



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 634 OF 2008

EMMANUEL WAWERU LIMA MATHAI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LTD.....1ST DEFENDANT
WARDPA HOLDINGS LIMITED.....2ND DEFENDANT
PATRICK KANG'ETHE NJUGUNA.....3RD DEFENDANT
EDWARD KANG'ETHE NJUGUNA.....4TH DEFENDANT
GEORGE KANG'ETHE NJUGUNA.....5TH DEFENDANT

RULING

The Applicant in the Notice of Motion dated 16th April 2010, has moved the court under **Section 3A of the Civil Procedure Act, Order L of the Civil Procedure Rules (2009 Revised Edition), Sections 31, 32, 33, 34 and 35 of the Advocates Act and Rule 12 of the Advocates (Practice) Rules**, praying, *inter alia*, that:

1. The Plaint dated 24th October 2008, the Chamber Summons of the same date, the Chamber Summons dated 14th November 2008, the Notice of Motion dated 8th December 2008 and all other pleadings expressed or purported to have been drawn and filed by Wambo & Company Advocates be struck out with costs to the Applicants.
2. That the interim orders granted by the Hon. Lady Justice Lesiit on 27th October 2008, and subsequent orders granted at the instance of Wambo & Company Advocates be vacated.

3. That the conviction for contempt, and 90 days sentence meted out on the 3rd, 4th and 5th Defendants/Applicants by the Hon. Mr. Justice Kimaru be quashed and an order be made for the refund of Kshs. 1,000,000/=fine paid by each of them pursuant to the Honourable Judge's Ruling of 8th February, 2010.
4. That Eric Otieno be deemed to be in contempt of court and be punished accordingly.
5. That the said Eric Otieno, Advocate be condemned to pay costs of the suit and this application personally.

The application is premised firstly, on the grounds that the said Eric Otieno, is, as a Practising Advocate, bound by the provisions of the **Advocates Act** (Chapter 16 of the Laws of Kenya) and the Rules made thereunder as provided for under **Section 23** of the said **Act** which states as follows:

“23(1) Every Advocate to whom a practising certificate is issued under this part shall thereupon and without payment of any further fee, subscription, election, admission or appointment, and notwithstanding anything contained in the Law Society of Kenya Act or in any regulations made thereunder, become a member of the Society and the Advocates Benevolent Association and be subject to any provision of law or rule of the Society and the Advocates Benevolent Association for the time being affecting the member thereof.

(2) Every advocate who has become a member of the Society under this section shall remain a member until the end of one month after expiration of his practising certificate, unless his name, whether at his own request or otherwise, is removed from or struck off the Roll, whereupon he shall cease to be a member of the society.

(3) An advocate who has become a member of the Society under this section and who is suspended from practice shall not be entitled during the period of the suspension to any of the rights or privileges of such membership”.

Further grounds in support of the Notice of Motion are that the firm of Wambo & Company Advocates which is responsible for the drawing and filing of the Plaint the taking out all related proceedings and filing of documentation related thereto, all of which have been authored by the said Eric Otieno Advocate, is unknown to and not recognized by the Law Society of Kenya and no declarations as to the particulars and/or proprietorship have been filed with, nor payments made to the Law Society in respect of the said Wambo & Company Advocates as is required under **Section 30C** of the Advocates Act, in which case, the said Eric Otieno ought to be deemed to be operating the said law firm in contravention of **Section 30A** of the Advocate Act with the result that, the Plaint filed herein as well as the several applications filed by the said law firm, including the affidavits filed in support thereof, are incompetent and null ab initio and should to be struck out and/or set aside with all orders given thereunder being vacated accordingly.

In what is enumerated as ground (iii) of the Notice of Motion, the applicant refers to **Section 30C** of the **Advocates Act** as having not been complied with, yet the said Section was repealed under **Act No. 9 of 2000**. The application is supported by the Affidavit of the 3rd Defendant/Applicant sworn on behalf of the 4th and 5th Defendants/Applicants on 16th April 2010, and a Supplementary Affidavit sworn by the same party and filed on 17th June 2010, in response to the Replying Affidavit sworn by Eric Otieno Wambo on

26th May 2010, in opposing the application.

Briefly stated, the Applicant's position as demonstrated in the two affidavits is that at all times material to the Notice of Motion, the Plaintiff was represented by Eric Otieno Wambo, whose professional capacity as an advocate of the High Court of Kenya was irregular, clandestine and in contravention of the Advocates Act, yet, pursuant to orders made by the court in the Applications made by the said advocate, while not properly on record, the 3rd, 4th, and 5th Defendants have been punished by the court and continue to suffer prejudice, hence their prayer that the status quo be reversed, with the said Eric Otieno Wambo being punished and condemned to pay the costs of the suit and the present application in the circumstances.

In addition to emphasizing that all advocates are bound by the provisions of the Advocates Act as required under **Section 23(1)** hereinbefore cited, counsel for the Applicants submitted that under **Rule 12** of the **Advocates (Practice) Rules**, no Advocate can practice in a name other than his own name. Further, counsel set out four conditions which the Applicants say must be complied with for a person to be deemed competent to practice law as provided under **Section 9** of the **Advocates Act**. They state that one must:

1. **be admitted as an advocate**
2. **have his/her name for the time being in the Roll of Advocates**
3. **have in force a practicing certificate**
4. **have in force an annual licence**

Counsel submitted that if one of the said conditions is not met then a person is incompetent to practice law. Suffice it to say however, that, in view of the repeal and deletion of **Section 30C** as stated hereinbefore, this court holds the view that condition No. 4 above is no longer a requirement. To support the submissions made on behalf of the Applicants counsel cited the following authorities, in addition to the **Civil Procedure Act** and the **Advocates Act**:

1. **KENYA POWER & LIGHTING CO. LTD –VS- MAHINDA [2005] 2 E.A. 102**
2. **BELGO HOLDINGS LTD –VS- ESMAIL [2005] 2 E. A. 28**
3. **DELPHIS BANK LTD –VS- BEHAL [2003] 2 E.A. 412**
4. **OBURA –VS- KOOME [2001] 1 E.A. 175.**

In all these decisions a common ground is held that an advocate representing any party must be competent to practice law under **Section 9** of the **Advocates Act** and that all the conditions set out under the said section must be met. The failure to meet the conditions precedent renders a person holding himself out as an advocate incompetent to act as such, having no capacity to act as an agent of a party to proceedings, and therefore statutorily barred from preparing, signing and/or filing documentation including pleadings, affidavits, instruments and other processes which are the reserve of advocates, with the result that any pleadings, instruments, documents or proceedings so prepared, signed and/or filed are liable for striking out with penal consequences being imposed upon the culprit.

The background to the present complaints by the Applicants is that on 27th October 2008, the Plaintiff herein sued the Defendant/Applicants under a Plaint dated 24th October 2008, drawn and filed by Wambo & Company Advocates of Alibhai Shariff House 2nd Floor, Kimathi Street, Nairobi. Alongside the Plaint, a Chamber Summons bearing the same date was filed which was also drawn by the same Advocates, seeking orders of an interim injunction against the Applicants, restraining them *inter alia*, from proceeding with the transfer and/or further dealings with the property known as **L.R. No. 209/2489/22 Ngara**, the eviction of tenants from the said premises, demolishing, damaging, developing, leasing, letting or subletting or collecting rent from tenants in the said property or interfering with the existing tenancies pending the hearing of the suit. The said orders were sought pursuant to the prayers contained in the Plaint which also sought declaratory orders as follows:

(a) “That the usurious and exorbitant rate of penalties and interest charged on the Plaintiff’s accounts (with the 1st Respondent) is unlawful and unconscionable and should be set aside or cancelled and (the) property i.e. L.R. No. 209/2489/22 does revert to or be conveyed to the Plaintiff.

(b) That the sale of the property i.e. L. R. No. 209/2489/22 to the 2nd, 3rd, 4th and 5th Defendants is illegal and unlawful”.

The filing of the Plaint and the Chamber Summons were accompanied by the Plaintiff’s verifying affidavit also drawn and filed by the said Wambo & Company Advocates confirming that the Plaintiff had instructed the said advocates to file the suit.

The Chamber Summons, which had been brought under a certificate of urgency, was certified urgent by the Honourable Lady Justice Lesiit on 27th October 2008, and restraining orders in terms of prayers 2, 3, 4 and 5 thereof granted, pending the hearing of the Chamber Summons on 5th November, 2008. In its Replying Affidavit, filed on 4th November 2008, the 2nd Defendant/Respondent brought to the attention of the court that it had on 3rd September 2008, bought the suit property from the 1st Defendant/Respondent and that the transfer of the same had been completed prior to the filing of the suit. The said facts formed the crux of the 2nd Defendant’s defence filed on 25th November 2008.

On 10th December 2008 the Plaintiff/Respondent through the same firm of Wambo & Company Advocates filed a Notice of Motion dated 5th December 2008, praying that the 3rd, 4th and 5th Defendant/Applicants, and the General Manager of the 2nd Defendant be committed to civil jail for acting in contempt of justice Lesiit’s orders of 27th October 2008, pursuant to leave granted in that regard on 27th November 2008 in Miscellaneous Application No. 1034 of 2008 also taken out by the same advocates.

Before the contempt proceedings could proceed the 2nd, 3rd, 4th and 5th Defendant/Applicants filed a Notice of Motion seeking, mainly, to review, vary and set aside the orders of 27th October 2008 together with all orders subsequent thereto, and to have the suit struck out as against them and accordingly dismissed on the basis that the Plaintiff had no cause of action against them and that his remedy, if any, was limited to damages against the 1st Defendant, who supported the application. The application was heard before the Honourable Mr. Justice Kimaru who dismissed the same on the ground that it lacked merit. The judge’s decision was informed by the fact that, prior to the Plaintiff/Respondent’s injunction application was heard, the court file had disappeared, the Plaintiff “conveniently” evicted from the suit property and the same demolished. The court presumed a linkage between these acts and the filing of the Applicant’s Notice of Motion, which he concluded had been filed with the intention of forestalling the contempt proceedings and in furtherance of the scheme of subvert the course of justice. The judge directed that the contempt proceedings be fixed for a hearing on priority basis. Subsequent upon a Notice to Show Cause being issued, the contempt proceedings were heard before the same judge and the

Applicants found guilty. They were fined Kshs. 1 million each or 90 days prison term in default. They paid the fine.

Although they have filed an appeal against the said findings of the court and the punishment meted out against them, the Applicants proceeded to file the present application on the grounds already stated, tables having now turned against the person of the advocate under whose hand the whole process had been orchestrated. The Applicants caused a routine search to be conducted with the Law Society, as regards the professional standing and particulars of Wambo & Company Advocates, Eric Otieno O. and Eric Otieno Advocate who has appeared under either of the three names for the Plaintiff in the various proceedings and documents filed on behalf of the Plaintiff. To the Affidavit filed in support of the Notice of Motion now before court, the applicants have annexed the following documents:

1. Copies of the pleadings, proceedings and orders forming the subject matter herein
2. A letter from the Law Society of Kenya dated 1/4/2010 stating that it did not have any records of Wambo & Company Advocates nor of an advocate by the name Eric Otieno W. but confirming that the society had a member by the names Eric Otieno, who between 2007 and 2008 worked with Yano & Company and with Ombajo & Company in 2009 and another Eric Otieno Ojura of Kinyanjui & Njuguna & Company Advocates.

In reply to the Notice of Motion Eric Otieno Wambo filed a replying Affidavit to demonstrate that he is known by the three names which he interchangeably uses, referring to himself either as Eric Otieno, or Eric O. or Eric Etieno O. or Eric Otieno Wambo. He explains that Eric and Otieno are his given names while Wambo is his father's name. He depones in paragraph 13 of the Affidavit, that after his admission as an advocate in 2001 he was employed in the firm of Shichangi & Company Advocates for 2 years, then joined M/S Yano & Company Advocates where he worked for 1 year after which he joined M/S Marende & Company in Mombasa, worked for a year there, before returning to Nairobi to handle briefs for Mrs Alice Yano, Advocate, and M/S Ombajo & Company. Thereafter he set up his own law firm as a sole practitioner, under the name and style of Wambo & Company, having been advised that the name Otieno was not available for registration. He has exhibited to his replying affidavit his certificate of admission to practice law dated 12th April 2001, in the name of Eric Otieno and his certificate of registration of his business name under Wambo & Company Advocates issued on 18th July 2003, with a place of business at Plot No. 209/714/4 Jubilee Insurance Exchange House, Kaunda Street, and a Law Society Search Report (date not shown) giving his particulars as Otieno Eric Wambo P105 Number P. 105/4489/01, work place: Wambo & Co. Advocates: Physical Address: Uchumi House 19th Floor Door 9, Aga Khan Walk, Postal Address 1101-00100 Nairobi.

