



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 82 OF 2012**

**FLORENCE MUMBI NJINE ..... PLAINTIFF**

**AND**

**KEFA OKETCHI MUINDE ..... DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant on 6<sup>th</sup> March 2012 seeking; a permanent injunction to retain the defendant from trespassing into, interfering with and/or in any other manner whatsoever dealing with all that parcel of land known as **LR No. Bukira Buhirimonono/2022** (hereinafter referred to as “**the suit property**”) and an order for the eviction of the defendant from the suit property. In her plaint the plaintiff averred that the plaintiff is the registered proprietor of the suit property and that on or about 9<sup>th</sup> February 2011, the defendant entered the suit property without the plaintiff’s consent and started putting up temporary kiosks. The plaintiff averred that as a result of the defendant’s said acts of trespass the plaintiff has been prevented from occupying and/or developing the suit property as a result of which the plaintiff has suffered loss and damage. This suit was filed on behalf of the plaintiff by the firm of Kaburi Henry & Co. Advocates. The law firm has a sole practitioner one, Henry Kaburi Advocate.

2. The defendant entered appearance and filed a statement of defence and counter-claim through the firm of G. M Nyambati & Co. Advocates on 21<sup>st</sup> March, 2012. In his statement of defence the defendant denied the plaintiff’s claim and contended that if the plaintiff is registered as the proprietor of the suit property then the said registration was carried out fraudulently. The defendant contended that he has been in occupation of the suit property since its registration and that if the plaintiff was registered as the proprietor thereof the said registration was without the defendant’s consent. In his counter-claim against the plaintiff the defendant reiterated that the plaintiff was registered as the proprietor of the suit property illegally and fraudulently. The defendant prayed for a declaration that the suit property was fraudulently registered in the name of the plaintiff.

3. The defendant also sought an order for the cancellation of the register for the suit property so that the suit property reverts to the original parcel known as LR No. Bukira/Buhirimonono/273. The defendant urged the court to dismiss the plaintiff’s suit with costs and to allow his counter-claim against the plaintiff. Together with the plaint the plaintiff brought an application by way of chamber summons dated 6<sup>th</sup> March 2012 seeking a temporary injunction to restrain the defendant from trespassing on the suit property pending the hearing and determination of this suit. The court in a ruling delivered on 20<sup>th</sup> September 2012 declined to grant the injunction that was sought by the plaintiff against the defendant but made an order that the status quo be maintained pending the hearing and determination of this suit.

4. After the disposal of the plaintiff’s application for injunction, the parties who had complied with all the pre-trial procedures listed this suit for hearing on 28<sup>th</sup> January 2013. When the suit came up for hearing

on 28<sup>th</sup> January 2013, Mr. Kaburi advocate appeared for the plaintiff while Mr. Nyambati advocate appeared for the defendant. Both advocates indicated to the court that they were ready to proceed with the hearing. Before the hearing commenced, the said advocates recorded a consent to the effect that the documents attached to the parties' respective list of documents would be admitted in evidence by consent. The plaintiff thereafter gave her evidence in chief was cross examined and re-examined. The case was then adjourned to 30<sup>th</sup> July, 2013 for further hearing when the plaintiff closed her case when the witness she had intended to call failed to turn up.

5. After the close of the plaintiff's case, the defendant gave evidence in chief, was cross-examined and re-examined. The matter was thereafter adjourned to 22<sup>nd</sup> October 2013 when the defendant was to call his witnesses to give evidence. On 22<sup>nd</sup> October 2013 the advocates for the parties informed the court that they were both ready to proceed with further hearing of the matter. Due to pressure of work on that particular day, the matter could not be reached. The same was adjourned to 29<sup>th</sup> October 2013. On 29<sup>th</sup> October 2013 the matter did not proceed again. The parties re-listed it for further hearing by consent on 20<sup>th</sup> January 2014. When the matter came up on 20<sup>th</sup> January 2014 for hearing, the defendant's advocate for the first time raised the issue that the plaintiff's advocate Mr. Kaburi did not have a practicing certificate when he instituted this suit. Mr. Kaburi asked the court for time to respond to that issue. The matter was fixed for mention on 25<sup>th</sup> February 2014 for Mr. Kaburi's response on the issue of his practicing certificate for the year 2012.

6. When the matter came up for mention on 25<sup>th</sup> February 2014, Mr. Aoga advocate held brief for Mr. Nyambati advocate for the defendant. Mr. Kaburi did not show up. Instead Mr. Oguttu Mboya advocate whose firm had been appointed to take over the conduct of the suit from Mr. Kaburi on behalf of the plaintiff appeared for the plaintiff. Mr. Aoga notified the court that they still wished to pursue the issue of the defectiveness of the plaintiff's pleadings on account of Mr. Kaburi's lack of a practicing certificate when he filed this suit. Mr. Oguttu asked the court to give the defendant's advocates a limited time within which to bring a formal application for whatever relief they wished to seek from the court. In view of this development, I directed the parties to list the matter for further hearing. At the same, I gave the defendant the liberty to file a formal application regarding the competency of the plaintiff's pleadings within 30 days from the date of that order.

7. On 27<sup>th</sup> March 2014, the defendant brought an application by way of Notice of Motion dated 27<sup>th</sup> March 2014 seeking an order that all pleadings filed herein and signed by the firm of Ms. Kaburi Henry & Co. Advocates be expunged from the court record and the plaintiff's suit dismissed and/or struck out with costs. The defendant's application was brought under section 8 of the Advocates Act, Cap 16 Laws of Kenya and sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The application was brought on the grounds that this suit was filed on 6<sup>th</sup> March 2012 by the firm of Kaburi Henry & Co. Advocates and that as the said date of filing the suit Henry Kaburi advocate who is the sole practitioner in that firm did not hold a valid practicing certificate for the year 2012. The defendant contended that under the Advocates Act, Cap 16 Laws of Kenya no advocate is allowed to receive or file proceedings on behalf of a party without first obtaining a practicing certificate. The defendant contended further that since the pleadings herein were filed by the firm of Kaburi Henry & Co. Advocates while Mr. Henry Kaburi had no practicing certificate, the same are null and void and should be expunged from the court record for having been filed by unqualified person and the suit struck out.

8. The defendant's application was supported by the affidavit of the defendant sworn on 27<sup>th</sup> March, 2014 in which he attached as an exhibit letters from the Law Society of Kenya dated 21<sup>st</sup> August 2013 and 15<sup>th</sup> October 2013 through which the Law Society of Kenya confirmed to the defendant that Henry Kaburi advocate according to the Law Society of Kenya records did not take out practicing certificates for the years 2012 and 2013. The defendant's application was opposed by the plaintiff. The plaintiff filed affidavit in reply to the application sworn on 10<sup>th</sup> April 2014. In her affidavit, the plaintiff deposed that this suit concerns a dispute over the ownership of **LR No. Bukira/Buhirimono/2022** ("**the suit property**") which is registered in the name of the plaintiff and which property the plaintiff acquired through transmission from her deceased husband one, James Njine Ndigirigi.

9. The plaintiff deposed that in view of the nature of the dispute between the parties, this is not an appropriate case to determine on procedural technicalities. The plaintiff stated that when she instructed Mr. Henry Kaburi advocate to represent her in this suit, she was not aware that the said advocate had no practicing certificate. The plaintiff stated that Mr. Kaburi had an established office from which he was operating his legal practice and as such there was no way she could suspect that he had no practicing certificate. The plaintiff deposed that now that it has transpired that Mr. Kaburi had no practicing certificate when he instituted this suit on behalf of the plaintiff it would not be fair to punish the plaintiff for a fault which is not of her own making. The plaintiff stated further that this suit having proceeded to hearing up to the stage at which the plaintiff has closed her case, the defendant's application has been brought after unreasonable and inordinate delay.

10. The plaintiff stated further that the defendant having participated in this suit since it was filed without raising an objection, the defendant must be taken to have waived his right to object to the competency of the pleadings that had been filed by Henry Kaburi while he had no practicing certificate. The plaintiff contended that the defendant is estopped from raising the issue at this point. The plaintiff contended that the defendant is guilty of laches. The plaintiff contended further that failure on the part of Henry Kaburi advocate to take out a practicing certificate need not to affect the rights of the plaintiff herein. The plaintiff contended that the court would have denied her a fair hearing if her pleadings were to be expunged from the record. When the application came up for hearing on 9<sup>th</sup> June 2014, the advocates for both parties informed the court that they wished to rely on the affidavits filed in support of and in opposition to the application. The defendant's advocate urged me to allow the application while the plaintiff's advocate urged me to the contrary. Each of the advocates' filed list of authorities in support of their respective positions.

11. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition to the application. In addition, I have considered the authorities that were presented to court by both parties. The following is my view of the matter. Article 50 (1) of the Constitution of Kenya confers upon every person a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body. It follows from the foregoing that a right to bring a dispute to court for determination is a constitutional right. Once the dispute is in court, Article 159 (2) (b) and (d) of the Constitution of Kenya, 2010 enjoins the court to dispense justice without delay and without undue regard to procedural technicalities. On the other hand, Article 48 guarantees a right to access to justice.

12. Order 9 rule 1 of the Civil Procedure Rules provides that any application to or appearance or act in any court required or authorized by law to be made or done by a party in such court may save where any law provides otherwise be made or done by the party in person or by his recognized agent or by an advocate duly appointed on his behalf. Order 9 rules 5 of the Civil Procedure Rules allows a party who has engaged an advocate to change advocates and one who had acted in person to appoint an advocate to act for him. It is not in dispute that Henry Kaburi advocate who was the sole practitioner in the firm of Kaburi Henry & Co. Advocates had no practicing certificate when he took instructions from the plaintiff and instituted this suit against the defendant. Mr. Kaburi was therefore in breach of the provisions of section 9 of the advocates Act, Cap 16 Laws of Kenya that prohibits a person with no practicing certificate from acting as an advocate.

13. It is also not disputed that the plaintiff was not aware all along that Mr. Kaburi had no practicing certificate. What I have been called upon to determine in the present application is the fate of the pleadings undertaken by an advocate without a practicing certificate. The advocates for the defendant have contended that such pleadings are null and void while the plaintiff's advocates have contended that the failure of an advocate to take out a practicing certificate has no effect on the rights of a party on whose behalf such an advocate has acted. I have considered the authorities cited before me by the advocates for both parties which tend to support their respective positions. The defendant has cited the cases of **Joseph Gethecha Kamau –vs- Kenya Bus Services Nakuru, HCCC No. 123 of 1999** (unreported) in which Musinga J. (as he then was) struck out the pleadings by the plaintiff that had been filed by an advocate who had not taken a practicing certificate. This decision was made on 19<sup>th</sup> January

2004 and the judge had agreed with the advocates for the defendants that pleadings filed by an advocate in breach of the provisions of section 9 of the Advocates Act, Cap 16 Laws of Kenya were incompetent and proceedings emanating there from a nullity.

14. The defendant also cited the case of **Tulip Apartments Ltd & Another –vs- Southern Credit Banking Corporation Ltd & Another Nairobi HCCC No. 284 of 2002**. In this case that was decided on 16<sup>th</sup> May, 2002, Rimita J. declined to strike out an application by the plaintiff seeking to strike out the defendant's statement of defence on the defendant's preliminary objection that the advocate who had filed the application on behalf of the plaintiff had no practicing certificate. Rimita J. held that it would not have been fair to visit the failure of an advocate who is in the roll of advocates and who has not been suspended whose only fault is his failure to renew his practicing certificate upon a party who had no idea that the said advocate had no practicing certificate. In reaching this decision Rimita J. observed that, the Advocates Act, Cap 16 Laws of Kenya has not provided for the consequences of the failure of an advocate to take out a practicing certificate on pleadings signed and filed by such advocate.

15. Rimita J. also relied on the Ugandan case of **Misc. Application No. 67 of 1992, In the matter of an application by A. A Kanji and the Estate of Jefeali A. Khanji** in which Wanaki J. stated as follows;

**“There is a lot to be said for and there is virtue in recognizing the disability of a client possibly an illiterate villager who appoints and authorizes an advocate whose name appears on the roll not just any quack but whose only defect is lack of a current practicing certificate, to draw up and process his matter in court. The advocate will certainly face the sanctions of the law in the Advocates Act and also lose his costs. He may even face criminal charges. But must the innocent villager or any other client also be punished because ignorance of law is no defence? An affirmative answer would prick the conscience of any court of equity. I do not wish to lay down a principle of general application here but each case must be examined on its own merit.”**

16. Rimita J. also considered Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 44 at page 266 which provides that;

**“Proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigants solicitor being unqualified for example by his not having a proper practicing certificate in force.”**

The Judge also considered Cordery's Law on solicitor's 8<sup>th</sup> edition page 36 in which it was provided that;

