



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 627 OF 2013

In the matter of the Estate of JASON NJERERA KAVANGUA (Deceased)

SAMMY MWIRIA.....PETITIONER/APPLICANT

VERSUS

LUCA NYAGA NJERERA.....OBJECTOR/RESPONDENT

R U L I N G

1. This is a ruling on a notice of motion dated 6/02/2017 seeking for orders that this honourable court be pleased to strike out the proceedings in this matter from the date of 1/12/2014 to 6/12/2016 conducted by Mr. Vincent Afande, a person not qualified to act as an advocate. It also seeks for orders that all rulings/orders and/or judgments issued in favour of the objector/respondent between the 1/12/2014 and 6/12/2016 be set aside and declared a nullity.

2. The application is grounded on the affidavit of the petitioner/applicant Sammy Mwiria. He deposes that the said Vincent Afande was a clerk in the firm of Kinyua Njagi & Co. Advocates before being employed by M/s J.A. Guserwa & Co. Advocates. The firm of J.A. Guserwa & Co. filed a notice of change of advocates on 27/04/2015 and served it on the firm of Albert Kamunde & Co. representing the applicant. The firm of Guserwa & Co. had full conduct of this matter through Mr. Vincent Afande throughout the aforementioned period.

3. It was later discovered that Mr. Afande was masquerading one Mr. Madoya Edwin Japheth, an advocate of the High Court by using his name under the firm of Guserwa & Co. The matter was investigated and Mr Afande was charged in court. The applicant states that he is likely to suffer irreparable damages by virtue of any orders, rulings or judgments entered against him within the period that Mr. Afande was in conduct of the matter.

4. The application was opposed relying on the affidavit of the objector/respondent Luca Nyaga Njerera. He deposes that Mr. Afande was first sent to court by his former advocate Kinyua Njagi & Co. Advocates as their representative. It is the respondent who introduced Mr. Afande to the firm of Guserwa & Co. who later took over this case to represent the respondent. Mr. Afande appeared in court several times holding brief for the said firm. M/s Guserwa & Co. wrote to the Law Society of Kenya on 9/12/2016 inquiring into the professional status of the said Mr. Afande. It was confirmed that Mr. Afande was indeed a masquerader.;

5. The respondent states that the said Vincent Afande never prepared any pleading and neither did he prosecute this matter. All the pleadings were drawn and filed by Guserwa & Co. He was never involved

in any interparte hearing of any application in court save for mentions and delivery of a ruling on 27/07/2016. For this reason, the respondent pleads with the court not allow this application.

6. The parties argued this application by way of written submissions.

7. The applicant submits that all the proceedings in this matter from 1/12/2014 to 6/12/2016 are null, incompetent and illegal having been conducted by an unqualified person. Mr. Afande was charged in Embu CM Cr. Case No. 1144 of 2016 which was followed by an order for fresh investigations in High court in Criminal Revision No. 5 of 2017. The respondent has not denied that Mr. Afande was a masquerader.

8. In support of his arguments, Mr. Kamunda relies on the case with similar facts, that of **MOHAMMED ASHRAF SADIQUE & ANOTHER VS MATHEW OSEKO T/A OSEKO & CO. ADVOCATES [2009] eKLR** where it was held that:-

...if orders have been made by court in pursuance of an illegal or invalid and/or incompetent suit which eventually has to be struck out, then any such orders made under the suit must be recalled or annulled. A court of law and justice must not condone or be seen to condone illegality of whatever nature.

9. Mr. Kamunda referred the court to the provisions of Sections 31, 32, 33, 34 and 39 of the Advocates Act which outlaw handling of legal business by unqualified persons. He argued that the conduct of Mr. Afande fits in the description of these provisions and as such any proceedings dealt with by him should be nullified.

10. The respondent's advocate argued that there were no malpractices in this matter before or after the firm of Guserwa came on record as alleged. The role of Mr. Afande in this cause was restricted to merely holding brief for the counsel on record Judith A. Guserwa. He did not prosecute any application or conduct the hearing of this case. The proceedings were prepared and filed by a qualified and competent counsel.

11. In the event that the prayers sought are granted, the objector who personally appeared before the court and gave evidence which formed the basis of the determination by the court, is likely to suffer irreparable damage.

12. The firm of M/s J.A. Guserwa & Co. acted in good faith and at no time did they have knowledge that one Vincent Afande was not a qualified advocate. It came to learn of it much later. The firm instructed Mr. Afande innocently believing that he was indeed a qualified person.

13. The respondent urges the court not to strike out or set aside the relevant proceedings on the basis that the counsel on record who also prepared and filed the pleadings is indeed competent and qualified.

