



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 284 OF 2002

TULIP APARTMENTS LTD & ANOTHER.....PLAINTIFFS

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LTD & ANOTHER.....RESPONDENTS

RULING

In a lengthy plaint comprising 61 paragraphs the plaintiffs claimed a total of 19 relief's from the defendants. The plaint is dated 15th February 2002 and is signed by Odhiambo M T Adala, who has described himself as the Advocate for the plaintiff. He has given his address as Austen Place, School Lane, Next to Westlands Primary School, PO Box 40182, Nairobi.

Upon service of summons to the defendants appearance was entered by Mohamed & Muigai, Advocates for the second defendant on 21st February, 2002. M/S Archer and Wilcock appeared for the first Defendant on 27th February 2002.

It would appear from the record that some interlocutory applications were heard and even parties appealed to the court of appeal against some of the rulings made in the matter.

I was not told whether the parties have been heard on appeal or not.

Be it as it may, the plaintiffs' Advocates applied for Interlocutory Judgment on 28th March, 2002 as the defendants had failed to file their defences within the prescribed time.

It would appear that the Principal Deputy Registrar obliged and entered interlocutory judgment on 28th day of March 2002. After the entry of the judgment more applications followed but none was relevant to the entry of the interlocutory judgment. However, on 5th April, 2002, the first defendant filed its defence and served the same on Odhiambo M T Adala on the same day.

The plaintiffs did not think that the defence should stand in law. They filed the application before me for striking out the defence filed by the first defendant on 5th April, 2002. The application is supported by five grounds of the body of the application and an affidavit sworn by a Director of the first and second defendants, Mr Navinchandra Nathoo Shah. I have perused and considered the same.

In response to the application the first defendant issued a Notice of Preliminary objection. It is the first defendant's case that the application for striking out the defence is incompetent and bad in law as the

advocate on record does not have a valid practicing certificate. It is said in the Preliminary Objection that the details of the first defendant's objection are set out in the affidavit of one Wilfred Oroko sworn on 23rd April, 2002.

During the hearing there was a dispute as to whether the application was opposed or not in view of the provisions of Order L r16 of the Civil Procedure Rules and whether the issues raised by the respondent's counsel were a preliminary point of law.

I ordered that the application be heard and that the defendants do use the Preliminary Objection to oppose the application.

Mr Kalove, advocate had then come on record for the plaintiffs. Mr Kalove gave a brief history of the matter and pointed out that the first defendant should have filed its defence within 15 days but instead filed it after a month and interlocutory judgment had been entered.

It was Mr Kalove's case that the application as it stood was not defended. He said that what the court had was a Preliminary Objection. He said that the preliminary objection cannot be supported by an affidavit. He said that all what had been raised in his application has not been answered.

In answer the respondent's counsel was of the view that the judgment was irregular. That the first defendants could enter appearance and file defence any time before judgment. She relied on Order IX and IXA of the Civil Procedure Rules.

The respondents were served with the application. Order L r16(1) of the Civil Procedure Rules state as follows:-

“16(1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.”

The first respondent did not wish to comply with the provisions of Order L r16(1) of the Civil Procedure Rules. It is not surprising therefore that Mr. Kalove maintains that his application was not opposed.

The Preliminary Objection was filed on 24th April, 2002 and served the same day the application was for hearing i.e. 24 April, 2002. A replying affidavit or grounds of opposition must be served not less than three clear days before the date of hearing.

Nothing was said as to why the First Defendant chose to deal with the matter as it did. But I must mention that my understanding of Order L r16 of Civil Procedure Rules is that a respondent who wishes to oppose any motion or any other application must file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any not less than three clear days before the date of hearing.

It is then that if the respondent wishes to raise a preliminary point of law, notice of the same may be given. Of course the respondent does not have to follow that sequence but notice of Preliminary Objection or a Preliminary Objection does not take the place of pleadings. A party who wishes to rely on a Preliminary Objection is bound by the Civil Procedure Act and rules as far as pleadings in the action or cause are concerned.

I therefore agree with Mr. Kalove Advocate that his application is not opposed. But I made an order that the respondents could use all what they had as Preliminary Objection to oppose the application.

Although Miss Jan Mohamed, Advocate raised several other matters which are not in the Preliminary Objection, I will look at the same after dealing with the Preliminary objection.

It was Miss Jan Mohamed's submission that Mr. Odhiambo Adala who signed the pleadings before me had no Practicing Certificate at the time he signed the pleadings in issue. She said that the change of

Advocate is dated 22nd April, 2002. Both the application and the plaint were signed before that date. In view of the provisions of the Advocate's Act the application should be struck out. She said that indeed the application and the whole suit are a nullity

Mr Majanja for the second defendant said that he was not involved in the application but supported Miss Jan Mohamed's submissions that the suit is incompetent and should be struck out.

On his part Mr Kalove said that the Preliminary Objection cannot stand in law. The facts relied on were in dispute as Mr Adala had a practicing certificate for the year 2002. The practicing certificate was produced by consent and it showed that it was marked practicing certificate for the year 2002. But it was issued on 23rd April 2002.

According to the particulars availed by the Law Society of Kenya Mr Adala is an active member of the society and is on the Roll of Advocates. He had paid for his practising certificate for the year 2001 but did not pay for his practicing certificate for the year 2002.

It is clear from the practicing certificate shown to court that the same was issued on 23rd April, 2002. In view of the provisions of Section 24 of the Advocate's Act the certificate became valid from that day. The effect is that since Mr Adala's previous certificate had expired in December 2001, then he had no practicing certificate for the months of January, February, March and part of April 2002.

When he signed both the plaint and the application before me, he had no practising certificate. It would appear that this was not known to any of the parties and service and correspondence continued between the parties and their Advocates until the matter was raised before me during the hearing. The plaintiffs appear to have sensed danger and changed their Advocates thereby dropping Mr Adala.

I have perused the Advocates Act and although it has provided for the consequences of practicing without a practicing certificate, it does not provide that any pleadings signed by an Advocate who has no practicing certificate are a nullity or bad in law and should be struck out.

This takes me to the provisions of Section 9 of the Advocate's Act. The Section is in the following terms:

"9. 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
- (d) he has in force an annual licence, 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)".

I have considered the submissions by Miss Jan Mohamed on this issue. I have also considered Mr. Kalove's submissions. Mr. Majanja supported Miss Jan Mohamed. I have perused the Advocate's Act, and it goes without saying that Miss Jan Mohamed's submission is not expressly provided for but the same can be implied. One must therefore look at the purpose and the intention of Parliament when it made, the provisions it made in the Advocates Act and especially Section 9 of the said Act. In *Seaford Court Estates Ltd v Asher* [1945] KB 461 at p 498 Denning L.J. Said:-

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise; and that, even if it were, it is not possible to provide for them in terms free from ambiguity. The English language is not an Instrument of Mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticized."

The preamble to the Act is simple and short. It reads:-

“An Act of Parliament to amend and consolidate the law relating to Advocates.”

The definition given of “Advocate” is interesting and probably shows what Parliament had in mind about who the advocate should be. Section 2 of the Act reads as follows:

“2. In this Act, unless the context otherwise requires – “advocate” means any person whose name is duly entered upon the roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and, for the purposes of part IX, includes any person mentioned in Section 10.”

When one looks at Section 9, of the Act, what comes in mind is the fact that proviso (a) and (b) are in respect of educational qualifications leading to admission of one as an Advocate, and being entered on the roll of the Advocates. Had Mr Adala not met the qualifications in 9(a) and 9(b) Miss Jan Mohamed’s submission would not have caused me anxiety and I would have struck out the pleadings as she prayed without even having to reserve the ruling.

But in my view (c) and (d) show a different intention, policy and object on the part of Parliament.

In Kenya Advocates are bound to be members of the Law Society of Kenya on admission. It is the Law Society that supervises their conduct. It has to have proper control of the Advocates by having annual practising certificate issued to practicing Advocates. That is why the Law Society has also to raise funds to sustain itself.

Paragraph (d) of Section 9 of the Advocates Act is even more laughable. However, I do not wish to comment on it further because of the cases I have partly handled between some members of the Law Society and some Local Authorities. But it may suffice to say that the object of the said provision is to raise Revenue for the Government or Local Authorities as the case may.

