



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 901, 933, 934, 935, 936, 937 & 938 of 2007

(CONSOLIDATED WITH MISC. APPLICATIONS NOS. 933, 934, 935, 936, 937 AND 938 OF 2007)

IN THE MATTER OF ORDER LII RULE 4 CIVIL PROCEDURE RULES

BETWEEN

MOHAMMED ASHRAF SADIQUE

HARBANS SINGH SOOR.....APPLICANTS/PLAINTIFFS

AND

MATTHEW OSEKO

T/A OSEKO AND COMPANY ADVOCATES.....RESPONDENTS/DEFENDANTS

R U L I N G

The applicants filed this and other various Originating Summons through their advocates M/s Koceyo & Amadi Advocates. The applications included Number 933, 934, 935, 936, 937 and 938 of 2007. These Originating Summons were later consolidated by a court order to be canvassed under the present application. Under the said applications the applicants through their said advocates required the respondent, M/s Oseko & Company Advocates to deliver a cash account in respect to certain cases in which Oseko & Company had represented the applicant(s) after receiving a deposit sum of just over One Million Kenya Shillings from the applicant, so that the balance from the deposit, if any, would be refundable to the applicant. Accountability was to be achieved through taxation of the Respondents bills. These Originating Summons were filed in this court in late November and early December 2007 and by April 30th 2008 the Respondent had filed a Replying Affidavit and a Statement of Grounds of Opposition.

In the Statement of Grounds of Opposition, the Respondent, inter alia asserted the following grounds: -

1. That the Plaintiff's firm of advocates had no capacity in law to draw and lodge these applications since the advocates did not qualify to practice law on their own as provided by the mandatory provisions of the Advocates Act

2. That the Plaintiff's advocates on record in these applications have purported to file the pleadings thereof in blatant contravention of Advocates Act, (Cap 16)
3. That the Applications were incurably defective and bad in law.
4. That, the Applications were an abuse of the court process and were therefore incompetent.

In the Replying Affidavit accompanying the grounds of opposition referred to above and sworn by one Mathew Ouma Oseko, the main partner in the Respondent firm, the advocate explained in details each ground of opposition above mentioned.

On 9th June, 2009 the consolidated applications were placed before me. Mr. Kurgat and Mr. Koceyo agreed then that a Notice of Preliminary Objection on points of law dated 16th March, 2009 and asserting that all the Originating Summons were incurably defective and therefore incompetent, should be heard first. They consented each to file a written submission on the points raised to be filed and served on the other side within 10 days.

On 23rd June 2009 both sides had complied and neither party wanted to orally add anything to the written submissions. The court accordingly fixed the 23rd July, 2009 to be the possible date for a ruling by court.

Before the said 23rd July, 2009, two events occurred. First, the Standard Newspaper of 20th July, 2009, published an article in reference to the awaited ruling with headline – **“FINGERS CROSSED AS NEW ADVOCATES AWAIT RULING”** with some photographs of judges including that of the presiding judge of this case. Secondly, Applicants advocates probably feeling aggrieved by what was written in the article, filed an application by a Chamber Summons dated 22nd July, 2009 seeking, inter alia, orders of stay of the impending ruling as well as leave to start contempt proceedings against the legal editor of the paper jointly with the firm of Oseko & Company Advocates.

When the case came up for the expected ruling on 23rd July, 2009, the court postponed the expected ruling to 23rd September, 2009 because the ruling was not at the time complete. Neither of the parties sought any interim orders or made any requests about the developments mentioned above.

Reverting now to the Notice of Preliminary Objection dated 16th March, 2009, which is the matter presently before me for consideration, it raises two issues.

1. That the Originating Summonses as drawn and filed is incompetent in law and is each an abuse of the process of the court.
2. That the illegality attending to the entire originating Summonses renders them incompetent which calls that they be struck out.

It is clear from these records therefore that the Respondent's intention in raising the Preliminary Objection is to have the proceedings in the several Originating Summonses numbered as No. 901, 933, 934, 935, 936, 937 and 938 of 2009, struck out at this stage. To that end the Respondent has to satisfy the court that the objection raised indeed satisfies the settled standard of a Preliminary Objection, as laid down by the court of Appeal in the case of **Mukisa Biscuit Co. Vs West End Distributors** (1969) E.A 697 where Law, JA. defined it as follows: -

“ A Preliminary Objection consists of appoint of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point, may dispose of the suit.”

In this case the Respondent who raises the Preliminary Objection argues that the firm of advocates of Koceyo and Amadi for the reasons to be examined and considered hereafter, is legally incompetent, not only in its registration as a partnership but also its practice as such law firm. The defendant further

argued that such registration of the Partnership and its practice of law is illegal and in contravention of the express provisions of Section 32 and other provisions of the Advocates Act, Cap 16 of the Laws of Kenya. While the plaintiffs denied breaking the provisions of the Act, it is nevertheless, correct to say that if the defendant's averment were to be ruled as correct, then preliminary point of law if properly argued, will have the ability to dispose of all these suits in the Originating Summons before the court at this preliminary stage. In the circumstances and in the absence of any different explanation on the point by the firm of Koceyo and Amadi Advocates the court accepted the fact that the preliminary points of law were properly and timely raised. Accordingly, the court will now consider whether the legal points raised have validity.

