



4. That all pleadings, applications, affidavits and any documents drawn and filed by Kenneth Watta, Advocate trading in the name and style of Watta & Associates in this suit, be expunged from the court record.
5. That the purported advocate/client bill of costs filed against the applicant in Milimani HCC MIS Case No. 988 of 2009 by Kenneth Watta, Advocate trading in the name and style of Watta & Associates, be struck out and expunged from the court record.
6. That it be declared that the firm of Watta & Associates as registered in breach of Section 32 of the Advocates Act is illegal, null and void.
7. That all the proceedings and judgment herein be set aside.
8. That this suit be struck out in entirety.
9. That appropriate disciplinary sanctions be meted against Kenneth Watta, Advocate trading in the name and style of Watta & Associates, Advocates.
10. That Kenneth Watta trading in the name and style of Watta & Associates be condemned to pay the costs of this suit and application.”

The two applications were supported by affidavits sworn by **Mary Wangari Wamae**, Strategy Director and Company Secretary of the plaintiff.

In respect of the first application, the plaintiff through the Company Secretary stated that this suit was filed purportedly on its behalf by Kenneth Watta for Watta & Associates Advocates without its authority. The Company Secretary further stated that the said advocate does not act for the Bank and neither was its firm in the panel of the Bank’s advocates. The Company Secretary further stated that the plaintiff received a letter from Neptune Credit Management Limited indicating that the said company had itself engaged Watta & Associates on behalf of the bank ostensibly as the part of a debt collection process. A letter dated 30<sup>th</sup> September, 2009 by Neptune Credit Management Limited addressed to the Chief Executive, Equity Bank Limited, was annexed to the affidavit of the Company Secretary. The salient part of that letter reads as follows:

**“This is to advise you that the application by Capital Construction Company Limited came up for hearing before Lady Justice Joyce Khaminwa on the 25<sup>th</sup> of September, 2009 and curiously, there was double representation given that Sichangi & Company Advocates also filed a notice of appointment of advocates on your behalf. .... We enclose herewith the replying affidavit by your Mr. Joseph Kamau duly filed for your perusal and detention. You will also note that M/S Sichangi & Company Advocates cannot act on your behalf on this matter granted they are acting for the bank with regard to the sale of L.R. 209/10568 (I.R. No. 42457) which is an issue in the instant suit at paragraph 11 of the plaint and they might be called upon to shed light on the same hence be potential witnesses. Consequently, we would appreciate if you could urgently sought out the issue on the said representation as we had engaged Watta & Associates as per the instructions given by your Mr. Joseph Kamau.**

Similarly, do urgently regularize the issue of the appointment of Mr. Willie Omoro as the receiver manager to enable us secure the cheque for the Kshs.400 million which is being fought by Capital Construction who are desperately trying to obtain the cheque from the Treasury and this would totally frustrate the concerted efforts and money that we have expended on this delicate matter.

Meanwhile we enclose herewith a copy of the plaint duly filed as per your instructions which we have served and the defendants have entered appearance.

**Yours faithfully**

**NEPTUNE CREDIT MANAGEMENT LIMITED**

**(Signed)**  
**BRYAN YONGO**  
**CC**

· **Company Secretary**

· **Joseph Kamau**

· **Stephen Gichohi”**

In the main suit the plaintiff had sued the defendants for recovery of a sum of **Kshs.725,132,446.41/=** together with interest at the rate of 24% per annum. The suit was filed on 2<sup>nd</sup> September, 2009. The verifying affidavit that accompanied the plaint was sworn by Joseph Kamau and reads as follows:

“I, **JOSEPH KAMAU**, a resident of Nairobi and of P. O Box 75104 – 00200 Nairobi in the Republic of Kenya do hereby make oath and state as follows:

**1. That I am the Fraud and Investigation Manager of the plaintiff and I have the knowledge of this matter on behalf of the company and I have been therefore authorized to swear this affidavit on behalf of the company.**

**2. That I have read and understood the content in the plaint and verify the same to be true.**

**3. That what is stated herein is true to the best of my knowledge, information and belief.”**

Subsequent to the filing of the said plaint, summons to enter appearance were issued on the same day and were duly served upon the defendants together with the plaint. **Messrs Otieno, Ragot & Company Advocates** entered appearance for all the defendants. The memorandum of appearance was filed on 25<sup>th</sup> September, 2009 and statements of defence were subsequently filed on 5<sup>th</sup> October, 2009. Messrs Watta & Associates filed a reply to the statements of defence on 7<sup>th</sup> October, 2009.

