



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO. 22 OF 2017

KYALO KOMU.....APPELLANT

VERSUS

FELIX MALITI MULINGATA.....RESPONDENT

Being an Appeal from Kitui Civil Magistrate's Court Civil Suit No. 269 of 2014, Judgement delivered on 28th August, 2017 by Hon. R. Ombata-Resident Magistrate)

J U D G E M E N T

1. “**Uchawi is real!**” is a street mantra that seems to have found traction in this matter particularly given that we are in Kitui a renowned place in matters witchcraft. How else would one explain a matter involving “witchcraft” finding its way to an Appellate court?

2. This appeal arose from *Kitui Chief Magistrate's Court Civil Suit Number 269 of 2014*, where the Respondent had sued the Appellant for defamation. The Respondent claimed that the Appellant had uttered defamatory words that suggested that he was a “witch” and the words in issue were the following: -

“..... we took Maliti and Kamaa to take anti-witchcraft oath because they are responsible for bringing witchcraft and casting evil spirits to pupils at Ung'aatu Primary School.....”.

3. The Respondent's claimed before the trial court that the words complained of were false and aimed at tarnishing his good name and reputation. He further pleaded that as a result, he requested for a meeting before an Area Assistant Chief, only for the Appellant to aggravate the matter by not only refusing to apologize, but claiming that this was a fair comment.

4. The Respondent then proceeded to file suit vide a plaint dated 16th October, 2014 seeking for the following reliefs namely: -

a) *General damages for defamation.*

b) *Aggravated damages for defamation.*

c) *Costs and any other relief.*

5. The record of proceedings from Lower Court shows that the Appellant failed to enter appearance or file any defence leading to interlocutory judgement being entered against him. The suit was then set down for formal proof on 9th December, 2014. On the said date the defendant turned up in court but failed to get audience as he had not entered appearance. The matter then proceeded for hearing on formal proof. Before the trial concluded, the Appellant filed an application dated 10th February, 2015 seeking to set aside the interlocutory judgement but the trial court vide its Ruling delivered on 4th August 2015 dismissed the application for lacking in merit.

6. The matter proceeded on formal proof to conclusion and vide its judgment dated 31st January, 2017, the trial court entered judgement for the Respondent and awarded him Kshs. 150,000 for general damages and Kshs. 100,000 aggravated damages plus costs and interests. The Respondent upon assessment of costs then applied for execution. The Appellant was put in civil jail on 28th July, 2017 after failing to show cause why he should not be committed to civil jail.

7. On 4th August, 2017, the Appellant filed an Application dated 4th August 2017. In that Application, the Appellant sought for the following reliefs namely: -

i) Spent.

ii) A stay of execution of the decree dated 24th February, 2017, and all the consequential proceedings to wit warrants of arrest and committal to civil jail.

iii) That the Applicant be released forthwith from civil jail.

iv) That the entire proceedings be declared a nullity, set aside and a new trial to commence.

8. The main ground for the Appellant's application was that the Respondent's pleadings were drawn and filed by an advocate who was inactive at the material time because he had not taken out a practicing certificate and that by a dint of **Section 34 (1) of the Advocates Act**, the Respondent's pleadings were invalid.

9. The trial court in its ruling delivered on 4th September, 2017, found no merit in the Appellant's applications noting that **Article 159 (2) (d) of the Constitution of Kenya 2010** cured the defect of the fact that the Respondent's Counsel had not taken out his practicing certificate at the time of filing the suit.

10. That ruling is now the subject of this appeal. The Appellant felt aggrieved and preferred this appeal raising the following 4 grounds namely: -

i) The Learned Magistrate erred in law and in fact by failing to consider the Appellant's submissions and authorities cited and finding that the entire proceedings in PMCC NO: 269 of 2014 were defective.

ii) The Learned Trial Magistrate erred in law and in fact by denying the Appellant his right to a hearing and denying him an opportunity to defend the case even when he had expressed his wish to file a defence and to be heard.

iii) The Learned Magistrate erred in law and in fact by failing to apply express statutory provisions of the law and failing to find that a layman masquerading as an Advocate could file and prosecute a suit on behalf of another layman.

iv) The Leaned Magistrate erred in law and in fact by awarding costs of the application to the Respondent.

11. The Appellant in his written submissions dated 10th November, 2020, majorly faulted the Trial Magistrate, for failure to appreciate that it was fatal for the firm of J.M. Muinde & Co. Advocates to file a suit on behalf of the Respondent without a practicing certificate. The Appellant's contends that the said advocate was later suspended from the roll of Advocates in 2017.

