



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 158 OF 2009

**IN THE MATTER OF AN APPLICATION BY STEPHEN MWENESI, ADVOCATE FOR
JUDICIAL REVIEW**

AND FOR THE ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

IN THE MATTER OF: THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

**IN THE MATTER OF: THE ADVOCATES (DISCIPLINARY COMMITTEE) RULES, CAP
16 (SUB LEG) OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE LAW SOCIETY OF KENYA DISCIPLINARY COMMITTEE
CAUSE NO. 126 OF 2008 AND THE DECISIONS MADE ON THE 2ND OCTOBER 2008; 23RD
OCTOBER 2008 AND 22ND JANUARY 2009 IN THE PROCEEDINGS OF THE SAID CAUSE.**

**IN THE MATTER OF STEPHEN MWENESI ADVOCATE.....
APPLICANT**

AND

THE LAW SOCIETY OF KENYA.....1ST RESPONDENT

THE DISCIPLINARY COMMITTEE..... 2ND RESPONDENT

AND

**THE ADVOCATES COMPLAINTS COMMISSION.....INTERESTED
PARTY**

JUDGEMENT

1. By a Notice of Motion dated 30th March, 2009, the *ex parte* applicant herein, **Stephen Mwenesi Advocate** seeks the following orders:

1. The order of prohibition to prevent to the Law Society of Kenya by itself or through the Compliance and Ethics Program Disciplinary Committee from taking out any disciplinary proceedings against or concerning the applicant whether the same or arising out of the same facts, as those involved in the Disciplinary Committee Cause No. 126 of 2008 or continuing with the proceedings in Disciplinary Committee Cause No. 126 of 2008.

2. The order of certiorari to call up into the High Court and to quash the proceedings and decisions therein made on the 2nd October, 2008; 23rd October 2008; and 22nd January 2009 of the Disciplinary Committee in Cause No. 126 of 2008 communicated by the Compliance and Ethics Program Director of the Law Society of Kenya under letter Reference No. DCC 126/2008 dated 3.2.09.

3. The order of mandamus directed to the Law Society of Kenya and the Disciplinary Committee and the Interested Party, the Advocates Complaints Commission, to observe the law and particularly the rules of natural justice enshrined therein on the discipline of advocates and the applicant in particular.

4. Costs of this application be provided for.

Ex Parte Applicant's Case

2. The application is based on the Statement of Grounds and Reliefs filed herein on 16th March, 2009, a Verifying Affidavit and a further affidavit sworn by the Applicant on 16th March, 2009 and 17th January, 2014 respectively.

3. According to the Applicant, a long standing Advocate of the High Court of Kenya, he was admitted to the Roll of Advocates on 24th March 1980 and currently hold practising certificate No. 5100 Serial No. JUD/2009 dated 1st January 2009 issued in his full names of **Stephen Musalia Mwenesi**.

4. According to him, he received a letter from Law Society of Kenya dated 9th September 2008 signed not by the Secretary of the Society but by one **Addraya E. Dena**, Compliance & Ethics (Program Director), Reference No. DCC/126/08 notifying him that "Disciplinary Committee Cause No. 126 of 2008" had been fixed for plea before the Disciplinary Committee on Thursday 2nd October 2008 and requiring his personal attendance. Attached to the letter was a copy of the affidavit referring the complaint to the Disciplinary Committee.

5. On receipt of the said letter, the Applicant replied thereto through the firm **S. Musalia Mwenesi Advocates** (hereinafter referred to as the Firm) vide a letter dated 22nd September 2008 pointing out that the complaint sent to him was an unsigned affidavit and that it lacked any correspondence from him to the alleged client who had set the complaint in motion. According to the Applicant, this was the first time he was hearing that the proceedings of the committee against him were afoot. He however attended a sitting of the Disciplinary Committee on the 2nd October 2008 but declined an invitation of the committee chairman **Dr Githu Muigai Advocate** to plead on the ground that there was no complaint and he had attended in obedience to the letter from the Law Society of Kenya of 9th September 2008. He further asked that in the circumstances the complaint was not sound and proceedings could not be said to have commenced at all whether as cause number 126 of 2008 or otherwise.

6. Although **Dr. Muigai's** response was the committee does not indulge in jurisprudence but prefers to get on with the facts of a matter, he however, eventually relented and said the matter would be mentioned on the 23rd October 2008 despite the Applicant's protest that there was no complaint to be mentioned.

7. The Applicant was therefore shocked when he got a copy of the proceedings of the Committee to see that it was recorded that he had willingly consented to the mention of the cause 126 of 2008 on the 23rd October 2008. The Applicant received a letter Reference “DCC/126/2007” dated 08.10.08 on the 21st October 2008 from the Law Society of Kenya signed by **Addraya E. Dena** again informing him that a “Disciplinary Committee Cause No. 127 of 2007” had been fixed for plea on Thursday 23rd October 2008. The Applicant deposed that he honestly believed that this was another matter and indeed the complainant’s signatory had changed in the annexure which now included letters from the Applicant concerning the complaint and was sworn on the 3rd October 2008. On 21st October 2008 the Applicant also received a copy of a letter dated 6th October 2008 Reference CC/M/236/5/268/03 addressed by **Mrs Esther J A Aduma** of the interested party to the secretary of the Law Society of Kenya. This, according to the Applicant was the first formal communication he received about any reference of a complaint against him by the interested party.

8. The Applicant did appear at the Disciplinary Committee on the 23rd October 2008 though according to him it was a chaotic session in which he queried why the matter was proceeding as the same cause and yet he had received summons for a 2007 cause that the affidavit referring the complaint was that of **Esther Jowi Anyango Aduma** who was now the complainant. He therefore wondered what had happened to the non-complaint of one **Joseph Kingarui** that was actually cause number 126 of 2008. The chairperson, this time round **Mrs V Awori**, decided that they were going to rule that the old affidavit would not apply but that the Applicant should note that they had recorded a plea on the Applicant’s behalf and that the Applicant should arrange to come for hearing in January 2009.

9. Despite the Applicant’s protestations that he did not believe the matter was proceeding as it should according to the law and also wondered why **Mrs Aduma** was personally complaining against him and sought a clarification as to why the matter was not a reference of a complaint by a litigant if the matter was said to arise out of a High Court matter concerning a client of his firm, he was told to arrange to appear at the hearing in January and that there was no time to go into any questions of law.

10. Subsequently on 24th December 2008, the Applicant received a “notice of hearing” dated 15th December 2008 signed by **Addraya E. Dena** Compliance & Ethics (programme Director), though not on any official letter paper, copied to Sound & Picture Works Ltd asking them to “please ensure to attend and give evidence and produce documents if any”. When the Applicant attended on 22nd January 2009, he raised issues of law which he believed needed to be cleared before any other action could be taken. Since the committee was differently constituted from the one that purportedly recorded plea on his behalf on the 23rd October 2008, the Applicant began to raise the issue of the competence of the committee as empanelled and other issues on the hearing notice as served and why **Esther Aduma** was the complainant but was informed that the committee had already said through **Dr Muigai** that this was not judicial body and it would not go into jurisprudence and on inquiring whether that factor would go on record of the proceedings of the committee was answered in the affirmative by the session chairperson.

11. However, the committee got exasperated and without receiving any evidence whether under oath or not proceeded to pronounce that the Applicant should return on the 19th March 2009 for judgment, mitigation and sentence at which point the Applicant inquired whether that factor would similarly be reflected on the record and requested to be supplied with copies of the record of the proceedings. He further complained that he had not been notified when and if he could examine whatever documents were with the committee and whether they were now satisfied that there was issue of misconduct as complained of by **Mrs Esther Aduma**. He was however informed to contact the 1st respondent if he wanted copies of proceedings and on making a request for the proceedings and decisions or orders of the committee to the Secretary of the Law Society of Kenya he received a response signed by **Addraya E. Dena** Complaints & Ethics (Program Director) together with the typed proceedings containing the decisions that he had raised issues with in these proceedings. However, the letter did not address other critical issues the Applicant had hoped the secretary of the society who is the statutory secretary of the Disciplinary Committee would address.

