



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 55 OF 2010**

**BISHOP PAUL AIGBOJE & 2 OTHERS.....PLAINTIFFS**

**VERSUS**

**MAGOMANO TRADING CO. LTD.....DEFENDANT**

**RULING**

Coram: Mwera J.

Sitati for Plaintiff/Respondents

Kiiru for Defendant/Applicant

Court Clerk Njoroge

In the chamber summons dated 10.10.10 the defendant invoked the old Order VI rule 13 (b) (c) (d), Order XXIX rule 4 of the Civil Procedure Rules together with section 9 of the Advocates Act and sections 3A, 63 of Civil Procedure Act for the main orders

(i) that the suit herein be struck out for being a grave abuse of the court process; and

(ii) that injunction orders issued herein be vacated.

Probably the 2 prayers should have been laid in the alternative because in the event prayer (i) is granted by striking out the suit, then the injunction (prayer (ii) ) automatically also goes. However, it was stated principally that the suit had to be struck out because it was instituted by an advocate who did not have a practising certificate.

In a short supporting affidavit James Karuga, a director of the defendant company deponed that the suit herein was instituted by Mr. Meshack Okoth Obura as an advocate for the plaintiff. Mr. Obura did not

have a current practising certificate at the time and therefore all was a nullity from the beginning. And a letter from the Law Society of Kenya(LSK) dated 19.05.10 was annexed stating that Obura Meshack Okoth last held a practising certificate in 2009. He had not taken out the 2010 practising certificate.

In the replying affidavit the said Mr. Meshack Okoth Obura stated **inter alia**;

**“ 3. That it is true that my practicing (sic) certificate had not been issued on 5<sup>th</sup> October, 2010.”**

He then annexed an application dated 13.8.10 by which a 2010 practising certificate was desired. It was then added that the respondent had brought this summons in bad faith by not filing a defence or filing papers to oppose the plaintiff’s application dated 4.2.10.

Directed to submit, the defendant/applicant urged the court to strike out the suit, terming it a non-starter, a nullity and an abuse of the process of court. It was submitted that Mr. Obura acting as the advocate of the plaintiffs, filed this suit on 5.2.10 together with an injunction application whereby the defendant was to be barred and was barred from interfering with their occupation of property LR 209/7609 SONULUX HOUSE, NAIROBI.

At that time Mr. Obura did not have a current practising certificate which he applied for 5 months later – on 13.8.10. He admitted that. As per section 9 of the Advocates Act, *the Act* as read with section 24 thereof Mr. Obura could not bring the proceedings herein. They should be struck out.

Briefly Mr. Obura argued that the present application was brought in bad faith and it was an abuse of the “Oxygen rule” (Sections 1A, 1B of Civil Procedure Act). And accordingly the plaintiffs should not be made to suffer because of the delay in obtaining and issuance of the practising certificate to him.

In this court’s view, it is not in doubt that Mr. Obura did not have a current practising certificate i.e. for the year 2010 when he filed the suit herein on 5.2.10. A letter from LSK (above) stated so and he himself admitted as much. He applied for such a certificate on 13.8.11 long after he filed this suit, in which he got injunction orders. Mr. Obura should no doubt be aware of section 9 of the Act which mandates that no person shall be qualified to practise as an advocate of this Honourable Court unless he has in force a current practising certificate. And that such practising certificate shall bear the date when it was issued and shall be valid from that date (Section 24) to the end of the calendar year. Mr. Obura had no such certificate to practise law as at 5/2/10 and so this suit should be deemed to have been instituted by a layman purporting to act as an advocate. With the provisions of law on this aspect so clear, this court was left wondering what bad faith prompted the defendant to bring this application and what constituted the abuse of the “oxygen rule.” Nothing whatsoever.

And with that the orders sought are granted with costs to be borne by Mr. Meshack Okoth Obura personally.

By the way this court should express its dismay and utter disapproval of the increasing cases of this type i.e. advocates going about to practise law without current practising certificates. Other incidents also worth mention, with disapproval, include advocates who after being admitted to the Roll proceed, to practise in their own names or as partners contrary to section 32 of the Act. These are indeed regrettable incidents in the legal profession by those few bent on committing them.

Delivered on 29.6.11.

**J. W. MWERA**

**JUDGE**