



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 257 OF 2019

PETER NJOROGE.....1ST APPELLANT

ANDREW KAMAU NJOROGE.....2ND APPELLANT

ANTONY WAWERU NJOROGE.....3RD APPELLANT

-VERSUS-

PETER MUCHIRI NDUNGU.....RESPONDENT

RULING

1. The respondent brought the Notice of Motion dated 24th October, 2019 and is supported by the grounds set out on its face and the facts deponed in the affidavit of the respondent. The following are the orders sought therein:

i. Spent.

ii. Spent.

iii. THAT the appellants' notice of motion dated 17th July, 2019, their memorandum of appeal dated 10th May, 2019 and filed on 13th May, 2019 and the record of appeal dated 19th September, 2019 and filed on 20th September, 2019 be struck out and expunged from the court record.

iv. THAT in the alternative to (iii) above, this court be pleased to vary its orders made on 5th August, 2019 and direct:

v. THAT the appellants do deliver to the respondent the original title deed for the seven (7) acre portion within 30 days of the order or such time as this court may direct.

vi. THAT the appellants do pay and settle the decretal sum within 60 days, failing which the respondent will be at liberty to execute.

vii. THAT the costs of the application, the application dated 17th July, 2019 and the appeal be awarded to the respondent.

viii. THAT this Honourable Court do make such directions as may be necessary under the Advocates Act on the conduct of the firm of M.M. Muriuki & Co. Advocates and Ms. Makena M'wiricha Advocate to protect the integrity of the practice of law.

2. To oppose the Motion, the 2nd appellant put in a replying affidavit.

3. When the motion came up for interpartes hearing, this court directed that the same be disposed of by written submissions. This court however notes that at the time of writing this ruling, none of the parties' had filed their submissions.

4. I have considered the grounds laid out on the body of the Motion, and the facts deponed in the supporting and opposing affidavits.

5. The Motion primarily concerns itself with the striking out of the appellants' aforementioned documents. In his affidavit, the respondent has stated that despite having been struck off the roll of advocates with effect from 7th May, 2018 M.M. Muriuki through his firm went ahead to draw and file the memorandum of appeal, the record of appeal and the application dated 17th July, 2019 which was heard and determined by this court.

6. The respondent is of the view that owing to the striking off, the firm of M.M. Muriuki & Co. Advocates is not certified to practice law yet advocate Makena M'wiricha has continued to attend court and appear on behalf of the firm, thereby enabling its illegal practice of law in contempt of the provisions of the Advocates Act.

7. In response, the 2nd appellant stated that advocate Makena M'wiricha at all material times represented the appellants in her capacity as a qualified advocate and not on behalf of any other advocate.

8. The provisions of **Section 2** of the **Advocates Act** ("the Act") define an unqualified person as:

"a person who is not qualified under section 9 and includes an advocate who—

(a) is not qualified under section 9..."

9. Section 9 of the Advocates Act provides that no person shall be qualified to act in the capacity of an advocate unless he or she has either been admitted as an advocate and his or her name is on the Roll of Advocates and he or she has in place a current practicing certificate.

10. Further to the foregoing, the provision to **Section 34 (1)** of the Act prohibits an unqualified person from preparing the documents listed therein, which includes documents relating to legal proceedings.

11. The Supreme Court in the case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR** offered the following interpretation of the abovementioned section:

"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.

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. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practicing certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.

Is such reasoning in keeping with a perception that Section 34 of the Advocates Act, invalidates all documents prepared by an advocate who lacks a current practising certificate? We do not think so.

Section 19 of the Stamp Duty Act...does not in our view, provide a basis for invalidating the instruments in question. Section 19 of the Stamp Duty Act only seeks to render inadmissible for purposes of evidence, all documents which are unstamped. The question before this Court is not the admissibility in evidence, of unstamped documents, but rather the validity of instruments (which indeed are stamped) prepared by an advocate who lacks a current practising certificate."

