**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 107 OF 2012 & 123 OF 2012**

**FLORENCE NGAIRA T/A GARYL AGENCIES ……...……..…PLAINTIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY SERVICES FUND BOARD OF TRUSTEES.…….....……...…1ST DEFENDANT**

**SAUTI AFRICA LIMITED…….....……2ND DEFENDANT**

**CONSOLIDATED WITH**

**CIVIL CASE NO. 123 OF 2012**

**SAUTI AFRICA LIMITED…….……..…..……PLAINTIFF**

**VERSUS**

**CHERAIK MANAGEMENT SERVICES LTD……....1ST DEFENDANT**

**FLORENCE NGAIRA T/A GARLY AGENCIES…….2ND DEFENDANT**

**R U L I N G**

By a notice of preliminary objection on a point of law dated 26th March 2012 and filed in this Court on 27th March 2012, the 2nd defendant prays that the plaintiff's plaint dated 7th March 2012 signed by **William KipkorirArusei** and amended on 19th March 2012 in addition to the plaintiff's application dated

7th March 2012 and also signed by the said **William KipkorirArusei** and amended on 19th March 2012 be struck out *in limine*on the following grounds:

**1. The aforementioned plaint and application filed on the 7th March2012 were drawn, signed and filed by an unqualified person (namely the said William KipkorirArusei) within the meaning and application of Section 9 of the Advocates Act Chapter 16 of the Laws of Kenya.**

**2. The said William KipkorirArusei paid for his practising certificate on the 14th March 2012 and therefore he could not have had a valid practising certificate as at 7th March2012 as he had not met the mandatory statutory prerequisites set out under Section 22(10 b of the Advocates Act Chapter 16 of the Laws of Kenya which include *interalia*, payment of annual subscriptions.**

**3. The plaintiff's suit herein constitutes the plaint dated 7th March2012 with the incorporated alterations made on the 19th March 2012.**

**4. The plaintiff's application for injunction is in essence the application filed on 7th March2012 with the incorporated alterations made on the 19th March 2012.**

**5. The plaintiff's pleadings and application are based on an incurable illegality and ought to be struck out forthwith and this suit dismissed with costs to the defendants.**

It is important at this stage to mention that on 14th March 2012 this suit was by consent of parties consolidated with HCC No. 123 of 2012 between **Cheraik Management Services Limited vs. Florence Ngaira T/A Garly Agencies** and it was ordered that both suits be heard as one in HCCC No. 107 of 2012.

In its submissions the 2nd defendant herein contends that since **William KipkorirArusei**, counsel for the plaintiff did not hold a valid practising certificate by 7thMarch2012, the date when these proceedings were instituted, and had not even paid for the same, the plaint and the application herein are unmaintainable and should be struck out. It is submitted that since the provisions of sections 9, 22, 31 and 34 of the Advocates Act Cap 16 are couched in mandatory terms, the same must compulsorily be met by any person who intends to be deemed as an advocate within the compass of the said statute for purposes of drawing, filing, signing and actively litigating causes of action in court and explicitly abhors persons pretending to be advocates within the meaning of the said statute or persons unqualified to be advocates within the meaning of the said provisions. In support of the said contention the 2nd defendant has relied on the case of**Geoffrey OraoObura vs. Martha KarambuKoome Civil Appeal No. 146 of 2000**. Since it is not disputed that **William KipkorirArusei** did not hold a practising certificate when these suit and subsequent proceedings were filed, based on **Kenya Power & Lighting Company vs. Chris Mahinda T/a Nyeri Trade Centre Civil Appeal No. 148 of 2004**, it is submitted that prior to the date of the issue of the certificate, the advocate had in force no practising certificate and that even payment itself is not adequate to satisfy the requirements of section 9 of the said Act.

Since the Advocates Act is a substantive law, it is submitted that the aforesaid requirements cannot be termed as merely technicality or procedural and hence not curable under Article 159(2)(d) of the Constitution.

