



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
PROBATE AND ADMINISTRATION
CIVIL CASE NO. 198 OF 2016
IN THE MATTER OF THE ESTATE OF THE LATE PAULO OKINDA OBONYO
AND
AND IN THE MATTER OF LAND PARCEL NUMBER SIAYA/RAMBA/2646
DANIEL OGERA OBONYO APPLICANT/PLAINTIFF
VERSUS
EDWIN AKACH OKINDA RESPONDENT/DEFENDANT
(CORAM: J.A. MAKAU – J.)
RULING

1. The Plaintiff/Applicant through a preliminary objection on points of law dated 29th November, 2016 and filed on the same date contents as follows:-

i. That the Respondent's purported Advocate Mr. Wesley Robinson Maranga Gichaba is an unqualified under the provisions of Section 9 (c) of the Advocates Act [Chapter 16] of the Laws of Kenya.

ii. That the said purported Counsel for the Respondent is not permitted to act as an Advocate or as such to cause any Summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any Court of Civil or Criminal Jurisdiction as stipulated under Section 31 of the Advocates Act [Chapter 16 of the Laws of Kenya].

iii. That under Section 33 of the Advocates Act [Chapter 16] of the Laws of Kenya "any unqualified person who willfully pretends to be, or takes, or uses any name, title, addition or description implying that he is qualified or recognized by law as qualified to act as an Advocate shall be guilty of an offence."

iv. That the Respondent's purported Counsel, being an unqualified person is barred by the mandatory provisions of Section 34 (1), (d), (e) and (f) of the Advocates Act [Chapter 16 of the laws of Kenya] from taking instructions to draw or preparing inter alia documents pleadings or instruments:

(d) for the purpose of filing or opposing a grant of probate or letter 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.

2. The Counsel for Plaintiff/Applicant filed affidavit of service dated 12 May, 2017 following service of a hearing notice dated 5.4.2017 confirming service of the hearing notice upon the firm of M/s. Gichaba, Ondieki & Company Advocates who acknowledged receipt by stamping the hearing notice.

3. At the hearing Mr. Jaoko, learned Advocate, appeared for Applicant and urged the preliminary points of law, urging the application was unopposed as the Advocate to whom the preliminary point of law related had not appeared nor filed Reply Affidavit or any grounds of opposition.

4. The Applicant in support of his preliminary points of law relied on a letter addressed to them by the Law Society of Kenya stating as follows:-

“Attn: Walter Amoko

Dear Sir,

RE GICHABA WESLEY MARANGA ROBINSON, ADVOCATE

We acknowledge receipt of your letter dated 28th July, 2016 contents of which we have noted.

We confirm that according to our records. Gichaba Wesley Maranga Robinson, Advocate has not paid for his practicing certificate for the year 2016. He is therefore not certified to practice law.

The Advocate is not currently serving any suspension, however he has a Disciplinary Cause No. DTC111 of 2014 pending for determination before the Disciplinary Tribunal.

Yours faithfully,

FLORENCE MUTURI

DEPUTY SECRETARY

(COMPLIANCE & ETHICS).”

5. In this matter there is no other information submitted by the Respondent controverting the contents of the letter written to the Advocates, for the Applicant by the Law Society of Kenya, showing that the Advocate had practicing certificate for the year 2016. The Law Society of Kenya Letter is *prima facie* evidence that the Advocate did not have practicing certificate for the year 2016 and I so hold.

6. Section 9 (c) of the Advocates Act (Chapter 16) Law of Kenya provides:

“9. Subject to this Act, no person shall be qualified to act as an advocate unless –

(c) he has in force a practising certificate; and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).”

It is not indispute in this matter, that one Mr. Wesley Robinson Maranga Gichaba, who is the Advocate on record for the Respondent did not hold practicing certificate in the year 2016, in breach of **Section 9 (c) of the Advocate's Act**. The said Advocate filed a Replying Affidavit on 1.9.2016 under the name and style of Gichaba, Ondiek & Co. Advocates, followed by Preliminary Objection dated the same day, memorandum of appearance dated 20.8.2016 and written submission dated 24.10.2016 under the name of Wesley M. R. Gichaba.

7. Section 33 of the Advocates Act (Chapter 16) Laws of Kenya provides:-

“33. Any unqualified person who wilfully pretends to be, or takes or uses any name, title, addition or description implying that he is, qualified or recognized by law as qualified to act as an advocate shall be guilty of an offence.

8. In Civil Appeal No. 146 of 2000 Geoffrey Orao Obura V. Martha Karambu Koome (2001) eKLR The Court of Appeal faced with similar situation had this to say:-

“That contention on behalf of the applicant appears to us to be well founded. However, Mr. K’Owade for the respondent, submitted that Section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common law of England. It is said that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant’s solicitor being unqualified, for example for his not having a proper practicing certificate in force.

