



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 50 OF 2016

PETER MWAKUNONA t/a PETROZ FOODS.....PLAINTIFF

VERSUS

1. QAMAR INVESTMENT LTD

2. JAGANI AUCTIONEERS.....DEFENDANTS

R U L I N G

1. The appellant filed the current appeal to challenge the decision and Ruling of the trial court Hon. G.O. Kimanga RM dated the 15/4/2016 in the original Mombasa CMCC No. 87 of 2016 by which the trial court held that one Patrick Kabundu had no right of audience to attend court and appear to represent the appellant, as the plaintiff then.

2. When the parties appeared before this court on the 10/5/2016 the issues was raised *in limine* and the court was asked to deal with it preliminary. On that day this court directed and said:-

“I therefore direct that the question of whether or not Mr. Patrick Kabundu can prepare papers and appear for the appellant be dealt with first and *in limine* at the next hearing date”.

The court then proceeded to further direct that submissions be filed limited to that question only. This decision is therefore on the sole question whether or not Mr. Patrick Kabundu was entitled to prepare court papers, pleading and to address the court as representing the appellant on the foot and strength of the power of attorney dated 9/4/2016.

3. Having given those directions the matter was listed before my sister Njoki Mwangi J on the 21/7/2016 and again on the 15/9/2016 when she directed that I determine the question I had frame 10/5/2016. The parties then appeared before me on the 16/9/2016 when the matter could not proceed and by consent it was stood over to the 13/12/2016 for highlighting of the filed submissions but once gain the matter could not be reached due to work load. It was once again stood over to the 20/3/2017 by consent.

4. Come the 20/3/2017 only Mr. Omwenga Advocate attended but not Mr. Kabundu for the Appellant. The court during call over slotted the matter to be heard at 10.30 and by 11.30 Mr. Kabundu had not appeared hence the matter proceeded in his absence but it was noted that he had on the 15/7/2016 filed written submissions.

5. In this decision I have taken time to read the submissions filed by both sides; those by the appellant

dated 15/7/2016 and by the Respondent dated the 18th July 2016. Upon reading those submissions I have noted that the appellants has, contrary to the directions by the court dated 10/5/2016 delved on the merits of the appeal as much as it addressed the issue at hand. For the purpose of this ruling I will not deal with the merits but the preliminary issue only.

Parties submissions and positions

6. The Respondent has put forth submissions whose gist is that the Power purported to have been donated to Mr. Kabundu by the Appellant are those powers that only vest in an advocate under the Advocates Act. The advocate gave an excerpt of the power of Attorney which provides:-

“to represent the appellant in filling, prosecuting, enforcing, defending, answering, opposing settling, adjusting and compromising in chief magistrates court at Mombasa Civil Suit No. 87 of 2016”

7. Reference was then made to paragraphs 45, 6, 9, 19, 20 and 21 and 32 for the submission that the donee of the power of attorney was actually giving representation as legal representative and that the pleadings were drawn and proceeding being conducted by the donee of the power of Attorney, an acknowledged unqualified person under the advocates Act. Section 34 and 31 of the Advocates Act were then cited for the proposition that it is only advocates who may take instructions to draw or prepare a documents or instruments relating to any legal proceedings and there is criminal penalty provided for any unqualified person who purports to act like an advocate. The advocate then cited two decisions by the High Court; *HC Criminal Appeal No. 1014 of 1989, Geoffrey Ndungu Theuri vs Republic [1990] eKLR* and *Jack J Khanjira & Another vs Safaricom limited [2012] eKLR* for the proposition that the donation of a power of Attorney affords to the donee no power to appear in court and plead the donors' case and that the restrictions created by the advocates Act apply in equal force to a donee of power of Attorney as they to all unqualified persons.

