



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

**Civil Case 1255 of 2002**

**KENYA UNION OF POST PRIMARY TEACHERS ::::::::::: PLAINTIFF**

**VERSUS**

**PETER WANYONYI & TWO OTHERS :::::::::::DEFENDANT**

**RULING**

The 3<sup>rd</sup> Defendant has come to this Court by way of a Chamber Summons dated 18<sup>th</sup> July 2007 and filed the same date. The application is brought under order VI rule 13 (1) (b) and (d) and rule 16 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 9, 31 and 34 of the Advocates Act Cap.16 Laws of Kenya and all other enabling provisions of the Law.

The application was brought under certificate of urgency seeking orders that:-

- (1) This Honourable Court be pleased to strike out the suit herein and expunge from the records the Plaint dated and filed 25<sup>th</sup> July 2002 and subsequent amended plaints.
- (2) In the premises this Honourable Court to set aside all consequential orders made herein.
- (3) Costs of this application and the suit be provided for.

The grounds in support are set out in the body of the application, supporting affidavits, annexures, oral submissions in Court, provisions of Law and case Law.

The background information to the application as gathered from the annexures to the applicants supporting affidavit are as follows:-

(1) That on 26<sup>th</sup> April, 2002 the Plaintiff Union namely the Kenya Union of Post Primary Teachers held their election and among the officials are the first to 3<sup>rd</sup> defendants namely PETER WANYONYI BUTEYO, ZEDEL ONYANGO A. LAMEK AND JOHN MUTHOMA WAITHAKA. On 30<sup>th</sup> April of the same year 2002 they were duly registered as officials by the Registrar of Trade Unions. Zedel Onyango A. Lamek (the 2<sup>nd</sup> named defendant was registered as the National Chairman, Peter Wanyonyi Buteyo (the 1<sup>st</sup> named defendant was registered as the Secretary General and Johnson Muthama Waithaka as the National Treasurer.

(2) It is averred vide paragraph 4 of the supporting affidavit that some officials of the plaintiff who were neither registered officials of the plaintiff nor members of the plaintiffs National Executive Council

(NEC) allegedly instructed an advocate by the name J.M. Mokamba to file the current suit through a branch official Monicah Ngethe. The suit was filed against the registered executive officials.

(3) The suit was originated by a plaint dated 25<sup>th</sup> July 2002 and filed in Court on 25<sup>th</sup> July, 2002 annexed to the affidavit as annexure J.M.W.1

(ii) A perusal of the said plaint vide paragraph 12 thereof reveals that the said plaint was intended to challenge the elections which had been held on 26<sup>th</sup> April 2002 allegedly on the basis that the said elections had been conducted on the basis of an invalid notice issued by one Mr. Raphael Maricho who did not have capacity or authority to issue the said notice on behalf of the plaintiff union.

(iii) It was alleged that the 5<sup>th</sup> defendant who is the Registrar of Trade Unions ignored protests leveled that elections were irregular and should not have been recognized.

(iv) In consequence of the matters aforementioned in no (i) – (iii), the plaint sought reliefs to the effect that (i) an injunction be issued compelling the defendants to de register the registered union officials registered on 30<sup>th</sup> April 2002, a declaration that the Union elections held on the 26<sup>th</sup> day of April 2002 were null and void in so far as they were unconstitutional and lastly any other relief that the honourable court may deem fit and just to grant in the interest of justice.

(4). It is further averred that during the pendency of the said suit, the Registrar of trade Unions issued a circular dated 9.12.2005, to all Registered Trade Unions to carry out elections from Branch level to national level and finally COTU the Central Organization of Trade Unions. Further that such elections are held every 5 years by all trade unions in the Republic, whereby the such elected officials remain in office for a period of the next 5 years following the election unless removed in accordance with the constitution of the relevant trade union. Clause 3 of the said circular annexure JMW 2 are relevant to the application and this reads *“pursuant to those recommendations I would like to remind all trade unions officials concerned with organizing Union elections that the last trade union elections were held in 2001 and as result of what I have stated in the foregoing paragraph, all trade unions and the branches will be required to carryout elections of all officers at branch and national level by 30<sup>th</sup> March 2006 and 30<sup>th</sup> June 2006, respectfully and that such elections will have to be supervised by officials of the Ministry of labour this date line must be met as the elections of the officials of the Central Organizations of Trade Union (Kenya) must be held on or before 30<sup>th</sup> September 2006”*.

