



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
SUCCESSION CAUSE NO. 186 OF 2014
IN THE MATTER OF THE ESTATE JAMES MAINA NZIOKI (DECEASED)
CYRUS MUTUNGA MAINAAPPLICANT
VERSUS
TABITHA GATHONI MAINARESPONDENT
RULING

1. Through a Notice of Motion dated 19th July, 2021 the applicant herein Cyrus Mutunga Maina moved this court pursuant to Section 3&3A of the Civil Procedure Act and Section 9 of the Advocates Act seeking for an order declaring all pleadings, appearances, execution and or representation made by Kamau David Wachira advocate on behalf of the respondent expunged and or removed from the court records as they are of no legal effect. The application is based on grounds cited on the face of it and averments contained in the affidavit in support sworn on 19th July, 2021 by Cyrus Mutunga Maina.
2. It is the applicant's case that having conducted search with the advocates records, he came to discover that one Mr Kamau David Wachira who is representing the respondent in this matter does not hold nor has he held a practicing certificate since 2017. To prove this accusation, he attached a search from the Law Society of Kenya marked exhibit No CCM-2 reflecting that the said advocate has been inactive since 2017.
3. He averred that he has never signed any assent or instrument capable of transferring any property before the said Kamau David. He therefore pleaded that any amendments of the petition herein and pleadings filed by the said David are irregular and illegal hence be expunged from the court record.
4. In response, the respondent one Tabitha Gathoni Maina filed a replying affidavit sworn on 8th September, 2021 stating that the application is frivolous, vexatious, lacks merit and is made in bad faith. That the application is only meant to frustrate her and her children.
5. It was further stated that the mistake of an advocate cannot be vested on his client. According to her, her late husband had engaged the firm of Muraya and Wachira advocates as the family lawyers and that upon his demise they continued with their services.
6. She contended that the application herein offends the express provisions of Article 159 (2) (d) of the constitution that substantive justice should be dispensed with without undue regard to technicalities.
7. In his rejoinder, the applicant filed a supplementary affidavit sworn on 19th July, 2021 which raised completely new issues not contained in the replying affidavit.
8. During the hearing, Mr Atancha appearing for the applicant reiterated the averments contained in the affidavit in support of the application. He contended that the said David Maina Kamau was trading in the name of Muraya and Wachira Advocates while fully aware that he was not possessed of the requisite practicing certificate.
9. On her part, Ms Kariuki adopted the content contained in the replying affidavit. She contended that the respondent as an administrator cannot be condemned for mistakes of her advocate. Counsel admitted that David Kamau advocate did not have a practicing certificate at the material time but was quick to add that her client cannot be blamed for that omission.
10. I have considered the application herein, affidavit in support, response thereto and oral submissions by both parties. It's an indisputable fact that, for the period one David Maina Kamau acted for the respondent he was not in possession of a valid practicing certificate. This evidence was confirmed from the law society Search which shows that from 2017-2021 the said David Kamau had no valid practicing

certificate.

11. The key question which renders itself for determination is, what is the status of the pleadings or documents prepared and or executed by such unlicensed lawyer? The application is expressed to be filed under Section 9 of the Advocates Act which provides qualifications to practise as an advocate 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 list;

(c) has in force a practicing certificate

(d) deleted

12. However, Section 9 is qualified by Section 34B of the Advocates Act which provides;

“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 provision of this Act, nothing shall affect the validity of any legal documents drawn or prepared by an advocate without valid practicing certificate

(3) for the purposes of this section, legal documents, includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law regarding filing by an advocate.

13. The amendment of the Advocates Act to introduce Section 34 B was pursuant to Act No 11 of 2017. While faced with a similar scenario, the Supreme court of Kenya in **National Bank of Kenya Limited Vs Anaj Warehousing Limited (2015) e KLR** held that;

“Paragraph 68- the fact 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 ...”

14. The Supreme Court went further to add that, while securing the rights of a client whose agreement has been formalized by an advocate not holding a current practicing certificate, such advocate’s obligations under the law remains unaffected. That such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject to.

15. My reading and understanding of the supreme court’s position is that an advocate who does not have a current practice certificate is simply inactive hence instruments or documents executed by him should not be declared illegal. However, this is different from one who has been struck out of the roll of advocacy. I believe that is what the introduction of Section 34 B of the Advocate’s Act intended to cure. However, Judge Korir sitting in the high court was of a different view from that of the Supreme court when deciding the case of **Barbra Cheorgina Khaemba Vs Central Bank of Kenya & 2 others (2019) e KLR** where he held that an advocate without current practicing certificate is unqualified and documents/pleadings so executed by him are illegal.

16. While expressing it’s sentiments on the same subject, the court of Appeal in the case of **Ngomeni Swimmers Limited Vs Katana Charo Suleiman (2014) eKLR** held that an unqualified advocate in terms of section 9 (c) of the Advocates Act was an illegal outfit and that a plaint drawn by a Mr. Kinyanjui who was an advocate without current practicing certificate was defective and therefore properly struck out by the trial court. It is however worth noting that the court of appeal’s decision was before the Supreme Court decision.

17. Looking at the reading of para 70 of the Supreme court’s decision in **National Bank of Kenya Ltd Vs Anaj (Supra)**, it was recommended that its judgment be served upon the Attorney General, Parliament and Law Society to initiate a legislative amendment to the advocates Act to clarify on the status of documents drafted by an unqualified lawyer.

18. It is this Supreme court’s judgment that informed the introduction of Section 34B in 2017 of the Advocates Act to clearly state that instruments or pleadings drawn by an advocate cannot be invalid because of being drawn by an unqualified advocate by virtue of not having a current practicing certificate. I believe the drafters of this provision were aware of innocent litigants who were victims of such situations and therefore the mischief to be cured.

19. The wording of Section 34 B does not need any further interpretation as the language used is plain, unambiguous and straight forward. On the aspect that the doctrine of stare decisis binds junior court’s to senior court’s decisions, the Supreme Court finding is binding. In view of the said Supreme court holding and the reading of Section 34 B of the Advocates Act, it is my finding that the documents and pleadings drafted by David Kamau are properly before the court hence the same cannot be expunged.

20. The best that can be done is to lodge disciplinary proceedings before the complaints commission or Law Society of Kenya or report to the

police for criminal proceedings. Accordingly, the application herein is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF FEBRUARY 2022

J.N.ONYIEGO

JUDGE