With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the Advocates Act and not the common law in England. The provisions of section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this court is to be exercised in conformity with the Constitution and subject thereto, all other written laws. Section 3(1) of the Judicature Act (Cap 8) reads: -----”

9. In Mohamed Asharaf Sadique, Harbans Singh Soor & Mathew Oseko (T/A Oseko & Co. Advocates) HCMISC. APPL. No. 901, 933, 934, 935, 936, 937 and 938 of 2007 (2009) eKLR it was held:-

“It is my view and finding, that apart from the criminal liability arising from the contravention of sections 31 and 34, there are civil consequences also that do arise. As stated by Wambuzi, CJ. In the case of HUQ V ISLAMIC UNIVERSITY OF UGANDA 91995) 2 E.A. 117 at page 118:-

“Where an advocate practiced without a valid practicing certificate. ... in any year, he committed an offence and was liable to both criminal and disciplinary proceedings. Any documents prepared or filed by such an advocate were invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities”

In the same case cited above, Karokora, JSC put the same principle thus, at page 122:-

“..... In my view what he (advocate) does in perpetration of the offence cannot be lawful, because these are the acts he uses in furtherance of the commission of the offence under the Act. Therefore the documents prepared, signed and filed by such an advocate whose practice is illegal, are invalid and of no legal effect, because courts would not condone illegality.”

10. In John Langat V. Kipkemoi Terer & Others HCCA No. 21 of 2013 (Unreported) the court stated as follows:-

“considered the application Article 159(2) (d) of the Constitution in the context of an election petition. In that case, the advocate who had filed the appeal did not have a practicing

certificate. The learned judge concluded as follows: “Mr. Anyoka sought to persuade the court that his client was innocent. He further sought to rely on Article 159(2)(d) of the Constitution of Kenya 2010 to argue that now that the court was dealing with a petition, a serious matter, the acts that may be deemed illegal or unprocedural should be excused. The Article enjoins the Court to do justice to all parties without undue regard to do justice to all parties without undue regard to procedural technicalities. There is as simple answer to Mr. Anyoka. It is criminal under section 34 of the Advocates Act for an Advocate to practice without a practicing certificate. The Section is not a procedural technicality. It is a substantive statutory provision. The Court is enjoined not only protect the Constitution but all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of section 34 of the Advocates Act is to perpetuate an illegality. Article 159(2)(d) does not condone such an act.”

11. The Applicant’s Preliminary points of law being unopposed and there being sufficient evidence to confirm the Respondent’s purported Advocate Mr. Wesley Robinson Maranga Gichaba has not paid for his practicing fee for the year 2016, I find he is therefore not qualified to practice law. I find merits in the Applicant’s/Plaintiff’ Preliminary points of law.

12. The Preliminary Objection on the points of law succeeds and I proceed to make the following declaration:-

i. That the Respondent purported Advocate Mr. Wesley Robinson Maranga Gichaba, M/s. Gichaba & Co. Advocate and M/s. Gichaba, Ondieki & Co. Advocates, are unqualified under the **provisions of Section 9(c) of the Advocates Act (Cap 16) Laws of Kenya.**

ii. That the said Respondent purported Advocate Mr. Wesley Robinson Maraga Gichaba, M/s. Gichaba & Co. Advocates, M/s. Gichaba, Ondieki & Co. Advocates are not permitted to act. as an Advocate or as such to cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any Court of Civil or Criminal Jurisdiction as stipulated under **Section 31 of the Advocates Act [Chapter 16] of the Laws of Kenya.**

iii. That as the Respondent purported Advocate Mr. Wesley Robinson Maraga Gichaba, the firm of Gichaba & Co. Advocates, and Gichaba, Ondieki & Co. Advocates in the relevant period have contravened the provisions of **Section 31 (1)(c), 33 and 34** jointly and severally is guilty of an offence and will criminally be prosecuted after full investigation by the Police. That process will definitely ensure that their Constitutional right to fair hearing is guaranteed as provided in our Constitution.

iv. That the Respondent’s purported Counsel M/s. Wesley Robinson Maraga Gichaba, is unqualified person and the firm of Gichaba & Co. Advocates and Gichaba, Ondieki & Co. are barred by the mandatory provisions of **Section 34 (1) (d) (e) and (f) of the Advocates Act (Chapter 16) Laws of Kenya** from taking instructions, to draw or prepare *inter alia* documents, pleadings or instruments, for the purpose of filing or opposing a grant of probate or letter of administration or/for which a fee is prescribed by any order made by the Chief Justice under **Section 44** or 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 instructions or for drawing or preparation of any such document or instrument.

This court makes accordingly the following orders:

a. The Officer-in-charge of Siaya County, is hereby commanded to investigate the Criminal Offences probably committed by the Advocate Mr. Wesley Robinson Maranga Gichaba, the firm M/s. Gichaba & Co. Advocates and M/s. Gichaba, Ondieki & Co. Advocates in contravention of Section 31 (c), 32, 33, 34, 37 and 39 of the Advocates Act and thereafter charge him or them accordingly within a period of 21 days from today.

b. I order that, all pleadings filed by the Respondent's purported Advocate, Mr. Wesley Robinson Maraga Gichaba and/or by M/s. Gichaba & Co. Advocate and/or M/s. Gichaba, Ondieki & Co. Advocates in this case struck out from the record for having been filed by unqualified persons and/or firm.

c. Costs to the Applicant.

DATED AND SIGNED AT SIAYA THIS 29TH DAY OF JUNE, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT.

IN THE PRESENCE OF:

MR. JAOKO FOR PLAINTIFF/APPLICANT

NO APPEARANCE FOR THE RESPONDENT

C.A. 1. L. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE