



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 109 OF 2000**

**JAMES MAYEKU MAKITONI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PAUL NAKHISA MAKITONI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**FRANCIS SIMIYU MAKITONI.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**WENSLAUS MUKWANA (Suing as an administrator of the estate of**

**TERESINA MUSEBE).....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**TOM MACHABE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CHRISPINUS WEKESA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**URBANUS WEKESA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**AND**

**LUTUKAYI .J. MASINDE (as administrator of the estate of the late**

**MICHAEL WATAMBA).....INTERESTED PARTY**

**RULING**

**The Application**

1. By a Notice of Motion dated 24/11/ 2019 brought under **Order 45 Rule of the CPR**. The Applicants jointly sought for orders that:

**1. ...spent**

**2. That judgment dated 21/12/2000 be restored.**

**3. That the Honourable court be pleased to review its ruling dated 6/11/2019 and substitute it with an order striking out the application dated 10/6/2019**

**4. That costs be provided for.**

2. The grounds in which the applicant relies are as follows: that the purported firm of advocates who filed the application never received such instructions; that the application was filed by an unqualified advocate and that there has been a serious miscarriage of justice caused by the said application

3. The application is supported by the Affidavit of **PAUL NAKHISA MAKITONI**- the 2<sup>nd</sup> Applicant sworn on the **24/11/2019**. He deponed that the application dated **10/6/2019** was purportedly filed by the firm of **M/s Walubengo Waningilo Co. Advocates**; that after the court's

ruling the applicants filed a Notice Of Appeal and served the firm in Nairobi; that on the **21/11/2019** the said firm of advocates served his advocates on record with a letter protesting that they had not received instructions and did not even know the said clients he annexed a copy of the letter as “**PNM1**”; that they returned the Notice of Appeal; that it has come to their knowledge that the advocate who appeared in court **PWOKA WANYONYI GODFREY**, does not work with the said firm nor was he authorized by the said firm of advocates; that his advocates sought to know the status of the advocates with the Law Society of Kenya and was confirmed that he is not authorized to practice he annexed a copy of a letter from the LSK marked as “**PNM2**” and that consequently the said application and the ruling of the court are a nullity.

4. The application is further supported by a supplementary affidavit sworn on the **27/11/2019** together with all the annexures thereto.

5. The court having conferred with the Law Society of Kenya for details found that **Godfrey Pwoka Wanyonyi** did not have a practicing certificate as at the time the application dated **16/6/2019** was filed. The court then directed that the Law Society of Kenya through its appropriate organ to deliberate on **Mr. Godfrey Pwoka Wanyonyi’s** conduct with a view of taking appropriate action against him.

### **The Response**

6. The application is opposed. The Defendants’/Respondents’ filed their Replying Affidavit dated **19/3/2021**. Their response is that the plaintiffs’/applicants’ application dated **24/11/2019** lacks merit and should be dismissed with costs; that Section **34B** of the **Advocates Act** provides that the validity of any legal documents drawn or prepared by an advocate who has not taken out a practicing certificate shall not be affected by the failure to obtain a practicing certificate; that even though their previous advocate Pwoka Wanyonyi Godfrey had not taken out a practicing certificate at the time of filing the application dated **16/6/2019**, he was not an unqualified person because he had not been suspended or struck off the roll of advocates; that the defect occasioned by his previous advocate is not fatal and the same can be cured by **Article 159 (2) (d) of the Constitution**; that there is no substantial loss that the applicants will suffer if the application is disallowed and that allowing the application will be too extreme consequence to mete out on them.

7. The application was canvassed by way of written submissions. The Defendants’/Respondents’ filed theirs on the **23/3/2021** whereas the Plaintiffs’/Applicants’ filed theirs dated **15/3/2021** which I have considered.