12. The Appellant relies on the decision of **Barbara Georgina Khaemba Versus Central Bank of Kenya & 2 Others 2019 eKLR**, where the court found that a suspended advocate cannot draft legally binding documents. The Appellant cites **Sections 9, 31 and 34 of the advocates Act** to support his submissions.

13. The Respondent has opposed this appeal through submissions dated 28th October, 2020 made through Counsel. The Respondent contends that this appeal is a ploy employed by the Appellant to re-open proceedings after his application to set aside interlocutory judgement was dismissed.

14. He further submits that; the Appellant did not prove that his advocate did not have a practicing certificate at the time Kitui *CMCC Number 269 of 2014 was filed in 2014*. According to the Respondent, his counsel had not been struck off the Roll of Advocates in 2014.

15. The Respondent further submits that, even if his advocate had not taken out his practicing certificate in 2014, his pleadings filed cannot be invalidated by that fact and he relies on the Supreme Court's decision in **National Bank of Kenya –versus –Anaj Warehousing Limited 2015 eKLR**. He also relies on the provisions of **Section 34B (2) of the Advocates Act** and a further decision in **T.J.F Kajwang -versus- Law Society of Kenya 2002 eKLR**.

16. He contends that, a mistake of Counsel cannot be visited upon an innocent party and on that score, he cites the case of **Republic –Versus- Exparte Geoffrey Kariuki Njuguna & 9 Others 2016 eKLR**.

17. This court has considered this appeal and the response made. The issue before this court is whether the failure by the Respondent's Counsel to take out his Practicing Certificate in 2014 invalidated/nullified the pleadings and the attendant proceedings in Kitui Chief Magistrate Civil Case number 269 of 2014.

18. The 1st question to be asked is who is an advocate? **Section 2 of the Advocate Act** defines an Advocate as a person “whose name is duly entered upon the Roll of Advocates and for purposes of part IX, includes any person mentioned in **Section 10**”.

Section 10 Provides for officers who are exempt from the conditions spelt out under **Section 2** and who are officers entitled to act as advocates. They are listed as follows: -

(a) An officer in the office of the Attorney-General or the office of the Director of Public Prosecutions;

(b) The Principal Registrar of Titles and any Registrar of Titles; or

(c) Any person holding office in a local authority established under the Local Government Act Cap 265.

(d) Such other person, being a public officer or an officer in a public corporation, as the Attorney-General may, by notice in the Gazette, specify.

19. The provisions of **Section 9** of the **Act** further provides 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 had in force a practicing certificate.”

20. An unqualified person is described under *Section 9 of the Act* to mean, 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 *Practicing Certificate*.

21. This court has seen from the *Record of Appeal at Page 47*, a copy of an excerpt from **Law Society of Kenya (LSK) website**, showing the status of Muinde Joseph Mutinda as “inactive” in the year 2014 but with a rider exempted). It is not clear from the proceedings, why the status of the said advocate was indicated as “exempted” but even supposing the said advocate had not taken out the Practicing Certificate (P.C) for the year 2014 can the documents drawn by the said advocate including the Respondents pleadings be said to be invalid or a nullity? That is the big question in this appeal whose answer certainly determines this appeal.

22. It is certainly clear, reading from **Section 9, 31 and 34** of the **Advocates Act**, that only advocates with practicing certificates are the persons allowed to practice as such and represent their clients in court. I have seen the decision cited by the Appellant in **Barbara Georgina Khaemba Versus Central Bank of Kenya & 2 Others 2019 eKLR**, and it is apparent that the court decided to strike out pleadings drawn by advocate who had been suspended from practice and the court’s decision was informed by the need to maintain high professional standards and discipline within the legal profession. I am however, not persuaded that it was fair and just to strike out pleadings belonging to an innocent party who may not have been aware that the said advocate engaged, had in fact been suspended from the Roll of Advocates.

This position is buttressed more by the fact that, in this instance the advocate had not actually been struck off the roll of advocates. He had not taken out his practicing certificate for the year 2014 when he drew the pleadings for the Respondent.

23. Furthermore, and more importantly is that, there at the present there is a paradigm shift in the legal position in regard to documents or pleadings drawn by an advocate who may have drawn documents/pleadings without renewing his/her Practicing Certificate (P.C.). Failure by an advocate to take out a Practicing Certificate (P.C), cannot invalidate the proceedings of a court. In the case of *National Bank of Kenya Limited –versus- Anaj Warehousing Limited 2015 eKLR*, the Supreme Court of Kenya put the issue to rest when it made the following observations;

“The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a Practicing Certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practicing certificate.

