



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 2 of 2007

STANLEY KIGIMA KAMONJO PLAINTIFF

VERSUS

STEPHEN WAINAINA KAMONJO 1ST DEFENDANT

ELIAS MAINA KARUMI 2ND DEFENDANT

FRANK OWEN WAINAINA 3RD DEFENDANT

RULING

When the Chamber Summons application dated 2nd January 2007 came up for hearing, Counsel for the 2nd defendant raised a preliminary objection regarding the competency of the application and the entire suit. The preliminary objection is on the grounds that the present suit was filed by one **Hari Gakinya Advocate** who was admitted in the roll of Advocates on 20th July 2006 and thus he did not comply with the provisions of **Section 32** of the **Advocates Act** which provides: -

“Notwithstanding that an Advocate has been issued with a practicing 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 obtaining the first practicing certification a salaried post either as an employee in the office of the Attorney General or an organization approved by the Council of Legal Education or of an advocate who has been engaged in continuous full-time private practice on his own behalf in Kenya for a period of not less than five years.”

In this regard, **Mr. Kisila** argued that the plaint and all the proceedings are incompetent and to demonstrate that **Mr. Hari Gakinya** was aware of the anomaly he purported to file a notice of change of Advocates which now shows that the applicant is represented by the firm of **Ngungiri Gakinya & Co. Advocates**. However, this can not cure the defect and the whole suit should be struck off.

The second ground of objection is founded in the ruling of *Hon. Justice Mugo* who dwelt with the ex parte application. Certain anomalies were noted in the application, the annexures to the affidavits were not endorsed as exhibits. The court granted the applicant leave to regularize the affidavit and serve the same alongside the application which was directed to be served by 11th January 2007. The applicant having failed to comply with those orders, Counsel for the respondents urged this court to strike out the

supporting affidavit and the application as there is no competent material in support of the same.

The 1st respondent supported the above submissions. On the part of **Mr. Gakinya**, he urged this court to exercise the inherent powers vested in this court under **Section 3** of the **Civil Procedure**. Moreover, the broad provisions of **Order 111** of the **Advocates Act**; an advocate can make an appearance for a party, as a recognized agent. This Counsel for the applicant urged the court to disregard the provisions of **Section 32** of the **Advocates Act** which is in contravention of the provisions of **Section 13** of the same **Act**.

As regards his failure to regularization the exhibits he pleaded with the court to over look the same and extend the period within which he can file a further affidavit.

I have considered this preliminary matter with an anxious mind as it is always trite that a suit can only be struck out on the basis of very sound reasons based on law. The litigants should be able to access the court of justice to seek remedies and in this regard the court is always cautious not to turn away litigants and shutter their right of access to justice.

In the case of **Mukisa Biscuit Vs West and Distributors [1969] 701.**

“The Court of Appeal held that; ... “a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Section 32 of the **Advocates Act** is clear that an Advocate cannot file proceedings for a party or represent clients in his capacity as a firm unless he has been employed prior to that for a period of two years. In this case **Mr. Hari Gakinya** the proprietor of **Hari Gakinya & Co. Advocates** had not practiced for a period of two years and considering the provisions of **Section 32** of the **Advocates Act**, **Mr Hari Gakinya** was not competent to institute the suit on behalf of the plaintiff. The importance of **Section 32** is clear, the legislature intended to prescribe standards that an Advocate who has been in employment for two years would have at least have gained experience before he/she represents clients.

Should the pleadings herein then be struck out, I would not have hesitated to strike out the pleadings for reasons that **Mr. Hari Gakinya** also recognizing his anomalies filed a notice of change of Advocate. The other saving grace, is that under **Section 32 (3)** of the **Advocates Act**, the Attorney General is mandated to appoint a date by way of Gazettee Notice of when the provisions of **Section 32** shall come into operation. None of the counsels brought this notice to the attention of the court and therefore in my mind, I am not aware whether the above section has been in operation. I might be wrong in this case considering the inherent powers of this court to ensure that the interest of justice prevails coupled with the fact that the firm of **Ngunjiri Gakinya** is now on record, I see no prejudice that has been occasioned to the defendants by the pleadings filed herein. I will therefore not strike the plaint.

Regarding the Chamber Summons there are no competent documents in support of the affidavit. The affidavit offends the provisions of **Rule 9** of the **Oaths and Statutory Declarations Rules**;

(a) which provides

“all exhibits to affidavits shall be secrecy sealed thereto under the sealed of Commissioner, and shall be marked with serial letters of identification.”

See also the **Milimani Commercial Court Civil case No.1474 of 2001 Diamond Trust Bank (K) Ltd vs Garex (K) Ltd & others** where *Emukule J* delivered himself as thus

“In this court’s view the sealing does not conform with the mandatory provisions of Rule 9 of the Oaths and Statutory Declaration Rules that all exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.”

The applicant's Counsel did not only fail to provide exhibits but also to comply with the order granting him leave to regularize the pleadings which he ought to have done by *11th January 2007* before serving the pleadings upon the defendants. The applicant's Counsel explanation for his failure to cure the irregularity is not plausible, I therefore find that there is no competent affidavit in support of the application and I hereby strike the affidavit sworn on *20th January 2007*.

The application dated *2nd January 2007* which was supported by the said affidavit cannot also stand and it is hereby struck off with costs to the respondents.

It is so ordered.

Ruling read and signed on 2nd February 2007.

MARTHA KOOME

JUDGE