



**Ochieng v Disciplinary Tribunal & 2 others (Civil Appeal E141 of 2025)
[2025] KEHC 11382 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E141 OF 2025

AC MRIMA, J

JULY 31, 2025

BETWEEN

OMOLLO KENNEDY OCHIENG APPELLANT

AND

DISCIPLINARY TRIBUNAL 1ST RESPONDENT

LAW SOCIETY OF KENYA 2ND RESPONDENT

GODFREY ONYANGO OGUK 3RD RESPONDENT

JUDGMENT

Background:

1. Godfrey Onyango Oguk, the 3rd Respondent herein, instructed Kennedy Omollo Ochieng, the Appellant herein, practising in the name and style of Ken Omollo & Company Advocates, to represent him recover L.R No. South Sakwa/Bar K'Owino/5076 or 5077. To that end, he claimed that on 15th May 2018, he furnished his Advocate [the Appellant herein] with the requisite documents among them, green cards of the disputed land and also paid Kshs. 65,000/- to the Advocate as professional fees so as to institute a suit on his behalf in the High Court of Kenya at Kisumu. However, on 4th August 2018, three months later, the 3rd Respondent withdrew the instructions from his Advocate on account of frustration as the Appellant had not filed the suit as yet.
2. The 3rd Respondent averred that despite the withdrawal of instructions, and without his knowledge, the Appellant proceeded to file a suit on 14th September 2018 at Bondo Law Courts, a fact he learned of on 14th February 2019. As at that time, he had already instructed the firm of Kangui & Company Advocates to pursue his claim. The 3rd Respondent claimed that, after the withdrawal of instructions, neither the Appellant nor his firm had the authority to institute the suit. The 3rd Respondent pleaded



that as a result of the double filing of his suit, his adversary successfully claimed from him damages of Kshs. 329,000/-.

3. On the foregoing factual background, the 3rd Respondent complained to the Advocates Disciplinary Tribunal (hereinafter referred to as 'the Tribunal'). He prayed that stern disciplinary action be taken against the Appellant for unprofessionalism manifested in handling him as a client and meddling in his case. He further prayed for a refund of Kshs. 65,000/=, Kshs. 329,000/= and Kshs. 335,075/- for meddling with his case which resulted in breach of trust, delayed justice and aiding the Defendant among other issues.
4. In its judgment dated 15th January 2025, the Tribunal observed that the Appellant did not controvert the 3rd Respondent's case despite being given the opportunity to file a formal response on 14th August 2023. The Tribunal then found the Appellant guilty of professional misconduct for failing to refund the Kshs. 65,000/-. It ordered the Appellant to refund the sum. Additionally, the Tribunal ordered the Appellant to foot Kshs. 335,075/- being costs awarded to the 3rd Respondent in the Environment and Land Court Case No. 67 of 2018. The Tribunal also ordered the Appellant to pay the 3rd Respondent Kshs.20,000/- for travelling and accommodation, Kshs. 128,773/- for withdrawal of the case and its fresh filing by the firm of P.G. Kangui & Co. Advocates and costs of Kshs. 20,000/- and Kshs. 10,000/- to the 3rd Respondent and 2nd Respondent respectively.
5. The Appellant was aggrieved by the decision of the Tribunal and lodged the instant appeal.

The Appeal:

6. Through a Memorandum of Appeal dated 14th February 2025, the Appellant urged that the entire findings of the Tribunal be set aside on the following grounds: -
 1. The Disciplinary Tribunal erred in law completely failing to consider the Appellant's replying Affidavit sworn and dated 4th August 2023 and filed and received by 1st Respondent on 14th August 2023 thus contravening the Appellant's constitutional right to a fair hearing as provided for under Article 50 of *the Constitution*.
 2. The Disciplinary Tribunal erred in law in failing to find that there was no retainer between the Appellant and the 3rd Respondent.
 3. The Disciplinary Tribunal erred in law and fact in finding the Appellant guilty and thereby convicting him without any supportive evidence.
 4. The Disciplinary Tribunal erred in law and fact in holding the Appellant liable and awarding special damages of Kshs. 548,848 against him without jurisdiction.
 5. The Disciplinary Tribunal in awarding special damages against eh Appellant exercised jurisdiction which it did not have.
 6. The Disciplinary Tribunal awarded unproven special damages.
 7. The Disciplinary Tribunal erred in law in failing to find that the Appellant discharged his professional legal obligation to the client by filing civil suit in Bondo MELC No. 67 of 2018 between Irene Samuel Odhiambo and Angeline Anyongi Ogutu upon obtaining necessary and supportive documents from the Land Registrar, Siaya.
 8. The Disciplinary Tribunal erred in fact in holding that the Appellant did not respond to the complaint when actually he had lodged a Replying Affidavit sworn on 4th August 2023 and filed on 14th August 2023.



9. The Disciplinary Tribunal erred in law and fact in finding the Appellant guilty of professional misconduct for failing to render any professional service.
10. That no judgment was delivered on 15th January 2025.

The Submissions:

7. In his written submissions dated 6th April 2025, the Appellant posited that the 3rd Respondent did not have supportive documents at the time of giving instructions, which necessitated him to do due legal diligence to obtain all, and necessary documents, in order to mount a competent suit. It was his case that after obtaining the relevant information, it became apparent that the subject land had been transferred and had been sub-divided into three land parcels. He submitted that since his client was interested in South Sakwa/Bar K'Owino/8754, he caused a caution to be lodged thereon and issued a demand letter to Angeline Anyango Ogutu. It was the Counsel's case that it took time at the Lands Office to obtain all the necessary documents and when he eventually lodged the case at Kisumu ELC Registry, he was referred to Bondo Principal Magistrates Court where he filed Bondo Principal Magistrate's Court ELC No.67 Of 2018, Irene Samuel Odhiambo (Suing as the Administrator and personal representative of the Estate of Samuel Odhiambo Oguk) -vs- Angeline Anyango Ogutu (Sued as the Administrator and personal representative of the estate of Samuel Ogutu Opiiti.
8. In challenging the propriety of the Tribunal's proceedings, the Appellant submitted that there was nothing on record as per the proceedings by 1st and 2nd Respondents as to what took place on 4th March 2024. As such, there was no judgment delivered that day. He further submitted that on 13th December 2024 he received an e-mail from the 2nd Respondent informing him that judgment would be rendered on 13th January 2025. The Appellant averred that he was supplied with a copy of the judgment dated 15th January 2025 on or about 31st January 2025. He pointed out that one Esther Mungai who also signed the judgment was not a member of the bench therefore there was a transgression of the rules on delivery of judgments. It was his case that one Wafula Andrew, a member of the bench did not sign or deliver the judgment, a further violation of the rules on the manner in which judgments ought to be dealt with. The Appellant contended that he has never been served with any notice of delivery of the judgment before delivery.
9. In impugning the findings of the Tribunal, the Appellant submitted that the donor of the power of Attorney, one Irene Samuel Odhiambo died on 13th July 2024 when the hearing of the case at the Tribunal was pending. He posited that the Tribunal's proceedings were, hence, a nullity upon the death of the donor since the provision of Section 60 of the *Advocates Act* was not available to the 3rd Respondent. He stated that if any cause of action survived the deceased, the same could only be treated as part of her Estate, and if the 3rd Respondent wanted to proceed with the same, he ought to have taken out Grant of Letters of Administration in respect to the estate.
10. The Appellant drew support from the decision in *Shah -vs- The Chief Land Registrar, Nairobi Lands Registry & 2 Others (Environment & Land Petition E011 of 2022) [2022] KEELC 14970 (KLR) (21 November 2022) (Ruling)* where it was observed: -

... It is a well-established principle the at power of attorney is extinguished upon death of the donor. By the death of the donor, the power of attorney is automatically re-voted. The done ceases to have such power....
11. The Appellant submitted that the Tribunal as well as this Court lacked jurisdiction for want of competent parties since the 3rd Respondent lacked locusstandi when the donor of the Power of



Attorney died. He further argued that the dispute before the Tribunal was a private prosecution and the 1st and 2nd Respondents had no active role or participation. He asserted that the whole proceedings, effective 13th July 2024 up to the judgment dated 15th January 2025 and any proceedings thereafter, including the scheduled mitigation and sentence, are not only illegal but a nullity.

