



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 37 OF 2011

IN THE MATTER OF ARTICLES 10, 19,20, 21, 22, 23, 27, 36, 47, 48, 50, 159, 259 AND SECTION 19 OF

THE SIXTH SCHEDULE OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 35 OF THE LAW SOCIETY OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 25 & 36 OF THE CONSTITUTION OF KENYA

BETWEEN

WILLIS EVANS OTIENO
PETITIONER

AND

THE LAW SOCIETY OF KENYA.....1ST
RESPONDENT

APOLLO MBOYA2ND
RESPONDENT

ATTORNEY GENERAL 3RD
RESPONDENT

RULING

On 9th of March, 2011 the petitioner through **Ruby Akinyi Okoth**, practicing in the name and style of **Ruby Okoth & Company Advocates**, filed a Petition dated 9th March, 2011 and an application dated 8th March, 2011. The application was made by way of Chamber Summons under **Articles 3, 10, 19, 20, 22, 23, 27, 36, 47, 48, 50 and 159** of the **Constitution of Kenya, 2010**, among other provisions of the law. The application seeks the following orders:

- “1. That this application be certified as urgent and be heard ex parte in the first instance;
2. That this honourable court be pleased to issue a temporary order to the 2nd respondent to include the applicant’s motion on the agenda for the Annual General Meeting scheduled for the 25th March, 2011 in the interim;
3. That without prejudice to the foregoing, the honourable court do restrain the 1st and 2nd respondents from reading the Notice convening the Annual General Meeting until the hearing and determination of this matter;
4. That the honourable court be pleased to issue such further order, writ, or direction as the honourable court shall deem to be just in the circumstances.”

The application was made on grounds that:

- By a notice delivered to the 1st respondent on 18th February, 2011, the petitioner expressed an intention to move a vote of no confidence against the Chairman of the 1st respondent at the Annual General Meeting of the 1st respondent to be held on 26th March, 2011.
- That the said notice of intention was made pursuant to Section 35 of the Law Society of Kenya Act (I believe the petitioner intended to refer to Regulation 35 of the Law Society of Kenya (General) Regulations).

- That the said notice of intention was filed and lodged within the time required for filing such motion under the Law Society of Kenya Act.
- That by a notice dated 7th March, 2011 the 2nd respondent circulated to the membership of the society the agenda of the said Annual General Meeting to be held on 26th March, 2011.
- That the said agenda as stipulated by the 2nd respondent did not include the notice of intention to move a motion as filed by the petitioner.
- That the failure by the 2nd and 3rd respondents to include the petitioner's notice in the agenda of the Annual General Meeting is not only a violation of the society's own statute but also infringes on the petitioner's fundamental rights.

The petitioner swore an affidavit in support of his application. The contents of the affidavit is a rehash with some amplification, of the aforesaid grounds.

The 1st respondent filed a Notice of Preliminary Objection and stated, *inter alia*:

- (a) That this court has no jurisdiction to compel the 2nd respondent to include the applicant's motion on the agenda for the Annual General Meeting.
- (b) Given that the petitioner has not sought nullification of the agenda dated 7th March, 2011 in respect of the said Annual General Meeting, this court lacks jurisdiction to restrain the 1st and 2nd respondents from reading the Notice convening the said Annual General Meeting which has not been challenged.
- (c) The petition seeks no relief against the 1st respondent whose AGM the Chamber Summons seeks either to stop or deal in a specific way. Accordingly, conservatory orders cannot issue against the 1st respondent as such orders could amount to final orders.
- (d) The petitioner's purported cause of action constitutes a dispute relating to the management of the affairs of the Law Society of Kenya which should be adjudicated upon by arbitrators pursuant to the Law Society of Kenya (Arbitration) Regulations, 1997.
- (e) The petition and the application were drawn and filed by an advocate who did not possess current practicing certificate and accordingly the said pleadings should be struck out forthwith.

Together with the Notice of Preliminary Objection the 1st respondent also filed a **Notice of Motion** pursuant to the provisions of **Legal Notice No. 6 of 2006** and **Section 9** of the **Advocates Act** and the Courts inherent jurisdiction. The 1st respondent sought to strike out the Petition and the Chamber Summons for being an abuse of the court process, having been filed by an unqualified person.

