



**Ndung'u v Bosire & another (Civil Appeal 579 of 2015)  
[2024] KEHC 2135 (KLR) (Civ) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2135 (KLR)

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

**CIVIL**

**CIVIL APPEAL 579 OF 2015**

**JN NJAGI, J**

**FEBRUARY 28, 2024**

**BETWEEN**

**JULIET MUKAMI NDUNG'U ..... APPELLANT**

**AND**

**STELLAH ANNE BOSIRE ..... 1<sup>ST</sup> RESPONDENT**

**SILVESTER MAGENI KISANJI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment, order and sentence of the Law Society of Kenya  
Disciplinary Tribunal in Disciplinary Committee Cause No.146 of 2011 delivered on 3/3/ 2014)*

**JUDGMENT**

1. This appeal arises from the decision of the Advocates Disciplinary Tribunal which found the appellant guilty of professional misconduct, admonished her and directed that she refunds to the complainants the sum of Ksh.350,000/= after it found that there was conflict of interest when the appellant acted for both the vendor and the purchaser in a land transaction.
2. The appellant was aggrieved by the decision of the Tribunal and lodged this appeal. The appellant listed 34 grounds in her memorandum of appeal which she condensed into the following grounds:
  1. The learned tribunal erred in finding that the appellant had declined to extend the time within which the land sale transaction was to be completed.
  2. The learned tribunal erred in fact and in law by failing to appreciate or consider that the appellant had lawfully advised the respondents that if at all they needed an extension, they needed to request the vendor personally and the advocate would merely formalise their resolution.



3. The learned tribunal erred in law by holding the appellant culpable when the breach of contract, if any, was attributable to the parties themselves including the vendor and it was only the parties who had an obligation towards each other under the sale agreement.
  4. The learned tribunal erred in condemning the appellant to pay to the respondent the sum of Ksh.350,000/= notwithstanding that the respondent had lodged a civil suit against the vendor claiming the same amount.
  5. The learned tribunal erred in finding that it was the appellant rather than the vendor who deducted or caused to be deducted 10% of the purchase price and the travel expenses amounting to Ksh.100,000/=.
  6. The learned tribunal erred in failing to find that in cancellation of the subject transaction, the appellant was only communicating a decision of the vendor and the tribunal was wrong to assume that the cancellation had been originated by the appellant.
  7. The learned tribunal erred in finding that the appellant was biased against the respondent.
  8. The learned tribunal erred in requiring the appellant to have proved a telephone call between her and the vendor particularly when the vendor had admitted the said conversations.
  9. The learned tribunal erred in law and misdirected itself in disregarding evidence and the detailed contents of the appellant's affidavit when it asserted that the appellant's details did not concern the tribunal.
  10. The learned tribunal erred in law in refusing to admit the affidavit of the Vendor - Grace Muthoni Wanjohi merely because it was indicated to have been drawn by the Appellant's firm.
  11. The learned tribunal erred in finding that the Vendor's affidavit would not have added value to the appellant's defence.
  12. The learned tribunal erred in making a pronouncement that an Advocate must be absolutely clear that a party does not feel compelled to have her as an advocate yet the respondent were not compelled to retain the appellant as their advocate.
  13. The learned tribunal erred in assuming that the appellant had noticed a development that was snowballing into a dispute when all evidence available before the appellant indicated that parties had agreed to cancel the agreement.
  14. The learned tribunal erred in finding that the appellant ought to have ceased acting for the respondents and convicting her for not doing so.
  15. The learned tribunal erred in finding that failure to issue the 21 days' notice was unprofessional and unethical in the circumstances.
  16. The learned tribunal erred in fact and in law in finding the appellant guilty of professional misconduct.
  17. The learned tribunal erred in failing to appreciate that their proceedings were quasi criminal and had to balance the effects of their decision on the career and standing of the appellant.
3. The appeal was opposed by the respondents through their submissions dated 7/11/2022.