The Company Secretary further stated that Mr. Joseph Kamau did not instruct Neptune Credit Management Limited to instruct the firm of Watta & Associates on behalf of the plaintiff and in any event, the said Joseph Kamau has no power to instruct external counsel on behalf of the Bank. The Company Secretary cited to a letter dated 29<sup>th</sup> October, 2009 by Mr. Joseph Kamau to Neptune Credit Management Limited. The letter made reference to **Civil Suit No. 960 of 2009** and Mr. Kamau indicated that in a meeting held on 19<sup>th</sup> October, 2009 it was agreed that the Bank had appointed its lawyers to represent it in that suit and Watta & Associates would remain as lawyers appointed by and representing Neptune Credit Management Limited and Willie Omoro in the matter.

In April 2009 Mr. Kamau, for and on behalf of the plaintiff, had instructed Neptune Credit Management Limited to recover the sum of **Kshs.735,334,152.58/=** from the 1<sup>st</sup> defendant herein. The company was to be paid a commission of **15%** of the amount actually collected. As per a letter dated 6<sup>th</sup> April, 2009 the bank was not going to bear any costs incurred by the aforesaid debt collector other than the agreed commission.

In paragraphs 12, 13 and 14 of her affidavit, the Company Secretary stated as follows:

**“12. That Mr. Joseph Kamau’s role was simply to assist Neptune Credit Management Limited to the extent possible with their collection efforts and he signed whatever papers he was presented with by Neptune Credit Management Limited.**

**13. That I have since confirmed from the said Joseph Kamau, which information I verily believe to be true that he was misled by Neptune Credit Management Limited that the papers were**

required by them in the recovery efforts above.

**14. That the said Mr. Joseph Kamau does not work in the Legal Department of Equity Bank Limited, and does not, nor has he ever engaged legal counsel on behalf of Equity Bank Limited.”**

When Watta & Associates wrote to the plaintiff on 9<sup>th</sup> October, 2009 requesting for a deposit of fees, the Company Secretary responded vide a letter dated 5<sup>th</sup> November, 2009 requesting the advocate to avail a copy of the instructions given to him by the plaintiff. The advocates responded vide a letter dated 16<sup>th</sup> November, 2009 and stated, *inter alia*:

**“We reiterate that the instructions were given by the bank and your Mr. Joseph Kamau signed the verifying affidavits as a duly authorized officer of the bank.”**

That letter was in respect of **HCCC No. 559 of 2009, HCCC No. 645 of 2009 and HCCC No. 660 of 2009** which were all filed by Watta & Associates wherein the Bank was named as the plaintiff.

A replying affidavit was filed by **David Otieno**, an advocate practising as a partner in the firm of Otieno, Ragot & Company Advocates on behalf of the defendants. He stated that the plaintiff had filed a proper suit against the defendants and in one of the matters aforesaid, one Mr. Liko Advocates working with Messrs Sichangi & Company Advocates had appeared in court and introduced himself as appearing alongside Messrs Watta & Associates for the plaintiff. In his view therefore, Messrs Watta & Associates were properly on record, having been duly instructed by the plaintiff through Mr. Joseph Kamau.

In paragraph 9 of the replying affidavit Mr. Otieno stated as hereunder:

**“9. THAT I am informed by the Respondents which information I verily believe to be true that he said Mr. Joseph Kamau is a former Director of Criminal Investigations Department (CID) of the Republic of Kenya and a very enlightened person well versed with court matters and it is simply inconceivable and out of this world that he would be misled about the import of appending his signature to a document to be filed in court.”**

Mr. Otieno further contended that the plaintiff’s application had been triggered by a demand by the defendants for supporting documents to which the applicant refused to comply, prompting the defendants to file an application dated 28<sup>th</sup> October, 2009 to compel compliance with, which the applicant had not yet furnished answers to. In his view, the plaintiff’s action was an attempt to run away from the consequences of paying costs of the suit since it had realized that it had no credible case against the defendants.

Mr. Kenneth Watta also filed a replying affidavit and reiterated that he had filed the three aforesaid cases i.e. 559, 645 and 660 all of 2009, for and on behalf of the plaintiff herein, having been duly instructed by the plaintiff through Mr. Joseph Kamau, the plaintiff’s Fraud and Investigation Manager. In those cases Mr. Watta had received from the said Joseph Kamau all the security documents and other related documentation as would enable him fully represent the plaintiff in the suit. Further, after drafting the complaints, Mr. Watta discussed the same with the said Joseph Kamau who signed the verifying affidavits that accompanied the complaints.

In **HCCC No. 559 of 2009, EQUITY BANK LIMITED VS KARIM BADRUDIN JAMAL**, the plaintiff filed an application by way of a notice of motion seeking summary judgment in the sum of **Kshs.194,702,385.68/=** as against the defendant. The affidavit in support of the application was sworn by Joseph Kamau in his capacity as the Fraud and Investigation Manager of the plaintiff. The court allowed the application and entered summary judgment as prayed. In **HCCC No. 660 of 2009, CAPITAL CONSTRUCTION COMPANY LIMITED vs EQUITY BANK LIMITED, NEPTUNE CREDIT MANAGEMENT LIMITED and WILLIE OMORO**, Mr. Joseph Kamau swore a replying affidavit for and on behalf of the Bank and stated that he had been duly authorized to swear the same for and on behalf of the bank. The affidavit was annexed to Mr. Watta’s replying affidavit.

In paragraph 14 of the replying affidavit Mr. Watta stated:

**“That Mr. Kamau is the former director of the Kenya Criminal Investigation Department (CID) and was then in charge of recovery of the debt due to Equity by the defendant herein. Indeed he even retained services of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in HCCC 660 of 2009 in a bid to collect the bank’s debt in that particular account. The letter of instructions is annexed herewith and marked “KOW6”.”**

Mr. Watta urged the court to dismiss the plaintiff’s application saying that it was an abuse of the court process.

In respect of the plaintiff’s second application, Mrs. Mary Wangari Wamae stated that Mr. Watta was admitted to the roll of advocates on **23<sup>rd</sup> June, 2005** and paid for his practising certificate on 30<sup>th</sup> June, 2005. He did not however take out a practice certificate for the year 2006 and as such he could not have complied with the provisions of **Section 32** of the **Advocates Act** in respect of his practice for that year.

Mrs. Wamae further deponed that she had been informed by Messrs Sichangi & Company Advocates that:

- **Kenneth Watta took out a practicing certificate for the year 2007 on 11<sup>th</sup> October, 2007 and at that time he was not employed as required under Section 32 of the Advocates Act.**
- **Kenneth Watta took out a practising certificate for the year 2008 on 25<sup>th</sup> March, 2008 but he did not indicate his place of employment. In the declaration accompanying the application for practicing certificate for year 2008 he merely wrote “N/A,” meaning “not applicable.”**
- **That Kenneth Watta took out a practising certificate for the year 2009 on 30<sup>th</sup> January, 2009 and indicated in his declaration accompanying application for practicing certificate for the year 2009 to be Watta & Associates.**
- **That in the said declaration Mr. Watta indicated that he registered his firm, Watta & Associates Advocates on 29<sup>th</sup> April, 2008 under Certificate Number 508757.**
- **That by engaging in practice on his own behalf Kenneth Watta had breached the provisions of Section 32 of the Advocates Act.**

In support of the aforesaid averments the plaintiff annexed to its affidavit a letter dated 4<sup>th</sup> March, 2010 from the Law Society of Kenya addressed to Messrs Sichangi Advocates.

In view of the foregoing, Mrs. Wamae stated that even assuming that Kenneth Watta had instructions to act for the plaintiff he had no capacity to act in his name and as such all pleadings in this suit including a bill of costs filed by him in Milimani HCCC Misc. Case No. 988 of 2009 ought to be struck out.

