

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

HCJR/E237/2025

MAOSA & CO. ADVOCATES
APPLICANT

-VERSUS-

THE ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

SIMPSON SENDA WA KWAYERA T/A

TELENEWS AFRICA &

THE ATLANTIC REGION.....INTERESTED
PARTY

JUDGMENT

1. On 8th August 2025 the court directed that the Chamber Summons dated 31st July 2025 shall be heard in the following terms;

- 1) **The Applicant will file and serve the Substantive Notice of Motion within 14 days.**

- 2) **Prayer number two of the Chamber Summons dated 31st July 2025 shall be heard alongside the Notice of Motion. This was the prayer seeking; THAT, the grant of leave do operate as a stay of execution of the Respondent's Decision dated 10-2-2025. and an its intended consequences pending the hearing and determination of this suit**

and/or further Orders of the Court. (It was actually prayer 3 of the Chamber Summons.)

2. The applicant thereafter filed the Notice of Motion dated 22nd August, 2025.
3. Prayer 2 of the Chamber Summons dated 31st July 2025 and the Notice of Motion date 22nd August, 2025 form the subject of this judgment. In the Notice of Motion, the Applicant seeks the following orders : -

(i) That the Honourable Court be pleased to grant an Order of Certiorari to bring before the Honourable Court and quash the Decision of the Respondent dated 10th February 2025.

THE APPLICANTS CASE:

4. The Applicant is troubled because, according to him, the Respondent arrived at an unfair decision on 10th February, 2025 by condemning him for not accounting for and withholding a sum of KES. 62.915.950.00 as settlement of the Complainant's/Interested Party's tender of 2004 whose particulars and the extent of liability on his part were not availed before the Respondent and with no clear statement of account thereof. The impugned decision was ultra vires for being done without jurisdiction pursuant to Section 60 (4)(e) and 60(9) of the Advocates Act Cap. 16 Laws of Kenya.
5. He argues that the impugned decision was against his right to fair hearing, especially the right against being subjected to double jeopardy since it proceeded to hear and determine the said disciplinary cause while the Complainant's civil

case against me in MILIMANI HCC SUIT (OS) NO. E063 OF 2024, seeking similar prayers was still pending determination.

6. The Applicant urged that it is imperative to note that the Respondent proceeded to hear and determine the matter notwithstanding the fact that in his response to the Complaint dated 2nd August 2024 duly informed the Tribunal about the above-mentioned pending civil case between him and the Interested Party and they ignored the same thus causing him grave prejudice of double jeopardy. The decision also overlooked the importance of having a scrutiny of all material particulars surrounding the settlement of 2004. It denied him the opportunity to respond to the same for the complainant is at variance with the impugned decision. He believes that the Respondent's decision was therefore unreasonable to the extent that no reasonable and right-thinking official would have arrived at the same decision if faced with similar facts and circumstances.
7. The Applicant contends that the decision made on 15th February 2025 (withholding the sum of Kes. 62,915,950.00) was based on total misapprehension of the facts relating to the settlement of tender of year 2004, and therefore, a wrong decision was arrived at. Further, that the decision has the likelihood of trampling on his right to legal practice as an advocate and fair administrative action on the part of the Respondent. He maintains that the decision was made without following the due process of law by failing to seek for full material particulars and/or disclosure of the tender of 2004.
8. The Respondent was privy to information from the Complainant and in its finding that the Applicant Advocate was legally entitled to his professional fees.

It was in a position to make this determination but neglected to do so and proceeded to condemn the Applicant. The Applicant argues that the complainant never adduced any supporting documents that he was eligible to be paid Kes. 62,915,950.00 and the complainant never submitted any decree from a Court or from the said Ministry that he was paid Kshs. 62,915,950.00.

- 9.** Counsel urged that the Respondent ignored the Provisions of the Advocate's Act Cap. 16 Laws of Kenya; governing client and advocate's relationship. It failed to give consideration to the Complainant/Interested Party's admission in his supporting Affidavit that his partner had received over Kshs. 23 Million. It is his case that there was no documentary proof that a sum of Kshs. 62,915,950.00 was paid to the Respondent/Advocate on account of the complainant. The Respondent failed to act with impartiality by giving consideration to the complainant's alleged aged instead of considering the issues between advocates and client and therefore violated the provisions of Act 159(2) of the Constitution.
- 10.** The Appellant contends that the Respondent acted in bad faith against the applicant/accused advocate when it brought forward a matter which had been scheduled for July, 2025 to February, 2025 for no reasonable cause. The Respondent failed to consider the Applicant's plea that the Complainant had never paid the Complainant was under an obligation to remit fees for services rendered to him for a period in excess of ten years. Additionally, that the Respondent ignored the Defence and/or Response duly submitted by the applicant. He stated that the principles of natural Justice demanding that a party be heard in his/her defence were not applied in the Respondent's decision of 10th February, 2025.

- 11.** It is further his case that the Respondent never made any proper interrogation in order to establish the source of Kshs. 62,915,950.00 and further no documentary evidence was adduced that the applicant received a sum of Kshs. 62,915,950.00. That the Respondent erroneously applied the doctrine of standard of proof as defined in Common Law jurisprudence in order to assist the Complainant for the matter before it is based on facts as to whether the Accused Advocate indeed received a sum complained of Kshs. 62,915,950.00.
- 12.** The Applicant's case is that the Respondent erred in both law and fact when they made a finding by relying on an alleged letter of 25th April, 2022 that Kshs. 85,934,255.10 was paid to the Accused Advocates/Applicants Bank as partial Settlement of the tender value. Further, that the Respondent erred in law and fact that an alleged tender of year 2004 was confirmed in Milimani Commercial High Court Civil Case No. 148 of 2012 and allegedly out of which Kshs. 22,820,000/= was remitted to the Complainant. The Applicant argues that the Respondent ignored the principal fact that the Complainant/Respondent never lodged a Client Advocates Bill of Costs wherein he would have been under an obligation to supply relevant documents to support his Claim for Kshs. 62,915,950.00.
- 13.** He argues that the Respondent occasioned a miscarriage of justice by failing to call for a Statement of Account detailing as to how the sum of Kshs, 62,915,950.00 and it instead created inconsistency by relying on Milimani Commercial High Court No. 148 OF 2012 wherein an alleged sum of Kshs. 22,820,000/= was paid to the complainant.

14. It is further his case that the Respondent erred in law when it neglected to evaluate the Accused Advocates/Applicants clear demonstration regarding the payment of Kshs. Kshs. 65,000,000/= and Kshs. 85,935,255.00 indicating that no tender proceeds were paid to him. He argues that the Respondent neglected its legal duty under the Advocate's Act to make a clear and unequivocal finding on the sum of Kshs. 62,915,950.00 as pertains to its source, documents and as to when the same was paid, and who paid the same and, on the subject, matter for the said payment.

15. He argues that the Respondent Tribunal erred in law when it arrived at a conclusion that "for the avoidance of doubt, the advocate is at liberty to have his bill taxed for purposes of ascertaining the legal fees due to him for the services rendered to the complainant. such monies shall be set off against the amounts of monies that the Advocate has been convicted of withholding". Additionally, that the Respondent neglected to make a clear finding on the actual amount complained of with supporting documents and the actual date when the said money was received: and thereafter make a determination of the legal fees due to the advocate.

EX PARTE APPLICANTS' SUBMISSIONS

16. Counsel for the Ex Parte Applicant laid down a background of the matter and identified the issues for determination which he then proceeded to submit on.