**“Thus an uncertified solicitor may be sued for negligence or subjected to disciplinary proceedings and while practicing on behalf of his client is privileged from arrest, and although an appearance entered for a defendant who has not been admitted as a solicitor has been struck out, an appearance would not be struck out, nor will proceedings be set aside for irregularity because a solicitor was uncertified unless the client was aware of his lack of qualification.”**

Rimita J. concluded that since none of the parties was aware that the advocate concerned had no practicing certificate none of the parties should be punished for the said advocate's failure to take out a practicing certificate. He therefore dismissed the preliminary objection that concerned the competency of the application that was before the court, which was signed and filed by an advocate who had no practicing certificate.

17. On his part, the plaintiff cited two cases, one from the Supreme Court of Uganda and the other from the High Court of Kenya. In the Ugandan case of **Huq –vs- Islamic University in Uganda [1995-98] 2 E. A 117**, the court was called upon to strike out the appeal on the ground that when the decree on which the appeal was based was extracted, none of the partners in the law firm that was handling the appeal for the appellant had taken out a practicing certificate. In this case the court in a majority decision of two to one held that any documents prepared or filed by an advocate who has not taken out a practicing

certificate are invalid and of no legal effect. In a dissenting judgment that the plaintiff sought to rely on, Tsekooko JSC held that, since the provisions of the Advocates Act did not render invalid pleadings drawn or prepared by an advocate who did not have a valid practicing certificate, deeming such pleadings or documents to be illegal would amount to a denial of justice to an innocent litigant who innocently engaged the services of such an advocate. Tsekooko JSC stated in his dissenting judgment that;

**“It appears from the petitions or cases decided by the High Court and the Court of Appeal and the newspaper articles that cases have been decided on the technical point whereby a case is lost because an advocate signed pleadings when he was not in possession of a valid practicing certificate. Unfortunately, I have not been able to find a provision in the Advocate’s Act of 1970 which states that pleadings become invalid or illegal if they are signed by an advocate who does not possess a valid practicing certificate. I think that if parliament intended to declare illegal or invalid pleadings signed by advocates without valid practicing certificates the legislature would have said so”.**

Tsekooko JSC supported his judgment by citing the English case of **Snarling vs. Brereton [1866] LR 2 Eq 64** in which Sir W. Page Wood VC stated that;

**“It would be most mischievous, indeed, if persons without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualifications of their solicitor. As against third parties, the acts of such a person acting as a solicitor are valid and binding upon the client on whose behalf they are done ..... I should be injuring both plaintiffs and defendants if I were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit.”**

Tsekooko JSC held that to declare pleadings drawn or prepared by an advocate who has no valid practicing certificate invalid would violate Article 126 (2) (e) of the Constitution of Uganda 1995.

18. The plaintiff also cited the case of **Kajwang –vs- Law Society of Kenya [2002] 1 KLR 846** that was decided by two judges of the High Court (Amin & Mulwa J.) In this case, a preliminary objection was raised and the court urged to declare the proceedings a nullity and the appeal to stand struck out on the ground that the advocate who appeared for the appellant had not taken out a practicing certificate. In dismissing the preliminary objection, the court held that proceedings are not invalidated merely by reason of the advocate for one of the parties being unqualified. The court held further that the client should not be made to suffer for the mistake of the advocate and that the penalties for practicing without a practicing certificate is to punish the unqualified advocate and not the litigant.

19. Having considered the peculiar circumstances of this case and the various authorities cited by the parties, my view is that it would be against all tenets of justice to grant the prayers sought herein by the defendant. The position in Kenya seems to be varied on the issue as to the validity or otherwise of the pleadings prepared and filed by an advocate without a practicing certificate. One line of thought is that such pleadings are invalid null and void and of no legal effect. The other school of thought is that failure by an advocate to take out a practicing certificate does not invalidate the pleadings drawn and filed in court by such advocate on behalf of a party. In Uganda, the issue seems to be settled that pleadings drawn by an advocate without a practicing certificate are invalid, null and void and of no effect. The position in England is also settled that, the proceedings are not invalidated on account of or by reason only of a solicitor’s disqualification.