In an affidavit sworn by **Mr. Kibe Mungai**, the 1st respondent's advocate, he deponed that by a letter dated 10th March, 2011 his firm wrote to the Secretary of the Law Society of Kenya enquiring about the

status of Ms Ruby Akinyi Okoth as to whether she had a valid practicing certificate for the year 2011 as at 9th March, 2011. On the same day, he received a reply from **Marykaren C.K. Sorobit**, Deputy Secretary, (Compliance and Ethic), who informed him that the said Ruby Akinyi Okoth had not taken out her 2011 practicing certificate as at 9th March, 2011.

The 2nd respondent filed a replying affidavit and stated that according to his contract of employment, he is answerable to the Council of the Law Society of Kenya. He admitted that on 16th February, 2011 he received the Notice signed by the petitioner, of his intention to move a vote of no confidence in the Chairman and Vice Chairman of the Law Society of Kenya at the Annual General Meeting scheduled for 26th March, 2011. On 21st February, 2011 a letter withdrawing the motion received on 16th February and replacing the same with two separate motions of a vote of no confidence in the Chairman and the Vice Chairman of the Society was received. When he tabled the said notices in the Council meeting held on 21st February, 2011, the Council considered the motions and decided not to admit the same as part of the agenda of the Annual General Meeting. The Council directed the Secretary to inform the petitioner of its resolution which he did on 7th of March, 2011.

In response to the 1st respondent's application, the petitioner filed a replying affidavit stating that Ruby Akinyi Okoth lodged her papers for renewal of her practicing certificate for the year 2011 on 9th March, 2011. He annexed thereto the statutory declaration made by Ruby. The same shows that her last practicing certificate was issued on the 1st day of January, 2010 and expired on the 31st day of December, 2010. The declaration is dated 9th March, 2011 and bears a stamp which indicates that it was received at Secretariat of the 1st respondent on 14th March, 2011. The petitioner further contended that the 1st respondent issued a receipt on **10th March, 2011** in acknowledgment of the sum of **Kshs.16,860/=** paid to it by the said Ruby Akinyi Okoth on account of 2011 practicing certificate. He stated that he was aware that there is usually a pile up of documents at the 1st respondent's Secretariat which at time leads to a delay in receipting the same. He urged the court to disregard the objections taken by the 1st respondent regarding Ruby Okoth's practicing certificate, saying that **Article 22 (3)** of the **Constitution of Kenya, 2010** permitted the court to entertain proceedings relating to enforcement of the Bill of Rights even on the basis of informal documentation. He further cited the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya, 2010**, which requires that justice shall be administered without undue regard to procedural technicalities. In his view, the application by the 1st respondent was based on procedural technicality and thus offends the aforesaid provision of the Constitution.

Mr. Kibe Mungai filed a further affidavit in response to issues raised by the petitioner in his replying affidavit. He pointed out that when this matter came up for hearing on 15th March, 2011 the issue of the petitioner's *locus standi* and the right to participate in the proceedings on account of the competence of his pleadings was raised, he told the court that he is an associate in the law firm of Ruby Akinyi Okoth and Associates. Mr. Mungai contended that the said representation is false because the petitioner is employed as a Governance Specialist by Transparency International. That is what he stated in his statutory declaration accompanying the application for practicing certificate for the year 2011. A copy of the said declaration was annexed to Mr. Kibe's affidavit. The deponent further pointed out that Ruby Akinyi Okoth had not sworn an affidavit to state that she had been issued with a practicing certificate for the year 2011 as at 9th March, 2011. Mr. Mungai further stated that he had been informed by Miss Sorobit, the 1st respondent's Deputy Secretary, that whereas Ms. Ruby Akinyi Okoth paid for her practicing certificate on 10th March, 2011 at about 4.00 p.m. she presented her declaration on 14th March, 2011. The letter issued by Ms. Sorobit on 10th March, 2011 was released at about 11.30 a.m. and when Ms. Okoth got wind of issuance of the said letter she rushed to pay for the practicing certificate. Upon realizing that the situation had not been regularized, the petitioner filed a Notice of intention to act in person on 11th March, 2011. The said Notice is on record.

Lindon Nicolas Otieno Advocate, was joined in these proceedings as an interested party and supported the submissions made by the petitioner.