(5). It is the stand of the applicant that the plaintiff held its national elections in pursuance to clause 3 of the annexure JMW 2 on 29.7.2006 and the elected office bearers were registered on the 31.7.2006 by the Registrar of Trade Unions to hold office for a term of 5 years as per annexure JMW3. The first, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not among the said elected officials. A perusal through that list reveals that the names that appear on that list comprise the names of the 4<sup>th</sup> to the 21<sup>st</sup> defendant.

(6). The applicant’s contention is that upon the registration of the said officials, the suit became superfluous and rendered nugatory.

(7). It is further their stand that since the suit herein was rendered nugatory, the same was not terminated, instead it has been kept alive and used to abuse the process of the court by some individuals who on 28.12.2006 filed a purported consent letter signed by two advocates who apparently had no authority, removing the duly elected office bearers duly registered on 31.7.2006 as aforesaid and replacing them with a care taker committee to be registered by the registrar of trade union who was commanded on the same purported consent order albeit not having been a party to the suit herein at the time as shown by annexure JMW 4.

(ii) Annexure JMW4 is on the letter head of Mariaria and Company Advocates. It is dated 11.12.2006. It is signed by 2 counsels namely M/s Mariaria & Co. Advocates and Mang’erere Ngira & Co. Advocates for the 2<sup>nd</sup> and 4<sup>th</sup> defendants. The terms of the said consent are as follows.

*“(a) The Plaintiff Union election held on the 26<sup>th</sup> day of April, 2002 and or any other elections thereof held thereafter be and is/are declared null and void and subsequently set aside generally.*

*(b) A care taker committee comprising of the following officials be and is hereby appointed and allowed to ran/manage and/or control the Plaintiff. Union office affairs in their respective capacities for the purposes of organizing, preparing for and or conducting the Union elections as stipulated in its Constitution.*

<b><u>TITLE</u></b>	<b><u>FULL NAME</u></b>
1. National Chairman	Maurice T. Misori
2. 1 <sup>st</sup> National Vice Chairman	Zadock Kislenya
3. 2 <sup>nd</sup> National Vice Chairman	Stephen Mutua
4. Secretary General	Wanyonyi, Buteyo
5. Deputy Secretary General	Moses Nthurima
6. Ass Secretary General	Raphael Mirinchu
7. National Treasurer	Wicks Mwathi Njenga
8. Assistant National Treasurer	June Salome Awino
9. 1 <sup>st</sup> national Trustee	Linus Ouma Asiba
10. 2 <sup>nd</sup> National Trustee	Monicah Ngethe
11. 3 <sup>rd</sup> National Trustee	Almade Usije Majina
12. N.E.C. Rift Valley	Richard Tonui
13. N.E.C. Rift Valley	Mathias Ng'eno
14. Central	Lilian Ngatho
15.	Joseph K. Kimani
16. Eastern	Stephen N. Kimwele
17. Easter	Paul K. Musembi
18. Western	Catherine Wambilyanga
19. Western	James Okomoi
20. Nairobi	Leonard R. Ochieng
21. Nairobi	James K. Maina
22. Nyanza	Eliud O. Ochieng
23. Nyanza	June Salome Awino

(c) The Union elections be held on or before the 26<sup>th</sup> day of April 2007.

(d) The Registrar of Trade Unions be and is hereby directed to rectify the Plaintiff union register accordingly.

(e) No order as to costs.

**Signed**

**Signed**

Mariara & Company Advocates

Mang'erere & Co. Advocates

Advocates for the Plaintiff

for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants

(8). As noted earlier, on it is the contention of the applicant that the above stated consent order was fraudulently obtained. The said order has caused confusion and enabled people who had not been elected as officials to access the Union funds to the detriment of the Union.

(9). That since the advocate who drew the plaint and filed it on behalf of the Plaintiff had no practicing certificate at the time as shown by JMW5 and 6 being a letter from the applicants advocates to the Law Society of Kenya, and Law Society of Kenya's reply to that letter the entire suit as well as any other subsequent proceedings emanating there from are incompetent and an abuse of the due process of the Court and as such they should be struck out with costs to them.

(10). They applicant contend that their allegations are true evidenced by the fact that the alleged advocate namely J.M. Mokamba has not sworn an affidavit to controvert their allegations.

(ii) The respondents have not put up any meaningful opposition to their application as the papers filed in opposition of the same were filed out of time and therefore invalid.

(11). Further justification of their allegation of abuse of the due process of the court was based on the grounds that:-

(i). The plaint was filed in respect to elections which were to take place on 26.04.02

(ii). Without amending the plaint, they introduced other parties in the consent letter and order and gave them the benefit of the proceedings un procedurally.

(iii). The suit had been overtaken by events after the Registrar of Trade Unions directed the holding of fresh elections country wide which was complied with.

(iv). The suit is a non-starter as it is an ordinary member who has gone to court to challenge the position of duly elected members of the union.

Counsels for the 2<sup>nd</sup> defendant, 4<sup>th</sup> – 18<sup>th</sup> defendants support the application.

On case law the applicants have relied on the case of **OBURA VERSUS KOOME [2001] 1 EA 175** where it was held by the Court of Appeal that:-

*“Section 9 of the Advocates Act (Chapter 16 Laws of Kenya provides that in order to qualify to act as an Advocate a person must have been admitted as an advocate, have his name on the roll and have inforce a practicing certificate. Where an Advocate who does not satisfy conditions signs a Memorandum of Appeal, then that memorandum is incompetent and the appeal will be struck out”.*

In the case of **DELPHIS BANK LTD VERSUS BEHAL AND OTHERS [2003] 2 EA**, the Plaintiff in that case was drawn and signed by an advocate who did not hold a practicing certificate. The defendant

applied to have the plaint struck out. Ondeyo J. (as she then was) following the Court of Appeal decision in **OBURA VERSUS KOOME [supra]** held that the plaint was signed by an advocate who had no practicing certificate at the time. He was therefore unqualified and not entitled to appear or conduct any proceedings in Court. The Plaint was incompetent and had to be struck out.

Reliance was also placed on the case of **MUTUKU AND 3 OTHERS VERSUS UNITED INSURANCE CO LTD [2002] 1 KLR 250**. The brief facts of the case are that the plaintiffs instituted a suit against the defendant seeking a declaration that the defendant was to satisfy a judgment obtained in default of an earlier suit HCCC. No.2376 of 1999 against one JOHN NJUGUNA an insured by the defendant herein. They argued inter alia that the defendant must settle the decretal amount by virtue of the provisions of the Insurance (Motor vehicle third party Risks Act) Cap.405 of the Laws of Kenya.

The defendant filed a defence but amended it later. The amended defence was unsigned. However, upon realizing the mistake the defendant filed a further amended defence without leave of the court.

The Plaintiff then filed an application to strike out the defence on the basis that it was unsigned and therefore not a defence at all and the amended defence there of was illegal as it purported to amend that which did not exist in law and that the purported amendment was made and filed without leave of the Court.

Ringera J. as he then was held inter alia that:-

- (1) *An unsigned pleading can not be valid in law. It is the signature of an appropriate person which authenticates a pleading and an unauthenticated document is not a pleading of anybody. It is a nullity.*
- (2) *Where a pleading has been amended and the same has been struck out, the party affected has simply no valid pleading left on the record.*
- (3) *The effect of an amended defence is to supercede and replace the original defence.*
- (4) *The further amended defence was a nullity as it purported to amend the amended defence which was a nullity.*

In the case of **MURRI VERSUS MURRI AND ANOTHER [1999] 1 EA 212** it was held inter alia that a summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable. It has nothing to do with a case being complex or difficult.

In the case of **MPAKA ROAD DEVELOPMENT CO. LTD VERSUS ABDUL GAFURKANA T/A ANIL KAPURI PAN COFFEE HOUSE MILIMANI COMMERCIAL COURT HCCC NO.318 OF 2000** on an application for striking out, Ringera J. (as he then was) dealt with striking out of a pleading on the basis that the same was scandalous and vexatious, issues not being inquired into herein.

The Plaintiff and the 1<sup>st</sup> defendant filed replying affidavits in opposition to the application. These were filed late outside the stipulated period allowed by the rules for filing responses. Counsel for the applicant urged the court in his submissions supported by Counsel for the 4<sup>th</sup> to 18<sup>th</sup> defendants to expunge them.

In this Court's opinion, since the objection was not taken as a Preliminary Objection and ruled upon before arguments and since no prejudice is alleged to have been suffered by the applicant, and their only complaint is that the papers were filed out of time without leave, and also since the affected Counsels have made representations based on the same, the Court is of the opinion, that expunging them will not be the solution. It will therefore exercise its discretion to allow them on the record *suo moto* and take them into consideration in view of the fact that what the applicant seeks to do is to bring the entire proceedings to an end. In the circumstances it is proper that all the parties participating in the proceedings be heard in order for ends of justice to be met to all the parties.

