



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 23 OF 2017

SAMUEL NDUNGI KARIUKI.....APPELLANT

VS.

JOSEPH MACUGU MUIRURI.....RESPONDENT

(Appeal from the judgment of the Principal Magistrate's Court at Kikuyu,

Hon. E. Michieka, (Mr.) SRM dated 2nd September, 2016

in PMCC No. 36 of 2015)

JUDGMENT

1. This is an appeal against the Ruling of the Principal Magistrate's Court at Kikuyu, delivered on 2nd September, 2016. Before that court, **Joseph Machugu Murirui** (hereinafter **Joseph**) sued **Samuel Ndungu Kariuki** (hereinafter **Samuel**) and sought judgment for Kshs.1,344,040 which amount Joseph pleaded was amount he paid Samuel as part of the agreed purchase price of 0.101 hectares of **KABETE/KARURA/2543**. Joseph alleged in his claim that Samuel breached the agreement of sale dated 7th October, 2013. Samuel filed his defence denying that claim through the law firm of *Kinyanjui & Njau Advocates*.

2. Joseph moved the Kikuyu Magistrate's court by an application dated 4th June, 2015 seeking for entry of judgment in his favour on the ground that Samuel filed his defence through the law firm of *Kinyanjui & Njau* which advocates had not taken out their practicing certificate contrary to the **Advocate's Act Cap. 16**.

3. That application was granted as prayed on 22nd June, 2015, in the absence of the advocate for Samuel.

4. Samuel filed a Notice of Motion application dated 24th February, 2016. Samuel, by that application, sought the following orders:-

(a) **THAT** the firm of *Matweke Asiyo and Company Advocates* be granted leave to come on record on behalf of the defendant/judgment debtor.

(b) **THAT** there be a stay of execution of the ex-parte judgment entered herein against the defendant, decree and all consequential ordered thereof pending the hearing and determination of this application inter partes.

(c) **THAT** there be a stay of execution of the ex-parte judgment entered herein against the defendant, decree and all consequential ordered thereof pending the hearing and determination of the application.

(d) **THAT** this honourable court be pleased to set aside the ex-parte judgment entered herein and all consequential orders and the defendant be granted leave to enter appearance and file defence within 15 days of the orders herein.

(e) **THAT** the orders ordering committal of the defendant/judgment debtor to a civil jail be varied and or lifted.

(f) **THAT** there be a stay of execution of the ex-parte judgment entered herein against the defendant, decree and all consequential orders thereof pending the hearing and determination of the suit.

(g) **THAT** the court be pleased to make any such orders as are appropriate in the circumstances.

5. The trial court delivered its Ruling to that application on 2nd September, 2016. It is that Ruling that is the subject of this Appeal.

ANALYSIS

6. This is the first appellate court. A hearing of an appeal by the first appellate court is by way of retrial. The principles that will guide this Court are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions. This Court is not bound necessarily to follow the trial court's finding of fact if it appears either that the trial court failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence: See the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123.**

7. An advocate is qualified to practise when he is admitted as an advocate; and his name is in the Roll of the advocates; and he has in force a **Practising Certificate**: See **Section 9 of Cap 16.**

8. **Section 22 of Cap. 16** provides that an advocate shall apply to the Registrar for practising certificate and the Registrar shall issue the practising certificate on being satisfied the advocate has paid to the **Law Society of Kenya (LSK)** the prescribed fees. **Section 24 of Cap. 16** provides that every practising certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day. That Section also states that the practising year shall be 1st January to 31st December. Further, that every practising certificate shall expire at the end of the practising year.

9. Joseph by his application dated 4th June, 2015 based his prayer for judgment on the ground that Samuel's advocate, *Kinyanjui & Njau Advocates* filed Samuel's defence and memorandum of appearance while the said advocate did not hold a valid practising certificate and was therefore unqualified to practise law.

10. As stated before, the advocate for Samuel did not attend the hearing of Joseph's application of 4th June, 2015, and the same was granted as prayed on 22nd June, 2016. It is the granting of the said application which prompted Samuel to file his application dated 24th February, 2016. The prayers that Samuel sought by that application are reproduced above.

11. The trial court by its Ruling which is the subject of this appeal had this to say, as its finding:-

“I have considered the application and affidavit in support, grounds of opposition and submission by counsel. Into (sic) the averment by the applicant, that he was not served with the Notice to show cause, the process server a Mr. Simon Kioko appeared in court on 30th May 2015 and was cross examined by counsel for the applicant. He stuck to his guns and his testimony that he served the applicant in Nakuru was unshaken. I formed the opinion that he was truthful and I find that the applicant was properly served with the Notice to show cause.

I have perused the draft defence by the applicant and can't help but to agree with counsel for the respondent that the same raises no triable issue and are only a denial aimed at delaying this case further than it has. The applicant admitted being indebted to the applicant at the onset and had sought a payment plan through his then advocate who he now say erred.

Having found that the applicant was duly served with Notice to show cause and having found that the draft defence raises no triable issues, I am constrained to find as I hereby do that the application dated 24th February, 2016 lacks merit and do hereby dismiss the same in its entirety with costs to the respondent.”

12. The learned magistrate by the above ruling considered whether Samuel had been served with notice to show cause before execution by issuance of a warrant of arrest was granted; the learned magistrate considered whether the defence Samuel sought to file had raised triable issues; and whether Samuels had admitted indebtedness to Joseph. That consideration was at the expense of the main issue raised by Samuel. Samuel by his application sought the setting aside of the *ex parte* judgment entered against him on 22nd June, 2015.

13. It was not denied that the advocate *Kinyanjui & Njau* did not have a valid practising certificate as required under Cap. 16. That advocate was an unqualified person as defined under Cap 16, which means one not either admitted as an advocate or whose name is not in the Roll of advocates, or one who does not have in force a practising certificate. Such a person is not permitted, under **Section 34 of Cap 16** to take instructions or prepare any document or instrument. **Section 34 of Cap 16** is in the following words:-

“(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**
- ii. any person employed by an advocate and acting within the scope of that employment; or**
- iii. any person employed merely to engross any document or instrument.**

14. It is on the provisions of Section 9 and 34 of Cap 16, presumably since the Ruling did not state so, that the trial court entered judgment. The trial court, it will be noted from the reproduced Ruling above, did not strike out the memorandum of appearance and defence filed by *Kinyanjui & Njeru* on behalf of Samuel.

15. It is therefore not clear how the trial could as it did, enter judgment for Joseph while the defence filed by Samuel and his memorandum of appearance were on record.

16. Much more than that, however, is that the jurisprudence prevailing at that time the trial court delivered its Ruling on the provisions of section 9 and 34 of Cap 16, was that any document or instrument prepared by an unqualified person, who had been admitted as an advocate, is not invalidated by the fact such a person is unqualified because he had failed to obtain a practising certificate.

17. The above jurisprudence was pronounced by the Supreme Court in the case **NATIONAL BANK OF KENYA LIMITED VS ANAJ WAREHOUSING LIMITED (2015) eKLR**. That decision of the Supreme Court was delivered on 2nd December, 2015. The trial court's Ruling, which failed to consider the Supreme Court's decision was delivered on 2nd September, 2016.

18. The Supreme Court in that case, **NATIONAL BANK OF KENYA LIMITED VS. ANAJ WAREHOUSING LIMITED** (supra) considered an appeal where the main issue was follows:-

“whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of Section 34 (1) (a) of the Advocates Act.

19. The Supreme Court in that case **NATIONAL BANK OF KENYA LTD VS. ANAJ WAREHOUSING LIMITED** (supra) had this to say on the identified issue above:-

“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. ...

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. ...

[68] The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”

20. The above holding of the Supreme Court distinctly reveals that the trial court's finding of 2nd September, 2016 was in error. Samuel's memorandum of appearance and his defence were not invalidated by the fact that the firm of *Kinyanjui & Njau Advocates*, who filed those documents, did not have a valid practising certificate. There was therefore no basis of entering judgment in favour of Joseph. The appeal therefore succeeds.

DISPOSITION

21. The following are the orders of this Court:-

(a) The orders issued in Kikuyu Principal magistrate's court in Civil Case No. 36 of 2015 on 2nd September, 2016 are hereby set aside and are substituted by an order setting aside judgment entered in that court on 22nd June, 2015.

(b) The appellant is awarded costs of the application dated 24th February, 2016.

(c) This matter is hereby referred back to Kikuyu Principal Magistrate's Court for trial.

(d) The appellant is awarded costs of this appeal.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice

For Appellant: Mr. Aunga

For Respondent: No appearance

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE