REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. 1 OF 2016

IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF: COMPANIES ACT CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF: CIVIL SUIT NO 290 OF 2015

BETWEEN

REPUBLIC.....
.....APPLICANT

AND

GEOFFREY KARIUKI NJUGUNA

ESTHER WANJA NGANGA

PETER MWAURA KAMAU

JULIUS MWANGI KURIA

GEORGE NDERITU KAGUORA

JOYCE RUKARIA GITAU

RICHARD NJOGU NDUNGU.....*EXPARTE*/APPLICANTS

VERSUS

THE RESIDENT MAGISTRATE'S COURT AT KIAMBU.....RESPONDENT

AND

DR. SAMUEL THINGURI WARWATHE.....1ST INTERESTED PARTY

BEATRICE WAIRIMU KAMAMIA.....2ND INTERESTED PARTY

KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY (KNCCI) LIMITED.....3RD INTERESTED PARTY

RULING

INTRODUCTION

1. In a short three weeks, the matters forming the subject matter of this suit have produced quite some fecund procedural history. In its High Court incarnation, this matter first found life through a Chamber Summons Application dated 22/06/2016 ("JR NO. 1 of 2016"). It was filed under a Certificate of Urgency on behalf of the Kenya National Chamber of Commerce and Industry (KNCCI) by EKN LLP Advocates. In the main, it sought to prayers: leave to KNCCI to apply for certain judicial review orders and an order that the grant of the prayed leave do operate as stay of the decision of the Kiambu Law Courts Civil Case No. 290 of 2015 (hereinafter "CMCC No. 290 of 2015").

2. CMCC No. 290 of 2015 is a suit between certain members of Kiambu County Branch of KNCCI (KNCCI-Kiambu County) regarding the running of the affairs of the Branch and in particular who the bona fide County Branch Officials were and the holding of County Branch elections. That suit was filed by Dr. Samuel Thinguri Warwathe and Beatrice Wairimu Kamamia who claimed that they were the bona fide County Chairman and Vice-Chairperson respectively of KNCCI-Kiambu County.

3. Certain rulings were given in CMCC No. 290 of 2015 the last of which was delivered on 3rd June, 2016. The effect of that triggered a flurry of applications and an appeal. As I understand it, that ruling paved the way for the elections of KNCCI-Kiambu County. The Plaintiffs in CMCC No. 290 of 2015 succeeded in getting the interim orders they sought. The Defendants in CMCC No. 290 of 2015 were, naturally, aggrieved. They filed a Memorandum of Appeal against the ruling and order at the High Court in Nairobi (since at the time this High Court had not started operations). That appeal was numbered HCCC No. 303 of 2016. They simultaneously filed an application under a Certificate of urgency seeking for injunctive relief to stop the impending elections. On 05/07/2016, Justice Mbogholi declined to give the interim orders sought and directed that the parties pursue the "very elaborate mechanism set in the Memorandum and Articles of Association of [KNCCI]".

4. Meanwhile, the National Office of KNCCI got wind of the disputes in KNCCI-Kiambu County and the dispute in the court. They ostensibly (it will become apparent shortly why the choice of this word is apropos and not merely flippant) instructed the law firm of EKN LLP Advocates to file a Judicial Review Application to challenge the proceedings in CMCC No. 290 of 2015 for lack of jurisdiction. This is the JR No. 1 of 2016. On 22/06/2016, Mr. Munaawa appeared before me in that matter. His mission was twofold: to obtain leave to file the substantive application and to get interim *ex parte* orders that any leave so granted acts as stay to the ruling and order of the magistrate's court in CMCC No. 290 of 2015. He succeeded in his first wish: I granted leave to bring the judicial review proceedings. However, I directed him to serve all interested parties for an inter partes hearing respecting the stay request. I asked the parties to appear to address that aspect of the application on 06/07/2016.

