REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 427 OF 2014

IN THE MATTER OF: AN APPLICATION BY NDOMBI TOM WACHAKANA OSOLIKA, THE APPLICANT FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION, CERTIORARI, AND MANDAMUS.

AND

IN THE MATTER OF: THE ADVOCATES ACT 1989

AND

IN THE MATTER OF: DISCIPLINARY COMMITTEE CAUSE NO. 145 OF 2011

AND

IN THE MATTER OF: DECISION BY THE DISCIPLINARY COMMITTEE DATED 15TH SEPTEMBER, 2014

BETWEEN

NDOMBI TOM WACHAKANA OSOLIKA…….…….
APPLICANT

VERSUS

THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA ……
RESPONDENT

AND

KAREN MATHEWS…….…….……..INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th February, 2015, the *ex parte* applicants herein, **Ndombi Tom Wachakana Osolika,** seek the following orders:

i. **An order of Certiorari to deliver to this court and quash the decision of the Disciplinary Committee of the Law Society of Kenya made on the 15th September, 2014 in DC. No. 145 of 2011.**
ii. **An order of prohibition, prohibiting the Disciplinary Committee of the Law Society of Kenya from sentencing, deliberating or dealing in any way with the Applicant.**
iii. **That costs be provide for.**

Ex Parte Applicants' Case

2. According to the applicant, on the 15th September, 2014, the Disciplinary Committee under the Law Society of Kenya made a final fundamental error of fact and law and proceeded to convict him of a professional misconduct without his submissions being filed and considered.
3. He contended that there was no judgment capable of being executed as it was not signed upon delivery by the 2nd signatory until two months down as required by the rules of Law and therefore incompetent.
4. The applicant averred that he filed and served a reply to affidavit of complaint on 26th October, 2011 and in paragraph 5 of the said affidavit stated clearly that he did not have personal knowledge of the instructions of **Edith Jenkins**, his client and further explained under paragraph 9 of the said affidavit the need or reasons for a certificate of urgency to obtain letters of administration and further that he did not know at all about **Karen Mathews** and also under paragraph 11, he denied and explained the alleged misconduct and breach of professional ethics. He further contended that on the 3rd May 2012 the Complainant filed a supplementary affidavit pursuant to the leave granted by the Disciplinary Committee on 16th April 2012 and she attached a Ruling in Respect of Nairobi High Court Succession Cause No. 848 of 2008 which ruling never at all mentioned his professional conduct or breach of his professional conduct.
5. However, it was the applicant's case that the decision did not take into account his defence and submissions that the matter was *res judicata* as the same matter had been dealt with and completed in the succession matter.
6. To the applicant, the decision by the Disciplinary Committee of the Law Society of Kenya was oppressive, punitive and largely erroneous and has caused anxiety, damage in his career and loss of reputation as the allegations emanate largely from the brief from the client but not from his conduct of the brief.
7. In his submissions the applicant contended that though he raised an issue of res judicata that the matter in issue had been determined in Succession Cause No. 845 of 2008, the same was not dealt with by the Respondent. It was also contended that the matter was dealt with by way of written submissions and that the judgement was not signed by the 2nd signatory upon delivery. To the applicant these issues demonstrate that the process used in arriving at the decision was flawed.

Respondents' Case

8. On behalf of the Respondent, the following grounds of opposition were filed:

1. That the said application is totally incompetent, bad in law, misconceived and an abuse of this honourable court's process;

2. That the application seeks to have the honourable court enquire into the evidence and merits of the complainant which is not a function of the judicial review court;

3. That the application offends the provisions of Section 60 and 62 of the Advocates Act;

4. That the application is otherwise misconceived, unfounded, has no merit and is an abuse if the due process of this honourable court.

9. It was submitted on behalf of the respondent that the Motion ought to be struck out as some of the documents relied upon were not the same documents relied upon at leave stage. In support of this submission the respondent relied on **Nyamodi Ochieng Nyamogo & Another vs. Disciplinary Committee of the Law Society High Court Misc. Appl. No. 122 of 2007** to the effect that it is the respondent who has the capacity to hear the applicant's complaint.
10. According to the respondent the applicant is trying to have this Court enquire into the evidence presented before the Respondent, a function conferred upon the respondent and reliance was placed on **Republic vs. Disciplinary Committee ex parte Wambua [2013] KLR**.

Interested Party's Case

11. The interested party similarly filed the following grounds of opposition:

1. That the Ex parte Applicant's has not demonstrated the impropriety of the decision capable of attracting judicial review.

2. That judicial review is not concerned with the merits which is a preserve of the High Court's appellate jurisdiction as provided for in Section 62 of the Advocates Act.

3. That the prohibition sought offends public policy/interest as it seeks to prohibit the occurrence of an obligation imposed by statute.

4. That the application fits the exposition of scandalous, frivolous and vexatious litigation.

5. That the application is lodged mala fide and after an inexcusable delay.

Determinations

12. I have considered the application, the evidence adduced in the form of affidavits, the grounds and the submissions filed on behalf of the parties herein.
13. The applicant complains that his submissions were never considered at all. The said submissions were in respect of an issue of res judicata. Apparently that issue was grounded on the fact that the matters before the Respondent had been determined in a succession cause. This Court dealt with the issue of the concurrency of proceedings before the Respondent Tribunal and in a Succession Cause in **R. vs. Disciplinary Tribunal of the Law Society of Kenya Ex Parte John Wacira Wambugu Nairobi High Court Miscellaneous Application No. 445 of 2013** and expressed itself as follows:

"In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent. Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words 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."

14. With respect to the issue of failure to consider the applicant's issues raised in the submissions, it is important to understand the scope of judicial review jurisdiction an issue which was dealt with by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** as follows:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

15. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
16. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or

rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

17. In **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003**, **Omolo J.A**. stated as follows:

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

18. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him.
19. In the judgement, the Respondent found that the filing of the submissions did nothing to change their earlier finding. It is therefore clear that the Respondent was alive to the submissions but found them unconvincing. It cannot therefore be properly said that the applicant's submissions were not considered. The import of the judgement was that they were considered and rejected. Whether the rejection was right or not is not a matter for this Court in these kinds of proceedings to determine.
20. The applicant also contended that the judgement was not signed upon delivery by the 2nd signatory until two months later. However, the judgement exhibited by the applicant on the face of it shows that it was signed by three people. There is no other evidence to the contrary on the record. Accordingly, there is no basis upon which I can uphold that contention.
21. In my view, the issues raised herein go to the merit of the Respondent's decision rather than the process and are not properly before this Court.
22. In these proceedings, the applicant seeks inter alia an order prohibiting the Respondent from sentencing, deliberating or dealing with him in any way. As was correctly appreciated by **Onyancha, J** in **T O Kopere vs. The Disciplinary Committee Law Society of Kenya & Anor. HCCA No. 461 of 2011**:

"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."

23. If and when the Committee makes its decision and the Applicant is aggrieved thereby, he will be entitled to invoke the appellate jurisdiction of this Court pursuant to section 62 of the Act. As it was held in **Republic vs. National Environment Management Authority [2011] eKLR**, where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

Order

24. In the premises I find no merit in the Notice of Motion dated 20th February, 2015 which Motion is hereby dismissed with costs to the respondent.

Dated at Nairobi this 15th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for Ms Rashid for the Applicant

Cc Patricia