



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 16 OF 2012

ALBERT KIBUGU.....PLAINTIFF

VERSUS

LAW SOCIETY OF KENYADEFENDANT

JUDGMENT

1. This suit was instituted on 20th January 2012 by the plaintiff Mr Albert Kibuga Wahome who is an advocate of the High Court of Kenya, against the defendant Law Society of Kenya, which is the Premier Bar Association in Kenya and established under the provisions of the Law Society of Kenya Act, Cap 18 Laws of Kenya. The plaintiff's claim against the defendant is for the following orders:

1. A declaration that the plaintiff had a practicing certificate for the year 2001;
2. Punitive damages;
3. Damages for negligence, stress and anxiety;
4. Refund of monies paid to the defendant by the plaintiff from 1998-2009;
5. Costs of the suit;
6. Any other relief deemed just by the court.

2. The defendant filed defence dated 3rd June, 2013 on 5th June, 2013 denying the plaintiff's claim against it in toto and praying that the plaintiff's suit against it be dismissed with costs.

3. The plaintiff testified as PW1 that he is an advocate of the High Court of Kenya. He practices in Karen. That in 2001 he took out an application for an intention to take out practicing certificate. The application for practicing certificate was received by the defendant Law Society of Kenya and approved on 12th February 2001 and the Law Society notified him vide a letter dated 12th February 2001 that his application had been approved. He however was not issued with a practicing certificate. He visited the Law Society of Kenya Secretariat to find out why the certificate could not be issued to him despite payment of shs 6,340 which was receipted on 11th January 2001. That the Law Society of Kenya told him that as long as he had paid, he should not worry.

4. The plaintiff further testified that he sued the Law Society of Kenya because in September 2001 he

filed suit in the High Court and prosecuted it in 2011. Another Law firm of Muriungi & Company Advocates wrote to the Law Society of Kenya to inquire on whether the plaintiff herein had a practicing certificate for 2001 when the said suit was filed. That that is when the plaintiff learnt that he had no practicing certificate. That in an affidavit sworn by Mr Apollo Mboya, Law Society of Kenya alleged that the plaintiff had no practicing certificate. Further, that Muriungi & Company Advocates had a list of advocates and it showed that for 2001 the plaintiff had no practicing certificate in 2001. That after the suit was dismissed, the plaintiff herein inquired from the Law Society of Kenya and he was notified that he had back fees from 1999 that is why they did not process his practicing certificate. That the Law Society of Kenya never communicated to him that he had any back fees to settle.

5. That in 2010, he had a practicing certificate hence he sought clarification from the Law Society of Kenya but there was no response. He was ordered to pay costs of the dismissed suit. He was also taken before the Disciplinary Committee of the Law Society of Kenya and charged with practicing without a practicing certificate. He was found guilty, disciplined and fined. He suffered loss as he had to compensate his client. He therefore prayed for damages for negligence, costs of the suit, a declaration that he had a practicing certificate for the year 2001, punitive damages and any other relief the court may deem fit to grant. The plaintiff produced his list and bundle of document filed on 20th January 2012 as Exhibits 1-7. These are:

1. Disciplinary committee DCC 117/2010 affidavit by Apollo Mboya PEX 1.
2. Ruling in HCC 1900/2001 as PEX2.
3. Demand note fees dated 18th December 2001 from Law Society of Kenya PEX3.
4. Letter dated 30th August 2011 from Law Society of Kenya to Muriungi & Company PEX4
5. Letter to Muriungi & Company by Law Society of Kenya dated 26th September 2011 PEX 5
6. Application for practicing certificate by Albert Wahome PEX6
7. Receipt No. 8419 dated 11th January 2001 issued to the plaintiff by Law Society of Kenya for shs 6340- PEX 7.

6. The plaintiff concluded that in their own affidavit sworn by Apollo Mboya on 29th June 2010, the Law Society of Kenya admitted that he had a practicing certificate for the years 2004 and 2010 and that under paragraph 7 of the said affidavit, it was conceded that he had practiced since admission in 1998 until 2002 when he took out a practicing certificate.

7. On being cross examined by Mr Olembo counsel for the defendant, the plaintiff stated that he was admitted to the Role of Advocates in 1998. That he practiced as an advocate although he did not take out a practicing certificate. He stated that the first time he applied for a practicing certificate was in January 2001. The plaintiff stated that he lodged an intention to take out a practicing certificate and paid for it the same day. He conceded that such an application for intention to take out a practicing certificate would take six weeks before consideration. He also stated that in his receipt of 10th January 2001 there was no back fees. He stated that he received the Law Society of Kenya's letter on 12th February 2001 written to the Registrar of the High Court with copy to him, and that it had a 'note for fees attached.' He stated that he did not respond to that letter and that when he went to the Registrar of the High Court, he was referred back to the Law Society of Kenya. The plaintiff also conceded that it is Registrar of the High Court who was to issue him with a practicing certificate on advice of the Law Society of Kenya. He denied confirming from the Registrar whether his practicing certificate was issued or not.