5. In the run up to the appointed hearing date of 06/07/2016, Nyambega & Co. Advocates entered appearance for the original defendants in CMCC No. 290 of 2015 ("Richard Njogu Ndung'u and the rest"). Dr.Warwathe, the 1st Plaintiff in CMCC No. 290 of 2015, also entered appearance in person and sought to be made a party. I easily granted that prayer. We were set to hear the application for stay inter partes on 06/07/2016. However, that was not to be.

6. Two interesting things happened on 06/07/2016 to thwart the hearing. First, Mr. Munaawa, appearing

for the *ex parte* applicant (KNCCI) now indicated an equivocality regarding his application for Judicial Review orders. The cause of his contretemps was that, he said, it had been brought to his attention that the original defendants in CMCC No. 290 of 2015 (who were now interested parties in JR No. 1 of 2016) had filed an appeal (that is HCCC No. 303 of 2016). The substance of that appeal, argued Mr. Munaawa, was exactly the same as the matters he wished addressed in his Judicial Review Application. He was, therefore, unsure whether it made sense to pursue his Application.

7. On his part, and in the second part of interesting happenings, Dr. Warwathe served "notice" that he would be challenging the mandate of Mr. Munaawa and his law firm to represent KNCCI in the matter. His basis for this was that, he said he was a national official of KNCCI and he was aware that no resolution or instructions had been given for KNCCI to bring the suit. Indeed, Dr. Warwathe was categorical that the affidavit supporting the application was sworn without authority. He sought more time to put in replying papers.

8. Mr. Edwin Onsongo Nyanyuki appeared on behalf of the firm of Nyambega & Co. Advocates for the other interested parties who were defendants in CMCC No. 290 of 2015. He simply wanted the directions of the court in the matter – including what to do about HCC No. 303 of 2016. In the end, I permitted the parties more time to file and serve suit papers and allocated the matter a hearing date of 08/07/2016 for the hearing of the Notice of Motion Application by KNCCI.

APPLICATION TO WITHDRAW JR No. 1 of 2016 – PART 1

9. On 08/07/2016, the parties assembled before me for the hearing of the application. A surprise awaited them. Mr. Munaawa now announced that he had instructions to withdraw the Judicial Review matter altogether. He sought the leave of the court to do the same. He had, earlier that morning, filed his written Notice to do so. He stated that he no longer had instructions in the matter and his instructions were now limited to effectuating the withdrawal of the suit and no more.

10. Mr. Nyanyuki appearing with Mr. Mose for the original defendants in CMCC No. 290 of 2015 (instructed by the firm of Nyambega & Co. Advocates) clearly dismayed by the change of stratagem, vigorously objected. The substance of the objection is twofold: first that the *ex parte* Applicant acted in bad faith in leading the Interested Parties to believe that their interests would be canvassed and protected through the suit and then mischievously withdrawing at the last minute. Mr. Nyanyuki and Mr. Mose jointly argued that what the *ex parte* Applicant had done was to send the Interested Party on a wild goose chase, so to speak, so that time could run for the exhaustion of local mechanisms of resolution as ordered by Justice Mbogholi in HCCC No. 303 of 2016. This, Mr. Nyanyuki and Mr. Mose argued, was in bad faith and an abuse of the process of the court. They were of the view that the withdrawal should not be permitted because it would adversely affect the Interested Parties.

11. Secondly, Mr. Mose argued that the application for withdrawal should be declined because, by definition, after the grant of leave to bring Judicial Review matters, they become public interest matters and a party should not be allowed to withdraw for their own interests if such are adverse to the public interests.

12. On his part, Dr. Warwathe supported the application for withdrawal. He returned to his earlier theme that there was no authority to bring the suit in the first place because as a National Director, he was aware that no such resolution had been passed. He informed the court, from the "bar" (put thus because Dr. Warwathe is not an advocate) that he is the one who had called the National Officials and alerted them about the purported suit with the effect that the National Chairman directed that the suit be withdrawn. In any event, Dr. Warwathe was of the view that the Interested Parties are seeking to vindicate their rights through a multiplicity of suits and it would be right to end this matter here.

