



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 698 of 2009

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS (JUDICIAL REVIEW)**

AND

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

**IN THE MATTER OF: WANJA G. WAMBUGU T/A W.G. WAMBUGU AND COMPANY
ADVOCATES**

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DISCIPLINARY COMMITTEE, LAW SOCIETY OF KENYA.....1ST RESPONDENT

AND

NGOVI MWASA.....INTERESTED PARTY

EX-PARTE: WANJA G. WAMBUGU T/A W.G. WAMBUGU AND COMPANY ADVOCATES

JUDGEMENT

1. By a Notice of Motion dated 21st December, 2009, the *ex parte* applicant herein, **Wanja G. Wambugu T/A W G Wambugu and Company Advocates** seeks the following orders:

1 That this honourable court be pleased to Issue an order of CERTIORARI to remove into court and quash the order and/or decision (s) and/or proceedings taken by the Respondent as more particularly exhibited in its decision/judgement delivered and dated 5th October, 2009 in the Advocates Disciplinary Committee Miscellaneous Cause No. 23 of 2008, where the Respondent purported to tax, or re-tax, or alter the agreement on Advocate –client costs whereas there was no complaint, charge or dispute over the same.

2 That by way prohibition Order, the Respondent to refrain, stop and cease from taxing, re-taxing, or altering and ordering a refund of a part of the agreed Advocate – Client costs whereas there was no complaint or charge filed by the interested party, before the Respondent.

3 That by way of **MANDAMUS** the Respondent, to finalise the proceedings and deliver its judgement and/or make its decisions only as concerned the matter complained of.

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

5 That the costs of this application be provided for and/or be in the cause.

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement of Facts and a Verifying Affidavit sworn by **Wanja G. Wambugu**, the applicant herein on 15th December, 2009.

3. According to the deponent, he was instructed by **Ngovi Mwasa** to commence proceedings for recovery of both special and general damages on behalf of a minor **Duncan Manuel Murigi**, as a result of a Railway Traffic Accident and that the agreement was that the applicant would pay all the requisite disbursements to wit filing fees, professional fees, service fees, where required and on a need to need basis. Pursuant thereto, the applicant filed HCCC NO. 2442 OF 1999, **Duncan Manuel Murigi (A minor suing through his Father and next friend Ngovi Mwasa) vs. Kenya Railways Corporation** in the High Court at Nairobi. The said matter, according to the applicant proceeded for hearing and judgement was delivered on 22nd day of May 2003 and a decree issued by the court on 8th October, 2003. Subsequent thereto, a bill of costs was prepared and taxed on 16th September, 2003 and a certificate of taxation duly issued on 2nd October, 2003.

4. Following the default by the judgement to settle the decretal sum, the complainant instructed the applicant to file Judicial Review proceedings seeking orders of mandamus to compel Kenya Railways Corporation to effect payment in Misc application No. 1148 of 2003 **Republic vs. The Managing Director Kenya Railways Corporation (Ex parte Duncan Manuel Murigi (A Minor Suing Thro' His Father and Next Friend Ngovi Mwasa)** which orders were eventually granted on the 8th day of June, 2004. As a result of the failure to comply contempt of court proceedings were commenced after which the Judgement-Debtor remitted to the applicant's firm Ten (10) post-dated cheques for a total sum of Kshs 5,272,702/=. However, upon presentation of Three (3) of the cheques aforesaid namely Cheque Nos. 084864 dated 15/10/04 for the sum of Kshs 500,000/= Cheque No. 084960 dated 14th October, 2004 for the sum of Kshs 1,352,128.70/= and Cheque No 084849 dated 8th October, 2004 for the sum of Kshs 500,000/= the said cheques were returned unpaid with the remarks "refer to drawer" following which the judgement-debtor's Managing Director was arraigned before the court when a proposal to pay the decretal sum in instalments was made as follows: a) 1st Instalment - Kshs 2,000,000/=; b) 2nd Instalment -Kshs 2,000,000/=; and c) Balance in 3 equal monthly instalments of Kshs 1,136,364.70 with effect from 30th November, 2004 and thereafter on the 30th of each successive month until payment in full.

