



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 225 OF 2017

**IN THE MATTER OF APPLICATION BY WILFRED KASHOGA SARONI, SCOLLA ONDIEKI
MATAGARO AND JUMA MUNGA CHARO FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION AGAINST THE INSPECTOR GENERAL OF THE
NATIONAL POLICE SERVICE, THE DIRECTOR OF CRIMINAL INVESTIGATIONS AND
THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)**

AND

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26 SECTIONS 8 & 9 LAWS OF KENYA
AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, CAP 21 LAWS
OF KENYA**

AND

**IN THE MATTER OF JOINT VENTURE AGREEMENT BETWEEN AFRICAN MINERALS
AND METALS LIMITED, TWINS HORSE MINING LIMITED AND BLACKSTONE MINING
GROUP LIMITED**

AND

**IN THE MATTER OF ARTICLES 2, 22, 23, 25, 27, 47, 48, 50, 159 AND 165 OF THE
CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 313 OF THE PENAL CODE, LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

WILFRED KASHOGA SARONI.....1ST EX PARTE APPLICANT

SCOLLA ONDIEKI MATAGARO.....2ND EX PARTE APPLICANT

JUMA MUNGA CHARO.....3RD EX PARTE APPLICANT

AND

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

AND

SAVI BHOGAL.....1ST INTERESTED PARTY

BHUPINDER SINGH BHOGAL.....2ND INTERESTED PARTY

SWARAJ SINGH BHOGAL.....3RD INTERESTED PARTY

RULING

1. The subject of these proceedings is a Notice of Motion dated 2nd June, 2017 seeking the following orders:

1. An order of Certiorari to remove into the High Court and quash the 1st, 2nd and 3rd Respondent's the anticipated decision to charge the Ex parte Applicants in regard to the joint venture agreement signed and executed between ex parte applicants and interested parties on 23/5/2016.

2. An order of Prohibition directed at the 1st, 2nd and 3rd Respondents, its officers and other persons and or authorities acting on the 1st, 2nd and 3rd Respondents' instructions from prosecuting the 1st, 2nd and 3rd Ex parte Applicants on any purported offence based on the joint venture agreement signed and executed between Ex parte Applicants and Interested Parties on 23/5/2016.

3. That leave so granted do operate as stay of any intended charge and or prosecution of the 1st, 2nd and 3rd Ex parte Applicants and Interested Parties on 23/5/2016.

4. The costs of this application be provided for.

2. By a Notice of Preliminary Objection dated 14th June, 2017 the Interested Parties herein raised the following issues:

1) That the aforementioned Judicial Review Application dated 2/6/2017 is subject to pleadings drawn, signed and filed an unqualified person (namely the said Omwoyo Kennedy Osoro) within the meaning and application of Section 9 of the Advocates Act, Chapter 16 of the Laws of Kenya.

2) That the said Omwoyo Kennedy Osoro has not taken out a valid practising certificate or

the year 2017 as he has not met the mandatory statutory prerequisites set out under Section 22(1)(b) of the Advocates Act Chapter 16, Laws of Kenya which include *interalia*, payment of annual subscriptions.

3) That the Judicial Review Application is grounded on an application and pleadings made in the period of 2017.

4) That the applicant's pleadings and application dated 2/6/2017 are based on an incurable illegality and ought to be struck out forthwith with costs to the interested parties.

3. These issues were repeated in the replying affidavit sworn herein on 14th June, 2017 to which was exhibited a copy of a letter dated 13th June, 2017 from the Law Society of Kenya confirming that according to the said Society's records, **Omwoyo Kennedy Osoro Advocate** last held a valid certificate in the year 2016 and was therefore entitled to practice law from 25th April, 2016 to 31st December, 2016. It proceeded to confirm that the named person was yet to take out a valid practicing certificate for the year 2017 and was therefore not certified to practice law for the current year.

4. The ex parte applicant opposed the application through an affidavit sworn by **Amota Nyasae Nyangera** Advocate.

5. According to the deponent, on 22nd May, 2017 he received instructions from the ex parte applicants to file this Judicial Review Application. Accordingly, on the said date he prepared the pleadings, signed the same and filed them in court as required by the law. He therefore denied that **Omwoyo Kennedy Osoro** drew pleadings of this case, signed and filed the same.

6. It was averred that the said **Mr.Omwoyo Kennedy Osoro** has never appeared in court in this matter nor has he represented the Ex parte Applicants at any level.

7. The deponent asserted that he is a qualified advocate as stipulated under the *Advocates Act* and exhibited a copy of the Practising Certificate.

8. The deponent explained that for the year 2017 **M/S Omwoyo Kennedy Osoro** was out of the firm on political reasons and he was not in office especially the date this matter was prepared and filed. It was accordingly contended that the preliminary objection dated 14th June, 2017 is misplaced, unfounded, unfounded, unsubstantiated and without merit and hence this honourable court ought to dismiss the same.

9. I have considered the issues raised herein. From the record of the proceedings herein, it is clear that the pleadings herein were filed on behalf of the firm of **Osoro Omwoyo & Co. Advocates**. It is however not contested that **Mr.Omwoyo Kennedy Osoro** did not have a valid practicing certificate at the time the pleadings were filed.

10. In the replying affidavit, the deponent has not disclosed the partners in the firm of **Osoro Omwoyo & Co. Advocates**. In my view, if **Osoro Omwoyo & Co. Advocates** had only one partner, **Mr.Omwoyo Kennedy Osoro**, it would not matter whether the pleadings were signed by an advocate in possession of a valid practicing certificate since it is common for advocates to sign pleadings on behalf of other firms. However the firm which takes responsibility for the drawing, signing and filing of the pleadings is the firm on record.

11. In this case the information as to the composition of the said firm is or ought to be within the knowledge of the advocates for the ex parte applicant who due to reasons known to them have decided not to disclose. What then are the consequences for this non-disclosure? In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012]** the court stated as follows:

“Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides: “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.” Where a party has custody or is in

control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

12. Based on the foregoing I have no hesitation in finding that the pleadings in this matter were drawn by or on behalf of a firm whose proprietor had no valid practicing certificate. However what is the fate of pleadings drawn, signed and filed by an advocate who though had a valid practicing certificate for the previous year fails to take one for the year when the pleadings in question were drawn, signed and filed? The Supreme Court dealt with this issue in Petition No. 36 of 2014 - **National Bank of Kenya Limited vs. Anaj Warehousing Limited** where it expressed itself as hereunder:

“Thus, the issue still remains: whether Section 34 of the Advocates Act actually invalidates all instruments of conveyance prepared by advocates who do not have current practising certificates. 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. 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 practising 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... The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. 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 roll of advocates, shall be void for all purposes. While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.”

13. What this decision holds is that pleadings drawn by an advocate who fails to take out a practicing certificate for a particular year, as opposed to non-advocates, or advocates whose names have been struck off the roll of advocates are not rendered void by that mere fact. This position is now made clear by section 34B(2) and (3) of the ***Advocates Act*** which provides as hereunder:

(2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

(3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.

14. It follows that this preliminary objection cannot be sustained. The same fails and is dismissed but in the light of my finding that the pleadings were drawn, signed and filed by a firm of advocates which had no valid practicing certificate, pursuant to section 34(1)(f) of the ***Advocates Act***, there will be no order as

to costs.

15. It is so ordered.

Dated at Nairobi this 24th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Atusimire for interested party

Miss Nakato for Mr Osoro for the applicant

CA Ooko