13. I reserved ruling for the application to withdraw for 15/07/16.

14. On that same day (08/07/2016), a new suit was filed. This one is a Judicial Review matter with the original defendants in CMCC No. 290 of 2015 as the *ex parte* Applicants seeking leave to bring judicial

review proceedings to review the very ruling and orders of the magistrate's court in CMCC No. 290 of 2015. This new suit is referred to as "JR No. 2 of 2016". It was obvious that this suit was filed as a safety valve in the event that the withdrawal of JR No. 1 of 2016 was allowed.

15. After perusing the Application and the bundle of documents supporting it, I directed the parties to appear before me on 20/07/2016 to address me on the question of consolidation of that suit with JR No. 1 of 2016.

APPLICATION TO STRIKE OUT JR NO. 2 OF 2016 AND EXPUNGE ALL REPRESENTATIONS BY MR. NYANYUKI, ADVOCATE

16. As had become customary in this dispute, on 20/07/2016, a new twist awaited us in court. When the matter was called out for hearing, Dr. Warwathe sought the permission of the court to raise a preliminary issue. I allowed him. The preliminary issue was that he wanted the entirety of the submissions ever made by Mr. Nyanyuki in JR No. 1 to be expunged from the records of the proceedings. He further wanted JR No. 2 to be struck out summarily. What would be the reasons for this drastic action? Mr. Nyanyuki, Dr. Warwathe informed the court, was not a qualified advocate. He was, therefore, not qualified to sign any suit papers or address the court.

17. Dr. Warwathe produced two letters – both dated 19/07/2016 in support of his dramatic application. The first was a letter by himself to the Law Society of Kenya seeking to be informed the status report of Edwin Nyanyuki Onsongo. The second was a letter by the LSK, signed by the Deputy Secretary (Compliance & Ethics) which read in material part that:

> We confirm that according to our records, Nyanyuki Onsongo Edwin, Advocate is yet to take out a valid practicing certificate for the year 2016 and is therefore not certified to practice law.
>
> a. Dr. Warwathe referred the Court to the provisions of section 34 and section 9 of the Advocates Act. He argued that the two sections, read together, are quite clear that:
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> b. An Advocate is "unqualified" to practice law if they have not taken out a practicing certificate for the given year even if their names have been entered to the Roll of Advocates upon admission.
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> c. Such an advocate cannot sign any court documents or represent a client in court.
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> d. Any court documents signed by such an advocate is a nullity as is any submissions made in court or any proceedings conducted by such an advocate.

18. Dr. Warwathe cited three cases in aid of his position:

> a. The Supreme Court decision in ***National Bank of Kenya Limited v Anaj Warehousing Limited*** (*Sup. Ct Petition No. 36 of 2014; [2015] eKLR*).
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> b. The Supreme Court decision in ***Anami Silverse Lisamula v IEBC & Others*** (*Sup. Ct. Petition No. 9 of 2014; [2015] eKLR*)
>
> c. High Court Election Appeal Decision in ***Abraham Mwangi Njihia v IEBC & Others*** (*High Court Election App. No. 3 of 2013* – Majanja J.)

19. Mr. Mose was present for the Interested Parties on behalf of the law firm of Nyambega & Co. Advocates while Mr. Munaawa was absent having earlier told the court that he no longer has instructions in the matter. Mr. Mose opposed the application. He expressed surprise that Mr. Nyanyuki did not have a practicing certificate. He admitted that he had never seen Mr. Nyanyuki's practicing certificate but that he had assumed that he had one. He reported that Mr. Nyanyuki has been an associate in his firm since February, 2016 and that the firm had even authorized payment of funds for his practicing certificate. Mr.

Mose did not contest the veracity or authenticity of the LSK letter produced by Dr. Warwathe but merely expressed his shock and disappointment.

20. However, Mr. Mose argued that neither the proceedings conducted by Mr. Nyanyuki nor JR No. 2 of 2016 ought to be struck out merely for the reason that Mr. Nyanyuki has not taken out a practicing certificate. His major point was that Mr. Nyanyuki was representing, at all times, the firm of Nyambega & Co. Advocates at which he (Mr. Mose) is the principal and at all times he (Mr. Mose) had a valid practicing certificate. He also argued that it would be unfair and prejudicial to the clients to be punished for the mistake of their lawyer. He urged the court to take into account the justice of the case and allow the suits to proceed since the validity of the foundational documents of the suits were un-assailed.

ANALYSIS AND DETERMINATION

21. Section 9 of the Advocates Act provides as follows:

> Subject to this Act, no person shall be qualified to act as an advocate unless?
>
> (a) he has been admitted as an advocate;
>
> (b) his name is for the time being on the roll ; and
>
> (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).

22. Section 34 which Dr. Warwathe referred to in his submissions, stipulates that:

> (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—
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> a. relating to the conveyancing of property; or
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> b. for, or in relation to, the formation of any limited liability company, whether private or public; or
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> c. for, or in relation to, an agreement of partnership or the dissolution thereof; or
>
> d. for the purpose of filing or opposing a grant of probate or letters 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:
>
> Provided that this subsection shall not apply to—
>
> i. any public officer drawing or preparing documents or instruments in the course of his duty; or
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> ii. any person employed by an advocate and acting within the scope of that employment; or
>
> iii. any person employed merely to engross any document or instrument.
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> (2) Any money received by an unqualified person in contravention of this sectionmay be recovered

by the person by whom the same was paid as a civil debtrecoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

"4) This section shall not apply to—

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof.

23. Section 34 was the subject of much litigation involving lenders and customers in the pre-2010 period. Problems would arise in the customer-lender bank relationship when the customer claimed that monies lent and accepted by the customer were not recoverable because the lawyer who drew up the contract documents did not have practicing certificates and were therefore unqualified to practice law under section 40 of the Advocates Act. The apex court at the time, the Court of Appeal, had dealt a death knell to any arguments based on equity and substantive justice to save any such documents in the (in)famous case, ***National Bank of Kenya Ltd v. Wilson Ndolo Ayah,*** *Civil Appeal No.119 of 2002*. The Court of Appeal settled the law in the following famous paragraph:

> Whether or not the instrument of charge and instrument of guarantee should be declared invalid *ab initio*for having been drawn by unqualified advocate is a conundrum. Courts in this country are not in agreement on the effect the absence of a [practicing] certificate will have on validity of documents drawn by such an advocate. Section 34 of the Advocates Act… makes it an offence for an advocate not holding a current [practising] certificate preparing or drawing any document for a client for a fee. Neither the Advocates Act nor any other written law makes provision with regard to the validity or otherwise of such documents. The Stamp Duty Act, unlike the Advocates Act, makes provision in Section 19 saying an unstamped document is inadmissible in evidence. The legislature, we think, not only made the documents unregistrable but also made the document invalid for any other purpose before stamping…

24. The Court of Appeal explained its reasoning thus:

> Section 34… as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise it is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by the unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The gravamen of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him. There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for [the] public good, more so in a country like ours, which has a predominantly illiterate or [semi-literate] population. There is a need to discourage [the] commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interest of the innocent party should not be swept under the carpet in appropriate cases. However, it should not be [forgotten] that the innocent party has remedies against the guilty party, to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law.
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> Besides, the Law Society of this country publishes annually, a list of advocates who hold a [practising] certificate, for general information. This is a fact we take judicial notice of, as Courts are also provided with such a list for purposes of denying audience to advocates who do not appear on the list. For that reason the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates Act itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered,

> although in our view provisions similar to Section 19 of the Stamp Duty Act, should have been included in the Advocates Act to remove any doubt as to the validity of documents drawn by unqualified advocates.
>
> It is public policy that Courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates…will discourage excuses being given for…the illegality. [Failure] to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal act. For that reason alone the charge and instrument of guarantee in this matter are invalid, and we so hold.

25. And thus stood the law for a long time. Thus stood the law when Justice Majanja made the Abraham Mwangi Njihia Case cited by Dr. Warwathe. Thus stood the law when the Anaj Warehousing Limited Case was heard at the High Court and the Court of Appeal. After faithfully applying that doctrine, in the *Anaj Warehousing Limited case*, however, the Court of Appeal was troubled enough to certify it as a matter of public interest that required interpretation by the Supreme Court as established under the Constitution of Kenya, 2010. The Supreme Court, thereby got the opportunity to render itself in the *Anaj Warehousing Limited Case* cited to me by Dr. Warwathe.

26. It is important to raise two things about the *Anaj Warehousing Limited Case.* First, Dr. Warwathe completely misunderstood the ratio of the case. He cited it to me for the proposition that all documents signed and filed by an advocate who does not have a practicing certificate are a nullity. He also thought that the *Anami Silverse Lisamula Case* – another Supreme Court decision -- supported that view. In fact, the Supreme Court did not say any such thing. To the extent that the Supreme Court overruled the *Wilson Ndolo Ayah case* referred to above, one can even plausibly say that the Supreme Court said the exact opposite of what Dr. Warwathe thinks it says. In pertinent part, the Supreme Court holds that:

> 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.

27. In other words, the Supreme Court saves from the declaration of nullity, announced by the Court of Appeal in *Wilson Ndolo Ayah case*, instruments or documents of conveyance even if they are drawn by an advocate who did not, at the time of drawing such an instrument or document, have a current practicing certificate.

28. This brings me to the second aspect of the *Anaj Warehousing Limited case* that is pertinent. It is the question whether the holding by the Supreme Court is limited to conveyancing documents or the other documents mentioned in section 34 of the Advocates Act or whether the reasoning of the Supreme Court can be extended to other matters. In particular, can that reasoning be extended to documents and pleadings drawn and filed in court? Different put, does the reasoning of the Court on section 34 of the Advocates Act extend to interpretation of section 31 of the same Act? That section reads as follows:

> (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:
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> a. be deemed to be in contempt of the court in which he so acts or which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and
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> b. be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and in addition, be guilty of an offence

29. The narrow question then is whether the reasoning of the Supreme Court respecting documents and instruments drawn by an advocate without a practicing certificate under section 34 should apply to pleadings, documents and submissions made by such an advocate under section 31 of the Advocates Act. In my view the reasoning applies and, hence, it should be extended to the interpretation of section 31 of the Advocates Act.

30. I say so for two reasons. First, the Supreme Court based its decision in *Anaj Warehousing Limited Case* on the policy objectives and public interest considerations of the case. The Supreme Court reasoned that the basis for the Court of Appeal reasoning in the *Wilson Ndolo Ayah Case* was not the text of the statute but public policy – public policy that declaring all documents signed by a lawyer without a practicing certificate as null and void creates a disincentive for lawyers to defy statutory provisions on taking of practicing certificates and creates a general public disposition that courts do not condone or encourage illegalities. The Supreme Court faulted this reasoning as applied to the case of admitted lawyers (who are in the roll of advocates) because it exacts a huge penalty on innocent clients who had plausible and reasonable basis for believing that the lawyer in question was duly qualified. Instead, the Supreme Court urges the Court, in line with the new Constitutional ethos, to take the lived realities of Kenyans into consideration in interpreting the statutory provision in question.

31. The Supreme Court held that since the statute did not expressly state that any documents signed by a lawyer who did not have a practicing certificate were invalid, that interpretation was unwarranted. The court called on the overriding principles of equity in reaching the opposite conclusion.

