REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 21 OF 2013

JOHN LANGAT.....APPELLANT

VERSUS

KIPKEMOI TERER ….....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

INTERIM COUNTY ASSEMBLY CLERK BOMET COUNTY ….....3RD RESPONDENT

R U L I N G

Following the general elections held on 4th March 2013, the Bomet County Assembly held its first sitting on 22/3/13 during which the appellant was elected as the Speaker of the Assembly. The 1st respondent filed a petition dated 28/3/13 in the subordinate court at Kericho to challenge that election alleging, among other things, that the appellant was not qualified to vie for, or to be elected on, the position in view of Article 193(2) of the Constitution of Kenya 2010 and sections 25 and 43(5) of the Elections Act (No.24 of 2011). This was because he had not resigned from his position as Clerk for the County Council of Kipsigis at least 6(six) months before the elections. The verdict was returned on 5/7/13 by the Acting Senior Principal Magistrate in which the election was held to have been invalid. On 10/7/13 the appellant filed this appeal to challenge the decision. With the appeal was the present motion under Order 42 rule 6 of the Civil Procedure Rules seeking the stay of the execution of the judgment and decree. On 12/7/13 MR. Langat (for Anyoka for the appellant) appeared before this court *ex-parte* and under a certificate of urgency. I certified the application as urgent and granted a temporary stay to allow for the application to be heard *inter-parties* on 26/7/13.

On 18/7/13 he 1st respondent filed an urgent motion seeking to strike out the appeal and motion by the appellant, to set aside the *ex-parte* orders granted on 12/7/13 and for the appellant to furnish the security for costs before his application was heard. The motion was brought under Order 9 rule 9 of the Civil Procedure Rules. The grounds were that the firm of Anyoka & Associates who had filed the appeal and motion were not properly on record; and that the firms of KORIR & Co,, Advocates and Onesmus Langat Advocates, both sole proprietors, who had acted for the appellant in the lower court did not hold practising certificates.

Both applications were heard on 2/8/13. MR. Anyoka appeared for the appellant, MR. Theuri for

the 1st respondent and Mr. Nyamweya for the 2nd respondent filed written submissions and also orally addressed the court.

The applications are easy to deal with, in my view. It is not in dispute that the appellant was represented in the lower court by the firms of C. Korir & Co., Advocates and Onesmus Langat Advocates. The sole proprietor of the former firm is Kipyegon Charles Korir and the sole proprietor of the latter firm is Langat Onesmus Kipkirui. On 15/7/13 the Law Society of Kenya wrote to confirm that Korir last held a practising certificate in the year 2010, and Langat last held a practising certificate in 2012. It follows that by the time the petition was filed in the lower court on 23/3/13, and the appellant filed his response on 2/5/13, the advocates were not holders of practising certificates. The position obtains up to now. The appeal and application were filed through Anyoka & Associates. These advocates were not on record for the appellant when the lower court rendered its judgment. Under Order 9 rule 9 of the Civil Procedure Rules.

"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

a) upon an application with notice to all the parties; or

b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intended to act in person as the case may be."

There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates

"without an order of the court."

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.

There is a more serious problem, however. Under section 9 of the Advocates Act (Cap 16) no person shall be qualified to act as an advocate unless he is admitted as an advocate, his name is on the roll of advocates, and he has in force a practising certificate. Under Section 34(1) of the Act it is an offence for an advocate not holding a practising certificate to prepare or draw any document for a client for a fee. It has not been alleged that the advocates then on record were acting for free when they drew the consent in question. Now that they were not qualified to act for the appellant because they did not hold a valid practising certificate, the consent that they drew was invalid and could not form the basis of effecting the change of advocates **(ABDUL AZIZ .V. JUMA .V. NIKISUHI INVESTMENT AND OTHERS, H.C. (MILIMANI) ELC NO.291 OF 2013).**

In **NATIONAL BANK OF KENYA LTD .V. WILSON NDOLO AYAH, Civil Appeal No.119 of 2002 at Nairobi;** the Court of Appeal was dealing with a case where a charge and a Deed of Guarantee were drawn by an advocate who did not have a practising certificate, and therefore not qualified to draw the documents. The High Court had declared the documents to be null and void *ab initio,* with the result that the money they had secured which had grown to Kshs.57,308,137/50 was irrecoverable. In agreeing with the decision, the Court of Appeal stated as follows:

"Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise is good policy that court's enforce the law and avoid perpetuating acts of illegality. It can only

effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The gravamen of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi-illiterate population. There is need to discourage such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interests of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law.

Besides, the Law Society of this country publishes annually, a list of advocates who hold a practising certificate, for general information. This is a fact to take judicial notice of as courts are also provided with such a list for purpose of denying audience to advocates, who do not appear on the list. For that reason the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates Act itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered....”

It should be noted that the appellant is himself an advocate of 20 years standing. Had he exercised the kind of prudence that is expected of him he could have found out that he was being represented by unqualified advocates.

Mr. Anyoka sought to persuade the court that his client was innocent. He further sought to rely on Article 159(2)(d) of the Constitution of Kenya 2010 to argue that now that the court was dealing with a petition, a serious matter, the acts that may be deemed illegal or unprocedural should be excused The Article enjoins the court to do justice to all parties without undue regard to procedural technicalities. There is a simple answer to Mr. Anyoka. It is criminal under section 34 of the Advocates Act for an advocate to practice without a practising certificate. The section is not a procedural technicality. It is a substantive statutory provision. This court is enjoined to protect not only the Constitution but also all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of sections 34 of the Advocates Act is to perpetuate an illegality. Article 159(2)(d) would not condone such an act.

The result is that the consent drawn by the appellant's advocates, to have the firm of Anyoka & Associates take over his case after judgment and to file the appeal and application, was invalid. Anyoka & Associates could not use it to file the appeal and application. These are the reasons why I allow the 1st respondent's application with costs and strike out both the appellant's appeal and application with costs.

Dated and delivered at Kisumu this 9th day of August 2013

A. O. MUCHELULE

J U D G E