17. On whether the Application meets the threshold for a Judicial Review, Counsel urged that the decision by the Respondent dated 10th February 2025 was unlawful, unreasonable, irrational and ultra vires, hence is a perfect candidate for quashing orders to issue. He urged that it is crucial to note that the gist of the

Respondent's decision is that it found the Ex parte Applicant culpable for withholding funds, amounting to about Kshs. 60 million, belonging to the Interested Party. That this finding while not only being beyond its pecuniary jurisdiction. is also in breach of the provision on double jeopardy as the Interested Party had already lodged a similar law suit before the High Court seeking similar reliefs. Further, that the decision of the Respondent was made without paying due regard to the evidence tendered or not tendered before it by the parties. In appreciating this issue, he urged the court to be guided by the finding by Justice L.L. Naikuni in Republic v Principal Kadhi. Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] KEELC 371 (KLR) and further submitted that the Ex-parte Applicant has surmounted all the prerequisites to entitle it to the orders of certiorari sought in the Application.

18.Counsel urged that firstly, it has been explained in detail in the pleadings on how the Respondent conducted itself during the proceedings before delivering its judgment on 10/02/2025 as well as after that, during supposed mitigation to show that the decision as well as the upcoming sentencing is a choreographed charade, and a premeditated decision, hence not measuring up to the principle of fair hearing.

19.On whether the Disciplinary Tribunal acted beyond its jurisdiction, the Exparte Applicant submitted that it acted beyond its abrogated powers and buttressed this submission by relying on the decision in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where the Court of Appeal laid the law on jurisdiction. He posited that the issue of jurisdiction herein is both pecuniary in nature and on the complaint before the Respondent being sub

judice and against the doctrine of double jeopardy, as the Interested Party filed an Originating Summons dated 26th March 2024, seeking orders that the Court direct Advocate Maosa Thomas Gichana Nyakambi T/A Maosa & Co. Advocates to pay to the Applicant the sum of Kshs. 62,915,950.00), being the alleged balance of the decretal sum due in Misc. Civil Suit (OS) No. 148 of 2012. He further submitted that the Advocates Disciplinary Tribunal was properly informed of the existence of the High Court proceedings concerning the same issues and parties, and proceeded with the complaint despite this, finding the Ex parte Applicant liable.

20.Counsel submitted that it is trite law that the Disciplinary Tribunal is established under Section 51 (I) of the Advocates Act with powers to hear complaints as outlined in Sections 60 and 60A of the same Act. Furthermore, the parameters of the body's capacities are outlined in the Law Society Act. Section 60(4)(e), limits the Tribunal's pecuniary powers to compensation not exceeding Five Million Kenya Shillings (Kshs. 5,000,000) and provides that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings. Counsel submitted that Section 60 of the Advocates' Act is clear that the Disciplinary Tribunal cannot order compensation or reimbursement of sums exceeding the statutory amount of Kshs. 5,000,000/-. The Disciplinary Tribunal was privy to the amount sought as it was outlined in the Affidavit of Complaint, yet it proceeded to entertain and determine the same matter. Therefore, the Disciplinary Tribunal rendered a determination which is beyond its statutory pecuniary jurisdiction hence ultra vires and a nullity.

21.Counsel urged that the Exparte Applicant is guided by Section 9 of The Fair Administrative Action Rules 2024 and further, that Section 21 of The Fair

Administrative Action Rules 2024 states that The High Court, Employment and Labour Relations Court and Environment and Land Court shall have the power to hear and determine, at first instance or on appeal, any Judicial Review Application within the respective areas of jurisdiction of the courts based on the subject matter and substance of the Application. Counsel maintained that the Tribunal erred in finding the Exparte Applicant liable for the reason that soon after filing the High Court suit, the Interested Party, thereafter, approached the Advocates Disciplinary Tribunal by way of a Complaint dated 25th March 2024, supported by an Affidavit of Complaint sworn on 22nd March 2024, seeking that the Tribunal compel the Ex parte Applicant to refund the sum of Kshs. 62,915,950.00. He cited the decision of Justice Weldon Korir in Republic v Disciplinary Committee Law Society of Kenya & another Ex-parte Charles Lutta Kasamani [2015] KEHC 7508 (KLR) in support of the submission.

22.Counsel submitted that since Jurisdiction is imperative and any determination made in excess of jurisdiction is illegal, the legal consequence is that the Disciplinary Tribunal's decision should be declared a nullity and properly quashed. He reiterated that the proceedings before the Respondent as well as its impugned decision were unlawful for being per-incuriam sound judicial precedent, as shown in the Republic v Disciplinary Committee Law Society of Kenya & another Ex-parte Charles Lutta Kasamani [supra] case.

23.On whether the Tribunal erred in finding the Exparte Applicant liable, counsel submitted that as can be seen from the pleadings, the ex parte Applicant has raised issues on how the Respondent arrived at its decision against him in spite of the deficiency of the information produced before it. He contends that the

Interested Party never furnished particulars of the tender from which he claimed to have been entitled to the hefty amounts he is claiming. That in short, the Ex Parte Applicant was raising the issue of the Complainant moving the Respondent Tribunal to help it enforce an illegal benefit he had allegedly received from the Government. The Tribunal in this matter was exercising judicial powers hence had a mandatory duty to prevent its processes from being utilized to further a manifest illegality, especially one which is brought to its attention. Counsel submitted that it is trite law that a court of law cannot sanction an illegality and that once an illegality has been brought to its attention must act to remedy the same. He placed reliance on the cases of Board of Trustees National Social Security Fund v Michael Mwalo [2015] KECA 782 (KLR) and Makula International Ltd Vs His Eminence Cardinal Nsubuga and Another [1982] HCB 11 in this regard. He urged that the Ex Parte Applicant, in his response before the Respondent Tribunal, demonstrated in detail how the court decision from which the Complaint emanated issued a decree for the payment of Kshs. 110, 061,691/= before his then advocate, Ezekiel Wafula entered into a consent with the Attorney General reducing the amount. Attempts to reverse the said consent decree before the High Court failed and the Government proceeded to release the money in batches to the Applicant. However, the Interested Party inexplicably obtained further payments from the Government despite the fact that the decree was limited to 65 million shillings and there being no other contract supporting such disbursements. Counsel submitted that it is evident that the Respondent ignored this crucial information presented before it in contravention of the provisions of Section 7(2) of the Fair Administrative Actions Act and the Constitution.

24. Counsel reiterated that the Respondent's decision is a ripe candidate for merit review in order to deliver actual justice between the parties, especially the Ex parte Applicant who has had his reputation soiled at the altar of a manifestly prejudiced Respondent. He placed reliance on the holding in *Muturi v Director, Kenya Forestry Research Institute (KEFRI) & another* [2026] KECA 134 (KLR). Additionally, that the Court has held in various decisions including in *Suchan Investment Ltd vs Ministry of Natural Heritage Culture 3 others* [2016] eKLR, *Judicial Service Commission another vs Njora* [2021] KECA 366 (KLR) and *Kabundu another vs County Government of Mombasa; Clerk County Assembly of Mombasa 7 others (Interested Parties)* [2023] KECA 1330 (KLR) that in appropriate cases and arising from the grounds for Judicial Review now set out in section 7 of the Fair Administrative Action Act, an element of merit review may be required in Judicial Review, particularly in examination of whether a decision or action by a public authority is the legal, constitutional and reasonable, as confirmed by the Supreme Court of Kenya in *Dande & others vs Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR). Further, that the development of the jurisprudence to include merit review of impugned administrative decisions was also authoritatively held by the learned P. Kiage JA, with the concurrence of SG Kairu JA and F Sichale JA, in *Judicial Service Commission & another v Njora* [2021] KECA 366 (KLR).

25. Counsel urged that a merit review of the Interested Party's complaint before the Respondent will find that there was no case against the Ex Parte Applicant, but instead ought to have put in motion an inquiry into the illegalities he perpetuated against the public treasury by obtaining payments outside of and beyond the money the consent decree mandated to be paid out. He urged the court to quash the Tribunal's proceedings and determination as prayed for in the Application.

THE RESPONDENTS' CASE

26. The Respondent filed a Grounds of Opposition to the Application on the following grounds:

1. **That the Application is misconceived, totally incompetent, bad in law and an abuse of this Honorable Court's process.**
2. **That the Application offends the provisions of Section 9 of the Fair Administrative Action Act 2015 for failing to exhaust the available mechanisms for appeal;**
3. **That the Application further offends the provisions of Section 62 of the Advocate's Act Cap 16, Laws of Kenya.**
4. **That the Applicant who duly took part in proceedings before the Respondent, has failed to follow laid down procedures by appealing the decision of the Respondent**
5. **That the Application is otherwise misconceived and should be dismissed with costs to the Respondent.**

27. He raised a Notice of Preliminary Objection in the following lines; Chamber Summons Application dated **30th July, 2025** and the substantive Motion dated **22nd August, 2025** on the following grounds:

(i) The jurisdiction of this Honorable court in the exercise of Judicial Review jurisdiction as conferred by Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya is not to hear the merits of the dispute. Thus;

(a) That this is a civil dispute masquerading as a Judicial Review application as the averment that the Interested Party has not adduced any documentary evidence to prove the sum in issue being Kshs.62, 915,950.00 will require interrogation and a scrutiny into the documentation and material particulars presented by both parties to indeed ascertain whether the said amount in issue has indeed been proven, this indeed excludes this indeed excludes this division from entertaining this motion as it squarely looks at the process.

(b) That this motion is an appeal in disguise against the Judgment delivered by (The Advocates Disciplinary Tribunal) on 10th February, 2025, thus this court is not clothed with jurisdiction to determine the same.

(c) The entire Judicial Review Application is admittedly incompetent, bad in law, an afterthought, misadvised, frivolous, scandalous, and vexatious and an outright abuse of the court process and therefore only fit for dismissal with costs to the Interested Party.

(ii) That the instant judicial review application is premature and offends the doctrine of ripeness as the Respondent herein is yet to make the

final reviewable order on mitigation and sentencing, which is the usually the final stage of the proceedings at the Tribunal.

- a) The doctrine of ripeness instructs that courts should not intervene in ongoing administrative or tribunal proceedings until all available internal remedies have been exhausted and a final reviewable order is made.**

THE INTERESTED PARTIES' CASE

28.The interested party, Simpson Senda Kwayere, filed a Replying Affidavit dated 26th February 2026 where he denied all the allegations contained in the Notice of Motion, Chamber Summons, Statutory Statement, and the Affidavit in support sworn by Thomas N. Maosa on 30th July 2025, and the substantive motion dated 22nd August, 2025.

29.He deponed that judicial review is concerned with the decision making process, not with merits of the decision itself; therefore an averment that the Interested Party has not adduced any documentary evidence to prove the sum in issue being Kshs.62,915,950.00 is an invitation on this court to delve into the merits which will require interrogation and a scrutiny into the documentation and material particulars presented by both parties to indeed ascertain whether the said amount in issue has indeed been proven, this indeed excludes this division from entertaining this motion.

30.The deponent averred that this motion is an appeal against the Judgment delivered by (The Advocates Disciplinary Tribunal) on 10th February, 2025 masquerading as a Judicial Review application, thus this Court is not clothed with the jurisdiction to determined the same. He urged that the same is premature and offends the doctrine of ripeness as the Respondent herein is yet to make the final reviewable order on mitigation and sentencing, which is the usually the final stage of the proceedings at the Tribunal, that is due on 13th April, 2026.

31.The deponent averred that this motion is fatally defective as the Applicant has failed to adduce and or properly set out, the substantive grounds for grant of Judicial Review orders as required under Orders 53 of the Civil Procedure Rules. Further, that the jurisdiction of this court in exercise of Judicial Review as conferred by Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya has not been properly invoked. The deponent averred that it is vital to note that Mr. Maosa has not disputed owing me the monies in issue.

32.The deponent averred that he is a 70-year-old media consultant working with his business by the name Tele News Africa and Atlantic Region. That on or about 2002, through his business Tele News and Atlantic Region, he was given a tender by the Ministry of Tourism, Trade and East Africa Community. He went ahead and did the publication in Financial Times Magazine and after doing the publication, he made a script which was advertised on Super Sport TV for a period of over four (4) months. The advertisement was mainly done during the start and the end of the English Premier League Matches and the script was kept after the end of Premier league Matches and it later introduced during World Cup Matches. After doing all this, there emerged a tug of war as to who should

pay him Kshs.12 million for the work done at the Ministry as there were three ministries such as Tourism, Trade and East Africa Community.

33.This prompted him to file a Civil Case Number 148 of 2012 between himself (Simpson Senda Kwayera) and the Honourable Attorney General and the Permanent Secretary Ministry of Trade at High Court through his lawyers then, E.K Wafula Advocates.

34.Through a court judgment of 24th July,2012 he was awarded damages in the sum of Kshs.12,000,000/= together with costs and interest thereon computed at the rate of 26% per annum with effect from the year 2004 till payment in full. Following the formal extraction of the decree and certificate of costs on 2nd August 2012, the same stood at a cumulative figure of Kshs.110,061,691.00(together with interest at 26% per annum thereon from April, 2004 until payment in full). Mr. Maosa was professionally retained after court judgment to pursue recovery of the Judgment sum.

35.The deponent averred that he then engaged Mr. Maosa's services to recover from the Government Kshs.110,061,691.00 until payment in full. Mr. Maosa through his firm of Advocates, Maosa and Company Advocates came on record pursuant to leave of court issued on 23rd August 2013. He annexed and marked as SSK-1 a copy of the said consent order to come on record. Mr. Maosa collected the funds in three tranches at different intervals from the Ministry of East African Affairs, Commerce and Tourism-formerly Ministry of Tourism and on each occasion he would call the deponent and concur on the amount and accounts to which the funds would be disbursed to. The said payments came in piecemeal installments and as that happened interest at the rate of 26% per

annum continued to accumulate on the balances. From the first two tranches, Mr. Maosa took a lion's share by retaining a sum of over Kshs.50 million (which constituted more than 50% of the payments) purportedly as his legal fees. These payments were made by the Judgment debtor directly to his Account at Standard Chartered Bank where he held an Advocate-Client Account.

36. The deponent averred that however, the last payment of Kshs.85,735,949.79 that came on 12th July,2021 saw Mr. Maosa change tact. He became elusive and would not pick his calls which was extremely frustrating. He annexed and marked as SSK-2 a copy of a letter from the Ministry of Tourism and Wildlife dated 25th April,2022 confirming that indeed the said decretal sum was paid out to the Respondent's Bank Account M/s Thomas Maosa & Company Advocates on 12th July 2021 to the Bank Account Number 01003150013427.

37. The deponent averred that the Attorney General, Auditor General, Parliament, Minister for Finance, the Permanent Secretary, all advised the parent ministry that the remaining outstanding payment had to be paid at ago since the 26% interest being charged was draining government funds. They made arrangements to offset the funds at once through the 2021/2022 Budget. It is important to demonstrate that the aforesaid payments were processed legally and lawfully to wit; Mr. Maosa made the first move in initiating payment of Kshs.85,735,950 by directly engaging the Ministry; On 7th July,2020 vide a letter referenced TM/SSK/16/1 he wrote to the Ministry of Tourism and Wildlife and stated that the outstanding amount due to the deponent was Kshs.74,000,000. This letter was a follow up of a meeting that had earlier on been held personally between the Hon. Safina Kwekwe Tsungu, CBS who was the Principal Secretary

Ministry of Tourism and Wildlife and the said Mr. Thomas Maosa, the Respondent herein. He annexed and marked as SSK-3 a copy of the said letter.

38. The deponent averred that the said sum of Kshs.74,000,00 was not settled in the month of July 2020 as anticipated and therefore the same continued to attract interest at the rate of 26%. On 5th August 2020, Mr. Thomas Maosa through a letter referenced TM/SSK/20/1 wrote to the Chairman Public Accounts Committee requesting the matter to be referred to the Parliamentary Accounts Committee abbreviated as “PAC” for further deliberations and settlement of the pending claim. In the said letter, Mr. Maosa made extensive reference to a PAC meeting of 8th June,2020 where the issue of the pending claim had been discussed and the way forward agreed. He emphasized that the 8th June,2020 meeting was attended by key officials from the Ministry of Tourism and Wildlife, including him in his capacity as his lawyer and therefore, wondered why payments had not been made notwithstanding an indication that a settlement had been reached. He attached and marked as SSK-4 a copy of the said letter dated 5th August,2020.

39. The deponent averred that there was all along indication from Mr. Maosa that the payment of Kshs.74,000,000 was going to be made in the year 2020; and as a result of that expectation, Mr. Maosa wrote to his Bank on 5th October 2020 through a letter referenced TM/SSK/15/11 and notified the bank of the impending payment in settlement of payments emanating from a Court Judgment delivered by the High Court in Nairobi High Court Civil Case Number 148 of 2012(O.S). He attached and marked as SSK-5 a copy of the said letter dated 5th October,2020. Equally, in the same year of 2020, on 19th June,2020, Mr. Maosa wrote a letter to the Principal Secretary Ministry of

Tourism and Wildlife referenced TM/SSK/16/1 forwarding his bank details in preparation to receive the payments amounting to Kshs.74,000,000 emanating from Nrb HCCC Number 148 of 2012. He attached and marked as SSK-6 a copy of the said letter dated 19th June,2020. The payments did not come as anticipated, and Mr. Maosa did not give up in pursuit of the same on his behalf. He, on 24th February 2021 through a letter referenced TM/SG/C/2004 wrote to the Principal Secretary, Ministry of Tourism and Wildlife, Hon. Safina Kwekwe Tsungu, CBS and now made a claim for Kshs.85,735,949.79 the same having arisen from Kshs.74,000,000 due to interest at the rate of 26% p.a. He attached and marked as SSK-7 a copy of the said letter dated 24th February 2021.

40.The deponent averred that the new claim with enhanced interest triggered a lot of activities between the Ministry of Tourism and Wildlife in form of official meetings and numerous correspondence between the Ministry Officials and Mr. Maosa culminating into a settlement whereby Mr. Maosa on 30th June,2021 issued an Irrevocable Professional Undertaking to the Ministry in regard to fully settling the matter upon receipt of Kshs.85,735,950, and that he would will not have any further claim in respect thereto. He attached and marked as SSK-8 a copy of the said Professional Undertaking dated 30th June,2021 issued by Mr. Thomas Maosa.

41.The deponent averred that crucially, the Office of the Attorney General had issued his recommendation earlier on 17th January, 2017 for the settlement of the outstanding claim. He attached and marked as SSK-9 a copy of the said letter dated 17th January 2017 to the Ministry of Tourism. Further, that it was noteworthy that the Auditor General, FCPA Edward Ouko, had on more than two occasions advised the Ministry to settle the pending claim to avoid

escalation of interest and thereby loss of public funds in the process. Be annexed and marked as SSK-10 a copy of said report for the year 2016/2017 with the relevant pages.

42.The deponent averred that as already noted, the PAC meeting of 8th June,2020 had sanctioned the Ministry to make payments upon considering the opinion of the Attorney General’s office on the matter, in which it was advised that the claim be settled in its entirety to avoid escalating costs to the public. That this information is well documented in the Report on the Examination of the Report of the Auditor General on the Financial Statements for the National Government for the Financial year 2018/2019 as adopted by the House on Thursday 2nd May 2022 at 2.30PM. He attached and marked as SSK-11 a copy of the said Report item 1466 with the relevant pages in which it was observed that the payments due to me were eventually settled in full.

43.The deponent averred that his payments for Kshs.85,735,950 are captured in Treasury records in a September 2021 report for General Economic Affairs (GECA) Sector under “Analysis of Court Awards. He annexed and marked as SSK-12 a copy of the said report with the relevant pages.

44.The deponent averred that Mr. Thomas Maosa played an important role in pursuing these payments through legal channels. He heavily corresponded with Treasury, Attorney General’s Chambers, Ministry of Tourism and PAC among other government agencies. He guided him all the time that the claim would be settled, if not, they had recourse in court. As a consequence of his commitment and hard work in pursuit of my claim, the funds were released to his Advocate-Client Account at Sidian Bank on Kenyatta Avenue Branch on 12th July 2021.

However, things changed immediately, he did not disclose this to the deponent and instead, he would sporadically deposit some funds into his account and misled him that he was using his personal resources to keep him going as he waited for the payment to be received into his Account from the Ministry. At one time, he went to the Bank with the Respondent in company of a Mr. Joseph Biwott and Mr. Michael Rotich to confirm to the Branch Manager that he was expecting Kshs.85,735,950.00 from the Ministry of Tourism and that once the funds arrived, they would all come to the bank and indicate to the bank the disbursement plan.

45.Indeed, later Mr. Maosa, the said Mr. Michael Rotich, Mr. Joseph Biwott and the deponent went to the Bank and when they were in the process of drawing out the disbursement plan, Mr. Maosa dramatically took off saying he was taking a call. He left them in the bank at around 3.00pm, never to return and they stayed in the bank until 5.00pm. He deponed that it was highly unethical and outright professional misconduct for a lawyer to run away from his client and abandon him in the banking hall. In a letter dated 6th August,2021, the deponent wrote to the Bank Manager immediately emphasizing what he had told him earlier through a letter dated 5th July,2021 that the funds belonged to Tele news Africa and Atlantic Region and should not be disbursed until himself, the Respondent, Mr. Michael Rotich and Mr. Joseph Biwott were present in the bank to do the disbursement together. He attached and marked as SSK-13 a copy of the said letter dated 5th July,2021 and the Bank's Response dated 8th August,2021 marked as SSK-14.

46.The deponent averred that unknown to him and his business associates, Mr. Maosa, and the Branch Manager, Mr. Jesse Karimi colluded to transfer his funds

to a private personal account at Standard Chartered Bank. He annexed and marked as SSK-15 a copy of the said Bank Account together with a Certificate of Electronic production.

47.He reported this matter to the Regional Coordinator DCI for investigations and prosecution for inter alia theft by agent contrary to section 283(c) of the Penal Code. Investigations have eventually revealed that Mr. Maosa wrote several cheques wherein withdrawals were made daily and severally until the funds were exhausted. As a consequence, the said Account Statement discloses disturbing but fundamental information that Mr. Maosa transferred a sum of Kshs. 30million from his Sidian Bank Advocate-Client Account to this Personal Account. The transfer was done on 16th July 2021, just four (4) days after receipt of a sum of Kshs.85 million from the Ministry of Tourism and Wildlife; and at a time when he had withheld this material information from me notwithstanding that I was pursuing him daily.