The Plaintiffs Counsel has opposed the application on the ground that there is no proof that the original plaintiff was signed by J.M. Mokamba Advocate. It is the firm of advocates that appears and according to him a firm of advocates does not take out practicing certificates.

**(2)** The Court is urged not to listen to the 3<sup>rd</sup> defendant as he was party to the signing of the consent filed herein.

**(3)** That if J.M. Mokamba had no practicing certificate as at the time he filed the suit, then the suit that he filed was compromised by the consent order filed herein and as such the Court is functus officio.

**(ii)** It is their stand that this is just another way of trying to set aside the consent judgment which the 3<sup>rd</sup> defendant unsuccessfully tried to set aside to no avail.

**(iii)** On this account the 3<sup>rd</sup> defendant's application is an abuse of the due process of the court and it should therefore be dismissed as it seeks to strike out a suit which has already been compromised and that judgment still subsists.

**(iv)** The applicant has come to court with unclean hands, firstly, as stated earlier on, because he was party to the consent. Secondly he has tried severally to set aside the consent judgment and failed. Thirdly the application is incompetent as it is asking to resuscitate a plaintiff which died and was buried in 2006.

In response to that submission Counsel for the applicant reiterated his earlier submissions and then stressed the following points.

**(i)** no evidence on affidavit that J.M. Mokamba did not sign the original plaintiff. Assertion from the bar that the plaintiff was signed by another advocate holds no water and it should be ignored.

**(ii)** The court is not functus officio because the consent order is not a judgment in finality, and secondly the process of execution has not been completed.

**(iii)** The 3<sup>rd</sup> defendant has not come to court with unclean hands because there is no affidavit from the 3<sup>rd</sup> defendant deponing that he was party to the said consent. What is evident on record is that the consent letter was signed by Counsels and not parties.

In support of the applicants Counsels reply, Counsel for the 4<sup>th</sup> to 18<sup>th</sup> defendants submitted that the application is not an abuse of the due process of the court as it is meant to assist the court determine the legality of the proceedings.

On the Courts assessment of the facts herein, it is clear from the deponements and the submissions of Counsels who participated in the proceedings that the bone of contention is the first plaintiff that initiated the proceedings herein. It is marked as annexure 1 to the applicants' application. It is indicated that it was drawn and filed by the firm of J.M. Mokamba and Company Advocates. It bears a signature.

It is the contention of the applicant that the said plaintiff was signed by one J.M. Mokamba who had no practicing certificate then, and as such the said plaintiff as well as the entire proceedings emanating from it are incompetent. To fortify their stand, the applicant has argued that the only way that the respondents could dispel their assertion is by Mr. J.M. Mokamba himself deponing an affidavit that he did not sign the said plaintiff or alternatively if any other advocate signed on behalf of J.M. Mokamba to so equally deponed to that effect.

In response Counsel for the respondent/plaintiff has argued that there is no proof that J.M. Mokamba signed the said plaintiff as it could have been signed any advocate in that firm. Further that firms of advocates do not take out practicing certificates. It is advocates who take out practicing certificates. That it is Mariara and Co advocates who have all along been acting for the plaintiff.

This court has weighed those two arguments together with a view of determining who signed the original plaint that initiated the proceedings. Although Mariaria has submitted that there is no evidence that J.M. Mokamba is the one who signed the Plaint, she has not deponed or asserted that he is the one who signed it. Neither has he suggested the name of any other Counsel in the firm of J.M. Mokamba and Co. Advocates to be the signatory of the said plaint. The Court agrees with the submissions of the applicants Counsel that the mystery could have been resolved by a Deponement from Mr. J.M. Mokamba himself. There is no assertion from the respondents that the said J.M. Mokamba is not available or that he cannot be traced. In the absence of evidence from him to the contrary, the court makes a finding that the signature appearing on the said plaint belongs to the name below it namely that of J.M. Mokamba. The said signatory signed in his capacity as an advocate for the Plaintiff.

The signing of the plaint by J.M. Mokamba as an advocate for the plaintiff brings to the fore the issue of his competence to sign the same as an advocate. This in turn brings to the fore the operation of the provisions of the advocates Act on the subject, Cap.16 Laws of Kenya. The Sections that were cited by the applicant were Section 8,31 and 34 accordingly.

Section 9 of Cap.16 Laws of Kenya provides

*“Subject to this Act no person shall be qualified to act as an advocate unless:-*

- (a) he has been admitted as an advocate; and*
- (b) his name is for the time being on the roll of advocates and he has in force a practicing certificate and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by an Order under Section 60(4)”*

Section 31 on the other hand provides:-

*“31 (1) subject to Section 83 no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or 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.*

*(2) Any person who contravenes subsection (1) shall:-*

- (a) be deemed to be 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 may be punished accordingly; and*
- (b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and*
- (c) in addition to be guilty of an offence.”*

Section 34 on the other hand reads:

*“34(1) No unqualified person shall either directly or indirectly take instructions or draw or prepare any document or instrument:*

- (a) relating to the conveyance 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, nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument provided that this subject shall not apply –*

*(i) any public officer drawing or preparing documents or instruments in the course of his duty; or*

*(ii) any person employed by an advocate and acting within the scope of that employment; or*

*(iii) any person employed merely to engross any documents or instrument.*

*(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.*

*(3) Any person who contravenes subsection (1) shall be guilty of an offence.*

*(4) This Section shall not apply to –*

*(a) a will or other testamentary instrument; or*

*(b) transfer of stock or shares containing no trust or limitation thereof”*

Applying the fore going provisions of the Advocates Act to the complaint herein, it is clear that in order for the complaint to succeed it has to be shown that the advocate complained of is either:-

*(a) unqualified or*

*(b) he has not signed the roll of advocates or*

*(c) he does not have in force a practicing certificate.*

When considered in the light of the facts demonstrated herein, it is clear that there is no contention that the advocate concerned was not qualified or that he does not appear on the roll of advocates. What is complained of is the lack of a practicing certificate as at the time he drew and signed the plaint that initiated the proceedings subject of these ruling. As noted earlier on J.M. Mokamba himself has not availed any Deponement to the contrary. The Court has no alternative but to go by the annexures relied upon by the applicant.

Annexure JMW 5 is a letter from Nyandieka and associates advocates dated 5<sup>th</sup> July 2007 addressed to the Law Society of Kenya. The content reads:-

**“RE: J.M. MUKAMBA & COMPANY ADVOCATES.**

*We act for some defendants in a civil suit filed on the 25<sup>th</sup> July 2002 who have instructed us to make inquiries as to whether:-*

*(a) the firm of J.M. Mokamba and Co. advocates had a valid practicing certificate for that year 2002 and if so when the same was issued and to which advocate.*

*(b) Whether Mr. J.M. Mokamba advocate had a valid practicing certificate for the year 2002 and if so when the same was issued.*

*(c) If the answer to number (a) and (b) above is in the negative when if at all was Mr. J.M. Mokamba Advocates issued with a practicing certificate as an advocate after the year 2002.*

*Your kind but urgent response shall be highly appreciated.*

*Yours faithfully,*

*Nyandieka and Associates*

*Alfred Nyandieka Advocate”*

The law society of Kenya replied vide their letter JMW 6 dated 13<sup>th</sup> July 2007 addressed to Alfred Nyandieka advocates. The content reads:-

**“RE: J.M. MOKAMBA & COMPANY ADVOCATES**

*We acknowledge receipt of your letter of 5<sup>th</sup> July 2007. Our records indicate that J.M. Mokamba & Co. Advocates did not hold a valid practicing certificate for the year 2002. He however held a practicing certificate for the year 2005.*

*Yours faithfully*

*Betty S. Nyabuto,*

*CEO/Secretary”*

The plaintiffs counsel submitted that the last word lies with the Registrar of the High Court who can tell who had a practicing certificate at any one particular time. The plaintiffs counsel however made no efforts to obtain the information from the Registrar of the High Court and have the same annexed to the replying affidavit sworn by one Wicks Njenga Mwathi sworn on 8<sup>th</sup> October 2007 and filed on 3<sup>rd</sup> December 2007. There is no deponement or submission from counsel that they made such efforts to get the said information but were denied the same. In the absence of an explanation as to why the information was not sought, knowing that the same is vital to their stand, gives rise to a reasonable inference that the same was not sought because it would be against their interests.

In the absence of any other evidence to the contrary the court has no alternative but to go by the content of annexure JMW6 to the effect that as at the time the plaint that originated these proceedings, had no practicing certificate in the year 2002, the year the said plaint was drawn signed and filed.

