**IN THE HIGH COURT OF KENYA**
**AT NAIROBI**

**CIVIL CASE NO. 488 OF 2010**

**LUMUMBA MUMMA & KALUMA ADVOCATES …….....…… PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION …… DEFENDANT**

**RULING**

Coram: Mwera J.
Kaluma for plaintiff
Agwara for Defendant
Court clerk Njoroge

On 21.2.11 the applicant herein, a firm of advocates brought a notice of motion of the same date under sections 1A, 1B, 3A of Civil Procedure Act and Order 51 rules 1, 15 of the Civil Procedure Rules. The main prayer was:

i) that the order of 15.12.10 herein be set aside.

The grounds stated that on the said 15.12.10 the applicant's bill of costs that had been filed herein was struck out for non-attendance, yet the applicant did not have notice that the respondent's application dated 29.11.10 was set down for hearing on that day. That by that application the applicants' personal and professional standing and reputation had been unjustly and undeservedly attacked, hence the need to hear that application dated 29.11.10 on merits. It was also misconceived and malicious. And that the party and party bill of costs whose outcome would prejudice the applicant, was due for hearing.

Thomas K'Bahati swore a supporting affidavit as an advocate and partner in the applicant firm. He said that when he was served with a copy of the application dated 29.11.10, it did not bear a hearing date nor was it accompanied with a hearing notice. So he assumed that that application was due for mention on 8/2/11 when the applicant's other bills of costs (in other causes – MISC APL. No. 485, 486 and 487 all of 2010) were due for taxation. Those other bills were listed on the said 8/2/11 before Dulu J, but this one (MISC. APL. No. 488/10) was not. So on inquiry Mr. K'Bahati, who was also referred to in these proceedings as Mr. Otieno, learnt that the cause had been entertained on 15.12.10. As stated, that the applicant had no notice of this date, yet the bill of costs dismissed was for sh. 500m or over and the application of 29.11.10 in which the order to strike out that bill had ***inter alia*** scandalised the applicant. This scandal transpired, in the proceedings, to have been by way of reference to the applicant firm as an illegal entity. So the applicant sought to set aside the orders of 15.12.10 to be able to canvass all that.

Among the annextures was a copy of the notice of motion dated 29.11.10 which did not bear the date on which it was due for hearing (Ann. Page 6) but was served on the applicant and acknowledged by

stamping on the same 29.11.10.

Prof Albert Mumma, advocate, acting for the respondent filed a replying affidavit in which he claimed:

**"3. THAT the purported applicant herein is non-suited and illegal entity with no legal capacity to file and/or sustain a claim before this Honourable Court as the purported firm of advocates is operating unlawfully and contrary to the provisions of section 32 of the Advocates Act, Chapter 16 of the Laws of Kenya. The respondent shall raise a preliminary point objection *in limine* and apply for the Application herein to be struck out with costs."**

And with that a bundle of documents was produced to which the court will revert in due course. In essence, it was deponed that the deponent Prof. Mumma, had discovered in 2010 that on 1.7.04, Peter Kaluma an advocate in the applicant firm and who argued this application, purported to join a firm of Lumumba and Mumma Advocates as a partner when he was only one year and seven months old in practice following his admission to the Roll of Advocates, contrary to section 32 of the Advocates Act, the Act, (above). Mr. Kaluma was enjoined by the Act to practise law on his own or as a partner after 2 years in practice with an eligible legal practitioner, if it should be added in paraphrase.

And it was added that Thomas Otieno K'Bahati (above) could not purport to depone on facts coming from the applicant firm where he was never a partner. He had committed perjury by doing just that. At this stage it may be noted that Mr. Otieno swore the supporting affidavit describing himself as a partner in the applicant firm. If he was not a partner as such, but an advocate "accommodated" at a fee there as the court heard at some stage, then if well seised of the facts of these proceedings, he should not possibly be barred from deponing to those facts. Anybody with facts about a given issue is competent to give them either orally or by affidavit. Mr Otieno K'Bahati did not do wrong, in the view of this court even if he was not a partner in the applicant firm, to depone to facts regarding a matter in respect of the applicant of which he had knowledge.

