IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & MOHAMMED, JJ.A)

CIVIL APPEAL NO. 210 OF 2012

BETWEEN

HENRY ASAVA MUDAMBA ……………………………APPELLANT

AND

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA……………….... RESPONDENT

(Appeal against the ruling and order of the High Court of Kenya at Nairobi (Musinga J.) made on 7th June 2011)

in

HC JR NO. 324 of 2010)

****

JUDGMENT OF THE COURT

1. Henry Asava Mudamba (hereinafter referred to as the appellant) is aggrieved by the ruling and order of Musinga. J, (as he then was) issued on 7th June 2011 in respect of the applicant's application for judicial review orders of certiorari and mandamus challenging a decision made by the Institute of Certified Public Accountants of Kenya (hereinafter referred to as the respondent). The trial judge dismissed the application. The impugned decision of the respondent before the trial judge is contained in a letter dated 19th October 2010 by the respondent rejecting an appeal by the appellant under **section 33(3) of the Accountants Act** against the recommendations by the Disciplinary committee of the respondent communicated to the applicant by a letter dated 27th July 2009.

2. In summary and to put the matter in perspective, a complaint was received by the respondent from Capital Markets Authority (hereinafter referred to as CMA) through its letter dated 11th August, 2009 concerning Francis Thuo and Partners Limited in respect of accounts for the year ended 31st December 2006 and for the previous period. The appellant through his firm, Mudamba & Associates were the auditors of the said Francis Thuo and Partners, a stock brokerage firm that eventually collapsed in February 2007. The appellant through his firm had given an unqualified opinion on the financial statements of the brokerage firm despite indications that the brokerage

firm's going concern status was in doubt.

3. The respondent through its disciplinary committee took up the matter with the appellant and undertook a disciplinary process that involved summoning the appellant to defend himself against the charges. The appellant obeyed and attended the disciplinary sessions and made representations including filing submissions. At the conclusion of the process, the respondent's disciplinary committee delivered its verdict through its letter dated 27th July, 2009 in the following terms:-

   "In view of the above, the Committee was convinced that you were guilty of contravening sections 28(1) (n) of the Accountants Act and in accordance with past precedents it recommended that you be suspended for a period of 2 years during which you should undertake Audit Quality Training conducted by a reputable practicing member of the Institute for a year.

   Kindly note that you have 60 days from the date of this letter to either:

   1. ***Comply with the ruling***
   2. ***Appeal to Council in accordance with section 33(3) of the Act; or***
   3. ***Appeal to the High Court in accordance with section 34(1) of the Act."***

   The letter was signed by **John K. Wambugu**, the respondent's Discipline and Regulations Officer.

4. The appellant subsequently consulted his advocate and elected to appeal against this decision to the respondent's council through correspondence initiated through the appellant's advocates. In summary, the appellant sought clarification from the respondent of the applicable procedure; the necessary rules and regulations not having been made. The appellant also requested for copies of documents as well as other materials forming the basis of the appeal and eventually lodged a memorandum of appeal on 29th September 2009 against the 1st decision of the respondent under **section 33(3)** of the Accountant's Act. This letter was acknowledged by Mr. Wambugu through his letter dated 29th September 2009. The appellant expressed concern and sought clarification that Mr. Wambugu was not involved in the consideration of directions relating to the appellant's appeal.

5. By a letter dated 15th October 2009, the respondent replied to the appellant's letter to the effect that Mr. Wambugu was not in any way involved with the consideration of the directions and that the respondent's council was seeking suitably qualified persons to comprehensively look at the memorandum *vis a vis* the evidence and documentation presented in the disciplinary inquiry and thereafter give a recommendation that the council would give regarding the appeal. The appellant responded seeking to have an opportunity to be heard as the memorandum of appeal merely gave an outline of the appellant's case. On 10th December 2009, the respondent informed the appellant that a sub-committee was looking into the matter and would report back. On 14th May 2010, the respondent informed the appellant that its Council's Appeals committee had started looking at the appeal and would be summoning the appellant in a few weeks at which stage all the appellant's concerns would be considered.

6. On 19th October 2015, the respondent through its letter communicated the findings of the appeal to the appellant's advocate in, *inter alia,* the following terms:-

   "The Council therefore rejected your client's appeal and affirmed the disciplinary committee's earlier decision in accordance with section 33(1) (h) and (e) of the Accountant's Act, Number 15 of 2008. Your client therefore stands suspended for a period of 2 years and will be required to undertake supervised audit training conducted by a reputable practising member of the Institute for a period of 1 year after serving the period of suspension."

The appellant, aggrieved by this decision, moved to the trial court by way of judicial review proceedings. The crux of the appellant's grievance was that he was unfairly denied an opportunity to appear before the council to argue his appeal. Indeed, the trial judge made this finding in stating as follows in the judgment:-***"The court has established that the applicant was unfairly denied an opportunity to appear before the council to argue his appeal. But having said that, I must add that the orders which the applicant sought are discretionary in nature."***

The trial judge went ahead to decline the appellant's prayers and dismissed the application prompting the present appeal.

7. The Memorandum of Appeal as filed by the appellant lists seven grounds of appeal summarized as follows:-

a. ***The learned judge erred in dismissing the appellant's application dated 2nd November 2007;***

b. ***The learned judge erred in failing to consider and uphold the appellant's objections that the Replying Affidavit of John Wambugu was inadmissible and could not be relied upon;***

c. ***The learned Judge erred in placing any reliance upon the Affidavit of Mr. John Wambugu who was not a member of the Council;***

d. ***The learned Judge erred in his interpretation and application of section 33(4) of the Accountants Act, 2008;***

e. ***The learned judge erred in declining the relief sought by the appellant as relief in Judicial review is discretionary even though the judge held that the appellant was unfairly denied an opportunity to appear before the council;***

f. ***The learned judge overlooked explicit assurance by the respondent to the appellant that it would promulgate rules governing appeals to it under section 33 before it heard and determined his appeal;***

g. ***The learned judge erred in holding that as under section 35(2) of the Accountants Act 2008, until the Chief Justice made rules for them, the Civil Procedure Rules applied and under Order 42, rule 32 of the Civil Procedure Rules the Council was therefore empowered to enhance the sentence.***

8. At the hearing before us, the appellant was represented by **Mr. Amoko** while the respondent was represented by **Mr. Mwathi Njue**. In essence, each party reiterated its case as presented before the trial court.

9. Mr. Amoko adopted the appellant's memorandum of appeal and the submissions made before the trial court. Learned counsel reiterated that the appellant was never afforded an opportunity to be heard on his appeal and instead disciplinary action was taken by persons unknown to the appellant. This is despite assurances the appellant had received that he would be called.

   Mr. Amoko also took issue with the trial court's reliance on the affidavit of Mr. Wambugu whose participation the appellant had protested and received assurance that Mr. Wambugu would not participate in the process. Mr. Amoko also submitted that the respondent had transformed the memorandum of appeal into a record of appeal and proceeded to make a determination on it without further representation by the appellant. This action in Mr. Amoko's submission was a fundamental error resulting in abuse of discretion by the respondent.

10. In urging us to allow the appeal, Mr. Amoko argued that a breach of rules of natural justice renders a decision a nullity. Counsel referred us to several authorities including ***Hypolito Cassiano de Souza v Chairman and Members of Tanga Town Council (1961) EA 377; David***

Oloo Onyango v Attorney General (unreported). In articulating his argument that it was immaterial whether the appellant would have succeeded or not had he been afforded an opportunity to be heard, counsel referred us to ***John v Rees (1969) 2 ALL ER 274*** and also to **Michael Fordham Judicial Review Handbook (3rd ed.) pages 400 to 404** to advance the position that there was never an argument before the judge. Mr. Amoko faulted the parity of reason used by the judge in applying **section 35(1) of the Accountants Act** allowing recourse to the Civil Procedure rules.

11. In response, Mr. Mwathi learned counsel for the respondent, explained that Mr. Wambugu was the legal advisor of the respondent's disciplinary committee and council and was the right person to swear the replying affidavit, being conversant with the matter. Mr. Mwathi relied on the provisions of **Order 19 rule 3(1) and Order 19(7)** of the **Civil Procedure Code** and urged us to ignore irregularities of a technical nature in terms of **Article 159 (2) (d)** of the **Constitution**. Mr. Mwathi argued that the appellant was not entitled to oral submissions on appeal under **section 33(4)** of the Accountants Act and as such the appellant was not denied natural justice. It was the respondent's case that the council discharged its mandate. Counsel conceded that the appellant may have been denied his legitimate expectation to make an oral presentation before the council through counsel but submitted that such hearing needed not to be vide *viva voce* evidence. Mr. Mwathi agreed with the trial judge's reasoning on how he made his decision concerning judicial discretion and relying on the celebrated case of **Shah v Mbogo** urged us to dismiss the case with costs.

12. In reply, Mr. Amoko pointed out that the trial judge never addressed himself to the admissibility of Mr. Wambugu's affidavit or his impartiality. Learned counsel reiterated that the appellant never asked for oral hearing and would be content had they even been asked to make written submissions.

