



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. E 146 OF 2020**

**MARIAKANI ESTATE WELFARE ASSOCIATION**

**(SUING THROUGH ITS VICE CHAIRPERSON AGGREY OWITI).....PLAINTIFF**

**= VERSUS =**

**LOCAL AUTHORITY PROVIDENT FUND.....1ST DEFENDANT**

**PREVIEW REALTORS LIMITED.....2ND DEFENDANT**

**BEELINE AUCTIONEERS.....3RD DEFENDANT**

**NAIROBI METROPOLITAN SERVICE.....INTERESTED PARTY**

**RULING**

The Plaintiff filed a suit on 16th October, 2020 and on the same date, he filed a Notice of Motion dated 16th October, 2020 under Certificate of Urgency. The said application was brought pursuant to the provisions of Articles 50 of the Constitution of Kenya 2010, Section 1A, 1B and 3A & 3B of the Civil Procedure Act, Cap 21 and Order 22 Rule 51 (2) of the Civil Procedure Rules, 2010 and all other enabling Provisions of the Law. The application sought the following orders;

- a. *Spent*
- b. *Spent*
- c. *Spent*
- d. *Spent*
- e. ***THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from attaching and/or selling any property of the residents of Mariakani Estate erected on the land Known as Land Reference Number 209/6612 pending hearing and determination of the suit filed herewith.***
- f. ***THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from instituting any actions aimed at levying distress of rent against the residents of Mariakani Estate erected on the land known as Land Reference Number 209/6612 pending hearing and determination of the suit file herewith***
- g. ***THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from evicting or in any way interfering with quiet possession by the residents of Mariakani Estate of their respective houses developed on Land Reference Number 209/6612 pending hearing and determination of the suit filed herewith.***
- h. ***THAT the officer Commanding Industrial Area Police station does ensure compliance with the***

*orders herein.*

- i. ***THAT costs of this Application be borne by the Plaintiff/Respondent.***

Before the said application could be heard on 30th November, 2020, the 2nd Defendant through the firm of Kimani Kagwima & Co. Advocates filed a Notice of Preliminary Objection dated 15th December, 2020. The grounds of the Preliminary Objection were as follows:-

1. ***The plaintiff herein being Societies registered under the Societies Act, Cap 108 lack capacity to institute a suit in their own name and as such the instant suit and Application is fatally defective.***
2. ***The plaintiff through its Chairman has purported to institute proceedings on behalf of the welfare association without written authority to appear, plead or act on behalf of members of the said association in writing pursuant to Order 1 Rule 13 (1) & (2) of the Civil Procedure Rules and the suit is therefore a nonstarter.***
3. ***That the Mariakani Estate Welfare Association lacks capacity to sue the respondents herein in collective as the tenancy agreement is between each representative tenant as an individual with different terms therein.***
4. ***That all the pleadings herein (Certificate of Urgency, Notice of Motion, Complaint and all accompanying documents all dated 16th October, 2020) are fatally defective as they were prepared by unqualified person namely VINCENT NYANGAYO) within the meaning and application of Section 9 of the Advocates Act, Cap 16 Laws of Kenya.***
5. ***The plaintiff's pleadings and application are based on an incurable illegality and ought to be struck out forthwith and this suit dismissed with costs to the defendants.***

The Ruling herein is therefore in respect of the said Preliminary Objection, which the court found ought to be heard before the aforementioned Notice of Motion as the same touched on the validity of the pleadings on which this suit is based on.

The Preliminary Objection was argued orally in Court on 26th January, 2021 by Mr. Murimi on behalf of the 2nd Defendant who relied on the provision of Section 9 of the Advocates Act. It was argued for the 2nd defendant that the pleadings were prepared by an incompetent person and referred to the letter dated 16th December, 2020 from the Law Society of Kenya. The letter confirms that Vincent Onyango Nyangayo was not certified to practice law since he took out his last valid practicing certificate in the year 2019. The 2nd defendant through its advocate submits that Vincent Onyango Nyangayo did not have a valid practising certificate to practice in 2020 and as a consequence, the pleadings herein ought to be struck out. It is the 2nd defendant's submission that the issues being raised are not mere technicalities.

