



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 123 OF 1999

JOSEPH GATHECHA KAMAU.....PLAINTIFF

VERSUS

KENYA BUS SERVICESDEFENDANT

RULING

The Defendant's application dated 28th November, 2002 seeks to have the following documents struck out for being incompetent from their inception: the amended plaint dated 30/3/99, the reply to defence filed on 10/5/99, the summons for directions dated 5/8/99, the statement of agreed issues dated 26/5/99, the Plaintiff's list of documents dated 21/7/99, the Plaintiff's submissions dated 9/10/2001 and the bill of costs dated 16/9/2002.

The application also seeks to have subsequent proceedings emanating from the aforementioned pleadings annulled and the judgment delivered on 1/8/2002 set aside.

The Defendant also asked the court to make any other order it deemed just and fit. The application was made on the grounds that the aforementioned pleadings were incompetent having been signed and filed by an unqualified person. The proceedings were also said to have been conducted by an unqualified person. The judgment was also based on pleadings and proceedings brought to the court by an incompetent person. The application was supported by an affidavit sworn on 13/11/2002 by RACHAEL KIOKO, the claims manager of the Defendant company. She deponed that all the pleadings referred to hereinabove were drawn, filed and presented by the firm of Gathaiya & Associates Advocates on behalf of the Plaintiff. The pleadings had been signed by one Mr. Gathaiya James Ngugi Advocate who also appeared in court and conducted this matter for the plaintiff. The said advocate, according to the law society of Kenya, had not held a Practising Certificate since 1993. A letter from the law society was exhibited as annexure "RK1".

Mr. Olola Advocate who held brief for the defendants advocates referred this court to the Court of Appeal decision in **OBURA VS KOOME E.A.L.R. [2001] 1 E.A. 173** where the court held that a memorandum of appeal was incompetent for having been signed by an advocate who was not entitled to appear and conduct any matter in that court or in any other court and proceeded to strike out the appeal with costs.

The Plaintiff appeared in person and opposed the application and relied on his affidavit sworn on 3rd November, 2003. He said that he did not know that the said advocate did not hold a Practising Certificate. He said that this was an issue which ought to have been dealt with by the Law Society of Kenya without involving him. He said that a member of the public could not go finding out if an advocate had a

Practising Certificate before engaging him. He further contented that Gathaiya & Associates and in particular Mr. Gathaiya James Ngugi, acted for Mercy Wambui Kamau, (the defence counsel in this case) in HCCC 1861 of 2000 DAVID SIFUNA VS SALLY KARAGO & MERCY WAMBUI KAMAU and wondered why the issue of Mr. Gathaiya's practicing Certificate was not raised then. He urged the court to reject the defendant's application saying he had a valid judgment against the Defendant.

I have looked at the documents referred to in the application on record as well as the pleadings and ascertained that they were prepared and executed by Mr. Gathaiya Advocate. The said advocate also conducted the proceedings herein. The letter from the Law Society of Kenya marked RK 1 clearly showed that the said advocate had not paid for a Practising Certificate since 1993.

The Plaintiff, in his replying affidavit sworn on 3rd November, 2003 admitted that his advocate did not have a Practising Certificate at the time when he was acting for him. Paragraph 5 of the Plaintiff's replying affidavit shows the advocate was charged in Disciplinary Committee Cause No. 156 of 2001 for Practising law without a Practising Certificate and was fined Kshs.105,000/-.

Section 9 of the Advocates Act Cap 16 Laws of Kenya provides as follows:-

"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 Practising Certificate and for the purpose of this Act a Practising 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)."

While I sympathise with the Plaintiff who has a valid judgment in his favour, I must apply the law as it is without any fear, favour, affection or ill will and strike out all the documents referred to in prayer number three of the Defendant's application as the same are incompetent. All the subsequent proceedings emanating from the struck out pleadings are also annulled and the judgment dated 1st August, 2002 is also set aside. The Plaintiff will bear the costs of this application.

This is certainly a very unwelcome decision as far as the Plaintiff is concerned and I do hope that all the regional branches of the Law Society of Kenya will continuously police themselves and forward to the secretariat of the society and to all the courts names of its members who are holding themselves out as being duly qualified to represent litigants when they do not hold current Practising Certificates. Together with any other step which the plaintiff may choose to take in this matter, I think he should take the appropriate legal action against Mr. Gathaiya James Ngugi. The said advocate willingly took up the Plaintiff's matter for a fee knowing very well that he had no Practising Certificate and knowing the legal ramifications of his conduct.

DATED, SIGNED & DELIVERED at Nakuru this 19th day of January, 2004. DANIEL K. MUSINGA

AG. JUDGE

19/1/2004

19/1/2004

Ruling delivered in the presence of the Plaintiff.

DANIEL K. MUSINGA

AG. JUDGE

19/1/2004