



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PETITION NO. 13 OF 2014
(CONSOLIDATED WITH NO. 36 OF 2014)

IN THE MATTER OF: A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO ARTICLES
22, 23, 165 (3) (B) 7 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE SUPREMACY OF THE CONSTITUTION AS
PER ARTICLE 2 (1 AND 4) OF THE CONSTITUTION

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE FUNDAMENTAL RIGHT AND FREEDOMS
UNDER ARTICLE 25 (C) AND 50 OF HE CONSTITUTION REGARDING THE RIGHT TO A FAIR
TRIAL AND HEARING

AND

IN THE MATTER OF: THE UNCONSTITUTIONALITY OF THE COMPOSITION OF THE
DISCIPLINARY TRIBUNAL CREATED UNDER SECTION 57 OF THE ADVOCATES ACT (CAP
16) OF THE LAWS OF KENYA

AND

IN THE MATTER OF: DISCIPLINARY TRIBUNAL CAUSE NO. 33 OF 2014
SHADRACK KAMBI & OTHERS VS. ROBINSON MALOMBO

AND

IN THE MATTER OF: UNDERMINING THE PRINCIPLE OF FAIR AND NATURAL JUSTICE
BETWEEN

ROBINSON O. MALOMBO T/A O.M. ROBINSON & COMPANY

ADVOCATES.....PETITIONER

VERSUS

1. THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA

2. THE ATTORNEY GENERAL.....RESPONDENTS

AND

SHADRACK KAMBI & 34 OTHERS.....INTERESTED PARTIES

RULING

1. Robinson O. Malommo, the Petitioner, is an Advocate of the High Court of Kenya who practices in the name and style of O.M Robinson & Co. Advocates. The Petitioner has brought this Petition in which he avers that the Complaints Commission of the Law Society of Kenya, on 10th February, 2014 instituted a disciplinary cause against him being D.C.C No. 33 of 2014 Shadrack Kambi & 34 Others vs. Robinson Malombo. The disciplinary cause was instituted at the Disciplinary Tribunal of the Law Society of Kenya, the First Respondent following a complaint lodged by 35 Complainants who were the Petitioner's former clients.

2. The Petitioner's case is that he is apprehensive the First Respondent as constituted under **Section 57 (1)** of the Advocates Act [Cap. 16 of the Laws of Kenya] ("the Advocates Act") cannot be an impartial tribunal as envisaged by **Article 50 (1)** of the Constitution of Kenya, 2010.

3. **Section 57 (1)** of the Advocates Act provides that:

"There is established a tribunal to be known as the Disciplinary Tribunal (in this Part referred to as "the Tribunal") which shall consist of—

a) the Attorney-General

b) the Solicitor-General or a person deputed by the Attorney-General; and

c) six advocates (other than the chairman, vice- chairman or secretary of the Society), of not less than ten years standing, one of whom shall be an advocate who does not ordinarily practise in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election."

4. The Petitioner submits that by providing for the inclusion of practising advocates in the Tribunal, **Section 57 (1)** does not create a Tribunal that is impartial as required by **Article 50 (1)** of the Constitution since the practising advocates are the Petitioner's direct rivals in the practice of law and are likely to be biased against him. That the Attorney General, the Second Respondent herein, as well as the Solicitor General and the Director of Public Prosecutions are public offices of which the Petitioner can aspire to hold and therefore, the Petitioner claims, the Second Respondent has vested interest in the Petitioner's reputation and is therefore likely to be biased against him. The Petitioner, therefore, argues that the provisions relating to the composition of the First Respondent under **Section 57 (1)** of the Advocates Act are in conflict with the Petitioner's rights and freedoms as enshrined in the Constitution.

5. The Petitioner seeks the following prayers:

(i) A conservatory order be issued against the 1st Respondent from proceeding with the hearing of D.C.C No. 33 of 2014 Shadrack Kambi & 34 Others vs. Robinson Malombo.

(ii) A declaration that any proceedings heard and/or determined by the First Respondent in D.C.C No. 33 of 2014 Shadrack Kambi & 34 Others v Robinson Malombo are in breach of the Petitioner's fundamental rights and freedoms as enshrined in Articles 25 (c) and 50 (1) of the Constitution and should be declared null and void *ab initio*.

(iii) A declaration that the First Respondent as constituted under the provisions of Section 57 (1) of the Advocates Act is unconstitutional and in breach of the Petitioner's fundamental rights and freedoms as enshrined in Articles 25 (c) and 50 (1) of the Constitution.

(iv) A declaration be issued that section 57 (1) of the Advocates Act is unconstitutional in so far as constituting a tribunal body that is in conflict with the provisions of Articles 25 (c) and 50 (1) of the Constitution.

(v) Costs

6. The Second Respondent, upon being served, filed a Notice of Preliminary Objection dated 19th February, 2015 against the entire Petition on the basis that the same is incompetent and ought to be struck out with costs because:

(i) The Petition is frivolous, vexatious and an abuse of the court process;

(ii) That the issue of constitutionality of Section 57 (1) of the Advocates Act has already been determined in **Nairobi High Court Petition No. 318 of 2012: the Law Society of Kenya vs. The Attorney General, the Judicial Service Commission and the Chief Justice.**

7. It is the Second Respondent's said Preliminary Objection that is the subject of this Ruling.

The Issue for Determination

8. The Petitioner filed his written submissions on 29th May, 2015 in which he submits that the Second Respondent's Preliminary Objection is not a preliminary objection, and relied on the case of **MUKISA BISCUIT MANUFACTURING CO. LTD Vs. WEST END DISTRIBUTORS LTD, 1969 [E.A] 696** where it was stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

9. In my view, the main issue for the court's determination is whether the Second Respondent's Preliminary Objection meets the threshold for what constitutes a Preliminary Objection and whether the same should be allowed by striking out the Petition.

Analysis

10. What constitutes a Preliminary Objection was discussed in the case of **Mukisa Biscuits, (supra)** where it was held as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. In my view, and with great respect to the Second Respondent, the first ground of the Preliminary Objection that the Petition is frivolous, vexatious and abuse of the court process is not a preliminary objection on a point of law. In the case of **ROSEMARY MULEE Vs. COUNTY ASSEMBLY OF MACHAKOS & ANOTHER [2015] eKLR**, the Respondents raised a preliminary objection to the

Petition on the basis, *inter alia*, that the same was seeking to impede the functions of constitutional office holders and as such were frivolous, vexatious and an abuse of the judicial process. The Court held that a Preliminary Objection cannot be raised if any fact requires to be ascertained. Nyamweya, J. stated as follows:

“A preliminary objection cannot therefore be raised if any fact requires to be ascertained... I have perused the grounds of objection raised and note that the first to fourth, and the seventh to ninth grounds do not raise any question of law, and are allegations which will certainly require further evidence and argument to establish their veracity or otherwise. In particular the issues of fact that the said grounds required to be first resolved are as to the nature of the Petitioner’s dispute, the particulars of the allegations made by the Petitioner as against the Respondents, and the manner in which the Respondents’ functions are being impeded and/or reorganized.” (underlining mine)

12. For this court to make a determination on whether the Petition is frivolous, vexatious and an abuse of the court process, the court must delve into the nature of the Petitioner's dispute and the particulars of the allegations made by the Petitioner as against the Respondents. One of the issues raised by the Petitioner is whether the inclusion of practising advocates in the membership of the First Respondent is likely to impede the Petitioner's right to a fair hearing. That allegation is one of fact that this court will have to ascertain by analyzing the evidence produced in this Petition. I say so because **Section 57 (1)** of the Advocates Act does not specify that the advocates comprising the membership of the Disciplinary Tribunal must be practising advocates so that they become rivals of the Petitioner in the practice of law. A person can be an advocate but one who is not necessarily engaged in the practice of law in the active sense of a law firm as the Petitioner. The first ground of the Second Respondent's objection therefore falls short of the definition enunciated in the case of **Mukisa Biscuit, (supra)**, since it is not based on pure point of law and will require the court to go to the merits of the Petition and ascertain the nature of the allegations therein.

13. On the second ground of the Objection, the Second Respondent argues that the issue of constitutionality of section 57 (1) of the Advocates has already been determined by the High Court sitting in Nairobi in **Constitutional Petition No. 318 of 2012: the Law Society of Kenya vs. The Attorney General, the Judicial Service Commission and the Chief Justice (hereinafter “Petition No. 318 of 2012”)** (**LAW SOCIETY OF KENYA vs. ATTORNEY GENERAL & 2 OTHERS [2013] eKLR**).