12. According to the Applicant, he is aware of the seriousness of disciplinary proceedings against an advocate hence the reason for raising these issues in this Honourable Court. According to him, he would like the court to have sight of the report and account dated January 29, 2002 and also the Advocate - Client acknowledgement the respondents and the interested party for some unknown reason decline. He contended that the client did not wish to put them in funds to pursue the matter in court and they had to finance it on a deposit of only Kshs. 25000/- despite having to get auctioneers to force the debtor to pay up.

13. In his view, he has made this application in judicial review to avoid any suspicion that he is out to defraud or wilfully refusing to comply. Despite being an advocate of long standing, he has now been hurt in his practice and his reputation in business and personally and hence it is very odd that he is being asked to produce evidence at a judicial forum after being told that he is due for sentencing. It is also odd that he is being allowed time to inspect the evidence against to prepare a defence when the tribunal has already set a date for sentencing and mitigation.

14. The Applicant reiterated that it is not true that **Mathew Peevers** was the complainant in Disciplinary cause No. 126 of 2008 since according to the purported affidavit of **Joseph Kingarui** and **Esther Ajowi Aduma** the Advocates Complaint Commission received a complaint from Sound & Picture Works Ltd and not **Mathew Peevers**. Sound & Picture Works Ltd, according to him is a limited liability company, a distinct person from **Mathew Peevers** who can sue and be sued. He averred that he had never acted for **Sound & Picture Works Ltd** therefore the complaint lodged at the disciplinary is not valid as the matter referred to in the said complaint was between **Mathew Peevers** and **Leo Singerland & Another**, a case which the Firm prosecuted and won, without any meaningful fees until the firm had collected the decretal amount and also collected its reasonable fees from the sums so collected.

15. The Applicant further contended that he was only aware of the complaint by **Sound & Picture Works Ltd** referred to in the affidavits of **Esther Ajowi Aduma** and the affidavit of **Joseph Kingarui** both of which he considered incompetent to commence proper proceedings against him at the Disciplinary Committee and that there was no complaint by **Mathew Peevers** hence the replying affidavit sworn by **Mathew Peevers** is misplaced and misguided as the same is made by a person who never lodged a complaint with the Advocates Complaint Commission and ought to be struck out.

16. Although the Applicant admitted that judgment was entered in favour of **Mathew Peevers** for the sum of Kshs. 678,308.00 he denied that the Firm failed or refused to pay the outstanding balance of the decretal amount to **Mathew Peevers**. To the contrary, **Mathew Peevers**, as a plaintiff in Civil Suit No. 2112 of 1996 was duly paid the necessary amount of the decretal sum less the reasonable advocates' fees hence the Firm owes no money to **Mathew Peevers** and that the Applicant certainly does not personally owe **Mathew Peevers** the money he wants to try to claim through these proceedings.

17. The Applicant denied that he failed to cooperate with the Complaints Commission and that the Complaints Commission filed a complaint in the Disciplinary Committee on behalf of **Mathew Peevers**. However it was the process taken by the Complaints Commission and the Disciplinary Committee that the Applicant questioned and that is the reason he filed this application questioning the Disciplinary Committee's decision to proceed to judgment, mitigation and sentence without a hearing and without proper facts and without proper jurisdiction. To him the Disciplinary Committee has not refuted that the procedure adopted by itself at the hearing was illegal and faulty. It was his view that when the chairman of the Disciplinary Committee proceeded to vacate the affidavit of **Joseph Kingarui** on the ground that it was unsigned and incompetent to invoke the jurisdiction of the committee, a fresh and proper proceedings were called for. To him the matters of law he raised cannot be wished away as technicalities especially when the matters concern the procedure for invocation of a body's jurisdiction and that the respondents ought to follow the law and procedure as provided for under the **Advocates Act** Cap 16 when dealing with the disciplinary process against members of the Law Society of Kenya hence his instant application.

18. He therefore sought that his prayers sought herein be granted.

Respondents' Case

19. In response to the Application, the Respondents filed a replying affidavit sworn by **Apollo Mboya**, the 1st Respondent's Secretary on 10th December, 2009.

