



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. E364 OF 2020**

**CHARLES MUIRURI NGANGA.....1<sup>ST</sup> APPLICANT**

**MICHAEL GATITU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**BENSON MBITHUKA.....RESPONDENT**

**RULING**

The respondent has a judgment against the applicants which he moved to execute to meet the decree therein. The applicant then moved the court by way of Notice of Motion dated 9<sup>th</sup> September, 2020 for stay of execution among other prayers therein including setting aside the ex parte judgment entered against them, leave to enter appearance and file a defence. The application was opposed and there is a replying affidavit sworn by the respondent and drawn by K. Kibiku & Co. Advocates.

Subsequent thereto, it transpired that the counsel for the respondent did not have a practising certificate at the time the execution was initiated and therefore the applicants filed a Notice of preliminary objection seeking inter alia to have the entire execution of the ex parte judgment and decree entered on 24<sup>th</sup> July, 2019 be set aside and struck out.

The Notice was opposed and counsel for the respondent who took over from the firm of K. Kibiku & Co. Advocates have filed a reply to the objection. I have considered the submissions by both parties, the law applicable, and the authorities cited. From the material presented it is true that, Mr. Kibiku Paul Kariba advocate had not taken out a practising certificate by the time the execution proceedings were initiated.

There is a letter by the Law Society of Kenya dated 2<sup>nd</sup> October, 2020 addressed to the advocates for the applicants confirming that position. There is also a copy of the practising certificate for the year 2020 in the name of Paul Kariba Kibiku, dated 26<sup>th</sup> October, 2020 and signed by the Chief Registrar of the Judiciary who is the issuing authority in that regard. The position is therefore that, the operating date of that certificate was 26<sup>th</sup> October, 2020.

It follows that as at the time the applicants' motor vehicle was attached, on the instructions of Mr. Kibiku on 18<sup>th</sup> August, 2020 the advocate was not certified to practice law. Section 9 of the Advocates Act Cap 16 Laws of Kenya has defined a person who fails to take out a practising certificate as an unqualified person. It is clear therefore that Mr. Kibiku could not practise law at that time, including giving instructions or taking instructions from any party. There is also Section 34 of the same Act which prohibits such a person from either directly or indirectly taking instructions of any nature. I am aware of the decision of the Supreme Court in the case of **National Bank of Kenya Limited Vs. Anuj Warehousing Limited (2015) e KLR** where the court held that no instrument or document of conveyance becomes invalid for reasons that it was prepared by an advocate who at the time was not holding a practising certificate under Section 34 (1) (a) of the Advocates Act. With profound respect, that case is distinguishable from the present case because the court in that matter referred to instruments or documents of conveyance which may be prepared by any advocate who is not in active law practice.

In the present case, the step taken by Mr. Kibiku was in the cause of court proceedings in an active matter that required execution of a decree. That is clearly different from preparing documents addressed in the Supreme Court decision. I see no conflict whatsoever in that distinction and therefore this court is not bound by that decision in the present dispute. See also **Kelvin Njiuri Mwaura vs. Mwangi Mwaura (2018) e KLR** and **Mohammed Ashraf Sadique & Another V Matthew Oseko T/A Oseko And Company Advocates [2009] e KLR**.

I have looked at the authorities relating to auctioneers. Whereas it is true that auctioneers are officers of the court, and that they are accountable to the court, an auctioneer takes instructions from the court at the instance of the advocate for the decree holder. Such an advocate must of necessity possess a practising certificate. In the case **EJ Austin & Others vs. Kimjomgkyu (2017) e KLR** the court observed inter alia,

**“It is the court which issues the warrants upon application by an advocate of the decree holder.”** Without that application, no auctioneer can execute any warrant. Mr. Kibiku had no practising certificate. He was an unqualified person to practise law. Practising law includes issuance of instructions to the court in the form of an application to issue warrants of attachments. The execution proceedings therefore initiated by Mr. Kibiku were unlawful and illegal to that extent.

The order that must therefore follow is that the execution proceedings must be vitiated and set aside in their entirety. These shall include the recall of the warrants and the release of the attached motor vehicle, and all costs attendant thereto which must be paid by Mr. Kibiku personally.

I observe in passing that Mr. Kibiku could have mitigated his loss by ordering the release of the motor vehicle when he was informed that he was an unqualified person. He did not do so and therefore he must bear the costs associated with his omission.

I know this ruling does not address the other substantive orders in the application by the applicants. The court shall now proceed to determine the rest of the application filed by the applicants on a date convenient to both counsel.

*Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of February, 2021.*

**A. MBOGHOLI MSAGHA**

**JUDGE**