Since under Order 3 rule 1 of the Civil Procedure Rules as read with Order 9 thereof contemplate that the agent of a party for the purposes of execution of the pleadings is an advocate pursuant to section 9 of the aforesaid Act, and since an action is commenced by a plaint and not by an amended plaint, this suit is incompetent *ab initio* and nothing can originate therefrom. Accordingly, it is submitted that the inherent jurisdiction cannot be called in to aid the plaintiff herein.

On the 1st defendant's part, while conceding that the objection was raised by the 2nd defendant, contends that the same goes to the root of the suit and the 1st defendant's counsel as an officer of the court not only

has the right, but a duty to submit his understanding of the law on the subject. Since the letter from the Law Society of Kenya indicates that **Mr. Arusei** paid for his practicing Certificate on 14th March 2012, which position is not contradicted by the documents annexed to **Mr. Arusei's** affidavit, between January 2012, and 14th March 2012, **Mr. Arusei** was not qualified. It is submitted that under section 24 of the Advocates Act, save for payments made in the 1st month of the practicing year which are deemed to take effect from the beginning of the month, the rest will have effect from the dates of compliance. Accordingly, it is submitted that **Mr. Arusei** attained full qualification to practice in the year 2012 on the 14th March 2012. Section 31 of the same Act, it is submitted, prohibits an unqualified person from acting as an advocate, and causing any summons of process to issue, or instituting, carrying on any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction or directly or indirectly from taking instructions or drawing or preparing any documents or instruments relating to any legal proceedings. Therefore by drawing and filing the plaint and Notice of Motion on the 7th March 2012 when he was unqualified, the learned counsel for the plaintiff was in breach of sections 31 and 34 of the Advocates Act and any acts done in breach of the Law are themselves illegal and cannot have recognition in a court of law and must be struck out since not to do so would be condoning contempt of court and would render useless the provisions of the sections since this breach is a substantive breach which cannot be equated to a technicality curable under Article 159(2)(d) of the Constitution and reliance is placed on **Raphael KavaiMaitha& 3 Others vs. Jays Syndicate Ltd & 3 Others HCCC No. 507 of 2003** and **Willis Evans Otieno and the LSK & 2 Others HCP No. 37 of 2011**. It is further submitted, on the authorities of **Lucas Njuguna S. Karobia vs. Consolidated Bank of Kenya Ltd HCCC No. 329 of 2005**and **Brooke Bond (K) Ltd vs. SirisiaKeruboKenyoru HCCA No. 34 of 2004** that documents drawn by an unqualified advocate cannot be validated by the subsequent qualification. Since the original documents were a nullity, there was nothing to amend and the entire suit and all applications based on it are for striking out. The allegations made against the 2nd defendant, it is submitted are highly contested and farfetched as opposed to the objection raised herein which is a point of law, it is submitted

In its submissions in opposition to the preliminary objection, the plaintiff reproduced an affidavit sworn by the said **William KipkorirArusei** on 23rd April 2012, in which it is deposed that at the time the suit was instituted the 2nd defendants was not a party to the suit as it was not joined in the suit until 14th March 2012 and hence, lacks l*ocus standi* to raise the issues raised herein. It is further deposed that the authorities relied upon were pre-2010 Constitution which provides in Article 159(2)(e) (sic) that justice shall be administered without undue regard to procedural technicalities. The authorities relied upon, it is deposed are distinguishable since they relate to situations where no practising certificates were ever taken out. The preliminary objection, it is deposed are not true objections and are intended to cloud, obstruct and even on occasions confuse issue.

This contention is reiterated in the submissions and reliance is placed on **Mukisa Biscuit Manufacturing Co. Ltd. vs. West End Distributors Ltd 1969 [EA] 698, 701**. Based on the same decision it is submitted the objection herein is not a pure point of law as the matters are in dispute and/or facts need to be ascertained which cannot be done without going into the substance of the matter. Such issues as when counsel pays for the certificate and is issued with a practising certificate for the year are matters which, in the plaintiff's view, cannot be the subject of a preliminary objection. The plaintiff again seeks support for this line of submission on the case of **Kajwang vs. the Law Society of Kenya NBI HCCC No 339 of 1999**. As the amended plaint and motion dated 19th March 2012 are conclusive as to the plaintiff's issues for determination, it is submitted there is no need to go to the original plaint and motion since by the time the plaintiff's advocate's position with the Law Society had been regularised. It is further submitted that pleadings signed by an unqualified advocate who has paid for practicing certificate should not be struck out.

