



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 37 OF 2011

CAROLINE W. WANJIHIA PLAINTIFF

VERSUS

RICHARD GATHECA NJOBA & ANR DEFENDANTS

RULING

Coram: Mwera J.
Non attendance for plaintiff
Githara for Defendants
Court clerk Kajuju

There are two applications together with a preliminary objection to which a composite ruling is expected to follow.

The first application is a notice of motion dated 2.2.11 by the plaintiff brought under sections 1A, 1B, 3, 3A of Civil Procedure Act and Order 39 rules 1, 2, 4, 5, 6 of Civil Procedure Rules.

The main prayers therein were:

- i) that a warrant do issue to arrest the 1st defendant to show cause why he should not furnish security for a sum of sh. 26m for his appearance;
- ii) that the property of both defendants including money in their named 2 accounts at Kenya Commercial Bank and Jamii Bora Bank together with a specified motor vehicle be considered sufficient to satisfy the decree that may be passed herein; and
- iii) In the ALTERNATIVE to prayer (ii) the defendants do furnish security in the sum of sh. 26m in 7 days or place property at the disposal of the court sufficient to satisfy the decree that may be passed.

In the 2 grounds stated the court was told that both defendants were truly and justly indebted to the plaintiff in a sum of sh. 25,879,700/=. That came about when the 1st defendant, managing director of the 2nd defendant, on his behest had the money lent. He then disappeared with no trace of where to find his assets. By that, the defendants were trying to delay or obstruct executing a decree that may be passed against them.

The plaintiff swore a supporting affidavit that between 2008 and 2010 the 1st defendant procured for himself and the 2nd defendant credits of up to sh. 49,179,701/=. It was partly repaid leaving a balance of sh. 25,879,701. The credits given on a friendly basis were to rescue the 2nd defendant from imminent collapse. The total sum was to be refunded by November 2010. But then the 1st defendant disappeared leaving no way to contact him. That conduct points to likelihood or intention not to honour the decree that may be passed here, hence this application. Documents were exhibited to evidence the transaction.

On 4/2/11 an *ex parte* order issued as per prayer (iii) above. The defendants instructed Mr. Githara who on 3.3.11 filed the second notice of motion:

- i) that the court's orders of 4.2.11 be stayed
- ii) that those orders be stayed then set aside or reviewed.

The defendants invoked Order 39 6 (2), Order 21 rule 22, Order 51 rules 1, 15 of the Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act.

It was contended in the grounds that the orders of 4.2.11 were obtained when the plaintiff falsely represented to the court that the 1st defendant had disappeared while in fact the parties had always been in contact. The alleged debt was not due and that the monies in question were not exchanged on a contractual basis but because of the intimate relationship between the plaintiff and the 1st defendant. In any event the plaintiff had received monies from the 1st defendant which offset the claimed debt. On obtaining the order of 4.2.11, which appeared to be final in the cause, the plaintiff had led her counsel directly to the 1st defendant's office in Westlands to serve the order contrary to the allegation that he had disappeared. The 1st defendant swore a supporting affidavit expounding on the stated grounds.

On being faced with allegations and counter-allegations as above the court granted in favour of the defendants, a stay of execution of the orders of 4.2.11 on 4.3.11.

On being served with the mention of 3/3/11 and the stay order of 4.3.11 the plaintiff filed a replying affidavit thereto. By it the defendants' application of 3.3.11 was termed as unprocedural together with the stay orders they obtained on the basis that they did that before or without responding to her application dated 2/2/11. She refuted the claim that the monies were exchanged on a social partner/intimate friend basis and not contractually. The two never had a joint venture and on the whole the 1st defendant's averments in the supporting affidavit were irrelevant. Then the plaintiff went on to provide evidence of the borrowing from her by the 1st defendant and his ownership of property including a villa. That replying affidavit came with grounds of opposition regarding the procedural aspect of filing the defendant's application which was considered bad in law and lacking in merits.

The 1st defendant filed a further affidavit on 6/4/11 with the main charge that the plaintiff's lawyer Mr. Christopher Mutuku was not having current practising certificate in 2011, having last held such a certificate in 2009 - Evidence from the Law Society in that regard was exhibited (RGN 13). Besides other averments, the 1st defendant urged the court to consider the pleadings herein a nullity *ab initio* because of the incapacity of the plaintiff's lawyer to lodge them.

The aspect concerning Mr. Mutuku, Advocate's lack of capacity to institute legal proceedings herein was the thrust of the preliminary objection lodged in court on 6.4.11 by the defendants.

When parties came to court on 13.4.11 Mr. Mutuku told the court that he wanted to consider the further affidavit of the 1st defendant touching on the question of his practising certificate. He wished to respond to it. The court granted both sides who had so far submitted on their respective applications, to file and serve whatever affidavit.

On 30/05/11 Mr. Mutuku had not filed any papers to counter the claim in the further affidavit of the 1st

defendant and the point of preliminary objection that he did not hold a practising certificate for 2011 when he instituted proceedings here-in.

The issue of whether Mr. Mutuku held a certificate to practise law in 2011 is fundamental. It must be dealt with first. It was averred in the said further affidavit that Mr. Mutuku was not licensed to practise law in 2011. Evidence from the LSK was appended and served. On 13.4.11 Mr. Mutuku told the court that he wished to respond to that allegation. He was granted leave to do that when the matter came up. On 30/5/11 Mr. Mutuku had not responded i.e. refuted the averment verbally or by affidavit.

Accordingly, it remains as the L.S.K. said in its letter to Mr. Githara, Advocate, for the defendants on 16.3.11 as regards Christopher Mutuku Advocate that:

“We confirm that the status of the Advocate is inactive. He last held a practicing (sic) certificate in 2009.”

Again, as stated above Mr. Mutuku sought and was granted leave to clarify/refute this status. He did not do so. Legal work done by an advocate who is not certified to practise law during the time of doing such work is a nullity. It is as good as having been performed by a layman pretending to be an advocate (see sections 9, 24 (2) (3) Advocates Act). Authorities on this aspect abound in our courts. So many decisions, they are, that it has become too obvious to recite them. The authorities have stated over and over again that an advocate not licensed to practise law by holding a current practising certificate covering the time he is engaged in given legal work, does nothing. All is void and **void ab initio**.

This is the case here. Mr. Mutuku engaged in legal work as an advocate when he was inactive – without certificate to practise. So all he did here from filing the suit to obtaining orders herein etc, is invalid, void and cannot be let to stand. And so even without going into the merits of the 2 applications, in the circumstances, on that account the suit, the application etc is struck out with costs to the defendants.

Orders accordingly.

Delivered on 13.6.11.

**J. W. MWERA
JUDGE**