REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 10 of 2012

LUCIA MWETHYA T/A KALEBRAN ENTERPRISES.....……...….....PLAINTIFF

VERSUS

NAIROBI BOTTLERS LIMITED.....1ST DEFENDANT

RUCHA AGENCIES…….....….....….....…2ND DEFENDANT

ALICE WAKABA.....…….....….....3RD DEFENDANT

AMOS WAKABA.....4TH DEFENDANT

R U L I N G

Before me are two applications. The first application is dated 25th January 2012 in which the plaintiff herein seeks the followingorders:

1. That this application be certified as urgent and be heard *ex parte* in the 1st instance and service thereof be dispensed with.

2. That there be a temporary injunction restraining the 1st and 2nd defendants, their agents and/or servants from proceeding with purported distress for rent purportedly levied on 12th January 2012 and/or removing the plaintiff's goods from her store situated on LR No. 29/6569 until further orders of this court.

3. That there be a temporary injunction retraining the 1st defendant from terminating the plaintiff's distributorship agreement, assigning the Jericho/Makadara designated areas to any other party, interfering with the plaintiff's operations and or in any other manner whatsoever doing any other act prejudicial to the plaintiff until the hearing and determination of this suit.

4. That there be a mandatory injunction for removal of 3rd and 4th defendants from the plaintiff's Jericho depot situated within Jericho shopping centre.

5. That there be an injunction restraining the 3rd and 4th defendants from interfering with the plaintiff's operations within Jericho/Makadara designated areas.

6. That there be a mandatory injunction directing the 1st and 2nd defendants to return or deliver all goods contained in the list annexed to the affidavit in support hereof taken from the plaintiff at their Jericho depot situated within Jericho Shopping Centre.

7. That there be a mandatory injunction directing the 1st and 2nd defendants to refund and/or reimburse the plaintiff the sum of Kshs 312,000 stolen and/or illegally taken from her Jericho depot and/or delivery of 1st defendant's products of the same value pending hearing and determination of this suit.

8. That the costs of this application be provided for.

The second application is dated 20th April 2012 filed by the defendants in which the defendants seek the following orders:

1. For the reasons apparent on its face, this Application be heard and determined prior to any further proceedings in this matter.

2. The Honourable Court be pleased to order that this suit be struck out.

3. In the event the Applicant is unsuccessful in prayer (2) herein, this Honourable Court be pleased to order that the Amended Plaint amended on 25th January, 2012 the Notice of Motion application dated 25th January, 2012 and all the consequential proceedings be struck out of and/or expunged from the record of this Honourable Court.

4. Costs of this Application be borne by the Respondent.

5. Such other Orders as this Honourable Court may deem fit and proper to grant.

Before the second application could be heard the plaintiff filed notice of preliminary objection dated 12th June 2012 in which the following issues were raised:

1. That the defendants have no right of audience in this Honourable Court as they are in contempt of the orders of this Court made on the 15th February 2012.

2. That this Honourable court ought not to entertain the defendants' application dated 20th April 2012 or any other proceedings by the defendants before they purge the contempt of the orders of this Court made on 15th February 2012.

The law as I understand it is not that a party who is alleged to have disobeyed an order of the court must not be heard. The decision whether or not the party should be heard is an exercise of discretion on the part of the Court. In the celebrated case of **Hadkinson vs. Hadkinson [1952] PD 285 [9720]**the Court stated that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard but if his disobedience is such that, so long as it continues, it impedes the cause of justice, in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it might make, then the Court might in his discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. See also **Mawani vs. Mawani [1977] KLR 159; [1976-80] 1 KLR 607**

The Court of Appeal in **Rose Detho vs. Ratilal Automobiles & 6 Others Civil Application No. Nai. 304 of 2006** was of the view that:

"The general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he has made some claim and not a case where all he seeks is to be heard in respect

of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction...The Court has a discretion whether to hear a contemnor who has not purged his contempt and in deciding whether to bar a litigant, the court should adopt a flexible approach...Thus there is no absolute legal bar to hear a contemnor who has not purged the contempt to be heard and whether the court will hear the contemnor is a matter for the discretion of the court dependent on the circumstances of each case. The question which arises in this case is whether it would be a proper exercise of the court's discretion to decline to hear the applicant on the application for stay of orders of the superior court pending appeal. Firstly, the order of stay of execution sought in the application the subject matter of the preliminary objection is a discretionary order and therefore what the applicant seeks is the exercise of judicial discretion. A preliminary objection cannot be raised where, among other things, if what is sought is the exercise of judicial discretion. Secondly, the applicant intends to appeal against the orders of the superior court granting both leave to apply for judicial review and stay and has filed the application for stay of execution of the orders pending appeal. The applicant intends to challenge the jurisdiction of the superior court to grant both leave and stay on the grounds which ex facie cannot be said to be frivolous in that the applicant intends challenge by way of appeal to the Court of Appeal the very foundation and the legality of the orders she was found to have disobeyed. Thirdly, the applicant, in addition, intends to appeal against the order of the superior court finding her guilty of contempt on the grounds of both facts and law and she denies that she, as a matter of fact disobeyed the court orders".