Having found that the said advocate had no practicing certificate as at the time he drew, signed and filed the plaint originating these proceedings the court proceeds to examine the effect of it on the entire procedures.

Case law on the subject has already been set out. In addition there is also the case of KAJWANG VERSUS LAW SOCIETY OF KENYA [2002], KLR 846. The brief facts are that during the course of the appeal hearing, when the appellants advocate had closed his submissions, the respondents advocate filed a notice of preliminary objection that because the appellants counsel did not have a current practicing certificate, on two occasions during which he had prosecuted the appeal, he was an unqualified person within the meaning of Section 2 of the Advocates Act (Cap 16) and was in contempt of court. The respondents advocate further sought to declare the proceedings a nullity on the ground and for the appeal to be struck out.

Amin and Mulwa JJ, as they were held thus:-

**(1)** *There is no specific legislation declaring proceedings conducted by an unqualified advocate null and void. In the absence of legislation common law applies.*

**(2)** *Proceedings are not invalidated merely by reason of the advocate of one of the parties being unqualified.*

(3) *Although the advocate had no practicing certificate he was still bound by the oath he took upon admission and his name was still on the roll of advocates. The absence of the certificate cannot be said to have deprived him of that privilege.*

(4) *The client cannot be made to suffer for the mistake of the advocate. The object of the penalty for practicing without a licence is to punish the unqualified advocate and not the litigant.*

(5) *Selective concealment and utilization of information is not a practice favoured by the court. The respondent had the custody of the qualifications portfolios of advocates and by raising the preliminary objection so late in the appeal, it would deny the applicant the right to resort to order III Rule 2 of the Civil Procedure Rules. The raising of the objection was therefore of little aid to the respondent.*

(6) *The appellants advocate by appearing before this court and conducting the appeal, knowing or is deemed to have known that he did not have a valid practicing certificate required under the Advocate Act Section 31 (2 c) was guilty of an offence for which there was a fine of Kshs.20,000.00 and in default an imprisonment for a period of six (6) months.”*

The Kajwang case is a High Court decision and therefore not binding on this court. It does not therefore oust the clear principles set by the Court of Appeal, that, proceedings, originated as such is invalid together with the originating pleading. Once the pleading is declared invalid then everything emanating from such a pleading is nothing but a nullity and therefore a proper candidate for striking out. See the case of **OBURA VERSUS KOOME** (supra). Being a Court of Appeal decision is binding on this Court. Just as the Court of Appeal found that a Memo of Appeal filed by an advocate without a practicing certificate was invalid and struck it out together with the entire proceedings, this court follows suit and makes a finding that a plaint signed and filed by an advocate without a practicing Certificate is not only invalid, but merits to be struck out. In addition to following the Court of Appeal foot steps in the case of **OBURA VERSUS KOOME** (supra) the Court is persuaded by the stand taken by Ondeyo J. (as she then was) in the case of **DELPHIS BANK LTD VERSUS BEHAL AND OTHERS** supra where the learned Judge as she then was struck out a plaint which had been signed and filed by an advocate who took action without a practicing certificate.

It is on record that the said original plaint herein had undergone an amendment and then a re-amendment. The question to be asked is whether these survive the axe. The answer for this is found in the case of **MUTUKU & 3 OTHERS VERSUS UNITED INSURANCE CO. LTD** (supra) Ringera J. (as he then was) held that since the unsigned defence was invalid it could not form an anchor for the amended defence filed without leave. The amended pleading was also struck out. The **MUTUKU** case is a decision of a Court of concurrent jurisdiction and therefore not binding on this Court. However the Court is satisfied that once the initiating pleading is faulted the subsequent pleadings anchored and or drawing strength from are tainted with the same invalidity and cannot survive the axe. The principle therefore binds this court and not the decision. On that basis the court makes a finding that by virtue of the invalidity of the initiating plaint, the subsequent pleadings purporting to spring from it namely the amended and reamended plaints are also tainted with invalidity and have to suffer the same fate as the parent plaint of being axed and or struck out.

There is also the consent that was filed herein. Annexure JMW 4 was indeed filed in Court and endorsed by the Deputy Registrar on 22<sup>nd</sup> December 2006 but signed on 28<sup>th</sup> day of December 2006. Counsel for the Plaintiff has submitted that the endorsement of the consent letter by the Deputy Registrar and extraction of the order, marked the compromization of the suit and as such the suit died and was buried on 28.12.2006 and so there is nothing to be struck out.

