



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 359 OF 2013

ISAAC NDUNGU KUGURU

**JULIUS MUTUTA
PLAINTIFFS**

.....

VERSUS

NEWTOWN SIELE

DORCAS TOO

**MAHAT SARA
DEFENDANTS**

.....

**(SUED AS OFFICIALS OF THE KENYA
PHARMACEUTICAL ASSOCIATION).**

R U L I N G

The main suit before the court is the Plaintiff's dated 2nd September, 2013 filed by the Plaintiff through their advocates, M/s Kinyanjui & Njau Advocates on 3rd September, 2013. In the plaintiff, the Plaintiff mainly sought that the entire election of the Defendants as held and conducted on 27th July, 2013, be nullified and fresh elections be held within a reasonable period. The plaintiff also sought costs.

The Defendants however, filed a Notice of Preliminary Objection together with a notice of Motion dated the 28th October, 2013. Both are seeking that the entire suit and any application that had been filed under the suit, dated the 2nd September, 2013, be struck out on the basis that they are incurably defective and incompetent because they were allegedly filed by one Francis M Kinyanjui of the firm of Kinyanjui & Njau Advocates, who did not hold a valid practicing certificate for the year 2013. They also alleged a violation of section 9 of the advocates Act.

The Plaintiff's application dated the 28th September, 2013, was supported by an affidavit sworn by Joseph Wangai Wanjuhi on the 28th October, 2013. He averred therein that he was an advocate of the High Court of Kenya practicing in the firm of Kittony Waiyaki Advocates. That he on or about the 16th September, 2013, was served with the suit herein, filed by the firm of Kinyanjui & Njau Advocates. That the plaintiff itself appeared to have been signed by one Francis Mbugua Kinyanjui, a partner in the said firm, who at the time of filing the said plaintiff, did not hold a practicing certificate for the year 2013. Annexed to the affidavit was a true copy of a letter dated 11th October, 2013 from the Law Society and marked as exhibit "JWWR". The said letter confirms the fact that the said Francis Mbugua Kinyanjui

advocate, had no practicing certificate for the year 2013. The letter also confirmed that the second partner in the said firm of Kinyanjui & Njau Advocates, Mr. Leonard Njogu Njau, did not also hold a practicing certificate for the year 2013.

In response to the Defendants' application aforesaid, a replying affidavit sworn by one Rhoda Nyawira Maina, Advocate dated 1st December, 2013, was filed on 19th December, 2013. She deponed that

she was an advocate of the High Court practicing in the firm of Kinyanjui & Njau Advocates and had read the defendants' Notice of Motion and preliminary Objection dated 28th October, 2013. She among other things, confirmed that the original partners in the firm of Kinyanjui & Njau, i.e. Mr. Francis Mbugua Kinyanjui and Mr. Leonard Njogu Njau, aforesaid, are both residing in South Africa and Namibia, respectively.

She however, did not deny or controvert the fact that neither of the Partners, one of whom apparently drew and signed the Complaint dated 2nd September, 2013, did not hold a practicing certificate for the said year. She did not explain how either of them, who at the material time of drawing and signing the complaint, lived in South Africa or Namibia, could at the same time be in Kenya to draw the same and sign it.

Furthermore, Rhoda Nyawira Maina did not explain in what capacity she herself practiced in the firm of Kinyanjui & Njau Advocates. She failed to say whether she was partner with the other two or merely an employee and if so, why she was not the one who drew and signed the complaint. Furthermore, she did not explain why Mr. Kinyanjui and Mr. Njau are still alone, the registered partners of the firm.

I have considered the facts of the matter before the court. I have come to the conclusion that at the material time of filing the complaint in this suit Mr. Francis Mbugua Kinyanjui and Leonard Njogu Njau were residing in Southern Africa and were not in Kenya to draw and sign the Complaint. If, however, either of them was in Kenya and happened to draw and sign the complaint, then he did so knowing that he had no practicing certificate for the year 2013. On the other hand, if any other advocate, including Rhoda Nyawira Maina, drew and signed the document on behalf of the two partners, she/he did so knowing that the two partners had no practicing certificate and their position would not be better than if either of the partners himself signed the document.

I now turn to the law applicable in a situation like in this case where the Advocate(s) who draw and sign a court process has no practicing licence. The relevant provision is Section 9 of the Advocates act, Cap 16 of the Laws of Kenya which provides thus: -

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

- a. he has been admitted an advocate; and**
- b. his name is for the time being on the Roll; and**
- c. he has in force a practicing certificate;....”**

In this case it is not in doubt that the registered partners of the firm of Kinyanjui & Njau Advocates, were not at least holding a practicing certificate for the year 2013 when this suit was drawn, signed and filed by the firm. The suit may not even have been drawn nor signed by Rhoda Nyawira Maina who deponed that she was practicing in the firm, and she indeed avoided deponing that she drew or signed the document. And as earlier pointed out herein, even if she had drawn, signed and filed the suit, she would, at the maximum, have done so only with the authority of the two registered partners who themselves had no lawful authority to draw and sign the complaint in view of the fact that they had no practicing certificate. Hence the reason why Nyawira Maina did not even attempt to claim such authority from the two partners, an issue that has no importance presently.

In short, therefore, this application falls squarely in the path of Section 9 (c) aforesaid. An Advocate

must satisfy all the three limbs of the Section to qualify to practice law under the purview of which he/she can draw, sign and file a plaint or in any manner, practice law. In this case the partners of the firm of Kinyanjui & Njau had no legal capacity to draw, sign, or file this suit through the plaint as they did because neither of them held the 2013 current practicing certificate. Nor could any other person or advocate have such capacity so long as such a person acted in the name or on behalf of the said two partners.

