

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMA NO. E017 OF 2023

WESLEY M. R. GICHABA.....APPELLANT

-VERSUS-

LAW SOCIETY OF KENYA.....1ST
RESPONDENT

ADVOCATES COMPLAINTS COMMISSION.....2ND RESPONDENT

THE ADVOCATES DISCIPLINARY TRIBUNAL.....3RD
RESPONDENT

JUDGMENT

1. A formal complaint was filed against the appellant at the Advocates Disciplinary Tribunal by Ms Naomi Wageraka, Commissioner, at the Advocate Complaints Commission, on behalf of Mr. Kurshbir Kaur Chadha, for withholding client's money, being Kshs.6,480,000/= 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) That the Honourable Tribunal's undated and/or not properly signed Judgment is null and void, bad in law, and of no legal effect;
- ii) That the Honourable Tribunal erred in law and fact in relying on evidence tendered by way of submission thus curtailing the appellant's right of fair hearing as enshrined in Article 50 of the Constitution of Kenya;
- iii) That the Honourable Tribunal erred in law and fact in failing to find that there was no retainer between the complainant and the appellant;
- iv) That 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) That 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) That 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) That 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) That the Honourable Tribunal erred in law and fact in relying on documents marked "*Without Prejudice*" and produced at submission 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. This Appeal was canvassed by way of written submissions. The appellant's submissions were filed on 16th May 2025 by the law firm of Gichaba & Company Advocates. Although the respondents were given timelines within which to file their written submissions, they failed to comply with the Court's directions and a date for delivery of the Judgment was reserved without the benefit of their submissions.
5. Mr. Omanga, learned Counsel for the appellant submitted that a decision of the Advocates Disciplinary Tribunal is appealable to the High Court as of right under Section 62 of the Advocates Act and Articles 50, 159 & 165 of the Constitution, as the Tribunal is a Subordinate Court. He relied on the Court of Appeal cases of **Paulina Amana v Republic** [2013] KECA 402 (KLR) and **Kola Chacha v Kenya Commercial Bank & another** [2006] KECA 172 (KLR), as well as the case of **Republic v Disciplinary Tribunal of the Law Society of Kenya & another Ex-parte Bernard Muriuki Kanyiri** [2018] KEHC 9508 (KLR), and argued that the impugned Judgment is a nullity for being undated and unsigned by all members who heard the matter, contrary to the mandatory requirements of Order 21 Rule 3 of the Civil Procedure Rules, 2010.
6. Counsel cited the case of **Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others** [2014] KEHC 6357 (KLR), and stated that the Tribunal erred by relying on documents introduced at the submissions stage, contrary to the provisions of Rule 18 of the Advocates Disciplinary Rules and Article 50 of the Constitution. He argued that no retainer was proved between the

complainant and the appellant, there were admissions on record showing that instructions emanated from a third party, which issue was ignored by the Tribunal. Mr. Omanga contended that the Tribunal also determined unpleaded issues by awarding Kshs.7,458,512.15, instead of the pleaded Kshs.6,480,000/=, rendering the decision unsafe in quasi-criminal proceedings.

7. Counsel further stated that the award of interest at 12% p.a. was unlawful for failure to comply with the Advocates (Deposit Interest) Rules, as was held by the Court in **Gunjan S. Patel v Simon Kamere P/A M/S Kamere & Co. Advocates** [2011] KEHC 1087 (KLR). Mr. Omanga submitted that the Tribunal wrongly admitted “*without prejudice*” communication and failed to consider certified Advocate-Client taxed costs of Kshs.3,889,249.50, occasioning injustice on the appellant. He further submitted that the Tribunal’s decision was based on illegally obtained bank records, in violation of Article 50(4) of the Constitution, contrary to the holding by the Court in the case of **RC v KKR** [2021] KEHC 12803 (KLR).

ANALYSIS AND DETERMINATION

8. I am cognizant of the fact that this being the 1st appellate Court, I have a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach my own independent conclusion, while bearing in mind that I neither saw nor heard the witnesses testify and make due allowance for the said fact. That was the position taken by the Court in the case of **Peters v Sunday Post Limited** [1985] EA 424, where the Court rendered itself as follows -

It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing

and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

9. An appellate Court will only interfere with the finding of a Trial Magistrate or Tribunal as in this case, if the same is founded on wrong principles of law or if there was misdirection of facts. To this end, I am bound by the Court of Appeal finding in the case of **Mwanasokoni v Kenya Bus Services Ltd** [1985] KECA 82 (KLR), where it was held that -

Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere.

