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

Civil Appeal 611 of 2003

RICHARD OTIENO HARUN.....APPELLANT

VERSUS

CYPPRIAN OJWANG OMOLO.....RESPONDENT

JUDGMENT

The Respondent herein filed suit against the appellant averring that by an agreement between the Plaintiff herein and the defendant dated 11th July 2002 the Plaintiff paid a sum of Kshs 300,000.00 to one Teresia Kivuva on behalf of the defendant full particulars of which are fully within defendant's knowledge. The Respondent was supposed to recover the same from the appellant as per the terms of the agreement. Despite demand the appellant neglected and or refused to pay the same or any part thereof hence the demand of the said sum of Kshs 300,000.00, costs of the suit and interest on (a) (b) above at court rates.

The appellant put in a defence drawn and filed by an advocate named Justus A. Wabuyabo who described himself as an advocate for the defendant. Just for the purposes of the record the appellant denied the claim and added that the payment made to Teresia Kivuva was not done on the appellant's behalf. Further that even if the same had been paid the same is null and void due to lack of consideration and or the same is un enforceable for being unclear, ambiguous and unequivocal on the rights and liabilities of the parties thereto especially the right, and or liabilities of the defendant. Nether was it agreed that it was the defendant appellant who was to repay the same. Further that the Respondent/Plaintiff was a tenant in land parcel number Nairobi/block 79/161 situated at Buru Buru Phase V at a monthly rent of Kshs 20,000.00 which he did not pay for 21 months making a total of Kshs 420,000.00 which was to be offset from the amount claimed from the appellant. Further that the Respondent had filed Nairobi HCCC NO. 1137 of 2002 against the appellant and another which was settled and which claim directly and or substantially related to the current claim which was settled by consent and so the matter in the suit was res judicata and should be struck out.

The plaintiff then filed a chamber summons under Order VI rules 13(1) (b) (c) and (d) and 16 of the Civil Procedure Rules, Section 32 (1) of the Advocates Act (Cap.16) Laws of Kenya

ad together with Legal Notice No. 94 of the 1999. It sought orders that the defence herein dated 24th January 2003 be struck out for being:-

- frivolous

- Prejudicial and meant to embarrass and or delay the fair and expedient trial and disposal of this suit.

- An abuse of the process of this honourable court.

- It is not clear whether that application was defended or not as the replying affidavit to the same is not included in the appeal record. The lower court file is not contained in the appeal file for this court to confirm whether it was opposed or not. But the proceedings in the lower court dated 28.7.2003 indicate that the application was duly argued. The defence is indicated to have been allowed to rely on points of law only which may suggest they had not put in any papers in opposition.

The main grounds put forward was that the defence had been drawn and filed by an un qualified person and so the same was incompetent and the court was urged to strike it out. Counsel then appearing for the appellant in the lower court distinguished the argument and the authorities on the basis that he had a Practicing Certificate as it is conceded that he was practicing in the firm of Rachuonyo and Rachuonyo Advocates.

(2) The court was urged not to strike out the pleading unless if it could not be remedied.

(3) That the defence on the record should be saved as there were issues that needed to be investigated.

(4) The court was urged not to punish the client who was not aware that he was not qualified and the counsel himself was not even aware of the rule and the client could not have asked him to confirm if he was properly qualified.

On account of the foregoing, Counsel urged the court to allow the innocent litigant defend the claim, that the counsel was not aware of the existence of the rule and had just qualified to practice on his own and he could regularize the pleadings.

In reply Counsel for the Applicant/Respondent urged the Court to ignore that submission because sentimental issues cannot override the provisions of the law.

That argument gave birth to the ruling by the lower court dated 1.9.2003. The Court made findings that the Counsel who drew the papers had not practiced for two years in the Attorney General's office or in an office of Counsel of 5 years standing. This was confirmed by a letter from the Law Society to the effect that the Counsel had not yet qualified to work on his own as at the time he drew the papers complained of. Further ignorance of law is no defence and so the Counsel cannot plead ignorance of the existence of Section 32(1) and the legal notice bringing that Section into operation and that these cannot be used to bend the law in favour of the appellants counsels account. On that account entered judgment for the plaintiff as prayed in the plaint and ordered the defendant to pay costs of the application as well as of the main suit.

The appellant became aggrieved and then filed this appeal citing six grounds of appeal. These are that the learned trial magistrate erred in law and in fact:-

(1) In failing to appreciate sufficiently or at all the judicial nature of the application which was before her, reached an erroneous decision when she not only struck out the appellant's defence for having been filed by an unqualified person but also entered judgment for the Respondent as had been prayed for in the plaint.

(2) In entering judgment against the appellant upon the ground that the appellants advocate who had filed the defence on record was not qualified to file the defence the after finding that appellant was innocent in this regard the learned trial magistrate thereby erroneously visited the mistake of the Appellants legal adviser upon the appellant.

(3) In failing to consider that the appellant had a good defence to the respondents claim and further erred when she entered judgment against the appellant thereby denying the appellant a chance to be heard

on his defence.

(4) When she rejected and or dismissed the application for adjournment which was made on behalf of the appellant on 18th August, 2003 and further erred when after finding that the appellants advocates then on record had no capacity to represent the appellant, she proceeded to enter judgment against the appellant instead of allowing the appellant a chance either to defend himself in person or to engage a qualified advocate to represent him.

(5) In totally ignoring the merits of the case and deciding the application which was before her on aside issue which could not entitle her to enter judgment against the appellant as she purported to do.

(6) In arriving at her decision, misdirected herself in law and facts and applied wrong legal principles.

On that account urged the appellate court to allow the appeal with costs to the appellant on appeal and the court below, set aside the lower courts orders striking out the appellants defence, rescind and or vary the same and then make an order dismissing the respondents application dated 21.7.2003 and make an order that the appellant be at liberty to file a defence either in person or through an advocate qualified to act as an advocate.

In his oral submissions, Counsel for the appellant reiterated the grounds of appeal and then stressed the following points:-

(1) It is not disputed that the appellant's counsel then on record was required to comply with the provisions of Section 32 of the Advocates Act as read with Legal Notice No. 94 of 1994. This requires that an advocate who has qualified is required to work for two years in the Attorney General's Chambers or in the Chambers of an advocates of 5 years standing before the said advocates can be allowed to practice on his own and draw papers in his own name.

(2) It is not disputed that the counsel who drew the defence which was truck out was qualified but was under the tutelage of a firm of Rachuonyo & Ranchuonyo Advocates but had not yet completed the pre requisite period of 2 years.

(3) It is their stand that even if it were to be taken that the drawing of the papers was irregular and that attracted the penalty of striking out, this alone should not have attracted the penalty of being shut out from defending the suit as well. After striking out the offending pleading, the magistrate should have stopped there and then allowed the appellant to file another pleading in person or through another qualified advocate.

(4) It is their stand that the appellant should not have been blamed for this Counsel choosing to draw the papers in his own name and it was not possible for the litigant to ask the Counsel whether he was qualified or not.

(5) That justice of the case demands that the appeal be allowed.

In response Counsel for the Respondent on the other hand opposed the appeal on the following grounds:-

(1) That the defence was filed in the name of Justus Wabuyabo and not Rachuonyo and Rachuonyo Advocates.

(2) It is common ground that Wabuyabo had not practiced for two years under an Advocate of five years standing as at the time he drew and filed the said papers.

(3) That the striking out was on the basis of improper papers being filed and so no appeal can lie there from.

(4) That the orders sought under order VI rule 13(1) are granted at the discretion of the Court which

cannot be interfered with unless if it can be shown that it was exercised wrongly or that it took into account issues it ought not to have considered. They contend the lower court properly exercised its discretion and so prayer 1 of the memo of appeal must fail.

