

Professional Ethics: An Advocate's Relationship with other Advocates

By: *Prof. Tom Ojienda, SC**

1 Introduction

An advocate is a person whose name is duly entered upon the Roll of Advocates or upon the Roll of Senior Counsel, for advocates having the rank of Senior Counsel.¹ Certain officers are also entitled to act as advocates,

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Africa" published by Law Africa, 2007; and "Conveyancing Theory and Practice" published by Law Africa, 2002.

Prof Ojienda, SC's published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?""; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions" published in The East African Lawyer, Issue No. 12 at pages 19-24; "Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism" published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; "Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya." (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; "Legal and Institutional Framework of the TJRC - Way Forward" published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; "A Critical Look

at the Land Question in the New Constitution” published in *Nairobi Law Monthly*, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; “Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya’ (with Lydia Mwalimu Adude) published in *Journal of Conflict Management & Sustainable Development*, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; “Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective” (with Lydia Mwalimu Adude) published in *Journal of Conflict Management & Sustainable Development*, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; “Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?” published in *Alternative Dispute Resolution Journal (CIArb-Kenya)*, Vol. 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 44-65; “Access to Justice: A Critique of the Small Claims Court in Kenya’ (with Lydia Mwalimu Adude) published in *Alternative Dispute Resolution Journal (CIArb-Kenya)*, Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; “Conflict of Interest and Public Office in Kenya” (with Lydia Mwalimu Adude) published in *Journal of Conflict Management & Sustainable Development*, Vol 6, Issue 5, 2021, ISBN: 978-9966-046-15-4; and a Book Chapter entitled “Land Law in the New Dispensation” in a book edited by P.L.O. Lumumba and Dr. Mbondenye Maurice.

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including an officer in the office of the Attorney-General or the Office of the Director of Public Prosecutions or such other public officer or an officer in a public corporation as specified by the Attorney General via Gazette Notice.² The legal profession is a self-regulating profession and advocates become members of the Law Society of Kenya (LSK) upon signing the Roll of Advocates.³ Generally, advocates are regulated by **the Constitution of Kenya, 2010 (the Constitution)**,⁴ the **Advocates Act**,⁵ and the various subsidiary legislation made thereunder, **the Law Society of Kenya Act, 2014 (LSK Act, 2014)**,⁶ and the subsidiary legislation made thereunder, and the **LSK Code of Standards of Professional Practice and Ethical Conduct (2017)**,⁷ made pursuant to **sections 4 and 5 of the LSK Act, 2014**.⁸

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¹ Advocates Act, Cap 16, Laws of Kenya, s 2.

² Ibid ss 2 and 10.

³ Law Society of Kenya Act, 2014 (Act No 21 of 2014) s 7; and Advocates Act, Cap 16, Laws of Kenya, ss 15(4) and 16.

⁴ Of particular relevance are chapter four (4) of the Constitution on the Bill of Rights, article 258 of the Constitution regarding the institution of legal proceedings to enforce the Constitution, article 156 of the Constitution on the Office of Attorney-General, and article 157 of the Constitution on the Office of Director of Public Prosecutions. See also the Office of the Attorney-General Act, 2012 (Act No 49 of 2012), the Office of the Director of Public Prosecutions Act, 2013 (Act No 2 of 2013), and the Office of the County Attorney Act, 2020 (Act No 14 of 2020). Moreover, among the objects and functions of the Law Society of Kenya under section 4(b) and (i) of the Law Society of Kenya Act, 2014 (Act No 21 of 2014) is to uphold the Constitution of Kenya and advance the rule of law and the administration of justice, and to formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects the Constitution of Kenya.

⁵ Cap 16, Laws of Kenya.

⁶ Act No 21 of 2014, Laws of Kenya (LSK Act, 2014).

⁷ Gazette Notice No 5212 of 2017, dated 11 March 2017. See The Kenya Gazette, Vol. CXIX—No. 69, dated 26 May 2017 <http://kenyalaw.org/kenya_gazette/gazette/volume/MTUyMA--/Vol.CXIX-No.69/> (accessed 9 August 2021).