Prof. Mumma continued that when Mr. Kaluma joined their firm in July 2004, he was not aware that Mr. Kaluma was yet to qualify. Accordingly, the application under review was misconceived and untenable in law. The application dated 29.11.10 had properly led to the striking out of the bill of costs filed by the applicant because the applicant was an illegal entity - and not because the applicant did not attend court on 15.12.10. That application had been served duly bearing the date. This court should not countenance and seem to allow its officers to engage in unethical and dishonest conduct. This was exhibited in Annexture AM – 1 a certificate of registration of a change of particulars (Form BN/5) signed by the senior assistant registrar of business names on 23.7.2004 to the effect the business name of ***Lumumba & Mumma Company*** given registration certificate number 287446 of 15/9/1998 had the changes made in the particulars thereof now to read:

**"…….. Patrick Loch Otieno Lumumba, Albert Oduor Mumma and Peter Opondo Kaluma ……..**
***now registered as carrying on business*** **at …….. Finance House, Loita Street, Nairobi…… under the New business name of LUMUMBA, MUMMA & KALUMA COMPANY ……." (underlining supplied)**

And also exhibited was a declaration to accompany application for practising certificate for the year 2008 by Mr. Kaluma dated 11.12.07 wherein Mr. Kaluma stated:

**"3. That the nature of my engagement is as a PARTNER."**

And:
"**That my place of business is LUMUMBA, MUMMA & KALUMA ADVOCATES,"**
whose:

**"10…… name was entered on the Roll of Advocates on the 17th day of November in the year 2002 as being duly admitted."**

It is this bit of Mr. Kaluma joining the applicant firm as a partner which gave rise to the preliminary objection that he did so contrary to section 32 of the Act and accordingly that firm was an illegal entity.

As alluded to in the replying affidavit, a preliminary objection was filed on 1.3.11 by the respondent based on 5 points that:

i) this court had no jurisdiction to entertain this application which was filed by an illegal entity,
ii) that entity was thus non-suited and had no legal capacity to lodge and sustain the application,
iii) the applicant was therefore operating unlawfully and contrary to section 32 of the Act,
iv) it is against due process and public policy to allow an illegal entity to operate contrary to express statutory provisions, and therefore
v) this application is incompetent and fatally defective.

Then Mr. Kaluma filed a supplementary affidavit, without leave of the court, an aspect which was hotly contested in these proceedings both by a written and oral submissions. Indeed what had been billed as highlighting the written submissions ended in virtually oral submissions and that is what the court will rely on when reviewing the presentation of this application.

Mr. Kaluma went over the mother cause NRI HCCC no. 1467/05 which gave rise to the bill of costs that was struck out on 15.12.10. That the subject matter there was worth sh. 20.2 billion, against which instruction fee of sh. 503m had been raised. The details of the claim and what the applicant did to warrant that instruction fee was gone into as if the taxation was in progress – a matter considered irrelevant at this stage. Then the deposition moved into the history of the initial firm of Lumumba & Mumma Co. Advocates being registered and how those two people eventually retired from that initial outfit and/or when it changed to the present outfit. Then Mr. Otieno joined it taking 20% shares while Prof. Mumma and Mr. Kaluma had 40% each. Prof Mumma went on to register his own firm – Prof. Albert Mumma & Co. Advocates. The long and short of it was that the applicant firm is a legal entity engaged in lawful business and therefore warranted to institute and maintain proceedings as the current application.

The court heard in reference to this supplementary affidavit, which the respondent contested as to admissibility, that the applicant firm was only **registered** on 23.7.2004 but it did not **practise** in that name until 17.5.08 when it applied for and was given another registration FORM BN/5 to change particulars (see Doc. 29, supporting affidavit), exactly in the same detail as that one of 23.7.04. That was Mr. Kaluma's direction of argument. That that later registration was in line with the partnership deed dated 3.4.06 which stated that that was the date the firm of Lumumba, Mumma & Kaluma Advocates, the applicant, started to do business in that name and style.

In essence Mr. Kaluma's position on the 2 central issues to be determined here is that:

i) the applicant firm had no notice of the hearing of the application dated 29.11.10 on 15.12.10 and
ii) the applicant was a legal entity with capacity to institute and maintain causes/actions as this application dated 21.2.11 now before court.

In response Mr. Agwara had a different view on the 2 issues.

Beginning with serving the hearing date of 15.12.10, the court heard that the application was regularly served on the very 29.11.10 bearing that date. It was duly acknowledged by the applicant's rubber stamp. The applicant did not appear on 15.12.10 and the court granted the orders on the basis of the prayer that the applicant was not a legal entity, as it has been stated over and over again before.

Regarding the aspect of the applicant being an illegal entity, again what has been stated above was repeated. The applicant had taken on Mr. Kaluma as a partner on 23.7.04 before he practised for 2 years contrary to section 32 of the Advocates Act, and the applicant has continued to so operate to date – an illegality this court should not countenance or let stand and the following cases were cited: NRI HC MISC APPLICATIONS NO. 901 (consolidated) **Mohammed Ashraf Sadique** Vs **Matthew Oseko** t/a

**Oseko and Co. Advocates, The Fort Hall Bakery Supply Co. Ltd.** Vs **Fredrick Muigai Wangoe [1959]** EA 474, and In re **Padstow Total Loss** & **Collision Assurance Association** [1882] 20 Ch 137. The principles covered in these cases were mainly that a lawyer should not move to practise alone or in a partnership before 2years expire, practising with a qualified lawyer. And that an illegal entity cannot maintain a proceeding in court.