(5) Since Section 32 (1) came into operation on 1.1.00 the learned Counsel who drew the papers had not capacity to draw the said papers. By reason of him lacking capacity. The papers filed by him were incompetent and the only solution to that is striking out of the pleading.

(6) This court should not rely on the common conclusions relied on by the appellant to save such pleadings. But rely on the Court of Appeal decisions which show clearly that such pleadings receive no sympathy and should be struck out.

(7) That proceedings being adversarial in nature and there being no affidavit on record asking for time to file a proper defence the court had no basis granting the same.

(8) The appellate court is urged not to allow the appeal and dismiss the application for striking out the defence because by doing so the appellate court would be reviving the incompetent papers and allowing them to remain in place.

(9) The court was informed that the appeal is an academic exercise as the orders in the lower court have been executed since the stay orders were denied and so the only remedy the appellant has is to sue his advocates for damages in negligence. They also maintain that submissions that the litigant will suffer for the wrongs of Counsel will not hold.

In response to the respondents submissions Counsel for the appellant reiterated the earlier submissions and added the following.

(1) The authorities relied upon by the Respondents relate to advocates not qualified to hold a practicing certificate under Section 9 of the Advocates Act and yet herein the issue is one of an advocate being duly qualified to practice and in fact being in possession of one but only failed to comply with Section 32(1) of the Advocates Act and Legal Notice No.94 of 1994. He had not completed tutelage under an advocate of five years standing.

(2) They still maintain that if the papers were struck out leave should have been given to him to file fresh papers.

(3) They still maintain that the authorities cited by the Respondents are distinguishable while those cited by them are relevant and they should be followed.

(4) There is no way the appeal if successful will be an academic exercise as it relates to a money decree which can be reversed in the same proceedings.

On the Courts assessment of the facts herein, it is clear that there is a common ground which is to the effect that there is no dispute that:-

(1) Section 32 of the Advocates Act requires that a practicing advocate newly enrolled and certified and holding a practicing certificate is required to practice under the tutelage of either the Attorney General's Office or a Senior Advocates of five years standing. The Section reads "*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 obtaining the first practicing certificate in 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.*

(2) The person employing an advocate under this Section shall in the prescribed form notify the

secretary to the council of Legal Education and the Registrar of the High Court of the commencement and the termination of the employment at the time of commencement and at the termination.

(3) This Section shall come into operation on such date as the Attorney Generally by notice in the gazette appoint"

(2). It is not also in dispute that the advocate who drew the defence whose striking out led to the filing of this appeal was an advocate by the name Justus A. Wabuyabo.

(3). There is no dispute that Justus Wabuyabo was then under the tutelage of the firm of Rachuonyo and Ranchuonyo Advocates but had not completed the two years requisite period as at the time he drew the said papers.

(4). There is also no dispute that as at that point in time Legal Notice 94 of 1999 had effected the said Section 32 (3) which was to take effect on 1.1.00. The notice reads:

"*Legal Notice No. 94.*

The Advocates Act (Cap.16).

Commencement in exercise of the powers conferred by Section 32 (3) of the Advocates Act the Attorney General appoints 1st January 2000 as the date on which Section32 of the Act shall come into operation.

Dated the 2nd July 1999.

S.A. WAKO

ATTORNEY GENERAL

(5) There is no dispute that the defence herein is dated 24th January 2003 and therefore affected by Legal Notice No.94 of 1999.

The appellant's Counsel agrees with the above but has presented the appeal on two fronts or limbs.

(4) On the first limb he argues that since the Counsel concerned had a practicing certificate the requirement of completion of 2 years was minor and questions of substantial justice should have weighed heavier as opposed to technicalities and thus the appellant should have been allowed to be heard on his defence. The defence should not have been struck out and judgment entered.