20. According to him, a complaint was received by the Complaints Commission against the applicant via a letter dated 24th September 2003 from a complainant, one **Mathew Peevers** a director of **Sounds and Pictures Works Limited** for failing to remit monies due to the complainant for a matter handled on their behalf and for overcharging the services rendered. By virtue of Section 53(4) and Rule 7 of the **Advocates (Complaints Commission) Rules**, the Complaints Commission wrote to the applicant informing him of the complaint lodged against him and requiring him to respond to the same within 21 days thereof. On receipt of the complaint, the applicant duly responded to the request by his letter dated 8th December 2003, *inter alia*, joining issue with the complainant's commission's authority to tax a bill.

21. According to the deponent, the Complaints Commission did inform the applicant via its letter dated 13th April 2004, that by dint of Section 53(6D) the commission had authority to order an advocate to produce a detailed fee note for the purpose of taxation of the bill of costs and therein requested the applicant to avail the same within 21 days failure to which the matter would be forwarded to the Disciplinary Committee and requested particulars from the complainant. By a letter dated 17th January 2007, the complainant advised that the total amount complained of Kshs. 470,000/- awarded to him from civil suit no. 2112 of 1996 of which amount only Kshs. 171,597.45 had been remitted leaving a balance of Kshs. 298,402.55 plus costs and interests.

22. Owing to the lack of response by the applicant and by virtue of the provisions of Section 53 (4)(b) of the **Advocates Act**, Cap 16, the Complaints Commission duly referred the matter to the Disciplinary Committee vide an affidavit sworn on 8th August 2008 by a commissioner of the Complaints Commission one, **Joseph Nguthiru Kingarui** and a request to the Law Society copied to the applicant, to fix the matter for plea taking. Pursuant thereto the Disciplinary Committee filed a complaint against the applicant under Section 60 of the **Advocates Act** for the offence of withholding Kshs 298,402/- recovered on behalf of the complainant and a date for plea taking was fixed for 2nd October 2008 wherein the applicant was duly informed of the date. Although the applicant duly attended the Disciplinary Committee proceedings on 2nd October 2008 he declined to take a plea citing that the affidavit of one **Commissioner Kingarui** was defective as it had not been signed. The applicant was duly advised of the Complaints Commission's role as a vehicle to refer meritorious complaints to the Disciplinary Committee under Section 53(4)(b) wherein the substance of the complaint, not the form take precedence in line with the spirit of the **Advocate's Act**. However, the Committee agreed to defer the matter for a further fourteen days to allow the applicant put in his replying affidavit. The applicant was duly informed of the new plea taking date via a letter dated 8th October 2008 and also annexed therein was a copy of the affidavit referring the matter to the Disciplinary Committee executed by one, **Esther Aduma** who by virtue of being a commissioner of the Complaints Commission has the mandate under Section 53(4) (b) to refer the complaint to the Disciplinary Committee. Further, vide a notice hearing dated 15th December 2008, the applicant was duly informed of the hearing date slated for 22nd January 2009 and therein reminded to put in his replying affidavit as per the orders given on the last appearance.

23. However, when the matter came up for hearing on 22nd January 2009 as scheduled the applicant was present but had not complied with the order to file a replying affidavit before the committee. According to the deponent, despite the fact that by virtue of rule 18 of the **Advocates (Complaints Commission) Rules**, the Disciplinary Committee has the authority to proceed and act upon affidavit evidence either on the whole case or as to any particular facts, the applicant was granted a further opportunity to put in his replying affidavit within 30 days and the matter thereafter fixed for judgment, mitigation and sentencing on 19th March 2009. Thereafter, the applicant subsequently wrote to the Law Society of Kenya requesting for copies of the orders made by the committee and of the complaint and on 3rd February 2009, the Law Society duly responded to the applicant furnishing him with typed proceedings of the Disciplinary Committee noting that the complaint had already been forwarded to him via the complaint lodged before the Disciplinary Committee by the Complaints Commission and the applicant was further invited to inspect the committee's file at his convenience.

24. It was the deponent's view that where an applicant is duly informed of a plea taking date and fails to appear before the Disciplinary Committee a plea of not guilty will automatically be entered on his behalf and by virtue of Rule 17 of the **Advocates (Complaints Commission) Rules**, where a party has been served and fails to appear at the hearing, the Disciplinary Committee has the discretion to proceed to hear the complaint in his absence. Since the applicant did fail to enter appearance by way of replying affidavit as directed by the committee and in the interest of justice for both parties noting that the complaint had been lodged way back in the year 2003, the committee exercised its discretion to proceed with the matter, however still leaving leeway for the applicant to put in his reply. According to him, the Disciplinary Committee is well aware that inordinate delay caused by unnecessary adjournments by the applicant was tantamount to denial of justice to the complainant and that the failure by the applicant to file his replying affidavit should not be visited upon the Disciplinary Committee in a roundabout way by the applicant averring he was not granted an opportunity to be heard.

1st Interested Party's Case

25. On behalf of the 1st interested party, **The Advocates' Complaints Commission** (hereinafter referred to as the Commission), a replying affidavit sworn by **James Odhia Marienga**, its Secretary.

26. According to him, a complaint was received by the Commission against the applicant on 24th September 2003 from a company by the name **Sound and Picture Ltd** and on 21st November, 2003 he wrote to the applicant informing him of the complaint and requested him to make his representation. In response thereto, the applicant wrote to him on 8th December, 2003 but did not answer the allegations that had been levelled against him. When an answer to the allegations was not forthcoming from the applicant he referred the matter to the Disciplinary Committee of the Law Society of Kenya as Miscellaneous Cause Number 126 of 2008, wherein the applicant was charged for withholding money from the client which Committee ordered the applicant to put in his response and a statement of accounts before the hearing date and further ordered that the matter be determined by affidavit and judgment date fixed for 19th March 2009. In his view, the applicant was duly accorded a chance to be heard which opportunity he refused and/or ignored hence the applicant has not come to this court with clean hands and is guilty of lashes.

27. To the deponent, the applicant has to date neither paid the complaint his money nor given a statement of accounts on how he has appropriated the funds. In his view, judicial review looks at the process of a tribunal but not the end result.

2nd Interested Party's Case

28. According to the 2nd interested party, he was the complainant in the Disciplinary Committee Cause No. 126, the subject of this application.. According to him, he was represented by the applicant in Civil Case No. 2112 of 1996 between **Mathew Peevers vs. Leo Singerland & Another** in which he sought damages for copyright infringement by the Defendant in which he succeeded and he was awarded a total of Kshs 678,308.00 of which only Kshs 271,597.00 was paid to him leaving the balance unpaid. According to him, this balance was the subject of the disciplinary proceedings.

29. Following the applicant's failure to co-operate with the Complaints Committee, the said Committee filed a complaint with the Disciplinary Committee on his behalf. In his view the proceedings before the Disciplinary Committee were conducted fairly and the applicant was given an opportunity to defend himself and since the role of the Advocates Disciplinary process is to protect the public from exploitation by Advocates, it was unreasonable and unfair for the applicant to rely on technicalities.

30. In his view the institution of these proceedings is meant to delay justice and avoid payment. He further averred that although the applicant filed Bill claiming Kshs 210,000.00 from him the costs were taxed at Kshs 25,000.00 which sum he had already paid. He therefore deposed that the applicant owed him Kshs 782,972.18 which sum continues to accrue interest which the sum the applicant has refused to settle despite demand.

Determinations

31. I have considered the application, the evidence adduced in the form of affidavits and the submissions filed on behalf of the parties herein.

32. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, where the Court expressed itself as follows:

“The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute...Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire into the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called “conduct short of expected standards of professionalism”, and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully...Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee’s findings of the Applicant guilt of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a ‘determination’ within the meaning of empowering legislation was accordingly a nullity...Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law...It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

33. Section 60(1) and (2) of the *Advocates Act* provides as follows:

(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.

(2) Where a person makes a complaint under subsection (1), the complaint shall be by affidavit by himself setting out the allegations of professional misconduct which appear to arise on the complaint to the Committee, accompanied by such fee as may be prescribed by rules made under section 58 (6); and every such fee shall be paid to the Society and may be applied by the Society to all or any of the objects of the Society.

34. It is therefore clear that a complaint against an advocate can be initiated by any person. The Applicant’s complaint therefore that the complaint against him was made by a person other than his client has no basis.