The facts which form the basis of the preliminary objections are as follows as the court understands them. The Applicants are presently represented by the firm of advocates called **KOCEYO & AMADI ADVOCATES**. The firm at all the material times, consisted of two partners who are **TITUS KOCEYO** and **EDDIE JATIANG'A AMADI**. The firm was registered on 13th July, 2006 by both Mr. Koceyo and Mr. Amadi. It is clear from the records of both sides that at the time, Mr. Amadi was engaged as a salaried employee of M/s Oseko and Company Advocates where he joined on 1st June 2006 after being admitted to the Role of Advocates on 18th May, 2006. This means that Mr. Eddie Jatiang'a Amadi started to practice law on his own although in partnership with Mr. Titus Koceyo, barely 43 days after starting his said employment with Oseko and company advocates.

It was argued therefore that conduct of the two advocates aforementioned was unlawful and contrary to the express provision of section 32 of the Advocates Act. The said provision states as follows: -

“Notwithstanding that an advocate has been issued with a practising certificate under the Act, he shall not engage in practice on his own behalf either full-time or part-time unless he has practiced in Kenya continuously on 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 an advocate who has been engaged in continuous full time private practice on his own behalf for a period of not less than five years.”

My understanding of the above section 32 of the Act is this: that a new advocate who has for the first time been admitted to the Bar and issued with a practicing certificate, does not qualify to engage in legal practice on his own behalf whether full time or part time; whether alone or in partnership, unless and until he has, for a continuous period of two years practiced as a salaried employee of a legally qualified person or organization. Such qualified person or organization include the Attorney-General's Office or any other organization approved by the Council of Legal Education. It also includes any advocate who has been engaged in a continuous full time legal practice for a minimum of five years.

Close scrutiny of the provision will confirm that the requirement to serve as a salaried employee by the newly qualified or admitted advocate, is mandatory. The legislature used the adverb **“shall”** to qualify the phrase **“not engage in practice.”** This to me mean's that neither the advocate nor the person or body authorized to give the advocate a practising certificate to practice full time or part time, has discretion to waive or remit the period of two years prescribed.

In this case before me M/s Oseko & Company for the defendants have first questioned Mr. Amadi's qualification under the provision of section 32 of the Advocates Act, Cap 16 of the Laws of Kenya. Their averment is that Mr. Eddie Amadi failed to serve or engage in a two year salaried employment under any of the persons or organizations prescribed under the section and could not therefore have qualified to practice independently or in partnership with Mr. Koceyo under the registered style name of Koceyo & Amadi Advocates.

I have carefully considered the above argument. I find as a matter of fact that Mr. Eddie Jatianga Amadi did not serve the two years period prescribed under section 32 aforesaid before starting to practice in the partnership. Indeed Mr. Amadi does not dispute or contradict that fact. The records, some of them from his deponements, confirm that he entered into partnership on 13th July, 2006, less than two months after being employed with salary by Oseko & Co. Advocates. There is no evidence that he was ever employed

by or under any one else prescribed under Section 32 of the Act.

Mr. Amadi in his affidavits and written submission in his defence, tends to argue that the Law Society had since admission issued him with the yearly practicing certificates. That for that reason he had legal authority to practice full time and that any claim that he was not qualified to so practise was a vendetta from his enemies. He added that even a complaint sent to the Law Society about his alleged non-qualification dated 30th April, 2008 by the firm of Oseko & Company Advocates, must have been dealt with by the Law Society in Koceyo & Amadi Advocate's favour since nothing came out of it and since the Law Society instead, wrote back a letter of commendation assuring of their good conduct.

The conclusion I however arrive at in respect to the specific issue in hand is that Mr. Eddie Jatiang'a Amadi, notwithstanding that he had been issued with practicing certificate(s) under the relevant Act, on 18th July, 2006 or thereafter to date, had no legal authority to engage in practice on his own behalf, either full time or part time. The reason for this conclusion is that he has to date not continuously practiced in Kenya on a salaried post under any of the persons or organizations prescribed under section 32 of the Act for a period not less than two years. To hold differently would be to interpret the section with a meaning totally different from that which it clearly and expressly holds. Indeed as I had earlier pointed out, and as the provision of the section expressly provides, the issuance to Mr. Amadi of the practicing certificate whether immediately after being admitted to the Bar or year after year thereafter, do not change the sanction in the section nor alleviate the legal requirement of the section to serve a mandatory two year salaried employment.

It is not clear from the record whether the Law Society had information that Mr. Amadi was practicing law full time or part time on his own behalf without first having served in the two year salaried post as prescribed by section 32 of the Act. A fairer assumption by the court would be that the Law Society did not have the said information. This is likely to be so because issuance of a yearly practicing certificate is a yearly legal requirement to authorize every advocate to practice law in the relevant year whether it be under an employer as envisaged under section 32 of the Act or independently by those qualified to practice full or part time. That is to say that the yearly practicing certificate that would be taken out by Mr. Amadi during the two years during which he would be serving in a salaried employment would be only and merely to authorise him to practice law in the salaried post. It would not in any way in itself, authorise him to engage in practice on his own behalf, whether full time or part time as he tended to suggest.

Facts on the record before me also show that Mr. Eddie Jatiang'a Amadi sought employment in salaried post from the firm of Oseko & company Advocate by his letter dated 19th April 2006. He in his said letter pointed out that he expected to be admitted to the Kenya's Roll of Advocates in May 2006. He apparently, had been retained in a holding-over capacity by the same firm since March, 2005. Mr. Amadi, expressed the clear view that he wanted employment with Oseko & Company Advocates to "**master the legal advocacy skills of an advocate of the High Court of Kenya**". The record further shows that the firm of Oseko & Company offered Mr. Amadi the job as an associate advocate with effect from 1st June, 2006 at a monthly salary of Kshs.35,000/- and at the end of June 2006 Oseko & Company paid for Mr. Amadi's 2006 practising certificate. Mr. Amadi does not deny the fact that he worked for Oseko & Company until 30th March 2007. To qualify to practice independently under section 32 of the Act, Mr. Amadi needed to serve in a salaried employment up to and inclusive of 31st May 2008, assuming that such employment was not for one reason or another, terminated. As it happened, he left the said employment on 30th March, 2007 after a period of only nine months. It is averred by Oseko & Company Advocates that Mr. Amadi thereafter, openly started to run the firm of Koceyo & Amadi Advocates which fact is indeed not denied by Mr. Amadi.