In this case, the orders which are alleged to have been disobeyed themselves are under challenge. In fact the objection goes to very root of the suit itself. In other words, the defendants' position is that the orders in question should never have been granted in the first place. Apart from that the decision whether or not to strike out a suit is an exercise of discretion. Pursuant to the decision of the Court of Appeal cited above it is incompetent to raise a preliminary objection when what is sought is an exercise of the court's discretion. Thirdly, in deciding whether or not to deny a party alleged to have disobeyed the order of the Court the nature of the order in question must be considered. Whereas a Court order is effective whether made *ex parte* or *inter partes*, the fact that it was made *ex parte* is a consideration to be taken into account where it is alleged that the orders ought not to have been granted at all. Lastly, it has not been suggested in what way the failure to obey the orders of the superior court will be an impediment to the Court hearing and concluding the application. Accordingly, the preliminary objection dismissed.

Since the defendants' application seek to have the suit struck out on the ground that it is so defective that it cannot be cured, I intend to deal with the said application first. In support of the said application, the defendants have sworn an affidavit through **Cyrus Gituai** on 20th April 2012. According to the deponent, the plaint herein was filed by the law firm of **Mutisya Ngala & Company Advocates** which firm was represented by **Mr Daniel Mutisya Ngala**. In the course of preparation of the hearing of the plaintiff's said application, the deponent states that it emerged that the said **Daniel Mutisya Ngala** did not have in force a current practicing Certificate since 1st January 2012 and indeed for the whole duration of the pendency of the suit. This, it is deposed, rendered the said person unqualified to act as an advocate in accordance with section 9 of the Advocates Act, Cap 16 Laws of Kenya and hence incapable of drawing and filing documents in Court on behalf of a party. Since the firm of **Mutisya Ngala & Company Advocates** is comprised of **Daniel Mutisya Ngala** as a partner, the firm is an unlawful entity which cannot purport to represent a party in legal proceedings before this Court hence all documents filed by the firm are incompetent and ought to be expunged from the record.

In opposing the application, the plaintiff has filed an affidavit sworn by **Daniel Mutisya Ngala**, in which he deposes that he is an advocate of the High Court of Kenya having graduated from the University of Nairobi and admitted as an advocate of the High Court and his name entered in the Roll of Advocates on 12th March 1998. According to him, he has never been suspended as such advocate at any time whatsoever. After Christmas vacation in 2011 he reported back to the office on 16th January 2012 and received instructions from the plaintiff to file this suit as soon as possible which he did under certificate of urgency on the 18th January 2012. At that time, he states, he was aware that under section 24 of the Cap 16 any certificate issued within the month of the practising years is effective from the beginning of

the month. On 27th January 2012, he applied for re-issue of his practising certificate and sent his clerk with the requisite cheques to forward the same to the offices of the Law Society of Kenya. However, the said clerk had some personal problems and did not report back to work for a period of 2 weeks. In the meantime the deponent was involved in a road accident and was weighed down by other misfortunes and it was not until 25th April 2012 when he was served with the defendants' application that he confirmed from his office that the practicing certificate for the year 2012 was not forwarded. It is then that he discovered that the cheques were still in possession of his clerk since a copy of the deponent's indemnity was required. These facts were, according to the deponent, unknown to the plaintiff. As soon as these facts came to light, he deposes, he rectified the situation since the omission was not deliberate. The defendants, however, have not complied with the orders of this court.

On the issue, **Mr. Wathuita**, learned counsel for the defendants submitted that since the default in renewing the practising certificate is not disputed, the excuses advanced by the plaintiff's advocate are not justifiable. According to counsel, the meaning of section 23 of the Advocates Act is that a person who applies before 31st of January will have his certificate backdated. However, any subsequent certificate is only valid from the date of issue and refers to the case of **National Bank of Kenya Limited vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002 [2009] eKLR**, which case, it is submitted, distinguished all the authorities relied upon by the plaintiff and the issue was settled. It is counsel's view that the issues raised by the plaintiff cannot be sustained in the face of the express provisions of section 9 of the Advocates Act and the pleadings filed should be struck out.