⁸ Section 4(c), (e) and (f) of the LSK Act, 2014 provides that the functions and objects of LSK include; ensuring that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they

Professionally, an advocate has duties towards his client, the court, the public, the profession, and other advocates or counsel, whether they are on the same side of a matter or on opposing sides. In *Francis Mugo & 22 others v James Bress Muthee & 3 others*,⁹ Musinga J eloquently stated:

While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an advocate he has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in “*THE ART OF THE ADVOCATE*.” As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth.¹⁰

This paper is concerned about those duties the advocate owes other advocates in the context of their professional relationship. The legal framework on the relationship between advocates is embodied in provisions of the law that pertain to the relations between advocates, particularly as depicted in the Advocates Act,¹¹ and relevant subsidiary legislation made thereunder, the Law Society of Kenya Act, 2014 (LSK Act, 2014),¹² and the relevant subsidiary legislation made thereunder, and the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).¹³

provide; setting, maintaining and continuously improving the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya; and determining, maintaining and enhancing the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya.

⁹ [2005] eKLR, HC (Nakuru) Civ Suit No 122 of 2005 (ruling dated 29 July 2005).

¹⁰ *Francis Mugo & 22 others v James Bress Muthee & 3 others* [2005] eKLR.

¹¹ Cap 16, Laws of Kenya.

¹² Act No 21 of 2014, Laws of Kenya.

¹³ Gazette Notice No 5212 of 2017, dated 11 March 2017. See The Kenya Gazette, Vol. CXIX—No. 69, dated 26 May 2017 <http://kenyalaw.org/kenya_gazette/gazette/volume/MTUyMA--/Vol.CXIX-No.69/> (accessed 9 August 2021).

2 Areas of Conflict in the Relationship between Advocates

There are a number of areas of conflict in the relationship between advocates. Advocate-advocate conflicts or disputes may arise in relation to the:

- (i) Oral and written correspondence between advocates;
- (ii) Professional undertakings made by an advocate;
- (iii) Discovery and exchange of documents and authorities;
- (iv) Confrontation during case presentation in court;
- (v) Change of advocates; and
- (vi) The law business, especially among partners, and even between partners and associates, and between associates themselves.¹⁴

However, though advocates are to zealously represent their client's legal interests,¹⁵ they should remain professional and not take the client's case personally to the extent of transferring the ill feelings of the client to the professional relationship between advocates.

3 Duties of an Advocate to Fellow Advocates

In *Republic v Ahmad Abolfathi Mohammed & another*,¹⁶ the Supreme Court asserted that, **'It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity.'**¹⁷ Consequently, for the sake of professionalism, the advocate's status and duty as an officer of the Court,¹⁸ and the duty to protect and preserve the esteemed reputation of the legal

¹⁴ See e.g., *Virginia Wangui Mathenge v Agnes Wairimu Njoroge & another* [2013] eKLR, HC (Nairobi, Civ Div) Civ Case No 568 of 2012.

¹⁵ In *Republic v Silas Mutuma Marimi & 2 others* [2016] eKLR, HC (Nakuru) Crim Case No 5 of 2016, the Court stated that, 'an advocate is under an obligation to zealously represent his client and to this end he is expected to use all the information and skills he possesses to advance his clients interest (or defend his client against a criminal charge).'

¹⁶ [2019] eKLR, SCoK, Pet No 39 of 2018 (ruling dated 15 March 2019).

¹⁷ *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, para 11.

¹⁸ Advocates Act, Cap 16, Laws of Kenya, ss 15(4) and 55.

profession in the eyes of the public, advocates owe each other the following duties:¹⁹

- (i) Civility, courtesy and respect in court and out of court and in oral and written communication²⁰ – Uncivil, discourteous, and disrespectful behaviour towards a fellow advocate on account of differences in age, sex, ethnicity, race, religion, nationality, social and economic status is uncalled for.²¹ We are all advocates and learned friends and should treat each other with civility, courtesy and respect on that accord, but with the acknowledgement of seniority as applicable.²²
- (ii) Refrain from abuse, insults or disparaging remarks against fellow advocates, especially personal remarks divorced from the professional business of law.
- (iii) Honour express and implied promises, agreements, and professional undertakings (oral and written) made with other advocates in good faith per **order 52, rule 7 of the Civil Procedure Rules, 2010**.²³
- (iv) Exchange written drafts of oral understandings and proposed agreements and consents to ensure that all advocates involved are on the same page;²⁴ avoid sneaking in additions and making deletions that have not been agreed upon.
- (v) Indulge or confer with opposing counsel on the viability of an out of court settlement, through a demand letter and alternative dispute resolution mechanisms, as applicable.²⁵

¹⁹ See e.g., American Bar Association (2 June 2020), 'Lawyers' Duties: Lawyers' Duties to Other Counsel' https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/lawyers_duties/ (accessed 10 August 2021).

