



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC SUIT NO. 291 OF 2013

ABDUL AZIZ JUMA.....PLAINTIFF

-VERSUS-

NIKISUHI INVESTMENT.....1ST DEFENDANT

PRIME BANK LIMITED.....2ND DEFENDANT

SWAMI NVESTMENT.....3RD DEFENDANT

RULING

I have before me a Notice of Motion application brought on behalf of the 2nd Defendant/Applicant under the provisions of Section 1A & 1B of the Civil Procedure Act, Order 2 Rules 15(1) (b) and (d), Order 51 Rule I of the Civil Procedure Rules, Section 9 of the Advocates Act, Cap 16 and all other enabling provisions of the law. The applicant seeks the following orders:-

- a. That the suit filed against the 2nd defendant be struck out with costs;
- b. That the plaintiff and its advocates do pay the costs of this application.

The application is predicated on the following grounds set out on the face of the application.

1. The suit was filed on 26th February, 2013 by Mutali Wanyama & Company Advocates, who is the advocate on record for the plaintiff.
2. The plaint was signed by Wanyama Mutali who did not have a practising certificate as at 26th February, 2013 when the suit was filed.
3. The suit is otherwise an abuse of the process of the court and the 2nd Defendant reiterates the preliminary objection dated 10th April.

The 2nd Defendant's application is further supported on the grounds set out on the annexed affidavit of Allen Waiyaki Gichuhi. The plaintiff Abdul Aziz Juma has filed a replying affidavit in opposition to the 2nd defendants Notice of Motion sworn on 16th May, 2013. The 2nd Defendant additionally filed written submissions and furnished authorities in support of its application.

The plaintiff was on 6th June, 2013 granted leave of 7 days to file his submissions in response to the 2nd Defendants filed submissions but apparently did not file any and the court will therefore make its ruling on the basis of the material placed on record by the parties and the applicable law.

The facts are not in dispute that Wanyama Mutali the Advocate for the plaintiff did not hold a current practising certificate on 26th February, 2013 when he signed and filed the plaint dated 25th February, 2013 on behalf of the plaintiff. The practising certificate for the year 2013 for the said Mutali Wanyama Advocate was issued on 8th May, 2013 as per the annexure marked AAI annexed to the Replying Affidavit of the plaintiff. The plaintiff's advocate himself vide the letter dated 22nd March, 2013 to M/s Walker Kontos Advocates confirmed that he did not hold a practising certificate then but that he had applied for the current year's practising certificate. A copy of the cheque for Kshs. 16,860/= drawn in favour of the Law Society of Kenya dated 5th March, 2013 was enclosed in the said advocate's letter as evidence that the Advocate had applied for the practising certificate.

Section 9 of the Advocates Act Cap 16 laws of Kenya provides as follows: -

9. Subject to this Act, no person shall be qualified to act as an advocate unless:-

- a. **he has been admitted as an advocate; and**
- b. **his name is for the time being on the roll; and**
- c. **he has in force a practising certificate;**
- d. **deleted by Act No. 9 of 2000, S. 57**

and for the purposes of this Act a practising Certificate shall be deemed not to be in force at anytime while he is suspended by virtue of Section 27 or by an order under Section 60(4).

The wording of Section 9 is to the effect that an advocate must satisfy all the conditions under (a) (b) and (c) to act as an advocate for a party. The wording is mandatory and is unambiguous. It is a legal requirement for any person who offers services as an advocate to clients.

The courts have now and again been called upon to make their pronouncement in circumstances similar to the one faced by the court in this instance. The courts have in unison come to the same conclusion that an advocate who does not hold a current practising certificate cannot purport to represent a party or draw pleadings to be filed in court. The courts have held pleadings drawn by an advocate who does not hold a current practising certificate to be incompetent and have proceeded to strike such pleadings out.

In **Obura vs. Koome [2001] 1 EA 175, the Court of Appeal** while considering a issue similar to the one facing the court in this matter had this to say:-

“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”.

In the court of Appeal case of **Standard Chartered Bank vs. Mechanical Engineering Plant Ltd & others [2009] EA 404** the Court of Appeal held a practising certificate cannot have a retrospective effect and hence a memorandum of Appeal filed by an advocate without a practising certificate at the time of signing was incompetent as the advocate was not qualified to do the act at the time he did it.

In yet another decision rendered by Hon. Justice Ochieng in the case of **of Karobia vs. consolidated Bank Ltd [2006] 1EA 103** the honourable judge applied the decision in **Obura vs. Koome (supra)** and equally Honourable Justice Ondeyo had applied it in the case of **Delphis Bank Ltd vs. Behal & others [2003] EA 412** where at pages 414 she stated:-

“Similarly, in this case the plaint was signed by an advocate working with Lumumba and Muma Advocates, but the said advocate had no practising certificate at the time. He was therefore unqualified and not entitled to appear and conduct any proceedings in this or any other court. The plaint filed herein on 1st March, 2002 is therefore incompetent. I allow the application dated 30th April, 2003 and order that he said plaint filed herein on 1st March, 2002 and signed by Mr. Oyiembo Advocate be and is hereby struck out with costs to the 2nd defendant applicant”.

The plaintiff in this case in his replying affidavit sought to invoke the provisions of **Article 159 (2) (d)** of the constitution which enjoins the court to do justice to all parties without undue regard to procedural technicalities. I may also mention that under Sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya the courts are required to foster the overriding objective of the court which is to render justice expeditiously without undue regard to technicalities.

Article 159 of the Constitution was never intended to override clear provisions of any statute unless such provisions of a statute are found and held to be unconstitutional. Acts of parliament such as the Advocates Act make provision for the application of the Law and the Constitution demands of the courts to protect the Constitution and to apply the law as enacted by parliament. In my view Article 159 of the Constitution cannot be resorted to where there are clear an express provision of the law as is the case with section 9 of the Advocates Act. In the **cases of Peter O. Ngonge t/a O. P. Ngoge & Associates vs. Ammu Investment Co. Ltd [2012] eKLR** and the **case of China Sichuan Corporation for international techno Economic Cooperative (Sietco) vs. Kigwe Complex Ltd [2013] eKLR** the courts have had to consider the application of Article 159 (2) (d) and the courts have held that Article 159 (2) (d) cannot be applied to do away with all rules of procedure but it is intended to ensure that adherence to strict rules of procedure do not lead to a miscarriage of justice.

I do not consider that application of Section 9 of the Advocates Act is one of procedural technicalities. It is a substantive provision of the law and the section is intended to ensure that only qualified advocates serve the public and to my mind it is more of a protection to the public as it ensures only persons who have been authorised to practice and hold practising certificates do so.

It is incumbent for the instructing clients to ensure the Advocate they choose to instruct holds a practising certificate. The non observance of the provision can easily lead to the invasion of the legal practice by “quacks” who have no qualifications. It should therefore be a primary duty and obligation of legal practitioners to ensure they at all times hold current practising certificates otherwise the consequences for failure to conform are devastating. The Law Society of Kenya (LSK) has in recent times made it easy to access the details and particulars of all Advocates including their status and hence members of the public should have little difficult to access information on the status of Advocates.

In the premises I am persuaded that indeed at the time Mr. Wanyama Advocate signed and filed the plaint in the present suit he did not hold a current practising certificate and he was therefore not qualified to act in the manner he did.

The plaint filed by him is incompetent and unmaintainable and I accordingly allow the Notice of Motion dated 30th April, 2013 with costs and further strike out the plaint dated 25th February, 2013 and filed in court on 26th February, 2013.

The costs of the suit are awarded to the 2nd Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendants**