



REPUBLIC OF KENYA



KENYA LAW
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**Nyamai v Mbaluka & another (Civil Case E057 of 2022)
[2022] KEHC 13315 (KLR) (Civ) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13315 (KLR)

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

CIVIL

CIVIL CASE E057 OF 2022

JN NJAGI, J

SEPTEMBER 29, 2022

BETWEEN

KOREA MUENI NYAMAI APPLICANT

AND

JAMES KIMANTHI MBALUKA 1ST RESPONDENT

HIGHWAY HOLDINGS LIMITED 2ND RESPONDENT

RULING

1. The plaintiff/applicant has filed an application dated May 20, 2022 seeking for orders that:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the suit the defendants/respondents by themselves and/or through their employees, servants and/or agents or whomsoever be restrained by way of a temporary injunction from, selling, dealing, wasting, charging, taking over, damaging, alienating, disposing, auctioning or interfering with any and all of their real or personal properties, assets or choses in action.
 4. The defence and memorandum of appearance filed in this matter be struck out and judgment be entered for the plaintiffs as prayed in the plaint.
 5. The costs of this application be borne by the defendants.
2. The application is based on the grounds on the face of the application and supported by the affidavit of the applicant sworn on May 20, 2022. The applicant alleges that he advanced a friendly loan of Ksh 2 million to the respondents. That later on he realized that the respondents had swindled him of the



money. He sued them claiming the refund of Ksh 2 million together with damages and loss of profits amounting to about Ksh 84 million. He now says that he is apprehensive that the respondents intend to hide or dispose of their property to defeat any judgment that may be given in his favour, hence the application for orders of injunction against the respondents as stated above.

3. The applicant further states that the memorandum of appearance entered by the respondents was signed by an advocate who does not hold a current practicing certificate from the year 2019 to date. Therefore, that the pleadings filed in answer to the applicant's pleadings are irregularly and illegally on record. Further that the respondents in their statement of defence admit to have received the claimed money from the applicant but goes ahead to make denials without any basis. Therefore, that the defence and the memorandum of appearance filed in the matter should be struck out and judgment entered for the applicant.
4. The application was opposed by the respondents through the replying affidavit of the 1st respondent who avers that when he instructed the advocate on record he was not aware that he did not have a current practicing certificate. That the fact that the advocate did not have a practicing certificate should not be visited on them. That if the prayers sought are granted the respondents will suffer prejudice and will be condemned unheard for mistakes not of their own.
5. The respondents aver that the defence filed in court raises triable issues on whether the Ksh 2 million advanced to the respondents was a loan or was paid for services rendered and more so how the advanced sum of Ksh 2 million ballooned to over Ksh 100,000,000/=. That the allegation that the respondents intend to hide or dispose of their property to defeat any judgment is a figment of the applicant's imagination.

Submissions

6. In their submissions, the advocates for the applicant, Kevin Ndoho Macharia Advocates, reiterated the contents of the applicant's supporting affidavit and cited the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2016) eKLR where the Court of Appeal set out the principles under which summary judgment may be entered and what amounts to a triable issue.
7. The advocates for the respondents, Kaveke Mwanja & co Advocates, submitted that the pleadings filed by the respondents are valid in law notwithstanding the fact that the advocate who filed them did not have a practicing certificate at the time of filing them. The advocates relied on section 34 (B) 2 of the *Advocates Act* that provides that:

“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.”
8. The advocates further cited the case of *Kyalo Komu v Felix Maliti Mulingata* (2021) eKLR where Limo J quoted the case of *Kenya Women Trust v Salome Waitthaka Kinyua & Another* (2019) eKLR 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.”
9. On the question whether the respondents defence raises triable issues, the respondents submitted that the admission by the respondents that they received the sum of Ksh 2 million was equivocal. That they denied that the money was advanced as a loan but was paid for services rendered. The advocates cited the case of *Desbro (Kenya) Limited v Polypipes & Another* (2018) eKLR where the court cited the case



of *Job Kiloch v Nation Media Group, Salaba Agencies Limited & Michael Rono* (2015)e KLR where the court stated thus;

What then is a defence that raises no *bona fide* triable issue. A *bona fide* triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.