8. The plaintiff also stated that he did not appeal against the ruling striking out his client's suit on account that he acted without a practicing certificate. He also stated that he never attached a practicing certificate but only a receipt for payment. The plaintiff also stated that he did not follow up with the

Registrar of the High Court and that he was aware of Section 25(4) of the Advocates Act. He however stated that he had been informed by Mr George Kegoro the former CEO of the Law Society of Kenya that his practicing certificate had been approved and that the affidavit of Apollo Mboya showed that the plaintiff had been issued with a practicing certificate.

9. The plaintiff further stated that in 2002, he paid for a practicing certificate but that it was not issued to him and the same situation prevailed in 2003 and 2004. The plaintiff stated that from paragraph 7 of PEx1 Mr Apollo Mboya's affidavit, the plaintiff had a practicing certificate for the years named but that nonetheless he did not apply or pay for a practicing certificate for those years.

10. The plaintiff conceded that he was disciplined vide Disciplinary cause No. 117 of 2010 and that he did not challenge that decision. Further, that during the period that he did not have a practicing certificate, he went to court once or twice. When questioned whether he had a practicing certificate for the year 2004, he stated that he had paid for one but he had no receipt to show that he had paid for it. He also conceded that in the period 2007 and 2008 he did not take out any practicing certificate. He further conceded that he handled HCC 563/2007 although he had no practicing certificate at the material time. He further conceded that from 2001-2004 he was never issued with a practicing certificate. He also conceded that although he had a law firm of A.K. Wahome & Company Advocates, he had not taken out practicing certificates after his admission in July 1998 and that the first time he sought for one was in 2001.

11. The plaintiff responded that Law Society of Kenya had a statutory mandate to ensure that he complied with the Advocates Act and that the responses given by Law Society of Kenya to Muriungi & Company were in the exercise of the statutory mandate of the Law Society of Kenya. He stated that he seeks for refund of all monies paid to Law Society of Kenya from 1998 to 2009. He concluded that he paid back fees in 2011 and that since then he has been issued with practicing certificates.

12. In re-examination by Mr Karanja advocate, the plaintiff stated that the Registrar of the High Court never informed him of any refusal to issue him with a practicing certificate. That in 2010, he was issued with a practicing certificate but no back fees was demanded from him until 2011 which he considers an afterthought. He also stated that it was up to the Registrar of the High Court to issue him with the practicing certificate.

13. At the close of the plaintiff's case, the defendant called DW1 Mr Apollo Mboya who testified that he was the Chief Executive Officer of the Law Society of Kenya. He adopted his witness statement made on 6th May 2014 as his evidence in chief and relied on the list and bundle of documents filed on 7th May 2014 as exhibits for the defendant.

14. DW1 testified that in 2001 the plaintiff issued to the defendant an intention to apply for a practicing certificate and an approval was given but no practicing certificate was issued to him as the plaintiff had to comply with various aspects of the requirements for issuance of a practicing certificate including back fees. That the plaintiff ought to have given 6 weeks notice which would be tabled before the Council of Law Society of Kenya for consideration and the council would approve subject to some directions that the Council may deem fit to give. That the council considered the plaintiff's application and the Secretariat communicated the council's decision to the plaintiff vide letter dated 12th February 2001 written to the Registrar OF the High Court and copied to the plaintiff, which letter show's that there was an attached "demand for fees" which was both current and previous fees.

15. Mr Mboya testified that according to the Law Society of Kenya records, Mr Wahome first applied for a practicing certificate on 11th January 2001 accompanied by his statutory declaration saying that from 27th July 1998 to 10th January 2001, he had not practiced law. That the plaintiff served a notice of intention to take out a practicing certificate upon Law Society of Kenya and the Registrar too was expected to be served with a copy but there was no evidence of such service upon the Registrar. DW1 stated that once the Secretary of the Law Society of Kenya communicates to the Registrar of such approval, it receives the requisite fees and that it was upon the Registrar to issue a practicing certificate.

16. DW1 stated that as a society, they received enquiries on the status of the advocate plaintiff herein and it responded stating that the plaintiff had not held a practicing certificate in the period inquired of that in 2001 the plaintiff next applied for a practicing certificate in September 2011 when he paid back fees. Further, that the plaintiff had been making part payment for practicing certificates fees without paying for the Advocates Benevolent Fund hence he could not be issued with a practicing certificate with part payment. That in 2003 and 2004, the plaintiff made some payments for practicing certificates but he did not issue notices under Section 25(4) of the Advocates Act since he had not held a practicing certificate for over 12 months.

