



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 73 OF 2005

NJIRU KARIUKI.....APPELLANT

VERSUS

NEWTON KARIUKI SILVESTER KIMOTHO.....RESPONDENT

(An Appeal from the Ruling and Order of SPM Embu delivered on 8/3/2005 in Embu SPMCC No. 361 of 1999)

J U D G M E N T

1. Introduction

This is an appeal arising from the ruling of Senior Principal Magistrate Embu delivered on 8/3/2005 striking out the appellants suit in CMCC No. 361 of 1999 on grounds that the plaint was signed by an unqualified person.

The appellant was the 1st plaintiff in CMCC No. 361 of 1999 while one Fredrick Muriithi was the second plaintiff. In the plaint dated 14th December 1999 and filed in court on the 15th December, 1999, the plaintiffs claimed special and general damages for injuries arising from an assault incident by the respondent Newton Kariuki Kimotho and one Martin Muriithi Kimotho the 2nd defendant in the suit. The incident took place on 2nd February 1999.

The plaintiffs were represented by Charles Kariuki & Co. advocates. The respondent's counsel Mr. Kathungu raised a preliminary objection before the suit was heard. He urged the court to strike out the suit on grounds that the plaint was signed by an advocate without a practicing certificate. The court heard the objection between the counsels for the parties and upheld it accordingly. The suit was therefore dismissed on 8th March 2005.

2. The grounds of Appeal

The appellant in this appeal is represented by Duncan Muyodi & Co. Advocates while the respondents retained Messrs Joe Kathungu & Co. Advocate.

The appellant raised several grounds which may be briefly stated. That the magistrate erred in law and fact in striking out the appellant's suit for the simple reason that the plaint was signed by an unqualified person. She ignored the fact that the appellant could not be penalized for a mistake of his advocate. It was not possible for a litigant to know whether an advocate has taken out practicing certificate.

Further that the magistrate erred in law and fact in finding that the propriety of pleadings was dependent on whether or not an advocate had taken out a practicing certificate. It was wrong for the magistrate to

strike out the suit on a technicality instead of hearing and determining it on merits.

3. The Submissions

The parties disposed of this appeal by way of written submissions.

The appellant argued that the plaint was drawn and filed by the appellant's advocate Mr. Charles Kariuki who had a practicing certificate at the material time. The advocate who signed the plaint was one Alphain Njue who was said to have no practicing certificate. The appellant argued that was an irregularity which could be cured by an amendment of pleadings or by the appellant's advocate signing the pleadings. Of greater importance was the drawing and filing of the pleadings and not the signing, a factor which the magistrate ignored. The magistrate ought to have treated the pleadings as unsigned instead of terming it illegal, null and void. The appellant relied on Order II Rule 14 of the Civil Procedure Rules that pleadings should not be struck out due to want of form.

The respondent submitted that it is not disputed that the pleadings in CMCC No. 361 of 1999 was drawn and filed by Charles Kariuki advocate. The contentious issue was that the pleadings were signed by Alphain Njue who had never taken a practicing certificate since he was admitted in 1992. The only issue for contention, therefore, is whether the magistrate was right in striking out the pleadings for the reason that the advocate who appended the signature was unqualified. The respondent argued that Mr. Alphain Njue was an unqualified advocate under Section 9 of the Advocates Act. He was therefore unqualified to represent a party to sign any pleadings. The magistrate was therefore qualified to strike out the pleadings.

4. The duty of the court

This is the first appellate court in regard to this appeal. The duty of the first appellate court was explained in the Court of Appeal case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN P. MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** where it was held inter alia:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

4. The law

The applicable law herein is Section 9 of the Advocates Act which provides:-

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 practicing certificate...”*

This provision is clear that the correct legal position is that a qualified advocate is one who has fully complied with Section 9 of the Act. He must have been admitted as an advocate, his name be in the Roll, and must have a valid practicing certificate.