Koceyo & Amadi Advocates as the record confirms, was the firm set up and registered by Mr. Titus Otieno Koceyo and Eddie Jatiang'a Amadi as a business name on 13th July, 2006. There is ample evidence to confirm and it is also not denied by those concerned, that by that date, both Mr. Koceyo and Mr. Amadi were still salaried employees of the firm of Oseko & Company Advocates. The position appears to have remained so until 30th March, 2007 when Amadi left for Koceyo & Amadi Advocates

followed by Mr. Koceyo on 1st October, 2007. The two have apparently continued to practice under the same business name to date.

There is no reason to think that the business name Koceyo & Amadi was not properly thought out by the two partners concerned before it went for registration. The relevant application forms must have been filled and signed by both parties before being submitted for registration. Indeed even after the registration and obtainance of the registration certificate, neither of the two partners, Amadi and Koceyo, showed any genuine concern or worry that the registration was illegal or incompetent; not even after Oseko & Company raised its complaints about the possible illegality or incompetence of the firm's existence.

It is baffling therefore that earlier on Mr. Koceyo on being confronted over the issue of the firm's possible illegality appeared to feign ignorance of material information about the registration of the firm. My view and conclusion from the facts before me is that Mr. Koceyo and Mr. Amadi as employees of the firm of Oseko & Company Advocates then, must jointly and severally have agreed to form and register their own law firm to which they intended to migrate later. If the two, meanwhile, intended to use their employment and positions with Oseko & Company to poach clients to their newly formed firm as M/s Oseko & Company asserted, would indeed be a serious possibility but an issue that is not before this court presently. What cannot be denied however, is that Mr. Amadi and Mr. Koceyo finally migrated to Koceyo & Amadi advocates to run it independently and have done so to the present time.

It is not denied by Mr. Amadi or by Mr. Koceyo that on 13th July, 2007 when they formed and registered the firm, Mr. Amadi had served in the salaried employment with Oseko & Company, for only nine months. Mr. Amadi was clearly not qualified and had no legal capacity to join Koceyo to form the firm for practising purposes. The two nevertheless went ahead and deliberately formed and registered the firm, notwithstanding Mr. Amadi's incapacity.

I have carefully examined Mr. Amadi's and Mr. Koceyo's affidavits in the court file record in response to the accusations made against each of them. In relation to the provisions of section 32 of the Act, Mr. Amadi does not deny, but indeed admits that he served in a salaried post with Oseko & Company for only nine months out of the 24 months prescribed by law. He also does not deny the fact that he jointly with Koceyo, formed and registered the firm of Koceyo & Amadi Advocates just within 43 days of the starting of his salaried employment. Clearly therefore section 32 disqualified Mr. Amadi from practicing law independently on full or part time basis under any name and/or style. The provision in my view declares Mr. Amadi or such class of persons or advocates as "**unqualified**" for its purposes and specifies the manner they should be dealt with under section 33 which states: -

"Any unqualified person who willfully pretends to be or takes or uses any name, title, addition or description implying that he is qualified to act as an advocate, shall be guilty of an offence"

Mr. Amadi in his affidavit sworn on 15th June, 2009, calls himself an advocate of the High Court of Kenya practicing as so in the law firm of Koceyo & Amadi Advocates, which firm's name he depones, was lawfully and duly registered on 13th July, 2006. The view taken by the court, however, is that Mr. Amadi is an unqualified person who since the registration of the firm of Koceyo & Amadi Advocates, has pretended to be or has taken or used the name, the title, the addition or description of or implying that he is qualified to act as an advocate. There is clear evidence on record that he was very early in time warned by the firm of Oseko & Company that his conduct amounted to a criminal offence(s) contrary to the various provisions of the Advocates Act. Mr. Amadi however, has continued to conduct himself as a qualified advocate and persistently so without regard to the relevant law particularly, in this respect, section 33 of the Act.

Mr. Amadi also in admitting in his affidavit that he is and has practiced law under the name and style of Koceyo & Amadi Advocates, expressly or impliedly admits that he directly or indirectly takes or has taken instruction and has drawn or prepared documents or instruments filed in court or in relation to social, business or economic activities. Such activity and conduct by a person or advocate who is unqualified, as is Mr. Amadi, may be in direct breach of section 34 of the Advocates Act which states: -

“No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument: -

- (a) relating to the conveyancing of property**
- (b) for, or in relation to, formation of any limited liability company,**
- (c) for, or in relation to, an agreement of partnership or dissolution thereof.**
- (d) for the purpose of filing or opposing a grant of probate or letters of administration**
- (e) for which a fee is prescribed by an order made by the Chief Justice under section 44**
- (f) relating to any other legal proceedings”**

It is also clear to me from the law that such unqualified person shall not accept or receive directly or indirectly, any fee, gain or reward for taking of any such instructions.

Finally, Mr. Amadi appears to be also caught in the general web of section 31 of the Advocates Act which forbids any unqualified person to act as an advocate or as such to cause any summons or other process to issue or to institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction. The section creates a contempt offence committed before the court, punishable instantly.