32. Even then, it is important to note, the Supreme Court neither limited nor announced the outer limits of the categories of documents which would be covered by the flexible rule the court announced in *Anaj Warehousing Limited Case*. First, the Court announced that with respect to conveyancing or other contractual documents identified in section 34 of the Advocates Act, even the flexible interpretation it had embraced would not cover documents drawn by non-lawyers or advocates who had been disbarred or suspended from practice. Secondly, the Court did not expressly provide that the flexible interpretation it announced would cover pleadings and submissions drawn by a lawyer who did not have a practicing certificate.

33. This latter question is, of course, the question squarely facing us in the present application. It is one which was presented to the Supreme Court in the *Anami Silverse Lisamula Case*. However, the Supreme Court decided that case on the question of jurisdiction without reaching this specific question. As I stated above, however, I believe that the reasoning of the Supreme Court in the *Anaj Warehousing Limited Case* can easily be extended to the situation presented by application of section 31 of the Advocates Act where a lawyer instructed by a client who is acting in good faith draws pleadings and addresses the court on a matter only for it to be discovered later that the lawyer did not have a practicing certificate.

34. A claim in law and a course of action belongs to the client and not the advocate. It is hard to justify, in this era where the Constitution (at Article 159) commands the courts to privilege the ideals of substantive justice as opposed to legal formalism, statutory interpretation which bereaves a party of a valid substantive claim because his or her lawyer failed to adhere to a procedural requirement unrelated to the claim in question. The case would be different, of course, if there is evidence that the client acted in bad faith or with knowledge of the failure of the lawyer to take out a practicing certificate but still persisted in having the lawyer represent them. No such evidence was presented here. Instead, we have a group of innocent members of the public who instructed a law firm – not even a particular lawyer – to file a claim on their behalf. The law firm so instructed, then, assigned the file to a lawyer in the firm who happened not to have taken a practicing certificate. In my view, to paraphrase the Supreme Court, the fact of this case, and its clear merits lead me to a finding that the pleadings drawn and signed by Mr. Nyanyuki as well as the submissions he made in the two suits are not invalid merely by dint of Mr. Nyanyuki's failure to take out a practicing certificate.

35. Like the Supreme Court, however, it is important to point out that this holding does not affect the obligations of Mr. Nyanyuki and his culpability in criminal and civil proceedings. I expressly find the conduct of Mr. Nyanyuki loathe some and unprofessional and I refer this judgment to the relevant body

within the Law Society of Kenya to take the appropriate action against Mr. Nyanyuki. In addition, I order that Mr. Nyanyuki shall personally pay for the costs of this application for all the parties which shall be taxed by the Deputy Registrar.

APPLICATION TO WITHDRAW – PART 2

36. Now that the suits have survived Dr. Warwathe's application to expunge documents and submissions, I will briefly return to Mr. Munaawa's application to withdraw. At the outset, I will point out that, in my view, there is little utility in analysing in details the duelling positions of the parties on this question in view of the second, almost identical Judicial Review Application filed by the original defendants in CMCC No. 290 of 2015.

37. Suffice it to say the following. The argument by the Interested Parties (original defendants in CMCC No. 290 of 2015) that they will be unduly prejudiced if the unilateral withdrawal is allowed are well founded. These interested Parties had cast their lot with the *ex parte* Applicant in JR No. 1 of 2016 and filed very substantive replying documents. They had, indeed, indicated a desire to abandon or consolidate their appeal (HCCC Appeal No. 303 of 2016) with JR No. 1 of 2016 so that the substantive issue of jurisdiction of the Magistrate's court to deal with the subject matter of the suits can be determined quickly and substantively. They have remained fairly consistent in their urgency and desire in this regard.

