



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU &**

**J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 101 OF 2017**

**BETWEEN**

**PATRICIA NJERI WANJAMA.....APPELLANT**

**AND**

**THE ADVOCATES DISCIPLINARY COMMITTEE.....1<sup>ST</sup> RESPONDENT**

**BRITISH-AMERICAN ASSET MANAGERS.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya*

*at Nairobi, (G. V. Odunga, J.) given on 15<sup>th</sup> November, 2016*

**in**

**THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 430 OF 2015)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] **PATRICIA NJERI WANJAMA**, the appellant, is an advocate of the High Court. She was an employee of the 2<sup>nd</sup> respondent British America Asset Managers Limited from 1<sup>st</sup> October, 2008, until 15<sup>th</sup> August, 2015, when she tendered her resignation. On 26<sup>th</sup> November, 2014, the 2<sup>nd</sup> respondent filed a complaint against the appellant with the 1<sup>st</sup> respondent the Advocates Disciplinary Committee which has since been renamed Disciplinary Tribunal, and is referred to herein as such. The complaint was against the appellant who was accused of breaching her duty to the 2<sup>nd</sup> respondent in the discharge of her responsibilities.

[2] The duties allegedly breached by the appellant included: duty to act in utmost good faith; duty to act in the best interest of the 2<sup>nd</sup> respondent; duty to apply due care and skill; duty to disclose any conflict of interest; duty of confidentiality; and duty not to profit from her engagement with the complainant outside the remuneration paid to her. In addition, the appellant was accused of acting contrary to her terms of engagement by entering into and sanctioning irregular contractual arrangements on behalf of the 2<sup>nd</sup> respondent in several suits where the 2<sup>nd</sup> respondent was a party.

[3] On 11<sup>th</sup> March, 2015, the appellant filed a preliminary objection to the complaint, challenging the jurisdiction of the Disciplinary Tribunal to hear the complaint. She contended that the matters complained of by the 2<sup>nd</sup> respondent were within the exclusive jurisdiction of the Employment and Labour Relations Court; that none of the allegations disclosed any case for professional misconduct; that the 2<sup>nd</sup> respondent was misusing the process in the Disciplinary Tribunal to stifle business competition, and the appellant's right to earn an honest living; and that the complaint was frivolous and vexatious as there were already four suits pending in the High Court arising from the same

circumstances.

[4] The 2<sup>nd</sup> respondent countered the preliminary objection through grounds of opposition, dated 13<sup>th</sup> March, 2015, contending that it was not a proper preliminary objection. This was because the objection was allegedly based on allegations of fact and not pure points of law. Secondly, that the complaint was squarely within the jurisdiction of the Disciplinary Tribunal as **section 60(1)** of the **Advocates Act**, allows any person to make a complaint of professional misconduct against an advocate; and thirdly, that the Employment and Labour Relations Court had no jurisdiction to hear cases of professional misconduct of an advocate.

[5] Upon hearing the preliminary objection, the Disciplinary Tribunal, upheld the argument that the objection was not properly brought, as it was not raising pure points of law, but was raising contentious factual issues which could not be ascertained without consideration of evidence. The Disciplinary Tribunal therefore, overruled the preliminary objection.

[6] Being dissatisfied with the ruling of the Disciplinary Tribunal, the appellant moved to the High Court under **Order 53 Rule 3** of the **Civil Procedure Rules**; **section 8 & 9** of the **Law Reform Act**; and **section 11** of the **Fair Administrative Actions Act, 2015**, for orders of certiorari, to remove into the High Court the decision of the Disciplinary Tribunal dismissing the appellant's preliminary objection; an order of prohibition restraining the Disciplinary Tribunal from entertaining the 2<sup>nd</sup> respondent's complaint against the appellant; and a declaration that the Disciplinary Tribunal has no jurisdiction to entertain disputes arising from employment contracts or relationship, whether the employee is an advocate or not.

[7] The appellant argued that the Disciplinary Tribunal had no jurisdiction to entertain the 2<sup>nd</sup> respondent's complaint, as the matters complained of were within the exclusive jurisdiction of the Employment and Labour Relations Court; and that once the issue of jurisdiction was raised, the Disciplinary Tribunal could not defer the issue. In addition, the appellant maintained that the Disciplinary Tribunal had failed to give clear reasons for rejecting the appellant's preliminary objection.

[8] The learned judge of the High Court, having considered the motion and the arguments, ruled that the Disciplinary Tribunal had actually considered the objection, and found that it did not raise pure points of law, but raised factual issues which could not be ascertained without calling for, and considering evidence; that the Disciplinary Tribunal was entitled to arrive at that decision; that the appellant could only challenge that decision by way of an appeal pursuant to **section 62** of the **Advocates Act**; and that this could be done after the finalization of the disciplinary proceedings. The learned judge added that assuming that the Disciplinary Tribunal had not considered and determined the appellant's preliminary objection, the only remedy would have been to quash the decision of the Disciplinary Tribunal under the Fair Administrative Actions Act, and direct the Disciplinary Tribunal to determine the objection. The learned judge therefore dismissed the appellant's motion for orders of judicial review.

[9] The appellant is now before us with a memorandum of appeal raising six (6) grounds in which he faults the learned judge for dismissing the appellant's application for Judicial Review; failing to find that the appellant's jurisdictional objection was properly brought before the Disciplinary Tribunal as a preliminary objection; failing to find that the Disciplinary Tribunal was duty-bound to adjudicate upon the jurisdictional objection before entertaining the complaint by the 2<sup>nd</sup> respondent; failing to find that the Employment and Labour Relations Court has exclusive jurisdiction in respect of all dispute and complaints relating to and arising out of employment relations between an employer and an employee; and failing to find that the Disciplinary Tribunal had no jurisdiction to entertain the 2<sup>nd</sup> respondent's complaint against the appellant as it related to an employment relationship.

[10] Pursuant to directions given by the Court during case management, all the parties filed written submissions and were given opportunity to highlight the same orally. It was submitted by the appellant, that once the issue of jurisdiction was raised, the Disciplinary Tribunal had an obligation to determine the issue; that the ruling of the Disciplinary Tribunal amounted to a refusal to address and determine the issue of jurisdiction; that the learned judge also avoided to address the elementary issue of jurisdiction, and therefore did not address the question whether the impugned action or decision was lawful.

[11] The appellant argued that the decision of the Disciplinary Tribunal flouted precedents set in cases such as **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited [1969] EA 696**; and **Owners and masters of the Motor vessel "Joey" vs Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367**. In the appellant's view, the precedent was that a question of jurisdiction may be raised as a preliminary issue, and must be determined at the earliest opportunity. In addition, the appellant argued that the learned judge was mistaken in holding that the relief sought by the appellant was precluded by **section 11(1)(e) & (h)** of the **Fair Administrative Action Act, 2015**; that without jurisdiction, the Disciplinary Tribunal, would be acting *ultra vires*; and that the learned judge abdicated his duty in failing to address and determine the issue of jurisdiction.

[12] In support of these submissions, the appellant cited several authorities, including, **R vs Shoreditch Assessment Tribunal ex parte Morgan [1910] 2 KB 859, 880**, wherein it was stated:

*"No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise jurisdiction which it has and ought to exercise."*

[13] The appellant also relied on **Donald Osewe Oluoch vs Kenya Airways Limited (unreported), Civil Appeal No. 5 of 2012; Abdikadir Suleiman vs County Government of Isiolo & another [2015] eKLR**, for the proposition that the Employment and Labour Relations Court has exclusive jurisdiction to determine disputes arising out of an employment relationship between an employer and an employee. The appellant drew a distinction between an advocate - client relationship which is not anchored on a contract of service but a contract for service, and an employer - employee relationship which is anchored on a contract of service contemplated under the Industrial Court Act, and the Employment Act (repealed). The Court was therefore urged to allow the appeal and reverse the orders issued by the High Court

[14] On its part, the Disciplinary Tribunal relied on the Supreme Court decision in **Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others [2015] eKLR**, for the proposition that:

***“A preliminary objection may only be raised on a ‘pure question of law.’ To discern such a question of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed as agreed as they are prima facie presented in the pleadings on record”.***

[15] The Disciplinary Tribunal maintained that the facts presented by the appellant in support of the objection, were contested and therefore a preliminary objection could not be upheld; that under **section 55 of the Advocates Act**, the Disciplinary Tribunal has jurisdiction to hear and determine the complaint against the appellant as she is an advocate subject to the jurisdiction of the Tribunal; that the matter in issue was whether the allegations made against the appellant constituted “disgraceful or dishonourable conduct, incompatible with the status of an advocate;” that the exclusive jurisdiction of the Employment and Labour Relations Court, does not take away the mandate of the Disciplinary Tribunal, to enforce discipline among members of the legal profession, by considering and determining complaints; and that the Disciplinary Tribunal had jurisdiction to hear and determine the complaints levelled against the appellant.