20. The rationale behind the position taken in England and by some Kenyan courts from the authorities that I have highlighted above is that it would be unjust to punish an innocent litigant for the mistake of his advocate in which he is not a party. The other rationale is that invalidating pleadings and all proceedings taken in a suit results in an injury to both the plaintiff and the defendant not to mention wastage of judicial time. To quote Justice Karokora JSC in the case of **Huq –vs- Islamic University in Uganda (Supra)**, **“in my view the remedy for the innocent party would lie in either starting the suit afresh, or seeking leave to file defence out of time or seeking exemption from Limitation Act or suing for damages for professional negligence or for other remedies.”** It is clear from the remedies proposed

above that the invalidation of pleadings and proceedings taken in a suit on account of the advocates failure to take out a practicing certificate does not lead to a just and expeditious conclusion of the matter. Instead, it creates room for more disputes and suits for the court to deal with. It also exposes litigants to more costs. This is what our legislators intended to arrest through the enactment of sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya. The provisions of sections 1A and 1B of the Civil Procedure Act were subsequently reinforced by Article 159 (2) (b) and (d) of the Constitution of Kenya 2010.

21. If I was to allow the defendant's present application it will mean that I will have to strike out the plaint that the plaintiff had filed herein together with all the other documents that the plaintiff's former advocate who had no practicing certificate had drawn and filed herein. I will also have to strike out the proceedings that have so far taken place in this matter which includes the plaintiff's evidence and the evidence that was given by the defendant. The plaintiff will then have to go back to the drawing board. She will have to file a fresh suit against the defendant and go through the whole process again. The question that I have to ask myself is what would I have achieved at the end of the day? Multiplicity of suits, waste of judicial time and money. The application brought herein by the defendant is not intended in any way to resolve the dispute before the court between the plaintiff and the defendant. It is also not intended to vindicate any right that has been infringed. The defendant has not contended that he has suffered any injustice or that he is likely to do so in future if the pleadings filed herein by the firm of Henry Kaburi & Co. Advocates are not struck out. I am of the opinion that if I was to allow the defendant's application, it would go contrary to the provisions of Articles 48, 50 (1) and 159 (2) (b) and (d) of the Constitution of Kenya, 2010 and sections 1A and 1B of the Civil Procedure Act, Cap 21, Laws of Kenya.

22. The case that the defendant has cited in support of this application was decided before the promulgation of the Constitution of Kenya, 2010 and the enactment of Sections 1A and 1B of the Civil Procedure Act. The Constitution confers upon the plaintiff a right to come to court and have the dispute that she has with the defendant resolved. The plaintiff has come to court in a manner permitted by order 9 rule 1 of the Civil Procedure Rules. When the plaintiff came to court she was not aware that the advocate that she had engaged to act on her behalf had no practicing certificate. The issue was never raised by the defendant who entered unconditional appearance and filed his statement of defence and counter-claim.

23. The matter then proceeded to hearing. The plaintiff gave evidence and closed her case. Thereafter, the defendant gave evidence and asked for more time to call a witness. Instead of calling his witness when the matter resumed, the defendant for the first time contended that he cannot go on with the case because the suit was filed by unqualified person. As I have stated above, there is no doubt that the issue raised by the defendant is of a technical procedural nature and that all that it will achieve is the delay in the resolution of the dispute herein. Article 159 (2) (d) enjoins the court to dispense justice without undue regard to technicalities while part 2 (b) of the same article enjoins the court to dispense justice without delay. It is my finding that the application herein if allowed would breach the plaintiff's rights guaranteed under the Constitution of Kenya that I have pointed out above.

24. I am also of the opinion that to rule that a party who unknowingly engages an advocate without a practicing certificate, does so, at his own risk of having his pleadings struck out would impede a right of access to justice which is guaranteed under Article 48 of the Constitution of Kenya. It is up to the state and the Law Society of Kenya to ensure that all practicing advocates in Kenya hold valid practicing certificates. They also have an added duty to ensure that the public are notified of those advocates who are practicing without such certificates. To put an obligation on an ordinary member of the public who wants to engage an advocate to find out for himself/herself whether the advocate has a practicing certificate would amount to an abdication of duty by the state and the Law Society of Kenya. The public have no duty statutory or otherwise of policing advocates.

25. For the foregoing reasons, I find no merit in the defendant's application dated 27<sup>th</sup> March 2014. I am not satisfied that any valid grounds have been put forward to justify the grant of the orders sought. The application is accordingly dismissed with costs to the defendant. The parties should take immediate steps to list this part heard matter for further hearing.