Parties filed their written submissions except the 3rd respondent who was presented by Mr. Onyiso, State Counsel. Mr. Onyiso simply submitted that the matters raised by the petitioner have nothing to do with the Office of the Attorney-General.

The first issue this court must consider is the propriety of the Petition as well as the Chamber Summons, dated 9th and 8th of March, 2011, respectively.

Section 9 of the **Advocates Act** states, *inter alia*:

“Subject to this Act, no person shall be qualified to act as an advocate unless –

- (a) he has been admitted as an advocate; and**
- (b) his name is for the time being on Roll; and**
- (c) he has in force a practicing certificate; and**
- (d) he has in force an annual licence.”**

An application for a practicing certificate is made to the Registrar of the High Court by delivering to him/her an application in duplicate signed by the applicant specifying his name and place of business and the date of his admission as an advocate and by producing evidence satisfactory to the Registrar that the applicant has paid to the Law Society of Kenya the fees prescribed for a practicing certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association. See **Section 22** of the **Advocates Act**. That in effect means that the statutory declaration must accompany the application as well as a copy of the receipt issued to an applicant by the Society upon payment of the necessary dues. Upon issuance of a practicing certificate, without payment of any other fee, subscription, election, admission or appointment, an advocate becomes a member of the Law Society of Kenya and the Advocates Benevolent Association. **Section 23 (2)** of the Act further provides that:

“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 practicing 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.”

The practicing year in respect of which a practicing certificate is issued runs from 1st January to 31st December. **Section 24(3)** makes it clear that every practicing certificate expires at the end of the practicing year in which it was issued.

In this case, Ruby Akoth Otieno was issued with a practicing certificate for the year 2010 on 1st January, 2010 and it expired on 31st December, 2010. On 10th March, 2011 she paid for 2011 practicing certificate but did not submit the statutory declaration that is supposed to accompany the application until 14th March, 2011. But even if the court were to give her the benefit of doubt and assume that the date stamp on the statutory form was imposed a few days after the statutory declaration was received at the Secretariat of the Law Society of Kenya, it can only be assumed that the declaration was received on the same date when the receipt was issued, that is, 10th March, 2011 at 16.01.35 hours. Between 1st January, 2011 and the said date Ruby Akinyi Okoth had not made any effort to renew her practicing certificate. The petition was drawn and filed by Ruby Okoth and Company, a sole practitioner, on 9th March, 2011. The petition was however signed by the petitioner as required. The Chamber Summons is dated 8th March, 2011 and was drawn and signed by Ruby Okoth. That in essence means that at the time of drawing and filing the Petition and Chamber Summons the said advocate did not have in force a practicing certificate for the year 2011. In the circumstances, Ruby Akinyi Okoth was not qualified to act as an advocate as at 9th March, 2011. She was not therefore competent to draw and file the Petition and the Chamber Summons. The Court of Appeal decision in **KENYA POWER & LIGHTING COMPANY vs CHRIS MAHINDA t/a NYERI TRADE CENTRE, [2005] 1KLR 753**, is sufficient authority for the aforesaid holding.

That deficiency cannot be cured by the Notice of Intention to act in Person that was filed by the petitioner on 11th March, 2011. As long as the documents on record had been filed by an unqualified person they cannot be validated by the petitioner's withdrawal of instructions from the unqualified advocate who had filed the same.

Having come to that conclusion, what should the court do in light of the submissions made by the petitioner that the court is obliged to disregard procedural technicalities in dispensation of justice? I do not agree with the petitioner that the issue of competence of pleadings, and particularly where such incompetence arises from circumstances as in this case, can be termed as procedural technicality. This is a substantive question of law which goes to the root of the matter. The provisions of **Article 159 (2) (d)** of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The Petition and Chamber Summons dated 8th March, 2011 must therefore be struck out with costs to the respondents, which I hereby do.

Having struck out the said documents, it will be superfluous for this court to consider the other issues which were raised by counsel. It will be a mere academic exercise and waste of scarce judicial time for this court to do so. Consequently, the 1st respondent's application dated 15th March, 2011 is granted with costs to be borne by the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Petitioner present

Mr. Kibe Mungai for the 1st respondent

2nd respondent present in person

No appearance for the 3rd respondent