



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 260 of 2003

SHEIKH ALI TAIBPLAINTIFF

VERSUS

GEORGE ELAM WEKESA.....RESPONDENT

SELINA M. WEKESA.....INTERESTED PARTY

RULING

1. This is the Defendant's Notice of Motion dated 8th December, 2011, brought under Section 9(c) and 12 of the Advocates Act and Orders 9 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. Other than seeking for urgency to be certified and for costs to be provided, the application seeks two other orders as follows:

"...2 That this honourable court be pleased to grant a temporary order of Stay of the Ruling delivered on 9th November, 2011, pending inter partes hearing of this application

3. That the Plaintiff's application dated 10th June 2011 and filed on 15th June 2011 by the firm of Taib A. Taib Advocates and signed by Lijoodi Osborne Advocate be struck out for being an abuse of the court process."

2. Prayer number 3 was dispensed with as the Plaintiff withdrew his application of 10th June, 2011, pursuant to a notice dated 16th April, 2012, and filed on 18th April, 2012.

3. The substantive grounds for the application for stay of the court's order of 9th November, 2011, are:

- that the pleadings were signed by Mr. Lijoodi who was not qualified to act as advocate.
- Mr. Lijoodi appeared in court on several occasions during the hearing of the application yet did

not have a practicing certificate for year 2011

- that it is in the interest of justice that the court do grant the prayers sought.

4. In his supporting affidavit deponed on 8th December, 2011, Tim Liko, Advocate, states that the Applicant wrote to the Law Society of Kenya requesting information as to whether Lijooji Osborne was qualified to practice as an Advocate in 2011. They responded in the negative, stating in their letter dated 2nd December, 2011 as follows:

"RE: LIJOODI OSBORNE ADVOCATE

...The Advocate held a practicing certificate in 2008 taken out on 12th November, 2008. He also took out practicing certificates in 2009 and 2010. He does no(t) have a practicing certificate for 2011 hence not authorised to practice on the current year. "

5. Armed with the aforesaid letter, counsel for the Applicant urges that what they call the "Ruling" of 9th November, 2011 be stayed. I have perused the record. On 9th November, 2011 Mr. Lijoodi for the Plaintiff and Mr. Matheka were present representing their clients. They argued applications of 23rd May, 2011 and 15th June 2011. In the end, I urged the parties to seek a settlement prior to my writing a ruling. The parties were to re-convene in the afternoon.

6. On reconvening Mr. Matheka and Mr. Lijoodi presented a written consent which they signed in my presence. A further consent was signed allowing the release of money to the Applicant, which he had deposited in court. On their representations as counsel for the parties, the court adopted the consent as follows:

"Court: Orders granted as consented to in writing. Consent is annexed as page 85 of this record of proceedings."

7. The consent itself, as signed by counsel had the following effect:

a) The application of 23rd May, 2011 by the Administrator was allowed, including permitting the Administrator to proceed to the Court of Appeal for hearing of Civil Appeal 146 of 2011.

b) Such permission was granted on condition that the Administrator should deposit Kshs. 1,000,000/- in a joint interest earning account in the names of the parties' law firms within 45 days.

c) In default of compliance, the application of the Applicant dated 23rd May, 2011 was to stand dismissed with costs.

d) The money deposited by the Defendant in court on 17th May, 2011 be released to him forthwith.

It is this consent, adopted as an order by the court, that is now alleged to have been entered by Mr. Lijoodi whilst he was unqualified.

8. Mr. Lijoodi in his Replying Affidavit sworn on 17th February 2012 said he was admitted in year 2004, and joined the firm of Taib and Taib for the Plaintiff in mid-2008. He says the firm relocated to Nairobi, and he remained in Mombasa. That in 2011 he sent his papers for renewal of his practising certificate to the Nairobi office, and continued practicing unaware that the renewal had not been paid for. He admits he had no practicing certificate for 2011.

9. Mr. Lijoodi further deponed that what the Applicant sought in his application was unattainable as there was no **"Ruling"** delivered by court, but merely a consent recorded. Further, that the consent order

was entered into on a "**Gentleman's Agreement**" basis. Finally, counsel deponed that a mistake of counsel should not be visited upon his client.

10. I have considered the parties' positions and the documents availed by them. I am required to determine the sole issue whether the consent orders sought to be stayed by the Applicant should be stayed on account of the non qualification of Counsel for the Plaintiff who was involved in negotiating them and presenting them in court.