## Background facts

4. The appellant is an advocate of the High Court of Kenya practicing in the name of J.M. Theuri & Co. Advocates. The respondents herein were tenants of one Grace Muthoni Wanjohi (herein referred to as the vendor) who was the owner of a property known as Kahawa West Residential Plot No.G within Ngei 11 Kugeria area. The respondents approached the vendor and they agreed to purchase the said plot in the sum of Ksh.2,500,000/=.
5. Thereafter both parties appeared before the appellant and asked her to draft an agreement for them which they executed and the respondents paid Ksh.10,000/= as the fees for preparation of the agreement. The agreement indicated that the appellant was to act for both the purchasers and the vendor in the transaction. It also indicated that the purchasers were to pay a deposit of Ksh.500,000/= and the balance of Ksh.2,000,000/= within a year from the date of the agreement which period could be extended upon request of the purchasers.
6. The deposit of Ksh.500,000/= was duly paid. At the end of one year, the respondents purportedly asked the vendor to travel from London where she was residing to come to Kenya to receive the balance. The vendor came to Kenya but the respondents were unable to raise the balance. The vendor thereupon rescinded the sale and asked the appellant to communicate the decision to the respondents. According to the appellant, the vendor indicated that she would retain 10% of the purchase price being damages for breach as provided for under the LSK Conditions of Sale. That the vendor also indicated that she would retain the sum of Ksh.100,000/= being the travel costs from London that she had incurred after being told by the respondents that they were to complete the transaction upon her arrival. The vendor refunded a sum of Ksh.130,000/= to the respondents. The respondents filed a suit, namely Milimani CMCC No.4716 of 2012 against the vendor claiming the balance of Ksh.370,000/=.
7. According to the respondents, they sometimes in August 2011 (sic 2010) they requested the appellant to write to the vendor and apply for extension of the completion period. The appellant wrote a letter to them dated 25/10/2010, indicating that the transaction was cancelled and that the sum of Ksh.350,000/= would be forfeited.
8. Separately, the respondents lodged a complaint against the appellant with the Advocates Disciplinary Committee accusing her of not seeking an extension for them. The appellant maintained before the tribunal that it was the purchasers who were supposed to approach the vendor, agree on the extension and have the appellant draw an addendum to the agreement to that effect.
9. The tribunal after considering the material placed before it found the appellant guilty of professional misconduct and convicted her of:
  - a. Continuing to act for both the vendor and the purchaser in a sale/purchase transaction even after it was clear that there would be a disagreement, and thereafter acting in favour of the vendor to the disadvantage of the purchaser.
  - b. Causing deductions of Kshs. 350,000/= from the monies refundable to the respondents herein, when such deductions were not contractual.
10. The Tribunal thereupon ordered the appellant to pay a sum of Ksh. 350,000/= to the respondent within 60 days. She was also admonished.
10. It is the above findings that gave rise to this appeal.
11. The appeal was canvassed by way of written submissions.



## **Appellant's submissions**

11. The appellant submitted that it is the parties themselves, the vendor and the purchasers, who were supposed to agree on an extension and then the appellant would be required to draft an addendum or a deed of variation. That the tribunal was in error to imply that the extension period was to be given or refused by the appellant. That it is the respondents who failed to negotiate an extension with the vendor and therefore the advocate could not carry the blame for a party who was in breach.
12. The appellant submitted that the 10% deposit of the purchase price was made to the vendor. However, that the tribunal treated the advocate as the one who retained the deposit and the travel costs. That it was erroneous for the tribunal to hold that the advocate "went ahead to deduct 10% of the purchase price (Ksh.250,000/=) and Ksh.100,000/=for an alleged air ticket." Therefore, that the advocate could not be made to reimburse the said funds when she is not the one who collected them. That the respondents were aware of this fact which is the reason why they sued the vendor over the money at Milimani Courts. It was submitted that for the tribunal to impose the duty to refund on the advocate was devoid of factual or legal basis. That it is the vendor who could deduct from the deposit and the advocate was only a mouth piece for the vendor.
13. The appellant submitted that the tribunal erred in rejecting the affidavit of the vendor because it was drawn by the law firm of the appellant. That though the affidavit was drawn by the law firm of the appellant it was commissioned by another advocate, L. S. Sane, Advocate. It was submitted that there was no problem with the affidavit as long as the appellant did not commission it.
14. The appellant submitted that she was acting for both parties in the matter. That if the respondents were feeling not adequately represented by the appellant, they would have sought the services of another advocate. That there was consensus on the cancellation of the sale and therefore the advocate was not expected to cease acting.
15. The appellant submitted that a finding of professional misconduct upon an advocate is career threatening. Therefore, that such a finding should be made in the clearest of the cases. That the totality of the evidence in this case did not warrant a finding of guilt. That to be condemned to pay Ksh.350,000/= when the advocate was only paid Ksh.10,000/= is unjust and unfair in the circumstances.
16. It was submitted that the tribunal failed to consider that there was a case against the vendor at Milimani Commercial Courts. That the tribunal should have restricted itself to issues of conduct of the advocate and leave the issue for reimbursement of the money to the magistrate's court. That to award the sum of Ksh.350,000/= was out of jurisdiction if not res judicata.
17. The appellant urged the court to allow the appeal.