48.The deponent averred that as demonstrated hereinabove, Mr. Maosa squandered his money by making heavy daily withdrawals to an unknown destination until the funds were depleted. He urged that it constituted professional misconduct which he has since been convicted by the Advocates Disciplinary Tribunal.

49.He stated that he had been to Mr. Maosa's offices over sixty (60) times in a period of two (2) years since the payments were made but all in vain. The few times he met him in his office he would swear that he was depositing the funds in his account within a day or two but he never did so. Of significance is that Mr. Maosa instructed his office never to receive or stamp his payment demand letters. That on 12th November,2021, he found him in the office again with Mr.

Rotich, Mr. Biwott and Mr. Wanambisi. He swore he was going to pay him on three days if he could write to him indicating the amount of money to be deposited but the following day he left for Dar es Salaam for over one month. He attached and marked as SSK-16 a copy of the instructions he desperately and under extreme pressure issued to him on 12th November, 2021 for him to pay Kshs.48 million and retain the rest but he still declined to honor.

50. He averred that from the Kshs.85,735,950.00, Mr. Maosa received from the Ministry of Tourism on his behalf, he has cumulatively paid Tele News and Atlantic Region a sum of Kshs. 22,820,000 and remained with Kshs.62,915,950.00 out of which he was to take a whopping Kshs.15,000,000 as legal fees and pay him the rest (Kshs.47,915,950.00). He urged that what Mr. Maosa obtained in the initial payments, a sum in excess of Kshs.50 million is sufficient, and therefore his claim is for Kshs.62,915,950.00. There is no justification whatsoever for a lawyer's fees to constitute more than 70% of the decretal sum, and Mr. Maosa's actions are unconscionable, and punitive.

51. He stated that Mr. Maosa seems to have secretly colluded with his business associate Mr. Rotich and paid him an extra Kshs.9 Million behind his back and without his instructions, thus totaling his tally to Kshs.16,050,000.00. Mr. Rotich's connivance with Mr. Maosa is indicative in his reluctance to assist him claim from him what is legally due to Tele News Africa and Atlantic Region.

52. The deponent averred that Mr. Maosa's record as an Advocate of the High Court of Kenya has been punctuated with incidences of obtaining money by false pretenses contrary to section 313 of the Penal Code, failure to honor professional undertakings, deliberate mishandling of clients leading to complaints at the

Banks, and obvious professional negligence among other gross violations. Five examples will suffice.

53. First, Mr. Maosa was charged in Kibera Criminal Case No. 6161 of 2012 Republic versus Thomas Nyakambi Maosa for obtaining money by false pretenses from his clients contrary to section 313 of the Penal Code. His efforts to stop this prosecution and thereby frustrate the payments to the client failed when he filed a Judicial Review case at the High Court and the court declined to stop the prosecution. He urged that the full judgment of this case can be located at **Kenya Law Reports as Thomas Nyakambi Maosa v Kibera Chief Magistrate & 3 others [2015] eKLR and annexed and marked** as SSK-17 a copy of the said Judgment.

54. The deponent highlighted that in **Puthucode Krishnairyer Seshadri & another v Thomas Gichana Nyakambi Maosa T/A Maosa and Company Advocates [2014] eKLR**, the court ordered the Advocate Thomas Gichana Nyakambi to honor a professional undertaking for Kshs. 21,840,000 together with interest at 14% from the date of the Agreement being 13th November, 2011. He attached and marked as SSK-18 a copy of the said Judgment.

55. Third, in a Daily Nation Newspaper, Mr. Maosa failed to pursue a claim with insurance on behalf of a cobbler since the year 1999 when he was first instructed. His negligence has caused pain and torture to the innocent and poor client. He attached and marked as SSK-19 a copy of the said Newspaper Cutting together with a certificate of electronic production marked as SSK-20 under section 65(B) and 108 (B) of the Evidence Act.

56.Fourth, Mr. Maosa refused to honor an irrevocable professional undertaking that he issued to his lawyer, Joseph Biwott based on his instructions; and the same has now found its way to court through Misc. App. E338 OF 2022(O.S) Joseph Korir Biwott T/A Biwott Korir & Co. Advocates V. Thomas Maosa T/a Maosa and Co. Advocates whereby Mr. Maosa in a clear show of sharp practice has brazenly denied ever issuing such an undertaking and termed the same as a forgery and even reported the said Joseph Biwott to authorities for allegedly having no practicing license in a bid to blackmail, and frustrate the said Advocate from enforcing the professional undertaking issued to him. He attached and marked as SSK-21 a copy of the application.

57.Fifth, Mr. Maosa breached the Central Bank and Government Regulations and Guidelines on withdrawal of the decretal sum in issue from Sidian Bank. He hurriedly caused the transfer of over Kshs.30 million to his private personal account at the Standard Chartered Bank and suspiciously made daily huge withdrawals of the remaining cash in deliberate breach of the law until the funds were exhausted. As a result, the bank issued a notice for closure of the account in issue in a clear show that he had flouted the law and established regulations, and the bank was not willing to be part of his fraudulent schemes and money laundering. He annexed and marked as SSK-22 a letter dated 10th September, 2021 pleading with the Bank to permit him to transact for a little more time in the impending millions of shillings he was expecting from other clients and another letter dated 23rd September,2021 marked SSK-23 confirming that his accounts had been closed.

58.The deponent averred that Mr. Maosa has refused to issue an account of how the entire decretal sum of Kshs.85,735,950.00 was spent and disbursed. He neither issued the deponent with any fee note nor taxed his costs so as to justify the

taking of over 70% of the decretal sum. That he issued Mr. Maosa with demand letters but all in vain. He annexed and marked as SSK-24 a demand letter dated 2nd August,2021 and another one dated 28th September 2021 marked as SSK-25.

59.The deponent averred that Mr. Maosa's actions have caused him untold suffering and extreme mental anguish. As a result lost my Kshs.6.5 million Land 12 Cruiser Prado TX auctioned in 2023 due to a Kshs.2 million debt. He attached and marked as SSK-26 the Auctioneers Certificate of sale confirming sale of the vehicle. Further, one of his children, has dropped out of school-Strathmore University for lack of fees with a balance now running at Kshs.850,000.00, and he has suffered loss of business for lack of reinvestment funds, and pecuniary embarrassment. He also has a pending debt of Kshs.1.4 million being costs of accommodation due to Mercury Hotel on Tom Mboya Street.

60.He stated that Mr. Maosa has devised a new strategy, and in his self-recorded statement at police to answer to investigations of theft by agent contrary to section 283 of the Penal Code, he has issued an incoherent and ambiguous statement and fails to respond to the issues at hand. He instead says, that the deponent was in fact not entitled to the Kshs.85,735,950.00. He maintained that the claim and payment of Kshs.85,735,950.00 is lawful and genuine.

61.The deponent averred that he filed a Recovery Suit serialized as: Milimani High Court Civil (OS) Number E063 of 2024: SIMPSON SENDA KWAYERA T/A TELE NEWS AFRICA AND ATLANTIC REGION VS MAOSA THOMAS GICHANA NYAKAMBI P/A MAOSA AND CO. ADVOCATES, which was

heard and Judgment was delivered on 17th September, 2025 wherein the court entered judgment against the Respondent for the sum of Kshs. 62,915,950.00 plus costs and interests until payment in full. He attached and marked as SSK-29 a copy of the Judgment.

62. Further, that contemporaneous with the said Recovery suit before the Superior Court, he filed a formal complaint under section 60(3) of the Advocates Act against Mr. Maosa at the Advocates Disciplinary Tribunal (ADT) which complaint was accepted, processed and admitted for hearing and determination. He took plea sometime in August, 2024 and Disciplinary Tribunal Case Number 112 of 2024 opened. The matter was determined on 10th February 2025 with a Judgment against the Advocate for illegally withholding his money amounting to Kshs. 62, 915,950.00. Mr. Maosa has been convicted; the matter is now awaiting mitigation and sentencing on 13th April 2026. He attached and marked as SSK-30 a copy of the Judgment dated 10th February, 2025.

63. The deponent averred that there is no double jeopardy as the Disciplinary Case Number 112 of 2024 is on Professional misconduct while the Milimani High Court Civil (OS) Number E063 of 2024 is on recovery.

64. The deponent averred that he is unable to meet his basic medical needs at the expense of Mr. Maosa who has chosen to abuse the judicial process in an attempt to avoid remitting the money due and owing. He urged the court to dismiss the Application

65. In his further affidavit in Further support of the Replying Affidavit sworn on 26th February, 2026 he argues that the Applicant filed an objection in the recovery

suit hinged on these similar facts in Milimani High Court Civil (OS) Number E063 of 2024: Simpson Senda Kwayera T/A Tele News Africa and Atlantic Region Vs Maosa Thomas Gichana Nyakambi P/A Maosa And Co. Advocates that a civil suit for recovery cannot be sustained together with the matter before the Disciplinary Tribunal for professional misconduct. The court in dismissing the Applicant held that the recovery suit was different from the matter before the Disciplinary Tribunal. This was done through a Ruling issued on 4th July, 2024.

66. An attempt by the Applicant to challenge the Tribunal's judgment is farfetched as he has partly complied with the said Judgment wherein the Tribunal directed the Applicant to file a bill of costs to recover his fees if any. He has since multiplied bills of costs and designated 4 of them in different divisions of this court, being **High Court Commercial and Tax Division Misc. Number E425 of 2025; High Court Misc. Civil Application Number E554 of 2025; High Court Misc. Civil Application Number E555 of 2025; and High Court Misc. Civil Application Number E556 of 2025** wherein on a subject matter of **Kshs.85, 735,749.79** the Applicant has split the same into 4 bills and claimed over **Kshs.370,735,749.79** this is an absurdity.

INTERESTED PARTY'S SUBMISSIONS

67. Counsel for the interested party laid down the background of the Application and proceeded to identify and submit on the issues for determination.

68. On whether this Court has the jurisdiction to determine this matter, Counsel submitted that the matter is premised on argumentative and contested facts and thus, cannot form basis of a Judicial Review. Further, that the jurisdiction of this court in the exercise of Judicial Review jurisdiction as conferred by Sections 8

and 9 of the Law Reform Act, Cap 26 Laws of Kenya, is not to hear the merits of the dispute. He pointed out that the Applicant's averment that the sum in issue, being Kshs.62,915,950.00 was obtained illegally, and therefore cannot form basis of a cause of action as it would require interrogation and scrutiny into the documentation and material particulars presented by both parties, to indeed ascertain whether the said amount in issue has indeed been proven. He urged that this excludes this division from entertaining this motion as it squarely looks at the process.

69.Counsel submitted that it is trite that for a Judicial Review Application to stand, the proceedings should be concerned with the decision-making process of an administrative body and not delve into the merits of that decision. He submitted that at a glance at the Applicant's Application, they are seeking this Court's intervention to determine disputed issues of facts without hearing evidence. That the core dispute as stated above is;-

- a) That the sum in issue being sum in issue being Kshs.62,915,950.00 was obtained illegally;
- b) That no material particulars were availed/clear statement of Accounts to prove the sum in issue being Kshs.62,915,950.00; and
- c) That the Respondent overlooked scrutiny of all material particulars.

70.He submitted that in any event, this court cannot sit on appeal of its own decision, this matter having determined and concluded by a court of equal status on 17th September, 2025 in Milimani High Court Civil (OS) No. E063 of 2024; Simpson Senda Kwayera T/A Tele News Africa and Atlantic Region Vs

Maosa Thomas Gichana Nyakambi P/A Maosa and Co. Advocates wherein the court rendered the Judgment against the Applicant for Kshs.62,915,950.00, together with interest and costs of the suit. The Applicant has not appealed this decision and therefore cannot invite this court to set aside the same judgment through back door.

71.Counsel submitted that further to the above, these are issues to be determined by way of viva voce evidence, which is not within the purview of this court but a civil court. That the Applicant has levelled various allegations that go to the merits of the case, which clearly spell out the issues in the decision, and not the process at arriving at that decision, which is not a concern of the Judicial Review Court. He stated that in the circumstances, having established beyond any iota of doubt that the Applicant's issues raised are disputed issues of facts that would require viva voce evidence, this matter should not be entertained by this court.

72.Counsel urged that this case is simply a misconceived shortcut designed to obtain Judicial Review orders in an otherwise civil dispute. Further that no material particulars have been adduced by the Interested Party to demonstrate that the said sums in issue, being Kshs. 62,915,950.00 are due and owing, which is essentially a matter to be resolved by way of evidence, which is the province of a civil court hearing the merits of the case.

73.Counsel posited that it is trite law that Judicial Review proceedings are concerned with the decision-making process and not the merits of the decision, and where no decision has been made, the alleged legality or propriety of the said decision-making process cannot be challenged through the Judicial Review process. Reliance was in this respect placed on the decisions in the case of

Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR. He further submitted that the Applicant has not demonstrated any Judicial Review grounds under Order 53 of the Civil Procedure Rules, 2010 being; illegality, irrationality and procedural impropriety, to warrant grant of the sought orders. He stated that the substantive motion and the submissions are at complete variance with the Application filed for leave, and this cannot be said to be a Judicial Review Application and therefore, it must collapse on this basis. He cited the case of Milimani HCJR/E176/2023 Peter Mutua & Others Vs Sam Ouko & Others in support of this submission.

74. Counsel urged that the final reviewable order is yet to be issued by the Respondent and therefore, the Applicant has brought the Judicial Review Application prematurely since the Respondent is yet to make the final order on mitigation and sentencing. Further, that the doctrine of ripeness instructs that courts should not intervene in ongoing administrative or tribunal proceedings, until all available internal remedies have been exhausted and a final reviewable order is made.

75. Counsel submitted that the proceedings before the Tribunal involves a host of steps that include plea taking, hearing of witnesses, tendering of evidence within the legal framework of Evidence Act, filing of submissions, highlighting, conviction, mitigation and sentencing as observed by this court in Republic v Advocates Disciplinary Tribunal; Amugune (Ex Parte Applicant [2023] eKLR. Additionally, that the Applicant's action amounts to an attempt to stop and interfere with the process at the Tribunal which is yet to be finalized. Counsel cited the decision by Justice G V Odunga in Ndombi Tom Wachakana Osolika v Disciplinary Committee of the Law Society of Kenya & another [2015] eKLR in

this regard. He submitted that the upshot is that the action sought to be reviewed has not crystallized into a final reviewable decision and therefore, inviting this court to stop or overturn the Judgment of 10th February, 2025 is to interfere with the statutory mandate of the Advocates Disciplinary Tribunal because it is still seized with the matter.

