



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 74 of 2007

CHARLES MBUGUA NJUGUNAAPPELLANT

VERSUS

JULIUS NGARACHU KARANJA1ST RESPONDENT

COUNTY COUNCIL OF THIKA2ND RESPONDENT

(From ruling and orders of L. Wachira, Resident Magistrate in Thika CMCC No.1281 of 1997)

J U D G M E N T

In the Thika CMCC No. 1281 of 1997 the appellant herein was the Plaintiff disputing the ownership of Gatura Plot No.447/29 with the Respondents herein who were the Defendants. The Defendants under an application dated 23rd January, 2003 sought that the suit be dismissed for lack of prosecution. It was heard on 10th May, 2004 and allowed in a ruling of the lower court dated 24th May, 2004.

It is not in dispute that the application to dismiss the suit was filed by the Defendant's advocate Mr. Njore of the firm of Macharia Njore & Company Advocate who however, was not the advocate who attended the defending of the application on 10th May, 2004. The record of appeal shows that a Mr. Mutua advocate holding brief for a Mr. Mutiso, appeared in court.

As stated above, the ruling dismissing the suit for want of prosecution was delivered on 24th May, 2004. It was however, more than two years down the line, on 23rd June, 2006, when the Appellant/Plaintiff filed an application for the review of the order for dismissal and reinstatement of the suit. The main ground upon which the application was based on that the advocate, who had filed it for dismissal, was not competent to do so because he had no valid practising certificate as at the time of filing the application.

Apparently, the firm of R.M. Mutiso & Co. Advocates then acting for the Plaintiff in a letter to the secretary of the Law Society of Kenya, had inquired of the existence or validity of Mr. Njore's practising certificate in respect to certain years, not clearly identified. However, the Law Society had replied to the inquiry in a letter dated 11th September, 2006 which in the relevant part stated as follows:-

“Mr. Macharia Njore held a practising certificate in the year 2003. However, he was suspended from the Roll of Advocates for 2 years by the Disciplinary Committee on 5th November, 2004. He was also suspended for 3 years by Committee sitting on 6th September 2004 and a further year by the Committee sitting on 18th October, 2004.”

The review application was heard on 12th March, 2006 by Hon. L. Wachira who dismissed the same with costs on 9th January, 2007. That is what prompted the Appellant/Plaintiff to file this appeal.

The main ground in the appeal is that the trial magistrate erred in not appreciating the fact that the application for dismissal of the suit was filed by the Defendants/Respondents who had no valid practising certificate, for which he was later punished with various suspensions from practice. The Respondents on the other hand argued that the relevant periods which mattered were the period after the disciplinary committee suspended Mr. Njore and not before. The suspensions took effect from September, 2004. That is clearly the view which the trial court also took and it is the issue that this court now needs to examine and resolve.

The right to practice as an advocate is provided for under Section 9 of the Advocates Act, Cap 16, which states thus:-

“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 in the Roll; and***
- (c) he has in force a practising certificate.***

And for the purpose of this Act, a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by an order under Section 60(4)”

Examination of the record shows that the said Applicant/Respondent’s Advocate, Mr. Njore, was an admitted advocate and his name was in the Roll of Advocates until September, 2004 when he was suspended for a period. That fact is not in dispute. What is in dispute is whether Mr. Njore had a practising certificate at the material time. It is to be observed from the wording of Section 9 of the Advocate’s Act quoted above, that the right to practice depends on all the three conditions contained in the provision. The relevant question then is whether Mr. Njore had a valid practising certificate on 23rd June, 2006 when he filed the relevant application for review.

The Law Society’s letter relied on by the Appellant stated that Mr. Macharia Njore held a practising certificate in the year 2003. The letter and the communication in it were made on 11th September, 2006. Although the communication could have been expressed with greater clarity, I nevertheless, find it not confusing as implied in the submissions of parties. If Mr. Njore held a practising certificate in the year 2003 and the communication is being made in September, 2006, then clearly, Mr. Njore did not hold a practicing certificate in 2004, 2005 and 2006, September. Otherwise the Law society would say that he held a valid certificate in those other years and not in 2003 only.

Secondly, even if Mr. Njore was an admitted advocate and his name had not been suspended from the roll of Advocates by the time he filed the Review application in June, 2006, he still, in my view, was not qualified to practice if he had no valid practising certificate at the time.

The Respondents argued that the Law Society’s letter and communication of the relevant information was a little unclear or vague. This court has however already said that the communication was sufficiently understandable that Mr. Njore had a valid practising certificate in 2003. The main ground for the application for review was that Mr. Njore had no valid practising certificate in June 2004. The Law Society wrote a letter to the effect that Mr. Njore had a valid practising certificate in 2003. It was in my view very relevant and indeed imperative for Mr. Njore to have informed the court that he had valid practising certificates for the years 2004, 2005 and 2006 by producing the same in evidence whether oral or deponed. His economic life depended on it. The law under Sections 30 and 31 of the Advocates Act, in Civil and Criminal Practice required of him to clear himself of the adverse allegation that he had no valid practising certificate. Indeed, in my considered view and finding, the burden to prove that he was validly

practising at the material time shifted to him the moment the Law Society wrote implying he had no practising certificate.

Furthermore, and with great respect to the Trial Magistrate, it should have become his concern to properly investigate the allegation and establish the matter; more so because such practice without a valid licence would amount to a criminal offence under Section 31 and 85 of the Advocates Act and since at the time, Mr. Njore had been suspended from practice for several years for his such past conduct and practice.

The only other issue remaining to be considered is whether the delay of two years in filing the Review application rendered the application untenable. I have considered the issue and would state that in an ordinary issue the delay would have been inordinate and would have adversely affected a favourable exercise of court's discretion. However, in this case the Review application was intended to set aside or review a null and void application and ruling. The delay to file it for a period would in the circumstances be excusable so as to allow substantive justice to be done by a competent court after proper and sufficient investigation.

The end result is that this appeal has merit and is hereby allowed. The lower court ruling and orders to dismiss the review application are hereby reversed, thus allowing the application for review dated 23rd June, 2006 and thereby reinstating the Thika CMCC No.1281 of 1997. This finding does not bar the Defendant's in the lower court filing a proper application at the lower court seeking dismissal of the suit for lack of prosecution to be decided on merit. For various reasons arising from the conduct of the matter, Appellant is granted only costs of this appeal. Orders accordingly.

DATED and **DELIVERED** at Nairobi this 8th day of March 2013

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D.A. ONYANCHA

JUDGE