It was an undisputed fact that Mr. Njue had not satisfied the provisions of Section 9 for he had never taken out a practicing certificate since he was admitted in 1992. The appellants did not dispute this fact but argued that there was a misdirection on part of the magistrate in striking out the suit.

6. The issues

The only issue for determination is whether the magistrate erred in striking out the pleadings on the ground that they were signed by an unqualified person.

7. The analysis of the Ruling

The magistrate in her ruling delivered on 8th March 2005 considered the arguments of the appellants counsel and that of the respondents on the point of law raised. The authorities relied on by the parties were also considered in the ruling and so was the law applicable.

The appellant relied on the case of **KAJWANG' VS LAW SOCIETY OF KENYA Civil Application No. 33 of 1999 High Court Nairobi** where it was held that proceedings do not become null and void merely because they were conducted by an unqualified advocate.

The magistrate gave precedence to the Court of Appeal decision of **GEOFFREY OLAO OBURU VS MARTHA KARAMBU KOOME Civil Appeal No. 146 of 2000** where the court in striking out a memorandum of appeal signed by an advocate without a practicing certificate held that it was incompetent.

The KAJWANG' case was decided by the High Court on 14th June 2002. This has been overruled by several Court of Appeal decisions on the same subject in that one cannot rely on a subsidiary legislation to cure violations of the statute. As the magistrate put it, the court of Appeal decision must take precedence over High Court decisions.

The appellant's pleadings were in violation of Section 9 of the Advocates Act. This signing of pleadings by an unqualified advocate is not a mere irregularity. The appellant referred to it as such and cited Order 2 Rule 14 of the Civil Procedure Act which provides:-

“No technical objection may be raised to any pleading on the ground of want of form.”

The issue here was not “want of form” but the validity of a pleading signed by an unqualified advocate. The drawing and filing of a document cannot override the importance of signing that document. The combination of the actions of drawing and signing go hand in hand. Any document will be said to be authentic only if a valid signature has been appended. The signature must be that of the author of the document. If the plaint was signed by Mr. Njue who was unqualified, it renders that document null and void. How does one identify the author of a document? It is only by the signature that identification can be done. The plaint as it was cannot be said to have been valid because of only the act of drawing and filing by the firm of Charles Kariuki & Co. Advocate.

In the GEOFFREY OLAO OBURU (supra) case the full bench of the Court of Appeal dismissed the memorandum of appeal filed by an unqualified advocate it is holding:-

“In these circumstances, the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this court or in any other court. Accordingly, we strike out the appeal with costs thereof, to the applicant including the cost of the notice of motion dated 26/02/2001.”

In the case of **NATIONAL BANK OF KENYA VS WILSON NDOLO AYAH Civil Appeal No. 119 of 2002** the Court of Appeal held in a case with similar facts:-

Section 9 makes a provision for qualifications of a practicing advocate and qualifications include having in force a current practicing certificate.... It is public policy that courts should not aid the perpetuation of illegalities. By invalidating documents drawn by such advocates we come to the conclusion that it will discourage excuses being given for justifying the illegality”. A failure to invalidate the act by an unqualified advocate is likely to provide a incentive to repeat the illegal

Act.”

8. The Decision

The foregoing authorities spell out the general principles which guide the court in dealing with pleadings drawn and signed by unqualified persons. The pleadings signed by an unqualified person must be struck out. I have no reason to divert from the established principles.

I therefore find that the Senior Principal Magistrate was right in striking out the pleadings in CMCC No. 361 of 1999. As much as I empathize with the appellant, the mistake resonated with his advocate who allowed an unqualified person to sign the pleadings.

The appeal is therefore dismissed with costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 21ST DAY OF APRIL,
2015

F. MUCHEMI

JUDGE

In the presence of:-

- 1. Mr. Mugambi for Okwaro for appellant**
- 2. Ms. Ndorongo for Kathungu for respondent**