35. However, it is clear that a complaint by whoever makes it can only be initiated by an affidavit. That an affidavit must be signed by the deponent is an elementary requirement. Affidavit by its nature contains evidence and has attendant consequences. Therefore the deponent must own the same in order for it to

qualify as an affidavit. Anything less than that does not elevate it to the status of an affidavit but places it at best as a mere statement. Under section 60 of the *Advocates Act* a complaint against an advocate can only be initiated by evidence and not a mere statement. This is necessarily so because complaints against advocates are taken seriously and ought not to be based on flimsy and unsubstantiated grounds.

36. It is the Applicant's case that this position was appreciated by the 2nd Respondent which made a decision to disregard the affidavit which purportedly commenced the proceedings. This contention has not been seriously contested by the Respondents. That the original complaint was vacated is clearly supported by the copy of the proceedings exhibited in support of this application. In my view the complaint having been initiated by a mere statement instead of affidavit evidence, there was no competent complaint before the 2nd Respondent that the Applicant could respond to. In other words the disciplinary proceedings were thereby rendered null and void and a subsequent affidavit could not cure non-existence proceedings. As was held in Macfoy vs. United Africa Co Ltd [1961] 3 All ER 1169 at 1172, such action is void *ab initio* hence a nullity in law and not only bad, but incurably bad. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. Since it is nothing, you cannot put something on nothing and expect it to stay there, as it will collapse. Therefore any proceedings hinged on a complaint which did not exist cannot stand. As was held in Council of Civil Service Unions vs. Minister for the Civil Service Unions vs. Minister for the Civil Service [1984] 3 All ER 935:

“...the decision-maker, (in this case the Respondent) must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable”

37. Apart from that it is clear from the proceedings of the 2nd Respondent that on 22nd January, 2009 the 2nd Respondent set a date for Judgement, Mitigation and Sentence for 19th March, 2009 and gave the Applicant 30 days to file a replying affidavit. From the record of the proceedings it would seem that the order setting the date for Judgement, Mitigation and Sentence was made before the direction for the Applicant to file a replying affidavit. It is basic that the order of conducting legal proceedings is hearing, judgement, mitigation and sentence. In this case it would seem from the way in which the proceedings were conducted that the 2nd Respondent had made a determination of the case before having the benefit of perusing a replying affidavit which was yet to be filed by the Applicant.

38. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

39. To give a party to a disciplinary proceedings an opportunity to respond to allegations made against him while at the same time listing the matter for judgement, mitigation and sentence in my respectful view defies logic and amounts to gross unreasonableness. To do so also amounts to failure to act fairly as it is an indication that the authority concerned has made a decision for it does not make sense to decide that mitigation and sentence would be necessary before hearing a party's case. In the premises it is my view and I so hold that the impugned proceedings were tainted with procedural irregularities. In the circumstances, one may be tempted to agree with the Applicant's contention that the 2nd Respondents reaction evinced exasperation with the Applicant.

40. In the premises I find merit in the Notice of Motion dated 30th March, 2009. I am however of the view that the 2nd Respondent's exasperation was contributed to by the conduct of the Applicant who may have sent wrong signals that he was being obstructive to the whole process.

Order

41. According to the orders which commend themselves to me and which I hereby grant are as follows:

1. An order of Certiorari is hereby issued calling into this Court for the purposes of being quashed the proceedings and decisions made on the 2nd October, 2008; 23rd October 2008; and 22nd January 2009 of the Disciplinary Committee in Cause No. 126 of 2008 communicated by the Compliance and Ethics Program Director of the Law Society of Kenya under letter Reference No. DCC 126/2008 dated 3.2.09 which proceedings and decisions are hereby quashed.

2. An order of prohibition is hereby issued restraining the Law Society of Kenya by itself or through the Compliance and Ethics Program Disciplinary Committee from continuing with the proceedings in Disciplinary Committee Cause No. 126 of 2008. I however decline to grant orders prohibiting the Respondents from commencing proceedings based on the same facts as sought.

3. With respect to the order of mandamus sought it is not upon this Court to direct the Respondents to proceed after the decision has been quashed.

4. Each party to bear own costs.

Dated at Nairobi this 6th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onindo for the applicant

Ms Kimani for 2nd interested party and holding brief for Mr Olembo for 1st and 2nd respondents

Cc Kevin