14. Perusal of the record shows that Mr. Vincent Afande appeared in court on 22/10/2015 before the judge for taking direction for hearing for application dated 27/02/2015. It was agreed that the application be disposed of by way of written submissions. On 16/12/2015 he appeared before the deputy registrar Mr. V.O. Nyakundi for mention followed by two other occasions for confirmation of compliance with directions. Mr. Afande took a date in the court registry on 16/12/2015 for mention of the case on 10/02/2016.

15. On 19/04/2016 Mr. Afande held brief for Guserwa for the objector/respondent while Mr. Chabari appeared for the petitioner/applicant. The counsels highlighted submissions filed in respect of the application dated 27/02/2015. The matter was fixed for ruling on 27/06/2016. On the date the ruling was delivered Mr. Madoya was holding brief for Ms. Guserwa & Co. while Mr. Kathungu held brief for the petitioner's advocate.

16. Mr Kamunda Njue for the objector came on record on 21/09/2016 and appeared in court on the same

day alongside Mr. Afande and this was repeated on 3/11/2016 when the matter came up for mention. It was Mr. Kamunda who brought the matter to the attention of the Deputy Registrar on 6/12/2016 that Mr. Afande was an unqualified person. The deputy registrar confirmed the allegation and ordered for investigation which led to the arrest and arraignment in court in Criminal Case No.1144 of 2016.

17. The respondent argued that Mr. Afande did not prepare or file any documents in court. It is on record that he appeared before the deputy registrar four times for mentions including confirmation of compliance. The mentions were relevant to the application dated 27/02/2015. The directions for hearing of the said application were also taken by him holding brief for the objector's counsel. He highlighted the submissions in regard to the same application and fixed various dates for mentions and hearing in the registry.

18. The ruling was taken by Mr. Afande on 27/02/2015 in which the court granted orders restraining the petitioner from meddling with the estate of the deceased and ordered the reinstatement of the original coffee account No. 92 in the name of the deceased for deposit of coffee proceeds for the benefit of all the beneficiaries.

19. The part played by Mr. Afande in this cause and in particular the hearing of the application dated 27/02/2015 cannot be underestimated. It is as a result of the actions by Mr. Afande that the application was set for hearing, directions taken and orders sought therein granted. The respondent's counsel argued that the firm of J.A. Guserwa & Co. prepared and filed the pleadings. This has not been controverted and it remains that the said firm were the advocates for the objectors/respondents at all material times. Therefore, the application dated 27/02/2015 was filed by the said firm which was competent and qualified under the Advocates Act.

20. Section 31 of the Advocates Act prohibits an unqualified person from acting as an advocate. It provides:-

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such 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.

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.

21. As I have stated earlier, Mr. Afande was an unqualified person who took upon himself to conduct legal business knowing that his actions were contrary to the law and amounted to a criminal offence. The firm of J.A. Guserwa & Co. failed to take due diligence to establish the legal qualifications of Mr. Afande before instructing him to hold their brief. It is important to note that Mr. Afande held brief from the said firm about ten times. This was the height of negligence on part of the firm that must not be condoned. Under the law, a client is entitled to claim damages against the law firm for any loss suffered as a result of the illegalities caused by the act or omission of a law firm. That kind of negligence may lead to prosecution of the firm concerned with a criminal offence under Section 39 of the Advocates Act which forbids such conduct.

22. It was held in the case of **ANTHONY KISIANGANI & ANOTHER VS NZOIA OUTGROWERS CO. LTD [2015] eKLR** that:-

Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders.. Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him.. Whereas it is true that the court has unfettered, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone. Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.

23. Section 34 of the Advocates Act forbids an unqualified person from directly or indirectly taking instructions from or drawing or preparing any documents or instruments relating to the work of an advocate. Any person wishing to practice law must meet the mandatory qualifications.

24. The applicant has established that the actions of Mr. Afande in this case were a breach of statutes and a commission of a crime which risks suffering by innocent litigants. By virtue of the oath of office, an advocate in private practice must promote the integrity and discipline in the legal profession. The negligence of the law firm is therefore, inexcusable.

25. I am satisfied that the applicant has established that the proceedings for the period between 1/12/2014 to 6/12/2016 were conducted by a person not qualified to act as an advocate and are therefore null and void. The application is hereby allowed.

26. The application dated 27/02/2015 or any pleadings filed by the firm of J.A. Guserwa & Co. are hereby declared in order and are properly on record.

27. The costs of this application will be paid by the firm of J.A. Guserwa & Co. advocates for reasons given in this ruling.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF DECEMBER, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Kamunda for Applicant