued to accrue interest. Also in the said response ICDC stated that even though they had been engaged in negotiations with the *ex parte* Applicant, the negotiations were unfruitful and so they requested the Commission to take the appropriate action regarding the complaint it had lodged with them.

31. Subsequently, on 10th October, 2011 the Commission wrote to the *ex parte* Applicant pursuant to section 53(5) of the ***Advocates Act*** (cap. 16 Laws of Kenya) inviting him to explore settling the matter through an in house dispute resolution session and gave the *ex parte* Applicant the luxury of choosing any date convenient to him from 7th November, 2011. Also in the said letter, the Commission gave the *ex parte* applicant an ultimatum of 15 days to respond to the said letter failure to which they would proceed to forward the matter to the Tribunal.

32. That on 11th October, 2011 the *ex parte* Applicant responded thereto indicating that he was at all times under the impression that the matter had long been sorted out and claimed to have been advised so by a member of the legal department of the Commission and disclosed that he had gotten in touch with the principal director of Corik Investment Co. Ltd, one **Mr. Kimonye**, who he claimed was still in business and doing well both Kenya and Tanzania and also stated that he would appreciate if concrete steps would be taken to bring all parties concerned on board so as to allow a more definitive and constructive approach.

33. Thereafter, the Commission on 19th October, 2011 wrote to the *ex parte* Applicant, and copied to ICDC, on a without prejudice basis requesting him to give a proposal on how he intended to settle the amounts due and in the alternative to return the title documents, which were being held as security, to ICDC in the same condition they were in prior to their being handed over to him in consideration of the professional undertaking that had been given to it by the ex parte applicant. Upon failure of the *ex parte* applicant to respond to the Commission's letter dated 19th October, 2011 addressed to him, the Commission by virtue of Section 60(2) of the ***Advocates Act***, Cap 16 Laws of Kenya went ahead and formally lodged a complaint, of failing to honour professional undertaking, against the *ex parte* Applicant before the Tribunal on 6th December, 2011 vide an affidavit of complaint sworn by one **Esther Jowi**

Anyango Aduma, a commissioner of the Commission, on 29th November, 2011.

34. It was deposed that upon receipt of the said complaint, the Tribunal allocated it disciplinary committee cause number 9 of 2012 and went ahead fixed it for plea taking on 5th March, 2012 and informed the *ex parte* Applicant of the same vide a letter dated 1st February, 2012 wherein was also attached a copy of the affidavit referring the complaint to the Tribunal. On 5th March, 2012 the *ex parte* Applicant appeared before the Tribunal as directed and took a plea of not guilty and was given 21 days within which to file and serve a replying affidavit and the matter was fixed for hearing on 14th May, 2012. On 14th May, 2012 when the matter came up for hearing, the *ex parte* Applicant was represented by one **Ojwang Agina** and the Commission was represented by one **Mr. Wanjohi** who was holding brief for **Mr. Bii**. ICDC sought for and was granted leave to file a supplementary affidavit within 14 days with corresponding leave to the *ex parte* Applicant to address any new issues raised within seven days of service and the matter was fixed for hearing on 9th July, 2012.

35. Come on 9th July, 2012 the *ex parte* Applicant was represented by one **Ojwang Agina** and the Commission was represented by one **Mr. Wanjohi** who was holding brief for **Mr. Bii**. On the said date, **Mr.Wanjohi** stated the Commission had filed its supplementary affidavit and served the same on the *ex parte* Applicant that very day who requested for 21 days to put in a further replaying affidavit, which was granted by the Tribunal and the matter fixed for hearing on 10th September, 2012. On the said hearing date, it was noted that the *ex parte* applicant had filed a preliminary objection which his counsel, **Ojwang Agina** was not ready to proceed with for the reasons that he needed time to consult *ex parte* Applicant on the same and also get prepared with his authorities before he could proceed. However, the Commission, represented by one **Mr. Oure**, was ready to proceed. In light of the above, the Tribunal directed that the matter be fixed for hearing of the preliminary objection on 17th September, 2012.

36. That on 17th September, 2012 the advocate for the *ex parte* Applicant, one **Mr. Ojwang Agina** sent one **Mr. Macharia** to hold his brief with instructions that he was held up in the High Court at Machakos and requested that the matter proceeds by way of written submissions which was opposed by **Mr. Oure** for the Commission who was ready to make oral submissions. The Tribunal however directed that **Mr. Ojwang Agina** files his submissions within 7days and the ruling was fixed for 22nd October, 2012 on which date the ruling was read in which the Preliminary Objection was dismissed and the Respondent directed that the complaint be fixed for hearing on 4th March 2013 and a hearing notice be issued to that effect. However, the matter was inadvertently listed for hearing on 3rd December, 2012 instead of 4th March 2013 which day fell on the voting day and so the matter was directed to be fixed for hearing on 6th May, 2013 and a hearing notice to that effect be issued.

37. On 6th May 2013 when the matter came up for hearing, one of the members of the Respondent herein, **Mr. Onguto** rescued himself and the matter was taken out of the day's cause list and fixed for hearing on 17th June, 2013 before a panel of the Tribunal excluding the said member, who had rescued himself. When the matter came up for hearing on 17th June, 2013, **Mrs. Thuku** who was representing the Commission sought to proceed under rule 18 of the Advocates (Disciplinary Committee) Rules whereas **Mr. Ojwang Agina** who was representing the *ex parte* Applicant sought to proceed by way of *viva voce* and indicated that if he could not proceed by way of *viva voce* then he would need time to file a supplementary affidavit so as to attach all the evidence to be relied upon by the *ex parte* Applicant. Taking into account the above, the Tribunal directed that the matter proceeds for hearing on 2nd September, 2013.

38. On 2nd September, 2013 when the matter came up for hearing, the *ex parte* Applicant who was appearing in person indicated to the Tribunal that there was some negligence on his part regarding matter and requested for some time to engage the complainant so as to have the same settled. Since the Commission, represented by **Mr. Oure** was willing to indulge the *ex parte* Applicant, the Tribunal directed the parties do explore an amicable solution and the matter be mentioned on 4th November, 2013 in order to receive the report on the status of the settlement. On 4th November, 2013, the *ex parte*

Applicant who was appearing in person indicated to the Tribunal that the negotiations were ongoing which position was confirmed by **Mr. Wanjohi** representing the Commission and the Tribunal fixed the matter for hearing on 10th March 2014 on which day the matter was adjourned to 24th Mar, 2014 as **Mr. Onguto** was a member of the panel.

39. On 4th March 2014 when the matter came up for hearing, **Mr. Ojwang Agina** advocate for the *ex parte* Applicant indicated to the Tribunal that the *ex parte* Applicant having a hip problem was unable to get to 2nd floor of Professional Centre where the Tribunal held its sittings and sought for directions. **Ms. Mungai** who was acting for the Commission indicated that another hearing date could be taken and therefore hearing was stood over to 13th October, 2014. However when the matter came up for hearing on 13thOctober, 2014, the *ex parte* Applicant who was appearing in person indicated that he was not ready to proceed for reason that he had been unwell and out of the country for treatment and therefore sought for more time. **Ms. Ogama** who was representing the Commission objected to the *ex parte* Applicant's application noting that the matter was old having been instituted in the year 2011 and she therefore suggested that they do proceed under rule 18 of the ***Advocates (Disciplinary Committee) Rules***. The Tribunal after taking into account the said sentiments directed that the hearing proceeds and also that the parties do exchange their written submissions if any within the next 30 days with each party having 14 days to file and serve the same and judgment was scheduled for 9th February, 2015. On that date however, judgement was not ready and was deferred to 20th April, 2015.

40. It was therefore contended that the *ex parte* Applicant had been represented throughout the proceedings before the Tribunal and accorded the necessary audience and time to defend the case of professional misconduct levelled against him and the Tribunal having observed and adhered to all the relevant ***Advocates (Disciplinary Committee) Rules*** that govern proceedings before it, the issue of breach of rules of natural justice did not arise in this case. Therefore the rules of natural justice having been observed by the Tribunal and the proceedings before the Tribunal having not been completed, as judgment was yet to be delivered and thereafter mitigation and sentencing done, the *ex parte* Applicant's application seeking to quash the said proceedings was premature, incompetent and bad in law.

41. According to the Tribunal, by virtue of Section 60(1) of the ***Advocates Act*** (Cap.16 Laws of Kenya), the Tribunal is the tribunal legally mandated to handle all issues of professional misconduct relating to advocates and the *ex parte* Applicant herein being an advocate and the subject matter concerning him being one of professional misconduct, rightfully falls within the realms of the Tribunal. It was therefore contended that the Tribunal cannot be prevented from executing its statutory mandate through the issue of an order of prohibition as sought by the *ex parte* Applicant. Moreover, the Tribunal is legally mandated to entertain matters of professional undertaking under section 60(1) of the ***Advocates Act*** (Cap.16 Laws of Kenya) as read together with rule 46 of the ***Law Society of Kenya Digest of Professional Conduct and Etiquette***.

42. It was the Tribunal's case that the issue of jurisdiction did not arise in this matter as the professional undertaking forming the subject matter of this suit was not given in a suit in the High Court of Kenya and that by virtue of the provisions already stated herein above and also Section 60(9) of the ***Advocates Act*** (Cap.16 Laws of Kenya) the Tribunal is empowered to enforce the professional undertaking as regards the sums forming part of the undertaking.

43. To the Tribunal, the *ex parte* Applicant's application is premature, incompetent and bad in law and should be dismissed with costs to the Tribunal.

44. It was submitted on behalf of the Tribunal that the failure to honour professional undertaking amounts to a professional misconduct a matter which the Tribunal is legally mandated to entertain. In support of this submission the Tribunal cited *inter alia* rule 46 of the ***Law Society of Kenya Digest of Professional Conduct and Etiquette*** which provides that a breach of an undertaking constitutes professional misconduct. On Order 52 rule 7 of the ***Civil Procedure Rules***, it was submitted that even if an undertaking is sought to be enforced by the High Court, it does not deprive the Tribunal of the jurisdiction to entertain a complaint arising from the same and in support of this position, the Tribunal relied on

section 85(2) of the ***Advocates Act***.

45. On limitation, it was submitted that section 19 of the ***Limitation of Actions Act*** is inapplicable, as the matter before the Tribunal is not for recovery of a sum secured, but is a matter in respect of the failure to honour a professional undertaking and in any case, time stops running once a matter is filed with the Commission which in this case was on 14th February, 2010 hence limitation is inapplicable.

46. It was further submitted that the Tribunal did not breach the rules of natural justice as the proceedings before it was procedural and the applicant was given an opportunity of to be heard.

Determinations

47. It is important in my view to understand the principles guiding professional undertakings. **Warsame, J** (as he then was) in **Equip Agencies Limited vs. Credit Bank Limited Nairobi HCCC No. 773 of 2004** dealt extensively with the issue when he stated *inter alia* as follows:

> **"An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is a convenient method or tool to circumvent the delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another...An undertaking is a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an advocate either personally or through the name of the firm he usually practices under...The breach of professional undertaking can result in lack of mutual or cordial trust between Advocates and invariably puts the administration of justice into disrepute. The advocates by relating together through a professional undertaking are officers of the court; therefore as far as possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship...The courts have inherent power to commit an advocate for breach of an undertaking. The court has jurisdiction over an advocate for breach of undertaking on the basis that the court seeks to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client's right. Therefore the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction. *The purpose of the punitive and disciplinary powers of the court's jurisdiction over advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Chapter 16 Laws of Kenya*...It is not the business of the court to oppress an advocate for no reasonable cause. The court is always reluctant to degrade an advocate unless the circumstances show that his conduct is dishonourable as an officer of the court and it is for that reason that the court would exercise its punitive and disciplinary powers to ensure that advocates conduct themselves in a manner that pleases the eyes of justice…It would be difficult if not impossible for advocates to carry out their duty to each other and to the public, if an undertaking by advocates becomes unreliable and unenforceable. Failure to honour professional consideration, in the court's view, amounts to misrepresentation or fraud. The purpose of an undertaking is to achieve a desired goal of mutual trust. In the premises it is incumbent upon advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider...".** [Emphasis mine].

48. In this case the ex parte applicant contends that under Order 52 rule 7 of the ***Civil Procedure Rules*** it is only the High Court which has the power to deal with allegations of breach of professional undertaking and not the respondent. Let us revisit the said provision in order to appreciate its scope. Order 52 rules 7(1) of the ***Civil Procedure Rules*** provides:

> ***(1) An application for an order for the enforcement of an undertaking given by an advocate***

shall be made—

(a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or

(b) in any other case, by originating summons in the High Court.

49. It is clear that the above provision does not purport to confer the exclusive jurisdiction of dealing with issues relating to breach professional undertakings on the High Court. In any case it would seem that the powers of the Court in such matters is limited to ordering enforcement of the undertaking to be made after affording an opportunity to the advocate to honour the undertaking. In the instant case, the Respondent has relied on section 60(1) of the ***Advocates Act*** (Cap.16 Laws of Kenya) as read together with rule 46 of the ***Law Society of Kenya Digest of Professional Conduct and Etiquette***. The former provides:

A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Committee by any person.

50. Under section 57 of the Act, the Disciplinary Committee [now the Disciplinary Tribunal] is mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act. It is also true that under section 60 of the Act, the said Tribunal has the power to receive complaints of professional misconduct against an Advocate from any person. Since the Applicant herein is such an Advocate, the Tribunal has jurisdiction to entertain any complaints made against him in his professional capacity pursuant to section 55 of the Act. This power, as was appreciated by **Mumbi Ngugi, J** in **Ex Parte Kimaiyo Arap Sego, Misc. Appl. No. 1266 of 2007**:

"goes over and above dealing with complaints by individuals. The Committee has the mandate to ensure ethical and professional conduct by members of the Bar and section 60 of the Advocates Act empowers it to deal with complaints regarding professional misconduct, defined to include conduct incompatible with the status of an Advocate…I take the view that the Disciplinary Committee would have failed in its duty if it did not pursue the disciplinary proceedings against the applicant if the evidence before it showed that such conduct was unprofessional and dishonourable."

51. Rule 46 aforesaid, on the other hand provides:

An undertaking shall be in a form which is clear and once accepted by an advocate shall bind him or his firm to the undertaking and any breach thereto shall constitute professional misconduct.

52. In the same vein, it was held in **Equip Agencies Limited vs. Credit Bank Limited** (supra) that:

***"Failure to honour an undertaking is not only a professional misconduct but a criminal conduct with intent to defraud*. An honourable member must not first give an undertaking but when he gives it, he must at all times endeavour to honour the same especially when it is given to a professional colleague."** [Emphasis mine].

53. It is therefore clear both on the law and on authorities that breach of professional undertaking amounts to a professional misconduct. Since an advocate has a professional duty and or obligation to honour his undertaking, the failure to do so in my view amounts to a "***disgraceful or dishonourable conduct incompatible with the status of an advocate"*** under section 60(1) of the ***Advocates Act*** hence constitutes a professional misconduct in which event the Tribunal is empowered to investigate the same. The mere fact that a party who has suffered a loss as a result therefor is entitled to invoke the Court's jurisdiction under Order 52 rule 7 of the ***Civil Procedure Rules*** does not in my view bar a complaint being lodged with the Tribunal on the same issue. As this Court held in **R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013:**

"…the mere fact that a matter is the subject of court proceedings does not *ipso facto* deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

54. I therefore find no merit in the contention that the Tribunal has no jurisdiction to entertain complaints revolving around allegations of breach of professional undertakings.

55. The Applicant further urged the Court to halt the proceedings before the Tribunal based on the lapse of time between the said undertaking and the institution of the subject proceedings. To the applicant to proceed with the said proceedings is likely to contravene his right to a fair hearing. However as was held in **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR**:

"Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself…it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

56. From the material on record, there no basis upon which this Court can find that the delay alleged by the applicant has adversely affected his ability to defend himself. From the replying affidavit filed by the Respondent, it would seem that a substantial delay in bringing the complaint to finality has in fact been occasioned by the manner in which the applicant participated in the proceedings before the Tribunal.

57. It was also contended that the claim against the applicant is time barred and reliance was placed on section 19(1) of the ***Limitation of Actions Act*** Cap 22 Laws of Kenya. The said provision provides:

An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

58. As stated in **Equip Agencies Limited vs. Credit Bank Limited** (supra) the jurisdiction over an advocate for breach of undertaking is based on the exercise of punitive and disciplinary power to prevent a breach of duty by an officer of the court hence , which is quite distinct and separate from the client's right. Its purpose is not for enforcement legal rights but for enforcement of honourable conduct among advocates in their standing as officers of the court by virtue of section 57 of the ***Advocates Act***. Therefore section 19 of the ***Limitation of Actions Act***, which deals with recovery of principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land in my view is inapplicable to these circumstances.

59. I have considered the material placed before me by the parties herein and I am not satisfied that the manner in which the Tribunal is proceeding or proceeded with the complaint lodged against the *ex parte* applicant contravened the rules of natural justice. I agree with the position adopted in **Republic vs. The Disciplinary Committee exp Wambugu [2008] eKLR** and **T O Kopere vs. The Disciplinary Committee Law Society of Kenya & Another HCCCA No. 461 of 2011** that:

"No one, not even the applicant, in my view, has a right to anticipate what the sentence of the Disciplinary Committee, will be, until it is legally pronounced. Indeed to try to stop the

Disciplinary Committee from completing carrying out its legal mandate under the relevant law, appears to me to be an illegal exercise which this court in its unfettered discretion, will not be willing to assist the applicant achieve. The stay sought if granted, will without doubt assist the applicant in preventing a lawfully constituted tribunal from carrying out its lawful mandate."

Order

60. In the result I find no merit in the Notice of Motion dated 23rd December, 2014. The same fails and is hereby dismissed with costs to the Respondent and the Interested Parties.

Dated at Nairobi this 3rd day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiongera for the Respondent

Mr Matheka for the Interested Party

Cc Patricia