



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEWS DIVISION
JR CASE NO. 227 OF 2015

REPUBLIC.....APPLICANT

VERSUS

ADVOCATES' DISCIPLINARY COMMITTEE.....RESPONDENT

AND

DANIEL MUTISYA NGALAINTERESTED PARTY

EX-PARTE

DANSTAN OMARI MOGAKA

JUDGEMENT

1. The ex parte Applicant Danstan Omari Mogaka through the Notice of Motion application dated 27th July, 2015 prays for orders as follows:

“1. An Order of Certiorari quashing the Decision of the Respondent contained in its letter dated 26th June 2015 charging the Exparte Applicant at the Disciplinary Committee in Disciplinary Cause No. 35 of 2015 as a result of the pleadings filed in Nairobi Children’s Court Children’s Case No. 389 of 2015 and as a result of the submissions made by the exparte Applicant in Nairobi Children’s Court Children’s Case No. 389 of 2015.

2. An Order of Prohibition prohibiting the Respondent from charging the Exparte Applicant at the Disciplinary Committee in Disciplinary Cause No. 35 of 2015 as a result of the pleadings filed in Nairobi Children’s Court Children’s Case No. 389 of 2015 and as a result of the submissions made by the exparte Applicant in Nairobi Children’s Court Children’s Case No. 389 of 2015.

3. Costs of this Application and interest thereon.

4. Any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.”

2. From the papers filed by the Applicant in Court, his case is that on 14th July, 2015 he received a letter dated 26th July, 2015 from the Respondent, the Advocates Disciplinary Committee asking him to appear before the Respondent on 20th July, 2015 for taking of a plea in Disciplinary Cause Number 35 of 2015. An affidavit annexed to the said letter disclosed that the compliant had been lodged by the Interested Party, Daniel Mutisya Ngala.
3. Prior to the issuance of the notice for plea, the Respondent had on 12th May, 2015 written to the Applicant asking him to respond to the Interested Party's complaint. The Applicant responded to the same through an affidavit sworn on 28th May, 2015.
4. It is the Applicant's case that the Interested Party had not made out any case to warrant his taking plea before the Respondent on 20th July, 2015. Further, that the Respondent has no jurisdiction to entertain the Interested Party's complaint.
5. The Respondent opposed the application through the replying affidavit of Apollo Mboya, the Secretary and Chief Executive Officer of the Law Society of Kenya. Through the said affidavit the Applicant asserts that the Disciplinary Tribunal is a creature of the Advocates Act and as such all advocates are subject to its jurisdiction.
6. According to Mr. Mboya, the Law Society of Kenya, acting as a secretariat for the Advocates Disciplinary Committee, received a complaint by the Interested Party vide his affidavit sworn on 7th May, 2015. The affidavit was served upon the Applicant who responded to the same through an affidavit.
7. The complaint and the response were subsequently placed before the Disciplinary Tribunal and on 22nd June, 2015 the Tribunal found that a prima facie case had been established in the matter. The Applicant was thus asked to attend before the Tribunal to take plea.
8. It is the Respondent's case that the issues raised in the Applicant's verifying affidavit are the issues he raised in response to the complaint and the same will form the basis of his defence during the hearing of the complaint against him.
9. The Respondent's position is that it is only concerned with issues relating to the conduct of advocates and has at no point in handling the complaint against the Applicant exceeded its jurisdiction.
10. The Respondent asserts that this application is an abuse of the court process as the Applicant has failed to establish a case for issuance of judicial review orders. The Respondent therefore prays for the dismissal of the Applicant's case with costs.
11. The Interested Party opposed the application through a replying affidavit sworn by himself on 7th August, 2015. The starting point of the Interested Party's opposition to the application is that a body known as the Advocates Disciplinary Committee does not exist. His view therefore is that the Applicant has sued a non-existent entity and this court should not act in vain and issue orders against a non-existent body.
12. Further, that even if the Advocates Disciplinary Committee exists, the decision which the Applicant challenges through these proceedings emanated from the Law Society of Kenya and not the Advocates Disciplinary Committee and there is therefore no decision made by the Advocates Disciplinary Committee which is capable of being quashed.
13. The Interested Party averred that he indeed presented a complaint against the Applicant to the Advocates Disciplinary Tribunal. The Secretary of the Law Society of Kenya who is the designated Secretary of the Tribunal wrote to the Applicant who responded to his complaint by asserting that the Tribunal had no jurisdiction to deal with the matter.

14. The Interested Party averred that his complaint before the Tribunal is in regard to the Applicant's professional conduct and has nothing to do with defamation. He further contended that what the Applicant wants this court to do is to usurp the function of the Tribunal by enquiring and determining if his complaint against the Applicant amounts to misconduct. It is the Interested Party's position that the Tribunal has not exceeded its jurisdiction and neither has it made any decision capable of being quashed.

15. Through a further affidavit sworn on 11th August, 2015, the Applicant averred that he cited the Advocates Disciplinary Committee as the Respondent since the letter dated 26th June, 2015 required him to appear before the Disciplinary Committee on 20th July, 2015 and it is therefore a fallacy for the Interested Party to assert that the Respondent is non-existent. The Applicant also reiterated that the Interested Party's affidavit filed with the Respondent did not disclose any professional misconduct on his part.

16. The main issue for the determination of this court is whether the Respondent has jurisdiction in regard to the Interested Party's complaint.

17. Before addressing the main issue there is the question of whether there is a proper application before this court. The Interested party asserted that an entity known as the Advocates Disciplinary Committee is unknown to the law and the Respondent as named in these proceedings is therefore non-existent. The Applicant replied that he had been summoned to appear before the Disciplinary Committee by the Secretary of the Law Society of Kenya and that is why he named the Advocates Disciplinary Committee as the Respondent.

18. The opposition raised by the Interested Party is a double edged sword. If this court agrees with him that there is no entity known as the Advocates Disciplinary Committee then it would mean that his complaint was made to a non-existent entity and the Applicant had no business responding to a complaint lodged with the Disciplinary Committee by the Applicant.

19. I think the problem here is that the Law Society of Kenya still talks of the Disciplinary Committee whereas the law has been amended so that the current body charged with the disciplinary mandate in regard to the conduct of advocates is the Disciplinary Tribunal as per Section 55 of the Advocates Act amended in 2012.

20. Whatever the case, the Respondent has not denied its existence and it is not for a third party namely the Interested Party to deny the existence of the Respondent. Any defect in the name of a party can always be rectified through an application for amendment. In the circumstances of this case, I would say that the Court should do justice without undue regard to technicalities. In any case, allowing the Interested Party's objection would render his complaint before the Respondent invalid and I do not think that is what he wishes to achieve. I therefore dismiss the Interested Party's assertion that the Respondent is a non-existent body.

21. On the core issue, the Applicant submitted that the Respondent has no jurisdiction to superintend the conduct of advocates in court matters. It was submitted on his behalf that the Interested Party is the Defendant in **Nairobi Children's Court Case No. 389 of 2015** and he cannot complain about the pleadings in that case.

22. According to the Applicant, all comments and pleadings made in court proceedings fall under the common law doctrine of absolute litigation privilege which provides that an attorney at law is absolutely privileged to publish defamatory matter concerning another in relation to judicial proceedings. The decision of G.V. Odunga, J in **K.L. v Standard Limited [2014] eKLR** was cited in support of this proposition. In that case the learned Judge opined that:

“The law of course recognises certain defences that may be invoked by a person sued with the tort of defamation I shall only deal with the ones relevant to the present case. The law recognizes that there may be occasions on which freedom of communication without fear

of an action for defamation is more important than the protection of a person's reputation and such occasions are said to be "privileged" and the privilege may be either absolute or qualified. Absolute privilege covers cases in which complete freedom of communication is regarded as of such paramount importance that actions for defamation cannot be entertained at all: a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it. Qualified privilege, though it also protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove "express malice" the privilege is displaced and he may recover damages, but it is for him to prove malice, once the privilege has been made out, not for the defendant to disprove it."

23. It is the Applicant's opinion that an advocate is the mouthpiece of the client and only makes representations in court with regard to matters that he/she has been told by the client. According to the Applicant, if the Interested Party was aggrieved by the Applicant's submissions then he ought to have sought for review of the orders issued on the ground that the same were issued based on misrepresentation or concealment of material facts. He could as well have appealed the decision.

