REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 180 OF 2012

(CORAM: F. GIKONYO J.)

KENYA WOMEN FINANCE TRUST..APPELLANT

VERSUS

SALOME WAITHAKA KINYUA..1ST RESPONDENT

RAHAB NJERI..2ND RESPONDENT

(Appeal from the Ruling of Hon. C.A. Otieno (Ms). SPM dated 9th day of March 2012

in the Kikuyu PMCC NO 53 of 2008)

JUDGMENT

1. This appeal basically relates to the application of **Order 9 Rule 9 of the Civil Procedure Rules.** The appellant was the 2nd Defendant in the trial Court. The Respondents were the 1st and 2nd Plaintiff respectively

2. During the trial the appellant was represented by the firm of **Soita & Saende Advocates** whereas the Respondents were represented by the firm of **Wamiti Njagi & Co. Advocates.** The firm of **Gachie Mwanza & Co. Advocates** later replaced the firm of Wamiti Njagi & Co. Advocates.

3. Consent was filed on 27th May 2011 in which the firm of Soita and Saende Advocates allowed the firm of **Walker Kontos Advocates** to come on record for the Appellant. The said firm also filed a notice of appointment on the same date.

4. During the intervening period between the filing of the Consent and its adoption as an order of the court on 24 th June 2011, the firm of Walker Kontos advocates had on 9th June 2011 filed an application on behalf of the Appellant seeking a stay of execution of the judgement and decree and that the proceedings therein, where John Wamiti Njagi advocate participated as an advocate for the plaintiff be nullified with costs to the 2nd Defendant.

5. **Rahab Njeri**, the 2nd Respondent herein averred that the application was made in bad faith as the parties were negotiating a settlement. It was argued that the application contravened the provisions of Order 9 Rule 9 and therefore void ab initio. She urged further that the court was *functus officio* in the matter.

6. The trial court considered the application and arguments made thereto and found that the firm of Walker Kontos was not properly on record at the time of filing the application and dismissed the application. The reasoning by the trial court is encapsulated in the following statement;

> **"From the court record I note that a consent letter dated 11thMay, 2011 allowing the firm of Walker Kontos to take over the conduct of this matter for the defendants from the firm of Soita & Saende was filed in court on 27th May, 2011. However, I note that an Order for the firm of Walker Kontos to come on record for the defendant in place of the firm of Soita & Saende was made on 24th June 2011 and as such took effect from that date……"**

7. Aggrieved by the aforesaid decision the appellant filed its memorandum of appeal on 4th April 2012 raising three grounds of appeal, namely;

a. The Learned Magistrate erred in law and in fact in finding that the application before her was technically defective when there was a consent on record that allowed Walter Kontos, to act for the Appellant.

b. As such the learned Magistrate erred in law in failing to apply the overriding objective of the Civil Procedure Act in the matter before her.

c. The learned Magistrate misdirected herself in failing to deal with the substantive question before her after having substantive arguments on it.

8. On 5/9/2019 this Honourable Court directed parties to canvass the appeal by way of written submissions. At the time of writing this judgement only the appellant has filed its written submissions. The appellant submitted that the objective of the provisions of **Order 9 Rule 9** is to safeguard the interest of an advocate to recover costs and ought not to be invoked to deny a party its rights to be represented by an advocate of their choice. It was also the appellant's submission that the trial Magistrate abdicated its duties under section 1A, 1B and 3A of the Civil Procedure Act as well as under Article 159 of the Constitution of Kenya. They relied on the following cited authorities in support of their submissions**; Tobias M. Wafubwa v Ben Butali [2017] eklr, Boniface Kiragu Waweru vs James K. Mulinge, John Gitonga Gachuhi & 4 Others v Commissioner of lands & 5 Others [2017] eklr, S.K. Tarwadi v Veronica Muehlemann [2019] eklr, Mombasa Highway Transport Limited v Gulf Africa Bank Limited [2019] eklr, Republic v C.W. Nyamisa Exparte Peter Murithi Kimuhiu [2007] eklr**

ANALYSIS AND DETERMINATION

9. As the first appellate Court, I will evaluate the material on record and reach own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

10. As stated at the opening paragraph of this judgment, the application and effect of **Order 9 Rule 9** of the **Civil Procedure Rules** is at the centre of controversy in this appeal. The rule provides as follows;

"When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."

