



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 117 OF 2014
(FORMERLY KERUGOYA E.L.C 666 OF 2013)

DOROTHY THARA IRERI.....PLAINTIFF

VERSUS

JOHN NJIRU PETER.....DEFENDANT

RULING

By their notice of preliminary objection of 7th March 2014, counsel for the plaintiff/applicant have raised a preliminary objection in respect of the representation of Mr John Njiru Peter, the defendant/respondent in this matter. According to counsel for the plaintiff, the advocate for the defendant Mr E.M. Mutahi did not hold a valid practising certificate for the year 2013. And for that reason, he was in law incompetent of drawing the pleadings and representing the defendant in this matter.

The preliminary objection was argued orally in court on 13th November, 2014 and the pleadings which Mr. E.M. Mutahi was alleged to have drawn were as follows:

1. *A notice of appointment of advocate of 2nd September, 2013 filed on 4th September, 2013,*
2. *A replying affidavit sworn on 3rd September, 2013, by Mr Mutahi and filed on 4th September, 2013,*
3. *A memorandum of appearance signed on 2nd September, and filed on 4th September, 2013,*
4. *Written statements of defence dated 2nd September, 2013 and filed on 4th September, 2013.*

Counsel for the plaintiff referred this court to the ruling of the High Court at Nairobi (*Mutungu, J*) in the case of *Abdul Aziz Juma Vs Nikisuhi Investment & 2 others* ELC Suit No. 291 of 2013 in support of her submissions. The High Court in that case, cited with approval the judgement of Court of Appeal in *Obura Versus Koome (2001) 1 EA 175*, a case in which the Court of Appeal was considering a matter in which an advocate had signed a memorandum of appeal, who was not entitled to appear and conduct any matter in any court. In that case, the Court of Appeal expressed itself in the following terms:

“The facts of this case are governed clearly by the provisions of the Advocates Act and not the common law in England. The provisions of Section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this court is to be exercised in conformity with the constitution and subject thereto, all other written laws..... In the 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”.

Mr E.M. Mutahi in response to that application stated that he acquired his practising certificate after the pleadings complained of had been filed. It is clear from his statement that he did not have the practising certificate at the material time.

He submitted that if the pleadings complained of are struck out, this court would be aiding an illegality. In support of his submissions, he referred the court to **Article 159(2) of the Constitution**, which according to him gives this court unlimited power to ensure that an illegality is not protected by procedural technicalities of the law. Furthermore, he submitted that a party to any suit should not suffer because of the mistakes of the advocate.

He therefore urged the court to give the defendant permission to file his defence if the court were to strike out the pleadings. He stated that the defence contains triable issues which merit a hearing.

Issues for Determination

The following are the issues for determination:

1. Whether or not Mr E.M. Mutahi had a practising certificate during the material times.
2. Whether the pleadings should be struck out on the ground that he did not have a practising certificate.
3. Whether or not the defendant should be given leave to file a defence to the plaint in the event that those pleadings are struck out.

Evaluation of the Submissions and the Law:

I have perused the letter written by the secretary of the Law Society of Kenya addressed to M/S Muriithi Wanira & Co. Advocates. According to that letter, Mr Elvis Maina Mutahi, the subject of this application did not hold a practising certificate for the year 2013. The letter goes further to state that he held a practising certificate for the year 2012, which he paid for on 24th July, 2012.

In the circumstances, it is clear that Mr E.M. Mutahi was not in possession of a practising certificate for the year 2013.

According to the Court of Appeal, in the case of **Obura Vs Koome, supra** the only course of action open to the court in these circumstances is to strike out the pleadings complained of.

It therefore follows that the pleadings complained of which I have set out above are hereby struck out.

If the defendant intends to file a defence to the claim, he has to file an application to that effect and the court will then consider the matter on its merit.

Verdict and Disposal Order:

In the light of the foregoing, the applicant succeeds in this application. The pleadings are hereby struck out.

The plaintiff is entitled to the costs of this application in terms of **Section 27, Civil Procedure Act**.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this...19th... day of...
November, 2014

In the presence of:

Ms Muriuki for the plaintiff/applicant and in the absence of Mr. 2E.M. Mutahi for the defendant

Court clerk Mr Kirong

Right of appeal under Order 43(7) Civil Procedure Rules explained to the parties.

J.M. BWONWONGA

JUDGE