76. Counsel submitted that the Applicant has not proffered any Appeal against the Ruling of the Respondent of 10th February, 2025 as mandated under section 62 of the Advocates Act, thus offending the doctrine of exhaustion. He reproduced the relevant provisions, urging that the said section is instructive that any party disgruntled by the decision of the Disciplinary Tribunal has a statutory right of appeal to the High Court. Further, that the High Court or a subordinate court shall not review an administrative action unless all internal mechanisms for appeal or review have been exhausted. He cited the case of *Republic & another v Advocates Disciplinary Tribunal: Munyi (Interested Party)* [2025] (eKLR) and *Republic & another v Advocates Disciplinary Tribunal; Munyi (Interested Party)* [2025] (eKLR) in support of this submission. Counsel reiterated that the actions by the Applicant exemplify bypassing statutory dispute resolution frameworks and is in breach of the doctrine of exhaustion and in the premises, the instant motion is fit for dismissal with costs.

77. Counsel pointed out that the Applicant alleges that there is double jeopardy as the Respondent proceeded to hear and determine the Disciplinary Tribunal Case Number 112 of 2024 while there was a similar suit with similar prayers being: *Milimani High Court Civil (OS) Number B063 of 2024; Simpson Senda Kwayera T/A Tele News Africa and Atlantic Region Vs Maosa Thomas Gichana Nyakambi P/A Maosa And Co. Advocates*. He then submitted that the

matters are distinct as the issues before the Disciplinary Tribunal were premised on Section 60 (3) of the Advocates Act on professional misconduct of the Applicant and for illegally withholding the Interested Party's money, while the matter at the High Court was on recovery of the said money due and owing. He stated that a glean at the orders issued both at the Disciplinary Tribunal and the High Court explains the distinctiveness in the matters. The Disciplinary case in which Judgment was determined on 10th February, 2025, the Tribunal convicted the Applicant for failing to account for and withholding a sum of Kenya Shillings Kshs.62, 915,950.00 received on behalf of the Interested Party while in the High Court recovery matter, the court held that Judgment was accordingly entered against the respondent for the sum of Kshs. 62,915,950.00 plus costs and interests until payment in full. To that end, the Disciplinary Tribunal Case Number 112 of 2024 lies squarely and aptly within the Jurisdiction of the Respondent and it was justified to hear and determine the same contemporaneously with the High Court Recovery matter.

78.Counsel submitted that in the disciplinary matter, the Applicant is accused of refusal to communicate to the client, diversion of client money without client knowledge and permission, dishonourable character and general misconduct and misbehaviour in a manner that does not befit an Advocate of the High Court of Kenya, which are issues that fall within the province of the Disciplinary Tribunal. Therefore, to attempt to obscure facts and distort the truth with an aim to defeat justice and ultimately defeat the Interested Party's claim, the Applicant has presented this matter. He urged that this cannot be said to be anything else other than a gross abuse of court process and urged the court to dismiss the Applicant.

79. Counsel submitted that a similar argument was made in the case of Republic v Law Society of Kenya Disciplinary Tribunal & another Ex Parte Muema Kitulu [2018] eKLR and urged that the Applicant filed an objection in the recovery suit hinged on these similar facts, that a civil suit for recovery cannot be sustained together with the matter before the Disciplinary Tribunal and the court, in dismissing the Applicant, held that the recovery suit was different from the matter before the Disciplinary Tribunal. This was done through a Ruling issued on 4th July, 2024 and therefore to attempt to ride the same issue is inviting this court to sit on appeal on its decision. That the court in delivering the ruling in Milimani High Court Civil (OS) Number E063 of 2024: Simpson Senda Kwayera T/A Tele News Africa and Atlantic Region Vs Maosa Thomas Gichana Nyakambi P/A Maosa And Co. Advocates on 4th July, 2024 stated as follows:

“The Respondent has challenged the hearing of this matter before the Civil Division Primarily on the basis that according to him the matter relates to money laundering and thus, in his view, fit for determination by the Anti-Corruption and Economic Crimes Division. I do not agree with that position. The High Court in exercise of its civil jurisdiction has the constitutional authority to determine any civil dispute. Subject to the constitutional limitation under Article 162 (2) of the Constitution. This court has examined the originating Notice of Motion and noted that what the Applicant seeks in the originating summons is to have the funds that he alleges were received by the Respondent as his duly appointed counsel and Agent released to him. The originating motion largely concerns the payment of money due and owing to the Applicant. The dispute is one

which this court or any other judge of the Civil Division can hear and determine.”

80. He stated that, in any event, the Applicant has partly complied with the Tribunal judgment that he is now challenging. In the judgment, the Tribunal directed the Applicant to file a bill of costs to recover his fees if any and he has since multiplied bills of costs and designated 4 of them in different divisions of this court, being; *High Court Commercial and Tax Division Misc. Number E425 of 2025; High Court Misc. Civil Application Number E554 of 2025; High Court Misc. Civil Application Number E555 of 2025; and High Court Misc. Civil Application Number E556 of 2025* wherein, on a subject matter of Kshs.85,735,749.79, the Applicant has split the same into 4 bills and claimed over Kshs.370,735,749.79. Counsel urged that the same was an abuse of the court process and prayed that the court dismiss the Application.

81. On whether the Tribunal breached the rules of natural justice, Counsel urged that this is a strange argument because the Applicant laments that after all processes had been complied with including filing of all Affidavits and final submissions, the Tribunal brought forward the judgment date. The initial date that the matter was supposed to be scheduled for judgment was 8 months away from when the matter was before the Tribunal and upon notice on all parties, the tribunal brought forward to 10th February, 2025. He posed the question as to how the Applicant was prejudiced by a matter being expedited, when he had filed all his requisite documents, urging that the complaint was malicious. Further, that the tribunals' actions were in compliance with the Oxygen principal Section 1A, IB, and 3A of the Civil Procedure Act and Article 159 (2) of the Constitution of Kenya, 2010.

82.Counsel submitted that it is noteworthy that the Interested Party is an elderly sickly client and the desire by the Applicant to derail the matter speaks to an inhumane and cruel Advocate, hell-bent not to account for the client's money amounting to Kshs. 62,915,950.00. That the Respondent exercised its mandate constitutionally by giving all parties audience, in its decision it considered the Affidavits, submissions and general documents presented by all the parties. The Adequate notices were issued severally and numerous to both parties through the provided official email addresses in view of general directions and Judgment. He urged that the Applicant fully participated in the proceedings before the Tribunal, filed all the requisite documents and appeared all the time the matter came up. Additionally, he never objected to the Judgment being delivered on 10th February, 2025.

83.Counsel urged that with regards to the orders sought, the Applicant has not laid demonstrable grounds to warrant the grant of the same. That it is clear that the window for intervention by a Judicial Review court into acts or commissions subject to Judicial Review is the grounds upon which the Application for Judicial Review reliefs is made. Further, that without the grounds on which Judicial Review reliefs are sought, an Application for Judicial Review would be fatally defective as observed by Justice Ngaah J in Milimani HCJR/E176/2023; Peter Mutua and Others Vs Sam Ouko and Others.

84.Counsel posited that it is trite under Order 53 of the Civil Procedure Rules, 2010 that grounds of illegality, irrationality and procedural impropriety must be established and proven for the Judicial Review Orders to suffice. As demonstrated herein, the proceedings at the Respondent are yet to be concluded,

mitigation and sentencing is pending and therefore there is nothing left to quash. The intention of the Applicant is to disturb and interfere with the process at the Tribunal having employed all manner of tricks to which he has failed. He submitted that the grounds upon which the motion is premised are contested matters of fact which do not fall within the province of a Judicial Review Court and prayed that the court dismiss the matter with costs.

ANALYSIS AND DETERMINATION

85. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction:

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“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

86. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings.

87. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in *Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR* held that: -

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent”

88. In *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR* Supreme Court stated as follows: -

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 counsels 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 ... 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.

89. From the foregoing, it is sufficiently settled that a Court’s jurisdiction is derived from the Constitution, an Act of Parliament or a settled judicial precedent.

90. Article 165(6) of the Constitution of Kenya stipulates as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

91. It is my finding that this court is vested with jurisdiction over the Respondent. Article 165 of the constitution gives the court to power to attend to the application.

Whether this court can conduct a merit review:

92. The Supreme Court’s in ***Petition No. 6(E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others*** addressed the issue of 'Whether the scope of judicial review has evolved to include determination of merit review of an administrative decision' . The summary is as follows:

(a) Prior to the promulgation of the Constitution in 2010, judicial review was found in Sections 8 & 9 of the Law Reform Act and Order 53 of the CPR that addressed the procedural basis [see paragraph 77-page 30].

(b) Judicial review was entrenched in the Constitution of 2010 to a substantive and justiciable right under Article 47 [see paragraph 78-page 301. The court concluded at paragraph 85 [see page 33]and held as follows:

'It is clear from the above decisions that when party approaches a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party files a

suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.

93. The Applicant in the instant case has raised and advanced very many issues that call for a lot of in-depth analysis. Though the case belongs to the applicant, the court notes that the interested party has fallen into the same trap. These are issues that can only be determined through a viva voce hearing with witnesses testifying, being cross examined and with documents being produced as evidence.
94. Being a judicial Review Court, I hold the view that this case does not meet the principles that create room for a merit review and I so hold.

The next issue is whether or not the Applicant is entitled to the orders sought.

95. Judicial review jurisdiction was discussed in the case of **Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR)** where it was held that;

“Illegality is when the decision-making authority commits an error of law in the process of taking the decision 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....

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: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

96. The application before this court is drafted in a manner that is not in the nature and or form of a Judicial Review application. The Applicant for instance argues that the Tribunal erred in law. That the Respondent's decision made on 10-2-2025 was based on total misapprehension of the facts of the existing complaint and in the process the Respondent arrived at a wrong decision, that the Respondent's action of 10-2-2025 was otherwise unlawful, irregular and unwarranted and the action is likely to trample on the Applicants' rights to legal Practice. He argues that the complaint never produced any supporting

documents that he was eligible to be paid Kes. 62,915,950.00. Further, that no document was produced before the Advocates Disciplinary Tribunal that the Complainant/Interested Party was to be paid a total sum of Kes. 62,915,950.00. The applicant further argued that The Complainant/Interested Party never submitted any decree from a Court and/or from the said Ministry that he was paid Kshs. 62,915,950.00.

- 97.** The applicant also argued that The Respondent failed and/or neglected to act with integrity by neglecting to consider the fact that the Respondent Advocates was eligible to be paid his legal fees. The applicant argued that The Respondent ignored the Provisions of the Advocate's Act Cap. 16 Laws of Kenya governing client and advocate's relationship in arriving at its decision. The applicant argued that The Respondent failed to give consideration to the Complainant/Interested Party's admission in his supporting Affidavit that his partner had received over Kshs. 23Million. It was the Applicant's case that there was no documentary proof that a sum of Kshs. 62,915,950.00 was paid to the Respondent/Advocate on account of the complainant.
- 98.** The applicant argued that The Respondent failed to act with impartiality by giving consideration to the complainant's alleged aged instead of considering the issues between advocates and client and therefore violated the provisions of Act 159(2) of the Constitution. He argued that The Respondent failed to consider the Applicant's plea that the Complainant had never paid the Complainant was under an obligation to remit fees for services rendered to him for a period in excess of ten years. The applicant argues that the judgment of the Respondent dated 10-2-2025 was against the weight of the evidence tendered. That the principles of natural Justice demanding that a party be heard in his/her defence

were not applied in the Respondent's decision of 10-2-2025 according to the Applicant. It was further his case that the Respondent never made any proper interrogation in order to establish the source of Kshs. 62,915,950.00 and further no documentary evidence was adduced that the applicant received a sum of Kshs. 62,915,950.00.

- 99.** He argued that the Respondent erroneously applied the doctrine of standard of proof as defined in Common Law jurisprudence in order to assist the Complainant for the matter before it is based on facts as to whether the Accused Advocate indeed received a sum complained of Kshs. 62,915,950.00. He argues that the Respondent erred in both law and fact when they made a finding by relying on an alleged letter of 25.4.2022 that Kshs. 85,934,255.10 was paid to the Accused Advocates/Applicants Bank as partial Settlement of the tender value. It was further the Applicant's case that the Respondent erred in law and fact that an alleged tender of year 2004 was confirmed in Milimani Commercial High Court Civil Case No. 148 of 2012 and allegedly out of which Kshs. 22,820,000/= was remitted to the Complainant.
- 100.** He argued that the Respondent occasioned a Miscarriage of justice by failing to call for a Statement of Account detailing as to how the sum of Kshs, 62,915,950.00 and it instead created inconsistency by relying on Milimani Commercial High Court No. 148 OF 2012 wherein an alleged sum of Kshs. 22,820.000/= was paid to the complainant.
- 101.** It was further his case that the Respondent erred in law when it neglected to evaluate the Accused Advocates/Applicants clear demonstration regarding the payment of Kshs. Kshs. 65,000,000/= and Kshs. 85,935,255.00 indicating that

no tender proceeds were paid to him. The Respondent never pointed out the source and full account details surrounding the sum of Kshs. 62,915,950.00. He argued that the Respondent neglected its legal duty under the Advocate's Act to make a clear and unequivocal finding on the sum of Kshs. 62,915,950.00 as pertains to its source, documents and as to when the same was paid, and who paid the same and, on the subject, matter for the said payment. From the foregoing it is clear to this court that the application is an appeal in disguise.

102. In *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA, it was held that

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

103. The applicant in the instant application is asking the court to reevaluate the evidence that was before the Respondent. It is an appeal in disguise. This court cannot do that.

104. In the case of *Municipal Council of Mombasa-Versus-Umoja Consultants Ltd (2002) eKLR* the Court of Appeal where the Court of Appeal had held as follows;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issue as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision”.

105. The court is of the view that the Application does not meet the principles of the grant of the orders sought within the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2EA 300** where it was held as follows:

“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.”

106. The court is satisfied that the Applicant was accorded the opportunity to present its case fully before the Respondent. The Respondent upheld the rules of natural justice during the hearings. The application lacks merit.

Costs;

107. In **Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR** Odunga, J. thus observed:-

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give

reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

108. The Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates Section 27(1):

“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” [emphases supplied].

109. In *Usherson v. Bandshell Artist Mgmt.*, No. 19-CV-6368 (JMF), 2020 WL3483661, at *9 (S.D.N.Y. June 26, 2020) the United States District Court for the Southern District of New York held:-

“A court may never impose sanctions pursuant to its inherent authority absent a finding, by clear and convincing evidence, that the party or attorney knowingly submitted a materially false or misleading pleading, or

knowingly failed to correct false statements, as part of a deliberate and unconscionable scheme to interfere with the Court’s ability to adjudicate the case fairly.”

110. The Ex-parte Applicant to pay costs.

Disposition:

The application is an appeal in disguise.

Order;

The application is dismissed with costs.

Dated, Signed and Delivered virtually at Eldoret this 24th day of April, 2026.

.....

J. CHIGITI (SC)

JUDGE