(5) On the second front he argues that even if the court were to be said to have been right in striking out the defence for being irregularly drawn, the defendant should not have been punished for the wrongs of Counsel and he should have been allowed to file another defence. On the first limb counsel relied on Common law decisions. In the case of **HOLDGATE VERSUS SLIGHT (1851)** Court of Queens Bench page 74 where the defendant sought to set aside a warrant on the ground that it was not properly attested as the attesting Attorney had not taken out a practicing certificate for several years. It was held inter alia that the want of a certificate eon the part of the attesting Attorney does not affect the validity of the warrant. In the case of **SPARLING VERSUS BREVETON (1866)** Equity cases volume 2 page 64, it was held inter alia that proceedings taken out on behalf of a defendant by a solicitor who had not at the time renewed his arrival certificate aside as irregular. It will only affect the right of the solicitor to recover his fees and not the interest of the client who is not bound to ascertain his solicitor is duly qualified to practice being alone affected by the want of proper qualification. Further reliance was placed on the case of **ISAAC KASIBA LULE VERSUS ADMINISTRATOR GENERAL AND ANOTHER KAMPALA, HCCC NO. 639/94 (19/3/96)** Kampala (l996) 1 KAR 118 where it was held inter alia that to hold that the proceedings as commenced by Counsel for the applicant were a nullity because he lacked a practicing certificate would be to deny the administration of substantive justice as required by the Constitution Art 126 (2) (e).

The Respondents Counsel on the other hand maintains that the pleading was properly struck out. Reliance was placed on the case of **ORAO – OBURA VERSUS KOOME [2001] KLR 109**, the case of **KINGS WAY TYRES AND AUTOMART LTD VERSUS ALSON RETREATING CO. LTD AND 3 OTHERS NAIROBI MILIMANI COMMERCIAL COURTS HCCC NO. 56 OF 1998,** and the case of MEHDI KHAN VERSUS KULDEEP SINGH CHAWLA AND 3 OTHERS NAIROBI HCCC NO. 1796 OF 1995.

All these relate to situations distinguishable from the situation herein as they related to papers filed by an advocate with no practicing certificate as required by Section 9, 30 and 31 of the Advocates Act, which Sections are not subject of inquiry herein although the consequences may be the same.

Reference was also made to the case of **CROMWELL KITANA** substituted for SAMUEL KITANA MBATHA VERSUS JOHN MWEMA MBEVI NAIROBI C.A. 50/1984. It concerned issues for setting aside. At page 4 paragraph 2 of the Judgment, it is observed that "*the history of indifference and default which the appellant and or his advocate evinced before judgment, was continued even after the delivery of judgment"*. On the same page, last paragraph at line 8 from the bottom it is observed "what reason did the appellant give for seeking the setting aside of this perfectly regular judgment?. They are two, first the appellants counsel was heavily involved in an election petition, second, although Counsel may have been negligent in his professional, duties towards him, he ought not to be penalized for his advocates default. It was said, it would be unfair otherwise. During the hearing of the application, it was conceded that an advocate's involvement in some other case is no good ground for setting the judgment aside. So the only ground left on which the variation of the judgment could be based; was that it would not be right to revisit Counsels mistake on his lay client. The learned judge obviously thought justice was not one way street. The court must not only look at the hardship that may be occasioned to the to the judgment debtor, but also that of the judgment creditor, as a court is supposed to hold the sides fairly, and evenly between the parties …."

At page 6, 2nd paragraph line 17 from the bottom it is observed

"*in view of the facts I narrated and the history of neglect and default on the part of the appellant, coupled with the relative blamelessness of the respondent and the less than candid reason given by the appellant as to why he did not ginger his advocates to take any steps to defend the suit I think the judges' exercise of discretion was perfectly proper."*

At page 7 paragraph 1 line six from the top it is observed "*in my opinion, an advocate must organize his workload in such a manner that no court of justice is held up on a matter of accommodation for him"*. At page 11 line 7 from the bottom it is observed "*The respondent for his part, acted with dispatch and the promptitude that one would expect from a person with a genuine grievance*". At page 12 line 9 from the bottom" it seems to me that if one of two sides to litigation should be demonized because of an advocates' default, elementary fairness requires that it should be the party whose advocate was in default.