10. I have re-examined the Record of Appeal, and given due consideration to the written submissions by Counsel for the appellant. The issue that arises for determination is whether the Appeal herein is merited.
11. The appellant challenges the legality of the Judgment of the Tribunal on ground that it was not signed, among other grounds. This raises the question of whether the proceedings and decision of the Advocates Disciplinary Tribunal met the threshold of legality, procedural fairness, and adherence to mandatory statutory and constitutional requirements. Upon perusal of the Judgment of the Advocates Disciplinary Tribunal, it is evident that it was signed by two of the three members of the Tribunal who heard the complaint and it was not dated. The mandatory requirement that all Judgments ought to be dated and signed is provided for under the provisions of Order 21 Rule 3 of the Civil Procedure Rules, 2010, which states that –

- 1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.*
- 2) A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it.*
- 3) A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review.*

12. Although the provisions of Order 21 Rule 3 of the Civil Procedure Rules, 2010, are not expressly incorporated in the Advocates Act, they apply by necessary implication to the said the Act. The Court in the case of **Zakayo Sang & 9 others v Sot Tea Growers Rural Cooperative Savings & Credit Society Limited & 10; others** [2018] KEHC 8630 (KLR), while allowing an appeal and setting aside the orders issued by the Cooperative Tribunal held that –

On the first issue, it is the submission of the appellants that the Tribunal's decision was not signed by the three members who sat as a bench. I have perused at the copy of the Tribunal's ruling presented to this court vide the record of appeal. It is apparent that the same is shown to have been delivered by three members namely: Alex Ithuku, chairman, Cecilia Kithinji Deputy Chairman and G. Kitiwa, member. It is also apparent that the ruling was only signed by one member namely Cecilia Kithinji. With respect, I agree with the submissions of the appellants that the failure by all the members to sign the ruling, renders the whole decision as a nullity.

13. The Court also in the case of **William Kinyanyi Onyango v Independent Electoral and Boundaries Commission & 2 others** [2013] KEHC 2082 (KLR), dealt with this issue and held as follows–

I will deal next with ground 7 of the appeal. All the parties conceded that the impugned ruling was delivered in open court at Nairobi on 31st May 2013. Did the learned Magistrate date his ruling? The record of appeal at pages 493 to 506 contains the certified true copy of the original ruling of the lower court. The ruling is signed but not dated. The respondents' counsel conceded that that is the version of ruling that was delivered in open court on 31st May 2013 and supplied to the parties. I have then looked at the original court record of the lower court. The original typed ruling is similar save that the learned magistrate has added by hand the following text at the bottom and reverse of his ruling: "ruling delivered (sic) dated and signed on this 31/5/13 in the presence of all counsel for all (sic) parties". The appellant's case is that that handwritten text was added by the magistrate long after delivery of the ruling and after filing of this appeal. The respondents' counsel submitted that since the ruling was delivered in open court, and there is no doubt that it was on 31st May 2013, it does not really matter. It was further submitted that that was a technical slip incapable of impeaching the decision.

Dating a judgment or ruling is a requirement of law. It is a matter of substance and not a technicality. It engenders certainty of the decree or order. Order 21 rule 3 (1) of the Civil Procedure Rules 2010 for example provides that "a judgment pronounced by the judge who

made it shall be dated and signed by him in open court at the time of pronouncing it". The language there is mandatory. The date of judgment impacts on the rights of parties: the time to lodge an appeal starts to run for example.

14. The Court of Appeal addressed itself on this issue in the case of **Paulina Amana v Republic** [2013] KECA 402 (KLR), where it held the following-

It is not contested that the Judgment was not signed by the two Judges who heard the appeal. In another similar case of Lockwacharia vs Republic (2005) KLR 379, this Court held that a judgment of two Judges who heard the appeal and was not signed by the two Judges was not a valid judgment. While allowing the appeal, the Court pointed out that it was even precluded from deciding the merits or demerits of the judgment of the High court which was a nullity.

15. From the authorities cited herein and the applicable law, this Court finds that it is now well settled that a Judgment which is unsigned or undated, or not signed by all members who participated in the hearing, is a nullity.
16. In the premise, this Court finds that the Judgment of the Advocates Disciplinary Tribunal by virtue of being undated and unsigned by all the 3 Tribunal members, is incurably defective and therefore a nullity.
17. Having found that the impugned Judgment is a nullity, this Court lacks the jurisdiction to delve into the merits and/or demerits of whether or not the Tribunal exercised its discretion within the limits of the law.
18. In the end, this Court finds that the Appeal herein is merited. It is hereby allowed in the following terms –

- i) The Advocates Disciplinary Tribunal's undated Judgment, signed by two out of a panel of three members, is hereby set aside in its entirety for being a nullity;**
- ii) There shall be a fresh hearing of the complaint leveled against the appellant; and**
- iii) Costs of the Appeal are hereby awarded to the appellant.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 20th day of February 2026. Judgement delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence:-

Mr. Orina h/b for Mr. Omanga for the appellant

Mr. Maina h/b for Mr. Olengo for the 1st & 2nd respondents

No appearance for the 3rd respondent

Ms B. Wokabi – Court Assistant.