



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**J.R. CASE NO 226 OF 2015**

REPUBLIC.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL OF

THE LAW SOCIETY OF KENYA.....RESPONDENT

JOHN FRANCIS NJOMO.....INTERESTED PARTY

Exparte

JOHN MAINA MBURU

**JUDGEMENT**

1. Through the Notice of Motion application dated 20<sup>th</sup> July, 2015 the ex parte Applicant, John Maina Mburu prays for orders as follows:

**“1. THAT an order of certiorari do issue to bring [into] this Court for quashing the decisions of the Respondent, the Disciplinary Tribunal of the Law Society of Kenya and expressed vide the letter dated 26<sup>th</sup> June 2015 requiring the Applicant to appear before the Law Society of Kenya Disciplinary Committee for a plea on 20<sup>th</sup> July 2015.**

**2. THAT there be a stay of that decision and any consequential proceedings before the Respondent in respect of the said summons.**

**3. THAT an order of prohibition do issue preventing the Respondent from accepting, entertaining, listening to and/or making a ruling on the complaint lodged by the interested party in so far as it refers to the Applicant.**

**4. THAT this honourable court be pleased to grant such other orders that are analogue and/or necessary adjuncts to the reliefs being sought that [it] may deem fair and just to grant in the circumstances.**

**5. The costs of this application be in the cause.”**

2. According to the statutory statement and the Applicant’s Verifying Affidavit which were filed together

with the chamber summon application for leave on 15<sup>th</sup> July, 2015, the Applicant is an advocate of the High Court of Kenya and a director of Tetezi House Limited (“the company”).

3. Sometimes in the year 2010, the company was offered for sale L.R. No. 209/359/2A Maisonette No. 9 belonging to the Interested Party, John Francis Njomo. In that transaction, the Applicant acted for the company whereas Martin Kiai Nuthu of Kiai Nuthu & Associates Advocates acted for the Interested Party.

4. The sale agreement was drawn by Mr. Kiai Advocate and the Applicant paid the deposit. The Applicant also made further payments as he was informed that the Interested Party had serious financial difficulties and thus the need for additional payments.

5. As the transaction progressed, the Applicant realized that the Interested Party could not complete the sale as he did not have the original lease (title) or a copy thereof and the property had a caveat placed by the Commissioner of Income Tax. The transaction stalled for some time until the Applicant stepped in and applied for a provisional copy of title and also introduced the Interested Party and his wife to an accountancy and secretarial firm by the name Maly Registrars to prepare the Interested Party’s accounts and sort out the tax issue.

6. In the interim, the Applicant continued making payments and it is his case that the company has paid the purchase price in full. His position is that the Interested Party has even been overpaid. According to the Applicant, the Interested Party signed all transfer documents and the same were forwarded to him by the Interested Party’s lawyers Kiai Nuthu & Associates Advocates. The Applicant executed the transfer and duly informed the Interested Party.

9. The Applicant averred that he later received a letter dated 26<sup>th</sup> June, 2015 from the Respondent, the Disciplinary Tribunal of the Law Society of Kenya summoning him to attend before the Disciplinary Committee on 20<sup>th</sup> July, 2015 for plea in **Disciplinary Cause No. 14 of 2015**.

10. The Applicant’s position is that there has never existed an advocate/client relationship between him and the Interested Party. It is his case that no complaint whatsoever has been presented against him in his capacity as an advocate of the High Court to warrant an appearance before the Disciplinary Tribunal.

11. The Applicant averred that the transaction in question was a simple purchase between the company and the Interested Party and any issue arising therefrom should be governed by the terms of the sale agreement.

12. The Applicant further asserted that the Interested Party’s complaint before the Disciplinary Tribunal is that the transfer documents were forged but the truth of the matter is that the Interested Party signed the transfer documents and he has been paid in full.

13. According to the Applicant, allowing the Respondent to proceed with the matter will defame him and lower his standing in society. Further, that the Interested Party had no genuine grounds for lodging the complaint against him.

14. The Respondent opposed the application through the Replying Affidavit of the Secretary and Chief Executive Officer of the Law Society of Kenya, Mr. Apollo Mboya. The starting point of the Respondent’s case is that the Disciplinary Tribunal is a creature of the Advocates Act and all advocates are subject to its jurisdiction.

15. Mr. Mboya averred that the Law Society of Kenya, acting as a Secretariat for the Advocates Disciplinary Tribunal, received a complaint from the Interested Party through his affidavit sworn on 26<sup>th</sup> May, 2015.

16. It is the Respondent’s case that the affidavit containing the Interested Party’s complaint was served

upon the Applicant through a letter dated 26<sup>th</sup> May, 2015. On 10<sup>th</sup> June, 2015 the Disciplinary Tribunal received the Applicant's affidavit in response to the complaint.

17. The complaint and the response thereto were placed before the Disciplinary Tribunal and on 22<sup>nd</sup> June, 2015 it determined that there was a *prima facie* case against the Applicant. The matter was allocated a number and fixed for plea.

18. The Respondent's position is that the Applicant being an advocate of the High Court of Kenya is subject to its jurisdiction in regard to issues relating to his conduct as an advocate. Further, that the Disciplinary Tribunal is not under any duty to consult an advocate before it can proceed to accept a complaint that relates to the conduct of that particular advocate.

19. The Respondent asserted that the complaint raised by the Interested Party touches on the Applicant's conduct as an advocate and the Disciplinary Tribunal has not exceeded its jurisdiction in summoning him for plea.

20. The Respondent concluded by asserting that the Applicant has not established grounds for grant of judicial review orders and his application should be dismissed with costs.

21. On his part the Interested Party opposed the application through a Replying Affidavit he swore on 4<sup>th</sup> August, 2015. Through the affidavit the Interested Party admitted that there was indeed a sale agreement between him and the Applicant but the said sale agreement is different from the one exhibited in Court by the Applicant.

22. It is the Interested Party's case that he has never signed any document of transfer of his property and neither did he give consent to the Applicant to take possession of the subject property before paying the full price.

23. The Interested Party averred that out of the purchase price of Kshs.13.5 million, he had only received Kshs.5,972,866/= and the balance of Kshs. 7,527,134/= has never been paid. It is his case that the payment schedules exhibited by the Applicant are fabricated.

24. The Interested Party averred that when he realized that his advocate Martin Kiai Nuthu was not being honest, he approached the Applicant through his (the Interested Party's) wife Lucy Wangui Njomo and the Applicant started dealing with him directly. The Applicant paid him directly and later claimed that he had completed payment.

25. The Interested Party stated that he asked the Applicant for a statement of accounts but he was non-committal and later told him that they should ask advocate Martin Kiai Nuthu for the statement of accounts. The Interested Party denied instructing Maly Registrars to do his accounts and wonders why the Applicant did not pull out of the transaction after discovering that it could not be completed.

26. The Interested Party averred that he has reported the matter of the forged transfer documents to the police at Kiambu vide OB No. 42/03/08/15.

27. It is his firm view that the Respondent has jurisdiction to deal with the matter.

28. The key question to be answered in this case is whether the Respondent has jurisdiction to deal with the complaint placed before it by the Interested Party. It is not disputed that upon review of the Interested Party's complaint and the Applicant's reply to the complaint, the Respondent formed the opinion that the Interested Party had a complaint worth hearing.

29. There is also no dispute that the Interested Party's complaint arose from a house sale transaction between him and a company called Tetezi House Limited. The Applicant is one of the directors of that company.

30. In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** the Supreme Court affirmed that jurisdiction is everything and without it a Court or tribunal has no power to entertain a matter. The court stated:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”**

31. In some cases, a perusal of the pleadings can straight away reveal that a court does not have jurisdiction. A simple example is where a presidential election petition is filed in a court other than the Supreme Court. However, some instances require the hearing of arguments before a court or tribunal can decide whether it has jurisdiction.

32. Although from the pleadings of the Applicant it appears that the Interested Party’s complaint is about breach of a contract between a company and the Interested Party, there could be an element of misconduct by an advocate. The Interested Party averred that the Applicant at one time acted as his advocate. Whether this is true or false can only be determined after evidence has been adduced before the Respondent.

33. Any attempt by this court to determine, with the kind of material before it, that the Respondent has no jurisdiction will amount to usurpation of the Respondent’s powers. It will deny the Interested Party an opportunity of placing his complaint before a body established by Parliament to deal with such complaints. The Respondent, after hearing the evidence, has the capacity and mandate to decide whether it has jurisdiction or not in the matter. Any error on the question of jurisdiction on the part of the Respondent can be corrected either through an appeal or review. In the circumstances of this case, any attempt to determine the question of jurisdiction without hearing the evidence may lead to injustice.

34. In a situation where a party is of the opinion that a tribunal or court has no jurisdiction, the reasonable thing to do is to point out that fact to the tribunal or court. The best forum for addressing the question of jurisdiction where the matter is not clear-cut is before the court or tribunal hearing the matter. Only when a determination has been made can one decide to appeal or apply for judicial review. Only in clear-cut cases should a party opt for judicial review.

35. In the case before me, I find that the Applicant’s application is premature. There is need to test the evidence of the parties before a determination can be made as to whether the Respondent has jurisdiction or not.

36. There is no shame or defamation in being taken through a legally established dispute resolution mechanism. The Applicant as an advocate is not beyond the reach of the Respondent.

37. The question as to whether the purchase price has fully been paid can only be decided by the Respondent or a civil court after evidence has been adduced. It is not the business of a judicial review court to make findings on the evidence of the parties. This court only looks at the process in order to determine whether the same is lawful, reasonable and in compliance with the rules of natural justice-see

**Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR.**

38. For the reasons stated above, I find that the Applicant's case has no merit. The same is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of Nov., 2015.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**