17. Further, that from 2005-2009 the plaintiff never held any practicing certificate and neither did he pay any fees. That in 2010, he issued notice of intention to take out a practicing certificate and it was approved conditional upon him paying back fees from 2004-2010 and DW1 swore the affidavit against the plaintiff referring the matter to the Advocates Disciplinary Committee for practicing without a practicing certificate.

18. The defence witness further stated that under paragraph 7 of his affidavit, the word “not” was inadvertently omitted between “had” and “practiced” and that the plaintiff had also admitted that he had not taken out a practicing certificate from 1998-2001 when he first applied for the same. That the Law Society of Kenya received the inquiries in 2008 concerning the plaintiff/advocate’s status. That in Succession Cause No. 563/2007 where the plaintiff was on record for the client, Honourable Onyancha J summoned the Law Society of Kenya Chief Executive Officer to give information to court under oath on the status of the plaintiff as an advocate.

19. According to Mr Mboya, the plaintiff was convicted by the Disciplinary Committee for practicing without a practicing certificate. The defence witness concluded that it was the Registrar to issue practicing certificates and not the Law Society of Kenya. He produced all the defendant’s list of documents filed on 7th May 2014 as plaintiff’s exhibits Nos 1-12 and urged the court to dismiss the plaintiff’s suit with costs.

20. In cross examination by Mr Karanja advocate for the plaintiff, DW1 restated that the procedure applicable for applications for practicing certificates which involve- after giving notice of intention to apply for a practicing certificate, an advocate must give 6 weeks and that the Law Society of Kenya only asks for payment after the Council has approved the application. He however stated that sometimes advocates pay in advance and agree to pay any difference later after the approval in case more money would be required.

21. Mr Mboya stated that in the letter of 12th February 2001, the Society had attached a tabulation of back fees and that in 2011, the plaintiff’s application for a practicing certificate was approved subject to payment of back fees for 2009 and 2010. Further, he stated that back fees was required where the Council determines that the advocate had been practicing for those past years. That in 2011, the advocate was asked to pay back fees for 1998- 2001 which he did not pay and that there was no waiver of back fees. Further that there were legal consequences for practicing without a practicing certificate hence the Disciplinary Committee proceedings instituted against the plaintiff. Mr Mboya further responded that the Law Society of Kenya records showed that the plaintiff had taken out a practicing certificate in 2002 and 2004. He also reiterated that it was in the discretion of the Registrar of the High Court to issue a practicing certificate and that the council of the Law Society of Kenya only responded to various inquiries from advocates and courts on the plaintiff’s status. He further stated that there was no evidence that the Registrar issued a practicing certificate to the plaintiff or that the plaintiff applied for a practicing certificate. He denied that fees was received on application, clarifying that the Law Society of Kenya members pay or deposit money in the society’s accounts then follow up for a receipts and make an appropriate application.

22. Mr Mboya maintained that a notice to the Registrar was a legal requirement and that the plaintiff later visited Law Society of Kenya offices severally and made payments on back fees. Mr Mboya also denied that the Law Society of Kenya was negligent in making claims in 2011 that the plaintiff had no practicing certificates for the many years and stated that in any event the plaintiff had accepted the

findings of the Disciplinary Tribunal which found him guilty and that he did pay back fees to Law Society of Kenya after issuing him with a 2011 practicing certificate hence the issue of negligence did not arise.

23. In re-examination by Mr Olembo, DW1 stated that the plaintiff never took out a 2001 practicing certificate and that according to PEX1, the plaintiff never practiced from 1998-2002 since he did not have a practicing certificate for those years. DW1 also maintained that the letter of 12th February 2001 had a condition and an attached demand for fees. Mr Mboya also stated that once the Registrar issues a practicing certificate, it is usually posted to the member directly and that it was the plaintiff's duty to confirm that he was issued with a practicing certificate hence it was upon the plaintiff to produce those certificates to this court.

24. At the close of the defendant's case, the parties filed written submissions.

25. In the plaintiff's written submissions dated 14th December 2015 and filed on 16th December 2015, it was averred that there was no basis for the defendant to demand that the plaintiff pays back fees after 10 years which was an afterthought aimed at hiding their mistakes which are obvious. Further that the plaintiff having paid fees for the issuance of practicing certificate for 2001, there were no other issues pending and that DW1's evidence was generalized and evasive as he was not the defendant's Chief Executive Officer then. Further, that DW1's evidence was misleading and false for reasons that Mr Mboya alleged that the defendant had/has no role in the issuance of practicing certificates to advocates, blaming the plaintiff and the Registrar of the High Court.

26. According to the plaintiff, DW1 failed to inform the court that the Registrar has delegated the role of issuing practicing certificates to the Law Society and that the Registrar never deals with Advocates directly but through the defendant. Further, that DW1 dwelt on Tribunal matters which were extraneous to the issues in this suit and that he failed to quote the Section in the Advocates Act which requires an advocate to pay back fees or any section the plaintiff may have breached to warrant denial of a practicing certificate.

