



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 159 OF 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAW SOCIETY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**DISCIPLINARY COMMITTEE.....2<sup>ND</sup> RESPONDENT**

**KAIRU MBUTHIA ADVOCATE T/a**

**KAIRU MBUTHIA & KINGATI ADVOCATES.....INTERESTED PARTY**

**EXPARTE**

**PAUL WAINAINA KIMANI & LUCY WAIRIMU KARIMI**

**JUDGEMENT**

In these proceedings Paul Wainaina Kimani and Lucy Wairimu Karimi are the ex-parte applicants. The Law Society of Kenya (LSK) is the 1<sup>st</sup> respondent and its Disciplinary Committee is the 2<sup>nd</sup> respondent. Kairu Mbuthia an advocate trading in the name and style of Kairu Mbuthia and Kingati advocates is an interested party.

The background to this matter is that the 1<sup>st</sup> applicant who is a partner of the 2<sup>nd</sup> applicant in the firm of Wainaina and Karimi Advocates was the advocate for the purchaser in a conveyancing transaction in respect L.R. No. 14902/18. The Interested Party's firm was acting for the vendor. There arose a dispute concerning the said conveyancing transaction. The purchaser, Afritrack Investments (East Africa) Limited has since instituted a civil claim against the vendor Jane Wamuyu Mwai vide **NAIROBI HIGH COURT (COMMERCIAL & ADMIRALTY DIVISION, MILIMANI) CIVIL CASE NO. 300 OF 2012.**

At the same time disciplinary proceedings before Disciplinary Committee were commenced against the applicants in **Cause No. 51 of 2012.** Those proceedings resulted in a letter dated 12<sup>th</sup> April, 2013 addressed to the applicants. The contents of that letter are as follows:-

**“RE: DISCIPLINARY COMMITTEE CAUSE NUMBER 51 OF 2012.”**

The cause under reference has been fixed for **Judgement/Mitigation & Sentence** before the Disciplinary Committee sitting at 9.00a.m. on Monday the 13<sup>th</sup> May, 2013 in the Council Chambers, 2nd Floor, Professional Centre, Parliament Road, Nairobi.

**You have a right to instruct counsel but your personal presence is mandatory whether or not you instruct counsel.”**

This is the letter that triggered these proceedings.

After the applicants were granted leave they filed the notice of motion dated 23<sup>rd</sup> May, 2013 in which the main orders they seek are:

**“i. The order of prohibition to prevent the Law Society of Kenya by itself or through the Compliance and Ethics Program Director or the Disciplinary Committee from taking out any disciplinary proceedings against or concerning the Applicants whether the same or arising out of the same facts, as those involved in the Disciplinary Cause No. 51 of 2012 or continuing with the proceedings in Disciplinary Cause No. 51 of 2012.**

**ii. The order of certiorari to call up into the High Court and to quash preceding proceedings and decisions therein made on 21<sup>st</sup> May, 2012, 16<sup>th</sup> July, 2012, 10<sup>th</sup> September, 2012, 5<sup>th</sup> November, 2012 and 4<sup>th</sup> February, 2013 of the Disciplinary Committee in Cause No.51 of 2012 communicated by the Deputy Secretary Compliance and Ethics of the Law Society of Kenya under letter Reference No. DCC 51/2012 dated 12<sup>th</sup> April 2013.**

**iii. The order of mandamus directed to the Law Society of Kenya and the Disciplinary Committee and the Interested Party, Kairu Mbuthia Advocate, to observe the law and particularly the rules of natural justice enshrined therein on the discipline of advocates and the applicants in particulars.”**

The 1<sup>st</sup> applicant swore an affidavit on 10<sup>th</sup> May, 2013 in support of the application for leave and through the said affidavit he avers that the 2<sup>nd</sup> applicant did not take instructions in respect of the conveyancing transaction and was therefore not involved in the conduct of the transaction. It appears the 1<sup>st</sup> applicant is arguing that the 2<sup>nd</sup> applicant ought not to have been made a party to the proceedings before the respondents.

The 1<sup>st</sup> applicant also avers that the issues in **HCCC No. 300 of 2012** are directly and substantially the same with those in **D.C. Cause No. 51 of 2012** and the decision of the High Court will determine the matter once and for all. The 1<sup>st</sup> applicant contends that the existence of the suit in the High Court had been brought to the attention of the Disciplinary Committee.

In the application for leave dated 10<sup>th</sup> May, 2013 among the grounds upon which the application is based are that the Disciplinary Committee acted irrationally. According to the applicants the evidence of the Disciplinary Committee’s irrationality is that:

**“The record of the 2<sup>nd</sup> Respondent shows that it purportedly held a hearing on 21<sup>st</sup> May 2012, 16<sup>th</sup> July 2012, 10<sup>th</sup> September 2012, 5<sup>th</sup> November,2012 and 4<sup>th</sup> February 2013 and the letter dated 12<sup>th</sup> April, 2013 then set a date for judgment and mitigation and sentence and then called upon the Applicant to supply evidence. This was irrational.”**

The applicants also assert that the respondents violated Section 60(3) and (4) of the Advocates Act which

provides for appearance and Section 58 of the same Act which provides for how the proceedings are to be conducted before the Disciplinary Committee. Further the applicants submit that the respondents' records misrepresented the facts and do not measure up to the standard of a judicial body. The only document exhibited in respect of the proceedings before the Disciplinary Committee is the letter dated 12<sup>th</sup> April, 2013 which is already reproduced.