In this particular case the appellant is not without a legal remedy for any loss or the deceased, estate suffered because of the advocates admitted negligence. In those circumstances to set aside the judgment and condemn the blameless respondent to begin all over again and after the lapse of nearly ten years would leave the respondent with a ranking sense of injustice".

Applying the foregoing observations to the facts herein it is clear that the observation were made by the Court of Appeal and therefore they are binding on this court. Despite their binding effect, they do not take away this courts discretion to consider each case on its own peculiar facts and either apply the observations wholly or distinguish them. In this courts opinion the facts displayed by the judgment are distinguishable from those prevailing herein that in the cited herein, in that in the cited case:

(i) case there was an element of a history of indifference and default which started before the judgment and then continued after the judgment.

(ii) There was in existence a regular judgment

(iii) The Court of Appeal was being moved almost 10 years since the onset of court proceedings to set aside and begin all over.

(iv) The court was satisfied that the advocate for the appellant did not give convincing reasons to show that he was involved in other heavy duties which made him fail to attend to the client's case.

The scenario herein is different in that.

(i) proceedings had just started. In fact the application for striking out was presented promptly.

(ii) The respondent has already enjoyed the fruits of the judgment and so the only hardship that he may suffer is that one of costs which can be compensated for.

(iii) There is no laxity on the part of the advocate of the appellant save for the failure to observe the requirement in Section 32 of Cap.16.

Indeed when confronted with the arguments on objection to his pleading, counsel stated that he had no knowledge of the existence of the legal notice effecting operation of Section 32 of Cap.16. The learned trial magistrate rightly rejected that plea as ignorance of law is no defence and that is the correct position in law.

The second plea which has been repeated on appeal was that his client should not be punished for wrongs committed by him. In the CROMWELL KITANA CASE SUPRA that plea was rejected. But this court takes judicial notice of the fact that there has developed a rule of judicial practice and which is now a matter of judicial notoriety that a litigant should not be punished for the wrongs of his counsel on record. The fact that there are denials and granting of the now notorious rule of practice goes to show that each case has to be considered on its own merits. When so considered in the light of the circumstances herein the plea has to fail in so far as the first limb is concerned. Section32 of Cap.16 is a provision of law. It was intended to be obeyed. The Counsel concerned had a duty to familiarize himself with the provisions of the law governing his profession for better professional conduct on his part. It is his own fault that this important provision escaped his attention. He has to bear the consequences. The duty of this Court is to enforce that provision. Ruling otherwise might innocently set a precedent and encourage impunity in the discharge of duties because a precedent for clemency has been set inadvertently by this court. For this reasons the argument on the first limb of the appeal fails. The lower court action of striking out an incompetent pleading is upheld.

As for the second limb there is no doubt failure to allow the defendant put in another competent pleading shut him out from the seat of justice. In addition to the representation made to this court by Counsel for the appellant, the court takes judicial notice of the following principles:-

(i) that denying a party a chance to be heard is draconian.

(ii) it is to be exercised only in plain and obvious cases where the pleading presented by that party is obviously un sustainable irredeemable and cannot be cured by an amendment.

In other words the lower court was enjoined to consider the defence on record and if the same raised triable issues create an avenue for the defendant to be heard on those issues. This court has been urged to revisit that issue and rule in favour of the appellant by reopening the matter for him to be heard on his defence on merit. The test to be applied is whether the defence raises triable issues. It maters not that they may not ultimately succeed. So long as they are triable, the litigant is assured of a ticket and a seat at the trial. The salient features of the said defence have already been set out in this judgment elsewhere. But for purposes of concluding there is no harm in repeating them. This court has identified these:-

(i) As per paragraph 4 (a) of the defence the triable issue is whether money or sums of money paid to Teresia Kivuva was paid on behalf of the defendant/appellant. An additional issue on this will arise as to who authorized that payment on behalf of the defendant.

