



REPUBLIC OF KENYA



KENYA LAW
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**Mpungu v Kimiyu & another (Environment & Land Case
378 of 2019) [2023] KEELC 22590 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 22590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 378 OF 2019**

EK WABWOTO, J

MARCH 20, 2023

BETWEEN

ANDREW MWITI MPUNGU PLAINTIFF

AND

HARON KIMIYU 1ST DEFENDANT

PAULINE MUSYIMI 2ND DEFENDANT

RULING

1. Before me for determination is the Defendants' Notion of Motion dated 27th October 2023 which was accompanied by the Supporting Affidavit sworn by Pauline Musyimi in which the Defendants sought the following orders:
 - i. ...SPENT.
 - ii. That this Court be and is hereby pleased to strike out this suit in its entirety with costs to the Applicants/Defendants.
 - iii. That this Honourable Court be pleased to issue any other or further orders as it may deem fit and necessary in the interests of justice and fairness.
 - iv. That costs of this Application be provided for.
2. The Application was premised on several grounds;
 - a. That the Complaint and application filed on 23rd November 2019 were drawn, signed and filed by an unqualified person (namely one Sharon Atieno Adunya Alias Sharon Atieno Adunya Obade) within the meaning and application of Section 9 of the *Advocates Act*.



- b. That following a launch for a crackdown on quack lawyers and masquerades by the Law Society of Kenya the said Sharon Atieno was one of the many culprits identified as non-advocates deceptively holding themselves out to the public as an Advocate of the High Court.
 - c. Sharon Atieno is currently under investigation by the Director of Criminal Investigation for the criminal offense of identity theft and forgery of legal documents
 - d. The record shows that the aforementioned individual has illegally and deceivingly had conduct of this matter since it was first presented before this Honourable Court in 2019.
 - e. The quack lawyer has been practising under the firm of Auma & Company Advocates as well as Apollo Chagina & Company Advocates contrary to Section 9 and 34 of the Advocates Act.
3. On 27th October 2023, the Plaintiff's Advocate filed a Notice of Change of Advocates in which the firm of Roba & Associates took up the matter on behalf of the Plaintiff.
 4. The application was canvassed by way of written submissions pursuant to the directions issued by this court on 31st October 2023.
 5. The Plaintiff filed a replying affidavit dated 21st November 2023 and submissions dated 16th January 2024 in which it was submitted that the Plaintiff innocently sought the services of a lawyer and Sharon Atieno Adunya had misrepresented herself as a qualified advocate. It was further argued that striking out the suit would unduly burden the Plaintiff who would be subject to refiling fees and seeking the services of a new lawyer.
 6. On the other hand, the Defendants filed submissions dated 17th November 2023 in which the Defendant outlined 6 separate dates when the alleged Advocate had conduct of the matter. It was also argued that equity should aid the vigilant not the indolent as such the Plaintiff could not be absolved since there was a free repository -The Advocate Search Engine which was available for use of by the public and could have been used to ascertain the status of the advocate.
 7. Having considered the application and submissions filed by the parties this court is of the view that the sole issue for determination before is whether the Application dated 27th October 2023 is merited.
 8. In proving the merits and demerits of the application, the sole contention is whether Sharon Atieno Adunya is an unqualified person whose actions amount to an offence as an unqualified person under Section 33 of the Advocates Act. Section 34 of the Advocates Act provides as follows:

“

- “(1)) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—
- a) relating to the conveyancing of property; or
 - b) for, or in relation to, the formation of any limited liability company, whether private or public; or
 - c) for, or in relation to, an agreement of partnership or the dissolution thereof; or



- d) for the purpose of filing or opposing a grant of probate or letters of administration; or
- e. for which a fee is prescribed by any order made by the Chief Justice under section 44; or
- f. . relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

- i. any public officer drawing or preparing documents or instruments in the course of his duty; or
 - i. any person employed by an advocate and acting within the scope of that employment; or
 - i. any person employed merely to engross any document or instrument.

“(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

“(3) Any person who contravenes subsection (1) shall be guilty of an offence.

“(4) This section shall not apply to—

- (a) a will or other testamentary instrument; or
- (b) a transfer of stock or shares containing no trust or limitation thereof.”[Emphasis Mine]

8. Additionally, Section 9 of the *Advocates Act* states that no person shall be qualified to act as an advocate unless-

- a) He has been admitted as an advocate; and
- b) His name is for the time being on the Roll; and
- c) He has in force a practicing certificate.

9. The Supreme Court in the case of *National Bank of Kenya Limited versus Anaj Warehouse Limited (2015)* eKLR considered pertinent issues with regards to defining who an unqualified advocate is:

“(53) What is the real intention of Section 34 of the *Advocates Act*? Is it aimed exclusively at advocates “without practising certificates”, or persons who are not advocates within the terms of Sections 2, 12 and 13 of the *Advocates Act*? Does one cease to be “an advocate”, on account of not taking out a practising certificate? Or does one remain “an advocate”, but “one who is not qualified to perform the tasks of an advocate”?

(54) It is plain to us that there are no clear-cut answers to these vital questions. Such a state of uncertainty flows from either, the inelegance of draftsmanship; or equivocation in the expression of parliamentary intent....In our opinion,



it is essential to establish the main objective of Section 34, as a basis for any conclusions. This Section prohibits unqualified persons from preparing certain documents. It is directed at “unqualified persons”. It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practising certificates.

(58) In these circumstances, how does the citizen’s position rest? If he or she were to walk into an advocate’s office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate’s practising certificate? Would he or she be in breach of the law if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate..... The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.”[Emphasis Mine]

10. I align myself with the sentiments of my Lordships in Supreme Court in so far as the Spirit of Section 34 is primarily a shield and protection for citizens who in our Kenyan context are less knowledgeable. In this instance, I have considered that save for referring to specific pleadings (within the Court’s knowledge), the Defendants did not provide evidence to the effect that Sharon Atieno Adunya alias Sharon Atieno Adunya Obade is an unqualified person. The Defendants ought to have addressed the Court on these questions: -

- i. Did Sharon Atieno Adunya have a legal training and was she consequently admitted as an advocate of the High Court of Kenya at the time of filing the suit?
- ii. Was Sharon Atieno Adunya’s name on the Roll of Advocates at the time of filing the suit?
- iii. Did Sharon Atieno Adunya have a valid practising certificate at the time of filing the suit?

10. The Court has further considered that averments of the Defendants would amount to circumstantial evidence to which Section 60 of the *Evidence Act* cannot be applied. In so far as the Defendants have outlined that Sharon Atieno Adunya is undergoing investigations, this Court must reiterate that, that in itself does not prove admission of guilt since the matter must follow due process.

11. In the foregoing, the Court finds that the Defendants have not met the threshold to warrant the striking out of the suit. The Notice of Motion application dated 27th October 2023 is hereby dispensed with in the following terms:

- a. The Notice of Motion Application dated 27th October 2023 is unmerited and the same is dismissed.
- b. The parties are hereby granted leave of seven (7) days to file and serve any further documents in respect to the suit.
- c. Each party to bear its own costs of the Application.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Oginga for the Plaintiff/Respondent.

Ms. Waithira for the Defendants/Applicants.

Court Assistant; Caroline Nafuna.

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