



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 142 OF 2018**

**BETWEEN**

**MARTIN TINDI KHAEMBA.....APPELLANT**

**AND**

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

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

**3. SALIM MWAROPHA MANANO.....3<sup>RD</sup> RESPONDENT**

*(This appeal arises from the Ruling and Order of the High Court of Kenya*

*at Mombasa (Hon. E.K.O. Ogola, J.) delivered on 31<sup>st</sup> May 2017*

*in*

*HCCC Judicial Review Application No. 22 of 2016)*

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**JUDGEMENT OF THE COURT**

***Martin Tindi Khaemba, the appellant***, an advocate of the High Court of Kenya is aggrieved by the Ruling and Order of the High Court (*Ogola, J.*) of 31<sup>st</sup> May 2017 wherein the court determined that his Judicial Review application to prohibit proceedings in *Disciplinary Cause No. 155 of 2015* against him scheduled for hearing on Monday 18<sup>th</sup> April 2016 before the Advocates Disciplinary Tribunal (*the Tribunal*) was premature.

On 26<sup>th</sup> April 2016, the appellant filed a Chamber Summons in the High Court. In the application he sought for leave to apply for an order of certiorari to remove into the High Court and quash the proceedings of the respondent in *Disciplinary Cause No. 155 of 2015*, against the exparte applicant scheduled for hearing on Monday 18<sup>th</sup> April 2016; leave to apply for orders of Prohibition prohibiting the respondents, interested parties or any person acting in their behalf from continuing with *Disciplinary Cause No. 155 of 2015* against him on the hearing date 2016, and for leave that the prayers sought operate as a stay of the proceedings in the *Disciplinary Committee Cause No. 155 of 2015*.

The application was premised on the grounds to wit, that, the appellant has demonstrated that in the face of the High Court's orders made by the *Kasango, J.* it would be unfair, unjust and a breach of his right to a fair hearing for the Tribunal to entertain the complaint, and that proceeding to trial and determination thereof would amount to an illegality or an "error of law" by the Tribunal; that the Tribunal lacked jurisdiction to set aside the charging order and the Certificate of Taxation of 8<sup>th</sup> September, 2014, both of which remain unchallenged; that as an advocate, the appellant was entitled to apply for an order under **section 52** of the *Advocates* to charge a portion of the property originally known as Plot No. MN/V/288 and MN/VI/855 (*the disputed property*); that by proceeding with the trial, the Tribunal is displaying gross unreasonableness in the decision taken, particularly as it will be sitting as an appellate court against the High Court's charging order.

The application was supported by the affidavit of the appellant sworn on 11<sup>th</sup> April 2016 where it was deponed that, it was unfair, unjust and a breach of his right to a fair hearing for the Tribunal to entertain the complaint and to proceed to the trial, when the High Court (*Kasango, J.*) had awarded him 3 acres of the disputed property in lieu of legal fees where after finalization of a claim for adverse possession, and

judgment was delivered, the leaders of Mabirikani Village were in the process of selling and transferring portions of the disputed property to third parties without settling the accrued legal fees; that as an advocate, he was entitled to apply to the court for a charging order over a portion of the disputed property.

It was further deponed that the remedy left to the interested parties was to challenge the charging order apportioning 3 acres in lieu of legal fees in court, and that therefore the complaint on the same subject matter was *res judicata* and the Tribunal had no jurisdiction to determine it; that in view of the High Court's charging order, the apportioning of three acres in lieu of fees did not amount to professional misconduct under **section 60 (1)** of the **Advocates Act**; that therefore the Tribunal's hearing is tainted with illegality since it is acting without jurisdiction or "*ultra vires*" in the face of two Court orders that have remained unchallenged.

The appellant further averred that the complaint filed, by Salim Mwaropha Maneno who purported to be the chairman of the Mabirikani Village Land Committee yet, the judgment in HCCC no. 328 of 2010 was made in favour of Iddi Ibrahim and Yusuf Nevi on behalf of 127 members of the Mabirikani Village Land Committee and hence the affidavit as presented is by an individual purporting to be the chairman whilst the judgment in issue shows someone else; who is not meant that the complaint lodged was invalid.

The brief history behind the application is that the appellant was instructed to act for Mabirikani Village Land Committee in *Civil Case No. 30 of 2016* in a claim for adverse possession over the disputed property. Upon delivery of the judgment where 152 acres of the disputed property was granted to the respondents, he sought for payment of his legal fees which were not forthcoming. Instead, the members of the group began quarrelling over the disputed property and proceeded to apportion it amongst themselves without settling the outstanding legal fees. As a consequence, the appellant filed a Bill of Costs for Taxation which was taxed and a certificate of taxation issued on 8<sup>th</sup> September, 2014, for a sum of Kshs. 14,000,000; that thereafter under **section 52** of the **Advocates Act** he sought and obtained a charging order for 3 acres of the disputed property in lieu of legal fees from the High Court (Kasango, J).