According to counsel the name Eric Otieno Wambo is the same name under which he practiced while in employment and that any confusion as to his particulars or the use of that name in the course of practicing law is cured by the fact that his admission number as entered in the Roll of Advocates and in the Law Society records has remained P. 1054489/01. He admits having registered a Deed Poll to permanently change his name and assume the name Eric Otieno Wambo for all purposes and causing a change to be effected in the Law Society Records in May 2010. Prior to that, he admits that he practiced as Eric Otieno but used the name Wambo & Company as his firm name firstly, because the name Otieno was not available for registration and secondly, to avoid being confused with many other Advocates listed in the Law Society records, under the said name. He swears also that he has always maintained a practicing certificate under Eric Otieno and paid the requisite practicing fees which, as is evident from the Law Society receipts (annextures "EO15") in which payments were receipted as being from Otieno Eric Advocate. Even after registering the firm name of Wambo & Company, he says he did not practice under it until he left employment in the year 2008. He, however, did not change his address as entered in the Law Society Records until he relocated to his current offices at Uchumi House. In the present suit where he represented the Plaintiff, the advocate states he acted pro bono and has even filed an affidavit sworn by the Plaintiff to that effect.

The Applicants' complaints herein are that the Plaintiff's Advocate has contravened the provisions of the Advocates Act by practicing law in a name other than his own. The relevant provisions of the Advocates Act said to have been contravened are **Sections 30A, 30C, 31, 32, 33, 34** and **35** of the Act and **Rule 12** of the **Advocates (Practice) Rules**. As earlier stated in this Ruling **Section 30C** was not in operation at the material time having been repealed in 2000.

Section 30A provides *inter alia* that

“Every person issued with a practicing certificate shall, if he intends to practice in his professional capacity require, in addition to such practicing certificate, an annual licence in the prescribed form for which he shall pay to the society a prescribed fee which shall be the aggregate of-

(a) Such annual fee as may be prescribed by the society under Section 81: and

(b) The sum of five thousand shillings or such sum as may be prescribed by the minister for the time being responsible for finance by Notice in the Gazette.

To my knowledge, the payment under **Section 30A (1) (b)** is no longer a prerequisite for practicing law following the scrapping of the annual licence with the repeal of **Section 30C**.

Under subsection 3 of **Section 30A** a person is deemed to practice in his professional capacity if he engages exclusively in his profession on his own account and is entitled to receive the entire amount of fees and charges earned for his own benefit or where he does so in a partnership with others and is entitled to a share of the profits earned by the partnership, for his own benefit and is also liable to bear a share of the partnership losses. The Plaintiff's advocate does not deny having been so professionally engaged while acting for the Plaintiff herein. He has demonstrated that he had been admitted as an advocate, (albeit that his name as appearing in the roll was either Eric Otieno or Otieno Eric) and that he all along had in force a practicing certificate. That being the case, he did, in my view pass the criteria for qualification to act as an advocate.

The question arising from the Applicants' complaint against him is whether by virtue of practicing under the name and style of Wambo & Company, drawing documents and taking out proceedings in that name, he should be deemed to have been an unqualified person for the purposes of **Sections 31, 32, 33** and **34** which prohibit unqualified persons from acting as advocates and thereby prescribing penal and other consequences in the event of breach. Having fulfilled the requirements of **Section 9** of the Act, I do not consider that merely by virtue of practicing under the name and style of Wambo & Company the Plaintiff's advocate became an unqualified person for the purposes of **Sections 31, 32, 33** and **34** of the **Advocates Act**.