²⁰ Also entails the duty of counsel to respond with reasonable promptness to communications from opposing counsel; a view taken by the Queen's Bench of Manitoba in the Canadian case of *Maruca v Yarema* (2016) MBQB 200 (CanLII).

²¹ See Constitution of Kenya, 2010, art 27(4) and (5).

²² See Advocates Act, Cap 16, Laws of Kenya, s 20.

²³ See also Rule 46 of the Law Society of Kenya Digest of Professional Conduct and Etiquette (2000); and SOPPEC 9 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).

²⁴ See e.g., *Maruca v Yarema* [2016] MBQB 200 (CanLII).

²⁵ See *Ibid*.

- (vi) Professionalism during discovery and case management;²⁶ practice good faith advocacy and avoid concealing, altering, falsifying, or destroying evidence, but adhere to advocate-client confidentiality and privilege as provided in **sections 134-137 of the Evidence Act (Cap 80)**.
- (vii) Prosecution counsel to honour the fair trial rights obligations to the defence under **article 50 of the constitution**, including the duty to inform the defence of the evidence the prosecution intends to rely on, and to afford the defence reasonable access to that evidence—also as pertains to rights of an arrested person under **article 49 of the Constitution** and the rights of a detained person under **article 51 of the Constitution**.
- (viii) Communicate the notification of appointment and change of advocates and cessation of representation of a client to opposing counsel, and the court, as required under **order 9 of the Civil Procedure Rules, 2010**, and per **rule 6 of the Advocates (Practice) Rules, 1966**.
- (ix) Avoid 'sharp practice,' including causing disappearance of files and pleadings from court, and unlawfully withholding information and documents during discovery;²⁷ only make

²⁶ See the Canadian case of *Schreiber v Mulrone*y [2007] CanLII 31754 (ON SC), para 27 where the Ontario Superior Court of Justice called out the plaintiff's counsel for avoiding and frustrating the case management of the case; the plaintiff's counsel later agreed to the case management of the case.

²⁷ See e.g., *Pasha Enterprises Limited v Bernard Kinyua Githaka Kiburi* [2015] eKLR, HC (Nairobi) Civ App No 401 of 2011 (ruling dated 29 May 2015), para 11 where the Court dismissed the respondent's application to have the appellant's record of appeal and appeal struck out for being filed out of time and for missing the decree appealed from, faulting the respondent's counsel for sharp practice because, among other things, the respondent's counsel failed to disclose the same to the court when directions were taken on the matter; In *Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue* [2016] eKLR, HC (Nairobi, JR Div) JR Appl No 218 of 2015, para 31, Odunga J recognized that 'sharp practice' amounts to professional misconduct as defined in section 60(1) of the Advocates Act, Cap 16, Laws of Kenya when he stated that, "'Sharp practice", it is my view falls within what can be termed as "disgraceful or dishonourable conduct incompatible with the status of an advocate"; *Institute for Social Accountability & another v National Assembly of Kenya & 4 others* [2020] eKLR, SCoK, Pet No 1 of 2018 (ruling dated 4 August 2020) paras 10-16; and the Canadian case of *Schreiber v Mulrone*y [2007]

- appropriate discovery and interrogatory requests and objections etc.
- (x) Honour and professionalism in undertaking the business of law; among partners, between partners and associates, and among associates.
 - (xi) Not to time the filing and service of documents, written pleadings, submissions, and authorities in a manner that prejudices the opposing party.²⁸
 - (xii) Not to unnecessarily seek adjournment of matters to delay the process of court, the administration of justice, and to unfairly disadvantage the opposing party.
 - (xiii) Reasonably agree to justified requests for extension of time and to lawfully doing away with procedural technicalities where necessary and justified.
 - (xiv) Good faith obligation in scheduling court dates for mentions, hearings etc.
 - (xv) Courtesy and good advocacy during examinations in court (examination-in-chief, cross-examination, and re-examination), and to refrain from harassing and intimidating