On his part, **Mr Okindo**, in his submissions both oral and written submitted that the Common Law position, as restated in **Spirling vs. Brendon [1886] LR 2 Eq 64**, with respect to the issue of the failure by an advocate to take out a practising certificate is that the acts of such a person are not invalidated. Citing **Cromwell Kitana vs. John Mwema Mbevi Civil Appeal No. 50 of 1984**; **Trust Bank vs. Portway Store** it is submitted that the fault of advocate is not the fault of his client and therefore a client should not be penalised for the mistake of advocate. It is further submitted, the authority of **Balozi Housing Co-operative Society Ltd vs. Samuel Waiganjo Thuo Civil Appeal No. 291 of 2012** and **Trust Bank vs. Amalo [2003] 1 EA 350** that as far as possible the Courts should encourage the resolution of disputes by hearing both sides on merit and that errors should not necessarily deter a litigant from pursuit of his right. Since the Advocates Act is largely concerned with the regulation of the conduct of Advocates for the good of the Public, it would be absurd for the Court to punish the same public for whose benefit the Act was intended. Citing **Kajwang vs. Law Society of Kenya [2002] 1 KLR 846,** it is submitted the omission to take out a practising certificate should be treated is the manner provided under Order 3 Rule 2 of the Civil Procedure Rules. Relying on section 23(2) and 24(1) of the Advocates Act, it is submitted that as long as an advocate has a practising certificate for the previous year any actions within the first month of the current year are valid and he continues to enjoy all the privileges conferred by his membership to the Law Society of Kenya including practising as advocate. With respect to the decision in **Geoffrey Orao Obura vs. Martha Karambu Koome Civil Appeal No. 146 of 2000**, it is submitted that the said decision ignored the express provisions of the Judicature Act which applies the Common Law of England. Under section 15(4) of the Advocates Act, it is submitted that on admission, an advocate takes an oath as an officer of the Court and remains so until his name is otherwise removed from the Roll of Advocates. Since even an advocate's clerk can draw legal documents under section 34(1) (i) and (ii) if the Advocates Act, it would be absurd and ridiculous interpretation of the law if such a person with no professional qualifications can draw documents but an advocate whose only defect is lack of a certificate cannot. Quoting the case of **Wang Commissioner of Inland Revenue and London & Clydeside Estates Ltd vs. Aberdeen District Council and Another** it is submitted that even in statutes with mandatory provisions, the same cannot be used to invalidate all actions and the Court has to look at the object intended to be achieved by the legislations. Citing **Grace Wanjiru Mburu vs. Joseph Mburu Kimuku** and **Deepak Chamanlal Kamani & Another vs. Kenya Corruption Commission & Others Civil Appeal No. 152 of 2009** it is submitted that the Courts now tend to move away from legal technicalities and should decide the real disputes between the parties. In the absence of an express provision to warrant the striking out sought, on the authority of **Kamlesh Mansukhulal Damji Pattni vs. Nasir Ibrahim Ali & Others HCCC No. 418 of 1998**, the plaintiffs urge the court to dismiss the defendants' application. Finally it is submitted that the pleadings sought to be struck out were drawn on 25th January 2012 within the grace period in which the advocate is to take out a practising certificate.

Striking out the said pleadings will serve no purpose and will be contrary to the provisions of sections 1A and 1B of the Civil Procedure Act since it will only enable the defendants to extract costs and waste time.

My view of the matter, having considered the foregoing is as hereunder.

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. However, from the affidavit sworn by the plaintiff's advocate as at and upto 25th April 2012, he was unaware that his clerk had not remitted the fees required for the issuance of the certificate. It was only after that that he dispatched a fresh application form to the Law Society of Kenya.

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.

It is, therefore 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 Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250 Ringera, 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 **Onyango Otieno, J's** decisions (as he then was) in **National Industrial Credit Bank Limited vs. Albert Gacheru Kiarie Nairobi (Milimani) HCCC No. 1863 of 1999** and **Jane W Kamau vs. Kenya Ports Authority Nairobi (Milimani) HCCC No. 1575 of 1999.**

In **Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001** consolidated with **Vipin Maganlal 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 Orao Obura vs. Martha Karambu Koome 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. Sirisia Kerubo Kenyoru HCCA No. 34 of 2004** as well as

Raphael Kavai Maitha & 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. Under Article 160(1) of the Constitution in the exercise of judicial authority, the Judiciary, as constituted by Article 161, is subjected only to this Constitution and the law and shall not be subject to the control or direction of any person or authority. There are, in my view, good reasons why the law requires that only qualified persons be permitted to institute legal proceedings. The legal profession is one of the few if not the only one 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. From the affidavit sworn by the plaintiff's advocate, this was in fact the reason given by his clerk for the rejection of the first application.

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 attained, 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. I do not subscribe to the submission that an act which our statute expressly declares to be criminal should be excused by invocation of the Common Law either. Common Law, it must be remembered, is subject to the statutes of the land. On the provisions of section 34, whereas an advocate's clerk may draw documents in the course of his employment and under the direction of the advocate, the clerk cannot claim ownership to the said documents and is not authorised to append his signature thereto as the person who drew the said documents. What this means is that just as a clerk, a person without a current practising certificate may draw legal documents under the supervision and employment of an advocate with a current practising certificate as long as he does not claim ownership thereto and does not share profits accruing therefrom with the advocate holding the valid certificate.

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 Ongeri Mariaria & 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, at this stage, to deal with 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 April 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.

Accordingly, the Notice of Motion dated 20th April 2012 succeeds and this suit is struck out. However, the conduct of he defendants in this suit with respect to strict compliance with the court orders left a lot to be desired. It would be inequitable to reward them with costs in the circumstances. Accordingly there will be no order as to costs

Ruling read and delivered in court this 30th day of July 2012

G.V. ODUNGA
JUDGE
In the presence of:
Mr. Okindo for Mr. Mackenzie for the plaintiff

Mr. Wathuita for the defendants