In the case of **Mohammed Ashraf Sadique Harban Singh Soor Vs Matthew Oseko T/A Oseko and Company Advocates** in Nairobi Misc. Application No. 901 of 2007 (OS) as consolidated with Misc. applications Nos. 933, 934, 935, 936, 937 and 938 of 2007, I gave reasons therein why Parliament found it necessary to promulgate Sections 31 to 43 of the Advocates Act. The purpose was to control and keep out unqualified persons from purporting to or attempting to practice law. I said therein that no advocate will lawfully practice law without adhering to the code of conduct prescribed by our law whether written or unwritten. I herein repeat what I said then.

The law prescribes the rules to be obeyed and the steps to be taken by those who wish to practice the discipline or profession of law. As stated by Lenaola, J in **Belgo Holdings Ltd Vs Esmail [2005]2EA 28**, the rules governing the practice are in place

“... so that no quack can pretend to practice law and those who are indeed qualified (can) renew their commitment and adherence to their oath of office every year. By so doing there is imparted in the practice the kind of discipline that is of utmost importance in the profession.”

Section 31, 33 and 34 of the Advocates Act forbid, with serious sanction, any unqualified person from practicing law as an advocate. While section 31 and 33 relate mainly to civil sanctions, Section 34 forbids an unqualified person from directly or indirectly practicing law.

For the removal of any doubt, an unqualified person would include any person who fails to fulfill any of the conditions stipulated by Section 9 and 32 of the Act. In this case the two partners of the firm of Kinyanjui & Njau and any person purported to be authorized to act on their behalf in the firm, would be included in the definition.

It is my view and finding that aside of and from criminal liability arising under Sections 31 and 34 aforesaid, there are civil consequences that also arise. In the case of **Huq Vs Islamic University of Uganda [1995] 2 EA 117**, at page 118, Wambuzi, CJ stated thus: -

“Where an advocate practiced without a valid practicing certificate in any year, he committed an offence and was liable to both criminal and disciplinary proceedings. Any documents prepared or filed by such an advocate were invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities.”

Closer home the Court of Appeal in **Kenya Power and Lighting Company Ltd Vs Mahinda and Another** Law Africa citation (2004) LLR 4452 (CAK) stated the same principle thus: -

“We come to our decision based solely on the undisputed fact that no practicing certificate for 2004 had been issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal. When those two were done by him the advocate was not qualified to act as an advocate with effect that the two documents were incompetent.”

The courts in the above cases struck out as incompetent the documents which were being referred to. The same happened in the case among others, of **Obura Vs Koome[2001] I EA, 175**. In my case earlier hereinabove cited I stated thus at page 29: -

“The important point to note in these cases is not merely that the advocate at the time of preparing and signing the documents had not obtained a practicing certificate but that by not

having a practicing certificate at the time, he had been rendered unqualified and therefore incompetent to sign those documents. Similarly if an advocate being unqualified to act as advocate because of some act or omission under the act, or while acting in perpetration or furtherance of an offence, draws, prepares or files any document or files any suit, then what he does will in my view and understanding be in furtherance of the commission of an offence under the Advocates Act. The result will be that documents prepared and filed by the Advocate for the purpose of either litigation as envisaged under Section 31, or for non-contentious ones drawn as envisaged under Section 34 of the Act, are rendered invalid and incompetent and of no legal effect”.

The conclusion I come to for the purpose of this matter before me accordingly, is that the plaint drawn and signed in this case by, for or on behalf of M/s Kinyanjui & Njau Advocates, dated 2nd September, 2013, is as incompetent as it is illegal. It is only fit for striking out and nothing else.

Before I make the final order I must express my sympathy to the Plaintiff being the party the firm of Kinyanjui & Njau Advocates represents herein and whose case is to be struck out for a mistake committed by his counsel. I faced a similar issue in the case I decided, earlier cited. I can only repeat the decision I reached which I still think is proper. I stated at page 36: -

“This means that the court is inept of sympathy to the party being represented by the erring advocate or other similar person, but its duty first and foremost is to interpret the law correctly and effect it without discrimination. It follows accordingly that if orders have been made by the court in pursuance of an illegal or invalid and/or incompetent suit which eventually has to be struck out, then any such orders made under the suit must be recalled and be annulled. A court of law and justice must not condone or be seen to condone illegality of whatever nature.”

As I also stated in the same case, where striking out leads to injury to the party whose case is struck out, the remedy to such party lay either in starting the suit afresh or in seeking leave to file the suit out of time if time barred, or in the last resort, filing a suit against the erring advocate on the basis of professional negligence or other similar remedies. In my view the question as to the competence of an advocate on record at the time for filing the suit, goes to the root of the validity and competency of the pleadings or documents drawn by him.

I finally propose that the Law Society of Kenya should investigate the operations and legal practice of the firm called Kinyanjui & Njau Advocates to establish who practices through it and whether such practice is proper and lawful. If not, the Society would be under obligation to take a corrective action. This is so because the Society is the major player in the maintenance of discipline of its members. On the other hand, had the Defendant sought the exercise of this court’s jurisdiction under Section 31(2) to the Act to take cognizance of any possible contempt, the court would have given such request a keen attention.

The upshot is that the plaint and suit herein is hereby struck out with costs. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of April 2014.

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D A ONYANCHA

JUDGE