



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**MISC. CIVIL APPLICATION NO. 29 OF 2016**

TERESA NYOKABI KIMONDO.....1<sup>st</sup> APPLICANT

PETER MUTHIGA NGETHA.....2<sup>nd</sup> APPLICANT

VERSUS

MWAGO AGRI CREDIT LTD..... RESPONDENT

**RULING**

1. The Applicant filed a Notice of Motion under a Certificate of Urgency dated 5<sup>th</sup> September, 2016; the application was brought under the provisions of Article 65(6) of the Constitution 2010 and Order 1 of the Civil Procedure Rules and all other enabling provisions of law; the Applicant prayed for the following Orders;

a) Spent

b) Spent

c) That this Honourable Court declare the ruling of the Principal Magistrate's Court in Karatina PMCC No.169 of 2010 delivered on the 30/06/2016 **NULL** and **VOID**.

d) That the legitimized documents and evidence prepared and attested by an unauthorized person in PMCC No.169 of 2010 be struck out.

e) That the Respondent be condemned to pay costs of this application.

**APPLICANTS SUBMISSIONS**

2. The application is premised on a Loan Application and Loan Agreement prepared J.K.Gachagua Advocate; the documents were drawn and attested by the advocate and are dated the 4<sup>th</sup> March, 2008.

3. That there was written evidence provided by the Law Society of Kenya that during that period the advocate had not taken out a practicing certificate for the year 2008 and was therefore not licensed to practice law.

4. The Respondent herein filed suit against the applicants to recover the amounts they had borrowed; and the primary documents that the respondent relies on as evidence are the impugned documents drawn by the unqualified advocate;

5. Counsel for the applicants raised a Preliminary Objection on the admissibility of the documents; which objection was overruled and dismissed by the trial magistrate.

6. The applicants being aggrieved by the ruling filed this instant application and pray for a revision of the ruling and a declaration that the orders of the subordinate court be declared **NULL** and **VOID** as it acted ultra vires;

### **RESPONDENTS SUBMISSIONS**

7. In response Counsel for the respondent relied on the respondents Replying affidavit; and made the following submissions; that the complaint of the applicants is that the trial court lacks jurisdiction to admit inadmissible documents; that the application presented by the applicants was bad in law and an abuse of the court process; that this court cannot be moved to exercise its jurisdiction vide a miscellaneous application;

8. The only way to challenge the ruling of the magistrates' court would either be by filing an appeal or a Judicial Review application citing that the trial court exceeded its jurisdiction; that the instant application is neither an Appeal nor a Judicial Review application nor is it a Constitutional Petition against the ruling.

9. That the issue of admissibility of the documents has been canvassed and determined and a ruling delivered; in the absence of an appeal the decision of the lower court still stands; that the trial court relied on the decision of the Supreme Court of **NBK Ltd vs Anaj Warehousing [2015] eKLR** to arrive at its decision on the admissibility of the documents; and the trial court held that the fact that the person who prepared the documents had no valid licence did not make the documents invalid.

10. Counsel prayed that the application be dismissed as it was calculated to delay the hearing and determination of the matter in the subordinate court.

### **ISSUES FOR DETERMINATION**

11. Taking into consideration the above submissions this court has framed the following issues;

- i) Whether it would be just in the circumstances for the court to invoke the provisions of Article 159 of the Constitution;
- ii) Whether the pleadings and documents ought to be struck out on the ground that the same were prepared attested and executed by an advocate with no valid practicing certificate;
- iii) Which party should bear the Costs.

### **ANALYSIS**

#### ***Whether it would be just in the circumstances for the court to invoke the provisions of Article 159 of the Constitution;***

12. It was the Respondent's contention that the application was not properly brought before the court; to counter this assertion this court observes that with the advent of the Constitution 2010 at Article 159(2) (d) it is the practice of the courts to consider administering justice without undue regard to technicalities of procedure; under the provisions of Articles 50(1) the applicant does have an unalienable right to a fair hearing; the applicant also has a right to come to court to seek redress in any manner.

13. To either file an appeal or application for review and coming before this court by way of a miscellaneous application is a procedural technicality and a matter of want of form and such an omission does not go to the root of the application; there is need to focus on administering substantive justice;

14. This court shall therefore invoke the provisions of Article 159(2)(d) and find that the application is

properly before this court; then it shall proceed to address the next issue of whether the pleadings are invalid and ought to be struck out;

**Whether the pleadings and documents ought to be struck out on the grounds that the same were prepared attested and executed by an advocate with no current and valid practicing certificate;**

15. The Respondent herein filed suit against the applicants to recover the amounts the applicants had borrowed and had defaulted in making repayments; the primary documents that the respondent relies on as evidence are the Loan Application and Loan Agreement Forms drawn, attested and executed by an unqualified advocate; the documents were drawn and attested by the advocate and are dated the 4<sup>th</sup> March, 2008;

16. Evidence in the form of a letter from the Law Society of Kenya was annexed to the application which indicated that the advocate had not taken out a practicing certificate for the year 2008 to date and was therefore not licensed to practice law.

17. Counsel for the applicants raised a Preliminary Objection on the admissibility of the documents; which objection was overruled and dismissed by the trial magistrate; and the dismissal gave rise to this instant application;

18. In addressing this issue this court makes reference to the relevant provision of the law as found in Section 34(1)(f) and (3) of the Advocates Act which reads as follows;

**“(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 drawing or preparation of any such document or instrument:”**

**(3) Any person who contravenes subsection (1) shall be guilty of an offence.”**

19. The Supreme Court observed in the case of **National Bank of Kenya Ltd vs Anaj Warehousing Ltd [2015] eKLR** that Section 34 of the Advocates Act;

**“...only prescribes 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.”**

20. The Supreme Court went on to make the following finding in the same case of **National Bank of Kenya Ltd vs Anaj Warehousing Ltd (supra)** which was as follows;

**“The facts of this case, and its clear merits, lead us to a finding and the proper direction of the 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.”**

21. The averments of the applicant in this instance were that the advocate had not been struck off but had only failed to obtain a valid current practicing certificate for the year 2008 - to date; this court is therefore also guided and bound by the doctrine of precedent; and is satisfied that the trial court correctly held that the documents prepared, attested and executed by the unqualified advocate and presented to the lower court in Karatina PMCC No.169 of 2010 were valid and admissible;

22. The lower court was therefore correct in dismissing the Preliminary Objection.

## **FINDINGS AND DETERMINATION**

23. For the forgoing reasons this court makes the following findings;

24. The documents prepared and presented to the lower court are found to be valid and admissible;

25. The application is found to be lacking in merit and is hereby dismissed.

26. The costs of this application are granted to the respondent;

27. The subordinate court is properly seized of the matter and has jurisdiction to hear the matter; that the file is hereby referred back to the subordinate court for hearing and determination.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 2<sup>nd</sup> day of March, 2017.**

**A. MSHILA**

**JUDGE**