



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS
CIVIL CASE NO.1436 OF 1998

SALIM KAZUNGU.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY..... DEFENDANT

RULING

This application is brought by way of Chamber Summons under Order 41 Rule 4(1) and (2); Order 3 rule 1; Orders 6 rule 13 and 14, Order 44 rule 1 (1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and S. 9 of the Advocates Act and all enabling provisions of Law.

The Defendant applicant is seeking inter alia orders for stay of execution of the orders of this court made on 21st November, 2000 pending the hearing and determination of an intended appeal and that the pleadings filed herein together with proceedings taken during the period 1999 to 14th August, 2000 when the Respondent's Advocates did not hold a practising certificate, be struck out and or expunged from the court record as incompetent.

The application is based on the grounds that applicant prefers an appeal against the said orders and that the Respondent is threatening to execute the said orders.

It is further grounded on the reason that the appeal is arguable and has a high chance of success and if a stay is not granted the appeal will be rendered nugatory in which event the applicant stands to suffer substantial loss.

There is also the ground that the advocate for the Respondent did not hold a practising certificate as at 1999 and until 14th August, 2000 and that the pleadings filed and proceedings conducted by

Mr. Stephen O. Owino were null and void.

In my view, the issues germane to this application are:

1. Whether a stay of execution pending appeal should be granted
2. Whether the pleadings filed and proceedings conducted by the Respondents' advocate during the period when he did not hold a practising certificate should be struck out and or expunged from the court record as incompetent.

I shall start with the issue whether the pleadings filed and proceeding taken by the Respondent's

Advocate while he did not have a practising certificate should be struck out and or expunged from the court record.

It is the applicant's case that the respondent's advocate did not have a practising certificate when he filed some of the documents contrary to Section 9 (c) and (d) of the Advocates Act and that the pleadings filed and proceedings conducted by the said advocate are null and void. The learned Counsel for the applicant, Mrs. Martha Koome produced a letters from the Law Society of Kenya confirming that Respondents' advocate, Mr. Stephen O. Owino did not have a practising certificate for the year 1999 upto the 14th August, 2000.

To buttress her submissions, Mrs. Koome cited Marbon Café and Others v. BML Downtown Limited NAI Civil App. No. NAI 192 of 1997 (82/97 UR) in which the Court of Appeal struck out an application on the grounds that the application was incompetent having been filed by an advocate who was not entitled to appear and conduct any matter in any court. She also cited the case of Kingsway Tyres and Auto Mart Ltd. vs. Abon Retreading and Company Ltd. and Others HCCC No. 56 of 1999 (unreported) where the High Court (Gacheche C.A.) struck out a plaint filed by an advocate who did not have a practising certificate at the material time.

It was submitted for the Respondents that one of the advocates in the firm had practising certificate at the material time and that the application had been brought so late after all the proceedings had been taken and judgement entered when the issue could have been raised earlier.

The Court of Appeal decision in Marbon Café Case (supra) is binding on this Court. However, it is distinguishable on the ground that the issue of the advocate's lack of a practising certificate was raised before the application was heard. No so in this case. Judgement had already been entered for the Respondent when the advocates for the applicant rushed to establish the respondents' advocates position.

Section 9 of the Advocates Act sets out mandatory requirements before one can act as an advocate. Amongst them is the requirement that one must have a current practising certificate.

In addition Section 30A (1) makes it mandatory that every person issued with a practising certificate should obtain an annual license if he intends to practise his professional capacity. Sub Section (3) provides that a person shall be deemed to practice his professional capacity if he engages exclusively in his profession on his own account and is entitled to receive the entire amount of all fees and charges earned; or in a partnership with others and is entitled to a share of the profits earned by such partnership and is bound to share any losses incurred thereby.

Order VI Rule 14 of the Civil Procedure Rules requires that every pleading shall be signed by an advocate or recognised agent or by the party if he acts in person. Such advocate must be qualified under the Advocates Act in the manner stated above:

It is not in dispute that in the year 1999 upto the 4th August, 2000 Mr. Stephen O. Owino practising in a partnership with Mark O. Okeyo in the name and Style of Owino Okeyo and Company Advocates did not have a current practising certificate. The advocate was therefore acting contrary to sections 9 and 30A of the Advocates Act and Order VI Rule 14 of the Civil Procedure Rules.

The applicant's counsel as stated did cite Kingsway Tyres and Automart Ltd. Vs. Mason Retreading & Company Ltd. (Supra) in which the High Court held a plaint instituted by an unqualified advocate contrary to the advocates Act and the Civil Procedure Act invalid. In my view, this case is distinguishable, as the issue had been raised early in the proceedings. The plaintiff had options in that case, which the plaintiff in the instant case may not avail himself if the pleadings taken and proceedings taken are expunged from the court record. This would prejudice the plaintiff, increase the costs and delay the proceedings.