24. The Applicant posits that by commencing the disciplinary proceedings against him over a matter in court, the Interested Party is lodging an appeal before the Respondent. As such, the Respondent in trying the Applicant will be sitting on appeal over a matter in which it has no jurisdiction.

26. The Applicant submitted that the powers and procedures of disciplinary tribunals are provided by statute and they cannot do that which is not allowed by statute. In support of this submission the Applicant cited the decision in **Republic v Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company, Nairobi HCMA No. 285 of 2006**. In that case it was held that a statutory body can only do that which it is expressly or by necessary implication allowed to do by statute.

27. In reply, the Respondent submitted that judicial review is only available where a public body has acted in excess of jurisdiction or in breach of the rules of natural justice or contrary to the law. The decision in **Republic v Vice Chancellor Jomo Kenyatta University & Technology ex parte Dr. Cecilia Mwathi & another [2008] eKLR** was cited in support of this statement. The Respondent asserted that the Applicant had not met the grounds for grant of judicial review orders since by virtue of Section 55 of the Advocates Act the Applicant who is an advocate is subject to the jurisdiction of the Disciplinary Tribunal. Further, that Section 60 of the Advocates Act, which requires service of the complaint upon an accused advocate, had been complied with.

28. It is the Respondent's submission that no illegality, irrationality or breach of the rules of natural justice had been established by the Applicant. In addition, the Respondent argued that there is no evidence of abuse of discretion or breach of the Applicant's legitimate expectation.

29. The Interested Party made submissions similar to the Respondent. He, however, went ahead and submitted that by filing this matter, the Applicant is asking the court to make a determination whether the Applicant's actions amounted to misconduct. The Interested Party contended that judicial review is concerned with the decision making process and not the merits of the decision itself. The case of **Republic v Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** was cited in support of this legal statement.

30. Section 60(1) of the Advocates Act provides the jurisdiction of the Disciplinary Tribunal as follows:

"60.(1) 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."

31. The Interested Party's case is that the Applicant acted outside the instructions of his client in the matter before the Children's Court. On the other hand, the Applicant's argument is that his representation of his client in that matter is not subject to the jurisdiction of the Respondent. The key words in Section 60(1) are **"a complaint against advocate of professional misconduct....may be made to the Committee."** The Disciplinary Committee is now the Disciplinary Tribunal. Professional misconduct includes disgraceful or dishonourable conduct incompatible with the status of an advocate.

32. The onus of determining whether an act amounts to professional misconduct belongs to the Disciplinary Tribunal. It would amount to usurpation of that mandate were the court to decide what amounts to professional misconduct. In my view, the court's jurisdiction can only be engaged after the Tribunal has made a finding as to whether or not the Applicant's actions amounted to misconduct. At that point the Applicant can argue that the Tribunal had no power over his actions and it is only then that the court can interrogate the decision of the Tribunal and make a finding as to whether the Tribunal had jurisdiction.

33. The Disciplinary Tribunal is made up of persons with knowledge of the law and they are capable of deciding whether or not the Applicant's conduct amounts to professional misconduct. It is not lost upon this court that jurisdiction is conferred by the Constitution or statute – see **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**. I wonder whether an advocate is allowed to use foul language in court proceedings in the pretext of representing the interests of the client. It is the duty of the Respondent to determine what amounts to professional misconduct.

34. Where the jurisdiction of a tribunal is clear-cut, it cannot act outside the statutory boundaries. The Disciplinary Tribunal cannot, for example, discipline a medical officer for professional negligence in the course of practising medicine.

35. In some cases, however, a hearing has to be conducted before it can be decided whether the Tribunal has jurisdiction or not. In the case at hand, the decision as to whether the Disciplinary Tribunal has jurisdiction can only be made by the Disciplinary Tribunal after hearing the parties. In other words, the Applicant can raise the issue of jurisdiction as his defence. The best place to do that is before the Disciplinary Tribunal.

36. Considering the foregoing, I agree with the Respondent and the Interested Party that the Applicant has not established a case for grant of judicial review orders. His application is therefore dismissed. Each party will meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 14th day of Oct., 2015

W. KORIR,

JUDGE OF THE HIGH COURT