The respondents opposed the application through a replying affidavit sworn on 31<sup>st</sup> July, 2013 by Mr. Apollo Mboya. Through the said affidavit, the respondents informed the Court that on 26<sup>th</sup> March, 2012 a complaint from the Interested Party was received by the Disciplinary Committee. The complaint alleged that the applicants had failed to honour a professional undertaking for the payment of the balance of the purchase price of Kshs.17,000,000/= within 14 days upon the successful registration of the transfer to the purchaser (Afritrack Investments). The Interested Party further complained that the applicants had failed to respond to correspondences sent to them. Consequently Disciplinary Cause No. 51 of 2012 was commenced against the applicants.

Mr. Mboya avers that the applicants were duly notified of the complaint and given time to respond. On 16<sup>th</sup> July, 2012 when the matter was fixed for hearing the 1<sup>st</sup> applicant sought for an adjournment on the ground that he wanted to file an application for stay since there was a case in the High Court related to the same matter which had been filed prior to the taking of plea.

The application was allowed and when the matter came up again on 10<sup>th</sup> September, 2012 the applicants had not filed the said application. The 1<sup>st</sup> applicant then applied for more time to file the application and he was directed to file the application so that the same could be heard together with the complaint on 5<sup>th</sup> November, 2012. When the matter came up for hearing on that date, the 1<sup>st</sup> applicant sent word that he was indisposed and the matter was put off to 4<sup>th</sup> February, 2013. On 4<sup>th</sup> February, 2013 the applicants were yet to file the application for stay and the parties were asked to file submissions on the substantive complaint. The matter was then fixed for judgement on 13<sup>th</sup> May, 2013.

The respondents assert that the applicants' application is misconceived and incompetent in law for the reasons that the applicants are named as Paul Wainaina and Lucy Karimi contrary to the established principles of law in judicial review matters where the applicant should be the Republic.

The respondents aver that they acted within the law in that Section 60 of the Advocates Act mandates the 2<sup>nd</sup> respondent to receive complaints from any person as against an advocate for professional misconduct.

The respondents contend that although there is a civil suit in the High Court regarding the issues that led to the complaint before the 2<sup>nd</sup> respondent, the jurisdiction of the 2<sup>nd</sup> respondent relates to matters of professional conduct of an advocate and whatever the outcome of that suit the 2<sup>nd</sup> respondent will still have the mandate to receive, hear and determine complaints lodged against the applicants in respect of their professional conduct.

The respondents' case is that the applicants were given an opportunity to apply to stay the proceedings before the 2<sup>nd</sup> respondent but they did not do so and these proceedings are only designed and intended to delay the proceedings before the 2<sup>nd</sup> respondent in order to defeat the Interested Party's pursuit of justice.

The respondents contend that they have not breached the rules of natural justice since the applicants have always been served with notices and they have always attended the Disciplinary Committee proceedings. It is the respondents' case therefore that they have acted rationally, in good faith and within the law.

The Interested Party opposed the application through a replying affidavit sworn on 13<sup>th</sup> June, 2013. Through Paragraph 3 of the said affidavit the Interested Party declares the application bad in law, misconceived and incompetent for the reasons that:

- “a. The applicants are Paul Wainaina Kimani and Lucy Wairimu Karimi contrary to the law.**
- b. The application is supported by an affidavit sworn on 23<sup>rd</sup> May, 2013 contrary to law and without leave of the court.**
- c. The application is not verified as required by law.**
- d. The 1<sup>st</sup> applicant has purported to swear affidavits and file pleadings on behalf of the 2<sup>nd</sup> applicant without any written authority contrary to law.**
- e. The proceedings and decisions sought to be quashed have not been supplied to the court.**
- f. The statement dated 10<sup>th</sup> May, 2013 does not contain the grounds upon which relief is sought.”**

The Interested Party further asserts that since he does not carry out public functions an order of mandamus cannot issue against him.

The Interested Party swore that he filed the complaint before the 2<sup>nd</sup> respondent on behalf of his client and that in his opinion the 2<sup>nd</sup> respondent has always conducted itself fairly towards the parties.

It is the Interested Party’s case that the civil suit in the High Court relates to a contract between two parties and the matter before the 2<sup>nd</sup> respondent relates to the conduct of advocates of the High Court.

The first issue to consider is whether the application before this Court is competent. If the answer to the first issue is in the affirmative, then the next question would be whether the applicants have made a case for the grant of judicial review orders.