The 2nd Defendant relied on a bundle of Authorities to support the Preliminary Objection. In the case of ***Kipsiwo Community Self-help Group V Attorney General & 6 others [2013] eKLR***, where Munyao J. in determining the legal capacity of the self-help group to institute an action in its own name held that "Kipsiwo Self Help Group had no capacity to institute action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit." While in the case of ***Kamiti Forest Squatters Association (Suing through its Chairman Peter Njore Wakaba & 2 others [2020] eKLR Gacheru J. in striking the 2nd and 3rd plaintiffs from the suit for lack of capacity to sue stated that a society registered under Section 41 of Societies Act cannot sue in its own capacity as it is not a juristic person and such the society needs to sue in a representative capacity.*** Lastly, in support of striking out of pleadings filed by an unqualified person, the 2nd defendant relied on the case of ***Cheraik Management Limited v National Social Security Service Fund Board of Trustee & Another [2012] eKLR, where Odunga J. in striking out a plaint as well as the suit held that documents signed by an unqualified person are the same position as unsigned documents and as such the pleadings thereon are rendered incompetent and are for striking out.***

Ms. Naima for the 1st defendant in support of the Preliminary Objection submitted that the suit should be struck out for being defective. Ms. Mbatani for the Interested party informed the court that she had not

received instruction from her client but nonetheless supported the 2nd defendant's position. Ms. Naima further submitted on behalf of the 1st defendant that the Preliminary Objection raises other grounds and that there is no proof of payments of rent in the documents filed by the plaintiff.

Mr Okatch on behalf of the plaintiff stated that the plaintiff filed a further affidavit deponed on 25th January, 2021 by Aggrey Owiti which deposes that authorization was given to him as chairman of the association to institute the proceedings on behalf of the society in a resolution dated 12th October, 2020 in accordance with the provisions of the Societies Act, Cap 108 and further that the register of the members represented in this matter as well as proof of payment of rent has been filed in court.

It was further submitted on behalf of the plaintiff that the Court of Appeal referring to Article 159 of the Constitution, has since departed from the law laid down in the case of *National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] eKLR* where pleadings could be struck off where a person had not taken out practicing certificate. Mr. Okatch also submitted that there is a notice of change and that the firm of Okatch and Partners Advocates are now on record for the plaintiff. Mr. Okatch relies on the Supreme Court case of *National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR*, where the Supreme Court in allowing the appeal while setting aside the Court of Appeal judgment stated 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 practising 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."** In the case of *Republic v Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njunguna & 9 others [2016] eKLR*, Ngugi J. guided by the Supreme Court Decision in *NBK V Anaj* (Supra) held that the pleadings drawn and filed by the advocate on record were not invalid since a claim and a course of action belongs to the client and Article 159 encourages administration of justice without undue regard to technicalities.

In the case of *Samwel Gioche t/a Sagio Contractors v Stanley Mwangi Kiboro & Another [2017] eKLR* Angote J. in holding that the failure of the advocate to take out practising certificate cannot invalidate the plaint and pleadings referred to the Supreme court decision in the National Bank case (supra) and stated that;

***"16. Although the Supreme Court was dealing with the issue of whether a conveyance instrument prepared by an unqualified person could be invalidated, the reasoning of the court as quoted above shows that any document, including pleadings, drafted by an advocate who does not have a current practising certificate cannot be invalidated on that ground alone.***

***17. According to the Supreme Court's decision, the sanctions prescribed by Section 34(2) of the Advocates Act are applicable in a situation where an unqualified advocate prepares the documents/instruments prescribed under Section 34(1)."***

#### **Analysis:**

Having carefully considered the grounds in support of the application, the parties' rival affidavits and submissions, the only issue this court is called upon to determine is whether the pleadings filed by Mr. Vincent Nyangayo, who had not taken out a practising certificate for 2020, are valid. On the issue of whether the plaintiff Mr. Aggrey Owiti had authority to institute this suit, i am satisfied that the Vice President of the association as per the resolution on record, which has not been objected to, had capacity to file the present suit.