10. Consequently, the respondents submitted that the court cannot determine the matter at this stage without the benefit of a trial. That the case is not a fit one for summary dismissal.
11. The respondents further submitted that the injunctive orders sought by the applicant are vague, ambiguous, full of generalities and incapable of being granted by a court of law. That the suit by the applicant is for liquidated amount and not property. That the applicant has not shown the specific property which is threatened with disposal or sale. That the application does not meet the threshold for granting the relief of injunction as set out in the case of *Giella v Cassman Brown* (1973) EA 358.
12. The respondents urged the court to dismiss the application with costs.

Determination

12. The issues for determination are:
 - (1) Whether the pleadings filed by the respondents should be struck out for being filed by an advocate without a practicing certificate.
 - (1) Whether the defence filed by the respondents should be struck out for failure to raise triable issue(s).
 - (2) Whether the orders of injunction should issue.

Whether pleadings are valid for being filed by an advocate without current practicing certificate –

13. The position of the law in respect to documents filed by an advocate who does not possess a current practicing certificate is captured in section 34 (B) of the *Advocates Act*, cap 16 Laws of Kenya, which provides as follows:

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.
14. Case law has emphasized this legal position. In *Kyalo Komu v Felix Maliti Mulingata* (supra), Limo J considered the provisions of the section and observed that:

.....it is the position of this court that non-compliance of an advocate in taking out his practicing certificate, is a separate issue to be dealt with against the concerned advocate which may include and not be limited to disciplinary action against that advocate. But the same does not go into the root or



substance of proceedings filed by such advocates. The non-compliance in my view, is a technicality and an innocent party or litigant should not be punished or impeded from accessing justice through a fault which is not of his/her making.

15. The Supreme Court of Kenya has further settled the position of the law on the issue in the case of *National Bank of Kenya Limited & Another v Anaj Warehousing Limited* (2015) eKLR where conveyancing documents were prepared by an advocate who did not hold a current practicing certificate and the court held 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.”

16. In view of the express provisions of section 34 (B) of the *Advocates Act* and the Supreme Court decision cited above, the defence in this matter, though filed by an advocate who at the time did not hold a current practicing certificate, did not make the defence invalid. The defence is therefore validly on record.

Whether the defence raises triable issues -

17. The principles upon which a suit may be struck out are well settled. It must be established that the defence filed by a party does not raise any triable issue. In *Desbro (Kenya) Limited v Polypopies Limited & another* [2018] eKLR the court observed as follows:

There are myriads of authorities on the subject of striking out pleadings. In the case of *Jubilee Insurance Company Limited v Grace Anyona Mbinda* [2016] eKLR, the honourable court quoted with authority the celebrated case of *Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd* [2014] eKLR where this court held that:

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is “demurer of something worse than a demurer” beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no *bona fide* triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J Test In *Patel V Ea Cargo Handling Services Ltd* [1974] EA 75 at p 76 (Duffus P) that “... a triable issue... is an issue which raises a *prima facie* defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.”

18. The respondents have in this matter denied owing the money and have put the applicant to strict proof thereof. The applicant is claiming damages for breach of contract. In my view there is a triable issue on whether general damages are payable for breach of contract. Though the defence by the respondents does not state the services that were rendered to the applicant, there is a question of how the advanced sum of Ksh 2 million ballooned to over Ksh 84 million that is being demanded by the applicant. I therefore find that the defence raises triable issues. That finding entitles the respondents to defend the suit.



Whether orders of injunction should issue -

19. On the third issue, the applicant is claiming that the respondents intend to dispose of their property so as to defeat the execution of any judgment that may be entered in his favour. He seeks for orders of injunction against the respondents.
20. Order 40 rule 1 of the [Civil Procedure Rules](#) provides as follows:
- “Where in any suit it is proved by affidavit or otherwise—
- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,
 - c. The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
21. It appears from the pleadings that the application is grounded on order 40 rule 1(b) of the [Civil Procedure Rules](#). However, there is no iota of evidence that the respondents in this matter intend to dispose of their property so as to defeat the applicant’s claim. The applicant did not specify any property of the respondents that they intend to hide or dispose of. The application was in general terms that the applicant is apprehensive that the respondents intend to dispose of their property. The allegation has thereby not been proved. The application does not meet the threshold for issuance of orders of injunction.
22. The upshot is that I find no merit in the application dated May 20, 2022 and the same is dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ndoho Macharia for Plaintiff/Applicant

Mr. Kaveke holding brief Mutinda for Defendants/Respondents

Court Assistant: Sarah

30 days R/A.

