



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 525 OF 2009

JAMES KAMBAU MURIUKI T/A

EXPRESS KENYA LINK.....PLAINTIFF

VERSUS

BANK OF INDIA.....1ST DEFENDANT

CHASE BANK LIMITED.....2ND DEFENDANT

RULING

[1] There are two pending applications herein that are the subject of this Ruling. The first one is the Chamber Summons application dated **12 May 2010**, filed on behalf of the 2nd Defendant by the law firm of **Kale Maina and Bundotich Advocates** for stay of execution and variation of the Court Orders issued herein on **23 April 2010** and **7 May 2010** at the instance of the Plaintiff, on the grounds that the orders were made against it before it was properly enjoined in the proceedings and was therefore condemned unheard. The second application is the 1st Defendant's Notice of Motion dated **10 November 2015** for the setting aside of the orders issued on **23 April 2010** on the ground that the proceedings were filed by **Mr. Robert Chesang, Advocate**, who at the time held no valid Practising Certificate. There appears to be no response by the Plaintiff to either of these applications; and as far as the record goes, the Plaintiff has not been attending Court in spite of service.

[2] Starting with the first application, which was filed pursuant to the provisions of **Sections 1A, 3A, 63(e) and 100 of the Civil Procedure Act** as well as the then **Order I Rule 10(2) and (4); Order 39 Rules 4 and 9** and **Order 21 Rule 22(2) of the Civil Procedure Rules** for the orders sought thereby were that:

[a] the application be certified urgent and heard ex parte in the first instance;

[b] pending hearing and determination of this application there be a stay of execution as against the 2nd Defendant of the Ruling and Order made on **23 April 2010** and **7 May 2010**, respectively;

[c] the Court be pleased to set aside the order made on **19 October 2009** enjoining the 2nd Defendant as a party to this suit;

[d] the Court be pleased to vary its Ruling and/or Order made on **23 April 2010** and extracted on **7 May 2010** by setting aside the Orders as against the 2nd Defendant;

[e] the costs of the application be borne by the 1st Defendant.

[3] The 2nd Defendant's cause for complaint is that on **19 October 2009**, the 1st Defendant sought and obtained an order to enjoin it to this suit; and that the 1st Defendant neither caused that Order to be served on it; nor did it amend its pleadings to properly enjoin it as a 2nd Defendant. In the meantime, the Plaintiff's application pursuant to which the Court delivered its Ruling on **23 April 2010** was heard without the knowledge of the 2nd Defendant and orders given for its compliance, of which orders the Plaintiff had commenced measures in execution.

[4] Although the 1st Defendant filed a Replying Affidavit, sworn by **Wangai Maina, Advocate** on **12 April 2016**, in opposition to the 2nd Defendant's application, in the written submissions filed herein on **8 July 2016** on behalf of the 1st Defendant, it was expressed that 1st Defendant was not opposed to the 2nd Defendant's application save for the 3rd and 4th prayers. It was conceded that the 1st Defendant did not, and was unable to extract the order for joinder for service on the 2nd Defendant until after the Ruling of **23 April 2010**; though it was the contention of the 1st Defendant that this was not due to any fault on its part, given that the court file was not available in the Registry, but in custody of the Trial Judge.

[5] Having carefully considered the 2nd Defendant's application and the response thereto by the 1st Defendant, it seems clear to me that the parties are in agreement on the issues arising therefrom. The 2nd Defendant appears to have a genuine grievance that it was condemned unheard in respect of the orders of **23 April 2010** and **7 May 2010**; a fact conceded by the 1st Defendant. The only point of departure is the question as to whether the 2nd Defendant's continued participation in these proceedings should be countenanced. The 2nd Defendant's anxiety stems from the fact that execution is imminent in respect of the Court Orders aforementioned, hence its prayer for variation and/or setting aside of the orders in so far as they relate to it.

[6] It is however noted that the same Orders are the subject of a pending appeal. Counsel for the 1st Defendant is on record as having confirmed that the Court of Appeal has granted stay of execution of the Order of **23 April 2010**, from which the Order of **7 May 2010** flowed. It is not in keeping with the Overriding Objective for these parallel processes to proceed simultaneously in respect of the same subject matter. There is a plethora of judicial precedents on the point, such as **Ali Ismail Baraki & Another vs Chairman, Garissa County Service Board & 4 Others [2014] eKLR** in which the Court of Appeal held thus:

"The principle that a court should not proceed with the trial of a matter in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties is well founded. It finds expression for instance in section 6 of the Civil Procedure Act. That principle aids in the efficient use of available judicial resources and efficient disposal of the business of the court as well as avoiding harassment of parties with multiplicity of actions. To pursue what is substantially the same matter in different courts is in our view an abuse of the process of the court."

There is a Notice of Appeal that was filed herein on **30 April 2010**, as well as a copy of an Order of the Court of Appeal dated **10 June 2010**, which show that the same issue of stay of the Order made herein on **23 April 2010** was the concern of the Court of Appeal; and that the Court of Appeal had in fact made an interim order of stay pending further directions. I would therefore direct that 2nd Defendant's application be stayed pending the outcome of the appeal.

[7] As for the 1st Defendant's application dated **10 November 2015**, what is sought thereby are orders that the Orders for Temporary Injunction given on **28 July 2009** and Mandatory Injunction given on **23**

April 2010 be set aside and that the proceedings herein, which were filed by **Mr. Robert Chesang**, be declared null and void and/or be set aside for the reason that the said **Mr. Robert Chesang** did not, at the time, hold a current or valid Practising Certificate. The application was filed pursuant to **Articles 50 and 159(2)(d) of the Constitution of Kenya; Sections 3 and 3A of the Civil Procedure Act; Sections 9 and 31 of the Advocates Act and Order 51 Rule 1 of the Civil Procedure Rules** and is supported by the affidavit of **Mr. Wangai Maina, Advocate**.

[8] There appears to be no response to the second application by either the 2nd Defendant or by the Plaintiff. Counsel for the 2nd Defendant intimated that he was not opposed to the application and indeed, in his submissions filed herein on **18 August 2016**, there is complete silence as to the 2nd Defendant's position vis-a-vis the 1st Defendant's application; save for the indication by **Mr. Shah** on **15 October 2016**, which indication had the concurrence of **Mr. Sang** for the 2nd Defendant, that both Defendants were eager to have the Plaintiff's suit struck out as prayed.

[9] The position has hitherto been that transactions effected by an unqualified advocate including an advocate without a current practising certificate, should not be allowed, the leading precedents being, inter alia, **Orao Obura vs Koome [2001] KLR 109**; and **National Bank of Kenya Ltd vs Wilson Ndolo Ayah Civil Appeal No. 119 of 2002**. However, the Supreme Court has since readjusted the judicial thinking on this point in the case of **National Bank of Kenya Limited vs Anaj Warehousing Limited [2015] eKLR**, thus:

"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...The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client... 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..."

[10] From the foregoing pronouncement, the conclusion I come to is that it would not accord with **Articles 48 and 159(2)(d) of the Constitution**, or the Overriding Objective of **the Civil Procedure Act**, to declare this suit incompetent simply because it was filed, and the initializing pleadings signed, by an advocate who had no practising certificate at the time. In the premises, I would dismiss the 1st Defendant's Notice of Motion dated **10 November 2015**, with an order that costs thereof be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2017.

OLGA SEWE

JUDGE