Disqualification of Mr. Amadi to engage in practice in a full or part time capacity under section 32 of the Act in my opinion disqualifies him from joining in partnership with any other person. Only qualified advocates can join and practice together under a registered business name. This is because their ethical and legal duties to members of the public as well as the court to which each advocate is an officer, are both individual and joint even if they operate under a joint name. A partner, in my view, would be an agent of the other partner in matters affecting the partnership. That is why a qualified advocate cannot share a professional business partnership with another who is unqualified. The legislature has gone to great lengths in regulating against any improper or unprofessional relationships. Section 37 of the Advocate Act states: -

“Any advocate who agrees to share his profits in respect of any professional business, whether contentious or non-contentious, with any person not being an advocate or other duly qualified legal practitioner (by whatever name, called) shall be guilty of an offence.....”

Section 37 above appears to mainly affect Mr. Koceyo’s conduct. In agreeing to carry on a professional partnership business with Mr. Amadi, he must have entered into some agreement with him to share profits of the business. It is only logical for this court to make such an assumption, especially since the two advocates who had opportunity to deny or explain the said arrangement chose to keep silence. Mr. Koceyo rightly, in my view, did not attempt to deny or contradict the implication that Mr. Amadi was a partner in the firm. The conclusion I reach, accordingly is that Mr. Koceyo Advocate shared and is presently sharing his profits in respect of his professional business with Mr. Amadi through the firm of Koceyo & Amadi in a probable contravention section 37 of the Advocates Act.

Mr. Koceyo Advocate also in my view and finding, at least for the purpose of this matter before me, has probably contravened the provision of section 39 of the Advocates Act. This is because, being or purporting to be a partner with Mr. Amadi in their said firm, he likely acted as an agent of Mr. Amadi in every case or matter in which the firm has been instructed to date. Mr. Koceyo has thus permitted his name or that of the firm in which he is a partner, to be made use of in such suits or matters upon the account and for the profit or advantage of Mr. Amadi who is an unqualified person and/or partner. Mr. Koceyo has since the registration of their firm as an advocate conducted himself through the partnership business in a manner that enabled Mr. Amadi to appear or act or practise as an advocate in all the matters or cases in which Mr. Amadi appeared or acted in spite of the fact that Mr. Koseyo knew or had reason to

know that Mr. Amadi is not qualified to act or appear or practice as such advocate.

The conclusion that follows is that Mr. Koceyo being an advocate of the High Court of Kenya and knowing or having reason to know that Mr. Amadi was a person not qualified to practice law independently, nevertheless went ahead to unlawfully assist him as partner and agent in the firm of Koceyo & Amadi. That way he enabled Amadi to practice law in probable contravention of section 39 of the Advocates Act.

The firm called Koceyo & Amadi Advocates is in my humble finding an illegal structure in so far as it incorporates an advocate who had no capacity to practice law for being an unqualified person under the provisions of the Advocates Act. The illegality of the firm, in my finding started from the date it was registered which was 13th July, 2006.

Mr. Amadi suggested that the illegality of the existence of the firm ended when he attained two years of legal practice from the 1st of June, 2006 when he started being employed with salary by Oseko & Company Advocates. However, in my understanding of the facts of this case and of the provision on section 32 of the Advocates Act, Mr. Amadi's above interpretation cannot be correct. The provision requires a newly qualified advocate whose name has been admitted to the Roll of Advocates and who has been given a practising certificate, to first work as employee with a salary under a more qualified prescribed advocate for a period of at least two years. The two year practice is clearly mandatory. No one therefore, has power to reduce the period, or alter the nature of it. While in my understanding the period of 24 months may be served from time to time and also be served under more than one employer, nevertheless, the cumulative period must add up to 24 months before a certificate of compliance is issuable.

In this case Mr. Eddie Jatianga Amadi engaged in a salaried employment under Oseko & Company Advocates for a period of nine months before breaking away to join the illegal firm of Koceyo & Amadi Advocates. The evidence leaves no doubt that he served at Koceyo & Amadi's as a partner and not as a salaried employee. This to my mind and in the absence of any evidence to the contrary, means that he still has more time to serve as such employee in order to satisfy the requirement of section 32 of the Advocates Act.

Part VIII of the Advocates Act, consists of sections 31 to 43. These in my opinion are provisions intended by Parliament to control and keep out unqualified persons from purporting or attempting to practice law. History can confirm that when after independence education expanded in Kenya the number of students who chose to become lawyers also grew rapidly. The thirst to learn and practice law overshadowed the need to keep and maintain the existing ethical rules of practice of the legal profession. Such rules most of which are as old as the law itself were established in Kenya over the years of colonial rule. The rules and regulations were adopted with the purpose of maintaining and sustaining the respect and integrity of the Judiciary as the origin and foundation of justice. Accordingly those who got the privilege to practice law before the courts needed to be trained to be persons of high moral and ethical standards as well as unquestionable honesty and integrity. This is because they have to be trusted by their clients as they fearlessly present the latter's causes. Their behaviour is expected not display dishonesty, double-dealing or trickery. They should on the other hand be frank and reasonable without in any way betraying their clients cause. They should not be enemies of the court of which they are part as officers nor enemies of their colleagues on the opposite side to whom they will never easily give way until they have done everything possible to protect their clients' rights within the realm of propriety.

The ideal standards resonated above were bound to be breached not only due to basic human nature but also due to other negative forces introduced into the legal profession owing to the influx of newly qualified advocates searching for easier ways and means of making a living. In these circumstances Parliament, from time to time, had to establish a minimum code of conduct for regulating the behaviour of a practising advocate to words the court and towards his client, towards his adversary in law and, even towards himself as a member of the legal profession. Such code of conduct in my view, is the one found in the Advocates Act and in the regulations promulgated under it. The said code of conduct, the rules and the regulations, are meant to protect members of our society who at one time or another, find it necessary

to deal with or require the services of, advocates.