His actions provoked the 3<sup>rd</sup> respondent to lodge a complaint against the appellant with the Tribunal for professional misconduct on 19<sup>th</sup> August 2015, and by a letter dated 31<sup>st</sup> August 2015, the appellant was invited to respond to the allegations within 14 days. In a letter dated 9<sup>th</sup> September 2015, the appellant provided an explanation to the Tribunal after which, the matter was set down for Plea taking on 23<sup>rd</sup> November 2015. Before the complaint could be heard and determined, the appellant filed the Chamber Summons seeking to quash the proceedings by the Tribunal.

In determining that the motion was premature, and whether the disciplinary action by the Tribunal was *res judicata*, the trial court concluded that the Tribunal could not be prevented from executing its statutory mandate through the issuance of the prohibitory order sought, and that it was the appellant's duty to submit himself before the Tribunal to explain how three acres of the disputed property came to be excised and registered in his name.

The appellant was aggrieved by the High Court's decision, and filed this appeal on grounds that, the learned Judge erred in failing to find that the Tribunal's decision to take a plea without giving him an opportunity to reply showed that it had made up its mind, and hence committed a procedural irregularity; that the learned judge wrongly found that the Tribunal had jurisdiction to deal with the complaint, the subject matter of which had already been heard and determined by the High Court; that the Tribunal did not have jurisdiction to question the charging order of the High Court; that the learned judge wrongly perceived that the appellant should not have "*rushed*" to the High Court by "*running away*" from the proceedings of the Tribunal, yet the appellant's complaint was that the Tribunal had already committed a procedural impropriety by denying him the right to respond before communicating the plea decision; that the learned judge was wrong in confirming that the mandate of the Tribunal was not limited to interrogating the court orders, notwithstanding that it did not have appellate jurisdiction; in observing that the appellant "*had acted*" above board and in due course, may be vindicated; in failing to appreciate that the matter was *res judicata*; in directing the appellant to submit himself to the jurisdiction of the Tribunal despite the procedural irregularity and the jurisdictional challenges raised; in concluding that the appellant approached the court under the wrong provision; that the court, while observing the rules of natural justice, should not be unreasonably restricted by procedural technicalities.

In his submissions before us, learned counsel, **Martin Tindi** who is the appellant herein submitted that he was entitled to his legal fees, and any action against the High Court's (Kasango, J's) order was void. Faced with that order, Counsel argued, the Tribunal did not have jurisdiction to hear and determine the complaint.

Learned counsel for the respondent, **Ms. C.N. Wanyama** relied on the respondent's submissions in the High Court, but added that, the disciplinary proceedings were in respect of the appellant actions in subdividing and excising a portion of the disputed property, and that the Court should only be concerned with the procedure adopted by the Tribunal and not the substance. Counsel submitted that the Tribunal was empowered to hear the complaint as the appellant was an advocate of the High Court, and he should therefore have submitted himself before the Tribunal to address the allegations of professional misconduct. In support of this assertion, counsel relied on the case of **Patricia Njeri Wanjama vs Advocates Disciplinary Committee & Another [2019] eKLR**; that what the appellant sought was to quash a decision that had yet to be made and therefore the challenge to the procedural irregularity of the Tribunal cannot be said to have arisen.

We have considered the pleadings and the submissions of the parties and surmise that the questions for consideration are whether the Tribunal committed a procedural irregularity in proceeding with taking of the plea, and whether the learned judge rightfully declined to exercise his discretion to grant the orders sought for reasons that the appellant's case was premature since the Tribunal had yet to render a decision in respect of the complaint in *Disciplinary Cause No. 155 of 2015*.

To arrive at a determination of the issue, it is necessary to establish whether there was a complaint, and whether the appellant was eligible to appear before the Tribunal.

To begin with **section 55** of the **Advocates Act** states that;

***"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.”*

Section 60 (1) of the *Advocates Act* establishes the Disciplinary Tribunal and empowers it to receive complaints from any person against an advocate for professional misconduct. The provision stipulates that;

***“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.”***

As such, the Tribunal’s responsibility is firstly, to receive and respond to complaints received from any person, secondly, to hear and determine the complaint which must be made against an advocate, and thirdly, the complaint must be for professional misconduct. It is not in dispute that the appellant is an Advocate of the High Court, and it is not disputed that the Tribunal received a complaint for professional misconduct from the 3<sup>rd</sup> respondent.

In effect, the conditions outlined above having been satisfied makes it clear that the Tribunal had the requisite jurisdiction to receive the 3<sup>rd</sup> respondent’s complaint against the appellant, and to order him to appear before it to answer to the allegations set out in the complaint.

This leads us into the next issue, which is whether the Tribunal’s order for the appellant to take plea was procedurally irregular and triggered the supervisory jurisdiction of the High Court under judicial review. The appellant’s case is that upon determining that a plea should be taken, the Tribunal had rendered a decision without giving the appellant a right to reply; that despite the appellant having been notified to respond within 14 days, the Tribunal had already made up its mind to prosecute the appellant by ordering that the plea be taken, and in so doing had committed a procedural irregularity.