11. My first task is to pronounce the trite law that where an advocate appears in court not being the holder of a practicing certificate, the proceedings he participates in are invalid. Section 34 of the Advocates Act treats as unqualified to practise law, take instructions, or prepare any legal document, a person who had not complied with Section 21 of the Advocates Act. That Section provides:

"21 subject to this Act, no person shall be qualified to act as an advocate unless-

- a) he had been admitted as an advocate; and**
- b) his name is for the time being on the poll, and**
- c) he has in force a practicing certificate, and**
- d) he has in force an annual license."**

The above prescriptions must be read inclusively and conjunctively. Absent any of the four requirements, and the disqualification crystallises. The provision is worded in mandatory language.

12. Section 34 of the Advocates Act provides as follows:

"34 (1) No unqualified person shall, either directly or indirectly take instructions or draw or prepare any document or instrument.

....

(f) relating to any other legal proceedings."

13. In this case, Mr. Lijoodi represented himself in court as counsel for the Plaintiff. He was thereby accorded an advocate's right of audience and argued the applications. When the court urged a settlement, he and Mr. Matheka retreated for negotiations. I think this was done in good faith and with the genuine aim of resolving the dispute. It may be that Mr. Lijoodi took instructions from his client to enable him negotiate the consent. Whether or not he did, he returned to court and, as counsel, together with Mr. Matheka drew up and signed a consent. It is on the file, marked page 85. Had it been presented in court by the parties themselves, that would have led to a different situation.

14. Here each counsel, acting for their clients, then respectively presented the consent in court, each signing for their client. The court gratefully accepted the consent, and adopted it as an order of the court. An "order" is defined in Section 2 of the Civil Procedure Act as follows:

"Order - means the formal expression of any decision of a court which is not a decree, and includes a rule nisi".

If it was not such an expression, it would be what Mr. Lijoodi called a "**gentleman's agreement**" selectively binding on the parties, but not legally enforceable. In this case, it is an order of the court and it affected the course of the ongoing legal proceedings.

15. In **Obura vs Koome** [2001] 1 EA 175, the Court of Appeal held that in circumstances where an appeal was filed by an advocate who, at the time of filing it, had no practicing certificate, the said

memorandum of appeal was:

"...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."

The appeal was struck out altogether.

16. In **Prashilee Ltd vs Rabai Road Estate Ltd** HCC 2336 of 1994, Ole Keiwua J (as he then was), held that where an advocate failed to take out a practising certificate, the matter was not only a mistake on his part, but in fact **"deprives such a person of the capacity to sue as an agent of any litigant under the provisions of the Civil Procedure Rules.."**

17. Finally, **Belgo Holdings Ltd vs Esmail** [2005] 2 EA 28 9(HCK) Lenaola J declared the proceedings therein invalid on account of an advocate appearing in court without a practising certificate. In that case, Lenaola J followed the decisions in **Obura** and **Prashilee's** cases. I entirely agree with his reasoning in that case.

I appreciate that High Court cases are only persuasive and not binding on this court.

18. There are grave dangers posed by lack of qualification of an advocate, which cause the court to take a rigid view of non-qualification. First, qualification gives legal capacity for an advocate to act. Without qualification he cannot enter into a contract with his client for legal representation in respect of statutorily regulated matters; without qualification, he cannot have audience before a court of law; he is *stricto sensu* without the qualification of advocacy, and if he does any regulated act, he is also criminally liable.

Finally, in terms of professional negligence, he diminishes his chances of acquiring professional indemnity cover, and jeopardises his clients' opportunity of recovery thereunder.

19. For all the foregoing reasons, I am obliged to go beyond staying the consent orders adopted by the court. Those orders are and were, invalid and incompetent, *ab initio*, and they are hereby vacated. The parties will therefore revert to the *status quo* prevailing prior to the entry to the consent orders.

20. Notwithstanding this outcome, the court encourages the parties to enter into a reasonable consent in this matter. This suit has been prosecuted by way of interlocutory applications since filing on 21st October, 2003. That is nine years, during which the real substance of the dispute has not even been broached. Parties are therefore directed to take a mention for directions within 30 days from date of this ruling, and appear with concrete proposals for an expeditious determination of the suit.

Dated, signed and delivered this 27th day of September, 2012

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

1. Judge: Hon. R.M. Mwango
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....

c).....

d).....