



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.31 OF 2019**

**GASHIKA ENTERPRISES .....PLAINTIFF/APPLICANT**

**VERSUS**

- 1. KARISA TSORI MRAMBA**
- 2. RENSON SHIDA MWANGIRI**
- 3. JUMWA CHARO KALUME**
- 4. KENGA KAHINDI MWARO**
- 5. STEPHEN SHIVASTI MASHA**
- 6. KAHINDI CHARO KAHINDI**
- 7. FRANCIS KAHINDI CHARO**
- 8. WILLIAM SAFARI CHARO**
- 9. KADII KATANA BAYA**
- 10. JOSEPH BARAKA MWANGI**
- 11. JULIUS CHARO SAFARI.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By their Notice of Motion application dated and filed herein on 17<sup>th</sup> May 2019, Gashika Enterprises (the Plaintiff/Applicant) prays for orders of injunction to issue restraining the eleven (11) Defendants/Respondents, their servants and/or agents from remaining on and/or interfering with the Plaintiff's access or entry upon all that Parcel of land known as LR No. 8513, being Grant No. CR 25146 situated within Malindi. The Plaintiff further prays for an order that the Defendants hand over vacant possession of the said property to the Plaintiff.

2. The said application is supported by an affidavit sworn by the Plaintiff's director Simon Gashwe and is based on the grounds, inter alia:-

- i. That the Plaintiff is the registered proprietor of the said parcel of land having acquired the same in the year 2014;**
- ii. That the Defendants trespassed thereon and started putting up structures without the knowledge and/or permission of the Plaintiffs.**
- iii. The Plaintiff has tried various means to settle the dispute including payment of some money to enable the Defendants to relocate elsewhere to enable the Plaintiff commence construction of a project on the land for which it was acquired;**
- iv. The Defendants have refused and/or neglected to vacate the land as a result whereof the Plaintiff has suffered loss and**

damage.

3. Upon being served with the Summons and the application before me, the Defendants proceeded on 27<sup>th</sup> November 2019 to file a Notice of Appointment of Advocates dated the same day through Messrs Onchangu Kemunto & Company Advocates. Subsequently on 15<sup>th</sup> January 2020, the said Law Firm filed herein a Notice of Preliminary Objection to the Plaintiffs suit on the grounds that:-

**i. The suit in its entirety is incurably defective and an abuse of the Court process.**

**ii. The Plaintiff contravenes the relevant Civil Procedure Rules in regard to suits by Corporations and the Companies Act Cap 480 (sic) of the Laws of Kenya.**

**iii. The suit is unsustainable in form of substance and is for striking out; and**

**iv. The suit is time-barred by dint of the provisions of the Limitation of Actions Act.**

4. On 17<sup>th</sup> January 2020, the Plaintiff in turn served a Notice to Strike Out and Expunge the Defendant's Notice of Appointment of Advocates dated 27<sup>th</sup> November 2019 as well as the Notice of Preliminary Objection dated 15<sup>th</sup> January 2020 on grounds which it stated would be adduced at the hearing.

5. When the application came up for hearing on 20<sup>th</sup> January 2020, Mr. Kibunja, Learned Counsel for the Plaintiff submitted that their application was unopposed as the Notice of Preliminary Objection did not disclose much given that the Defendants had not filed their Defence and/or any other pleadings. Counsel further submitted that Ms Onchangu Advocate who practices in the name of Onchangu Kemunto & Company Advocates, the Advocates for the Defendants had failed to take out a Practising Certificate for the Practice Year 2019 and that the documents filed by the said Law Firm were without basis and ought to be expunged from the record.

6. In response, Mr. Kariuki, Learned Counsel holding brief for Ms Onchangu responded that he was unaware if Ms Onchangu had a Practising Certificate for the year 2019. Counsel submitted that the absence of a Practising Certificate on the part of Ms Onchangu was in any event not fatal to the pleadings filed by the Law Firm and undertook to furnish the Court with an authority to that effect before the end of the day.

7. Mr. Kariuki Advocate in that respect submitted that the Preliminary Objection was well-grounded as the Verifying Affidavit did not show that the suit has been filed on behalf of the company. He conceded however that in the absence of any other pleading, he had nothing to show that the suit herein had been filed outside the Limitation period as stated in the Preliminary Objection.

8. I have considered the issues herein and the oral submissions made before me by the Learned Advocates for the parties.

9. As it were, and contrary to the submissions of Counsel for the Defendants, the Law does not allow an unqualified person to act, as an Advocate. Section 2 of the Advocates Act (Cap 16 of the Laws of Kenya) defines the term "unqualified person" as a person not qualified under Section 9 to act as an advocate."

10. Section 9 of the Act provides as follows:-

**"9. 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 Roll; and**

**c. He has in force a Practising Certificate.**

11. In light of the provisions of Section 9 of the Advocates Acts aforesaid, it goes without saying that the law requires that for an advocate to qualify, he or she must have in force a Practising Certificate. Indeed, Section 31 of the Act creates an offence for unqualified persons acting as Advocates while Section 34 makes it an offence for unqualified persons to draft certain documents.

12. The question of signing of pleadings by unqualified advocates or otherwise Advocates who lack practicing Certificates has been the subject of several decisions of the Court of Appeal. In *Obura –vs- Koome(2001) 1 EA 175*, the Court considered whether to strike out an appeal where an Advocate lacked a Practising Certificate at the time that a Memorandum of Appeal was filed. The Court held that the Memorandum of Appeal was "in the circumstances,....incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other Court."

13. In *National Bank of Kenya –vs- Wilson Ndolo Anyah, Civil Appeal No. 119 of 2002* (unreported), the Court of Appeal again rendered itself thus:-

**"Section 9 makes provisions for qualifications for practicing as an advocate, and the qualifications include having in force a current practicing certificate. It is public policy that Courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion, will discourage excuses being given for justifying the illegality. A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal act"**

**(see also Delphis Bank Ltd –vs- Behal & Others (2003) 2EA 412).**

14. In the matter before me, this Court was provided with an extract from the Law Society of Kenya on the Practicing Status of Ms Onchangu Martina Kemunto of Onchangu Kemunto & Company Associates Advocates Malindi. Her Status for the year 2019 is clearly marked as “inactive”, an indication that the said Advocate had no Practicing Certificate for the said year.

15. The general principle resonating from the above authorities is that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out. I find no reason to divert from that general position and the Notice of Appointment of Advocates and the Notice of Preliminary Objection as filed herein by the Defendants are hereby struck out.

16. The net effect of that decision is that the Plaintiff’s application stands unopposed and the same is hereby allowed with costs.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of April, 2020.**

**J.O. OLOLA**

**JUDGE**