



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

Election Case 2204 of 2007

STEPHEN MURIUKI CHIURIAPPLICANT

V E R S U S

ALICE MWANIKI1ST DEFENDANT

JOHN KAGIO2ND DEFENDANT

THE CITY COUNCIL OF NAIROBI3RD DEFENDANT

R U L I N G

I. Civil Practice and Procedure Order III

Recognized agents and advocates

1. In a few files that came before me a question arose on the issue of representation in court by advocates. More so those who are in employment of the local authority, parastatals and or government

2. I kindly requested the advocates to address me on this point A. B. Shah (retired judge of appeal) kindly appeared as a friend to the court. Notices to the law society and the Attorney General were sent out through the Deputy Registrar to participate on this question. The law society failed to attend and or send their representative. The Attorney General sent a State Counsel

C. N. Mutinda who stated that he was not aware of the question before the court.

3. The question raised are as outlined below.

II: Question on Representation

i) Local authority

4. Are duly qualified advocates in the employment of a local authority entitled to appear and represent their employer as counsel in court?

5. Are duly qualified advocates but employed in a Private Company entitled to appear for their employer in court.

6. Are duly qualified advocate in the employ of a parastatal entitled to appear and represent their employer as counsel in court?

7. As a sole practitioner entitled to practice under their own without a firm name being registered?

8. Are duly qualified advocates of less than 2 years standing entitled to appear on their own for the law firm which employs them?

9. Are duly qualified advocates of less than two years standing entitled to appear on their own for a body which is not a law firm?.

10. Are duly qualified advocates employed as in house lawyers/advocates under take private practice to his/her own benefit?

III: Response

i) Local authority

11. It was argued that under section 10 of the Advocates Act Cap 16 Laws of Kenya there are certain officers who are entitled to act as advocates. These are:-

a) An officer in the Attorney General's Office.

b) The Principal Registrar of Titles and any Registrar of Titles

or

c) Any person holding office in a local authority established under the Local Government Act.[1]

12. These persons are so subject to holding professional and academic qualifications as prescribed in Section 13 of the Advocates Act Cap. 16 Laws of Kenya.

13. The Mayor or Town Clerk can therefore appear to court for the local authority on grounds that they are qualified.

14. What of an advocate and or lawyer employed?

ii: Opinion

15. The advocate and or lawyer who is employed by the City Council of Nairobi as "an officer". Such may represent the City Council of Nairobi. This is on condition that the said advocate must be admitted:-

i) As an advocate of the High Court of Kenya.

ii) Must have his or her name for the time being on the roll of advocates.

iii) And he has a practicing certificate[2]

where the person is a lawyer or an officer he must hold a professional or academic qualifications namely:-

"having passed the relevant examinations; of any recognized university in Kenya he holds or has become eligible for the conferment of, a degree law of that university or, having passed the relevant examinations of such University college or other institution as the council of legal education may from time to time approve he holds and has become eligible for conferment of a degree in law in the trial of

that university, University college or institution which the council may in each particular case approve . . .
and thereafter both

i) He has attended as a pupil and received from an advocate of such class as may be prescribed, instruction in the proper business practice and employment of an advocate has alluded such course or tuition as may be prescribed for a period which is the aggregate which such institution does not exceed one year.

ii) He has passed such examination as the Council of legal education may prescribe on.

2) The Council of legal education may exempt any person from any or all of the requirements prescribed for the purpose of paragraph (i) or paragraph (ii) of which upon such condition, if any as the council may impose”

16. Any officer for the local authority may appear. This would apply to state counsels in the Attorney General Chambers.

ii) Advocates employed in private company or parastatal entitled to appear.

17. The advocate must be a duly qualified advocate under section 9 of the Advocates Act. Such advocate is not permitted to appear to court if he/she has under 2 years experience. Where they are under 2 years experience they require to be attached to a firm of advocates whereby they undergo supervision in a private company or parastatal that supervision is lacking. It is only the local authority and the Attorney General’s authority and the Attorney General being a legal representative of the government namely a qualified person.

18. I was made to understand by the submissions herein that the advocates employed in a company or parastatal having over 2 years experience or practice may appear to court on behalf of their employers. They are however not entitled to profits made for their legal works provided that they may agree with such employee to set off their profit costs against their salary payable to them. The reasons being that they do not incur expenses in the office being provided with an officer. Furniture, payments of electricity and water being

iii) Opinion

19. Rules 5 of the advocate (Practice Rules) Cap 16 Laws of Kenya state that:-

“no advocate employed by an unqualified person shall draw documents or under other legal service to his employer for which fees are charged directly or indirectly by his employer to any other person and retained by that employer”.

20. The private company and the parastatal are unqualified persons. They cannot enter into a transaction and seek their employees to draw up documents or order other legal services which they would in effect be paid for (instead being paid for these services) and thereafter retain the fees as the employer so earned.

21. Private company and parastatal employees as legal officer cannot render services to which fees are chargeable directly or indirectly by the employer and duly retained by that employer. In this aspect advocates who are employees of a private company cannot appear to court on their own behalf and that of the company as service would be rendered and profits retained by the employer. As to the parastatal the advocate must work for the government as state counsel.

iii) A sole practitioner entitled to practice under his own name without a law for being registered.

A. B. Shah JA (Rtd) who falls under this category argued that he is permitted to practice without

necessary having a law firm on condition that he holds a practicing certificate is not (implied) employed by anyone. Under the business name act Cap.449 Laws of Kenya a “a firm” as referred its:-

“ an unincorporated body of this or more individuals or of one or more individuals and one or more corporates, or of two or more corporations, who or which have entered into partnership with one another with a view to carry on business for profit”.

thus an advocate need not be registered.

22. I was referred to section 4 (a) which requires firms, individuals and competitors to be registered. But section 4 b specifically deals with:-

“every individual having a place of business in Kenya and company or business under the business name which does not consist of his surname without any addition other than forenames or the initials thereof shall be registered.”

iv. Opinion

23. My opinion is that an advocate does need to be registered. He is an “individual” and must therefore take out a registration as such under the Registrar of Business names.

If he does not register he is not permitted to handle clients accounts. The practicing certificate is issued on grounds that accounts for clients are catered for and discussed to the society as being sound.

ii An advocate of duly qualified but is less than 2 years standing.

24. At all times a duly qualified advocate of less than 2 years standing who holds a practicing certificate must be attached to a qualified advocate. For this instance where such an advocate is attached to a law firm he/she must state that they appear for that law firm. He/she must also say that they are duly employed and paid by that law firm. For this instance such an advocate may appear to court.

25. An advocate who is less than 2 years experience may appear to court on behalf of the Local Government and the Attorney General but are not permitted to do private work outside their employment namely,

“32(1) notwithstanding that an advocate has been issued with a practicing certificate under this 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 full time basis for a period of not less than two years after the first practicing certificate in apost either as an employee in the office of the Attorney General or an organization approved by the council of legal education of an advocate who has engaged in an full time private practice on his own behalf in Kenya for a period of not less than five years”.

25. This would equally apply to advocates who are less than two years standing but represent a body which is not a firm.

“Are duly qualified advocates employed as in house lawyer/advocate undertake private practice to his own benefit”

26. An advocate as stated earlier must be in full possession of practicing certificate. They are not permitted to court unless duly authorized under the corporate seal of a company it so appear Order III r 2 (e) Civil Procedure Rules.

27. Such an advocate must undertake to work for his employer full time to engage in private work unless his employer is permitted to represent parties in court who are not his employer and are in conflict with his work. The employer is not permitted to advertise the advocate nor use him for work on behalf of other organizations.

In Summary

28.1 An advocate appearing to court should hold a practicing certificate from the Law Society of Kenya.

28.2 Where an advocate appears for a body such as the Local government or the government of Kenya they are permitted to appear to court even if they are below two years.

28.3 Where the body is parastatal- the advocates of two years standing are not permitted to appear to court. The advocates of over two years standing must have hold authority of the said body to permit them to attend court. This applied to in house lawyer.

28.4 Any profits or proceeds earned are to be set from the salary.

28.5 A sole practitioner must register a business name. such practitioner handle clients moneys as such must give account to the Law Society in order to obtain a practicing certificate.

28.6 An advocate of 2 years standing is not permitted to practice on his own. He/she cannot appear to court using their name but uses the name of their principal advocate.

29. I wish to mention that an advocate who represents a body as both an employee and advocate cannot represent a local authority at the same time. Thus further such as advocate must disclose that they are employees.

I thank the advocate for their submission.

DATED THIS 4TH MARCH DAY OF 2008 AT NAIROBI

M. A. ANG'AWA

J U D G E

Advocate

a) A. B. Shah (Rtd) (JA) friend of the court leading

b) T.V.M Okwaro for applicant/ plaintiff in HCCC.2237/07

Mr. Ouna Were & Co Advocate.

c) K. N. Nyabare – for respondent/defendant in HCCC 2237/07

(employee with no law firm) (legal officer)

d) O. A. Kenyatta – for respondent 2nd defendant in HCCC. 2237/07 and 3rd defendant in

HCCC 2204/07. M/s Omati & Co. Advocates (representing employee of local authority so employed as legal officer but have no law firm and are less than 2 years experience)

e) A. A. Oganda for the 1st and 2nd defendants in HCCC.2204/07 M/s Kiplagat & Co.

Advocates .

f) M. N. Waigajo for Plaintiff in HCCC 2204/07 absent. Nyokabi Waiganjo & Co. Adv.

g) Representative of the Lawabsence

h) Representative of the Attorney General C. A. Mutinda – State Counsel