13. We have considered the record, the respective submissions by the learned counsel and the authorities cited by learned counsel for the appellant and are now at an opportune moment to render our decision. Our mandate on a first appeal is set out in **Rule 29(1)** of this **Court's Rules** and it is to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in ***Selle v Associated Motor Boat Company Ltd [1968] EA 123*;** and that we will not interfere unless we are satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. That principle is the same in ***Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014]eKLR.***

14. In our view this appeal hinges mainly on whether the learned judge was correct in disallowing the appellant's application dated 2nd November 2010 for whatever reason. As already stated above, the trial judge made a finding that the appellant was unfairly denied an opportunity to be heard by the respondent's counsel to argue his appeal, the appellant having been promised that he would be called upon to defend self. There was thereby created a legitimate expectation through correspondence that he would have an opportunity to present his case before the appeal was determined. We are in agreement with this finding, and emphasis that indeed the appellant was not given an opportunity to be heard on his appeal.

15. Despite this finding, the trial judge proceeded to decline the prayers sought by the appellant. From the record before us, the trial judge's approach was based on the fact that the reliefs under judicial review are discretionary in nature and the judge's interpretation of **section 33(4) and 35** of the **Accountants Act**. We also note that the trial judge never addressed himself on the admissibility of Mr. Wambugu's affidavit despite submissions to that effect having been made before him. We have therefore found it necessary to address ourselves to the above issues in determining this appeal.

16. It is important, on the outset, to establish the purpose of judicial review. In ***Municipal Council Of Mombasa V Republic & Umoja Consultants Limited [2002] eKLR*** this Court stated that in judicial review:

"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 our view, the trial judge appears to have gone to the merits of the case in determining the extent to which the council could handle the appeals under **section 33(4)** of the **Accountants Act** as opposed to how the decision was arrived at. This, with respect, amounted to wrong exercise of discretion by the trial judge and the same warrants our intervention. **Section 33(3)** and **(4) of the Accountants Act** provides:-

"(3) ***A member aggrieved by a determination of the Disciplinary Committee under subsection (1) may make an appeal to the Council within sixty days of the communication to him of such determination, providing the grounds upon which the appeal is lodged.***

(4) The Council may upon receipt of an appeal under subsection (3) direct the Disciplinary Committee to re-open the inquiry and shall in such direction specify the aspects of the matter it requires the Disciplinary Committee to reconsider."

The appellant accordingly filed a memorandum of appeal providing his grounds of appeal, receipt of which the respondent acknowledged, adding that the same would be determined and the appellant given an opportunity to argue the same. The appellant insisted that its memorandum of appeal was a mere outline and there was need to argue it out. With this acknowledgment, it was no longer available for the council to deny the re-opening of the inquiry. It was therefore irrational and procedurally improper when the council purported to give its determination of the appeal without taking into consideration the appellant's arguments. The right to be heard is fundamental and is enshrined in **Article 50** of the **Constitution**. It is not for the court to determine whether the respondent's council would have arrived at a different outcome had the appellant been heard as he wished.

17. The circumstances under which orders of judicial review can issue were elaborated by Justice Kasule in the Ugandan case of ***Pastoli V Kabale District Local Government Council & Others [2008] 2 EA 300*** at pages 303 to 304 thus:

"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: See **Council of Civil Service Union v Minister for the Civil Service** ***[1985] AC 2; and also*** **Francis Bahikirwe Muntu and others v Kyambogo University**, ***High Court, Kampala, miscellaneous application number 643 of 2005 (UR). 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)."***

18. As already stated above and from our perusal of the record and proceeding from the trial judge's finding that the appellant was unfairly denied audience, we are convinced that aspects of irrationality and procedural impropriety were encountered in the proceedings leading to the decision against the appellant. As per the letter dated 27th July 2009, the appellant had the option of either appealing to the respondent's council or to the High Court. The appellant exercised the latter and should not be faulted for exercising that choice however convoluted the process would be. This in effect is what led to the appellant seeking reliefs for judicial review and in particular orders of certiorari or mandamus.

19. The reach of the judicial review orders was laid down by the Court of Appeal in ***Kenya National Examination Council V Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 Of 1996 (Unreported)*** when it stated:

"That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. . . . What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed…………..

Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

Having established the applicable law, it is our view that given the circumstances of the case, the

appellant had well satisfied the conditions of grant of the relief sought for judicial review by the trial court.

20. From the foregoing we do not find it necessary to go to the admissibility of the replying affidavit or parity of reasoning under **section 35** of the **Accountants Act** as that would in our view amount to going to the merits of the appeal with the potential consequence of embarrassing the objective hearing of the appeal.
20. For the above reasons, we allow the appeal, set aside the High Court ruling and order of the trial judge issued on 7th June 2011 and substitute therefore an order allowing the appellant's Notice of Motion application dated 2nd November, 2010 with costs.

It is so ordered.

Dated and delivered at Nairobi this 4th day of December, 2015.

G. B. M. KARIUKI

………………………………

JUDGE OF APPEAL

P. M. MWILU

……………………………….

JUDGE OF APPEAL

J. MOHAMMED

…………………………….…

JUDGE OF APPEAL

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

DEPUTY REGISTRAR