11. Even after the promulgation of the Constitution of Kenya 2010 some commentators still hold the view that pleadings and or applications filed in contravention of Order 9 Rule 9 of the Civil Procedure Rules should be struck out. The proponents of this school of thought posit that these are mandatory provisions of the law which should be observed. See the case of **Stephen Mwani vs Murata Sacco Society LTD [2018] eKLR.** Others hold that substantive issues before the court should be adjudicated upon and determined on merit despite the non-compliance with Order 9 Rule 9 of the Civil Procedure Rules. They argue that such non-compliance is a technicality which is curable under Article 159(2) (d) of the Constitution as well as the overriding objective of the court. The whole idea in the position held by the latter school of thought is to follow after the constitutional command that courts of law should serve substantive justice rather than rely on technicalities to deny parties the right to be heard on merit. See the decision of Mativo J in **John Gitonga Gachuhi & 4 others v Commissioner of Lands & 5 others [2017] eKLR that**;

"The first ground raises the question whether or not the Civil Procedure Rules apply to constitutional petitions, and if they do, by virtue of Order 9 Rule 9 cited above, whether the Respondents counsel is properly on record……..At the outset in determining this issue, I would stand guided by the clear provisions of the constitution which is the supreme law of the land which binds all persons and all state organs.[6] It is important to bear in mind that in exercising judicial authority, the courts and tribunals are under article 159 (2) (d) required to administer justice without undue regard to procedural technicalities.

My strong view is that conduct of judicial proceedings and exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, the right to a fair trial, the right to legal representation and access to justice cannot stand court scrutiny.

……………………The constitution is an effective document that is the basis of our laws. Considering the principles, purposes and objectives of the constitution enumerated above, the right to legal representation, I find myself unable to uphold the objection by the petitioners counsel that the Respondents counsel is not properly on record. Instead, in exercise of my discretion, I hereby grant an order regularizing his being on record and a further order that the notice of change of advocates and all the documents filed by the said advocate be deemed to be properly on record……"

12. With binding force, the Court of Appeal in **Tobias M. Wafubwa v Ben Butali [2017] eKLR** stated that;

"We would go further to add that, provided that <u>where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings.</u> A similar approach was

invoked in the case of Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;

> ***"All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all…"***

In the instant case, the learned judge took the view that, the issue being one of failure to comply with Rule 9 was a procedural lapse that did not go to the root of the appeal and duly invoked the directions of Article 159 of the Constitution in dismissing the appellant's application.

By declining to dismiss the appeal on account of non-compliance, was by exercise of the learned judge's discretion. The guiding principles on the exercise of discretion by the trial court are that an appellate court will not interfere with such exercise unless it is demonstrated that the trial court misdirected itself, or considered matters it should not have considered, or failed to take into account matters which it should have taken into account, and in so doing arrived at the wrong decision. (See Mbogo & Another vs Shah (1968) EA 93 and United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] E.A 898)…." [Emphasis Added]

13. I should also add that Order 9 Rule 10 of the Civil Procedure Rules permits combining of the application under Rule 9 with other prayers except it directs that the change of advocates after judgment be tackled first. This to me does not seem to declare prohibition that a party intending to act in person or intended incoming advocate after judgment cannot apply in that capacity for substantive orders. See Rule 10 below:

> **10. An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.**

I am aware that Order 9 Rule 9 serves a useful purpose of safeguarding the interest of the outgoing advocate. However, non-compliance with Order 9 Rule 9 of the Civil Procedure Rules is not fatal but venial omission which would be cured under Article 259 (2) (d) of the Constitution and the oxygen principle. But of course, that is a matter for discretion of the court which should be exercised on the principles enunciated by the Court of Appeal in the **Tobias case (supra).**

15. I will apply the above test. The Appellant in this case filed Consent and a notice of appointment before filing the application in issue. The trial court completely ignored the fact that Consent of parties to allow the incoming advocates to take over proceedings after judgment had been filed by the relevant advocates. I am aware that such consent requires adoption by the court to have the effect of a court order. But that notwithstanding, the fact that the Consent had been filed was an important consideration for purposes of Order 9 Rule 9 of the Civil Procedure Rules. The trial magistrate erred by ignoring that fact in the exercise of discretion. The omission of a relevant factor entitles the appellate court to interfere with the exercise of discretion by the trial court.

16. I should also state that had the Appellant's advocates added a prayer to be permitted to come on record pursuant to the consent already filed in court, perhaps this appeal would have been avoided.

17. In conclusion, the trial Magistrate by strictly relying on the provisions of Order 9 Rule 9 failed to listen to the loud and repeated echoes of Article 159 and/or the overriding objective of the court that courts commanding courts to always strive to serve substantive justice rather than unduly rely on technicalities to adjudicate cases. I also do not foresee any prejudice that would have been occasioned upon the Respondents by the non-compliance herein which in any case was pardonable given the circumstances of this case. Accordingly, I find that the trial Magistrate erred in leaving important factor from account and also failing to consider Article 159 of the Constitution or the overriding objectives in the Civil Procedure Act. I will now determine the merit of the application.