27. The plaintiff maintained that the demand for back fees is not backed by any law and was only meant to justify the failure by the defendant toward the plaintiff.

28. Further, that in any case DW1 admitted in his affidavit that the plaintiff had between 2001-2004 paid for his practicing certificates and that if the plaintiff had owed money to the defendant, it would not have issued him with a practicing certificate. It was further submitted that the issue of back fees was only raised by the defendant when the plaintiff threatened to sue the defendant for giving misleading information to the law firm of Muriungi & Company Advocates; that the defendants all along knew that the plaintiff had complied with all the provisions of the Advocates Act and that it is the defendant who was negligent by not processing the said practicing certificates.

29. The plaintiff in his submissions claimed that he lost shs 4 million including legal fees and decretal sum awarded by the High Court Commercial Division; that he suffered stress and anxiety for having to refund all the monies to the plaintiff in HCC 1900/2001 as awarded and wasted time. He prayed for shs 4,000,000 plus interest from 2011 at commercial rates.

30. In their submissions filed on 17th March 2016 the defendant relied on its defence as filed, exhibit documents produced, and testimonies in court. According to the defendant, it was not responsible for the loss suffered by the plaintiff and his client in HCC 1900/2001 when the said suit was struck out. Further, that it is the duty of the defendant which is a lawyers' professional body to inform the general public, when required, and or requested, about the practicing status of any one person who purports to practice as an advocate. The defendant submitted that the plaintiff signed the Roll of Advocates in 1998 but that he never applied for a practicing certificate until 2001 which application was approved subject to payment of back fees which he did not pay until 15th August 2002 after the 12 months period had lapsed necessitating him to put in another notice for practicing certificate in accordance with Section 21 of the Advocates Act. Again the plaintiff lodged his application and paid for a

practicing certificate in 2004 but he could not be issued with the practicing certificate for want of notice and in the years 2005, 2006, 2007, 2008 and 2009 he never held any practicing certificate. That in 2010, he put in a notice which was approved and he took out a practicing certificate in 2011.

31. That the defendant never at all admitted that the plaintiff held a practicing certificate in 2001. Further, that the plaintiff in his testimony in court admitted that after his admission to the bar in 1998, he practiced law without taking out a practicing certificate contrary to Section 9 of the Advocates Act.

32. The defendant maintained that the approval for issuance of practicing certificate in 2001 as communicated to the Registrar copied to the plaintiffs on 12th February 2001 was subject to payment of back fees whose demand was attached, since the plaintiff had already paid the fees for practicing certificate on application. It was submitted that the plaintiff's conduct was in direct violation of the law and professional ethics of the legal profession hence he was charged before the Disciplinary Committee for the Law Society of Kenya vide Disciplinary Case No, 117/2010 wherein he was found guilty of practicing without a practicing certificate for the years 2005, 2007, 2008 and 2009. It was further submitted that there were no particulars of special damages pleaded hence he cannot be awarded the same as submitted.

33. Further, it was submitted that the issue of the 2001 practicing certificate not having been issued to the plaintiff although he had paid for it was settled in HCC 1900 of 2001 by Havelock J who made it clear that the *".....Registrar may not have exercised his discretion to issue the same."*

34. Reliance was placed on Section 25(4) of the Advocates Act which provides that:

The Registrar may in his discretion-

- i. Grant or refuse any application made under this section; or
- ii. Decide to issue a practicing certificate upon such terms and conditions as he may think fit.

35. It was submitted that the plaintiff never appealed against non issuance of a practicing certificate by the Registrar in 2001 as required under Section 26 of the Advocates Act. Further, that the plaintiff had not produced any evidence of holding a practicing certificate in all the years he complained of and current year as stipulated in Section 31(1) of the Advocates Act. The defendant urged the court to dismiss the plaintiff's suit with costs.

DETEERMINATION

36. The plaintiff had on 25th September 2013 filed statement of agreed issues for determination which are:

1. Whether the plaintiff paid for the practicing certificate to the defendant.
2. Did the defendant write to the Registrar of the High Court recommending that the plaintiff be issued with a practicing certificate.
3. Did the defendant inform the plaintiff that they did not process the practicing certificate?
4. Did the defendant receive the money from the plaintiff and what was the money for .
5. Was the loss shs 3,000,000 as a result of the defendant's negligence.
6. Whether the plaintiff is entitled to any relief as stated.
7. Who is entitled to the costs of the suit?

37. The defendant did not file any issues for determination. I shall in determining this dispute examine the above issues framed by the plaintiff which issues no doubt generate other ancillary questions. However, the main issue for determination is whether the plaintiff has proved his case against the defendant on a balance of probabilities to warrant grant of the reliefs sought; what orders should this court make and who should bear costs of this suit?