5. Pursuant to the foregoing, the Judgement-Debtor then effected payment as follows:- a) 27/10/04 Banker's Cheque for Kshs 2,000,000.00/=; b) 1/11/04 Banker's Cheque for Kshs 2,000,000.00/=; and c) 2/12/04 Cheque No 085837 Kshs 1,136,364.00/= totalling Kshs 5,136,364.70. However, before the applicant could receive further payment, the complainant by their letter dated 13th January 2005 withdrew instructions from the applicant firm and the firm of **L. Wahome & Co Advocates** subsequently served the applicant with an order directing the applicant to release the sum of Kshs 1,498,000 which the applicant did. By this time, the applicant had already disbursed on account of the claimant various amounts including court filing fees, payment to various professionals who had been engaged and other disbursements all totalling Kshs 170,780/=. However, by an application dated 9th September, 2005 the complainant sought orders that the applicant do release the sum of Kshs 2,696,626.40/= for investment purposes which application is still pending before the court.

6. It is the applicant's position that contrary to the depositions made by the Interested Party, the party and

party costs were taxed and allowed in the sum of Kshs 1,056,749 and NOT Kshs 1,568,469.30 as alleged and further the applicant denies receipt of the sum of Kshs 7,341, 170/= as alleged by the complainant from Kenya Railways Corporation. It is contended by the applicant that he is yet to receive its legal fees in respect of services rendered in **Hc Misc. Application No. 1148 Of 2003 Republic ~Versus~ The Managing Director Kenya Railways Corporation (Ex-Parte Duncan Manuel Murigi (A Minor Suing Thro' His Father And Next Friend Ngovi Mwasa)** and reserves his right to seek an order that the matter be referred to the taxing master for taxation. It is the applicant's position that on numerous occasions the complainant visited his offices and even attended court during the hearing of Miscellaneous application and that out of the sum of Kshs. 5,136,364 which the firm received the firm was entitled to the agreed fees of Kshs 3,919,901 being 20% of the decretal sum agreed between the applicant's firm and the complainant, as the firm was no longer acting in collecting the balances of the decretal sum. According to the applicant, the sums received by his firm worked out thus:- a) Received on account Kshs 5,136,364.00; b) Less agreed fees being 20% of the total award Kshs 3,919,901.00; c) Balance Kshs 1,216,463.00 out of which he has already disbursed a total sum of Kshs 1,668,000/= as set out herein above. To the applicant, the complainant owes the firm a total sum of Kshs 451,537/= in respect of fees in HCCC NO. 2442 OF 1999 and in addition to untaxed costs in the Judicial Review proceedings being MISC CIVIL APPL. NO 1148 OF 2003 aforesaid.

7. It is the applicant's case that the Respondent Committee lacked jurisdiction to hear and determine this matter more so as concerned taxing the Advocate –Client costs where an agreement had been reached, and where there was no complain, like in the subject proceedings. To him, the complaint had been filed out of a mistaken believe that the firm had been paid more money that it had accounted for.

8. However, when the disciplinary proceedings were finally heard, the committee in delivering its judgment on 5th October, 2009 made the following findings, inter alia that a) the applicant is entitled to a total fee of Kshs 1,988,815.00 as well as a further Kshs 170,000.00 representing a prior payment to the complaint and that the applicant is therefore entitled to retain Kshs 2,158,815 out of the sum of Kshs 3,638,364.70 that the applicant currently holds b) The balance of Kshs 1,479,549.70 should be paid over to **Duncan Murigi** or his legally appointed representative; and that c) the applicant is acquitted of the charge of failing to account.

9. It is the applicant's position that in the said judgement the Respondent erred when taxing the Advocate–client costs and ordering the firm to pay a sum of Kshs 1,479,549.70; acted in excess of its jurisdiction, contrary to the applicant's legitimate expectations and failed to grant orders proportionate to the complaint and particulars of the charges, filed before it.

10. It is therefore deposed that given the circumstances this Honourable Court has discretion to make orders to revoke the said findings, and issue the other reliefs stated in the statement of facts filed herein.

INTERESTED PARTY'S CASE

11. In opposition to the Motion the complainant who is the interested party herein, **Ngovi Mwasa**, swore a replying affidavit on 26th February 2010.