38. The *ex parte* Applicant in JR No. 1 of 2016 approached the Court under a Certificate of Urgency and impressed on the court on the urgency and importance of the case noting that it involved KNCCI which has many members and branches in all the 47 counties. The determination of the present suits will affect the governance and the conduct of the affairs of KNCCI going forward. Given its diverse membership, Mr. Mose is correct in defining these suits as analogous to public interest litigation. In that case, it would be prejudicial to have a party who brings a case riding on the public interest aspects of the case to gain personal or "selfish" benefits by strategically withdrawing such a suit to the disadvantage of others who had banked on the filing of the suit to vindicate certain rights. To do so would be to permit the courts to be used cynically as theatres of casino justice ruled by the doyens of sharp practice and knavish strategies.

39. In my view, therefore, though this case is not a typical public interest case founded by way of Petition under the Mutunga Rules, it has aspects of public interest that warrant consideration as such. I would, therefore, extend the rule we announced in ***Peter Makau Musyoka & Others v Permanent Secretary, Ministry of Energy & Others*** *(Machakos High Court Petition No. 305 of 2012)* on the legal test to be employed in considering granting leave to a party to withdraw a public interest litigation. We stated the test thus:

> The test requires a court to only permit a withdrawal ….. where the court is satisfied that the juridical effects of the withdrawal will not be adverse to the public interest or the interests of any individuals involved. Differently put, the test is simply that a court will only permit a petitioner to withdraw a Public Interest Litigation matter upon being satisfied that none of ….."juridical effects", are present:
>
> > a. *That the public interest initially presented in the case will not suffer as a result of the withdrawal*. Differently put, the question to ask here is whether the public interest concerns which were to be addressed in the case will suffer adverse effects resulting from the withdrawal of the suit. If the public interest would be compromised or diminished in any way or if the withdrawal of the suit would make it strategically, technically or procedurally more arduous to establish, articulate or consider the public considerations in the case, it follows that public considerations would counsel against leave to withdraw the petition.
> >
> > b. *That is there is no abuse of the process of the law*. Here the court will look to see if the party seeking to withdraw acted in good faith both at the time of filing the suit and at the time she seeks to withdraw….
> >
> > c. *That the case at hand is not an exercise in futility*. If the case has been overtaken by events

or the points pressed by the petitioners are moot, it would be absurd to insist that they case proceeds even if initially it was dripping with public interest.

40. In the circumstances, I decline to permit the withdrawal of the suit. Instead, I permit the *ex parte* Applicant (KNCCI) to withdraw from further participation in the suit and direct that any order of costs in the suit shall take into consideration that the *ex parte* Applicant withdrew from further participation from the date hereof.

41. In view of the ruling and direction I have given above and a related ruling and directions I will give respecting consolidation of this suit with JR No. 2 of 2016, JR No. 2 shall become the lead file in the matter.

ORDERS AND DIRECTIONS ON THE APPLICATIONS

42. The orders and directions from the two applications considered here, then, are as follows:

a. THAT the application *in limine* by Dr. Warwathe to strike out all the pleadings filed by Nyambage & Co. Advocates on behalf of the Interested Parties who were the original defendants in CMCC No. 290 of 2015 in JR No. 1 of 2016 and on their behalf as *ex parte* Applicants in JR No. 2 of 2016 as well as the submissions made by Mr. Nyanyuki in both suits is declined and dismissed.

b. THAT the application to withdraw the suit by the *ex parte* Applicant in JR No. 1 of 2016 (KNCCI) is declined but the *ex parte* Applicant is permitted to withdraw from further participation in the suit.

c. THAT any order as to costs in the suit shall toll for the *ex parte* Applicant in JR No. 1 of 2016 as of today so that it shall not be liable for further costs after this order even if JR No. 1 is eventually unsuccessful.

d. THAT in view of the ruling and order made in JR No. 2 of 2016 dated today (29/07/2016), this suit shall be consolidated and be argued together with JR No. 2 of 2016.

e. THAT Mr. Nyanyuki shall personally pay the costs related to the present application.

Dated and delivered at Kiambu this 29th day of July, 2016

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JOEL NGUGI

JUDGE