Addressing when a decision becomes the subject of a judicial review, in the case of *Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR* this Court succinctly stated thus;

***“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. the 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 judicial review.”***

In the instant case, an affidavit of complaint was made against the appellant on 19<sup>th</sup> August 2015, and in a letter of 31<sup>st</sup> August 2015, the 1<sup>st</sup> respondent invited the appellant to respond to that complaint within 14 days. The appellant responded on 9<sup>th</sup> September 2015, disputing the complaint, and provided the particulars of his defence. On 2<sup>nd</sup> November 2015, he was informed that a plea was fixed for hearing before the Tribunal on 23<sup>rd</sup> November 2015. The appellant was also informed that his presence was mandatory. From the sequence of events, it is apparent that before the plea was taken, the appellant was provided with a right of reply, which he did on 9<sup>th</sup> September, 2015 well before he was notified that the plea was to be taken. Subsequently thereto, he was informed on 2<sup>nd</sup> November, 2015 that a plea would be taken and on 24<sup>th</sup> March 2016, the Tribunal entered a plea of “not guilty” and ordered the appellant to file a replying affidavit within 21 days. Thereafter, he was duly informed that a hearing of the complaint would take place on Monday 18<sup>th</sup> April 2016. Given the foregoing, we are not satisfied that there was any procedural irregularity occasioned on the part of the Tribunal leading up to the taking of the plea, and we consider this ground to be unfounded.

We turn now to the issue of whether the Tribunal had jurisdiction to hear the complaint for reasons that High Court (Kasango, J.) had in the case of *Miscellaneous Application No 27 of 2013, Martin Tindi Kahemba vs Iddi Ibrahim and Yusuf Nevi* granted him a charging order over the disputed property in terms of **section 52** of the *Advocates Act*. The appellant asserts that in view of the High Court’s decision, the right thing for the complainant to do was to challenge it on appeal. In this regard, the learned judge stated that;

***“Now it is clear that Mr Tindi’s argument is vindicated by the court processes, which have upheld his conduct and even allowed him 3 acres in lieu of cash and a Taxation Certificate duly issued. It is clear that Mr. Tindi has acted above board if the Rulings before the court are anything to go by. It is also clear that the Disciplinary Tribunal may be satisfied by the vindication the High Court has given Mr. Tindi and which have not been appealed. However, in all these Mr. Tindi has forgotten that Judicial Review proceedings are concerned with procedure leading to a decision. Further, Mr. Tindi has also forgotten that the Advocates Disciplinary Tribunal also has mandate which is not limited by whatever may be taking place elsewhere, unless of course there is an order of stay.”***

The court then went on to state;

***“The exparte Applicant has submitted that by virtue of the Tribunal hearing the complaint against him, the Tribunal will be sitting on appeal in respect of a Ruling by the High Court in taxation proceedings and that more so bearing in mind that no Appeal has been filed to challenge the said Ruling. The opinion of the court is that the Respondents have a statutory obligation to hear the complaint brought before it whether the matter has been brought before it whether or not the matter has been concluded in the Court. It is the duty of the exparte Applicant to submit himself to the jurisdiction of the Disciplinary Tribunal, and explain to the Tribunal what transpired in the court.”***

In other words, what the judge was saying was that following receipt of the complaint against the appellant, the Tribunal had an obligation to hear the complaint, and the appellant had a duty to submit himself to the jurisdiction of the Tribunal in order that the complaint could be

heard and determined; that as no decision had been rendered, there was no decision upon which the High Court could exercise its supervisory jurisdiction of Judicial Review under **Article 165 (2) (c)** of the **Constitution** in order to ascertain its procedural veracity.

In the case of **Biren Amritlal Shah & Another vs Republic & 30 others [2013] eKLR** this Court stated thus;

**“Judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question.”**

And expounding on the principles of judicial review in the case of **Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** the court was clear that;

**“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant...**  
(emphasis ours).”

The Tribunal, which is an independent authority, is charged with the responsibility to hear complaints for professional misconduct against an advocate and to render a determination in respect of such complaint. Where, as specified under the proviso to **section 60 (3)** the Tribunal does not dismiss the complaint without requiring, “...*the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint,*” it becomes incumbent upon such advocate to submit himself or herself before it so that the complaint can be heard and determined.

What the Tribunal is concerned with in this case, is whether the appellant’s actions that culminated in the excision of three acres of the disputed property amounted to professional misconduct. It is upon this question, and not the question of whether the Tribunal will be sitting on appeal in respect of the impugned rulings of the High Court, that the Tribunal’s decision in *Disciplinary Cause No 155 of 2015* is required. For that determination to be made one way or the other, it now remains for the appellant, as an advocate of the High Court, to appear before the Tribunal to answer to those allegations. If he is dissatisfied with such decision, it may become a basis for judicial review.

Accordingly, we have no reason to interfere with the learned Judge’s exercise of discretion. The appeal is unmerited and is dismissed with costs to the respondents.

**It is so ordered.**

**Dated and delivered at Malindi this 11<sup>th</sup> day of July, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