12. As regards violation of the right to fair hearing, the Appellant submitted that despite filing a response to the complaint, the 1st Respondent completely shut its eyes to its Replying Affidavit filed on 14th August 2024 and duly acknowledged by the stamp on a copy. The Appellant referred to the Court of Appeal decision in JMK -vs- MWM Another 2015 KECA524(KLR) where fair hearing was discussed as follows: -

... In this appeal, the appellant was entitled to contend, as he did, that the judgment of the Industrial Court which directly affected him, was in breach, not only of the law, but also of *the Constitution* in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1) ...

13. The Appellant further cited Sections 60(4) and 60A of the *Advocates Act* that contemplates a 'hearing' whenever an Advocate faces a Tribunal and stated that he was not accorded a fair hearing. It was his case that the Tribunal failed to abide by Rule 18 of the Advocates (Disciplinary Committee) Rules which makes it imperative to involve both parties and hear their opinion. He stated that discretion was not exercised judiciously.
14. On the issue of retainer, the Appellant, while relying on the decision in Omulele & Tollo Advocates -vs- Mount Holdings Ltd. C.A.75 of 2015 (unreported), argued that the 3rd Respondent was not his client. He submitted that the 3rd Respondent did not provide supportive documents to the 2nd Respondent instead, he (3rd Respondent) simply commenced prosecution. On the issue of damages, the Appellant stated that the 1st Respondent is limited by statute. Its jurisdiction does not extend to claims of special damages but nonetheless, the 3rd Respondent was awarded Kshs. 548,848/-. He submitted that the 3rd Respondent neither pleaded with particularity nor strictly proved its claim, a fact that rendered the judgment illegal and null. The Appellant submitted that the 3rd Respondent did not prove his case beyond reasonable doubt.
15. Finally, the Appellant rejected the Respondents' challenge on competence of the appeal before this Court's jurisdiction by submitting that by dint of section 60, 60A, 61(1) and 62 of the *Advocates Act*, an appeal lies to this Court. It was his case that non-compliance of Section 61(1) of The *Advocates Act* by the 1st Respondent does not render the instant application or appeal incompetent.

The Respondents' case:

16. The Advocates Disciplinary Tribunal and TheLaw Society of Kenya challenged the appeal through written submissions dated 29th April 2025. At the outset, it was their position that the appeal is premature, an abuse of the Court process and that this Court lacks jurisdiction for the simple reason that mitigation and sentencing, scheduled for 8th September 2025, are yet to be done.
17. While submitting on the import of section 60(4), 61(1), (2) and 64 of the *Advocates Act* as regards appeal from the decision of the Tribunal, Respondents argued that no appeal lies to the High Court until sentencing is done and a report issued under Section 61 of the *Advocates Act*. They argued that the proceedings before the disciplinary proceedings have not concluded and no report has been issued as required under Section 62 of the *Advocates Act*.



18. The Respondents claimed that allowing the appeal against the ongoing proceedings would be tantamount to this Court exercising its appellate jurisdiction prematurely. They relied on the case of *Macharia & Another -vs- KCB & Others* and the one in *Nyang'au -vs- LSK & Others*. They reiterated that no appeal is before this Court pending finalization of the processes before the Tribunal.

Analysis:

19. Having carefully considered the record, the parties' submissions and the decisions referred to, the issues that emerge for determination are as follows: -
- i. Whether this Court has jurisdiction to hear the appeal.
 - ii. Depending on (i) above, whether the engagement between the Appellant and the 3rd Respondent gave rise to Advocate-Client relationship.
 - iii. Depending on (i) above, whether the Tribunal accorded the Appellant a fair hearing.
 - iv. Depending on (ii) above, the propriety of the Tribunal's awards.
20. This Court will now deal with the issues as under.

(a) Whether this Court has jurisdiction to hear the appeal:

21. Before embarking on the role of this Court as an appellate Court, the jurisdictional contest ought to be addressed conclusively, first. I say so because a challenge on jurisdiction goes to the root of validity of any Court proceedings. In *Public Service Commission & 4 others v Cheruiyot & 20 Others (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR) (8 February 2022) (Judgment)*, the Court of Appeal discussed the paramountcy of jurisdiction as follows: -
36. Jurisdiction is everything, it is what gives a Court or a Tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

.... By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.