8. In the Criminal appeal, the court held that to interpret order III Rule I, now order 9 Rule 2(a) to permit an unqualified person to plead the case of another on the basis of a power of attorney would be to affront the provision of section 31(b) of the Advocates Act as well as section 81 of the Civil Procedure Act. In the recent decision by *R.M. Mwongo J, in Klanjira vs Safaricom (supra)* the court having considered a series of past decisions came to the conclusion that to allow a party plead the others 'case and appear for him on account of wide powers given by a power of attorney would be to affront the law under the Advocates Act and barred the donee from exercising the powers so directed'.

9. With those submissions the Respondent beseeched the court to strike out papers filled by the donee of power of attorney on behalf of the donor and to award costs to the Respondent.

10. On behalf of the appellants, submissions were filed with reliance on Order 9 Rule 2(a) permitting, recognized agents, to act for litigants in a suit, section 81 of the Advocates Act which permit specific categories of unqualified persons to attend court and be accorded audience. Various articles of the constitution including Articles 20, 22, 25, 27, 48, 50 and 159 were also cited as giving a right of any litigant to appoint, by power of attorney, a recognized agent to act for him. The decision in *EBOO's Petrol Station Ltd vs Black Stone Utilities [1985] 28 KLR* was therefore cited by the appellants, without a copy being provided for the proposition that nothing under the advocates' Act prohibits a party from instituting its own suit through an unqualified agent provided the agent held the power of Attorney. I have been unable to lay my hands on the full text of that decision hence I lack the benefit to comment on it or generate any assistance from it.

11. I however appreciate that the existence of any law is to address the public good and interests. To me the restrictions of persons other than qualified advocates to undertake certain tasks has a valid and huge public interest and policy concerns. The concerns to me are that every time a party relies on another's advice and expertise and places his liberty and property on the line, he should be placed on safe hands of a valid professional service provider and in the event of mis-step there are provided safeguards to remedy the injury thereby occurring. The protection in my view is not to the profession of lawyers as such but the

public who are to benefit from the professional expertise. It is therefore not strange that most professions are protected by regulations to ensure the public get quality for the fees they pay.

12. These public policy considerations are to this court genuinely founded and justifiable. They cannot be trashed away by the Rules made under Order 9 nor have they been rendered otiose by the Liberal Bill of Rights under the Constitution of Kenya, 2010.

13. I do therefore find and hold that Mr. Patrick Kibundu has no right of audience before court the power of attorney he seeks to rely upon would constitute him an advocate and bestows upon him the duty of an advocate when he is unqualified to do so. That to me would fly in the face of the unequivocal provisions of the Advocates Act and defeat the public good and concerns parliament set to set and address by the statute if I were to be wrong on this, I would seek guidance, refuge and direction from the decision of the Supreme Court in *National Bank of Kenya Ltd vs Anaj Warehousing Ltd* [2015] eKLR where the court said:-

“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 role of advocates, shall be void for all purposes”.

14. In *East African Development Bank Ltd vs Muktoba Jaffer & 2 Others* Mombasa HCC No. 153 of 2003, the Court said of documents prepared by an advocate not admitted to the bar in Kenya and said:-

“Indeed there are public interest considerations and policies informing every enactment by parliament. This court as state organ is bound to observe the rule of law which is the bastion of democracy and well-being of every civilized society. The law forbids an unqualified person, which MR. PESHU is conceded to have been by the confirmation of the Law Society of Kenya, from preparing the document he did prepare. He was therefore not qualified to act in preparation and drawing a document which it was the preserve of an advocate in Kenya to prepare. Now that he did so, he contravened the law and that cannot be blessed or countenanced by this court”.

15. Having so found, it follows that the papers conceded to have been prepared by the same attorney, being papers statutorily made only available for preparation by an advocate, are themselves invalid for being in affront to the provisions of the Advocates Act and must be struck out. The memorandum of appeal is therefore struck out with costs to the Respondent.

16. I have ordered that costs be paid by the Appellant as a way to express the court's displeasure at the evident and outright scheme to allow an unqualified person masquerade as an advocate.

17. It is so ordered.

Dated and delivered at Mombasa this 31st day of March 2017.

HON. P.J.O. OTIENO

JUDGE