One of the basis of the Appellate Court’s decision was founded upon a hypothesis which, in our opinion, should not be the criterion for resolving the question as to the rights of the parties: that since the Advocates Act provides for the recovery of fees by a client whose advocate has not taken out a practicing certificate, there would be no harm if the charge documents are annulled. For even if the appellant were to recover any fees paid, it stood to be damnified by the non-repayment of the loan itself.

The Court’s obligation coincides with the constitutional guarantee of access to justice and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution:

“justice shall be administered without undue regard to procedural technicalities”.

To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person’s property of any description), 20 (3) (a) and (b) (interpretation that favors the development and enforcement of fundamental rights and freedoms) and 10 of the same.

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.

While securing the rights of the client whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such advocate's obligations under the law remain unaffected. 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.

We commend this Judgment to the attention of Parliament, the Law Society and the Attorney General so that appropriate legislative action may be taken to address the gaps and inconsistencies now apparent in the Advocates Act as highlighted in paragraphs 48, 49, 50, 51, 52, 53 and 54 herein."

24. In the light of the above decision, Parliament vide Legal Notice number 11 of 2017, took the advisory seriously and amended the **Advocates Act** by introduction of **Section 34B** which provides as follows: -

- (a) "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.
- (b) 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
- (c) 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."

25.. As I have observed above, the status of the advocate in this instance was indicated as "exempt" and the trial court could not be faulted for finding that it could not annul proceedings when the status of the advocate drawing the pleadings was uncertain. So even if the Supreme Court had not pronounced itself in 2015 and changed the position of the law, the trial court was still perfectly within its correct lane by dint of **Article 159 2 (d) of the Constitution of Kenya 2010**. In the case of **Kenya Women Trust versus Salome Waitthaka Kinyua & Anor. (2019) eKLR**, the Court of Appeal made the following guiding observation expressing common law position, prior to the amendment of **Advocates Act**.

"The disqualification's provisions are verbatim, see Section 20 of the Solicitors Act vis a vis Section 31 of the Advocate Act. The Solicitors Act like our Act is also silent on the question of what happens to the proceedings where an Advocate without a certificate had acted. However, as to proceedings, the position is set out in Halsbury's Laws of England, Vol. 44 and 4th Edition Par 353 thus:

"Proceedings are not invalidated between the litigant and the opposite party merely by reason of the litigants' solicitor being unqualified, for example by his not having a proper practicing certificate in force."

This has been the position since the 1866 decision of Sparling vs Brereton (1866) 1 LR 64, where Sir Page Wood VC held that such actions/ proceedings are valid and binding upon the clients as against third parties. We find this decision very persuasive and compelling, and we accept it as the law, which should apply in this instance as well.

It is disgraceful and a criminal offence for an advocate to practice without a valid practicing certificate. However, no prejudice has been shown to have been occasioned to the innocent litigant in this case. Similarly, it is instructive to note that: -

"Proceedings are not invalidated between the litigant and the opposite party merely by reason of the litigants' solicitor being unqualified, for example by his not having a proper practicing certificate in force

By law, striking out pleadings or staying or expunging proceedings by such unqualified person for a client who is innocent would negate the entire constitutional imperative of serving substantive justice to the parties. On this basis, I find that the application in the trial court to strike out pleadings and or proceedings by the unqualified advocate herein lacks merit and is not worth of reinstatement".

26. In the light of the above decisions, and the dictates of the **Article 159 2(d) of the Constitution of Kenya**, it is the position of this court that non-compliance of an advocate in taking out his practicing certificate, is a separate issue to be dealt with against the concerned advocate which may include and not be limited to disciplinary action against that advocate. But the same does not go into the root or substance of proceedings filed by such advocates. The non-compliance in my view, is a technicality and an innocent party or litigant should not be punished or impeded from accessing justice through a fault which is not of his/her making. The Appellant in my view, failed to give satisfactory explanation as to why he failed to enter appearance or file his defence in time or at all in the trial court dealing leading to the ruling of that court on 7th April, 2015, when it dismissed the Appellant's attempt to set aside interlocutory judgement. The attempt in my view, lacked merit as correctly found out by the trial court and that finding left the Appellant's cause hanging in a thin thread hence his Notice of Motion dated 13th September, 2017. That application was a ploy employed by the Appellant to re-open proceedings after his ill-application to set aside the interlocutory judgement was disallowed. There was no merit in that application as well as I have observed above.

In the end, this court finds no merit in this appeal. The same is dismissed with costs to the Respondents.

Dated, Signed and Delivered at Kitui this 12th day of May, 2021.

HON. JUSTICE R. K. LIMO

JUDGE