The Applicants have not come out clearly as to how **Section 32** has been contravened but do strongly hold the view that by virtue of **Rule 12** of the **Advocates (Practice) Rules**, the actions by the Plaintiff's advocate in the conduct of these proceedings do contravene **Sections 31, 33, 34** and **35** of the Act. The relevant parts of the said provisions state as follows:

“31 (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 or defend any suit or other proceedings in the name of any 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

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33. Any unqualified person who willfully pretends to be, or takes or uses any name, title, addition or description implying that he is, qualified or recognized by law as qualified to act as an advocate shall be guilty of an offence.

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

(a)-----

(b)-----

(c)-----

(d)-----

(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;---

(2)-----

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

35 (1) Every person who draws or prepares or causes to be drawn or prepared any document or instrument referred to in Section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting to do so shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate;-----

Provided that-----

(2) The Registrar, the Registrar of Titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept or recognize any document or instrument referred to in Section 34 (1) unless such document or instrument is endorsed in accordance with this Section”.

Rule 12 of the Advocates (Practice) Rules provides that;

“No advocate shall practice under any name other than his own name or the name of a past or present member or members of the firm”.

I do not consider this rule to override the provisions of **Section 9** of the **Advocates Act** as relates to qualification or to constitute a valid ground to invoke the provisions of **Sections 31, 33, 34** and **35** of the Act. Rather I find it to be a rule made for the regulation of professional practice, conduct and discipline of advocates, the breach of which entitles any person to lodge a complaint with the Disciplinary Committee of the Law Society of Kenya. I say this because in my view, the said rule was formulated pursuant to **Section 81 (1) (a)** of the Advocates Act which empowers the Council of the Law Society to make rules with regard to the professional practice, conduct and discipline of advocates. **Subsection 2** of the said Section states quite clearly that if any advocate fails to comply with any rules made under the section, any person may make a complaint in respect of that failure to the Disciplinary Committee. Another reason for my concluding that **Rule 12** is subservient to the provisions of the Act is that under **Rule 14** of the **Advocates (Practice) Rules** the Council of the Law Society of Kenya is empowered to waive any of the provisions of the rules. No such power is conferred upon it, as regards the provisions of the Act itself. Had Parliament intended that the requirement as to the practicing of law, strictly under one’s own name be a reason for disqualification, it would easily have made it so when legislating the criteria for qualification.

No complaint has even been lodged with the Disciplinary Committee as to the use of the name Wambo & Company Advocates, even after the enquiries made by the advocate for the 2nd Defendant/Applicant herein. Moreover, the regulating authority, the Law Society of Kenya continued to issue the advocate with a practicing certificate. The present application, having been brought after the lodging of an appeal against Justice Kimaru’s Ruling, of 9th February 2010, can only, in my considered view, be deemed to be an afterthought.

It is not disputed that the Plaintiff’s advocate is bound by the provisions of **Section 23** of the **Advocates Act**. I accept that the authorities cited herein are relevant in as far as the law as relates to unqualified persons acting as advocates is concerned. However, the advocates cited in those judgments, having contravened the provisions of **Section 9** of the Act, which is not so in the present case, the said authorities are distinguishable. I am not persuaded that a case has been made out for striking out the pleadings and/or proceedings filed on behalf of the Plaintiff herein by Wambo & Company or orders made pursuant thereto, nor is it proved that Eric Otieno Advocate is in contempt of court in the context of the cited provisions of the Advocates Act. This court has neither the jurisdiction nor power to grant the orders sought under prayer (e) of the application which seeks the quashing of the Applicants’ conviction and refund of the fines paid by them. The same, in my view, can only be done by the Court of Appeal.

In view of my findings as stated herein-above I see no merit in the Notice of Motion dated 16th April 2010, and the same is hereby dismissed with costs to the counsel for the Plaintiff, Erick Otieno Wambo Advocate.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH day of FEBRUARY, 2011.

M.G. MUGO
JUDGE

In the presence of:

Mr. Mutuli

Mr. Kamau holding brief for Mr. C. Kihara

For the Applicant

For the Respondent