IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 262 OF 2017

BETWEEN

PETER KINYANJUI.....APPELLANT

AND

ADVOCATE DISCIPLINARY TRIBUNAL....1ST RESPONDENT

ANNE WAMBUI NGUGI.....2ND RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya

at Nairobi (Odunga, J.) dated 7th March, 2017 in

High Court Misc. Application No. 6 of 2016)

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JUDGMENT OF THE COURT

The circumstances giving rise to this appeal are adequately summarized in Civil Appeal No. 326 of 2012, a decision rendered by this Bench on 20th April, 2018. It should be noted that the two appeals, though arising from the same transaction, were not consolidated. The particular suit to which this appeal relates was brought against the advocate who drew up the agreement, the subject matter in Civil Appeal No. 326 of 2012. As such, we find no need to recapitulate the background of the dispute here *in extensor*, save to state that the crux of this appeal is an agreement between the appellant and one, Virginia Waithira Mwangi (the respondent in Civil Appeal No. 326 of 2012) made on the 9th of February 1992, in which the latter undertook to pay Kshs. 67,000 to the former for work done and materials supplied to construct the latter's house. This agreement was witnessed by the 2nd respondent in this appeal, an advocate who acted for both parties and was paid the requisite legal fees.

The 2nd respondent is alleged to have taken custody of title documents (Certificate of Lease, Transfer Forms, Sale Agreement and a Deed Plan for **Plot No. SSS 6/97 or Block 1/100 Thika Municipality**) as a guarantee for the payment of the aforesaid Kshs. 67,000. It is further alleged that part payment in the sum of Kshs. 20,000 was also made to the 2nd respondent, who, in turn, is said to have released it to the appellant.

It was a term of the agreement that Virginia would pay the appellant Kshs. 2,000 by monthly installments until final settlement. When Virginia failed to pay the first installment, the appellant filed Civil Suit No. 68 of 1993 at Thika Magistrates Court against her. She engaged the 2nd respondent who came on record and filed a defence. Although Virginia subsequently hired the services of another advocate, the appellant proceeded to commence disciplinary proceedings before the Advocates Disciplinary Tribunal in Cause No. 104 of 2014 against her alleging that, by acting for Virginia, one party to the agreement and failing to release the documents to him, the 2nd respondent committed professional misconduct.

On 2nd March, 2015, the matter came up before the Tribunal but was not heard for non-attendance by the 2nd respondent. Eventually, the complaint proceeded by affidavit evidence. While judgment was pending, the Tribunal ordered the appellant to provide further particulars before judgement. Both sides were granted leave to file affidavits. In her replying affidavit, the 2nd respondent denied that the appellant was her client. She pointed out that the appellant had earlier on lodged a complaint with the Advocates Complaints Commission (ACC) on 8th August, 1996 and upon the ACC conducting investigations, she was absolved of any wrong doing.

In determining this complaint, the Tribunal noted that the 2nd respondent, in fact, did drew up the agreement between the appellant and Virginia. But from the agreement, the Tribunal found that there was no proof that the 2nd respondent was retained by the appellant or that the appellant gave the 2nd respondent the title documents or that the 2nd respondent was holding any money on behalf of the appellant. The Tribunal concluded that;

> **"The fact that an advocate draws a contract is not proof that he or she necessarily represents one or both the parties."**

Finding that the 2nd respondent did not engage in any form of professional misconduct, the Tribunal cleared her of all charges against her.

Aggrieved by this decision, the appellant moved High Court, *inter alia*, for an order of *certiorari* to quash the decision of the 1st respondent for being unprocedurally and unlawfully arrived at; a substitution of the said decision with an order directing the 2nd respondent to release all his title documents; a refund of all the money being held by the 2nd respondent and costs.

After considering the submissions by both parties, the learned Judge reminded himself that the remedy of judicial review is concerned with reviewing, not the merits of the decision, but the decision-making process itself. On the grounds upon which the application was premised, the Judge pointed out that the appellant's concern was the allegation the 1st respondent granted leave to the 2nd respondent to file her replying affidavit on the day that the matter was fixed for judgment. But because the applicant did not deny that the 1st respondent had jurisdiction to grant such orders, the Judge concluded that;

> **"….Whereas the same may, to an appellate court be found to have been a wrong exercise of discretion, this court not being an appellate tribunal over the decision of the 1st respondent cannot inquire into the merits of its decision. Such a decision can only be challenged by way of an appeal to the High Court and such option is available in respect to the decisions of the 1st respondent.**
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> **24. In my view the route that the applicant has taken in challenging the decision of the 1st respondent cannot lead him in that destination he intended to arrive at. If he felt that the decision of the 1st respondent was incorrect he ought to have filed an appeal against the 1st respondent's decision. In other words even if I was to be of the view that the first respondent in exercising its undoubted discretion, did so wrongly, I am not entitled to substitute my discretion for that one of the 1st respondent in proceedings of this nature."**

The learned Judge found that there was no merit in the judicial review application and dismissed it with costs to the respondents.

Subsequent, upon the delivery of this Judgment, the appellant instituted a motion on notice dated 25th August, 2016, asking, in the main, that the portion of the judgment directing him to meet the costs of the respondents be reviewed, varied or set aside. He wondered how he would be condemned to pay costs when the court had found him to have no means to institute an action and allowed him to do so as a pauper.

Odunga J. in the impugned ruling agreed and on that score conceded that the order on costs was issued through inadvertent error on the part of the court, thus satisfying the stricture of an error or mistake apparent on the face of the record under **order 45 rule 2** of the Civil Procedure Rules. He corrected it by reviewing his decision and declaring that the portion in the judgment awarding costs against the appellant be set aside. For that application, he made no orders as to costs.

It may appear strange that an order, which on the face of it appears to be in favour of the appellant, would aggrieve him. He has challenged that decision on 8 grounds summarized as follows; that the learned Judge erred by: holding that the High Court in its review jurisdiction could not alter or vary the finding of the Tribunal while it has inherent jurisdiction; finding that the issues raised did not fall within the purview of judicial review; finding that the appellant had no recourse to an appellate process in the judicial review division despite the appellant urging that the Tribunal's proceedings were unprocedural; holding that the judicial review division had only supervisory jurisdiction; holding that an order quashing the Tribunal ruling could not issue; and holding that the court could not review its decision.

The appellant, appearing in person before us contended that the learned Judge, having reviewed his earlier decision on costs ought to have granted him the other prayers sought, because by granting him costs the learned Judge had in effect found merit in his suit.

In opposing the appeal, Mr. Mulekyo, learned Counsel for the 1st respondent submitted that the Memorandum of Appeal, though relating to the ruling of 7th March, 2017, the grounds upon which it was brought are irrelevant as they relate to the judgment of 29th June, 2016. Counsel found no fault with the determination of the learned Judge on judicial review application.

Though duly served, the 2nd respondent failed to file submissions or attend Court for the hearing of the appeal.

We have considered the grounds proffered and the arguments as summarized above. Although we cannot trace in the record the application dated 25th August, 2016 in which the appellant sought the review of the earlier decision, it is nonetheless apparent from the learned Judge's summary in the impugned ruling that the appellant was only aggrieved by the award of costs.

It is unclear, from the memorandum of appeal which decision was being appealed. The notice of appeal is explicit that the appellant was challenging the decision of 7th March, 2017. That decision, as we have observed, related to an application for review which was determined in favour of the appellant hence our trouble in understanding why one would challenge a decision made in one's favour.

Looking at the grounds in the memorandum of appeal, we have no doubt that none relates to ruling of 7th March, 2017. Those grounds fault the conclusions of the learned Judge insisting that he ought to have found that the Tribunal made an error in allowing the 2nd respondent to respond while the judgment was pending delivery; that it was erroneous to state that the appellant had no recourse to an appellate process in the judicial review division, yet the appellant had demonstrated that the Tribunal's proceedings were unprocedural; and for holding that, in the circumstances, the court could not review the Tribunal's decision. Those grounds plainly had no bearing on the decision setting aside the order of costs.

We can only suppose that the appellant was aggrieved by the rejection of his judicial review application and went as far as applying for leave before this Court to lodge an appeal as a pauper. On 24th July, 2017 Karanja, JA granted leave but it would appear the appeal was not pursued. Again, we can only guess that the judgment the appellant intended to challenge was the one rendered on 29th June, 2016.

The leave to appeal as a pauper granted nearly one year later would require another application for enlargement of time. Being ingenious, he lodged this appeal as though dissatisfied with the decision of 7th March, 2017, when his focus was in fact the judgment of 29th June, 2016. It was indeed conceded that no notice of appeal against the judgment of 29th June, 2016 was ever filed.

For these reasons, we find no merit in the appeal. We accordingly dismiss it and make no orders regarding costs.

Dated and delivered at Nairobi this 18th day of May, 2018.

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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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