CanLII 31754 (ON SC), paras 23-28 where the Ontario Superior Court of Justice expressed itself as follows as concerns 'sharp practice' by the plaintiff's counsel; 'Mr. Anka [counsel for the plaintiff] did not give any advance notice to Mr. Prehogan [counsel for the defendant] that he was going to note the defendant in default or take default judgment proceedings. In the circumstances of this case it is quite obvious that he should have done so. It constituted sharp practice that should not be condoned. While the "Principles of Civility for Advocates" published by the Advocates' Society are not the force of law, the lack of notice to Mr. Prehogan breached those principles of civility. Incredibly, even after instructions had been given by Mr. Anka to obtain a default judgment, he wrote on July 24, 2007 suggesting that there were still interlocutory matters to be dealt with without disclosing the default proceedings. Mr. Anka conceded that his client had not told him not to provide advance or post notice to Mr. Prehogan, so this is something that Mr. Anka took on his own behalf. This lack of frankness should not be condoned.' (See reason 6 in para 24 of the decision.)

²⁸ See e.g., Rule 28 of the Law Society of Kenya Digest of Professional Conduct and Etiquette (2000), which provides that 'As a matter of professional courtesy, the advocate acting for the opposing party should be furnished with a copy of the list of authorities as submitted to the librarian, at least one day prior to the hearing.'

- opposing counsel and witnesses; question and object to questions within the parameters and limits imposed by law.²⁹
- (xvi) Refrain from making false statements of law and fact (material or otherwise) to opposing counsel and the court.
 - (xvii) Do not ascribe to an advocate a position they have neither taken orally nor in writing in court or in the court records, including an exercise of caution in sharing advocate-advocate correspondence to court, except as permitted in law.
 - (xviii) Draft orders and decrees to be approved by the court per the ruling or judgment and get opposing counsel to agree on the contents thereof before presenting them to court.

4 Dispute Resolution in the Context of the Relationship Between Advocates

4.1 Advocates Complaints Commission

The Advocates Complaints Commission is established in **section 53(1) of the Advocates Act** to enquire into complaints against any advocate, firm of advocates, or any member or employees thereof.³⁰ The Commission is under **‘duty to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof.’**³¹ In essence, an advocate may also submit a complaint against another advocate to the Commission. In considering the complaint submitted to it, the Commission may reject those complaints without substance,³² but those with substance will proceed through the disciplinary process set out under **section 53(4) of the Advocates Act**—the Commission will refer to the Advocates Disciplinary Tribunal complaints

²⁹ See e.g., Chapter V of the Evidence Act, Cap 80, Laws of Kenya as pertains to the examination and questioning of witnesses and the production of documents to be used as evidence.

³⁰ See the Advocates (Complaints Commission) (Structure and Procedure) Rules, 2003.

³¹ Advocates Act, Cap 16, Laws of Kenya, s 53(4).

³² *Ibid* s 53(4)(a).

that disclose a disciplinary offence,³³ but if not, the Commission will deal with such matters.³⁴

Nonetheless, in matters that do not appear to be of serious or aggravated nature, the Commission will endeavour to promote reconciliation and encourage and facilitate an amicable settlement between the parties to the complaint.³⁵ However, if the complainant has suffered loss or damage by reason of the advocate's conduct, the Commission may, by order, award such complainant compensation or reimbursement not exceeding KES 100,000.00.³⁶ If a complaint has substance but the circumstances of the case do not disclose a disciplinary offence which can be dealt with by the Advocates Disciplinary Tribunal and the Commission considers that it should not deal with the matter, the Commission may advise the Complainant to refer the matter to the Court if that appears to be the proper remedy.³⁷

4.2 Advocates Disciplinary Tribunal

Section 57 of the Advocates Act establishes the Advocates Disciplinary Tribunal to look into professional misconduct and disciplinary offences by advocates. Further, **section 58A of the Advocates Act** establishes **Regional Disciplinary Committees** with concurrent jurisdiction with the Advocates Disciplinary Tribunal.

