



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 36 OF 2019

EDWARD OBINO KENYARIRI.....PLAINTIFF

VERSUS

MAKORI SAMARERE.....DEFENDANT

AND

JAMES MOGAKA MAKORI.....1ST INTERESTED PARTY

HENRY MORARA MAKORI.....2ND INTERESTED PARTY

VINCENT MOSONGO KENYARIRI.....3RD INTERESTED PARTY

JAMES BICHAGE KENYARIRI.....4TH INTERESTED PARTY

CHRISTOPHER ORINA KENYARIRI.....5TH INTERESTED PARTY

RULING

INTRODUCTION

1. By a Notice of Motion dated 4th February 2020 brought pursuant to section 9 (c) and 31 of the Advocates Act Chapter 16 of the Laws of Kenya, Order 2 Rule 15 (d) and 51 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act, the Applicants filed an application seeking orders that:

2. The Honourable court be pleased to strike out the following documents filed by the Plaintiff:

- i. A Replying Affidavit by Edward Kenyariri (the plaintiff) sworn on 16th January 2020.
- ii. The Supporting Affidavit sworn by Defendant annexed to the said Replying affidavit.
- iii. A letter dated 15th January 2020 authored by one B. Rogito Isaboke.
- iv. Grounds of Opposition dated and filed on 16th January 2020 by the firm of Nyariki and Company Advocates.
- v. ELC Case No. 36 of 2019.

3. The application is anchored on the grounds inter alia that Isaboke Benson Rogito and Josiah Abobo are not certified to practice law in Kenya and therefore the documents filed by them should be struck out for being incompetent. It is further stated that the Replying Affidavit is a forgery as it has not been signed by the Defendant.

4. The application is also based on the supporting affidavit of Dr. Christopher O. Kenyariri, Advocate (4th Intended Interested Party) sworn on the 4th February 2020, in which he depones that he confirmed from the Law Society of Kenya that Isaboke Benson Rogito and Josiah Abobo are not authorized to practice law in Kenya.

5. Although the application was indicated as ex-parte, the court directed that the same be served on Mr. Rogito and Mr. Abobo against whom

allegations have been made. Despite being duly served the said advocates did not file any response to the application.

6. The application was set down for hearing on 17.6.2020 via video link when Dr. Kenyariri submitted that since the application was unopposed, it should be granted as prayed. The court reserved its ruling in order to give due consideration to the issues raised in the application.

ANALYSIS AND DETERMINATION

7. The singular issue for determination is whether the documents filed by the firm of Abobo & Company Advocates for the Plaintiff and B. Rogito Isaboke Advocates for the Defendant should be struck out.

8. Before delving into the issues at hand, it is important to give a brief background of the case. The Plaintiff is the eldest son of the second wife of one Kenyariri Kenyariri (deceased) who jointly owned land parcel number Nyaribari Chache/900 with the Defendant together with Ochi Gekonge (deceased). By virtue of the judgment of the Court of Appeal in Kisumu Civil Appeal No. 5 'A' of 2013 dated 15th January 2020, the Defendant and the administrator of the estate of Kenyariri Kenyariri were required to secure the services of a Government Surveyor to determine the boundaries of the land belonging to the said three registered owners.

9. It is the Plaintiff's case that the Defendant, in total disregard of the said judgment of the court purported to sub-divide the land and distributed the late Kenyariri Kenyariri's share among the beneficiaries of his estate before an administrator was appointed and in disregard to the portions occupied by the said beneficiaries on the ground. The Plaintiff therefore prays that the purported sub-division be cancelled so that the title reverts to the name of Kenyariri Kenyariri (deceased) until such time as an administrator is appointed.

10. The Defendant filed a defence dated 28th November 2019 denying the Plaintiff's claim and stated that he had effected the sub-division of the suit property in conformity with the Court of Appeal order and issued titles to the beneficiaries of the estate of Kenyariri Kenyariri and the Plaintiff was the only one who was uncooperative.

11. The Plaintiff filed this suit through the firm of Nyariki & Co Advocates. The defence was filed through the firm of Ongegu & Company Advocates. On 30th January 2020, the Defendant appointed the firm of B.Rogito & Company Advocates to act for him in place of Ongegu & Co Advocates. The firm of Kenyariri & Associates filed a Notice of Change of Advocates dated 4th February 2020 in which they indicated that they were coming on record in place of Ongegu & Co Advocate who previously acted for the defendant. On the other hand, Josiah Abobo & Co Advocates was appointed to act as an additional advocate for the Plaintiff on 24th January 2020.

12. On 20th December 2019 the Defendant filed an application seeking to strike out the Plaintiff's suit on the grounds inter alia that it was res judicata, that the court had no jurisdiction and that the Plaintiff lacked locus standi. In response to the said application, the Plaintiff filed a Replying Affidavit and Grounds of Opposition.

13. The Interested Parties now seek to strike out the Plaintiff's Replying Affidavit together with its annexures comprising of an affidavit sworn by the Defendant and a letter written by Rogito Isaboke Advocates. He also seeks to strike out the Plaintiff's Grounds of Opposition and the entire suit. The reason advanced by Dr. Kenyariri is that the firms of Abobo & Co Advocates and Rogito Isaboke Advocates do not have current practising certificates and therefore the documents authored by them are incompetent. He further argues that the Grounds of Opposition filed by the firm of Nyariki & Co Advocates are equally incompetent as they are based on incompetent documents. The court is therefore called upon to determine the fate of the said documents.

14. 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; and

(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 practicing 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).

15. Section 31 of the Advocates Act provides as follows:

“Unqualified person not to act as advocate -

(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 in 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

(c) in addition be guilty of an offence.”

16. Section 34 thereof stipulates that:

“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.”

17. In the case of **National Bank Limited v Anaj Warehousing Limited (2015) eKLR** the Supreme Court held that:

“...Even as stare decisis assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up.”

18. At paragraph 68 of the Judgment the Supreme Court found as follows:

“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) 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.” (Emphasis Supplied).

19. Furthermore, in the case of **Peterson Ndungu & 5 Others v Kenya Power & Lighting Company Limited (2018) eKLR** the Court of Appeal held as follows:

“By parity of reasoning of the Supreme Court decision in the **Anaj Warehousing Case**, we find and hold that no pleadings, documents or submissions become invalid under Section 31 of the Advocates Act only by dint of their 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 whose names have been struck off the roll of advocates shall be void for all

purposes”

20. From the above decisions which are binding on this court, it is clear that documents filed by advocates who do not have practising certificates do not become invalid unless the said advocates have been struck off the Roll of Advocates. Since there is no evidence that either Mr. Josiah Abobo or Mr. Rogito Isaboke Advocates have been struck off the Roll of Advocates, there is no reason why the documents drawn or filed by them should be held to be invalid. In the circumstances, the application lacks merit and it is hereby dismissed with costs to the Plaintiffs.

Dated, signed and delivered via video link this 30th day of June 2020.

J.M ONYANGO

JUDGE