



REPUBLIC OF KENYA
OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

YOUR REF: TBA

Date: 18/11/2022

OUR REF: CC/PE/AUG/22/36 (6833)

ERICK MANGO OTIENO

P.O BOX 184-40400

SUNA, MIGORI

“Via Email; erickmango2006@yahoo.com ”

Dear Sir,

**RE: YOUR COMPLAINT AGAINST OWADE & CO. ADVOCATES AND MUDEYI
ALBERT OKUMU, ADVOCATE**

We write making reference to the above matter being your complaint lodged with the Commission on 19TH August 2022.

Upon perusal of your complaint, we noted that your complaint was against two advocates as mentioned herein above for their failure to prosecute your accident claim on time and thus leading to frustration resulting from their breach of duty of care to you as the client.

We did also peruse your submissions as received and wrote to you vide our letters dated 5/9/2022 and 20/9/2022 as well as our tele-conversation with you on 14/11/2022. In our letters we emphasized that you:-

1. Avail proof of payment of the legal fees to the advocate(s).
2. Documentary evidence to substantiate your claims against the said advocates.

3. Avail proof of advocate-client relationship between yourself and the advocates.
4. You are knowledgeable of our mandate as the Commission as per section 53 of the Advocates Act CAP 16.

We herein issue our response as follows:-

The Mandate of the Advocates Complaints Commission

The Advocates Complaints Commission is established under Section 53 of the Advocates Act to enquire into complaints against advocates, Law firms and their employees. After due enquiry, we are mandated to either: reject the complaint, promote reconciliation and/or encourage and facilitate an amicable settlement or, if a disciplinary offence that is serious or aggravated is disclosed, to file a complaint before the Disciplinary Tribunal.

The Act further explains in subsection 4 that it is within the mandate of the Commission *'...to receive and consider a complaint made by any person, regarding the conduct of any advocate.... if it appears to the Commission that there is no **substance** in the complaint it shall **reject** the same forthwith; if it appears to the Commission whether before or after investigation that there is **substance** in the complaint but that the matter complained of constitutes or appears to constitute a **disciplinary offence** it shall forthwith refer the matter to the **Disciplinary Committee**; if it appears to the Commission that there is **substance** in the complaint but that it does not constitute a disciplinary offence it shall forthwith **notify the person**;.... if it appears to the Commission that there is **substance** in a complaint but that the circumstances of the case do not disclose a disciplinary offence with which the Disciplinary Committee can properly deal and that the Commission itself should not deal with the matter but that the proper remedy for the complainant is to **refer the matter to the courts** for appropriate redress the Commission shall forthwith so advise the complainant.'*

During our tele-conversation with the complainant on 14th November 2022, I informed you that all complaints received by the Commission must first pass through the *sieve* to ensure that they have 'merit' or as described above, 'substance'. Upon receipt of any complaint lodged within the Commission, it is within the mandate of the Commission to 'weigh' whether each and every complaint falls within the threshold of what can be pursued as 'professional misconduct' against an advocate, law firm or its employees. For the Commission to decide whether or not a complaint has 'merit' or 'substance' the same is weighed based on the 'evidence' adduced

otherwise what would make a complaint worth of pursuit stand out from any other allegation made by anyone against another? The Commission in its implementation of its mandate relies entirely on evidence in determining whether or not a complaint falls within the constraints of what the Commission deals with, being, allegations against advocates for acts of professional misconduct.

You have been informed and reminded of our mandate in our letters to you and the importance of documentary evidence. Complaints without evidence are merely allegations without proof.

Proof of Payment

An advocate, as in any other profession, is entitled to legal fees for professional services rendered within the course of his professional duty. Section 46 of the Advocates Act explains more in Advocate's remuneration and further states that '*... such agreement shall be valid and binding on the parties PROVIDED IT IS IN WRITING and signed by the client or his agent duly authorized in that behalf.*'

In the Help Form filed and signed by yourself on 18th August 2022, you indicated that you had paid the advocate legal fees but then went ahead to state that it was an '*..abuse of the court process to ask for proof of payment of legal fees..*' Take note that 'He who alleges must prove'.

Kindly note that proof of payment in your case would act as evidence that you indeed instructed the advocate, paid a retainer fee for which the Commission would then have authority to inquire from the advocate(s) under which circumstances had he/they received the money paid by you. We wish to reiterate that 'merit' or 'substance' is sourced from evidence, which in this case, is missing.

Establishment of Advocate-Client Relationship

It is imperative that you establish an advocate client relationship while lodging a complaint against 'your' advocate for acts of professional misconduct. In the event legal fees were not paid and/or a written fee agreement is lacking, one is able to establish the same by way of correspondences between yourself as the client and the advocate discussing matter to do with the brief.

You allegedly instructed advocates to render professional legal services on your behalf in exchange for legal fees but you have failed to establish existence of instructions/ advocate-client relationship between yourself and the advocate (s).

Tort of professional Negligence and Liability

In your submissions, you further indicated that , *'My complaint's grounded in the tort of professional negligence and liability...'* noting to cite the decision of the court in *'Blyth vs Birmingham, read together with the breach of duty of care '...since their professional misconducts failed to meet the statutory requirement-thresholds set by law...'* We wish to reiterate as herein above that the mandate of the Commission as lying within section 53 of the Advocates Act is to deal with complaints against advocates, law firms or their employees for acts of professional misconduct, not tort. Further, your allegation has not be backed by any evidence authorizing us to inquire deeper into the complaint, thus lacking 'substance'.

CONCLUSION

It is noteworthy that you have **failed, neglected and refused to cooperate** with the Commission for purposes of your complaint as clearly shown in your submissions. We have (in our communication to you) narrowed down what the Commission would need to pursue your complaint further but you have been insistent on explaining why what we have requested from you is not necessary. The Advocates Complaints Commission is governed not only by the Advocates Act but also the Constitution of Kenya as read together with other laws allowing the Commission to act within the confines of the Law governing it. The Commission is required to accept complaints from the public however, the complaints are scrutinized to ensure that they fall within the limits of the law, thereby giving them 'substance' or 'merit' or lack thereof. It is also within the mandate of the Commission pursuant to Section 53(4)(a) of the Act to reject a complaint lacking in merit. This complaint as is lacks merit which results from the lack of evidence and is therefore rejected. You are at liberty to appeal the decision of the Commission by exercising your rights as under Section 53(8) of the Advocates Act CAP 16 or personally prosecute your complaint before the Disciplinary Committee as under Section 60 (1) of the Advocates Act or seek redress from the courts. Further take note that the Commission is not a court or the Disciplinary Committee. The Commission works with the Disciplinary Committee in prosecuting complaints and thus the court procedure dictates the operations of the Commission while at the Prosecution stage/before the Committee but not at the preliminary stages upon receipt of complaints.

Take note that we shall proceed to close our file.

Yours faithfully,

**FOR: COMMISSION SECRETARY,
ADVOCATES COMPLAINTS COMMISSION.**

Mutua-

Leah M. Mutua

Senior State Counsel.