The question now is whether the delay by an Advocate, who is on the Roll of Advocates, and not suspended, to obtain a practising certificate or an Annual Trade Licence would be used or as it usually put visited on innocent parties but who have no idea of what is going on. This is an issue in which there is no doubt a difference of opinion. This is made worse by the fact that the Civil Procedure Act and the Rules do not define the term Advocate. The term Advocate therefore is left to the definition under section 2 of the Advocate’s Act.

Wanaki J., in Misc. Application No 67 of 1992 – (Uganda) – in the matter of An application by A A Kanji and the Estate of Jefferali A Khanji refused to strike out pleadings signed by an Advocate who had no current Practising Certificate. He said in part:-

“There is a lot to be said for and there is virtue in recognizing the disability of a client possibly an illiterate villager, who appoints and authorizes an Advocate whose name appears on the roll not just any quack but whose only defect is lack of a current practising certificate, to draw up and process his matter in court. The Advocate will certainly face the sanctions of the law in the Advocates Act and also lose his costs. He may even face criminal charges. But must the innocent villager or any other client also be punished because ignorance of law is no defence? An affirmative answer would prick the conscience of any court of equity. I do not wish to lay down a principle of general application here, but each case must be examined on its own merit.”

I think Justice Wanaki’s argument is sound and would agree with him.

He is not alone on this as that appears to be the position in England.

In *Halsbury’s Laws of England*, 4th Edition, Volume 44, at p266, it is said:-

“Proceedings are no invalidated between one litigant and the opposite party merely by reason of the litigant’s solicitor being unqualified, for example by his not having a proper practicing certificate in force’.(The underlining is mine)

In *Cordery's Law* relating to solicitors, 8th Edition, p 36, it is said:-

“Thus an uncertified solicitor may be sued for negligence or subjected to disciplinary proceedings and while practising on behalf of his client is privileged from arrest, and although an appearance entered for a defendant who has not been admitted as a solicitor has been struck out, an appearance will not be struck out, nor will proceedings be set aside for irregularity, because a solicitor was uncertificated unless the client was aware of his lack of qualification.”

From what I have on record and what I have said, it is clear that none of the parties knew that Mr Adala had no current practising certificate. Indeed the plaintiffs changed Advocates immediately the issue was brought to their attention by the defendants.

The defendants also dealt with Mr Adala up to the point they discovered that he had no current practising certificate. None of the parties should be punished for that.

The Preliminary Objection fails and is rejected. The pleadings will stand as between the parties and will not be struck out.

Miss Jan Mohamed also submitted that under Order IX (1) of the Civil Procedure Rules she was at liberty to appear and file defence at any time before Interlocutory Judgment or final judgment was entered.

The record shows and it is admitted that an Interlocutory Judgment was entered in favour of the plaintiffs and against the defendants on 28th March, 2002.

The defence was filed on 5th April, 2002. The Interlocutory Judgment was on record and is still on record. The defendants therefore cannot come under Order IX(1) of Civil Procedure Rules.

I was not addressed by Miss Jan Mohammed on Order VIII of Civil Procedure Rules which supports Mr Kalove's contention. Order VIII r 1 of the Civil Procedure Rules is in the following terms:-

“1 (1) The defendant may, and if so required by the court at the time of issue of summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his defence.
(2) Where the defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the date of filing the defence.”

The record shows that summons issued by the court on 18th February, 2002, and served on the defendants on 19th February, 2002 gave the defendants 15 days within which to appear. The second defendant appeared on 21st February, 2002 but has filed no defence.

The first defendant appeared on 27th February, 2002 but filed no defence within 15 days. Its defence was filed on 5th April, 2002. This was clearly in contravention of Order VIII r 1(2) of Civil Procedure Rules.

The said defence cannot stand. I find merits in the application dated 17th April, 2002. The same is allowed. The first defendant's defence filed in court on 5th April 2002 is struck out as prayed.

Costs of this application will be paid by the first Defendant to the plaintiffs.

Dated and delivered at Nairobi this 16th day of May, 2002

D.M RIMITA

JUDGE