By virtue of **sections 60 and 60A of the Advocates Act**, the LSK Council, the Advocates Complaints Commission, and any person, including advocates, can submit a complaint of professional misconduct against an advocate at the Disciplinary Tribunal. **Section 60(1) of the Advocates Act** defines professional misconduct as disgraceful or dishonourable conduct incompatible with the status of an advocate. The complaint against an advocate by a person, including another advocate, is made by way of an

³³ Ibid s 53(4)(b).

³⁴ Ibid s 53(4)(c) and (d).

³⁵ Ibid s 53(5).

³⁶ Ibid s 53(6)

³⁷ Ibid s 53(4)(e).

affidavit setting out the allegations of professional misconduct arising on the complaint.³⁸

The advocate against whom a complaint is made has a right to be heard and if the Disciplinary Tribunal determines that a case has been made out against an advocate, the Tribunal may order that:³⁹

- (a) such advocate be admonished; or
- (b) such advocate be suspended from practice for a specified period not exceeding five years; or
- (c) the name of such advocate be struck off the Roll; or
- (d) such advocate do pay a fine not exceeding one million shillings; or
- (e) such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.

Every advocate is subject to the Advocates Disciplinary Tribunal,⁴⁰ and the LSK Secretariat acts as the administrative arm of the Tribunal, receiving and forwarding complaints to the Tribunal and further forwarding, correspondences as between the Tribunal, the complainant and the advocate against whom a complaint has been made.⁴¹

Appeals against the decisions of the Disciplinary Tribunal lie at the High Court with a further appeal at the Court of Appeal.⁴² Besides, one may file a complaint against an advocate at the Disciplinary Tribunal for professional misconduct occurring in a matter ongoing before the courts. A position that was reiterated by Odunga J in the case of *Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue*,⁴³ where the Honourable Judge stated as follows:

³⁸ Ibid s 60(2).

³⁹ Ibid s 60(4).

⁴⁰ Ibid s 55.

⁴¹ Ibid s 58(3).

⁴² Ibid ss 62-68.

⁴³ [2016] eKLR, HC (Nairobi, JR Div) JR Appl No 218 of 2015.

It was contended that the Judgement in *Disciplinary Committee Cause Number 66 of 2013* was biased, unlawful and contravened the doctrine of *sub judice* as the Complainant has never prosecuted his claim in *Milimani CMCC No. 3623 of 2012 Boniface Otieno Agoro vs. Martin James Mwalimu & Another*. This Court has had occasion to deal with the issue of the concurrency of proceedings before the Respondent Tribunal and in a civil case and held that the mere fact that a party who has suffered a loss as a result thereof is entitled to invoke the Court's jurisdiction under Order 52 rule 7 of the Civil Procedure Rules does not bar a complaint being lodged with the Tribunal on the same issue. This was the position adopted in *R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013* where the Court expressed itself as follows:

"In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent. Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

Therefore, if the applicant's conduct amounted to a professional misconduct, the mere fact that a civil suit was yet to be determined did not bar the Respondent from entertaining the

complaint. Therefore the issues of the Respondent sitting on appeal on a decision of the Court and casting aspersions at the Court do not arise.⁴⁴

4.3 Disciplinary powers of Court

The advocate's relationship to other advocates in court and in relation to the processes of court may give rise to disciplinary action by the court. Pursuant to **section 56 of the Advocates Act**, the disciplinary mechanism for advocates under the Advocates Act, does not supersede, lessen nor interfere with the powers of the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.

Above all, advocates are officers of the Court and **section 55 of the Advocates Act** is clear 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.' Further, **section 15(4) of the Advocates Act** provides that a person duly petitioning to be admitted as an advocate '(...) shall take an oath or make an affirmation as an officer of the Court before the Chief Justice in such form as he shall require, and shall thereafter sign the Roll (...).' In *Republic v Ahmad Abolfathi Mohammed & another*,⁴⁵ the Supreme Court in commenting on the status of an advocate as an officer of the Court stated as follows:

The status of an Advocate as an Officer of the Court, is expressly provided for in *Section 55 of the Advocates Act*. An Advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context, Advocates bear the ethical duty of telling the truth in Court, while desisting from any negative

⁴⁴ *Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue* [2016] eKLR, paras 34-35.