## **Respondents' Submissions**

18. The respondents submitted that the agreement of sale provided that the vendor could upon request extend the time within which the purchasers were required to pay the balance of the purchase price. That the appellant was the advocate on record for the respondents when the respondents asked her to request the vendor for an extension. Therefore, that the refusal by the appellant to apply for extension as requested by the respondents was without any lawful cause and was in contravention of her professional obligation to the respondents.
19. It was submitted that the appellant's action of writing a termination letter to her clients, the respondents, amounted to gross professional misconduct for reasons that:



1. The appellant was acting on behalf of the respondents and had been paid fees to act on their behalf. It was unprofessional and unethical for the said advocates without first ceasing to act on behalf of the respondents to proceed to act in an adverse manner to their interests and in favour of the vendor when she was professionally obligated to act in their best interest and in a manner to safeguard their rights. The respondents stressed that the appellant while still being contractually bound by a retainer to act in the best interests of the Respondents, breached that duty and acted in a manner inimical to the Respondents' rights and interests.
  2. The appellant without lawful reason refused to apply for the extension of the completion period and thereby acted contrary to the instructions of her clients, the respondents herein.
  3. The Appellant took sides with the vendor and unlawfully cancelled a valid sale agreement without looking out for the interest of the Respondents.
  4. The Appellant sanctioned and acquiesced in the illegality of forfeiture of the deposit of the purchase when the same was not provided for by the Agreement for Sale.
  5. The Appellant sanctioned and acquiesced in the deduction of a further sum of Kshs. 100,000/= on account of ticket expenses for the vendor, which had not been provided for under the Agreement of Sale.
20. The respondents submitted that the Committee rightly convicted the appellant for the offence of professional misconduct. That the Committee had power to order the appellant to compensate the respondents to an amount of Ksh.5 million but in exercise of its discretion ordered the appellant to pay the respondents a sum of Ksh.350,000/=. It was submitted that this court can only interfere with that exercise of discretion if it is demonstrated that the Tribunal has misdirected itself in some matter and has as a result arrived at a wrong decision, citing *Mbogo v Shah* [1968] EA 93. It was submitted that the Tribunal in this case judiciously exercised its discretion and arrived at a correct decision.
21. The respondents submitted that the appeal herein is under Section 62 of the *Advocates Act* relating to the professional misconduct of an advocate in the discharge of her duties to the respondents. That issues in regard to a suit filed at the magistrate's court have no application to the dispute before this court as the appellant is not a party to the dispute before the magistrate's court. It was argued that the two disputes and the resulting court processes are mutually exclusive and different. That they have jurisdiction to make their independent determinations. That the fact that the appellant was convicted and ordered to pay a sum of Ksh.350,000/= does not distract the respondents' rights to pursue the vendor for remedies for breach of contract. The respondents cited the case of *R v Disciplinary Tribunal of the Law Society of Kenya Ex parte John Wacira Wamgugu*, High Court, Misc.Application No.445 of 2013 where Odunga J. (as he then was) dealt with the issue of concurrency proceedings before the Disciplinary Tribunal in a succession cause in the High Court and stated that:
- ....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 complaint is one that it is empowered to entertain.
22. The respondents urged the court to dismiss the appeal with costs.



## Analysis and Determination

23. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its own conclusion. This position was expounded in *Selle & Another v Associated Motor Boat Co. Ltd.& others* [1968] EA 123 where the Court of Appeal held that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is and inconsistent with the evidence in the case generally.”

24. I have considered the grounds in support of the appeal, the pleadings and the submissions by the respective counsels for the parties. The issues for determination are:

- (1) Whether the tribunal erred in finding the appellant guilty of professional misconduct.
- (2) Whether the tribunal erred in ordering the appellant to pay the respondent a sum of Ksh.350,000/=.

### Whether the tribunal erred in finding the appellant guilty of professional misconduct

25. It is trite that an advocate will protect the interest of his client and act in a manner as to protect their client’s interest. The *Advocates Act*, Cap 16 Laws of Kenya recognizes that an advocate may be liable to his clients for negligence – See Section 46.

26. The court in the case of *Fatuma Abdalla Ahmed v Kahiro Kimani* [2013] eKLR stated as follows:

“When an advocate, like in this case, acts for both the purchaser and the vendor, ethical and professional responsibility issues arise. The general principal in law is that an advocate is obliged to refrain from acting for both parties where there is a conflict of interest or where such a conflict is likely to arise.”

27. In the case of *Kinluc Holdings Ltd v Mint Holdings Ltd & another* [1998] eKLR the Court of Appeal stated as follows:

“The advocate was acting for both the vendor and the purchaser. It is an unfortunate aspect of legal practice in Kenya that an advocate can act for both parties in a transaction for sale of land. This does create problems and having seen the problems, we understand, why the Law society in England agitated, successfully, to bar such a practice. We hope that the Law Society of Kenya will deem it fit to bring an end to such practice in Kenya.”

28. The above cases highlight the potential problems and conflicts that can arise when an advocate represents both the purchaser and the vendor in a sale/purchase transaction. The decisions underscore the professional responsibility of advocates to avoid situations where conflicts of interest are present or likely to arise. Advocates are expected to act in the best interests of their clients. Representing both parties in a transaction where their interests may diverge can undermine this duty.



29. In this matter, the Tribunal in its judgment held as follows:

“It is common practice and in order for an advocate to act for both parties in a sale/purchase transaction. However, the advocate must be absolutely clear that neither party feels compelled to have him/her as his advocate. The advocate must make it clear that each party has a right to be represented by his own advocate. And in process of the transaction, the advocate acting for both parties must cease to act for either, or both parties, if he/she notices a development which will result in a dispute arising from the transaction. The tribunal feels that the Accused Advocate in this case failed in her professional duties, the moment she felt she could not agree to either amend or extend the Agreement of Sale as requested by the Purchasers, and refused to cease acting for them. We find the Accused Advocate guilty of this count and convict her accordingly. The agreement of Sale not only had a clause for extension of the completion period but did not have a penalty clause for the defaulting party. Instead of the Advocate seeking from the vendor the extension of the completion period, she cancelled the Agreement of Sale without notice and went ahead to deduct 10% of the purchase price (Kshs. 250,000) and Kshs 100, 000 for an alleged air ticket for the vendor, which deductions were not contractual. Although the Advocate claims that she relied on the Law Society of Conditions of Sale in causing the forfeiture of the 10% deposit (Kshs 250,000) by the complainants, our reading of the said conditions shows otherwise. Before the forfeiture can take place, the Vendor’s advocate must give the purchaser a twenty one (21) day notice to complete the sale (see conditions 4(7)(b)(c) and (d). No such notice issued for these actions, we find the advocate acted unprofessionally and unethically in favour of the vendor to the disadvantage of the complainants. These actions are incompatible with the conduct expected of an advocate, and clearly puts the legal professional into disrepute. We find her guilty of professional misconduct and convict her accordingly.”

30. It is not in dispute that the appellant was acting for both the purchasers and the vendor in the sale/purchase transaction. The respondents accused the appellant for acting in a manner that was adverse to their interests while she was still their advocate.
31. The respondents allege that they went to the appellant’s office and requested her to seek for an extension for payment of the balance from the vendor but that she declined to do so. The appellant on the other hand contends that no such request was made to her as it was for the respondents to seek for an extension from the vendor. She submitted that it was the duty of the respondents to demonstrate that such instructions were given. That there was no evidence of such writing ever being given to her.
32. The 2<sup>nd</sup> respondent indicated in his witness statement that the request for extension was made orally at the appellant’s offices. The appellant denies that such a request was made to her.
33. The Tribunal held that the respondents requested the appellant to seek for an extension from the vendor but that she refused to do so. The Tribunal however did not state the evidence it relied on to conclude that such a request was made to the appellant. It is trite that whoever alleges must prove. In this case it was only the word of the respondents that they made the request against the denial by the appellant that such a request was made. On my part I find no sufficient evidence that the respondents made a request to the appellant to seek for an extension from the vendor.
34. There is however no dispute that the Appellant wrote a letter to the respondents dated 25<sup>th</sup> October 2010 indicating that the sale transaction was cancelled and that the vendor would retain the sum of Ksh.350,000/= . The appellant says that the parties mutually agreed to cancel the agreement. The respondents denied this. There is no evidence to support the assertion that the parties mutually agreed



to rescind the contract. If the parties did so, there is no reason why the appellant did not have it reduced down in writing since she was appearing for both sides and particularly considering that the agreement provided that the respondents were entitled to an extension without any conditions. It is clear to me that the appellant sided with the vendor to rescind the contract despite the fact that the respondents were entitled to an extension.