Relying on **Prof. Syed S Huqvs. Islamic University in Uganda Civil Appeal No. 47 of 1995 [1995-1998] EA 117; Republic vs. Eldama Ravine Land Disputes Tribunal & 2 Others Nakuru HCMA No. 428 of 2006; Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Milimani High Court Civil Case No. 810 of 201 [2001] 2 EA 460; Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000**it is submitted that procedural technicalities should not override the need to do justice.

Apart from the foregoing the plaintiff has reiterated what is contained in the said affidavit and the cause of action herein as well as the 2nd defendant's *locus* in this matter.

Although the rules of procedure are designed to facilitate fair demonstration of justice and are the handmaiden of justice, todate they remain so, but at the same time, the court must be guided by the desire to do justice without undue regard to the procedural technicalities and not the zeal to dismiss or strike out cases on technical grounds. The Court, it is deposed should be guided by the principle that where possible disputes should be heard on their merits. Since the 2nd defendant's *locus standi* is tainted with illegality, the 2nd defendant has no right of audience taking into account the equitable doctrine that he who comes to equity must do so with clean hands and he who comes to equity must do equity. The deponent further deposes that for the more than 16 years he has been an advocate of the High Court, he has throughout held a practising certificate and that he has in fact paid for the practising certificate for the year 2012. Since leave was granted to amend the plaint and the motion which now constitute the plaintiff's cause of action in the present suit, the documents are valid and both should proceed to hearing on their merits. While not admitting that he is an unqualified advocate, the deponent deposed that the Advocates Act does not make invalid pleadings drawn or prepared by an advocate who has no practising certificate and hence pleadings cannot be invalidated merely by reason that the Advocates of one of the parties is unqualified since an advocate who is still on the Roll of Advocates is bound by the oath he took and a client cannot be made to suffer for the mistake of the Advocate.

With respect to the 1st defendant's submissions, the plaintiff, while reiterating the issues raised in opposition to the 2nd defendant's objections contends that the 1st defendant has not filed any formal application or pleadings raising any objection to the plaintiff's pleadings and is therefore barred from doing so. In conclusion, the plaintiff submits that the objections are not only misconceived, misguided, bad in law but clearly not the preliminary objection that would determine the suit.

I have considered the preliminary objection, the documents both in support and opposition thereof, the submissions of counsel and authorities cited.

An issue has been raised with respect to the 2nd defendant's *locus* in these proceedings. It has been contended that the 2nd defendant was joined after the grant of leave and it has no capacity or locus to challenge the suit. It is further contended that the 2nd defendant's illegal actions disentitles it from raising the issues raised herein. The defendants' position, however, is that the issue raised goes to the root of the suit. In my view if the issues raised in the objection are fatal then it does not matter which party in the proceedings raises them. In fact unless the irregularity is capable of being waived, the Court on its own motion is properly entitled to take up the matter. Similarly, on whether or not the 2nd defendant's conduct disentitles it from raising the issue would depend on the nature of the objection raised and whether it is capable of being waived. Whereas it is true that he who comes to equity must do equity and that he who comes to equity must come with clean hands, it is equally true that equity follows the law. Accordingly I am not prepared to find that the 2nd defendant had no *locus* to raise the issue. As to whether or not there are merits in the objection is another matter.

The first issue for determination is the circumstances under which a preliminary objection can be entertained. In **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696,Law, JA** was of the following view:

**"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".**

As for **Newbold, P**:

**"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point**

**of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".**

However in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it was held that:

**"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debitojustitiae*(as of right) but as a matter of judicial discretion".**

Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion.

In this case the both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication. The preliminary objection is that the plaintiff's advocate, who filed the suit was not competent to do so since at the time of filing this suit, he had neither paid for nor secured a practicing certificate for the year 2012. In support of this position the 2nd defendant has annexed a copy of the letter dated 26th March 2012 from the CEO/Secretary of the Law Society of Kenya confirming that **Arusei William Kipkorir** paid for his 2012 practicing certificate on 14th March 2012. In his affidavit, **Mr. Arusei** while not expressly denying that he had not paid for and secured the practicing certificate when he signed and filed the plaint herein on behalf of the plaintiff, states that he has since paid for the said certificate. He does not state when he paid for the same. There is no express positive averment emanating from **Mr. Arusei** to the effect that he paid for the said certificate before the filing of the suit. He has, however, annexed a copy of a letter dated 31st January 2012 purportedly remitting a cheque to the Law Society of Kenya. I say purportedly because the cheque numbers being enclosed are not indicated. However, the copies of the Law Society receipts are dated 14th March 2012. There is also a copy of the Society's fee note dated the same day.This information is confirmed by a copy of the letter dated 26th March 2012 from the same Society confirming that the said certificate was paid for on 14thMarch 2012. In the premises I am satisfied based on both the applicant's documents and the respondents' documents that the allegation that **Mr. Arusei** paid for his practicing after instituting this suit is undisputed and may properly be relied upon to found a preliminary objection.

Section 9 of the Advocates Act provides as follows:

***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 on 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).***

It is therefore clear that a person is not qualified to act as an advocate unless all the said three conditions are fulfilled.

Section 22 of the Advocates Act, on the other hand, provides as follows:

***(1) Application for a practising certificate shall be made to the Registrar–***

***(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate;***

***(b) by producing evidence satisfactory to the Registrar that the applicant has paid to the Society the fee prescribed for a practising certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and***

***(c) by producing a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate.***

From the foregoing it is clear that an application for practicing certificate is, *inter alia*, by producing evidence that the prescribed fee for the same has been paid to the Law Society of Kenya. The only evidence available as stated above is that the said fee was paid on 14th March 2012 hence the application for the same could not have been made before the said date.

Section 31 of the said Act provides as follows:

***(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.***

***(2) Any person who contravenes subsection (1) shall–***

***(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and***

***(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and***

***(c) in addition be guilty of an offence.***

From the foregoing it is clear that an unqualified person (i.e. a person not qualified under section 9 to act as an advocate) cannot *inter alia* institute legal proceedings on behalf of another person and the consequences of such an action are that the advocate is deemed to be in contempt of court and may be punished accordingly and is rendered incapable of maintaining an action for costs in respect of such services and in addition is guilty of an offence. The section is, however, silent on the fate of the legal proceedings instituted by such an advocate.

Section 34 of the said Act on the other hand provides as follows:

***(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument–***

***(a) relating to the conveyancing of property; or***

***(b) for, or in relation to, the formation of any limited liability company, whether private or public; or***

***(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or***

***(d) for the purpose of filing or opposing a grant of probate or letters of administration; or***

***(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or***

***(f) relating to any other legal proceedings;***

***nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:***

***Provided that this subsection shall not apply to–***

***(i) any public officer drawing or preparing documents or instruments in the course of his duty; or***

***Penalty for pretending to be advocate.***

***(ii) any person employed by an advocate and acting within the scope of that employment; or***

***(iii) any person employed merely to engross any document or instrument.***

***(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.***

***(3) Any person who contravenes subsection (1) shall be guilty of an offence.***

***(4) This section shall not apply to–***

***(a) a will or other testamentary instrument; or***

***(b) a transfer of stock or shares containing no trust or limitation thereof.***

Similarly, this section is silent on the fate of the documents drawn by such an advocate.

In my view therefore, documents signed by an unqualified person are in the same position as documents signed by a layman, in so far as their legality is concerned. Since the said documents are executed by a person whose signature is not legally recognised, they are, in my view, in the same position as unsigned documents. What then are the consequences of failure by a person to sign documents especially the plaint? In **Regina KavenyaMutuku& 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250Ringera, J** (as he then was) held that:

**“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity”.**See also **OnyangoOtieno, J’s** decisions (as he then was) in**National Industrial Credit Bank Limited vs. Albert GacheruKiarie Nairobi (Milimani) HCCC No. 1863 of 1999** and**Jane W Kamauvs. Kenya Ports Authority Nairobi (Milimani) HCCC No. 1575 of 1999.**

In **AtulkumarMaganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001** consolidated with**VipinMaganlal Shah Vs. Investment & Mortgages Bank Limited &2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190** the Court of Appeal was of the following view:

"**Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law".**

From the foregoing, it is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently such pleadings are rendered incompetent and are for striking out.

Similar, fate has been held by the Courts in Kenya to apply to cases where pleadings are signed by an unqualified person. In **Kenya Power & Lighting Company vs. Chris Mahinda T/A Nyeri Trade Centre Civil Appeal (Application) No.Nai 148 of 2004**, the Court of Appeal expressed itself as follows:

**"Practicing Certificates are dealt with in Part VII of the Advocates Act from which it is clear that the issue of practicing certificates is the responsibility of the Registrar of the High Court and not the Law Society. The practicing Certificate for the year 2004 exhibited to the advocates affidavit in support of the application is dated 22nd September 2004 and signed by the Registrar of the High Court. In that Certificate the Registrar certifies that the advocate is duly enrolled as an advocate and is entitled to practice as such Advocate. We consider that it cannot be validly argued that, prior to the date of issue of that Certificate, the advocate had in force a practicing certificate...We come to our decision based solely on the undisputed fact that no practicing certificate for 2004 had been issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal. When those two acts were done by him the advocate was not qualified to act as an advocate with the effect that the two documents were incompetent. A practicing certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22nd September, 2004, it had retrospective effect back to the beginning of 2004. We do not accept this submission. If no practicing certificate had been issued when the act was done, the advocate was not qualified to do that act at the time he did it".**

This position was taken in the case of **Lucas Njuguna S. Karobia vs. Consolidated Bank of Kenya Ltd HCCC No. 329 of 2005** in which following in the footsteps of **Geoffrey OraoObura vs. Martha KarambuKoome Civil Appeal No. 146 of 2000** and **Delphis Bank Ltd vs. Behal& Others [2003] EA 412 at 414**, **Kajwang vs. the Law Society of Kenya NBI HCCC No 339 of 1999**was distinguished and the Court held that the circumstances of the later case needed to be appreciated within the special circumstances of the matter. I, also concur taking into account that the same beaten path was followed by **Kimaru, J** in **Brooke Bond (K) Ltd vs. SirisiaKeruboKenyoru HCCA No. 34 of 2004**as well as **Raphael KavaiMaitha& 3 Others vs. Jays Syndicate Ltd & 3 Others HCCC No. 507 of 2003** and **Willis Evans Otieno and the LSK & 2 Others HCP No. 37 of 2011.**

Whereas I agree with the decision cited by the plaintiff that procedural lapses should not be elevated to fetish in order to override substantive justice, I am unable to accept that the contemptuous institution of proceedings in a manner that is criminalised by the law can be excused as amounting to merely procedural lapses. One of the cardinal tenets of the Constitution is that parties must be treated equally in the eyes of the law and none of the parties should be accorded undue advantage in legal proceedings. There are good reasons why the law requires that only qualified persons be permitted to institute legal proceedings. The legal profession is now one of the few if not the only whose activities are circumscribed by a special Act of Parliament known as Law Society of Kenya Act. There are very good reasons for

ensuring that the activities carried out by the legal profession are regulated. The need for regulations, in my view,is informed by the fact that the acts and omissions of advocates may have far reaching effects on the lives and activities of third parties hence the need to ensure that the people who undertake to render legal services are not only people competent to do so but people whose activities are properly regulated so that in the event of loss sustained by third parties as a result of their activities recourse may be had by those sustaining loss thereby. Accordingly the requirement to adhere to the provisions of the Advocates Act cannot be dismissed off-hand as being merely procedural or technical in nature. One of the important requirements for example is the need to have a professional indemnity insurance in force so as to ensure that client's interests are adequately covered. Whereas I agree that the provisions of Article 159(2)(d) of the Constitution should be invoked to aid in ensuring that substantive justice is stained, I do not accede to the argument that the said provision can be called in aid of an act that is declared to be criminal by Legislature. Similarly, the overriding objective cannot be resorted by a party whose act is declared by statute to constitute a criminal offence. Overriding objective , it must be made clear, is case management tool. Even so, in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010**the Court of Appeal dealing with the said objective stated *inter alia*as follows:

