



**Njoroge (Suing as Administrator of the Estate of Njoroge Ngugi) & another v Ali  
(Environment & Land Case E412 of 2022) [2023] KEELC 19102 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19102 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E412 OF 2022**

**EK WABWOTO, J  
JULY 27, 2023**

**BETWEEN**

**JOHN KIARIE NJOROGE (SUING AS ADMINISTRATOR OF THE ESTATE OF  
NJOROGE NGUGI) ..... 1<sup>ST</sup> PLAINTIFF**

**LUCY WANJIRU NJOROGE (SUING AS ADMINISTRATOR OF THE ESTATE  
OF NJOROGE NGUGI) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NOOR HAJI ALI ..... DEFENDANT**

**RULING**

1. This ruling is in respect to the Plaintiffs' application dated June 22, 2023 and the Defendant's preliminary objection dated June 29, 2023. The Plaintiffs filed a Notice of Motion Application dated June 22, 2023 which was accompanied by a Supporting Affidavit sworn by Edwin King'ori Rukwaro. The Plaintiffs sought the following orders:
  - i. ...spent.
  - ii. That this Honourable Court be pleased to set aside its orders issued on June 22, 2023 dismissing the Plaintiff's/Applicant's application dated May 18, 2023.
  - iii. That this Honourable Court be pleased to reinstate the Plaintiffs/Applicants application dated May 18, 2023 which was dismissed on June 22, 2023.
  - iv. That this Honourable Court be pleased to certify the Application dated May 18, 2023 as extremely urgent and grant a hearing date on priority basis.
  - v. That the costs of this application be in the cause.



2. The Application was premised on the following grounds:
  - i. The Plaintiffs/Applicants herein filed an application dated May 18, 2023 seeking the Defendant/Respondent to be cited for contempt of court resulting from the disobedience of the orders of this court given on the April 27, 2023.
  - ii. That the said application was scheduled to come up for directions on the June 22, 2023 before Justice E Wabwoto.
  - iii. That the advocate on record for the Applicants was unable to log into the online court on the said June 22, 2023 due to technical difficulties.
  - iv. That on June 22, 2023, the application dated May 18, 2023 was dismissed for non- attendance of the Plaintiffs/Applicants advocate on record.
  - v. That the mistake on the part of the Plaintiff/Applicants Advocate should not be visited upon the Plaintiffs/Applicants.
  - vi. That it would only be fair if the Plaintiffs/Applicants are given a chance to argue their case on merit as the rule of natural justice demands.
  
3. The Defendant's filed a notice of preliminary objection dated June 29, 2023 and grounds of opposition to the application dated June 22, 2023. The preliminary objection was premised on the following grounds:
  - i. That this Honourable Court in limine lacks jurisdiction to hear and determine the Plaintiffs Application which was drafted and filed by Rukwaro Edwin King'ori who at the time of filing was not a qualified person to act as an advocate as per Section 9(c) of the [Advocates Act](#).
  - ii. That under Section 33 of the [Advocates Act](#), Rukwaro Edwin King'ori was an unqualified person who committed an offence by instituting the application.
  - iii. That the Plaintiffs/Applicants purported Counsel, Rukwaro Edwin King'ori being an unqualified person is barred by the mandatory provisions of Section 34 (1)(f) of the [Advocates Act](#) Cap No 16 Laws of Kenya from taking instructions to draw or prepare legal pleadings or proceedings like the Application dated June 22, 2023. Accordingly, this Honourable Court in limine lacks jurisdiction to hear and determine the Plaintiffs/Applicants Application dated June 22, 2023 as drawn and filed by an unqualified person contrary to Section 34 (1) (f) of the [Advocates Act](#) Cap No 16 and should proceed to strike out all legal pleadings/proceedings duly filed and signed by Rukwaro Edwin King'ori.
  - iv. That the entirety of the Plaintiffs/Applicants Application dated June 22, 2023 is incurably defective for the reason that its Supporting Affidavit dated June 22, 2023 is sworn by Edwin King'ori Rukwaro in his purported capacity as an Advocate of the High Court of Kenya, contrary to Rule 8 of the [Advocates \(Practice\) Rules, 1963](#) and requirements of the law that an advocate is not competent to swear an affidavit on disputed facts like in the instant matter.
  - v. That the entirety of the Plaintiffs/Applicants Application dated June 22, 2023 is incurably defective for the reason that it violates the provisions of



the Practice Directions for Virtual Court Sessions, 2023, more specifically paragraph 9 which requires that all participants in virtual court sessions must ensure they have strong internet connectivity and stable power supply during virtual sessions and paragraph 13 of the said Directions which requires that Advocates and/or parties must be ready for the sessions at least five minutes before the time scheduled for hearing of their cases.