38. It is not in dispute that the plaintiff did pay for his practicing certificate for 2001 on 11th January 2001 the same day that he issued an application for practicing certificate for 2001. In that application PEX6 the plaintiff described himself as an advocate admitted on 23rd July 1998 and that during the period 27th July 1998 to 10th January 2001 he did not apply for a practicing certificate because he did not, during that period practice on his own account, either alone or in partnership, nor did he hold or receive client's money. He stated that he was unemployed during that period. The plaintiff made a declaration conscientiously believing the same to be true and in accordance with the Oaths and Statutory Declarations Act on 10th January 2001.

39. However, in his testimony in cross examination, the plaintiff stated as follows: ***“I was admitted to the Roll of Advocates in 1998. I practiced as an advocate. I did not take out a practicing certificate. I first applied for a practicing certificate in January 2001. I made an intention to take out a practicing certificate and paid for it the same day. Such an application (intention) would take six weeks before consideration. There is no payment for back fees in my receipt of 10th January 2001.”***

40. From the above evidence, what this court gathers is that the plaintiff either lied in his declaration made on 10th January 2001 when he was applying for his practicing certificate for the year 2001, that he had been unemployed from 1998-2001 or he was lying to the court when he stated that he had practiced from 1998-2001 January without taking out a practicing certificate. He never provided any clarification in re-examination to that issue of whether he was practicing from 1998-2001 without a practicing certificate contrary to Section 9 of the Advocates Act, or whether he was unemployed during that period.

41. In this court's view, assuming that the defendant took the application (intention lodged by the plaintiff to be the gospel truth- that the plaintiff had been unemployed for the period 1998-2001, then there would have been no basis for requiring the plaintiff to pay any back fees. The reason here is that back fees could only have been claimed from an advocate who had disclosed that he had been practicing for the past years without a practicing certificate. There is no legal provision and basis for punishing advocates who have not practiced. To order payment of back fees for a person who has not practiced is punishing those advocates who chooses not to practice which would be illegal.

42. The above position notwithstanding, it is not in dispute that the payments for practicing certificates are normally made to the Registrar of the High Court through the Law Society of Kenya. This is because, besides a practicing certificate fee, the Law Society also collects other charges which include Law Society Annual Subscription for the year; Levy for the Law Society Library Fund; Levy for the Law Society Journal; Advocates Benevolent Association fee and East Africa Law Society subscription fee.

43. From the receipt issued on 11th January 2001 to the plaintiff, and the letter to the Registrar copied to the plaintiff dated 12th February 2001, there is no indication that there was any other pending fee payable besides what the plaintiff had paid.

44. Further, there is no evidence to show that the approval of notice of intention to apply for a practicing certificate for 2001 was subject to any conditions. If there were any conditions attached to that approval, nothing prevented the defendant from producing before this court the following documents-

1. Minutes of the Council meeting held where the plaintiff's application for practicing certificate was approved with conditions.

2. Copy of the demand for fees (other than the fees paid on 10th January 2001.

45. It is trite law that he who alleges must prove, as stipulated in Sections 107,108 and 109 of the Evidence Act. However, Section 109 of the Act is clear that *‘the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’*

46. In this case, it is the defendant who has insisted that the approval for issuance of the practicing certificate for 2001 was conditional upon the plaintiff paying back fees. However, the defendant has not discharged the burden of proving that as at that particular time, with the kind of Statutory Declaration that the plaintiff had filed, which I have nevertheless found to be inconsistent with his testimony in court, there was any reason to place that condition or even ask him to pay back fees.

47. In addition, Section 112 of the Evidence Act is clear that ***“ In civil proceedings , when any fact is especially within the knowledge of any person to those proceedings, the burden of proving or disproving that fact is upon him.”***

48. In the instant case, the plaintiff averred that he applied for and paid for a practicing certificate for the year 2001 which fact is conceded by the defendant. It is also not in contention that the application was approved by the Council of the Law Society of Kenya who went ahead to communicate that approval to the Registrar of the High Court as required since it is the Registrar of the High Court who issues advocates with practicing certificates and not the defendant.

49. The defendant also notified the Registrar that it had no objection to the Registrar issuing the plaintiff with the necessary certificate, and notified the plaintiff of that position. That being the case, the question is, what other role was the defendant expected to play in the issuance of a practicing certificate to the plaintiff? The plaintiff has accused the defendant of being negligent in the following manner:

- a) *Constantly informing the plaintiff that they had processed the practicing certificate well knowing it had not.*
- b) *Failing to correct/reverse the said mistake.*
- c) *The defendant accepted money without intention of processing the said practicing certificate.*
- d) *Failing to inform the plaintiff the true position regarding his practicing certificate status.*

50. Having found that the defendant did act on the plaintiff’s application for a practicing certificate for 2001 by receiving fees, approving and notifying the Registrar of a no objection, the question is whether the defendant was negligent and how? In my humble view, the plaintiff has miserably failed to show this court that the defendant was negligent or that it owed him any duty of care and breached that duty of care as a result of which he suffered loss and damage.