In this matter these proceeding start with the respondent's motion dated 29.11.10. The main prayer there was:

**" ( c) The Advocate – Client Bill of Costs herein dated 12th October, 2010 and filed the 13th October 2010 be struck out with costs."**

The main grounds on which this prayer was based were:

**"1. Lumumba, Mumma & Kaluma Advocates, is not an advocate capable of lodging and/or taxing an Advocate – Client Bill of Costs under the Advocates' Act Chapter 16 Laws of Kenya and the Advocates (Remuneration) Order.**

**……..**

**6. Lumumba, Mumma & Kaluma Advocates through which Peter Kaluma Advocate has purported to lodge this Bill of Costs is non-suited and an illegal entity with no capacity to lodge and/or tax the purported Advocate – Bill of Costs herein."**

The foregoing is sufficient extract from the application dated 29.11.10 which was lodged by the respondent's lawyer M/s Prof Albert Mumma & Co. Advocates. Prof Mumma, the principal in that firm, is the Mumma who features in the name of the applicant firm. An affidavit in support was filed by the corporation secretary of the respondent.

On 15.12.10 this application came up for hearing. Mr. Agwara appeared for the respondent/applicant while there was appearance by or on behalf of the advocate/applicant herein, who was the respondent in that application. Mr. Agwara told the court that the advocate/applicant/respondent had been served with the application bearing the day's date but had not turned up. And if it can be added, the court did not find any papers in opposition on the file. That the advocate/applicant had acknowledged receipt of the application by appending its stamp as per the affidavit of service filed. So the court should grant the prayer to strike out the bill of costs in question. On satisfying itself that due service of the application had been effected on the respondent, and that party had neither filed papers nor appeared in court to oppose that application, orders were granted. This ex-parte order is what prompted the present application.

Before determining this aspect, may it be noted that this ruling is to focus on the prayer to set aside the orders of 15/12/10, the preliminary objection herein and whether to admit and rely on the supplementary affidavit sworn by Mr. Peter Kaluma and filed in court on 07/3/11 without the court's leave.

To begin with after arguments and submissions the court was minded to admit the said supplementary affidavit, despite the fact that it was not filed with its leave. In referring to it the court considered it as a response to Prof. Mumma's replying affidavit on various points, including a claim that the advocate/applicant firm was an illegal entity. Filing an affidavit in a proceeding without leave of the court, when it had been considered that all that the parties had placed before the court, and the court had taken it that at that point, that the matter can be fully argued and a decision taken, it should not be allowed. Such filing can be considered as an ambush and clearly it does not permit the court to have charge of the proceeding before it. If such is allowed without sanction or bar, then it cannot be certain when more of such filings will end and proceedings begin. Such filing is therefore undesirable and that is known by all. So a court may decide to strike out or expunge such an affidavit filed without leave from the record or admit with/without leave to the other side to respond/reply accordingly. The court may as well consider to condemn the "offending" party in costs. In this case Mr. Kaluma did not seek and obtain the court's leave to file the subject supplementary affidavit. He did not even explain to the court why he

deemed it fit to file it without due leave. But be that as it may. That affidavit is admitted and its contents and annextures may be adverted to as and when deemed necessary.

Coming to the preliminary objection, it was argued along with the merits of the application under review. Beginning with the merits and particularly whether the notice of motion dated 29.11.10 was served on the applicant bearing the hearing date of 15.12.10, Mr. Agwara asserted and drew the court's attention to the affidavit of service sworn on 14.12.10 that indeed valid service was effected. Mr. Kaluma on his part maintained that the motion did not bear a date of its hearing – 15.12.10. The court sighted the copy placed before it and was inclined to agree with Mr. Kaluma that it did not bear the hearing date – 15/12/10. The copy placed before court by Mr. Kaluma did not bear such a date. It did not appear to have suffered any erasures to remove the hearing date in order to mislead the court so as to obtain favourable orders prayed. On that basis this court could have been minded to grant the order and set aside the ruling of 15.12.10. However, before getting to that point, the court had to address the preliminary objection centering chiefly on the claim that the applicant firm was an illegal entity that could not institute these or other legal proceedings before court, because one of the partners there, Mr. Kaluma had joined it contrary to section 32 of the Act.

