



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

**Civil Appeal 37 of 2004**

**BROOKE BOND (K) LTD.....PLAINTIFF**

**VERSUS**

**SISIRIA KERUBO KENYORU.....DEFENDANT**

**JUDGMENT**

The respondent in this appeal, Sisiria Kerubo Kenyoru, filed suit in the subordinate court against the appellant Brooke Bond (K) Limited seeking to be paid damages on account of injuries she alleges to have sustained while she was working for the appellant. The suit in the subordinate court was filed on her behalf by Nyamokeri & Company Advocates. The said firm of advocates is a sole proprietorship. The sole practitioner in the said firm is Kennedy Nyagaka Nyamokeri. The appellant was served with summons to enter appearance. It entered appearance and filed a defence. When the case was listed for hearing, the appellant's advocate made an application under **Section 9 of the Advocates Act and Order VI rule 13(b) (c) & (d) and rule 16 of the Civil Procedure Rules** seeking to have the suit filed by the respondent herein struck out for being incompetent, an abuse of the court process, scandalous and vexatious. The main ground in support of the application was that Kennedy Nyagaka Nyamokeri who had filed the suit on behalf of the respondent, had no practicing certificate at the time he filed the suit. The application was opposed by the respondent. It was heard by Kibiru A.G, Senior Resident Magistrate, who in his considered ruling delivered on the 22<sup>nd</sup> of March, 2005 held, on the material part, as follows:

*“...It is not disputed that at the time of filing the suit (on) 13<sup>th</sup> January, 2004 the said counsel for the respondent had not drawn out a current practicing certificate. It is also not disputed that subsequently thereafter the said advocate has regularized his position per the respondent's exhibit marked 'KNII' attached to his replying affidavit. I have heard the arguments by both counsels and perused the pleadings thereof, while I agree that it was improper for counsel for the respondent to act as he did without regularizing his position as required, I am bound by the finding of the superior court in the authority cited of REHMAT KHAN KHERDIN & SONS LIMITED AND OTHERS VERSUS STANDARD CHARTERED BANK LIMITED KISUMU HIGH COURT CIVIL CASE NUMBER 231 OF 1998 the finding of which I also subscribe to. I therefore find that striking out the suit hereof would be to punish an innocent party who had unknowingly instructed the advocate without knowing his capacity of practice.”*

The application to strike out the suit filed by the respondent was dismissed with costs thus provoking this appeal.

The thrust of the appeal filed by the appellant is that the trial magistrate erred in disallowing the

application when the facts of the case called for striking out of the respondent's suit. It was aggrieved that the trial magistrate had erroneously held that it had the discretion to decide whether or not to allow a suit which had been filed irregularly to still exist on record. At the hearing of the appeal, I heard the submissions made by Mrs. Muthiga, learned counsel for the appellant. This court heard the submissions by the appellant in the absence of the respondent who was served to attend but during the hearing of the appeal but chose not to attend court. This court was satisfied that the respondent was properly served and therefore ordered the hearing of the appeal to proceed.

Mrs. Muthiga submitted that the trial court having found that the advocate who had filed the suit on behalf of the respondent did not have a practicing certificate as required by the law, he ought to have struck out the suit because it was incompetent. She submitted that the trial magistrate did not have discretion not to strike out the suit due to the sympathy that he had for the respondent. She relied on the Court of Appeal decision of **Geoffrey Orai – Obura vs Martha Karambu Koome CA Civil Appeal No.146 of 2000 (Nairobi) (unreported)**. She urged this court to allow the appeal with costs.

This being a first appeal, this court is required to re-consider and to re-evaluate the facts of the case as presented to the trial magistrate so as to arrive at its independent decision whether or not to uphold the decision of the trial magistrate. In the present appeal, the issue for determination by this court is one; whether or not the trial magistrate having found that the advocate who had filed the appeal did not have a practicing certificate could have reached a decision of not striking out the said suit.

I have re-evaluated the said submissions made before the trial magistrate. I agree with his finding that there was no dispute that Kennedy Nyagaka Nyamokeri did not have a practicing certificate at the time he filed the suit on behalf of the respondent. **Section 9 of the Advocates Act** provides that:-

*“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 purposes 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 Court of Appeal in the case of **Geoffrey Orai Obura vs Martha Karambu Koome CA Civil Appeal No.146 of 2000 (Nairobi) (Unreported)** held that the requirements of Section 9 of the Advocates Act were mandatory and where an advocate filed pleadings while he did not have a practicing certificate such pleadings shall be incompetent. In the present appeal, it is clear that Kennedy Nyagaka Nyamokeri, at the time he filed the suit on behalf of the respondent, was not authorized in law to practice law. In the circumstances of this case therefore, such pleadings filed by the said unauthorized person cannot be sustained on record. Although the said advocate regularized his position later by taking a practicing certificate, that fact could not cure the incompetence of the pleadings which were filed when the said advocate did not have a practicing certificate.

It is clear from the reasons stated hereinabove that the appeal herein shall be allowed. The part of the ruling of the trial magistrate which was delivered on the 22<sup>nd</sup> of March, 2005 which held that a court has discretion to allow incompetently filed pleadings to remain on record is set aside and substituted by an order of this court allowing the appellant's application dated the 20<sup>th</sup> of July, 2004. The suit filed by the respondent, having been filed by a person who was not authorized in law to file such pleadings, is hereby struck out with costs to the appellant. The appellant shall have the costs of this appeal.

**DATED at KERICHO this 2<sup>nd</sup> day of November 2006.**

**L. KIMARU**

**JUDGE**