REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 73 OF 2009

REPUBLIC..APPLICANT

VERSUS

DISCIPLINARY COMMITTEE,

LAW SOCIETY OF KENYA...RESPONDENT

MILCAH WANZA MUTISYA ....INTERESTED PARTY

EX-PARTE

FRANCIS MWANZA MULWA

JUDGEMENT

The ex-parte applicant (Francis Mwanza Mulwa) is an advocate of the High Court of Kenya and is the subject of **DISCIPLINARY CAUSE NO. 37 OF 2006** before the Disciplinary Committee. The Disciplinary Committee, Law Society of Kenya (LSK) is the respondent in this matter. The complainant in **DISCIPLINARY CAUSE NO. 37 OF 2006** is Milcah Wanza Mutisya the Interested Party herein.

The facts which gave rise to the proceedings before the Disciplinary Committee go all the way back to 1984 when the ex-parte applicant represented the Interested Party in **Nairobi High Court Civil Case No. 2305 of 1984, MILCAH WANZA MUTISYA V BEATRICE MUTONO & ANOTHER.** In that case the Interested Party had sued the defendants for compensation as a result of the demise of her husband from injuries sustained in a road traffic accident involving the defendants' motor vehicle. Judgement was entered in favour of the Interested Party and the decretal amount of Kshs.240,081.00 was paid to her lawyer (the ex-parte applicant) by the defendants' lawyers.

The ex-parte applicant failed to remit the decretal amount to the Interested Party. The Interested Party and other complainants lodged a complaint with the police. The ex-parte applicant was arrested, charged, convicted and sentenced to five years imprisonment for several counts of stealing by agent in **Nairobi R.M Criminal Case No. 3252 of 1985.**

As the ex-parte applicant was still serving sentence, the Interested Party filed **Nairobi High Court Civil Case No. 3421 of 1987 MILCAH WANZA MUTISYA & 3 OTHERS V MWANZA MULWA** claiming the sum of Kshs. 240,081.00 which the ex-parte applicant had failed to remit to her. In a ruling delivered on 4th March, 1992 Tank, J entered judgment in the terms of the plaint. It seems that the judgment was never executed.

Through an affidavit sworn on 7th April, 2006 the Interested Party lodged a complaint with the respondent over the same amount of money. The applicant filed a replying affidavit on 30th August, 2006.

The matter proceeded before the Disciplinary Committee and on 16th November, 2006 an order was entered as follows:

> **"As the principal sum of Kshs.250,000/= is undisputed and as the respondent has unequivocal offer to pay the same by installments, we hereby order that the said amount be liquidated as follows:**

a. **Kshs. 50,000/= within 7 days from today's date.**
b. **Kshs.50,000/= on the 23rd day of each succeeding month until payment in full.**
c. **All monies to be paid to the Law Society of Kenya.**
d. **In default of any one payment the full amount to become payable forthwith.**
e. **Mention on 2nd April, 2007 to review compliance and to make further orders."**

The matter came up for mention many times before the Disciplinary Committee and on 16th June, 2008 it was noted that the capital of Kshs.250,000/= had been fully paid. What remained was the issue of interest.

The ex-parte applicant later raised an objection to payment of interest and on 16th October, 2008 the Disciplinary Committee ruled that **"the Complainant is entitled to be paid interest on the Kshs.258,411/= at the rate of 12% from the 30th of March 1985 until the date the same was paid to the Complainant and the Advocate shall so pay the interest found to be due."**

The ex-parte applicant was aggrieved by the said ruling and he moved to this Court and obtained leave to commence these judicial review proceedings. Through the notice of motion dated 12th February, 2009 the ex-parte applicant therefore prays for an order of certiorari to quash the Disciplinary Committee's decision of 16th October, 2008. He also prays for an order of prohibition prohibiting the Disciplinary Committee from executing its said decision or from making further orders or giving directions in the proceedings. He also prays for costs.

In the papers filed in Court, the ex-parte applicant argues that the proceedings before the respondent were void *ab initio*. He submits that the cause before the respondent was intended to execute the judgment in the Interested Party's case against him in **HCCCC No. 3421 of 1987** and the said matter has the effect of usurping the powers of the High Court and was also sub judice the said High Court case.

The ex-parte applicant asserts that having been convicted and punished in respect of the same matter, the proceedings before the respondent will result in being punished twice thus offending the double jeopardy principle. The ex-parte applicant points out that the proceedings before the respondent were commenced 21 years after the cause of action arose and the respondent had waived its right to take disciplinary action against him by granting him a practicing certificate. Further, the ex-parte applicant contends that his participation in the proceedings before the respondent cannot in any way validate an illegality.

In its reply, the respondent argues that under Section 4 of the Law Society Act (Cap 16) it has a duty to protect and assist the public in matters touching, ancillary or incidental to law. Further, the Advocates Act establishes the Disciplinary Committee and empowers it to receive complaints against advocates.