### **Analysis and Determination**

I have perused the Application, the Supporting Affidavit, the Replying Affidavit and the Submissions filed by the parties herein and the issues for determination are:

*a. Whether the judgment dated 21/12/2000 should be restored?*

*b. Whether the court should review its ruling dated 6/11/2019 and substitute it with an order striking out the application dated 10/6/2019?*

8. Order 45 Rule 1(1) of the **Civil Procedure Rules** provides as follows:

*1) any person considering himself aggrieved-*

*a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or*

*b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

9. Order 45 of the **Civil Procedure Rules 2010** is very explicit that a court can only review its orders if the following grounds exist:

*a) There must be discovery of a new and important matter or evidence which after the exercise of due diligence was not within the applicants knowledge and which could not therefore produce at the time the order was made; or*

*b) There was a mistake or error apparent on the face of the record; or*

*c) There were other sufficient reasons*

10. Further, the application for review must be made without unreasonable delay.

11. The pertinent issue for determination herein therefore, is whether the applicants have established any of the above grounds to warrant an order of review:

12. In **Muyodi –v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

“...in *Nyamogo & Nyamogo –v- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal....”

13. He who alleges must prove. I have read the applicants’ application, the supporting affidavit, a further affidavit together with the annexures and their submissions. I find that there is nothing new they have advanced to convince the court to review its orders dated 6/11/2019.

14. The only ground that they seem to be relying on in seeking the court to review the ruling of 6/11/2019 is the ground that the application dated 10/6/2019 is null and void *ab initio* for having been filed by an advocate who was unqualified.

15. Section 9 of the **Advocates Act** states that 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.
- d) Deleted by Act No. 9 of 2000, s 57

The act also states that

“...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)”

16. Section 10 of the **Act** deals with “*unqualified persons.*”

17. Section 34 of the **Advocates Act** bars an unqualified person from practicing law.

18. It is not in contention that the advocate who acted for the Respondents in drawing the application dated 10/6/2019 did not have a valid practicing certificate at the time he filed the application.

19. It is worth noting that the failure of an advocate to take out a practicing certificate amounts to professional misconduct which may attract sanctions from the professional body, the Law Society of Kenya and under the **Advocates Act**.

20. As to whether the application is invalid because of failure by Mr. Godfrey Wanyonyi Pwoka to take out a practicing certificate, the court is invited to examine the provisions of the **Advocates Act** on the issue.

21. Section 34B of the Act states

“Validity of legal documents

- 1) A practicing advocate who is not exempt under Section 10 and who fails to take out a practicing certificate in any year, commits an act of professional misconduct
- 2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate
- 3) For the purpose of this section, “legal document” includes pleadings, affidavits, depositions, applications; deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.”

22. The import of the sections cited above is that the provisions prevent the taking of instructions, drawing and preparation of documents by an unqualified person. The remedy for breach would be visited on the unqualified person both in criminal and in civil action. The unqualified person must not be a beneficiary of a wrong that he engaged in.

23. The defendant/ respondent submitted that they are innocent and the mistake of their previous advocate should not be visited on them. They cited the case of **Capt. Philip Ongom vs Catherine Nyero Owota SCCA 14/2001 (2003) eKLR** where it was established that a litigant ought not to bear the consequences of an advocate’s default unless the litigant is privy to the default or where the default results from default of a litigant to give instructions to the advocate.” (See also the case of **Republic .v. Resident Magistrate’s Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 Others (2016) eKLR.**)

24. The case of **National Bank of Kenya Limited versus Anaj Warehouse Limited (2015) eKLR** the Supreme Court observed that:

**“The facts of this case, and its clear merits, lead us to a finding and the proper direction in law that no instrument or document of conveyance becomes invalid under Section 34(1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing Certificate. The contrary effect is that documents prepared by other categories of unqualified persons such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes (emphasis added)**

25. From the facts of this case, it is clear that Mr. Godfrey Pwoka Wanyonyi did not a current practicing certificate but was not struck out of the roll of advocates or suspended from the said roll.

26. In the light of the foregoing I lack grounds to review my ruling of **6/11/2019** or to strike out the application dated **10/6/2019** or even to restore the judgment of **21/12/2000**. I therefore find the application dated **24/11/2019** devoid of merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21ST DAY OF APRIL, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE**