



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 13 OF 2015**

1. JOHN KINYANJUI NJUGUNA..... 1<sup>ST</sup> PLAINTIFF

2. FRANCIS NJOROGE NGUHIU.....2<sup>ND</sup> PLAINTIFF

V E R S U S

1. GROUP COMPANY SECRETARY KTDA..... 1<sup>ST</sup> DEFENDANT

2. CHAIRMAN BOARD OF DIRECTORS GITHAMBO TEA FACTORY... 2<sup>ND</sup> DEFENDANT

3. BOARD MEMBER ZONE 3 .....3<sup>RD</sup> DEFENDANTS

4. PETER SIMON CHEGE KIBATHI.....INTERESTED PARTY

**RULING**

The application now before the court filed by the Defendants (notice of motion dated 11<sup>th</sup> February 2016) seeks the following orders:-

- “1. That the irregular interlocutory judgment entered herein be set aside**
- 2. That this Honourable court be pleased to strike out the incompetent plaint filed herein.**
- 3. That in the alternative the Defendants be allowed to filed their Defence and defend the suit.”**
- 4. That the costs of this application and the suit be borne by the Plaintiffs”**

The application is brought essentially upon the ground that the advocate who filed the suit, one D.N. Kamau, did not have a valid practicing certificate for the year 2015 when he filed the suit. As such, the plaint and all other proceedings filed by the said advocate are incompetent, having been signed and filed by an unqualified person who was not entitled to appear and conduct any matter before the court as an advocate. There is also a contention that the Defendants were never served with summons to enter appearance as required by law.

The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act; **Order 50, rule 1, Order 10 rule 10, Order 2 Rule 15** of the **Civil Procedure Rules** (the **Rules**) and Section 9, 31 and 34 of the Advocates Act. It is thus the Defendant’s case in this application that the plaint is an abuse of the

process of the court and it deserves to be struck out.

The application is supported by the affidavit of one **CHRISTOPHER MWANGI KARIUKI**, Counsel for the Defendants. To the affidavit is annexed a letter dated 17<sup>th</sup> November, 2015 written to the Defendant's advocates by one **MERCY K. WAMBUA**, the Deputy Secretary, Compliance and Ethics, of the Law Society of Kenya. The letter reads as follows,

**“RE: WAIGURU MACHARIA ADVOCATE-P.105/939/78**

**The above named advocate last held a practicing certificate in the year 2010. He has not taken out a practicing certificate for the year 2015.**

**We do not have any advocate who has declared to be under the name D.N. Kamau & Co. Advocates.”**

The application has been opposed vide Replying Affidavit filed on 18<sup>th</sup> April 2016 and sworn by one David Ngata Kamau. His grounds of objection include –

- i. That contrary to the assertions of the Defendant's Advocate, he is a well-established Advocate with a current practicing certificate and thus he was qualified to file the pleadings on behalf of the Plaintiffs.
- ii. That the allegation by the Defendants is not true as his law firm is registered.
- iii. That the overriding objective dictates that the court should facilitate just, expeditious, proportionate and affordable resolution of disputes and the current application is meant to delay the plaintiffs' entitlement. That the Defendants participated in the whole process without raising concern until interlocutory judgment was entered.

Annexed to the replying affidavit are David Ngatia Kamau's practicing certificate dated 27<sup>th</sup> February 2015; certificate of registration of D.N. Kamau as a business name commencing 16<sup>th</sup> July 2013 and affidavit of service sworn by one Stephen Mwangi Macharia on 3<sup>rd</sup> August 2015.

**Section 34** of the **Advocates' Act, Cap. 16** prohibits, in mandatory terms, unqualified persons (with certain exceptions) either directly or indirectly, taking instructions as advocates or drawing or preparing various documents or instruments. The documents include documents in legal proceedings.

Apart from that, **Section 9** of the **Advocates Act** provides -

**“Subject to this Act, no person shall be qualified to act as an advocate unless:-**

- a. he has been admitted as an advocate; and**
- 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)”.**

The Registrar of the High Court issues practising certificates to advocates upon the recommendation of the Law Society of Kenya. The said Society has stated categorically that at the time the plaint in this suit was filed the advocate who prepared and signed the plaint David Ngata Kamau, did not have a current practising certificate. As such, he was not entitled or authorized to act as an advocate and file the suit on

behalf of the Plaintiffs.

Mr. David Ngata Kamau has filed replying affidavit and annexed his practicing certificate for the year 2015 which was issued on 27<sup>th</sup> February 2015 about a month after filing of the suit herein. Upon the recent authority of the **Supreme Court in Petition No. 36 of 2014 National Bank of Kenya Limited vs Anaj Warehousing Limited**[2015]eKLR , no instrument or document becomes invalid under Section 34(1)(a) of the Advocates Act only by reason of it having been prepared by an advocate who at the time was not holding a current practicing certificate. Hence, the proceedings filed herein by Mr. David Ngata Kamau, are competent. Prayer 2 of the Notice of Motion is therefore refused.

That brings the Court to the issue of whether the interlocutory judgment herein should be set aside and whether the draft defence should be admitted.

Rule 11 of Order 10 of the Civil Procedure Rules provides -

**“Where judgment has been entered under this Order, the court may set aside or vary such judgment or any consequential decree or order upon such terms as are just.”**

This court has an unfettered discretion, subject only to dictates of justice. But like all discretions of the court, it must be exercised judiciously and upon settled principles.

The principles to guide the court in applications of this nature are now well settled. The main concern of the court is to do justice to the parties before it. Its discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However, it will not be exercised in order to assist an indolent litigant, or one who has deliberately sought, by commission or omission, to obstruct or delay the course of justice. See the case of **SHAH –VS- MBOGO**, [1967] E.A. 116.

Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after the judgment sought to be set aside. It will also consider if the defendant has an arguable defence to the claim. To deny the defendant the right to a trial should be the last resort of the court.

The Affidavit of Service describing how summons to enter appearance was served has been faulted on the basis that it is vague and that no such service was ever made. Order 6 rule 16 of the Civil Procedure Rules provides that where it is purported that the service of summons to enter appearance was improper, the court may call the process server for cross examination. In this case, with the ambiguity surrounding the service (does not follow the laid down procedure in Order 5 rule 15); the allegation that the process server is not registered (which was not denied) I find that no service of summons to enter appearance was effected on either of the Defendants.

Therefore, the judgment entered was irregular and must be set aside which I hereby do. The notice of motion dated 11<sup>th</sup> February 2016 is allowed in terms of prayers 1 and 3. Costs shall be in the cause.

*Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of September 2016.*

**A. MBOGHOLI MSAGHA**

**JUDGE**