51. The defendant having approved the application by the plaintiff of a practicing certificate and having communicated to the issuing authority a no objection, if the issuing authority did not issue the plaintiff with the practicing certificate, it was upon the plaintiff to make a follow up with the Registrar to establish why his practicing certificate was not forthcoming. Instead, the plaintiff sat in his comfort zone and waited for the defendant to follow up and deliver to him a practicing certificate issued by the Registrar.

52. This court takes judicial notice that practicing certificates are issued by the Registrar of the High Court who then sends them directly to the advocates using their last given and known addresses. This court is well aware of that statutory procedure under the Advocates Act procedure and it has not been demonstrated by the plaintiff herein that the practice where the Law Society of Kenya Council approves the application and notifies the Registrar to issue the advocate with a practicing certificate has changed over time.

53. I therefore find that there was no obligation placed on the Law Society of Kenya – the defendant herein to ensure that the advocate -plaintiff was issued with or received his practicing certificate. Furthermore, the plaintiff has not demonstrated to this court that he did follow up the issue of his practicing certificate with the Registrar and that he was informed that it was with the defendant.

54. I reiterate that the power to issue practicing certificates to advocates is vested in the Registrar of the High Court and not the Law Society of Kenya which is only a conduit for processing applications for practicing certificates.

55. Under Section 25 of the Advocates Act, Cap 16 Laws of Kenya, where an advocate applies for a practicing certificate when for twelve months or more he had ceased to hold a practicing certificate in force, the applicant shall give to the Registrar and to the Secretary of the Law Society not less than six weeks before his application for a practicing certificate, notice of his intention to apply therefore.

56. In addition, Section 25(4) of the Advocates Act provides that the Registrar may in his discretion-

i. Grant or refuse any application made under this section.

ii. Decide to issue a practicing certificate upon such terms and condition as he may think fit.

57. In the instant case, indeed, there is no evidence of whether or not the Registrar exercised his discretion in refusing to issue the plaintiff with a practicing certificate in 2001. There is also no evidence that the plaintiff ever complained against the Registrar for the latter's failure to issue him with a practicing certificate.

58. Further, there is no evidence to show that the plaintiff, having failed to secure his practicing certificate from the Registrar in 2001, ever lodged any appeal to the High Court under Section 26 of the Advocates Act against the Registrar's decision or indecision. I also find that there is absolutely no evidence that the defendant in any way after 12th February 2001 influenced the Registrar with an advisory not to issue the plaintiff with a practicing certificate. The plaintiff simply lay back and never bothered to get the practicing certificate for 2001 from the Registrar and is now shifting the blame to the Law Society of Kenya whom I find innocent in this whole saga and infact, non suited.

59. From the above exposition, it becomes clear to me that in the absence of any evidence that the defendant was under any duty to issue the plaintiff with a practicing certificate, or that it breached that duty, it would be superfluous to find that the defendant was negligent. In my humble view, if the plaintiff did suffer and loss, if at all, then he has himself to blame for his own lethargy. It is for the above reasons that I find that the defendant's responses dated 23rd November 2000 to an inquiry by Muhanji Kasango Advocate dated 17th November 2001 that the "*above advocate has not held a practicing certificate since admission in 1998*" was accurate as there was no evidence to the contrary and neither was that response by Law Society of Kenya laced with any malice.

60. I also find that indeed the plaintiff has not shown that he was ever issued with any practicing certificate for the subsequent years since 2001 leading to various complaints against him including one by Muhanji Kasango on 15th January 2001; the District Magistrate's courts, Othaya on 1st October 2001; inquiries by V Goswani advocate on 13th October 2004; and Cauri & Co- Advocates on 15th April 2008 following Honourable Onyancha J directions in HC Succession Cause No. 563 of 2007.

61. This court also notes that the plaintiff claims that the affidavit sworn by the Secretary to the LSK Council and a letter by Mary Karen had maintained that they had processed his practicing certificates from 2001 until 2004 and therefore he had no cause to worry. I have examined the plaintiff's exhibit 1, an affidavit sworn by Apollo Mboya which referred to some annexures which were not produced as part of the affidavit. I note that since it is the plaintiff who wished to rely on that affidavit which had explanatory annexures and which annexures he did not produce, he cannot purport to hold the

defendant to have affirmed that he had a practicing certificate in 2004,1998-2002. I say so because DW1 made it clear that in paragraph 7 of his affidavit sworn on 29th February 2010, the word **not** had been inadvertently omitted between **had** and **practiced**. In my humble view, that position by the deponent of the affidavit hereinabove was informed by the plaintiff's own statutory declaration made on 10th January 2001 which he nonetheless contradicted in court when he stated in cross examination that he had been practicing since 1998 until 2001 when he gave notice of intention to apply for a practicing certificate.

62. This court also notes that this suit was instituted by the plaintiff against the defendant after the plaintiff was convicted by the Law Society of Kenya Disciplinary Committee for the offence of practicing without a practicing certificate following several complaints raised against him. The judgment in that Disciplinary Case No117/2010 was delivered on 1st November 2010 and this suit was instituted in court on 20th January 2012. In the judgment, after the plaintiff stating that he had nothing to say, the Disciplinary Committee found that from the complaint, the advocate had last held a practicing certificate in 2004 and that he had issued a notice of intention to take out a practicing certificate which was approved in February 2010. He subsequently took out one in 2010. The Disciplinary committee also found that the evidence before it was not challenged that in 2008, the plaintiff never took out a practicing certificate culminating in certain inquiries from the public and summons from the court in P & A 563/2007 Nairobi. It also found that the plaintiff had not taken out a practicing certificate for the years 2005, 2007, 2008 and 2009. He was ordered to pay outstanding due.

63. From the above record, it is clear to this court that the plaintiff instituted this suit against the defendants to clear his name after being convicted of the various charges of practicing without a practicing certificate by the Law Society Disciplinary Committee. In my humble view, this not being an appeal, or a Judicial Review Forum this court would not have any jurisdiction to review, vary or set aside the proceedings of the Disciplinary Committee other than through the process established under the law, by way of an appeal, Judicial Review or any other known procedure. There is no evidence that the plaintiff appealed against that unfavourable decision of the Disciplinary Committee. That being the case, how then would this court be asked to find that the defendant was negligent in failing to correct/ reverse the mistakes of failing to process the practicing certificates despite receiving the prescribed fee; accepting money without intention of processing the said practicing certificate, failing to inform the plaintiff the true position regarding his practicing certificate status?

64. Furthermore, the best and appropriate forum where the plaintiff could have raised such issues of negligence would have been before the Disciplinary Committee where he was facing charges of practicing without a practicing certificate for the mentioned years. He should have raised those particulars of negligence as his defence against the charges. He chose to remain silent, which was in the exercise of this constitutional right. Having done so, he cannot be heard to turn around and claim that the defendant was negligent, which negligence, as I have stated, he has not proved or at all.

65. This court also notes that the plaintiff lodged this suit after the ruling of Havelock J on 9th November 2011 which struck out the (plaintiff's) client's proceedings in HCC 1900/2001 Erastus Wahome T/A Lenana Chemicals V Kwa Matingi Farmers Co-operative Society on account that the plaintiff herein had been on record for the plaintiff/deeree holder yet he did not hold a practicing certificate for the year 2001. The question that I pose is, if the plaintiff believed that he had in his possession a practicing certificate at that time, by swearing an affidavit in reply to the plaintiff's application on 18th October 2011 at paragraph 10(a) that he had attached a copy of his practicing certificate which the learned judge Havelock J found was not attached, how then would the plaintiff advocate turn around in 2012 and allege that the defendant was negligent? At page 4 paragraph 6 line 7 of the said ruling, Havelock J observed:

“ He considers the defendant's application is made in bad faith and then veers off in an attempt to show that despite problems with the Law Society and a disciplinary complaint being raised against him by the Law Society's Secretary, he had held a valid practicing certificate in 2001.....”

66. The learned judge also did not hesitate to remind the plaintiff that the Registrar of this Court is the issuing authority for advocate's practicing certificates. When the plaintiff was challenged on the issue of holding a valid practicing certificate for 2001, he filed a further affidavit annexing copy of a receipt dated 11th January 2001 for shs 6340 and copy of his letter to the Law Society of Kenya protesting the response by the Law Society of Kenya dated 30th August 2011 to Muriungi & Company Advocates on his status. He did not annex a practicing certificate. To this date, the plaintiff did not adduce any evidence to show that he challenged the ruling in HCC 1900/2001 which struck out his client's proceedings with costs to the defendant in that matter. Had the plaintiff herein challenged that decision, perhaps he could have benefitted from the decision of **Supreme Court Petition National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR** Others where the issue of whether the proceedings at the Court of Appeal were a nullity for being conducted by an 'advocate' without a practicing certificate was considered.

67. The Learned Havelock J was clear that Mr Wahome did not in his view, hold a practicing certificate for the year 2001 contrary to Section 9 of the Advocates Act replying on **Obura V Koome [2001] 1 EA 175**. Again, the plaintiff appears to be faulting the defendant for what befell him in HCC 1900/2001 yet he did not seek to enjoin the defendant as a third party to those proceedings where his capacity to represent the client was being questioned, to pass that liability to the defendant claiming that the nullification of that case was due to the negligence of the defendant who acted unprofessionally resulting into a loss to himself and his client.

68. In my humble view, the plaintiff has not approached this court with clean hands. His claim against the defendant, in my humble view, falls in the category of cases which do not disclose any cause of action against the defendant, is frivolous, vexatious, and an abuse of the court process. It is also scandalous and was only intended to embarrass the defendant.

