



**Department of Agriculture and Food Authority v George & 4 others (Miscellaneous Civil Suit 15 of 2021) [2022] KEHC 11006 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11006 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS CIVIL SUIT 15 OF 2021**

**RPV WENDOH, J**

**JUNE 23, 2022**

**IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY**

**BETWEEN**

**DEPARTMENT OF AGRICULTURE AND FOOD AUTHORITY .... APPLICANT**

**AND**

**VICTOR MUKAMI GEORGE ..... 1<sup>ST</sup> RESPONDENT**

**EMMANUEL N. NYAIRARIA ..... 2<sup>ND</sup> RESPONDENT**

**PETER MBERO ..... 3<sup>RD</sup> RESPONDENT**

**JACKSON ROBI ..... 4<sup>TH</sup> RESPONDENT**

**SEMPRINA WAMBUA MAMBE ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant the Department of Agriculture and Food Authority, filed this miscellaneous application through the firm of Titus Makhunu & Associates. On 7<sup>th</sup> July 2021, Mudeyi Okumu & Co Advocate filed a notice of appointment on behalf of the Respondents and also filed a replying affidavit of even date.
2. The applicant filed a Notice of Preliminary Objection (Objection) dated 29/9/2021 based on the following grounds:-
  - a. That the respondents' duly appointed Advocate Mr. Mudeyi Albert Okumu does not have in force a valid practicing certificate for the year 2021, thus precluded by Section 9 (c) of the *Advocates Act*, Cap 16 Laws of Kenya from practicing law as such and/or representing any party before courts of law within the Republic of Kenya;



- b. That the respondents' said Advocate Mr. Mudeyi Albert Okumu place of work is Messers. Kerario Marwa & Co. Advocates which firm has commissioned the said Replying Affidavits contrary to Section 4 (1) of the [Oaths and Statutory Declarations Act](#), Cap 15 Laws of Kenya;
  - c. That consequently, the Respondents said Affidavit and Notice of appointment filed herein are incompetent, fatally and incurably defective, hence should be struck off forthwith.
3. The objection was canvassed by way of written submissions which I have duly considered. The issue for determination is whether the pleadings filed on behalf of the respondents by Mr. Mudeyi Albert Okumu should be struck out.
  4. In its submission, the applicant alleged that the objection is based on the f provision of Section 9 (c) of the [Advocates Act](#) and Section 4 (1) of the Statutory Instruments Act. It was further submitted that at the time when Counsel for the respondent was filing documents on behalf of his clients, beginning with the notice of appointment dated 7/7/2021, Counsel was not a holder of a valid practice certificate.
  5. The applicant also submitted that the Advocates' search engine as of 29/9/2021, showed that Counsel has been inactive since the year 2019 and a letter from the Law Society of Kenya dated 7/1/2022, confirmed that the last time Counsel took out a practice certificate was in the year 2019 and therefore he could not have had a valid practice certificate as at 7/7/2021. Further, it was submitted that the replying affidavits were commissioned at the firm of Kerario Marwa & Co. Advocates which was the respondent's Counsel place of work contrary to Section 4 (1) of the Oaths and Statutory Declaration Act.
  6. The applicant urged this court to expunge the documents from the record and relied on various provisions of the [Advocates Act](#) and the case of [Isaac Ndungu Kuguru & Another vs Newton Siele & 2 Others](#) (2014) eKLR.
  7. In a brief rejoinder, Counsel for the respondent submitted that the orders being sought are draconian and if allowed, it would greatly prejudice the respondents. Counsel submitted that the reason he could not take out the practicing certificate for the year 2021 was due to the personal challenges experienced that year but he has since regularised the issue.
  8. In support of his submissions, he asked this court to consider the findings of the Supreme Court in Petition No. 36 of 2014 between [National Bank of Kenya Ltd vs Anaj Warehousing Ltd](#) (2015) eKLR.
  9. There is admission by Counsel for the respondent (Mr. Mudeyi) that he did not take out a practising certificate for the year 2021. The applicant also produced a letter from the Law Society of Kenya which confirmed that Mr. Mudeyi was not licenced to practice law in the year 2021.
  10. Section 9 of the [Advocates Act](#) provides that a person is not entitled to practice as an Advocate if he does not have a practicing certificate as follows:-

Subject to this Act, 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;
- (d) deleted by Act No. 9 of 2000, s. 57,



11. A person who does not have a current practicing certificate for the year of practice, is described as an unqualified person under the *Advocates Act*. Section 2 of the *Advocates Act* describes an unqualified person as an advocate who:-
- (a) is not qualified under section 9;
  - (b) is not exempt under section 10; and
  - (c) fails to take out a practising certificate
12. Section 34 of the *Advocates Act* prohibits an unqualified person from drawing certain documents or instruments. In relation to the case before this court, Section 34 (1) (f) provides:-
- (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—
    - a. ...
    - b. ...
    - c. ...
    - d. ...
    - (f) relating to any other legal proceedings;
13. The consequences thereof of drawing legal instruments by an unqualified person is provided for under Section 31 of the *Advocates Act*. It provides:-
- (1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.
  - (2) Any person who contravenes subsection (1) shall—
    - (a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and
    - (b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and
    - (c) in addition, be guilty of an offence.
14. The provisions of the law are clear that a person who is unqualified to practice law by virtue of not being a holder of a current practicing certificate, but purports to draw up legal instruments, is guilty of an offence and is also deemed to be in contempt of the court in which he so act.
15. The law does not explicitly provide for the fate of the documents which are drawn up by the unqualified person. In *Kenya Women Trust versus Salome Waithaka Kinyua & Anor.* (2019) eKLR, the Court of Appeal made the following observation expressing the common law position: -
- “The disqualification’s provisions are verbatim, see Section 20 of the Solicitors Act vis a vis Section 31 of the Advocate Act. The Solicitors Act like our Act is also silent on the question of what happens to the proceedings where an Advocate without a certificate had acted. However, as to proceedings, the position is set out in Halsbury’s Laws of England, Vol. 44 and 4th Edition Par 353 thus:



“Proceedings are not invalidated between the litigant and the opposite party merely by reason of the litigants’ solicitor being unqualified, for example by his not having a proper practicing certificate in force.”

This has been the position since the 1866 decision of *Sparling vs Brereton* (1866) 1 LR 64, where Sir Page Wood VC held that such actions/ proceedings are valid and binding upon the clients as against third parties. We find this decision very persuasive and compelling, and we accept it as the law, which should apply in this instance as well.

It is disgraceful and a criminal offence for an advocate to practice without a valid practicing certificate. However, no prejudice has been shown to have been occasioned to the innocent litigant in this case. Similarly, it is instructive to note that: -

“Proceedings are not invalidated between the litigant and the opposite party merely by reason of the litigants’ solicitor being unqualified, for example by his not having a proper practicing certificate in force

By law, striking out pleadings or staying or expunging proceedings by such unqualified person for a client who is innocent would negate the entire constitutional imperative of serving substantive justice to the parties. On this basis, I find that the application in the trial court to strike out pleadings and or proceedings by the unqualified advocate herein lacks merit and is not worth of reinstatement”.

16. The Supreme Court of Kenya settled this debate in the case of [National Bank of Kenya Ltd](#) (supra) where the court held that :-

“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 practicing 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.

While securing the rights of the client whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.

We commend this Judgment to the attention of Parliament, the Law Society and the Attorney General so that appropriate legislative action may be taken to address the gaps and inconsistencies now apparent in the [Advocates Act](#) as highlighted in paragraphs 48, 49, 50, 51, 52, 53 and 54 herein.”

17. In light of the foregoing, Parliament through Legal Notice No. 11 of 2017, took the advisory of the Supreme Court and made changes to the [Advocates Act](#) by introduction of Section 34 B which provides:-

34B. Validity of legal documents

- (1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.



- (2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.
  - (3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.
18. The above amendments brought reprieve to innocent litigants who instruct Advocates in the belief that they are qualified to practice. Ordinarily, an instructing client does not necessarily do a background check on the Advocate he intends to instruct. This is not to encourage Advocates to practice without taking out a practicing certificate. A separate action can indeed be taken against such Advocates as their actions are an affront to the rule of law and the honourable legal profession.
  19. It is this court's view that the pleadings as filed cannot be struck out on account of an unqualified Advocate.
  20. On the commissioning of the replying affidavits, Mr. Mukhanu submitted that they were commissioned by the firm of Kerario Marwa and Company Advocates where Mr. Mudeyi was employed at that time contrary to the provisions of Section 4 (1) of the Oaths and Statutory Declaration Act. The allegations of Mr. Mudeyi is employment in the said firm at that time, can only be established by a letter or contract of employment from the said firm. There is no such document which has been produced before this court.
  21. From the foregone, the following orders do issue:-
    - a. The Notice of Preliminary Objection dated 29/9/2021 is dismissed.
    - b. The costs of this application shall be borne personally by Mr. Mudeyi and are assessed at 20,000/= to be paid forthwith .

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 23RD DAY OF JUNE, 2022**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of**

Mr. Ouma holding brief for Mr. Makhunu for the Applicant.

Mr. Kisera holding brief for Mr. Mudeyi for the 1st, 2nd, 3rd and 4th Respondents

Nyauke Court Assistant