12. According to the said party the applicant did not serve him with the application an omission which in his opinion reeks of mala fides and bad faith and is contrary to Order LIII rule 3 (2) and (3) and consequently, the motion is incompetent and ought to be struck out with costs. In his view, the disciplinary committee of the Law Society was properly seized of the matter under Miscellaneous cause No. 23 of 2008, and acted within its mandate and the statutory scheme set out in section 60 and 60A of the **Advocates Act** in which proceedings the applicant herein was able represented throughout the proceedings, attended personally in the Committee and was represented by a competent advocate but never raised the issue of competence, jurisdiction or otherwise of the Disciplinary Committee and fully participated in the proceedings thereof hence the motion herein is clearly an afterthought.

13. According to his legal counsel, section 60 (6) of the **Advocates Act** provides that, where an advocate against whom the committee is hearing a complaint relating to fees and costs has not filed a bill

of costs in court, the Committee may upon the request of the complainant, order such an advocate to produce before it a detailed fee note: provided that where the advocate fails to comply with an order of the Committee under this subsection, the Committee may determine the fee payable to the advocate in such sums as it deems fit.

14. It is deposed that in compliance with the powers donated to the Disciplinary Committee as stated hereinabove; the Applicant was Ordered to file her Bill of costs which she did 10th June, 2009, hence the Motion as filed herein is non-suited and incompetent because the Applicant ought to have approached the court through section 62 of the Advocates Act which provides for appeals against orders of committee for any advocate aggrieved by order of the Committee hence the motion is solely meant to defeat the statutory purpose encompassed under section 62 of the Advocates Act and court is urged not to assist the applicant in this unlawful cause. It is deposed that the disciplinary committee was entitled to apply the law as clearly stated in its ruling Judgement of 5th October, 2010 the same cannot be faulted for its clarity and appreciation of the legal principles applicable to the case.

15. The interested party's position is that this matter has been in court since 1999, when his son **Duncan Manuel Murigi** was just a minor and the applicant therein has taken him through the court process up to 2010, 11 years later, without a clear horizon on the determination of the issues hence it is capricious, unconscionable, malicious and unjustified and the Court should determine the matter expeditiously to bring it to a rest and final conclusion.

EX PARTE APPLICANT'S SUBMISSIONS

16. On the part of the applicant it was submitted that while in delivery of its judgement on 5th October, 2009, the disciplinary committee wrongly and without jurisdiction and contrary to the Advocates Remuneration Order purported to tax and/or re-tax the Advocates bill and consequently ordered the applicant to pay the interested party a further sum of Kshs 1,479,549.70 from the sum duly retained as part of earned and accrued legal fees disbursements. It is submitted that the said decision was wrong and ultra vires and was done in total disregard to the outstanding unpaid fees and disbursements of the client. It is submitted that the Respondent had no jurisdiction to purport to "tax", "re-tax" or alter the Advocate-Client Agreement on costs when there was no complaint, charge or dispute over the same which position was conceded by the Respondent and a consent arrived at.

17. Relying on **R vs. Nyeri Provincial Committee ex parte Ruth Wangui & 11 Others [2012] eKLR**, it is submitted that in law jurisdiction is everything since it concerns the power and the competence of a tribunal to make a lawful decision hence if a court or tribunal does not have the capacity to exercise power or jurisdiction over a dispute, the chances when challenged are likely that the decision will be set aside, nullified or quashed. In its submissions the applicant relies on Articles 23(1), (3) and 165 of the Constitution. Based on Article 47 of the Constitution of Kenya, it is submitted that the applicant has a right to fair administrative action hence the interested party should not purport to direct the applicant on how she should protect her interests but allow the law to take its course.

18. It is submitted that the jurisdiction of the Advocates Disciplinary Commission under section 57(1) of the **Advocates Act** Cap 16 is to deal with complaints against an Advocate for professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an Advocate. It is the applicant's case that the Committee proceeded to re-tax the applicant's bill of costs in disregard of the express written agreement as to Advocates fees hence was ultra vires its jurisdiction since under section 45(6) of the **Advocates Act** the costs of an Advocate in any case where an agreement has been made by virtue of section 45 of the Act is not subject to taxation nor to section 48 of the Act.

19. On the consent entered into "behind the back of interested party" it is submitted that the consent was an appreciation of the fact that the decision of the respondent was *ultra vires* and a violation of the principles of natural justice and that the interested party has no substantive role to play and indeed lacks competence to object to the said settlement.

INTERESTED PARTY'S SUBMISSIONS

20. On the part of the interested party it is submitted that since the Motion was not served on the interested party contrary to Order 3(2) and (3) of the **Civil Procedure Rules** which are couched on mandatory terms, based on **Republic vs. Commissioner of Police & 2 Others ex parte Nguruman Limited [2004] eKLR**, the application ought to be dismissed.

21. It is submitted that the Disciplinary Committee of the Law Society was properly seized of the matter and acted under its mandate under section 60 and 60A of the **Advocates Act**.

22. It is submitted that since the complaint against the ex parte applicant by the interested party was one of failure to account for a sum of Kshs 7,341,170.00 received on behalf of the interested party, the complaint of the said monies is inseparably intertwined and contemporaneous with the issue of the fees because the advocate was to deduct his fees from the monies received on behalf of the interested party. It is further submitted that the Committee was within its legal purview to apply section 45(d) of the **Advocates Act**.

23. It is further submitted that the application is incompetent since the applicant ought to have appealed against the decision of the Committee as provided under section 62 of the **Advocates Act** and reliance is placed on **R vs. Falmouth and Truro Port Health Authority ex parte South West Water Ltd [2000] 3 All ER 306 at 308** that in the absence of exceptional circumstances the avenue of appeal ought to have been followed.

DETERMINATIONS

24. Section 45(6) of the Advocates Act provides that the costs of an advocate in any case where an agreement has been made with respect to the remuneration of an Advocate is not subject to taxation.

25. Section 45(2) of the said Act on the other hand provides:

(2) A client may, apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

(a) that the agreement be upheld; or

(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or

(c) that the agreement be set aside; or

(d) that the costs in question be taxed by the Registrar;

and that the costs of the application be paid by such party as it thinks fit.

26. From the foregoing, it is clear that where there is an agreement between an advocate and the client with respect to remuneration, that agreement is not subject to taxation and where it is sought to be set aside ***on the grounds that it is harsh and unconscionable, exorbitant or unreasonable*** the procedure provided under section 45(2) ought to be followed. In this case, it is contended by the applicant that the Respondent decided to tax the bill of costs between the applicant and the interested party when it had no jurisdiction to do so as there was an agreement for the remuneration of the applicant. This contention has not been disputed by the Respondent.

27. The interested party however contends that the applicant ought to have appealed against the Respondent's decision as provided under section 62 of the **Advocates Act**. Whereas the existence of an

alternative procedure does not necessarily bar the remedy of certiorari, the fact that a remedy exists which has not been resorted to is a factor which the Court takes into account in deciding whether or not to award the discretionary remedy of certiorari. However, that avenue must be beneficial, convenient or effectual.

28. Section 62 of the Advocates Act provides:

(1) Any advocate aggrieved by order of the Committee made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61 (2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.

(2) The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days' notice of the date of hearing.

(3) An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.

29. In my view, section 62 applies to situations where the Committee has exercised the powers conferred upon it by section 60 of the Act. Here the powers which were purportedly exercised by the Committee was ultra vires its jurisdiction hence there is no lawful order to be appealed against. Judicial review orders are intended to correct a wrong or illegal performance or non-performance of the inferior tribunals or bodies or persons who could be judicial and quasi judicial but now include administrative bodies or persons. Properly used, these order are intended to bring out faster but more effective results. I am therefore satisfied that section 62 of the Advocates Act is not a bar to the reliefs sought in this application.

30. It has also been contended that the interested party has waited for too long for the matter to be resolved. That may be so. However, it is the interested party who initiated a wrong procedure for solving the dispute between him and the applicant. It is the interested party's action that has unnecessarily delayed the resolution of this dispute hence he cannot lay the blame on any other party. Justice, it has been said must be done in accordance with the law and any form of "justice" which does not accord with the law is not justice.

ORDER

31. In the result I grant prayers 1, 2 and 3 of the Notice of Motion dated 21st December, 2009.

32. As the application was not opposed by the Respondent, there will be no order as to costs.

Dated at Nairobi this 3rd day of June 2013

G V ODUNGA

JUDGE

Delivered in the presence of **Mr Wilson** for the ex parte applicant and **Mr Kiarie Mungai** for the Interested Party