



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2755 of 1996

WAINAINA KIGATHI MUNGAI.....PLAINTIFF/RESPONDENT

VERSUS

TRADE PAN REALTY LTD.....1ST DEFENDANT/APPLICANT

KAMAU JOHN KINYANJUI.....2ND DEFENDANT/APPLICANT

RULING

1. The two defendants are the applicants in the Notice of Motion application dated July 26, 2007. The application is brought under Section 3A of the Civil Procedure Act, Order 50 Rules 1,3 and 14 of the Civil Procedure Rules and prays for ORDERS:-

1. *THAT this Honourable Court be pleased to grant an order directing the Plaintiff/Respondent herein to trim and cut all such branches of trees growing on his land and which presently overhang and intrude onto the land of the 1st Defendant/Applicant herein causing great inconvenience and which presently constitute a nuisance.*

2. *THAT in the alternative to ORDER 1 above, this Honourable Court do grant leave to the Defendants/Applicants to proceed to trim and cut all of the overhanging branches complained of, under the supervision of the Officer-in-charge, Runda Police Station for the purposes of keeping peace.*

3. *THAT this Honourable Court do give the necessary directions for the efficacious carrying out of Orders 1 and 2 above; and*

4. *THAT the costs of this application be costs in the cause:*

2. The application is premised on three grounds appearing on its face:?

(a) *THAT there are and have been for quite a while branches overhanging from trees growing on the Plaintiff/Respondent's land on the lower end which are causing a great inconvenience and presently constitute a nuisance on the 1st Defendant/Applicant's land.*

(b) *THAT despite requests from the Defendants/Applicants that the Plaintiff/Respondent do the right thing and trim and cut the said branches, such requests have totally and willfully been ignored by the Plaintiff/Respondent herein.*

(c) *THAT the Defendants/Applicants only recourse is the court orders now prayed for to rectify and put correct the current state of things by having the inconvenience and nuisance brought about by the said branches removed.*

The application is also premised on a supporting affidavit sworn by the 2nd defendant/applicant, Kamau Kinyanjui. The deponent says that there was a continuing nuisance caused by the branches which grossly overhang onto the 1st Defendant/Applicant's land from the plaintiff's land and despite requests to the plaintiff to trim the offending branches the plaintiff had failed to do so and thus caused great inconvenience and nuisance on the 1st Defendant/Applicant's land.

The deponent further says that the branches that overhang onto the 1st Defendant/Applicants land totally cause an obstruction of sunlight and a permanent shade in the affected area, with the result that nothing vegetative can be propagated on the affected areas, hence the nuisance.

3. The Plaintiff/Respondent raised a Preliminary Objection to the application saying:-

“That the Notice of Motion is technically incurably defective bad in law and should be struck out.” With costs to the plaintiff/respondent.

4. The Preliminary Objection was canvassed before me on June 11, 2008. Miss Chege for the Plaintiff/Respondent argued that the applicant’s application is not sustainable because the same was filed by the firm of K.J. Kinyanjui & Co. Advocates in clear contravention of the Advocates’ Act. She said that the said firm of advocates was not on record as at the time of the filing of the said application. Miss Chege also contended that the said firm of Advocates only filed their Notice of Change of Advocates on November 5, 2007 long after the instant application had been filed.

5. Secondly, Miss Chege contended that the application is also incurably defective because it is signed by a person who was not qualified to act as an advocate since Mr. K.J. Kinyanjui did not have a practicing certificate as at the time of drawing and filing the application.

6. In response, Mr. Kinyanjui for the applicants admitted that as at the time of filing the application, he had no practicing certificate, but that by November 5, 2007, he had regularized his status as a practicing advocate. He argued that even if the application were to be struck out, the applicants would still be at liberty to file another application. In reply, Miss Chege argued that the admitted defects are incapable of a cure in law. She also pointed out that Mr. Kinyanjui did not even have a Practicing Certificate as at June 11, 2008 for the year 2008. Neither counsel cited any authority to the court to support their submissions.

7. The issue of the validity of practicing certificates by advocates has been the subject of many a decision, among them the case of **Kenya Power & Lighting Co. Ltd. –vs- Malunda t/a Nyeri Trade Centre [2005]** 1 KLR 753. In the above case, the applicant who was the respondent in an appeal against a judgment of the High Court, brought an application seeking an order striking out the appeal for being incompetent on the ground that the Notice of Appeal and the Memorandum of Appeal had been signed by a person who was not entitled to act as an advocate as he did not have a practicing certificate, though payment for the issuance of the Practicing Certificate had already been made to the Registrar of the High Court. The court, after hearing submissions held that until and unless a Practicing Certificate is issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal, the acts done by the advocate were done by the advocate when he was not qualified to act as an advocate with the effect that the two documents were incompetent.

8. Section 9 of the Advocates Act, which formed the basis for the court’s decision in the Kenya Power & Lighting Case (above) provides as follows:-

“9. 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; and

(c) 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).”

9. The process by which practicing certificates are issued is provided for under Part VII of the Act, and it is the Registrar of the High Court who issues such certificates authorizing advocates to practice as advocates. In the **Kenya Power & Lighting case** (above) the advocate against whom the application was made contended and adduced evidence that he had in fact paid for the issuance of the practicing certificate. In their considered opinion the court said, inter alia, at page 757 that

“We consider that it cannot be validly argued that, prior to the date of issue of that certificate, the advocate had in force a practicing certificate ---“

and also said,

“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 the effect that the two documents were incompetent.”

10. In the instant case, Mr. Kinyanjui admitted that he had not taken out a practicing certificate by the time he drew and filed the instant application. In light of section 9 of the Advocates Act, and the finding in the **Kenya Power & Lighting** case, I am persuaded that the Preliminary Objection raised by the Plaintiff herein has merit. The acts which were done by Mr. Kinyanjui regarding the present application were done when Mr. Kinyanjui was not qualified to practice as an advocate. Consequently, the application is incompetent.

11. Mr. Kinyanjui argued that though he did not have a Practising Certificate at the time of filing the application, he did rectify the situation and urged the court to find that the earlier acts were regularized when he regularized the practicing certificate. Similar arguments were put forth on behalf of the advocate in the **Kenya Power Lighting** case, but the learned Judges of Appeal held that a practicing certificate which is normally issued for one whole calendar year had no retrospective effect to the beginning of the year. I would respectfully adopt a similar understanding in the instant suit. I therefore find and hold that the fact that Mr. Kinyanjui got his practicing certificate later in the year did not have retrospective effect as to validate the incompetent application.

12. In the result, I have no other option but to uphold the plaintiff’s Preliminary Objection and accordingly to strike out the defendant’s application dated June 26, 2002 and filed in court on July 31, 2007. Costs of this application shall go to the plaintiff/respondent.

13. I also direct that until and unless Mr. Kinyanjui has a valid practicing certificate for the year 2008, he should not appear before me again either on this or another matter.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of July 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-