⁴⁵ [2019] eKLR, SCoK, Pet No 39 of 2018 (ruling dated 15 March 2019).

conduct, such as dishonesty or discourtesy. The overriding duty of the Advocate before the Court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.⁴⁶

Courts have inherent powers to hold persons in contempt and to punish for contempt, that is, conduct that tampers with the dignity and authority of the court and disrupts the process of court and the fair administration of justice—in the case of advocates, conduct unbecoming of an officer of the Court.⁴⁷ Under **section 28(1) of the Supreme Court Act, 2011**,⁴⁸ a **contemnor includes a person who assaults, threatens, intimidates, or wilfully insults an officer of the Court (includes advocates) during a sitting or attendance in Court, or in going to or returning from the Court**. A judge of the Supreme Court is empowered to make the order that a contemnor be taken into custody and be detained until the rising of the Court.⁴⁹ The Supreme Court may sentence a contemnor to imprisonment for a period not exceeding five days, or to pay a fine not exceeding KES 500,000.00, or both, for every offence of contempt of court.⁵⁰

In addition, **part IX (rules 56-58) of the Supreme Court Rules, 2020** makes particular provision on the treatment of contempt of court before the Supreme Court—**contempt in the face of the Court (*in facie curiae*), and contempt of court proceedings initiated by the Court on its own motion or on the application of any person**. Regarding contempt in the face of Court, the Supreme Court ‘may cause any person whose conduct before it manifests disobedience, obstruction or contempt, to be detained in custody,’ and contempt proceedings will follow thereafter.⁵¹ In any other cases, and by virtue of **section 28(4) of the Supreme Court Act, 2011**, where contempt proceedings are initiated on the motion of the Court or on the application of any person, the contemnor will be given an opportunity to be heard before

⁴⁶ *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, para 7.

⁴⁷ *Ibid* paras 24-30.

⁴⁸ Act No 7 of 2011, Laws of Kenya.

⁴⁹ Supreme Court Act, 2011, s 28(2).

⁵⁰ *Ibid* s 28(3).

⁵¹ Supreme Court Rules, 2020, r 56.

the Court makes its determination on the matter.⁵² Under **rule 58 of the Supreme Court Rules, 2020**, the penalty for contempt of court is such order as the Supreme Court may deem fit, including the issuance of an order denying audience to the contemnor for a period not exceeding one year.

Contempt proceedings may also be taken at the Court of Appeal,⁵³ the High Court,⁵⁴ and the Magistrates' Courts,⁵⁵ which Courts are equally empowered to punish for contempt. In *Equip Agencies Limited v Credit Bank Limited*,⁵⁶ Warsame J (as he then was), when considering the framework on the enforcement of professional undertakings between advocates, expressed himself as follows:

In my understanding an undertaking is usually given to ease and smoothen the path of transactions carried out by Advocates. It is a convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a contract between

⁵² Ibid r 57.

⁵³ Section 38 of the Court of Appeal (Organization and Administration) Act, 2015 (Act No 28 of 2015) empowers the Chief Justice, in consultation with the President of the Court of Appeal, to generally make rules for the better administration and organization of the Court of Appeal, including rules on the procedure relating to contempt of court.

⁵⁴ See High Court (Organisation and Administration) (General Rules), 2016, pt VIII, rr 39-42 on the procedure relating to contempt of court before the High Court and contempt of subordinate courts, including revision of orders of a subordinate court to punish for contempt—rule 39 is very particular as to the objectives of punishing for contempt, which include to: 'uphold the dignity and authority of the Court; ensure compliance with the directions of the Court; ensure the observance and respect of due process of law; preserve an effective and impartial system of justice; and maintain public confidence in the administration of justice as administered by court.' The rules are made pursuant to section 39 of the High Court (Organization and Administration) Act, 2015 (Act No 27 of 2015) which generally empowers the Chief Justice to make rules for the effective organization and administration of the High Court, including rules on the procedure relating to contempt of court.

⁵⁵ See Magistrates' Courts Act, 2015 (Act No 26 of 2015), s 10. Section 20 of the Act generally empowers the Chief Justice to make rules for the effective organization and administration of the Magistrates' Courts, including rules on the procedure relating to contempt of court.