In the instant case a judgement has already been passed. The plaintiff even attempted execution, which is now being sought to be stayed. The plaintiff has gone too far. In my view, if the person who acted for the Plaintiff could never act as an advocate for other reasons other than failure to pay for a practising certificate it would have made things different. Furthermore, I take cognizance of the fact that this

advocate had previously had a practising certificate. I also appreciate the fact his name is duly on the Roll of the Advocates. He was only for the said period without a practising certificate. He is, in my view distinct from any body from the street without any legal qualification acting as an advocate.

This advocate omitted for unknown reason to renew his annual practising certificate. I do not think a litigant should be let to suffer for the errors and omissions of his advocate. Section 31 (2) of the Advocates Act provides for penalties for any person who acts as an advocate while he is unqualified.

This sub section provides:

“(2) Any person who contravenes subsection (1) shall:

- (a) be deemed to be in contempt of the court in which he so acts, or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and
- (b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and
- (c) In addition be guilty of an offence and liable to a fine not exceeding twenty five thousand shillings or to imprisonment to a term not exceeding two years or to both.

I do not wish the plaintiff should suffer by invalidating the pleadings and proceedings just because the persons who acted for him had not, during the period taken out his annual practising certificate. Rather I would have the penalties prescribed under Section 30 be visited on the advocate.

Invalidating the proceedings and pleading would most unfair to a client who may easily ascertain whether the “advocate” he intends to retain is on the Roll of Advocates by inspecting the Roll of Advocates at the Registrar’s office without payment as provided under Section 16 of the Advocates Act, but would find it extremely difficult, if not impossible to find out if his intended ‘advocate’ has taken out a practising certificate. Are we saying by these requirements that a litigant has to demand a production of the Annual practising certificate from an advocate when such litigant goes to seek the services of an advocate. This is simply not practical. In my view, Sections 9 and 30A of the Advocates Act present practical difficulties which the court must take into account while considering the effect and consequences of an advocate having acted without an annual certificate. Annuling of proceedings on the grounds that the advocate did not have an annual practising certificate cannot be said to be one of the ways of enhancing access to justice.

In an old English case of Sparking v. Brereton (1986) L.R. 2 Eg. 64, where a solicitor had not renewed his certificate, PAGE WOOD V.C. refused to invalidate proceedings begun by the solicitor on behalf of a defendant and stated: “It would be most mischievous indeed if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their solicitor”

I agree with this statement and adopt the same. The issue as to whether the pleadings filed and proceedings taken herein by the advocate for the Respondent while he was not duly qualified and where the matter has reached judgement is answered in the negative. Prayer 4 of the application is accordingly refused.

The other issue germane to this application is whether Stay of Execution pending appeal should issue. Mrs. Martha Koome, the Learned Counsel for the Applicant submitted that there is an intended arguable appeal to challenge the finding on liability and the awards made. She stated that the plaintiff ought to have borne some liability.

The grounds on which Stay of Execution may be granted are specified in Order LXVI , 4 and in Halsburys Laws of England. The Court has an absolute and unfettered discretion as to the granting or

refusing a stay, and as to the terms upon which it will grant it. This grounds here adopted Ag. V Emerson (1889) 24 Q.B. O56 and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

Under Order 41 Rule 4 Civil Procedure Rules an applicant must show substantial loss.

In Kenya Shell Ltd. v. Benjamin Karuga and Ruth Wairimu Karuga (1982-88) 1KAR 1018, the Court (Platt J.A.) held that if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions in granting a stay.

In Rosengrens Ltd. v. Safe Reposit Centres Ltd. (1984) 3 All ER Sir John Donaldson MR. said at page 200:

“Where a court is trying to preserve a position pending a further investigation, either of a counter claim or a possible appeal, it is rightly concerned to make certain that thus far successful party shall by passage of time lose the potential fruits of his judgement. That is what security is all about. The court is not concerned to take steps against the unsuccessful party with a view to punishing him in any way or to disadvantage him to any greater extent than is necessary to do justice to the plaintiff”

The Plaintiff has no doubt suffered serious injuries. He is paraplegic. His counsel submitted that the plaintiff may die in the process of appeal as the delay may take long. The applicants do not deny liability completely but rather want the plaintiff to shoulder some contribution. I find that the plaintiff ought to have some amount to cater for his health as the parties embark on the intended appeal.

This court is sympathetic to the Respondents medical condition and doing all it can under the circumstances allows a stay of execution pending appeal subject to the condition that the applicant do pay the sum of Kshs.2,000,000/- to the applicant forthwith.

The cost be in the cause.

Delivered and dated this 30th day of January, 2001

KASANGA MULWA

JUDGE