69. Therefore, whereas it is true that the plaintiff paid for the practicing certificate for the year 2001 to the defendant as is the procedure; I find that on issue No. 2, as framed by the plaintiff, the defendant did approve issuance of a practicing certificate to the plaintiff by writing to the Registrar of the High Court, the issuing authority, recommending that the plaintiff be issued with a practicing certificate.

70. As to whether the defendant received the money from the plaintiff, I find the answer to be in the affirmative for the year 2001 and other years expressly admitted by the defendant, though the amounts are not disclosed and the monies received were fees for practicing certificates. However, I find that as the power and discretion to issue practicing certificate was vested in the Registrar of the High Court, and not the defendant, in the absence of any evidence that the defendant in any way contributed to the Registrar's failure to issue to the plaintiff a practicing certificates, the plaintiff has miserably failed to prove the liability of the defendant on a balance of probabilities.

71. On the issue of whether the loss of shs 3,000,000 as a result of the defendant's alleged negligence has been proved, I note that this is a claim for special damages. It is trite law that special damage must not only be specifically pleaded, but they must also be strictly proven.

72. In the instant case, the plaintiff did not plead for loss amounting to shs 3,000,000. He simply at paragraph 12 stated that by reasons of matters aforesaid (negligence) of the defendant, the plaintiff has suffered loss and damage. It would be expected that the plaintiff quantifies and pleads the specific loss and not raise it in the issues and submissions. In his submissions, the plaintiff prayed for shs 4,000,000, which he claims included legal fees and decretal sum awarded by the High Court Commercial Division.

73. In my humble view a party is bound by their pleadings and they are expected to adduce evidence to prove the pleaded facts. Submissions are not evidence. By pleading that the "lost money which had been awarded by the court," the plaintiff's plaint fell short of specifically pleading the alleged loss. He could therefore not be allowed, without an amendment to his pleadings to adduce evidence to prove a specific loss that was not pleaded. Neither could he submit on what he 'probably' lost as a result of his client's case being nullified. In any event, the plaintiff did not even produce any documentary evidence

to show that he paid the alleged shs 3,000,000 or 4,000,000 to his client after the suit filed by an “unqualified person” was nullified.

74. On the whole, the plaintiffs claim fell short of the standard of proof required in civil cases on a balance of probabilities. I therefore dismiss that claim for loss of money including legal fees and decretal sum awarded.

75. The plaintiff also prayed for a declaration that he had a practicing certificate for the year 2001. That prayer must fail for reasons that the evidence adduced is clear and as was established by Havelock J in HCC 1900/2001 that the plaintiff had no practicing certificate for the year 2001, it is not for this court to attempt to review or sit on appeal of the ruling of another judge of the superior court exercising competent jurisdiction. The plaintiff never challenged the decision by Havelock J which declared that the plaintiff did not hold a practicing certificate in 2001. I find that nothing has changed since then to persuade this court to review that decision by way of a separate suit. Accordingly, that prayer for a declaration is dismissed.

76. The plaintiff also prayed for punitive damages and damages for negligence, stress and anxiety. As I have already stated, there is absolutely no basis for this court to attempt to quantify any damages for negligence which was never proved on a balance of probabilities as the suit herein is frivolous, vexatious and an abuse of the court process. No basis was laid for payment of general damages let alone punitive damages. Assuming that there was some basis, I would award the plaintiff nominal damages of shs 10,000. I award him nothing.

77. The plaintiff further claimed for refund of money paid to the defendant from 1998-2009. This claim is a special damage claim which was never specifically pleaded. No amount of money was claimed by the plaintiff and even his evidence did not attempt to quantify the said claim. In addition, the evidence was clear that the plaintiff did not take out a practicing certificate from 1998-2001 and only paid fees for 2001 but never followed up for issue of the same by the Registrar. He did not produce any receipts to show how much he paid for the whole period from 1998-2009 for this court to determine. In addition, the plaintiff having been convicted by the disciplinary committee for practicing without a practicing certificate in the period that he claims for refund of the money, that claim for refund of the money, is absolutely frivolous and the same is dismissed.

78. In the end, I find that the answer to issue No. 6 as framed by the plaintiff is that the plaintiff is not entitled to any relief(s) as stated in plaint.

79. On who is entitled to the costs of the suit, the law is clear under Section 27 of the Civil Procedure Act that costs follow the event and to the successful party. In this case, the plaintiff has miserably lost his claim against the defendant. However, in order to promote harmonious relations between the premier Bar Association Law Society of Kenya and its member(s) the plaintiff in this case, I order that each party bear their own costs of this suit which was absolutely unnecessary.

Dated, signed and delivered at Nairobi this 19th day of September, 2016.

R.E. ABURILI

JUDGE