



**Gichaba v Law Society of Kenya & another (Commercial Appeal E017 of 2023)
[2024] KEHC 13584 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E017 OF 2023
MN MWANGI, J
OCTOBER 25, 2024**

BETWEEN

WESLEY M R GICHABA APPELLANT

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

ADVOCATES COMPLAINTS COMMISSION 2ND RESPONDENT

RULING

1. This ruling is in regard to the 1st respondent's Notice of Preliminary Objection dated 17th April 2024. A brief background of the case is that a complaint was filed against the appellant at the Advocates Disciplinary Tribunal by Ms. Naomi Wagereka, on behalf of Mr. Kurshbir Kaur Chadha, for withholding client's money being Kshs.6,480,000.00 plus interest and for failure to reply to the Commission's letter dated 22nd September 2014. The complaint was heard and determined vide a judgment delivered on 17th February 2020, wherein the appellant was ordered to pay the complainant Kshs.7,458,572.00 plus interest at the rate of 12% from 11th December 2009 until payment in full.
2. Aggrieved by the said judgment, the appellant lodged an appeal against it at the Milimani High Court, Commercial & Tax Division vide a Memorandum of Appeal dated 1st February 2023 raising the following grounds –
 - i. The Honourable Tribunal's undated and/or not properly signed judgment is null and void, bad in law, and of no legal effect;
 - ii. The Honourable Tribunal erred in law and fact in relying on evidence tendered by way of submissions thus curtailing the Appellant's right of fair hearing as enshrined in Article 50 of *the Constitution* of Kenya;



- iii. The Honourable Tribunal erred in law and fact in failing to find that there was no retainer between the complainant and the appellant;
 - iv. The Honourable Tribunal proceeded to make a decision on facts not deposed to in the affidavits as at the time of retiring to write the judgment;
 - v. The Honourable Tribunal erred in law and fact in relying on matters not pleaded at all to arrive at its decision;
 - vi. The Honourable Tribunal's findings that interest is payable lacks legal backing;
 - vii. The Honourable Tribunal erred in law and fact in its finding that Kshs.7,458,512.15 was payable when the amount pleaded was Kshs. 6, 480,000/= without any amendment to the pleadings;
 - viii. The Honourable Tribunal erred in law and fact in reaching its decision by failing to factor in the judgment certified taxed costs by the Honourable Deputy Registrar in favour of the appellant; and
 - ix. The Honourable Tribunal erred in law and fact in relying on documents marked "Without Prejudice" and produced at submissions' stage denying the Appellant a chance to respond to the critical documents.
3. The appellant's prayer is for the instant appeal to be allowed with costs, and for the Tribunal's undated judgment to be wholly set aside.
 4. In opposition to the appeal, the 1st respondent filed a Notice of Preliminary Objection dated 17th April 2024 raising the following grounds –
 - i. That the said appeal is totally incompetent, bad in law, misconceived and an abuse of the Honourable Court's process;
 - ii. That the Honourable Court lacks the jurisdiction to handle and determine the case as filed by the appellant as the same is in contravention of Section 62 of the [Advocates Act](#);
 - iii. That the orders being sought are against a Disciplinary Committee established under Section 57 of the [Advocates Act](#), and which is not a party to this suit; and
 - iv. That the said appeal is otherwise misconceived, unfounded, has no merit and is an abuse of this Honourable Court's process and ought to be dismissed with costs.
 5. The Preliminary Objection was canvassed by way of written submissions. The 1st respondent's submissions were filed on 11th July 2024 by the law firm of Nyawira Milimu & Omotto Advocates, whereas the appellant's submissions were filed by the law firm of Gichaba & Company Advocates on 15th August 2024.
 6. Mr. Olembo, learned Counsel for the 1st respondent relied on the decision in Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR, and the Speaker of National Assembly v Njenga Karume [1992] eKLR, and submitted that the appellant failed to adhere to the clear and right procedures available to him in order to secure the reliefs sought in this appeal. He cited the case of the Owners of the Motor Vessel Lillian 'S' v Caltex Oil Kenya Ltd [1989] KLR 1 and the provisions of Section 62 of the [Advocates Act](#) in submitting that this Court has no jurisdiction to determine the dispute between the parties herein since the petitioner's claim is of a civil nature.



7. On his part, Mr. Omanga, learned Counsel for the appellant referred to the provisions of Articles 165 & 169 of *the Constitution* of Kenya, 2010 and Section 62 of the *Advocates Act* and submitted that this Court is clothed with the requisite jurisdiction to hear and determine this appeal. He referred to the decisions in *Nicholus v Attorney General & 7 others*; *National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR), and submitted that the Disciplinary Tribunal has never complied with the provisions of Section 61(2) of the *Advocates Act* so as to operationalize the provisions of section 62(1) of the *Advocates Act*.

Analysis And Determination.

8. Upon consideration of the appellant's appeal, the Notice of Preliminary Objection by the 1st respondent, and the written submissions by Counsel for the parties, the issue that arises for determination is whether the Preliminary Objection herein should be sustained.
9. The Court in the case of *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd* [1969] EA 696, considered what constitutes a Preliminary Objection. Similarly, in the case of *Oraro v Mbaja* [2005] 1KLR 141, Ojwang, J, (as he then was), expressed himself as follows on the issue of what constitutes a Preliminary Objection -

The principle is abundantly clear. A 'preliminary objection' correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point. ... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

10. On the question of jurisdiction, the Court in the Owners of the Moor vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1, held as follows -

Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

11. The 1st respondent submitted that the appellant ought to have filed a Civil Appeal to the High Court's Civil Division as per the provisions of Section 62 of the *Advocates Act*, and not to the High Court's Commercial and Tax Division as is the case herein. Section 62 of the *Advocates Act* provides for Appeals against orders of the Tribunal, in the following words -

1. Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.



2. The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days' notice of the date of hearing.
3. An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.
12. The High Court is established under Article 165 of *the Constitution* of Kenya, with inter alia unlimited original jurisdiction in criminal and civil matters as per Article 165(3)(a) of the said Constitution. Appellate jurisdiction is conferred on the High Court by legislation. In this case, Section 62(1) of the *Advocates Act* confers the High Court with appellate jurisdiction over decisions of the Advocates Disciplinary Tribunal.
13. The Civil Division and the Commercial and Tax Division, are sub-registries for civil cases filed in the Nairobi High Court in Milimani. In as much as this Court sits as the Commercial and Tax Division it has jurisdiction to hear both criminal and civil matters. This Court therefore agrees with Counsel for the appellant that the jurisdiction of this Court to hear and determine this appeal cannot be ousted by virtue of it sitting as a Court in the Commercial and Tax Division, although ideally, the appeal herein should have been filed in the Civil Division of the High Court.
14. The 1st respondent also referred to the provisions of Section 62 of the *Advocates Act* and contended that this Court lacks the requisite jurisdiction to determine this appeal as filed by the appellant. From the pleadings filed, it is evident that the 1st respondent does not dispute that it did not comply with the provisions of Section 62 of the *Advocates Act*, however it submits that the Advocates Disciplinary Tribunal has never complied with the provisions of Section 61(2) of the *Advocates Act*, so as to operationalize the provisions under Section 62(1) of the said Act. In my considered view, in order to determine the foregoing, this Court will have to ascertain whether or not the Advocates Disciplinary Tribunal complied with the provisions of Section 61(2) of the *Advocates Act* by ascertaining facts and interrogating evidence adduced by way of affidavits.
15. The 1st respondent's Notice of Preliminary Objection is also on the ground that the orders being sought are against a Disciplinary Committee established under Section 57 of the *Advocates Act*, which is not a party to this suit. Upon perusal of the appellant's Memorandum of Appeal dated 1st February 2023, the appellant seeks orders for his appeal to be allowed with costs, and that the Tribunal's undated judgment to be set aside wholly. This Court is of the view that the orders sought are not against the Advocates Disciplinary Tribunal per se, but challenge the decision rendered by the said Tribunal.
16. As to whether or not the Advocates Disciplinary Tribunal is a necessary party in this appeal, that is an issue that can be argued in the normal manner and be determined after the Court has ascertained facts and considered evidence adduced by the parties.
17. It is trite law that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. From the foregoing, it is evident that the issues raised by the 1st respondent do not fall in the realm of a Preliminary Objection, as they can only be determined after the Court has probed the evidence adduced and ascertained facts.
18. In the premise, it is this Court's finding that the 1st respondent's Preliminary Objection dated 17th April 2024 is devoid of merits. It is hereby dismissed with costs to the appellant.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Omanga Alex for the appellant/respondent

Mr. Olembo for the 1st respondent/appellant

No appearance for the 2nd respondent

Ms B. Wokabi – Court Assistant.