Section 2 of the Advocate's Act provides that: -

**““unqualified person” means a person who is not qualified under section 9 and includes an advocate who—**

**(a) is not qualified under section 9;**

**(b) is not exempt under section 10; and**

**(c) fails to take out a practising certificate.”**

Section 34 further provides as follows: -

**“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—**

**(a) relating to the conveyancing of property; or**

**(b) for, or in relation to, the formation of any limited liability company, whether private or public; or**

**(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or**

**(d) for the purpose of filing or opposing a grant of probate or letters of administration; or**

**(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or**

**(f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument: Provided that this subsection shall not apply to—**

**(i) any public officer drawing or preparing documents or instruments in the course of his duty; or**

**(ii) any person employed by an advocate and acting within the scope of that employment; or**

**(iii) any person employed merely to engross any document or instrument.**

**(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.**

**(3) Any person who contravenes subsection (1) shall be guilty of an offence.**

**(4) This section shall not apply to—**

**(a) a will or other testamentary instrument; or**

**(b) a transfer of stock or shares containing no trust or limitation thereof.”**

Section 34B which is one of the amendments introduced in 2017 provides for validity of documents and states that: -

**“Validity of legal documents**

**(1) A practising advocate who is not exempt under section 10 and who fails to take out a practising 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 practising 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."**

The provision of Section 34B of the Act as couched, validates legal documents of advocates in good standing who have not taken out practising certificates. It is worth noting that the Supreme Court Decision in **Anaj Warehousing Limited** (supra) is what necessitated the National Assembly to amend the Advocates Act by introducing among other provisions sections 34A and 34B because while the law was clear that unqualified persons could not draw legal instruments and pleadings, it was not clear on the validity of such documents.

In the case of National Bank of Kenya Limited Versus Anaj Warehousing Limited (supra), the Supreme court stated as follows;

Thus, the issue still remains: whether section 34 of the advocates Act actually invalidates all instruments of conveyance prepared by advocates who do not have current practising certificates. In our opinion, it is essential to establish the main objective of section 34, as a basis for any conclusions. This section prohibits unqualified persons from preparing certain documents. It is directed at "unqualified persons". It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practising certificates.

According to the decision 8 of the Supreme court, the transgressor is the advocate who has failed to take a practising certificate and not the client who gave instructions to the advocate. This position, in my view, is equal to a situation where a driver fails to renew his driving licence. If such a driver carries passengers in a bus and is stopped halfway by the police who note that the driver's licence expired some months back, the logical way forward will not be to send the passengers back to where they came from but to allow another licenced driver to complete the journey. The driver whose licence had expired was still a qualified driver and once he renews his licence, he will continue driving. This position is totally different from a situation where someone is not a qualified driver and has no driving licence but decides to drive. Turning to the case at hand, the plaintiff's pleadings were filed by an advocate who was practising in the year 2019 but had not renewed his licence in 2020.

According to section 34 B(2) the validity of any legal document drawn by an advocate without a valid practising certificate does not affect the validity of such documents. Such documents in my view include pleadings filed in court.

The case of **Cheraik Management Limited v National Social Security Service Fund Board of Trustee & Another [2012] eKLR** was decided way before the Supreme Court decision and the Amendment of the Advocates Act. The advocate who instituted the present suit had not taken out his practising certificate at the time of drafting and filing the plaint and the application herein however being guided by the Supreme Court in **Anaj Warehousing Limited** (Supra), Section 34B of the Advocates Act and the doctrine of stare decisis, I find that the pleadings filed by Advocate **Vincent Nyangayo** in the present suit are valid.

Accordingly, the preliminary objection dated 15th December, 2012 is dismissed with costs to the plaintiff.

**Dated and Signed at Nairobi this 10<sup>th</sup> day of March, 2021**

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**S. CHITEMBWE**

**JUDGE**