**"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".**

It has been contended that the mistakes of advocates should not be visited on clients. In certain cases that position may ring true. However, in certain cases where an advocate contemptuously institutes legal proceedings, it may be prudent for the said advocates to shoulder the consequences of such actions. In **John OngeriMariaria& 2 Others Vs. Paul Matundura Civil Application No. Nai. 301 of 2003[2004] 2 EA 163**it was held that:

**"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".**

It also important to take note of section 24 of the Advocates Act which provides as follows:

***(1) Every practising certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day:***

***Provided that a practising certificate which is issued during the first month of any practising year shall have effect for all purposes from the beginning of that month.***

***(2) The practising year shall be from the 1st January to 31st December:***

***Provided that the Council of the Society, with the approval of the Chief Justice, may by order alter the practising year, and the order may make such transitional provision in regard to incidental matters as may be expedient.***

From the foregoing it is clear that save for a practicing certificate issued during the first month of the practicing year, a practicing certificate is only valid from the beginning of the date of issue. The practicing year is, unless otherwise provided, from 1st January to 31st December. Accordingly, under section 24 aforesaid, it is only those practicing certificates issued in the course of January that are valid for the whole month of January. In this case, the practicing certificate was paid for in March 2012 with the result that its validity could not relate back to January 2012.

It is therefore my considered view and I so hold, not without some sympathy to the plaintiff that save in cases where section 24 aforesaid applies, a pleading signed and filed by an advocate before issuance of a practicing certificate is incompetent and is liable to be struck out.

The plaintiff has, however, raised the issue that since an amendment was effected after the payment of the said certificate, it is the amended plaint that is relevant. The law with respect to the status of amended pleading was stated by **Newbold, JA** (as he then was) in **Eastern Radio Services & Another Vs. R J Patel T/A Tiny Tots and Another [1962] EA 818** as follows:

**"Whereas a plaint as amended may be treated as if it were the original claim, there is nothing which requires that it must be so treated for all purposes and in all circumstances. Logic and commonsense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed".**

Similarly, in**DhanjiRamji Vs. Malde Timber Co.[1970] EA 422** the East African Court of Appeal stated:

**"While amendments of pleadings are conclusive as to the issues for determination the original pleadings may be looked at if it contains matters relevant to the issues. The new pleading is of course conclusive as to the issues for determination, but it does not replace the old pleading for all purposes. Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed. The test is, in the Court's opinion, whether the old pleadings contains matter relevant to the questions for determination in the suit; if so, it may be looked at…It is clear that the court looks only to the pleadings as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on. But that does not mean that the original pleading has entirely ceased to exist. It remains on record and it is a rule of practice that the amendment must be so effected that what was originally written remains legible. It seems that it is proper to refer to an original pleading for certain limited purposes, one of course which is, to show inconsistency".**

Therefore, it is my view that whereas amended pleadings are conclusive as to the issues in dispute, the mere fact that a pleading is amended does not validate a suit which was rendered invalid *ab initio*. If the contrary was the position parties and counsel would simply evade the legal strictures in the Advocates Act by simply amending their pleadings thus defeating the very essence of the legislation.

Accordingly, the preliminary objection dated 26th March 2012 filed in this court on 27th March 2012, succeeds with the result that the plaint herein as well as this suit is struck out with costs to the defendants.

**Ruling read and delivered in court this 25thday of May 2012**

**G.V. ODUNGA**
**JUDGE**
**In the presence of:**
Mr.Aruseifor the plaintiff

Mr.OkothOriemafor the 1st defendant

Mr.OkothOriema for Mr.Munya for 2nd defendant