12. The Supreme Court; in departing from the reasoning by both the High Court and the Court of Appeal in the case of **National Bank of Kenya Ltd. v. Wilson Ndolo Ayah [2009] eKLR** that documents prepared and transactions effected by an unqualified advocate are invalid and have no legal effect; went ahead to appreciate that in respect to advocates, it is the Law Society of Kenya that would be better placed to have information regarding advocates who have and have not taken out practicing certificates, whatever the case may be.

13. In the end, the Supreme Court took the position that no instrument or document is rendered invalid by dint of its preparation by an advocate in the absence of a current practicing certificate, though such advocate would remain liable under the law. However, the Court added a caveat 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.”

14. I perused a copy of the letter dated 3rd October, 2019 addressed to the respondent’s advocate by the Law Society of Kenya and annexed to the Motion marked as “PNM 3.” The communication borne in the letter is that Mr. M.M. Muriuki had not taken out his practicing certificate for the year 2017 and was in fact struck off the Roll of Advocates with effect from 7th May, 2018. It is thus clear that the aforesaid person falls in the category of unqualified persons.

15. However, going by the reasoning of the Supreme Court in **National Bank of Kenya Limited v Anaj Warehousing Limited** (supra), the lack of a current practicing certificate by the said advocate in the year 2017, prior to his being struck off the Roll of Advocates, would not have invalidated any documents prepared by himself pursuant to the provisions of **Article 159(2)(d)** of the **Constitution** that “justice shall be administered without undue regard to procedural technicalities.”

16. Upon perusal of the record of appeal and related documents referenced by the respondent, it is apparent that the same were drawn and filed by the firm of M.M. Muriuki & Co. Advocates.

17. It is also noted that annexed to the 2nd appellant’s replying affidavit and marked as “AKN 1” is the affidavit of Gaylene Makena M’wiricha in which she stated that she is the managing partner at the aforementioned firm and that she was at all material times acting in the matter in her capacity as an advocate. A copy of her practicing certificate for the year 2019 was annexed to her affidavit and marked as “GMM 1.” It is therefore apparent that she was at all material times qualified to practice law.

18. The record shows that in the course of the appeal, the learned advocate Makena M’wiricha has been appearing for the appellants and even signed the documents filed on behalf of the appellants. There is nothing to indicate that she was ever holding brief for or acting on behalf of advocate M.M. Muriuki.

19. Furthermore, from my knowledge and understanding, a law firm does not cease to operate as a result of disqualification of an individual advocate by virtue of being struck off or removed from the Roll of Advocates, as is the case here. The action of striking off a person from the Roll of Advocates applies to the individual and not his or her business.

20. There was nothing precluding the firm of M.M. Muriuki & Co. Advocates from drawing or filing any documents or attending court through its qualified persons. The respondent herein has not shown that M.M. Muriuki was responsible for drawing, signing and or filing the documents relating to the appeal in his capacity, neither has he shown that Makena M’wiricha contravened the provisions of the Advocates Act in the course of this appeal, so as to require the striking out of such documents.

21. Even if it were to be shown that advocate M. M. Muriuki had in fact prepared or signed any of the documents without a current practicing certificate, the said documents would not have been rendered invalid on that basis alone. I therefore see no reason to strike out or expunge the documents filed on behalf of the appellants on appeal.

22) The main order sought in the motion dated 24th October 2019 is basically to have this appeal struck out. I have considered in great detail the grounds put forward in support of the application and found no merit. The alternative orders sought in the aforesaid motion were dependent in the outcome of the main prayer. Having found no merit in the main prayer, I feel not obliged to consider the alternative orders prayed in the application.

23) In the end, I find no merit in the motion. The same is dismissed with costs abiding the outcome of this appeal. Parties should take necessary steps to have the appeal ready for hearing on priority basis.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st, 2nd and 3rd Appellants

..... for the Respondent