



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 480 OF 2004

ZACHARY NYAYIEMI MOTURI.....PLAINTIFF

VERSUS

KISII BOTTLERS LTD.....DEFENDANT

RULING

The Applicant seeks to strike out the verifying Affidavit to the Plaintiff herein under O.VII Rule 1(3).

“The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub-rule (2) of this rule”

Sub-rule (2) states: -

“The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments in the plaint”

The reason for striking out the verifying Affidavit in this matter is because it does not state who drew it and offends section 34(1) and 35(1) of the Advocates Act (The Act) which states: -

34 (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instruments.

(a) relating to the conveyancing or property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings;

35 (1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address or the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate.

Provided that, in the case of any document or instruments drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.”

As the reason for the striking out is a breach of these provisions the application should have been brought under O.V 6 rule 13(1) (b) (c) or (d) However under Order 50 rule 12 this is not fatal to the Application. As Mr. Justice Ibrahim rightly pointed out in the case of **Dubai Bank Kenya Ltd versus Come-Cons African Ltd CC No.68 of 2003**. There is nothing in these sections, which renders the instruments; to use his words

”incurably invalid, void or defective”

The courts have in most cases struck out documents filed in court which offends these proceedings (see **Barclays Bank of Kenya Ltd Versus Sollomon Otieno Orero HCCC No.1736 of 2001 and Johann Distelberger Versus Joshua Kivinda Muindi & Another HCC Misc. Civil Applications No.1587 of 2003**).

Miss Libanya relied on the case of **Kotecha Versus Mohammed (2002) I.E.A.** page 112 where at page 113 the Court of Appeal in Uganda held as follows: -

“Section 65 and 66 of the Advocates Act were intended to identify and punish unqualified persons who prepared legal documents for a fee. They did not apply to instruments prepared by advocates with valid practicing certificates. In this instance, the Notice of Motion was signed by the Respondent’s Counsel and there was no suggestion that he did not have a valid practicing certificate. Moreover, as the affidavit in support of the application had been filed together with the Notice of Motion, they both had to be read together and since the affidavit was endorsed with the name of the firm of Advocates that had prepared it, that was sufficient to satisfy the provisions of the Advocates Act.

The objection that the notice of motion was invalid for not having endorsed the name of the advocate who prepared it was a mere technicality of a kind frowned upon by the constitution which provided that no technicality should be allowed to militate against the administration of substantive justice”

The sections mentioned are similar to those in the Advocates Act referred to above.

Although not binding on this court the reasoning that the omission of the name of the person as an irregularity is to be taken notice of and is persuasive.

The main reason for the regulation is to ensure unqualified persons do not compete with advocates in drawing legal documents. The courts however should ensure that offences if committed are not condoned.

In this case there is a breach of section 35 of the Act. For the reasons given I strike out the offending verifying affidavit but order that the applicants do file another verifying affidavit, which does not contravene the provisions of the Act. The Applicant will have the costs of this Applicant.

Dated and delivered at Nairobi this 20th day of June 2005

P.J. RANSLEY

JUDGE