The respondent submits that this application is not only an abuse of the court process but is also an abuse of the process of the Disciplinary Committee. It is the respondent's case that were the Court to grant the orders sought by the ex-parte applicant, the respondent would be prevented from executing its statutory mandate. The respondent argues that it has a duty to maintain the profession in a manner characterized by honesty, integrity, civility, accountability and decorum.

The respondent further opines that if the applicant was aggrieved by its decision, then the only recourse open to it was to file an appeal.

The respondent further contends that it complied with the rules of natural justice in handling the complaint against the ex-parte applicant. The respondent asserts that the fact that it had granted the applicant a licence does not mean that it had waived any claim against him. Further, the respondent argues that the ex-parte applicant admitted the debt and the claim was thus revived. As regards the award of interest, the respondent submits that the applicant has used the money belonging to the Interested Party for 21 years and it is only just and equitable that the Interested Party be compensated.

The Interested Party swore a replying affidavit in opposition to the application. It is her case that this application is made in bad faith. She contends that although the ex-parte applicant is aware of the Court's judgment in **HCCC No. 3421 of 1987** he is yet to make any amends in line with that judgment. She is of the opinion that the ex-parte applicant has approached this Court with tainted hands and should not get the orders sought.

The Interested Party, like the respondent, is of the view that since the applicant had complied with the earlier order of the respondent with respect to the payment of the principal amount, he is now estopped from denying the respondent's authority. Consequently the Interested Party contends that the double jeopardy principle is not applicable and the plea of autrefois convict is also not available to the ex-parte applicant.

As to the interest awarded against the Applicant, the Interested Party opines that the same was not time barred. According to the Interested Party, time started running on the claim for interest once it was awarded. She submits that the applicant should not be allowed to reap the fruits of his illegal, unjust and unlawful acts.

In my view, the main question to be answered in these proceedings is whether the respondent had jurisdiction to entertain the Interested Party's complaint.

The applicant cited Section 77(5) of the repealed Constitution in objecting to the proceedings before the Disciplinary Committee. That Section provided that:

> **"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."**

Section 77(5) from its face barred criminal proceedings and punishments based upon facts for which an accused had already been convicted or acquitted. The plea of autrefois acquit or autrefois convict was therefore available in a criminal trial.

The matter before the Disciplinary Committee is not a criminal process before a court. It is a matter of professional misconduct before a professional statutory body. Section 60 of the Advocates Act mandates the body to handle complaints against advocates. Criminal proceedings before a court and proceedings before the Disciplinary Committee for professional misconduct are two distinct and exclusive processes. The plea of autrefois convict is not available to the applicant in respect of proceedings before the Disciplinary Committee.

There is, however, an important issue namely whether the Disciplinary Committee abused its powers by acting on the Interested Party's complaint. The ex-parte applicant correctly submitted that the Interested Party's complaint was essentially recovery proceedings in respect of money he had failed to remit to her. Judgement had already been entered in favour of the Interested Party in **Nairobi HCCC No. 3421 of 1987.** No explanation was offered as to why the Interested Party failed to execute the judgment in that case.

The ex-parte applicant had already bared his soul to the respondent when applying for a practicing certificate. The respondent therefore knew that the ex-parte applicant had pending claims from his former clients but nevertheless issued him with a practicing certificate. The respondent must have been satisfied that it no longer wanted to pursue the disciplinary aspect of the applicant's matter.

It is indeed unlawful and immoral for an advocate to abuse the trust bestowed upon him/her by a client. The ex-parte applicant has indeed admitted that his conscience could not allow him to retain the money he owed to the ex-parte applicant. He stated that although he knew the proceedings before the respondent were void *ab initio* he had decided to participate so as to pay the applicant. Whether this statement is made in good faith is another matter altogether.

In my view, the proceedings before the respondent were aimed at aiding the Interested Party recover her money from the ex-parte applicant. The Interested Party already had a judgment from the High Court but it is not known why she did not execute it. Her actions were an abuse of process. She ought to have pursued the execution of the judgment in the High Court. I do not think it was right for the Interested Party to shuttle the ex-parte applicant between different forums. The respondent aided the Interested Party in her scheme and that is neither right nor fair. Much as the Interested Party was aggrieved, she ought to have been advised by the respondent to execute the judgment in **HCCC No. 3421 of 1987.**

The respondent is not an agent of the High Court for the purposes of executing its judgments. The respondent no longer had jurisdiction. It could not, in disguise of disciplinary proceedings reopen a matter that had been dealt with by the High Court. The Interested Party is to blame for not executing the decision of the High Court. The entire proceedings before the respondent were uncalled for and the Interested Party is lucky that the applicant only sought to quash part of those proceedings.

I am satisfied that the application before this Court is merited. Orders of certiorari and prohibition are issued as prayed by the ex-parte applicant. Considering the history of this matter I order each party to meet own costs.

Dated, signed and delivered at Nairobi this 14th day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT