



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCC. CAUSE NO. 65 OF 1987**  
**IN THE MATTER OF THE ESTATE OF NJAMA WERU (DECEASED)**  
**STEPHEN NDEGWA NJAMA.....PETITIONER /RESPONDENT**  
  
**V E R S U S**  
  
**RICHARD NJERU NJAMA**  
**FRANCIS WACHIRA NJAMA**  
**JOSEPH KANYINGI NJAMA**  
**SIMON MAINA NJAMA**  
**JOHN NGOTHO NJAMA ALIAS JOHN MWANGI**  
  
**NJAMA (DECEASED) ..... APPLICANTS**

**R U L I N G**

The issues before me are (1) whether the proceedings herein were conducted by an unqualified person and should be expunged from the record (2) whether the Summons for revocation of Grant filed on 20/2/2017 contravenes the *subjudice* rule and ought to be struck out. The record will show that what was fixed for hearing before me on 27/2/17 is the application dated 23/11/09- that is the Summons for Revocation of Grant filed by the applicant herein.

On 27/2/17, counsel for the respondent Mr. Wahome Gikonyo was not available – but Ms. Mwai held his brief – the applicant Francis Wachira Njama was present in person. The applicant told the court that the respondent had not replied to the Summons for revocation of grant since it was filed 7 years ago. He urged the court to allow his application. However, the matter was adjourned to 20/3/17 when Mr. Wahome Gikonyo would be available.

On 23<sup>rd</sup> March 2017 Mr. Wahome Gikonyo raised preliminary issues which the court needed to address before the matter could proceed.

1. The applicant had been represented by a Mr. Mugo who was an unqualified person and therefore every pleading and proceeding in the file ought to be expunged – he referred the court to S. 34 of the Advocates’ Act and the case of **KENYA POWER LTD. VS. CHRIS MAHINDA [2005] eKLR.**

2. That the applicant had filed a similar application to the one of 23/11/09, on the 20/2/2017. He sought that one be struck out, so that the court could proceed with one.

To these the applicant responded that the Summons for revocation of grant dated on 23/11/09, was filed by Kebuka Wachira, Advocate whom he said was a competent lawyer and qualified to do so; that none of his papers were filed by Mr. Mugo; and that the others he had filed himself hence and all his papers were validly on record. He submitted that the reason he had filed the application of 20/2/17, was because the respondent had not replied to the one of 23/11/09 and that for that reason, the respondent had lost the “moral and legal” grounds to defend the grant he had obtained fraudulently.

In response Mr. Wahome submitted that the court needed to deal with the proceedings of 12/10/15 which he said were conducted by Ndata Mugo, an unqualified person, and that there was no provision in law for the filing of an application simply because the one on record had not been heard.

I have considered the issues raised before me. On the first issue the law is clear. Section 34 of the Advocates Act Cap 16 Laws of Kenya states at subsection (1 (

“No unqualified person shall either directly or indirectly take instructions or draw or prepare any document/instrument...

(a) .....

(b) .....

(c) ....

(d) for the purpose of filing or opposing a grant of probate or letters of administration

(e) relating to any other legal proceedings,

Subsection (3) – makes it an offence to contravene these provisions.

In **KPLC VS. CHRIS MAHINDA CIVIL (APPLICATION)148/2004** the court of appeal dealing with a situation where the applicant was represented by an advocate who had not taken out a practicing certificate stated; -

“when these two acts were done by him, the advocate was not qualified to act as an advocate with the effect that the two documents were incompetent... If no practicing certificate had been issued when the act was done the advocate was not qualified to do that act ...”

On the said 12/10/15 the Summons for revocation of grant dated 23/11/09 came up for hearing before Hon. Justice Mativo. Mr. Nderi was holding brief for Mr. Mugo. He had instructions to seek for an adjournment, which Mr. Wahome opposed seriously. The court taking into consideration the age of the matter – denied the application for adjournment and allocated time.

Mr. Mugo did not show up in time. The applicant then told the court he was ready to proceed with his case, only for him to show up when the applicant was already in the witness box. He told the court that the applicant was his client – and that he was ready to proceed. He conducted the proceedings until the applicant completed his testimony. The matter was adjourned due to time and applicant stood down for cross examination.