In respect of the plaintiff’s application dated 20<sup>th</sup> April, 2010, the defendants filed a replying affidavit sworn by **Pauline N. Sewe**, an advocate practising in the firm of Otieno, Ragot and Company Advocates. She stated that the plaintiff’s application is not only strange and totally misconceived but is also an abuse of the court process. The plaintiff had filed the present application during the pendency of his earlier application dated 23<sup>rd</sup> November, 2009. Ms. Sewe added that even if Mr. Watta had acted in breach of **Section 32** of the **Advocates Act** the plaintiff cannot run away from the consequences of their own doing as it was not the defendants’ responsibility to ensure that the plaintiff engaged competent firms of advocates to institute suits on its behalf. She added that the firm of Sichangi & Company Advocates were complete strangers in the matter since they had acted in contravention of the mandatory provisions of **Order III** of the **Civil Procedure Rules**.

Mr. Watta did not file a replying affidavit to the plaintiff’s second application because he died in an accident that occurred on **1<sup>st</sup> May, 2010**. The Law Society of Kenya indicated that in his declaration accompanying the application for a practicing certificate for the year 2010 Mr. Watta had appointed **Mr. Alfred Ochieng Opiyo Advocate** of Nyandoro & Company Advocates to manage and complete all

pending briefs in his law firm in the event that he was not in practice for whatever reason. Mr. Opiyo could have filed a replying affidavit but he did not.

The parties were directed to file their respective written submissions and on behalf of Mr. Watta the submissions were filed by Mr. Ochieng Opiyo. Messrs Sichangi & Company filed submissions on behalf of the plaintiff while Messrs Otieno, Ragot & Company Advocates filed submissions on behalf of the defendants. I have carefully perused all the affidavits on record as well as parties submissions.

The hearing of these applications commenced before Apondi, J. but after his transfer from the station the task of finalising the same fell upon me.

The main issues for determination in these two applications are:

1. **Whether Mr. Kenneth Watta was duly instructed by the plaintiff to file a suit on its behalf.**
2. **Whether Kenneth Watta had legal capacity to take instructions and act for the plaintiff in this case.**
3. **Whether Kenneth Watta violated the provisions of Section 32 of the Advocates Act.**
4. **Whether the pleadings drawn by Kenneth Watta are competent or should be struck out as being incompetent.**
5. **Whether the defendants are entitled to costs from the plaintiff.**

#### **ISSUE NO. 1**

There is no dispute that the plaint herein was drawn and filed by Watta & Associates on 2<sup>nd</sup> September, 2009. Paragraph 1 of the plaint states that the plaintiff's address for service for purposes of the suit is care of Watta & Associates, Consolidated Bank, Koinange Street, Nairobi. The verifying affidavit that accompanied the plaint was sworn by Joseph Kamau, the Fraud and Investigation Manager of the plaintiff. **Order VII rule 1(2) (e)** of the repealed **Civil Procedure Rules** stated as follows:

**“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”**

It is therefore evident that Mr. Joseph Kamau swore the verifying affidavit for and on behalf of the plaintiff herein.

The plaintiff did not deny that the defendants, and in particular the 1<sup>st</sup> defendant, were not indebted to it in the sum of Kshs.725,132,446.41/= or thereabout. On 6<sup>th</sup> April, 2009 Mr. Joseph Kamau had written a letter to Neptune Credit Management Limited instructing the company to collect on behalf of the bank a sum of Kshs.735,334,152.58/=. The instructions were to expire within sixty days from the date of the said letter.