35. Clause 11 of the agreement stated that the sale was subject to the Law Society of Kenya Conditions of Sale [1989] Edition. The same require the advocate for the vendor before forfeiture is made to give the purchaser a 21-day notice to complete the sale. The appellant did not comply with this condition when she issued the notice to the respondents. It is clear that the appellant in cancelling the agreement and in addition failing to issue the necessary notice acted in a manner adverse to the interests of the respondents in favour of the vendor.
36. When the vendor decided to rescind the contract despite the fact that the respondents were entitled to an extension, it must have dawned on the appellant that a dispute would likely arise between the parties.
37. Consequently, the appellant should have ceased to act for both parties in the transaction. I agree with the finding of the Tribunal that it was unprofessional for the appellant without first ceasing to act for the respondents to proceed to cancel the agreement. In so doing, she acted in an adverse manner to the interests of the respondents and in favour of the vendor when she was professionally obligated to act on their best interests. The appellant took sides with the vendor and unlawfully cancelled a valid sale agreement without looking out for the interests of the respondents. I accordingly agree with the decision of the Tribunal in finding the appellant guilty of professional misconduct by continuing to act for both the vendor and the purchaser in the sale/purchase transaction even after it was clear that there would be a disagreement, and thereafter acting in favour of the vendor to the disadvantage of the purchaser.
38. The tribunal further found the appellant guilty of professional misconduct for causing deductions of Kshs. 350,000/= from the monies refundable to the respondents when such deductions were not contractual.
39. It is clear from clause 2(a) of the Sale Agreement that the deposit money was paid directly to the vendor's bank account. The appellant argues that she did not cause the deduction as the money was not in her possession. Though there was no evidence that the appellant directly caused the deductions as the money was not in her possession, it is all the same clear she sanctioned and acquiesced with the deduction as she wrote to respondents informing them of the deductions. Her argument that she was only communicating the decision of the vendor is not tenable. The letter indicates that she was acting under instructions from the vendor, yet she never sought for instructions from the respondents before writing the letter despite the fact that the respondents were also her clients. The appellant acquiesced to the deductions and therefore caused the deductions. It is clear, yet again, that the appellant took sides and acted in favour of the vendor to the disadvantage of the respondents when she was expected to act for both sides. This amounted to professional misconduct on her part. The charges of professional misconduct were therefore proved against the appellant.

Whether the tribunal erred in ordering the appellant to pay the respondent a sum of Ksh.350,000/=

40. The tribunal ordered the appellant to pay the sum of Ksh. 350,000/= to the respondent within 60 days. The question is whether it was proper for the tribunal to order the appellant to refund the money in view of the fact that there was in existence a civil suit pending before the magistrate's court claiming the same amount of money.



41. Section 60(4) of the *Advocates Act* provides as follows

“After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, 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.”

42. Further, Section 60A(4) of the *Advocates Act* provides that:

“The Committee shall not exercise any of its powers under this section unless it is satisfied that it would in all circumstances, be appropriate to do so; and in determining whether in any case it would be appropriate to exercise any of those powers, the Committee may have regard—

- a. To the existence of any remedy that could reasonably be expected to be available to the client in civil proceeding; or
- b. Where proceedings seeking any such remedy have not been commenced by the client, whether it would be reasonable to expect him to commence such proceedings.”

43. In view of the fact that there was a pending suit over the money between the respondents and the vendor, it was not appropriate for the Tribunal to delve into the issue of compensation to the respondents. Under Section 60A(4) of the referred to Act, the Tribunal is not required to exercise its powers under Section 60(4) where there is a remedy under the civil proceedings. Once the Tribunal found the appellant guilty of professional misconduct, it should have left the issue of compensation to the magistrate’s court to determine whether the claim of Ksh.350,000/= was refundable or not. The order for compensation was inappropriate in the circumstances of the case and ought to be set aside which I hereby do.

44. The upshot and outcome of the appeal is therefore as follows:

- (1) The finding of the Tribunal that the appellant was guilty of professional misconduct is upheld.
- (2) The finding of the Tribunal that the appellant be admonished for professional misconduct is upheld.
- (3) The order of the Tribunal for the appellant to pay compensation to the Respondents in the sum of Ksh. 350,000/= is set aside.



45. In view of the fact that the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2024**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

**Miss Kiiru HB for Mr. Thuita for Appellant**

**Mr. Masese for Respondents**

**Court Assistant - Amina**

**30 days Right of Appeal.**