(ii) An issue arises as to whether the said alleged agreement if it existed is null and void due to lack of consideration.

(iii) An issue will also arise as to whether the said alleged agreement is un enforceable due to the fact that it is unclear, ambiguous and unequivocal.

(iv) As per paragraph 5 of the defence an issue arises as to whether it was the intention of the parties, that the said amount should be recovered from the defendant/appellant.

(v) As per paragraph 6 of the defence an issue arises as to whether the plaintiff was a tenant of land parcel No. NAIROBI BLOCK 79/161 at a monthly rent of Kshs 20,000.00 per month which rent had not been paid for a total number of 21 months to the tune of Kshs 420,000.00 which amount was to be offset off against the amount claimed by the plaintiff against the defendant.

(vi) As per paragraph 8 of the defence, an issue arises as to whether the issues in NAIROBI RMCC No.10465/02 were similar to the issues in Nairobi HCCC. 1137 of 2002 which had been determined and the issues raised in the proceedings giving rise to this appeal were therefore Res judicata.

In view of the above this Court is satisfied that there were issues raised in the defence meriting trial which the lower court should have considered before shutting out the defence. There was therefore sufficient ground to enable the court to strike out the offending pleading with leave to the defendant to defend either conditionally or unconditionally by filing fresh proper pleadings. Issue was raised that leave to file proper papers was not asked for and so the same could not be granted. It is this courts finding that whether asked for or not the lower court is in a position to consider the same as it is usually part of the courts discretionary powers package dispensed at the discretion of the court when circumstances of the case demand so.

Another issue raised was that allowing the appeal will be an exercise in futility as judgment given by the lower court has already been executed. As submitted by the appellants execution counsel and or realization of the lower courts' judgment is no bar to the matter being reopened for a deserving litigant to be heard on his pleading as there is room for amendment of pleadings to suit the changed state of affairs more so when there is an issue of set off not ruled upon. Further in a case like this, where judgment has been given and executed, the door is fore closed on the defendant appellant as he is barred to raised any of the matters subject of the issues raised herein in any subsequent proceedings as he will be caught up with the doctrine of res judicata. It therefore follows that the only way to accord him justice is to reopen the same matter if justice demands so. In this case it does demand so.

The upshot of the foregoing assessment is that justice demand that the appeal be allowed on the second limb of the argument and the final orders are as follows:-

(1) The appellants defence filed herein dated 24th January, 2003 and which was ordered to be struck out by the lower courts ruling delivered on 1.9.2003 shall stand and remain struck out.

(2) However the 2nd limb of the said ruling entering judgment for the plaintiff as prayed in the plaintiff is quashed and set aside. It is substituted with an order that the appellant defendant is given a time frame within which to file a proper defence in accordance with the relevant provisions of the law.

(3) The appellant/defendant will have sixty days from the date of the reading of this judgment to file a proper defence in the lower court proceedings. This will allow time for movement of the lower court file from the High Court to the lower court.

(4) Despite the appeal having been allowed the Respondent will nonetheless be awarded full costs on appeal and half costs in the lower court as he is an innocent party. The half costs in the lower Court arises because this court has ruled that after striking out the defence, the applicant/defendant should have been allowed to file proper pleadings.

(5) The costs ordered will be paid personally by the advocate who occasioned the striking out proceedings in the lower court leading to this appeal namely Justus A. Wabuyabo.

(6) There after parties to proceed accordingly to law.

DATED, READ AND DELIVERED AT NAIROBI 21ST DAY OF AUGUST 2007.

R. NAMBUYE

JUDGE