It is not clear whether the instructions were renewed after the said period or not. It would however seem that Neptune Credit Management Limited was still lawfully collecting the debt as at 29<sup>th</sup> October, 2009 when Mr. Kamau wrote a letter to the said company referring to various suits that had been instituted towards recovery of the aforesaid sum. That letter alluded to a meeting that was held at the bank's premises and attended by Mr. Muiruri, Mr. Stanley, Mr. Joseph Kamau and Ms. Florence representing Equity Bank and Bryan Yongo together with Abdul Malik representing Neptune Credit Management Limited as well as Mr. Kenneth Watta of Watta & Associates and Mr. Liko Advocate of Sichangi & Company Advocates held on 19<sup>th</sup> October, 2009. Following that meeting Mr. Kamau wrote the letter dated 29<sup>th</sup> October, 2009 which reads as hereunder:

**“Neptune Credit Management Limited  
P.O. Box 331-00660  
NAIROBI**

**Dear Sir**

**REF: CAPITAL CONSTRUCTION COMPANY LIMITED**

We refer to the above matter and write to highlight the issues that have transpired since the meeting we had with yourselves on 19<sup>th</sup> October, 2009 as hereunder: -

**1. Representation in Civil Suit No. 660 of 2009**

It came out very clearly that the bank has appointed Lawyers to represent it in the suit and that Watta & Associates would remain as lawyers appointed by and representing Neptune Credit Management Limited and Willie Omoro in the matter.

**2. Interpartes hearing on 22<sup>nd</sup> October 2009**

The hearing on 22<sup>nd</sup> October 2009 did not proceed but the court issued various Orders including that which required that Affidavits be filed and the matter proceeds by way of written submissions. We also note that no Orders were issued concerning representation. Please note that the bank's lawyers will file the affidavits if deemed necessary and will handle the submissions where the bank is concerned.

**3. Collection of the debt**

We look forward to receiving the payments noting that there are no Orders against the receivership.

**Yours faithfully,  
Equity Bank Limited  
Joseph Kamau  
FRAUD & INVESTIGATIONS MANAGER  
cc. Dr. James Mwangi  
C.E.O. – Equity Bank Ltd.  
Mary Wamae  
Company Secretary & Director of Corporate Strategy”**

It is evident from the aforesaid letter that there was some dispute in regard to the issue of representation but Mr. Kamau did not refer to this suit, he only made reference to HCCC No. 660 of 2009.

Did Mr. Joseph Kamau actually give instructions to Messrs Watta & Associates to file the suit on behalf of the plaintiff? Did Mr. Kamau have capacity to give such instructions to the said firm of advocates?

Mr. Kamau did not swear an affidavit to deny that he never gave such instructions inspite of the fact that he is a very central figure in these proceedings. The plaintiff's Company Secretary asserted that Mr. Kamau had no authority to instruct advocates on behalf of the plaintiff and that whatever papers he may have signed he was misled into signing the same by Messrs Watta & Associates. On the other hand, Mr. Kenneth Watta emphatically stated that he was given instructions to act for the plaintiff by Mr. Joseph Kamau. Such instructions were given in respect of the three matters. The verifying affidavit in this matter was no doubt signed by Mr. Kamau for and on behalf of the plaintiff. In the letter dated 30<sup>th</sup> September, 2009 by Mr. Bryan Yongo to the C.E.O. of Equity Bank, a copy of the plaint that had been filed was enclosed. Mr. Yongo stated that the plaint had been filed as per the Bank's instructions. It is trite law that a debt collector cannot commence legal proceedings against a debtor on behalf of a creditor.

In the absence of an affidavit by Mr. Joseph Kamau the plaintiff cannot state with any degree of certainty that Messrs Watta & Associates were not duly instructed to act for the plaintiff by Mr. Kamau. An outsider dealing with Mr. Kamau would not know whether he had authority or not to engage a law firm to act for the plaintiff. The **doctrine of in-door management** in company law operates to

protect outsiders against a company's internal operations and arrangements. The rule is to the effect that a person dealing with a company is entitled to assume, in the absence of facts putting him on inquiry, that there has been due compliance with all matters of internal management and procedure required by the articles. See **ROYAL BRITISH BANK V TURQUAND (1856) 6E & B 327 (Exchequer Chamber)**.

**Section 181** of the **Companies Act** states that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or disqualification. That means that even if Mr. Kamau was not authorized by the plaintiff to instruct advocates to act for the Bank, as long as he did that, his actions as far as outsiders are concerned remain valid and cannot be challenged on that ground alone.