- vi. That the Plaintiffs/Applicants' Application dated June 22, 2023 apparent contravention of the Practice Directions for Virtual Court Sessions, 2023 is demonstrated under paragraph 6 (labelled 8) in the Supporting Affidavit dated June 22, 2023 where the Plaintiffs/Applicants Advocate blames alleged power outage for his non-attendance in court on June 22, 2023 without any evidence and contrary to paragraph 9 of the Practice Directions for Virtual Court Sessions, 2023. This is further misleading considering that virtual court attendance can be done via mobile phones and other devices. Further, despite the Plaintiffs/Applicants Advocates having the Defendant's/Respondent's Mobile Number/Email address they never communicated to them of the alleged unforeseen technical difficulties.
  - vii. That in its very essence, the Plaintiffs/Applicants Application dated June 22, 2023 contravenes the provisions of Sections 107 and 109 of the *Evidence Act* (Cap 80) that provide that whoever alleges the existence of a fact bears the burden of proof to prove that those facts exist. The outright failure by the Plaintiffs/Applicants to substantiate and offer any tangible evidence on their failure to attend Court on June 22, 2023 renders the Plaintiffs/Applicants Application dated June 22, 2023 incurably defective.
  - viii. That the entirety of the Plaintiffs/Applicants Application dated June 22, 2023 contravenes and/or violates Section 1B(1)(c) of the *Civil Procedure Act* (Cap 21) 7 that provide for the efficient use of the available judicial and administrative resources.
4. Pursuant to the directions issued by this court, it was directed that the application dated June 22, 2023 and the preliminary objection would be canvassed by way of written submissions.
  5. In the Plaintiffs' submissions dated June 26, 2023, it was reiterated the non-attendance by the Plaintiff's Advocate was due to technical difficulties beyond the control of the Advocate. Furthermore, the Plaintiff's had not, at any particular time indicated that they were willing to abandon the application. Relying on the cases of *Yamko Yadpaz Industries v Kalka Flowers Limited* (2013) and *Wachira Karani v Bildad Wachira* (2016), it was submitted that they had made the application without unreasonable delay and as such proved sufficient cause for the application to be allowed as prayed.
  6. The Respondents filed a Replying Affidavit sworn on June 29, 2023, sworn by Noor Haji Ali, and written submissions of the same date. The Defendant's submissions referred to Section 9(c) as read with Section 33 & 34 of the *Advocates Act*, Rule 8 of the *Advocates (Practice) Rules*, Paragraph 9 & 13 of the Practice Directions for virtual court sessions 2023, section 107 & 109 of the *Evidence Act* and Section 1B (1) (c) of the *Civil Procedure Act*. The submissions hinged upon the fact that the Advocate who prepared, signed and filed the application dated June 22, 2023 was an unqualified advocate and therefore the application and all supporting pleadings would be null and void. It was further argued that since the Respondent were entitled to costs.



7. I have considered the application, the preliminary objection, rival affidavits and respective submissions. In my view, the issues that arises for determination is whether the preliminary objection as filed is merited and whether the Plaintiffs are also entitled to the orders sought.
8. Firstly, the preliminary objection is based on the interpretation of Section 34 of the Advocates Act (Cap 16, Laws of Kenya) which 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
- 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.

(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.”

9. 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.

10. In this instance the contention is whether the actions of filing the application by Advocate Rukwaro would fall under Section 34 1(f) of the [Advocates Act](#) and consequently amount to an offence as an unqualified person under Section 33 of the [Advocates Act](#). 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 by stating as follows;

“(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.”

11. I echo the sentiments of my learned Lordships in Supreme Court in so far as the Spirit of Section 34 of the [Advocates Act](#) is primarily a shield and protection for citizens who in our Kenyan context are less endowed with knowledge of legal systems and subsequent requirements. I have also considered that



the letter dated June 29, 2023 from the Law Society of Kenya confirms that Advocate Rukwaro “is not certified to practice law”. The letter reads as follows;

“We confirm that according to our records, Rukwaro Edwin Kingo’ri Advocate has never taken out a valid practising certificate since 2022. He is therefore not certified to practice law....we request that you furnish us with the same to enable us to institute disciplinary proceedings against him”

12. Furthermore, I must emphasize that at all times advocates must not only remain true to their quintessential duty as officers of the court but also strive to be above reproach. It is on this premise that I find that the preliminary objection merited.
13. Secondly, I am of the opinion that this Court having allowed the preliminary objection, the net effect calls for the Court to down its tools with respect to determining the merit of the application for reinstatement.
14. In the foregoing, this Court makes the following orders:
  - i. The Notice of Motion application dated June 22, 2023 is unmerited and hereby struck out in its entirety.
  - ii. The Preliminary Objection dated June 29, 2023 is allowed.
  - iii. Costs will abide the determination of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Rukwaro for the Plaintiffs.**

**N/A for the Defendants.**

**Court Assistant; Caroline Nafuna**