That section reads:

"**32. (1) Notwithstanding that an advocate has been issued with a practising certificate under this Act, he has not engaged in practise on his own behalf either full-time or part time unless he has practised in Kenya continuously on a full-time basis for a period of not less than two years after obtaining the first practising certificate in a salaried post either as an employee in the office of the Attorney-General or an organisation approved by the Council of Legal Education or of an advocate who has been engaged in a continuous full-time practice on his own behalf in Kenya for a period of not less than five years."**

The other subsections of section 32 oblige the person engaging such an advocate to report the commencement and termination of such employment to the Council of Legal Education or the Registrar of the High Court. Section 32 came into operation wef 01.01.2000 by LN 94/99.

In our present cause it is alleged that Mr. Kaluma joined the applicant firm wef 30.7.2004 by filing a notice of change (FORM BN/4) dated 30.6.04. By it the registrar of business names was notified that the firm previously called Lumumba & Mumma Co. would wef 01.07.04 operate business under the name Lumumba, Mumma & Kaluma Co. the notice added:

**"2. Peter Opondo Kaluma has from the 1st day of July 2004 joined the business as a Partner."**

The notice was apparently signed by all the 3 "partners". Following this the registrar issued the certificate of registration of a change of particulars (on FORM BN/5) on 23.7.04 as earlier set out, with the names of the 3 partners. If it may be repeated that certificate said of the 3 partners Lumumba, Mumma and Kaluma that they:

**"…….. are now registered as carrying on business……"**

Accordingly and without evidence to the contrary, although Mr. Kaluma from the Bar appeared to refute this, the applicant firm herein with Mr. Kaluma as a partner started to do business by the nature of practising law in all its aspects with effect from 23.7.04. But had Mr. Kaluma been employed by the AG's Chambers, or an organization approved by the Council of Legal Education or an advocate of five years standing on a full time basis for 2 years from the time he was admitted to the Roll of Advocates in order to legally and validly join the other two as partners in the applicant firm? Not so, in this court's view. Mr. Kaluma was admitted on the Roll of Advocates on 17.11.02. By the 23.7.04 when he was registered as a partner in the applicant firm, he had been admitted to practise law for a period of about one year and seven months only. This he admits. But he argued that the applicant firm did not begin to practise law in its new name until the partners concluded a partnership deed dated 3.4.06 which specifically so stated. And that as at that time Mr. Kaluma had been in practice for 4 years with the firm of Lumumba &

Mumma mainly clearing what he termed a mess that was in that firm's office. The claim that the applicant firm commenced business in its new name on 3/4/06 was contained in the contested supplementary affidavit which the court admitted, though it was filed without leave. But what that affidavit did not attempt to place before the court was evidence that surely, the 3 partners of the applicant firm did not do business in that name since July 2004 OR that indeed they continued to practise as Lumumba & Mumma Advocates until 3.4.06. No documents, pleadings, letters etc were exhibited to confirm that claim. In all probabilities the applicant firm did not demonstrate that the 3 partners, including Mr. Kaluma who joined it before he served 2 years as per section 32 (above), did not carry out legal practice as such wef 23.7.04. Concluding that it did carry on business in the name of Lumumba, Mumma & Kaluma Advocates wef 23.7.04 while Mr. Kaluma had not done the mandatory 2 years from the time he was enrolled, necessarily leads to the finding that the applicant firm was an illegal entity in terms of section 32 of the Advocates Act. As an illegal entity the applicant firm could not institute and maintain proceedings in court or transact any business transacted by lawyers from 23.7.04 or at any time thereafter. And an illegal entity which essentially is non-existent cannot maintain an action in a court which finds that it was indeed non-existent. In the **Fort Hall** case (above) where the facts therein are not relevant here, the court said of the plaintiff:

**"It is not registered as a company under the Companies Ordinance [Act] or formed in pursuance of some other Ordinance or Act of Parliament or of letter patent. It cannot therefore be recognized as having legal existence ……..**

**A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.**

And with that the action, **Fort Hall Bakery** the plaintiff, had instituted was struck out and it was denied costs because it did not exist and so could not pay or receive them. So it is with these proceedings and the actions herein. As instituted by the applicant firm, they are struck out. The court heard that Prof. Mumma whose name appears in the applicant firm retired from it in 2008. In fact he is the one representing the respondent on instructions by the firm he registered. Lumumba had left earlier. Therefore costs will be paid **personally** by Mr. Kaluma and Mr. Otieno K'Bahati who have held themselves out as the partners in the applicant firm.

In reaching the above conclusion the court perused with appreciation and concurred with Onyancha J's long and well explained decision in the **Mohammed Ashraf** case above.

The learned judge went into detail referring e.g. to sections 31, 37, 38, 39 of the Advocates Act and of course section 32 being addressed herein.

So all in all the orders sought are refused. The application is struck out on the basis of the preliminary objection with costs being paid personally by Mr. Peter Opondo Kaluma and Mr. Thomas Otieno K'Bahati.

Delivered on 2/6/11

**J. W. MWERA**
**JUDGE**