⁵⁶ [2007] eKLR, HC (Nairobi, Milimani Commercial Courts) Civ Case No 773 of 2004 (ruling dated 28 February 2007).

Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another.

In my humble view an undertaking is a promise to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under.

It is my position that breach of professional undertaking can result in lack of mutual or cordial trust between Advocates. And invariably puts the administration of justice into disrepute. The Advocates by relating together through a professional undertaking are officers of the court, therefore as far possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship.

In HCCC 2721/1976 Kenya Commercial Bank v Adala, Hancox J held

“1) The courts have inherent power to commit an Advocate for breach of an undertaking. The court has jurisdiction over an Advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client’s right. Therefore the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction.

2) The purpose of the punitive and disciplinary powers of the court’s jurisdiction over Advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of [Sections 55 and 56] of the Advocates Act Cap 16 Laws of Kenya”.⁵⁷

⁵⁷ Equip Agencies Limited v Credit Bank Limited [2007] eKLR.

Warsame J (as he then was) then proceeded to justify the court's exercise of disciplinary powers over advocates in general and in the context of professional undertakings, and asserted that:

It is not the business of the court to oppress an Advocate for no reasonable cause. The court is always reluctant to degrade an Advocate unless the circumstances shows that his conduct is dishonourable as an officer of the court. It is for that reason that the court would exercise its punitive and disciplinary powers to ensure that Advocates conduct themselves in a manner that pleases the eyes of justice. It is within the powers of the court to prevent a breach of duty by an Advocate, especially when he has given an unequivocal undertaking to another Advocate. As a matter of good practice relationship between Advocates must be resolved between themselves without recourse to the courts. However, when the dispute lands before court, the court would enforce that which is honourable among the officers of the court. The court would not shy away from exercising its punitive and disciplinary jurisdiction to ensure compliance of the promise given by an Advocate and acted upon by another Advocate.⁵⁸

4.4 LSK's Intervention in Advocate-Advocate Disputes

Section 4(f) of the LSK Act, 2014 provides that **one of the functions and objects of LSK is to represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare.** This means that LSK can be the first stop in resolving any conflicts as pertains to the professional relationship between advocates. Where applicable, voluntary mediation of advocate-advocate disputes is one way to resolve professional issues arising between advocates and in turn protecting the reputation of the legal profession in the eyes of the public.

Besides, under **section 41(q) of the LSK Act, 2014**, the LSK Council may, subject to the Act and with the approval by a resolution of members, make **regulations, binding on all members of LSK, prescribing alternative forms of dispute resolution, including reconciliation, mediation and**

⁵⁸ Ibid.

arbitration. Of particular importance is **regulation 96 of the LSK (General) Regulations, 2020**,⁵⁹ which allows the Council to settle disputes, including member to member disputes, through arbitration.

4.5 Judicial proceedings

As already noted above, under **section 53(4)(e) of the Advocates Act**, if a complaint submitted against an advocate at the Advocates Complaints Commission has substance but does not disclose a disciplinary offence to be dealt with by the Advocates Disciplinary Tribunal and the Commission considers that it should not deal with the matter, the Commission may advise the complainant to refer the matter to the Court if that appears to be the proper remedy. Besides, advocates, like any other person, have legal rights. In line with the principle of equality before the law, advocates too are entitled to equal protection of the law just like any other person.

The Constitution is at the forefront as pertains to equal protection of the law. **Article 27(1) and (2) of the Constitution** guarantees to every person equality before the law and the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and fundamental freedoms. Other rights equally applicable to advocates as with any other person are: the right to human dignity under **article 28 of the Constitution**; the entitlement to freedom and security of the person in **article 29 of the Constitution**; the right to fair administrative action under **article 47 of the Constitution**; the right of access to justice under **article 48 of the Constitution**; the rights of an arrested person under **article 49 of the Constitution**; and the fair trial rights under **article 50 of the Constitution**.

Moreover, **article 19(3) of the Constitution** is emphatic that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, and are equally subject only to the limitations contemplated in the Constitution, and in accordance with **article 24 of the Constitution**.⁶⁰ Further, **article 20(1) and (2) of the Constitution** stipulates

⁵⁹ Legal Notice No 32 of 2020.

⁶⁰ Under article 24(1) of the Constitution, a right or fundamental freedom in the Bill of Rights can only be limited by law and any such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation must also take into account all relevant factors, including

that the Bill of Rights applies to all law and binds all State organs and all persons, and every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

Accordingly, an advocate may institute civil proceedings or make a criminal complaint against another advocate for civil or criminal wrongs. In addition, pursuant to **articles 22(1) and 258(1) of the Constitution**, an advocate whose fundamental rights and freedoms under the Constitution are threatened or have been denied, violated, or infringed, just like any other person, has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or that the Constitution has been contravened, or is threatened with contravention.

5 Conclusion

This paper set out to interrogate the areas of conflict in the advocate-advocate relationship, and the duties of advocates to other advocates as depicted in the Constitution, the Advocates Act, and relevant subsidiary legislation made thereunder, the LSK Act, 2014, and the relevant subsidiary legislation made thereunder, and the LSK Code of Standards of Professional Practice and Ethical Conduct (2017). The paper has also explored the avenues for resolving advocate-advocate conflicts and disputes, including the advocates disciplinary mechanisms, disciplinary powers of the court, interventions by LSK in advocate-advocate conflicts and disputes, and judicial avenues and remedies available to advocates who have suffered civil and criminal wrongs, and constitutional contraventions or threatened contraventions in the context of the professional relationship between advocates.

the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

References

Advocates (Practice) Rules, 1966.

Advocates Act, Cap 16, Laws of Kenya.

American Bar Association (2 June 2020), 'Lawyers' Duties: Lawyers' Duties to Other Counsel'

https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/lawyers_duties/ (accessed 10 August 2021).

Constitution of Kenya, 2010.

Court of Appeal (Organization and Administration) Act, 2015 (Act No 28 of 2015).

Equip Agencies Limited v Credit Bank Limited [2007] eKLR, HC (Nairobi, Milimani Commercial Courts) Civ Case No 773 of 2004 (ruling dated 28 February 2007).

Evidence Act, Cap 80, Laws of Kenya.

Francis Mugo & 22 others v James Bress Muthee & 3 others [2005] eKLR, HC (Nakuru) Civ Suit No 122 of 2005 (ruling dated 29 July 2005).

High Court (Organisation and Administration) (General Rules), 2016.

High Court (Organization and Administration) Act, 2015 (Act No 27 of 2015).

Institute for Social Accountability & another v National Assembly of Kenya & 4 others [2020] eKLR, SCoK, Pet No 1 of 2018 (ruling dated 4 August 2020).

Law Society of Kenya (General) Regulations, 2020, Legal Notice No 32 of 2020.

Law Society of Kenya Act, 2014 (Act No 21 of 2014).

Law Society of Kenya Code of Conduct and Ethics for Advocates (2016).

Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).

Law Society of Kenya Digest of Professional Conduct and Etiquette (2000).
Magistrates' Courts Act, 2015 (Act No 26 of 2015).

Maruca v Yarema (2016) MBQB 200 (CanLII).

Noel Cox and Tom Odhiambo Ojienda, 'The Enforcement of Professional Ethics and Standards in the Kenyan Legal Profession' (CreateSpace Independent Publishing Platform (Amazon), 2013).

Office of the Attorney-General Act, 2012 (Act No 49 of 2012).

Office of the County Attorney Act, 2020 (Act No 14 of 2020).

Office of the Director of Public Prosecutions Act, 2013 (Act No 2 of 2013).

Pasha Enterprises Limited v Bernard Kinyua Githaka Kiburi [2015] eKLR, HC (Nairobi) Civ App No 401 of 2011 (ruling dated 29 May 2015).

Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR, SCoK, Pet No 39 of 2018 (ruling dated 15 March 2019).

Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue [2016] eKLR, HC (Nairobi, JR Div) JR Appl No 218 of 2015.

Republic v Silas Mutuma Marimi & 2 others [2016] eKLR, HC (Nakuru) Crim Case No 5 of 2016.

*Schreiber v Mulrone*y [2007] CanLII 31754 (ON SC).

Supreme Court Act, 2011 (Act No 7 of 2011).

Supreme Court Rules, 2020.

Virginia Wangui Mathenge v Agnes Wairimu Njoroge & another [2013] eKLR, HC (Nairobi, Civ Div) Civ Case No 568 of 201