[16] For the 2<sup>nd</sup> respondent, it was argued that judicial review is not concerned with the merit of the decision made by an administrative body or tribunal, but is concerned with the decision making process; that the issues raised in the memorandum of appeal do not arise from the prayers sought by the appellant in the judicial review proceedings; that the appeal was an abuse of the court process as no proper ground of an appeal had been raised; and that the appellant had simply reargued her application for judicial review which was dismissed in the High Court.

[17] It was further submitted that the question of jurisdiction, was dealt with extensively by the learned judge of the High Court who held that judicial review was not the proper manner by which to raise a jurisdictional challenge; that requiring the court in the judicial review proceedings to make a determination as to whether the jurisdictional objection was proper, is to require the court to interrogate whether the Disciplinary Tribunal’s decision to dismiss the preliminary objection was proper; and that this would be an assessment of the merit of the Tribunal’s decision thereby usurping the function of the Disciplinary Tribunal.

[18] In addition, the 2<sup>nd</sup> respondent submitted that the appellant not having sought an order of mandamus, the learned judge of the High Court could not be expected to make a finding that the Disciplinary Tribunal was obligated to make a determination on the jurisdictional point; that the appellant was introducing a matter that was not before the review court and therefore not open to this Court for consideration; and that the learned judge of the High Court considered the question of jurisdiction and properly dismissed the application for judicial review. The 2<sup>nd</sup> respondent urged the Court to dismiss the appeal.

[19] We have considered this appeal, the submissions made before us and the authorities cited. It is evident that the motion before the learned judge was one for judicial review. The duty of a judge in considering such a motion, is now well settled. The judge is concerned with the decision-making process, and not the merit of the decision. In **Municipal Council of Mombasa vs Republic & another [2002] eKLR**, this Court described the duty as follows:

***“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. ‘Did those who made the decision have the power, i.e. jurisdiction to make it.’ Were the persons affected by the decision heard before it was made.’ In making the decision did the decision maker take into account relevant matters or did he take into account irrelevant matters.’ These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a Court of Appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of the judicial review.”***

[20] This is to say that in judicial review, the court is not concerned with the merit of the decision arrived at, whether it is right or wrong, but whether the procedure adopted in arriving at the decision was proper, and within the powers of the decision-making body. Secondly, the court is concerned with the fairness of the decision-making process, that is, whether the party against whom the decision is made has been given a hearing and reasons for the decision and whether the decision is legal, fair and rational.

[21] Irrationality has been described as where there is such gross unreasonableness in the decision taken or done, that no reasonable authority addressing itself to the facts under or before it, would have made such a decision. (**Pastoli vs Kabale District Land Government Council & others [2008] 2 EA 300. Associated Provincial Picture Houses Limited vs Wednesbury Corporation [1947] 2 All ER 680; and Council of Civil Service Unions vs minister of State for Civil Service [1984] 3 All ER 935.**) Where necessary this might require an element of consideration of the impugned decision with a view to assessing its reasonableness being mindful of the limitation of the review court in addressing the merit of the decision.

[22] The Disciplinary Tribunal in its ruling in regard to the preliminary objection, having referred to **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited [1969] EA 696**; and **Oraro vs Mboya (2005) 1KLR**, had this to say:

***“6. We have carefully considered the grounds of objection, the complainant’s grounds of opposition and submissions by counsels for the parties, we are of the view that the objection by the respondent does not find basis in pure points of law. Substantially it raises factual aspects which cannot be ascertained without calling for and considering evidence.***

***7. We are hesitant to make any specific findings on the specific grounds of objection for by doing so we risk the danger of appearing to be substantially determining the complaint itself.***

**8. The material placed before us would be good stuff for an application for summary dismissal of the complaint herein.**

**9. In conclusion, we wish to state that the preliminary objection raised herein by the respondent was proper. The issues that the respondent's advocates canvassed before us were all contentious and could not be determined in a summary manner before taking evidence. This matter should be left to proceed to trial."**

[23] The issue that we have to determine as a first appellate Court is whether the learned judge of the High Court, properly discharged his judicial review obligation, in reviewing the decision of the Disciplinary Tribunal in light of its duty as above stated. The appellant questioned the jurisdiction of the Disciplinary Tribunal to hear the complaint that was lodged against her. The objection having been brought by way of a preliminary objection, the Disciplinary Tribunal had to determine the propriety of the objection based on the law and the pleadings before it.

[24] In regard to the jurisdiction of the Disciplinary Tribunal section 55 of the Advocates Act is instructive. That section provides as follows:

**"Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Tribunal:**

**Provided that the persons mentioned in section 10, other than those included in paragraph (c) of that section, shall not be subject to the jurisdiction of the Disciplinary Tribunal"**

[25] Also of importance is section 60 of the Advocates Act that provides as follows:

**"60. (1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person."**

[26] A reading of section 55 together with section 60(1) of the Advocates Act, reveal that the jurisdiction of the Disciplinary Tribunal is anchored on two things. First is the status of the person against whom the complaint is made, that is the person must be an advocate, and secondly, the complaint should relate to professional misconduct. While the status of the appellant as an advocate was not in dispute, there was contention regarding the capacity in which the appellant rendered her services to the 2<sup>nd</sup> respondent, that is whether a contract of service or a contract for service, and whether this affected the appellant's status as an advocate. In addition, there was also contention regarding the facts constituting the alleged professional misconduct.

[27] The Disciplinary Tribunal's view, was that the information before it was not sufficient to support the objection that it did not have the jurisdiction to hear the complaint. Its decision was not that it had jurisdiction or did not have, but that the matter of jurisdiction, could not be determined at that stage as a preliminary issue, as there was need to establish the contested facts. This was not unreasonable given that these facts had to be established in order to determine whether the complaint fell within the jurisdiction of the Disciplinary Tribunal or whether the complaint was within the exclusive jurisdiction of the Employment and Labour Relations Court as contended by the appellant.

[28] In our view, the learned judge of the High Court cannot be faulted in finding that the Disciplinary Tribunal was entitled to arrive at the decision it made. It was not for the judge to determine whether the Disciplinary Tribunal was wrong or right in deciding that the preliminary objection was not a pure point of law. The learned judge of the High Court could not in exercise of his judicial review jurisdiction usurp the powers of the Disciplinary Tribunal in considering the objection and substituting his view. Moreover, the issue of jurisdiction, was not moot but remained alive to be raised again at the appropriate time.

[29] The appellant has argued that there was breach of Article 47 of the Constitution as read with the Fair Administrative Actions Act, as he was not given any reasons for the Disciplinary Tribunal's decision. We find that the appellant was less than candid in making that submission. As we have demonstrated by quoting the decision verbatim, at paragraph 22 of this judgment, the Disciplinary Tribunal gave clear reasons why it rejected the preliminary objection.

[30] We appreciate that the preliminary objection related to jurisdiction of the Disciplinary Tribunal and that under ordinary circumstances, the issue of jurisdiction should be addressed at the earliest opportunity. However, a determination on the issue could only be properly made if all relevant information was before the court. The issue of jurisdiction, could only be addressed as a preliminary issue if the objection regarding jurisdiction was anchored on factual issues that were pleaded and were uncontested, so that the issue before the Disciplinary Tribunal would have been simply applying the law to the uncontested facts, but, that was not the position that the Disciplinary Tribunal was faced with.

[31] In her application for judicial review, the appellant not only challenged the decision of the Disciplinary Tribunal regarding her preliminary objection but also introduced an element questioning the merit of the decision arrived at when she stated in her ground No. 8 that:

**"By virtue of Article 162(2)(a) of the Constitution as well as section 12(c) of the Industrial Court Act, the Employment and Labour Relations Court has exclusive jurisdiction to deal with (sic) and disputes relating to labour relations. Thus, the Disciplinary Committee does not and cannot have any jurisdiction over disputes and complaints relating to labour relations."**

[32] As already stated, the issue of jurisdiction was still alive as the appellant was still free to re-argue her objection in the normal manner after the Disciplinary Tribunal had had the benefit of full arguments and affidavit evidence. Thus, it would have been premature and improper for the learned judge of the High Court to determine whether the Disciplinary Tribunal was acting ultra vires without giving it an opportunity to consider the matter, and make a decisive decision.

[33] We come to the conclusion that the learned Judge properly exercised his discretion and took into account relevant matters in rejecting the motion for review, and that there is no justification for us to interfere with his decision

[34] For these reasons, we find that this appeal has no merit. It is accordingly dismissed with costs.

**DATED and delivered at Nairobi this 25<sup>th</sup> day of January, 2019.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR.**