It can therefore be said with confidence that no advocate will in Kenya, properly practice law without adhering to the code of conduct prescribed by our law, whether it be written or unwritten. For that reason the said law prescribes steps which a person who wishes to practice the discipline or profession of law must take or maintain in order to qualify to do so. The basic purpose for such prescription by the legislature was in my view, correctly and aptly put by Lenaola, J. in the case of **BELGO HOLDINGS LTD V. ESMAIL** (2005)2 E.A., 28 at page 30 where he stated thus: **“The reason as I understand it is so that no quack can pretend to practice law and those who are indeed qualified renew their commitment and adherence to their oath of office every year. By so doing there is imparted in the practice the kind of discipline that is of utmost importance in the profession.”**

To the above end, the Advocates Act has prescribed specific sanctions for non-compliance of its provisions by both the qualified and the non-qualified persons. I will now turn to examine the consequences of failure to comply with the said provisions.

Sections 31 and 33 of the Act forbid with serious sanction, any unqualified person from practicing law as an advocate. They forbid such a person from causing any summons or any other process from issuing. They further forbid such a person from instituting, carrying on or defending any suit or any other proceedings in his own name or in the name of any other person in any court of civil or criminal jurisdiction.

Similarly, section 34 of the Act forbids an unqualified person from directly or indirectly taking instructions from or drawing or preparing any document or instrument relating to conveyancing of property, formation of companies, formation of partnership agreements, filing or opposing a grant of probate or letters of administration, relating to any other legal proceedings or/and for doing anything that the Chief Justice has prescribed a fee.

I have no hesitation therefore, in finding that as such unqualified person under section 32, Mr. Eddie Jatianga Amadi is alone squarely netted up under sections 31, 33 and 34 of the Act. Similarly Mr. Titus Koceyo is individually in contravention of section 37 and 39 in sharing profits with and in allowing himself to act as an agent or partner of Mr. Amadi in the firm of Koceyo & Amadi Advocates and in so doing, permitting his own name or that of the firm to be made use of by Mr. Amadi to practice law when Mr. Amadi was unqualified to do so.

The direct consequences of contravening the provisions of section 31 by Mr. Eddie Jatianga Amadi are specified in the provisions. He is deemed to be: -

- a) in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken and he may be so punished accordingly.
- b) Incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting.
- c) In addition, guilty of a criminal offence clearly punishable under section 85 of the Act which provides a fine not exceeding one hundred thousand or imprisonment for a term not exceeding two years or both.
- d) In pretending to be advocate and/or using a name, title, addition or description implying that he is advocate, Mr. Amadi is guilty of an offence under S. 33 punishable under section 85 aforementioned.
- e) Intaking instructions to and drawing or preparing legal documents including those in relation to this case Mr. Amadi under section 34 is guilty of an offence punishable under section 85 aforementioned.

On the other hand Mr. Titus Koceyo who appears to have contravened sections 37 and 39 respectively, may be liable to the punishment imposed by section 85 aforementioned in respect to each offence created under each of the above sections. I will revert to this issue of criminal liability later in this ruling

It is my view and finding, that apart from the criminal liability arising from the contravention of sections 31 and 34, there are civil consequences also that do arise. As stated by Wambuzi, CJ. in the case of **HUQ V ISLAMIC UNIVERSITY OF UGANDA** (1995)2 E.A. 117 at page 118: -

“Where an advocate practiced without a valid practicing certificate.in any year, he committed an offence and was liable to both criminal and disciplinary proceedings. Any documents prepared or filed by such an advocate were invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities.” The stress is mine.

In the same case cited above, Karokora, JSC put the same principle thus, at page 122: -

“..... In my view what he (advocate) does in perpetration of the offence cannot be lawful, because these are the acts he uses in furtherance of the commission of the offence under the Act. Therefore the documents prepared, signed and filed by such an advocate whose practice is illegal, are invalid and of no legal effect, because courts would not condone illegality.”

In the case of **KENYA POWER AND LIGHTING COMPANY V. MAHINDA AND ANOTHER** Law Africa citation (2004) LLR 4452 (CAK) the Kenya Court of Appeal restated the principle as follows:-

“We come to our decision based solely on the undisputed fact that no practicing certificate for 2004 had been issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal. When those two acts were done by him the advocate was not qualified to act as an advocate with effect that the two documents were incompetent.”

The court in the above case struck out both the Notice of Appeal and the Memorandum of Appeal as incompetent. The same court in **Obura V. Koome** (2001)1 EA 175, also struck out a Memorandum of Appeal for being incompetent because it had been signed by an advocate who had no practicing certificate. It stated that such an advocate was not entitled to appear and conduct any matter in that court or in any other court. The important point to note in these cases is not merely that the advocate at the time of signing the documents had not obtained a practicing certificate but that by not having a practicing certificate at the time, he had been rendered unqualified and therefore incompetent to sign those documents. Similarly if an advocate being unqualified to act as advocate because of some act or omission under the Act, or while acting in perpetration or furtherance of an offence, draws, prepares, files any document or files any suit then what he so does will in my view and understanding be in furtherance of the commission of an offence under the Advocates Act. The result will that such documents prepared and filed by such Advocate for the purpose of either litigation as envisaged under section 31 or non-contentious ones drawn as envisaged under section 34 of the Act, are rendered invalid and incompetent and of no legal effect.

It should however be observed that the cases cited above to demonstrate the principle under discussion relate to situations where the advocates who drew, prepared or filed the relevant documents were unqualified to do so merely because they had not renewed in time their annual practicing certificates. This case before me is however distinguishable on facts. Here the advocate, Mr. Edie Jatianga Amadi had failed to serve as a salaried advocate for a period of two years under a prescribed person or association as required under section 32 of the Act. But Mr. Amadi on his part, claimed that he was qualified to practice because he obtained his renewable annual practicing certificate for the 2007, 2008 and 2009 which covers the relevant period of his practice. He accordingly wondered how he can be condemned when the Law Society and the Registrar of the High Court who were the persons concerned with issuing practicing certificates for those years had authorized him to practice by issuing him with an annual practicing certificates.

I have considered the above argument with care but do not accept Mr. Amadi's point. First, section 32 of the Act requires the newly qualified advocate to serve in a two-year salaried employment notwithstanding the obtainance of the yearly practicing certificate. This means that the Legislature deliberately and mandatorily subjected such advocate to the two year practise under the prescribed

qualified person. There is no doubt, it did so to expose the young and newly qualified advocate to more and better practical experience and in-house discipline before allowing him to practice independently on his own. Secondly, the two year practice for such newly qualified advocate is mandatory and cannot be remitted by any person. To my understanding this means that failure to engage in the said salaried practice renders the concerned advocate unqualified to practice law in Kenya. If therefore the issuing authorities issued a practicing certificate for the years 2007, 2008 and 2009, they should be deemed to have done so with full awareness of and compliance to the requirement of section 32 of the Act and clearly not with any intention to override it.

In conclusion of this point therefore, my finding, is that it may not seriously matter what may be the cause of disqualification of an advocate. What matters, is that due to an illegal act or conduct on his part the advocate is rendered unqualified or is prevented from becoming qualified to practice law. In this case Mr. Amadi failed to engage in a salaried employment for the period prescribed of two years after being issued with a practising certificate. The record shows that he deliberately set out to practice law on his own, although of course in partnership with Mr. Titus Koceyo under the name and style of Koceyo & Amadi Advocates. This as earlier found was unlawful practice, the same being in probable contravention, not only of section 32 but also of sections 31, 33, 34 and 37 of the Advocates Act.

It was stated on this point by Ole Keiwua, J (as he then was) as follows in **Prashillee Ltd V Rabai Road Estate**, High Court Civil Case No. 2336 of 1994: -

“In this case, Mr. Oseko is in contempt of this Court by virtue of having instituted this suit contrary and in breach of section 31(2) of the Advocates Act. To my mind, anything done in pursuant to such breach of a statutory provision and in contempt of court is not a mere mistake like failing to file appeal out of time. It is an offence and must be viewed as such. Anything done pursuant to and in preparation for the breach of the said statutory provision cannot be saved by the fact that it was not by the principal but by an agent.”

In this case Mr. Amadi and Mr. Koceyo deliberately set up a legal practice of Koceyo & Amadi Advocates on 13th July, 2006. Mr. Amadi was clearly and to the full knowledge of Mr. Koceyo, unqualified to practice law. Mr. Koceyo nevertheless allowed Mr. Amadi to practice in partnership with him from then to the present time. They did so in open contravention of the several provisions of the Advocates Act, in particular Sections 31, 32, 33, 34, 37 and 39 as earlier found herein. Since July 13th 2006 when they unlawfully started to practice, they must have handled many cases from many different clients. They have not jointly or individually denied this. If anything, they have individually directly or indirectly admitted such practice. In furtherance of such unlawful practice in my finding, the two advocates filed on the same date an Originating Summons dated the 26th November, 2007 supported by an affidavit of their client called Mohammed Ashraf Sadique, sworn the same day. It is my finding accordingly that the said Originating Summons now before me was filed at the time it was so filed pursuant to and in perpetration and furtherance of the breach of statutory provisions of the Advocates Act. Apart from the filing of the suit being a criminal offence, I hold that all the documents filed in support thereof and the suit itself, were and are accordingly also invalid and incompetent. It is more so because the documents were filed by and in the name of Koceyo & Amadi Advocates which firm itself is and was from the beginning, an illegal firm for the reasons earlier stated and in particular for being set up and run in contravention of the specific provisions of the Advocates Act.

Having come to the above conclusion, it is without doubt a concern of the court that the party in whose behalf the suit was filed and those many others that have been represented by the firm of Koceyo & Amadi, will probably suffer the possible serious consequences of the striking out of this suit and others herein referred to. Indeed in a case similar to this one, the court out of sympathy and with a view to save such innocent members of the public, tried to ignore the illegality committed by unqualified advocate. That is the case of **Njagi V Kihara** (2001)1 E.A. 167 where Mulwa, J (as he then was) stated: -

“to my mind, I do not think that documents duly drawn, signed and filed in court and which the court has acted upon, by an unqualified person and were specifically an advocate because his name is in the Roll of Advocates under Section 2, should be expunged from the records and done away

with.”

However, Lenaola, J. in **Belgo Holdings Ltd v Esmail** earlier cited, disagreed strongly with Mulwa, J’s sentiments. I, on my part, agree and associate myself with Lenaola, J’s opinion when he stated: -

“Advocates are not a special breed of Kenyans whose actions can be excused because they are advocates. The Advocates Act has given mandatory conditions to be met by a person who wished to practise law. One of them is that a practicing certificate must be obtained..... Worse, it is an offence punishable under criminal law to practice without such certificate. How can one then justify a court of law countenancing both breach of statute and commission of a crime because there is the risk of innocent litigants being affected?”

This means that the court is inept of sympathy to the party being represented by the erring advocate or other similar person but its duty first and foremost is to interpret the law correctly and effect it without discrimination. It follows accordingly that if orders have been made by the court in pursuance of an illegal or invalid and/or incompetent suit which eventually has to be struck out, then any such orders made under the suit must be recalled and be annulled. A court of law and justice must not condone or be seen to condone illegality of whatever nature.

There are however cases where the invalidating or striking out of the unqualified advocates’ documents or suit leads to injury to an innocent party. My view and finding however, is that the remedy to such party lies either in starting the suit afresh or seeking leave to file the process out of time or even seeking exemption from the Limitation Act to start the suit afresh or as last resort, the injured party can sue for damages for professional negligence or for any other remedies. My understanding is that there is sufficient connection between the competence of an advocate and the filing of pleadings by a litigant through such advocate. Indeed, the question as to competence of the advocate on record at the time of filing a pleading goes to the root of the competence and validity of the pleadings or documents drawn by him.

Mr. Amadi at one stage was heard to weakly assert that the jurisdiction to enforce the code of conduct of advocates as contained in the Advocate Act is reposed in the Disciplinary Committee of the Law Society and no other person. I agree that the Law Society is the major player in the discipline of the members of the society. The proposition is however not wholly correct since the courts also play a substantial role in the discipline of advocates, day to day. First and foremost section 31 authorises the court to deem and deal with the unlawful practice of unqualified person before it as contempt. Subsection 2(a) thereof gives the court jurisdiction to take cognisance of such contempt and deal with it as if it were any other act of disrespect to the court committed before it inclusive of pronouncing a fair punishment. In my view and finding, the wording of Section 31 makes it a provision of a wide application which can enable the court to deal with any such conduct (including that of an unqualified advocate) committed before it, particularly in respect to those acts specifically mentioned in the several provisions of the Advocates Act. Were it not so, that power given to the court by the section to deal with the offending advocate or person instantly, would be toothless, a situation clearly not intended by the legislature.

Secondly, the court has general power to deal conclusively with any act or conduct of contempt committed before it. It would therefore have power to deal with a contempt arising from a conduct of the kind envisaged under section 31 since contempt is contempt notwithstanding the name it is called or identified.

Thirdly, section 56 of the Advocates Act expressly saves and preserves the court’s jurisdiction to deal with the breach of any provision of the Advocates Act. The section provides thus: -

“Nothing in this Act shall supersede, lessen or interfere with the powers rested in any of the judges of the court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of or relating to proceedings before any judge.”

In summary therefore, this court has jurisdiction to deal with any matter arising out of any misconduct

of advocate or any person entitled to act as such advocate envisaged by any provision of the Advocates Act. The position remains so even in matters where the Disciplinary Committee has independent complementary jurisdiction to deal with the same matter dealt with by the court in accordance with its own prescribed procedures under the Act. In any case the court cannot allow itself to be made an instrument of enforcing obligations shown to have arisen out of a transaction that is illegal or immoral if such illegality has been brought to its notice. If it did so, it would be lending aid to transactions founded on illegality which would be against public policy. The legislature whether through the Constitution or statute has indeed always empowered the court to exercise corrective jurisdiction for the good of society.

The Respondent argued that the illegality attending to the entire lot of the Originating Summonses numbers 901, 933, 934, 935, 936, 937 and 938 of 2007 be held as rendering the suits invalid and incompetent. It then cited Order VI rule 13(1) (d) as empowering the court to strike out the suits. The rule grants this court power to strike a suit out at any stage of its proceeding if the suit is an abuse of court process. I have considered the point raised. I agree that the court has such power to strike out.

Since I have already made a finding that the suits abovementioned are invalid, incompetent and of no legal effect, I see no good reason not to hold that their filing and proceedings are an abuse of court process. The court will therefore in a moment, proceed to strike them out.

I earlier made a finding that the acts of one partner in a partnership are held as acts of a duly authorized agent of the other partner. In this case the business firm was Koceyo & Amadi Advocates. Each of the partners, Koceyo and Amadi practiced under the business name. In my view the acts of one or the other, in his appearance in court to represent clients in various cases, including those referred to herein, were shared by the other. Either held the other as his agent. As they shared remuneration from the business, so they shared or would share liability in criminal or civil actions.

I have carefully gone through the matter before me. I observe for example that Mr. Koceyo made most appearance before this court in these matters. However, Mr. Amadi also did so from time to time. For example he appeared on 29th January, 2009. While it is clear that Mr. Amadi can be dealt with for contempt under section 31, I see no reason why Mr. Koceyo cannot share Mr. Amadi's criminal liability in the contempt on the basis that Mr. Koceyo actually assisted, aided and abetted him. Taking into account the fact that the possible criminal offences committed by both advocates should be investigated properly and also considering the fact that there should be a proper and full process for a criminal trial, I would prefer that the advocates be independently charged and tried for possible criminal offences in the lower court.

Mr. Amadi on the other hand practiced law before this court in the above suits knowing or having reason to know that he was not qualified to do so in contravention of section 31(2) of the Advocates Act. He has not offered to this court any reasonable defence or excuse in his written submissions. I hold that his conduct amounts to contempt as defined and described by section 31(2) © of the Act. He will be punished in accordance with the law.

Before I make the final orders I find it necessary and relevant to make some observations about an urgent letter authored by M/s Oseko & Company Advocates to the Secretary, Law Society of Kenya, dated 30th April 2008. In the said letter the said firm expressly requested the Law Society to investigate the case of Mr. Eddie Jatianga Amadi, Titus Koceyo and their firm Koceyo & Amadi Advocates. The letter raised in details the serious issues now dealt with in this ruling and ended by requesting the Law Society to **“take suitable action and issue a policy statement for directions to Advocates who may be or are contravening the clear provisions of the Advocates Act with impunity to desist or get punished.”**

The letter further requested for

“..... stern action to preserve the integrity of ethical standards and to make sure that unqualified persons do not repeat the same mistakes.”

Perusal of the records before me do not show whether the Law Society reacted in any way to the above serious complaint and issues raised. It is not clear therefore whether the Secretary Law Society or the Board, referred the complaint to the Disciplinary Committee after receiving the letter. If reference was so made, then the Disciplinary Committee may not have dealt with the matter, otherwise the outcome could have been made a point of reference by either party herein during their submissions.

Both Mr. Amadi and Mr. Koceyo however placed serious reliance on the letter addressed to no one in particular and dated the 19th May, 2009. The same was signed by one Addraya E. Dena, Compliance & Ethics, Programme Director. The letter states that Titus Koceyo and Eddie Amadi of Koceyo & Amadi Advocates are members of the Law Society who are in good standing. He confirmed that neither has a case pending against him before the Society's Disciplinary Committee. What in my view, the above unsolicited representation mean, is that the letter of complaint by Oseko & Company earlier referred to, must have found its way to the dust bin immediately it was received. If not so, the writer should be called upon by the Law Society, to account.

Be the situation as it may, the Law Society as the major institution entrusted with the enforcement of the code of discipline of advocates in this country, has the obligation to carry out that mandate with the seriousness the duty deserves, without fear or favour. That is to say, the Law Society must stay in the forefront in earnestly enforcing and maintaining a high professional and ethical standard among its members in order to protect the wider interest of our society. That would in my view make the reason why the Kenyan citizenry would keep silent in honour to the Honourable Society whenever the latter takes the microphone to speak! In conclusion, the deep silence by the Law Society, once it received the letter of complaint from the firm of Oseko & Company Advocates, requires an explanation to the Kenyan public and to this court.

In summary, the following are the findings made by this court:-

1. Mr. Eddie Jatianga Amadi has never complied with the mandatory requirement of Section 32 of the Advocates Act, Cap 16 of the Laws of Kenya, the consequence of which is that he has not, to date, qualified to engage in practice on his own behalf either full-time or part-time.
2. Mr. Amadi's engagement in practice of law in the firm of Koceyo & Amadi, Advocates from its inception to date, is illegal, being in clear contravention of section 32 as read with section 33 of the Advocates Act.
3. Mr. Amadi in engaging in practice in the firm of Koceyo & Amadi advocates while being unqualified as found above, acted in contravention also of sections, 31(1) ©, 34(3) and 38.
4. Mr. Amadi, being an unqualified person, acted as an advocate in his own behalf before this court in this matter, and acted in the name of Mr. Koceyo his partner. He also acted in the name of the firm of Koceyo & Amadi Advocates. In any of those capacities Mr. Amadi either caused summons or other court process to issue or he carried on or defended this suit(s) in contempt of this court contrary to Section 31(1) (a) of the Advocates Act. He will be punished accordingly.
5. The law firm of Koceyo & Amadi Advocates having been formed and registered by two advocates, one of whom was unqualified, was an illegal entity and its practice or business was in contravention of sections 37 and 39 of the Advocates Act.
6. Mr. Titus Koceyo's act of forming and registering the law firm abovementioned, contravened the provisions of Sections 37 and 39 of the Advocates Act.
7. Mr. Titus Koceyo was in the relevant period not only an agent of Mr. Eddie Jatianga Amadi as a partner in the practice of the law firm of Koceyo & Amadi Advocates but he also encouraged, aided and abetted Mr. Amadi to commit the offence of the contempt of court in this suit(s). He will in that capacity be relatively punished for the contempt of court.

8. The two advocates for variously contravening the provisions of Section 31(1) ©, 33, 34(3), 37 and 39 jointly or severally will be criminally prosecuted after a full investigation by the police. This approach will enable them to exercise their basic right to be heard.

9. The Originating Summons before the court particularly those known as Miscellaneous Applications Numbers 901, 933, 934, 935, 936, 937 and 938 of 2007, were drawn and filed by an illegal firm of Koceyo & Amadi in contravention of the provisions of the Advocates Act. Further the act of drawing or preparing them is in perpetration and furtherance of criminal offences. The suits are therefore invalid, and incompetent and of no legal effect. So are all the orders, if any, made under them?

The court accordingly makes the following orders: -

ORDERS

1. The summary findings of the court above numbered from 1-9 are hereby made court declarations or orders of court, as the case may be.

2. Mr. Eddie Jatianga Amadi and Mr. Titus Koceyo are hereby found guilty of contempt of court within the context of Section 31(1) (a) of the Advocates Act, Cap 16 of the Laws of Kenya, Eddie Jatianga Amadi as principle while Titus Koceyo as an aider and a better

a) Mr. Eddie Jatianga Amadi shall serve a prison sentence of four months together with a fine of Kenya Shillings Fifty Thousand or in default of the latter, one additional month prison sentence.

b) Mr. Titus Koceyo shall serve a prison sentence of Three months or in the alternative pay a fine of Kenya Shillings Three Hundred Thousand.

3. The officer-in-charge, Central Police Station, Nairobi is hereby commanded to investigate the criminal offences probably committed by the two advocates in contravention of sections 31(C), 32, and 33, 34, 37 and 39 of the Advocates Act and thereafter charge them accordingly, within a period of 14 days.

Dated and Delivered at Nairobi this 30th day of September, 2009.

.....

D A ONYANCHA

JUDGE