14. Although the Second Respondent did not elaborate how the decision in Petition No. 318 of 2012 should lead to the striking out of this case, my understanding is that the Second Respondent's objection is that the Petition cannot be heard since the issues raised therein have been determined by a court of competent and concurrent jurisdiction to this court and therefore this petition is barred by the doctrine of **res judicata**. I do not think that **res judicata** is a proper objection to raise because the Petitioner herein was not a party to Petition No. 318 of 2012 and the issue of infringement of the Petitioner's rights were not pleaded in the said Petition. **Res judicata** only arises under section 7 of the Civil Procedure Act [Cap 21, Laws of Kenya] where the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim.

15. Further, on the question of whether the issues raised in this Petition have been determined in Petition No. 318 of 2012, I notice that the issue raised in Petition No. 318 of 2012 was whether the Statute Miscellaneous Amendment Law that replaced the Disciplinary **“Committee”** with the Disciplinary **“Tribunal”** contravened the provisions of **Article 159** of the Constitution. Majanja, J. stated as follows regarding that argument:

“The change of the name of the Committee engendered by the amendment did not change the substance of the Advocates Act nor interfere with the powers of that body. The name was cosmetic and within the legislative authority and the use of the word “Tribunal” only established the fidelity of that body to the principles set out in Article 159. I find and hold that this ground of attack lacks merit and is dismissed.”

16. The issue raised by the Petitioner herein, to wit, whether by providing for the inclusion of practising advocates in the Tribunal, **Section 57 (1)** does not create a Tribunal that is impartial as required by **Article 50 (1)** of the Constitution is a novel one that was not addressed in Petition No. 318 of 2012. I therefore do not think that this Petition should be struck out on the basis of the decision in Petition No. 318 of 2012.

17. Although the question of whether the inclusion of the Director of Public Prosecutions (DPP) in the membership of the Disciplinary Tribunal was discussed in Petition No. 318 of 2012, the arguments raised therein were substantially at variance with the ones raised by the Petitioner herein. The Petitioner here argues that the inclusion of the DPP infringes on his right to fair hearing while in Petition 318 of 2012 the issue was that the DPP should not be included in the membership of the Tribunal because the DPP's office only deals with criminal matters under **Article 157** of the Constitution. Majanja, J. expressed himself thus on the question of membership of DPP:

“Mr Chigiti expressed concern over the amendment of section 57 which introduced the Director of Public Prosecutions (“DPP”) as member of the tribunal urging that it did not see the need for the introduction of such an office whose primary role is to deal with criminal matters under Article 157. This argument does not have merit as the membership of any statutory body is a matter for the legislature to determine unless the Constitution directs otherwise. This argument also ignores the fact that prior to the promulgation of the Constitution, the office of the Attorney General, established under section 26 of the former Constitution, was charged with the responsibility of prosecuting criminal offences yet he was a member of the Committee. The Attorney General’s duties regarding the enforcement of criminal law were transferred to the office of the DPP under Article 157. One of the requirements for appointment of the DPP is that one must be qualified to be a judge of the High Court hence there is nothing in the Constitution that disqualifies the DPP from being a member of the Tribunal particularly given that the holder of that office is required in law to be a qualified advocate and a member of the profession.”

Conclusion

18. The issues raised in this Petition touch on the Petitioner's right to fair hearing. The same were not the issues in Petition No. 318 of 2012. I therefore do not agree with the Second Respondent that the issues raised herein were determined in Petition 318 of 2012 and therefore the Petition should be struck out. Further, this court is not bound by the decision of another High Court which is a court of cognate or concurrent jurisdiction. The Second Respondent can only use the decision in Petition No. 318 of 2012 to persuade this Court to find in its favour but not as a binding authority to warrant the striking out of the Petition.

19. The Preliminary Objection dated 19th February, 2015 and filed on 20th February, 2015 is hereby dismissed. The question of costs to abide determination of the Petition herein.

20. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 6th day of November, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Ms. Tsuma holding brief Nyongesa for 1st Respondent

Ms. Namahiya holding brief Ngari for 2nd Respondent

Mr. Silas Kaunda Court Assistant