37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders 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.
22. The pertinent question is whether this Court’s jurisdiction is properly invoked given the uncontroverted position that the Tribunal is yet to consider mitigation and pass a sentence. Section 60 of the *Advocates Act* (hereinafter referred to as ‘the Act’) allows for the lodging of complaints against Advocates in the following manner: -
60. Complaints against Advocates
1. A complaint against an Advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.
23. Once the Tribunal has heard and established that a complaint has been made out against an Advocate, Section 60(4) prescribes the orders it can make against the Advocate as follows: -
4. the Tribunal may order—
 - a. that such Advocate be admonished; or
 - b. that such Advocate be suspended from practice for a specified period not exceeding five years; or
 - c. that the name of such Advocate be struck off the Roll; or
 - d. that such Advocate do pay a fine not exceeding one million shillings; or
 - e. that 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.
24. An appeal to this Court is provided for by Section 62 of the Act in the following terms: -
62. Appeal against order of Tribunal
- 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.
25. A reading of the above provision affirms the position that for an appeal under Section 62 to lie to the High Court, the requirements under Section 61(2) of the Act must have taken place. Section 61(2) provides as follows: -
61. Reports by Tribunal and action thereon:
1. On the termination of the hearing of a complaint, if the Tribunal does not dismiss the same, the Tribunal shall embody its findings and the order or orders made by it in the



form of a report to the Court, which shall be delivered to the Registrar, together with the record of evidence taken and any documents put in evidence.

2. The Registrar shall give to the complainant, to the Complaints Commission (if the complainant has been referred by it to the Tribunal), to the Council of the Society and to the Advocate to whom the complaint relates notice of delivery of the report, which shall be open to inspection by the complainant, the Commissioner, the Advocate to whom the complaint relates and their respective Advocates, if any, and by the Council.
26. Therefore, in a nutshell, the sequence of events that precede the lodging of an appeal to the High Court is, firstly, as enshrined in Section 61(2) and, subsequently, by Section 62 of the *Advocates Act*. It is the Registrar who first receives the findings or orders of the Tribunal and thereafter, gives notice as well as the findings and orders to the complainant, the Law Society of Kenya, the Advocate whom the dispute relates and the Complaints Commission. Once the Registrar has issued the notice anticipated in Section 61(2), then the 14-day period within which an aggrieved Advocate may lodge an appeal, starts to run. Such an Advocate kick-starts the process by lodging a Notice of Appeal and within 30 days thereof, must lodge a Memorandum of Appeal setting out the grounds of appeal. Further, pursuant to Section 63 of the Act, the Registrar shall furnish a copy of the report and record to the Council of the Society and the Advocate to whom a complaint together with a list of any documents put in evidence and the Memorandum of Appeal before the appeal is set down for hearing.
27. This Court has intently interrogated the Record of Appeal. Not only are the proceedings before the Tribunal incomplete for want of mitigation and sentencing but, there is also absolute non-compliance with the legal hurdles set by Sections 61 and 62 of the *Advocates Act*. In his letter dated 12th February 2025, addressed to the Chief Registrar, the Appellant acknowledged his own non-compliance with Sections 61 and 62 of the *Advocates Act*, before lodging an appeal when he wrote thus: -
- I. the aforementioned Advocate in abundant caution and despite the fact that no compliance has been made as provided for under section 61(1) and (2) of the *Advocates Act*, hereby issue a Notice of Appeal to the judgment dated 15th January 2025...
28. This Court needs not go any further. It must down its tools as its jurisdiction has not been properly invoked. In the premises, the appeal is premature. Having found as such, the rest of the issues identified in this appeal have become moot and the discussion ought to come to an end.
29. Consequently, the following final orders hereby issue: -
- (a) The appeal is hereby struck out in its entirety.
 - (b) As the dispute is still current, each party shall bear its own costs of this appeal.
30. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Gichaba, Learned Counsel for the Appellant.

Amina/Michael – Court Assistants.

