

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 82 of 1994

JOSEPH WAITIKI NDEGWA.....PLAINTIFF

Versus

NDUTA MACHARIA RUNGARE

MWANGI KIRUHI T/A M/S TRANSHANIA AUCTIONEERS....DEFENDANTS

RULING

A preliminary objection was raised by the Defendant on a point of law seeking that the suit be struck out for the Plaintiff having been signed by an unqualified person. The plaint herein was filed on 9th March 1994 by the firm of Nyawira Gitonga & Co. Advocates. The Defendant brought to the attention of the court a letter written by the Law Society of Kenya

30th June 2003 where the society confirmed that the said Gitonga Grace Nyawira Ebrahim Advocate has not held a practicing certificate since 1988 to the date of the letter. What that means is that at the time the plaint was filed in this matter Nyawira Gitonga was not a holder of a practicing certificate. That was not denied by the Plaintiff's counsel. Rather in opposition the Plaintiff's present counsel argued that after the original plaint was filed, it was later amended and the amended plaint was filed by the firm of Bali Sharma & Bali Sharma Advocates.

The argument of the Plaintiff is that the operative plaint in this action is the amended plaint. What distinguishes a person who is entitled to file an action or to represent a person is *Section 9* of the Advocates Act. That section 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; 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).”

The jurisprudence of the Court of Appeal cases where that court has decided in respect of documents filed by an unqualified person as defined by *Section 9* is that such documents are liable to be struck out. In the case of **C.A. NAI 186 of 1997 (UR 77/97) SOLOMON KAMAU NJUGUNA -V- BARCLAYS BANK OF KENYA LTD.** when the court had to consider the fate of an application filed by a person not holding a current practicing certificate, stated as follows:

“As such he was not entitled to act as an advocate, or even to file this application. In simple terms he was a layman.”

In the case of **C.A. NO. 148 OF 2004 KENYA POWER & LIGHTING CO. LTD -V- CHRIS MAHINDA T/A NYERI TRADERS CENTER** the court had the following to say:

“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 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.”

In the case of **C.A. 146 OF 2000 GEOFFREY ORARO OBURA -V- MARTHA KARAMBU KOOME** the court stated as follows:

“However, Mr. K’Owade for the respondent, submitted that section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common law of England.....With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the Advocates Act and not the common law in England.”

The law is clear with particular reference to *Section 9* that documents filed by a person who is unqualified are liable to be struck out. I reject the Plaintiff's argument that the operative plaint is the amended plaint. The subsequent amended plaint is not a fresh plaint but rather it incorporated the amendments brought before court. It is still the initial plaint that was filed but with amendments. If the original plaint is struck out there would be no basis of amending. The amended plaint would also fail. The Plaintiff's suit therefore is hereby struck out for having been filed by an unqualified person. The Defendant is awarded costs of the suit and costs of the preliminary objection dated 23rd May 2007.

Dated and delivered at Nyeri this 2nd day of October 2007.

MARY KASANGO

JUDGE