What is in the fate of these proceedings?

First – it appears that there is no contest by the applicant that as at the time Mr. Mugo was representing him as his advocate.

The fact of Mr. Mugo being an unqualified person apparently came to light on 9/12/15 – when Mr. Wahome told the court

“We may not proceed. I have a letter from LSK dated 8/7/15 “and Mr. Mugo responded “I will look at the issue”. The Court in turn “Case marked stood over generally. Parties to take a fresh date once they sort out”.

The issue of the proceedings conducted by an unqualified person was examined in great detail in;

**PHILIP MUKUI WASIKE VS. JAMES LUSWETI MUKUKWE & 2 OTHER (PETITION NO. 5 OF 2013) [2013] eKLR** where Justice H.A. Omondi examined the different sides taken by Judges of the High Court, and also the position taken by the Court of Appeal.

There are judges who find that such a situation to be a technicality can be cured ‘in the interests of justice’ under Article 159(1)(d) of the Constitution, while others are of the view that the situation is incurable, as the failure of advocate to take out a practicing certificate and then to purport to represent clients is criminal – and by excusing that act the court would be condoning an illegality.

I am of the latter persuasion. The clear provisions of Section 34 indicate that it is not a technicality for a person to obtain or fail to obtain a practicing certificate. It is also not just one of the minor ‘sins’ that can be excused by not visiting it on the litigant. It is statutory requirement, that carries a criminal offence with a penalty. I agree with my brothers and sisters in this, and take the guidance of the Court of Appeal.

I find therefor that the proceedings that were conducted by Mr. Mugo while he held no practicing certificate are incompetent and expunge them from the record.

With regard to the related pleadings, I have examined them. They are drawn by the firm of Kebuka Wachira & Co. Advocates. I find that they are validly on record as they were not affected by Mr. Ndata Mugo’s status.

The 2<sup>nd</sup> issue is the fate of the two Summons for revocation of grant now pending in the court file.

The applicant’s reason for filing the 2<sup>nd</sup> one is because the respondent did not reply to the first one. To emphasize this point – The heading is;

“Re: Summons for Revocation /Annulment of Grant of 23/11/2009.

Notice to court on Petitioner Respondents negligence to respond to the above summons.

Opportunity to do so considered as lapsed through passage of time”.

The applicant proceeds to seek the revocation of the same grant but with a new application and a new affidavit – both of which contain essentially the same allegations.

The record shows by the time the matter was being heard on the 12/10/2015, each party had filed the requisite documents I have seen on record documents filed on 9/7/2015 heeded “Petitioner’s list of documents” in support of the confirmation of the certificate of grant, and two responses by the applicant dated 8/10/2015 and another dated 9/10/2015. The applicant’s submission that the respondent has not filed any response to the Summons for the Revocation of Grant dated 23/11/09 cannot be further from the truth. The matter was part heard before Hon. Justice Mativo – and all these documents were on record.

I find that the filing of this second application dated 20<sup>th</sup> February 2017 is an abuse of the process of court and a symptom of vexatious litigation It is struck out accordingly.

In conclusion, I find that;

1. The proceedings of 12<sup>th</sup> October 2015 conducted by an unqualified person contrary to section 34 of the Advocates Act Cap 16 Laws of Kenya, Mr. Nderitu Mugo, while he had not taken out practicing certificate. They are incompetent and are expunged from the record.
2. The Summons for revocation of grant filed on 20<sup>th</sup> February 2017 is an abuse of the process of court and is struck out.
3. The parties to fix the Summons for Revocation of Grant of 23/11/09 of hearing at the earliest date.
4. Parties to file agreed issues or issues for determination.
5. Each party is to file witness statements/and exchange documents that they may rely on within the next 30 days from the date hereof.

**Dated this 13<sup>th</sup> April 2017 and Delivered in Open Court at Nyeri in the presence of**

.....

.....

Court Assistant..... Harriet

**TERESIA MATHEKA**

**JUDGE**

.....