The respondents and the Interested Party have urged this Court to find the application incompetent for several reasons. In the first place it is argued that in a judicial review application the applicant is the Republic. This is a valid argument. Judicial review proceedings are brought in the name of the Republic. The Republic moves the Court on behalf of the aggrieved person who becomes an ex-parte applicant in the proceedings. However, I hold the view that failure to cite the Republic as an applicant should not be used to deny a party access to justice. After all, the Republic is a nominal party in judicial review proceedings.

Secondly, the Interested Party submitted that the substantive notice of motion is supported by an affidavit sworn on 23<sup>rd</sup> May, 2013 which is contrary to the law. The Interested Party is again right on this one. The application for leave, the affidavits accompanying the application for leave and the statutory statement are the documents to be relied upon in support of the notice of motion. The 1<sup>st</sup> applicant’s supporting affidavit sworn on 23<sup>rd</sup> May, 2013 is therefore struck out. The substantive notice of motion however remains alive since it is supported by the application for leave, the verifying affidavit and the statutory statement.

Thirdly, the Interested Party argued that the application is not verified. Indeed Order 51 Rule 1(2) of the Civil Procedure Rules, 2010 requires that an application for leave be accompanied by a statement and affidavits verifying the facts to be relied upon. A perusal of the court file shows that the applicants’ application for leave is accompanied by a document titled **“The supporting Affidavit of Paul Wainaina Kimani.”** Upon reading the affidavit it is clear that it is an affidavit verifying the facts relied upon. The Court would be worshipping procedural technicalities were it to find that the said affidavit is not the one referred to in Order 53 Rule 1(2).

Fourthly, the Interested Party contends that the 1<sup>st</sup> applicant has purported to swear affidavits and file pleadings on behalf of the 2<sup>nd</sup> applicant without any written authority contrary to law. These are judicial review proceedings and the Civil Procedure Rules do not strictly apply. The 2<sup>nd</sup> applicant has not complained to the Court and it is assumed that these proceedings were filed with her permission.

Fifthly, the Interested Party contended that the proceedings and decisions sought to be quashed have not been supplied to the Court. I will come back to this submission later in my judgement.

Sixthly, the Interested Party argues that the statement dated 10<sup>th</sup> May, 2013 does not contain the grounds upon which the relief is sought. I will also come back to this ground in due course.

Finally, the Interested Party asserted that since judicial review orders are directed at public bodies, and not private persons, an order of mandamus cannot issue against him. This argument is valid and based on the law. The applicants' prayer that an order of mandamus does issue against the respondents and the Interested Party is therefore bad in law in so far as it refers to the Interested Party. If at the end of this judgment I find that an order of mandamus ought to issue, then that order can only issue against the respondents.

Having addressed some of the issues raised against the application, I now move to address the core issue namely whether the orders sought should be granted to the applicants. Judicial review remedies are available in situations where an applicant has been treated unlawfully, unreasonably or in defiance of the rules of natural justice by a public authority. For an applicant to succeed there must be evidence that the public body acted illegally, irrationally or in breach of the rules of natural justice.

The applicant's application does not reveal much. In fact it is only through the replying affidavits of the respondents and the Interested Party that the Court gets to understand what actually happened. In the first instance, the applicants argue that the respondents acted irrationally. This allegation is supported by the statement that the applicants were asked to adduce evidence after the hearing. The letter dated 12<sup>th</sup> April, 2013 which has been reproduced in this judgement is only asking the applicants to appear for their judgement, mitigation and sentence. Mr. Apollo Mboya who is the Secretary of LSK and the Disciplinary Committee has clearly demonstrated through his unchallenged affidavit that the applicants fully participated in the proceedings and they were taken through a fair process.

Apart from the letter dated 12<sup>th</sup> April, 2013 the applicants did not produce anything else to support their application. In fact the proceedings which they alleged were conducted illegally, irrationally and in breach of the rules of the natural justice were not exhibited in Court. They are asking the Court to quash proceedings without giving the Court an opportunity to see the proceedings they want quashed. Without the benefit of looking at the proceedings, this Court cannot say that they were conducted in a manner not befitting the standards of a judicial tribunal. I therefore agree with the respondents and Interested Party that failure to exhibit the decision being challenged is fatal to the applicants' case.

The applicants also failed to cite in the statutory statement the grounds upon which the relief is sought. Order 53 Rule 1(2) of the Civil Procedure Rules 2010 requires that the grounds on which the relief is sought should be contained in the statutory statement. Failure to comply is fatal to the application.

The applicants also alleged that there is need to stop the cause before the 2<sup>nd</sup> respondent because of the existence of a civil suit in the High Court dealing with the same matter. In my view, the proper forum for seeking a stay of the cause is before the 2<sup>nd</sup> respondent or before the Judge hearing the civil suit.

In short, the application before this Court has no merit. The notice of motion dated 23<sup>rd</sup> May, 2013 is dismissed with costs to the respondents and the Interested Party.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of May , 2014**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**