The applicants responded to this submission that the mater had not been finally concluded and without a finality stamp by execution of the order or judgment, then there exists room for attacking that order or procedure and that is what they are doing.

This court has given due consideration to those arguments and has come to the conclusion that the said consent order cannot be considered in isolation with the originating pleading. In order for it to stand it

must be anchored on a sound pleading. If the very base on which it has been anchored has been faulted, as well as any other subsequent pleadings emanating there from, the subsequent pleadings and proceedings are also tainted and stand faulted. This Court has already ruled that once the initial pleadings were faulted the subsequent ones also stand faulted. Once the pleadings are faulted all consequential orders flowing there from also stand faulted and there is no way these can be treated as compromising a pleading. In this Court's opinion, they can only compromise that which exists or is capable of existing as they cannot exist in a vacuum. For this reason the Court makes a finding that the consent orders herein, entered in pursuance of a consent letter filed and endorsed by the Deputy Registrar, did not compromise the suit as the same was incapable of being compromised due to reason of it having been invalid. It subsisted solely for purposes of it being declared invalid subsequently.

The last issue to be dealt with is one touching on abuse of the due process of the Court. It is not clear as to whether the defence lawyer and the incoming lawyer for the plaintiff had knowledge of the lack of practicing certificate on the part of the advocate who drew, signed and filed the pleadings. If they had access to such knowledge and they ignored the same, then any subsequent activities by them from the date such knowledge came to their attention is nothing but an abuse of the due process of the Court. This has not come out clearly from the depositions and submissions. What has come out clearly and which is heavily relied upon by the applicant, is the filing of the consent letter which introduces beneficiaries not party to the initial suit.

This assertion has prompted the Court to revisit the initial pleadings as well as the amended and re-amended pleadings. The initial pleadings dated 25<sup>th</sup> July 2002 and filed on 25<sup>th</sup> July 2002 had the Kenya Union of Post Primary Teachers as the plaintiff. The defendants were indicated as being the Teachers Service Commission, Peter Wanyonyi Buteyo, Zedel Onyango A. Lameck, Johnson Muthama Waithaka and Registrar of Trade Unions. This initial pleadings was meant to declare the elections of 26.4.02 null and void and to register the Union officials registered on that date.

The said initial suit had been accompanied by an interim injunction application which was granted, and the order extracted on 5<sup>th</sup> August 2002 indicate clearly that those targeted were the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

There is on record an amended pleadings, amended on 23<sup>rd</sup> day of July 2003 and filed on 12<sup>th</sup> August, 2003. A perusal of the same reveals that it is only the prayers of the original pleadings which were affected and introduction of a new Counsel for the Plaintiffs.

The original prayers in the initial pleadings were:

- (a)** An injunction to issue compelling the defendants to deregister the registered union officials registered on 30<sup>th</sup> April 2002.
- (b)** A declaration that the Union election held on the 26<sup>th</sup> day of April, 2002 were null and void in so far as they were unconstitutional.
- (c)** A declaration that there be fresh elections.
- (d)** An order directing the first defendant herein to release the union funds, it is holding to the current Bank account No. 0110040 760000 at Co-operative Bank of Kenya Ukulima Branch Haile Selassie Avenues Nairobi.
- (e)** Any other relief that this honourable court may deem fit and just to grant in the interest of justice.
- (f)** Costs of the suit.

The reliefs introduced by the amendment are:-

- (a) (i)** The 5<sup>th</sup> defendant be and is hereby ordered to reinstate some of the former union officials and register names of the new officials appointed by the National Executive Committee (NEC) before the flawed elections of 26<sup>th</sup> April 2002.
- (b) (i)** The 5<sup>th</sup> defendant be ordered to de-register the Kuppet officials list and all names entered in the register of the trade Union on 30<sup>th</sup> April 2002.
- (c) (i)** The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> defendants, their assistants, deputies and vices and their agents and or servants be restrained and hereby jointly and severally be restrained from carrying out any union duties at all.
- (f) (i)** Costs of this suit to be borne by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

There is also a re-amended plaint on record. The copy traced does not have a filing stamp. It is indicated to have been re-amended on 9<sup>th</sup> day of June 2005. The joint amended defence for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants is indicated to have been amended on 24<sup>th</sup> November, 2005 and filed the same date. The salient features of the said re-amendment are:-

- (i)** The Teachers Service Commission and the Registrar of Trade Union were deleted as parties to the proceeding.
- (ii)** Peter Wanyonyi Buteyo, Zedel Onyango A. Lameck and Johnson Muthama Waitthaka were retained as defendants
- (iii)** The central subject of the Plaint was still the elections of 26<sup>th</sup> April, 2002 held on the basis of a notice alleged to have been invalid.
- (iv)** The particulars of the invalidity of the said notice calling for the elections held on 26.04.02 were introduced.
- (v)** Reliefs (a) (i) and (b) (i) and f(i) introduced by the amended plaint earlier mentioned were deleted.
- (vi)** One new relief was introduced as A (ii) namely an Order declaring that the former officials of the Union who were Constitutionally appointed by national Executive Committee (NEC) before the flawed elections, held on 26<sup>th</sup> April, 2002 to run the affairs of the Union until a fresh elections are held.

The record reveals that the re-amended plaint came on to the scene before the circular from the Registrar of Trade Unions dated 9<sup>th</sup> December 2005 requiring all Trade Unions countrywide to hold elections latest 30<sup>th</sup> June 2006. Hot on the heels of the said Registrars circular, came the consent filed herein annexure JMW 4 dated 11.12.2006. Item (a) sought to nullify the elections held on 26<sup>th</sup> April, 2002 as well as those held thereafter which were also to be declared null and void and subsequently set aside. The second portion of this item namely that concerning elections held after 26<sup>th</sup> April 2002 is alien to the pleadings.

The second item of the said consent which makes provision for the appointment of a caretaker committee to run and manage and or control the plaintiff union office/affairs in their respective capacities is also alien to the content of the plaint.

With the exception of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> persons named in the list of officials, the rest of those persons are alien to the proceedings.

Item (c) thereof makes provision for the holding of elections on or before 26<sup>th</sup> day of April, 2007 is alien to the pleadings.

Item (d) of the said consent requires the Registrar of Trade Unions to be directed to rectify the Plaintiff Union register accordingly by inserting the names of the persons on the list. The introduction of the Registrar of the Trade Union is Registrar is alien to the pleadings since the said Registrar was deleted from the pleadings through the mentioned amendment.

The said consent was endorsed by experienced lawyers whom the court presumes are aware of the rules of pleadings. This being the case, the Court is of the opinion that bearing in mind the subject matter of the initial pleading, namely the faulted plaint, considering the nature of the subsequent amendments, though in valid, as well, the introduction of the said consent letter in the proceedings in the manner it was introduced is nothing but an abuse of the due process of the Court.

For the reasons given above this Court is satisfied that the applicants' application dated 18<sup>th</sup> July 2007 has merit the same is allowed on the following terms:-

- (1) The initial plaint dated 25<sup>th</sup> day of July 2002, drawn, signed and filed by J.M. Mokamba Advocates be and is hereby struck out for the reasons that the said originator M/S J.M. Mokamba and Co-Advocates had no practicing certificate as at the time he drew, signed and filed the same.
- (2) Since the said originating plaint is null and void, all the subsequent amendments of the same namely the amended and re-amended plaints, which drew strength from it are also declared invalid and are accordingly struck out.
- (3) The striking out of the initial plaint as well as the subsequent amendments, robs the proceedings the base on which they are anchored. In the absence of a base on which to anchor, the proceedings cannot stand and the same are also struck out.
- (4) In view of matters aforesaid in number 3 above the consent order filed herein and endorsed on 28.12.2006 and any other consequential orders emanating from the said pleadings are all declared null and void because:-
  - (i) They are anchored on an invalid initial plaint which had been drawn, signed and filed by an advocate without a practicing certificate.
  - (ii) They cannot draw strength from the amended and reamended plaint as these too are invalid because they were anchored and draw strength from the invalid initial plaint they too are tainted with that invalidity and cannot survive the axe.
  - (iii) The consent endorsed on 28.12.2006 sought to introduce matters which ere not part of the pleadings.
  - (iv) The said consent endorsed on 28.12.2006 sought to benefit persons not party to the proceedings.
  - (v) The said consent order was also directed at the Registrar of trade unions as the officer to take action and yet he had been deleted from the proceedings.
- (5) The 3<sup>rd</sup> applicant who has succeeded will have costs both of the application as well as the struck out suit and the struck out consequential orders and proceedings.

**DATED, READ AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL 2008.**

**R.N. NAMBUYE**

**JUDGE**