Striking out of Pleadings

18. The main prayer of the appellant's application was the striking out of the pleading and proceedings in which Wamiti Njoga had participated. The advocate who represented the Respondents in the trial Court, as had been shown in the trial court by the Appellant did not have a practising certificate for the year 2008.

19. **Section 9 of the Advocates Act** provides 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;**
>
> **(b) his name is for the time being on the roll ; and**
>
> **(c) he has in force a practising certificate;**
>
> **And for the purpose of this Act a practising 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).**

Section 34 of the Act stipulates that:

> **(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—**
>
> **………**
>
> **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 31 of the **Advocates Act** provides;

> **1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.**
>
> **(2) Any person who contravenes subsection (1) shall:**
>
> **a. be deemed to be in contempt of the court in which he so acts or which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and**
>
> **b. be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and**
>
> **in addition, be guilty of an offence**

20. There is no express provision in the Advocates Act or other written law as to what happens to pleadings drawn and filed by a person who masquerades as advocates yet unqualified to so act under the Advocates Act. Comparative jurisprudence from the UK undertaken revealed similar dilemma. I will not however re-invent the wheel as much judicial ink has been spilt on this subject. The reasoning in **National Bank of Kenya Ltd v. Wilson Ndolo Ayah, Civil Appeal No.119 of 2002** by the Court of Appeal was that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him. See also the industry of Aburili .J. in **Republic v Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna& 9 others [2016] eKLR** that;

> **34. This latter question is, of course, the question squarely facing us in the present application. It is one which was presented to the Supreme Court in the Anami Silverse Lisamula Case. However, the Supreme Court decided that case on the question of jurisdiction without reaching this specific question. As I stated above, however, I believe that the reasoning of the Supreme Court in the Anaj Warehousing Limited Case can easily be extended to the situation presented by application of section 31 of the Advocates Act where a lawyer instructed by a client who is acting in good faith draws pleadings and addresses the court on a matter only for it to be discovered later that the lawyer did not have a practicing certificate.**
>
> **35. A claim in law and a course of action belongs to the client and not the advocate. It is hard to justify, in this era where the Constitution (at Article 159) commands the courts to privilege the ideals of substantive justice as opposed to legal formalism, statutory interpretation which bereaves a party of a valid substantive claim because his or her lawyer failed to adhere to a procedural requirement unrelated to the claim in question. The case would be different, of course, if there is evidence that the client acted in bad faith or with knowledge of the failure of the lawyer to take out a practicing certificate but still persisted in having the lawyer represent them. No such evidence was presented here. Instead, we have a group of innocent members of the public who instructed a law firm – not even a particular lawyer – to file a claim on their behalf. The law firm**

so instructed, then, assigned the file to a lawyer in the firm who happened not to have taken a practicing certificate. In my view, to paraphrase the Supreme Court, the fact of this case, and its clear merits lead me to a finding that the pleadings drawn and signed by Mr. Nyanyuki as well as the submissions he made in the two suits are not invalid merely by dint of Mr. Nyanyuki's failure to take out a practicing certificate.

21. Also in **T.J.F Kajwang' v Law Society of Kenya [2002] eKLR** the court was also of the opinion that the Advocates act is silent on the question of what happens to the proceedings where an Advocate without a certificate had acted. The court held as follows;

"The requirements for practice of Advocates in Kenya are verbatim the requirements for practise as solicitors in England, as laid out in S.1 of the Solicitor Act 1974 which are:

(a) he has been admitted as a solicitor

(b) his name is on the Roll of Solicitors the time in question

(c) he has in force a certificate issued by the Law Society authorizing him to practise as a solicitor"

The disqualification's provisions are verbatim, see S.20 of the Solicitors Act vis a vis S. 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 Halsburys 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 practising 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….."[Emphasis mine]

22. 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 practising certificate in force." [See Halsbury's Laws of England supra]

23. 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.

24. In the upshot, whereas the trial Magistrate erred in dismissing their application on the basis of their non-compliance with Order 9 rule 9, for reason I have stated, the application is not worth of reinstatement in so far as it is founded on participation of unqualified person in the proceedings as an advocate. Those pleadings and proceedings by unqualified advocate are proper record and will not be struck out. I reject the request to strike them out.

25. For the avoidance of doubt the appellants herein are properly on the record in the trial Court proceedings and may so move the court for any other relief and or remedy as may be permitted in law.

26. In light of the result of the appeal, each party shall bear their own costs of this Appeal. It is so ordered.

Signed and dated at Meru this 7th day of November, 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 13th day of November, 2019

L. NJUGUNA

JUDGE