Under **Section 34** of the **Companies Act** a contract can be made by parol on behalf of a company. **Section 34 (1) (e)** in particular states:

**“A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.”**

Such a contract is effectual in law and binding upon the company and its successors and all other parties thereto. An advocate dealing with Mr. Joseph Kamau as the Fraud and Investigation Manager could not have doubted that Mr. Kamau had express or implied authority to instruct him on behalf of Equity Bank.

Although Watta & Associates did not have any letter from Mr. Kamau instructing them to act for the plaintiff it is trite law that a retainer need not be in writing.

In **OHAGA vs AKIBA BANK LIMITED [2008] 1 EA 300**, it was held that a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order.

In this application the conduct of Mr. Kamau estops him from denying that he actually instructed Messrs Watta & Associates. He swore several verifying affidavits for and on behalf of the plaintiff. He even swore an affidavit in support of the plaintiff's application for summary judgment in HCC 559 of 2009 in which the plaintiff was granted summary judgment in the sum of Kshs.194,702,385.68/=.

The plaintiff is also estopped by its conduct from denying that the said advocate was instructed by Mr. Kamau to act for it. The plaintiff was aware that Messrs Watta & Associates had since early September, 2009 filed this suit on its behalf. I do not think that the plaintiff became aware of the matter when it saw the advocates letter dated 9<sup>th</sup> October, 2009 requesting for deposit of fees. The plaintiff was pursuing recovery of a substantial amount of money and I believe Mr. Kamau must have kept the plaintiff's top officers informed of the progress in the matter. Mr. Kamau's letter dated 9<sup>th</sup> October, 2009 was copied to the plaintiff's managing director as well as the Company Secretary and Director of Corporate Strategy. The letter dated 30<sup>th</sup> September 2009 by Mr. Bryan Yongo of Neptune Credit & Management was addressed to the Banks C.E.O. and copied to the Company Secretary and Mr. Joseph Kamau.

I do not agree with the plaintiff's contention that Mr. Kamau was misled by Neptune Credit Management Limited into signing all the affidavits that he signed for and on behalf of the plaintiff. Firstly, if that was so, nothing would have been easier than for Mr. Kamau to swear an affidavit to that effect. Secondly, Mr. Kamau is no ordinary man on the street. He is a very intelligent person, and having been the Director of the Criminal Investigation Department in the police force knows the ramifications of swearing an affidavit to be filed in Court and when he states that he has been duly authorized by the plaintiff to swear such an affidavit on its behalf, that must be taken to be so unless he personally convinces the court otherwise. It is not enough for a third party to state that Mr. Kamau had been misled into signing such an affidavit.

I therefore find and hold that Kenneth Watta Advocate trading in the name and style of Watta & Associates Advocates was duly instructed by the plaintiff through Mr. Joseph Kamau, Fraud and Investigation manager of the plaintiff to act for the Bank in this suit. If at all Mr. Kamau breached any internal protocol in giving such instructions the plaintiff is at liberty to take such action against him as may be deemed appropriate. But such breach, if at all, cannot affect the advocate or the defendants.

I now turn to the second and third issues which I shall dispose of together. **Section 32 (1) and (2)** of the **Advocates Act** states as follows:

**“(1) Notwithstanding that an advocate has been issued with a practising certificate under this Act, he shall not engage in practice on his own behalf either full-time or parttime unless he has practiced 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 organization approved by the Council of Legal Education or of an advocate who has been engaged in continuous full-time private practice on his own behalf in Kenya for a period of not less than five years.**

**(2) The person employing an advocate under this section shall in the prescribed form notify the Secretary to the Council of Legal Education and the Registrar of the High Court of the commencement and the termination of the employment at the time of commencement and at the termination.”**

The letter from the Law Society of Kenya that was annexed to the plaintiff’s affidavit indicated that the Law Society did not have details of Mr. Watta’s employment prior to the year 2009. The Society did not know when the firm of Watta & Associates was registered since it does not keep such details. If the advocate had been in employment from 2005 when he was admitted upto 2007, the earliest date he could have opened his own firm, the details of his employment could only have been with the Council of Legal Education and the Registrar of the High Court of Kenya. It was the plaintiff’s contention that the advocate had not been in any prior employment before he opened up his practice in 2009 and if at all he was, there was no evidence to that effect.

Despite the fact that the plaintiff’s application dated 20<sup>th</sup> April, 2010 was served upon the advocate sometimes in April 2010 no replying affidavit was filed by the advocate or by Mr. Opiyo who acted for the firm of the deceased advocate after his demise on 1<sup>st</sup> May, 2010. If at all the advocate had been in employment for two years prior to commencing practice on his own nothing would have been easier than so stating in an affidavit and such averment would have been backed by a letter from the Secretary of the Council of Legal Education or the Registrar of the High Court of Kenya.

In the absence of such an affidavit, the court is entitled to assume that indeed the advocate had not complied with the mandatory provisions of **Section 32** quoted hereinabove. However, the plaintiff’s Company Secretary stated in paragraph 10 of her affidavit that on 30<sup>th</sup> January, 2009 Mr. Watta had taken out a practicing certificate for the year 2009. He was therefore qualified to act as an advocate in terms of **Section 34** of the **Advocates Act** except that he was not qualified to practice on his own.

What then ought to be the fate of the pleadings that were drawn and filed by Mr. Watta under his firm name?

**Section 34(1)** of the **Advocates Act** prohibits an unqualified person from directly or indirectly taking instructions or drawing or preparing any document or instrument-

- (a) relating to the conveyancing of property; or**
- (b) for, or in relation to, the formation of any limited liability company, whether private or public; or**
- (c) for, or in relation to, an agreement of partnership or the dissolution thereof; or**
- (d) for the purpose of filing or opposing a grant of probate or letters of administration; or**
- (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.**

An unqualified person cannot also accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instructions or for the drawing or preparation of any such document or instrument.

In **MOHAMMED ASHRAF SADIQUE & ANOTHER vs MATHEW OSEKO t/a OSEKO & COMPANY ADVOCATES**, Nairobi High Court Miscellaneous Application No. 901 of 2007, Onyancha, J. dealt with a similar matter as this one where a Mr. Amadi was disqualified under **Section 32** of the **Advocates Act** from practising law on his own. The court held that the advocate was in contempt of court and was incapable of maintaining any suit for any cost in respect of anything done by him in the course of so acting.

In **NATIONAL BANK OF KENYA vs WILSON NDOLO AYAH**, Civil Appeal No. 119 of 2002, the Court of Appeal held that a document prepared by an unqualified advocate is invalid. I am in total agreement with the above findings.

Any pleading that was drawn by Mr. Kenneth Watta in violation of **Section 32** of the **Advocates Act** is invalid and is for striking out. That includes the plaint in this matter. Equally, the advocate could not file a bill of costs for recovery of any fees in respect of a matter filed contrary to the aforesaid mandatory provisions. That being the case, this suit is struck out in its entirety. The bill of costs that had been filed by the said advocate must also go.

Under **Section 27** of the **Civil Procedure Act**, the costs of any action, cause or other matter follow the event unless the court orders otherwise. In this instance, the plaintiff, through its Fraud and Investigation Manager, Mr. Joseph Kamau, instructed Mr. Kenneth Watta to file High Court Civil Suit No. 645 of 2009 against the defendants. The defendants instructed Messrs Otieno, Ragot who filed statements of defence and various other documents. The defendants are not to blame for the plaintiff's choice of its advocate.

The plaintiff had urged the court to order that the costs of this suit be paid by Kenneth Watta. There is no legal basis of making such an order. The said advocate died on 1<sup>st</sup> May, 2010 and that information was well known to the plaintiff since 5<sup>th</sup> May, 2010. No application was made by the plaintiff to amend its application and seek any orders against the administrator of the estate of the deceased advocate, if at all the plaintiff still wanted to pursue that prayer. A case filed against a dead person is a nullity and of no legal consequence. It was so held in **BABUBHAI DHANJI PATHAK v ZAINAB MREKWE [1964] E.A. 24**. The plaintiff must therefore bear the defendants' costs of the struck out suit. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2011.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**

**Muriithi – Court Clerk**

**Mr. Ochieng for the Plaintiff/Respondent**

**Miss Sewe for the Defendants**

**Mr. Mari for Mr. Anam for the Plaintiff**