



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEALS DIVISION**  
**CIVIL APPEAL NO 22 OF 2013**

**PETER KARUIRU GACHIRA.....APPELLANT/APPLICANT**

**VERSUS**

**LEONARD WANJOHI MURAGE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

On 17<sup>th</sup> November 2015 counsel for the first Respondent herein filed a notice of a preliminarily objection raising the following grounds, namely:-

- a. That the memorandum of appeal dated 25<sup>th</sup> March 2013 and the entire record o appeal filed on 9<sup>th</sup> December 2014 in invalid having been drawn and filed by an unqualified advocate contrary to the provisions of the Advocates Act.[\[1\]](#)*
- b. That the documents have been drawn by an unauthorized person contrary to Section 9 and 34 of the Advocates Act.[\[2\]](#)*
- c. That the advocate who drew the court documents has since the year 2012 up to the time the documents were drawn had **inactive status** contrary to the law governing the legal profession.*

It is important to mention that the appeal against the second Respondent was withdrawn on 9<sup>th</sup> May 2014, hence this appeal is only the first Respondent.

At the hearing of the preliminary objection, counsel for the first Respondent urged the court to uphold the preliminary objection citing provisions of the Advocates Act.[\[3\]](#) Counsel in support of his position cited a decision rendered by a subordinate court in *Abraham Mwangi Njihia vs IEBC & Others*[\[4\]](#) which decision is with tremendous respect not binding to this court.

**Mr. Kahinga** counsel for the appellant vehemently opposed the preliminary objection and maintained that no evidence had been rendered before the court to suggest that the advocate had no practicing certificate and that what was exhibited is a computer printout extracted from the website of the Law Society of Kenya which was not authenticated and that there was no communication from the Law Society of Kenya confirming the said position. Counsel also insisted that the said computer printout had been improperly introduced to the court in that it was attached to the notice of a preliminary objection as opposed to an affidavit. Counsel submitted that striking out a pleading is a drastic step and urged the court

to be reluctant to do so and urged the court to allow the appeal to be determined on merits. Counsel urged the court to be guided by the Supreme Court of Kenya decision in case of *National Bank of Kenya Limited vs Anaj Warehousing Limited*.<sup>[5]</sup> However this decision dealt with a charge document whose facts and details are totally different from the present situation, hence the said decision can be distinguished from the present case. In fact the Supreme Court at paragraph 68-70 of the said judgement clarified the position and pointed out gaps in sections 48- 54 (both sections inclusive) of the Advocates Act and recommended appropriate legislation to seal the said gaps, but there is no mention of Section 9 discussed below in the said recommendation.

Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*<sup>[6]</sup> said:-

*"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."*

In the words of Sir Charles Nwebold P at page 701, B:-

*"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

I take the view that the preliminary point now under consideration, hence I do not agree with the first respondents counsel that the document relied upon, namely the computer printout ought to have been introduced by way of an affidavit. To me, this being a point of law, the notice of preliminary point filed on 17<sup>th</sup> November 2015 and served upon the first respondent was clear and it was upon the first respondent to take such steps as may be necessary to rebut the contention in the notice including but not limited to securing an affidavit from the advocate in question or obtaining information from the Law Society of Kenya to prove otherwise if at all they wished to dispute the said computer print out. The matter is so weighty that if at all the first Respondent desired to challenge the position, then nothing could have been easier than to bring forward all the necessary information. I find no reason to doubt the grounds of objection.

I am clear in my mind that the law does not allow an unqualified person to act as an advocate. Section 2 of the Advocates Act<sup>[7]</sup> defines the term "unqualified person" as "a person not qualified under Section 9 to act as an advocate." Section 9 of the Act is clear on qualifications that one must possess in order to practice as an advocate. The section 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 practicing certificate; and for the purposes 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 69 (4).*

The use of the word "**and**" at the end of section 9 (a), (b), and (c) reproduced above requires a conjunctive reading of the requirements so that all the three requirements have to be met for an advocate to be regarded as being qualified under the Act. This was the decision in *Belgo Holdings Ltd vs Esmail*<sup>[8]</sup> where the court stated discussing Section 9 cited above held thus:-

*"It is instructive that these four qualifications are not to be read to the exclusion of each other. The*

*use of the word "and" means that for one to be qualified to act as an advocate....one must have all of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and Section 34 aforesaid operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings."*

Under Section 24 of the Act, every practising certificate is to bear the date of the day on which it is issued and is to have effect from the beginning of that day save that a practising certificate issued during the first month of any practising year shall have effect from the beginning of that month.

In *Kenya Power & Lighting Co Ltd vs Chris Mahinda T/A Nyeri Trade Centre*[9] the Court of Appeal was categorical that "if no practising certificate had been issued when the act was done, the advocate was not qualified to do that act, at the time he did it."

More relevant to the case now under consideration, the Court of Appeal in *Standard Chartered Bank vs Mechanical Engineering Plant Ltd & Others*[10] held that "a memorandum of appeal filed by an advocate without a practising certificate at the time of signing it was incompetent as the advocate was unqualified."

It is therefore not in doubt that the law requires that for an advocate to qualify, he or she must have in force a practising certificate. 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.

Counsel for the appellant submitted that striking out pleadings is a drastic step and pleaded for the appeal to be heard on merits. I am alive to the overriding objective under the Civil Procedure Rules 2010 and also the provisions of Article 159 (2) (d) of the constitution. However, I fully agree with **Musinga J** in *Willis Evans Otieno vs Law Society of Kenya & 2 Others*[11] where he stated that the provisions of Article 159 (2) (d) of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. A similar position was held by **Muchelule J** in *John Langat vs Kipkemoi Terer & 2 Others*[12] where he held *inter alia* that to ignore the clear provisions of the Advocates Act is to perpetuate an illegality. The said sections are not procedural technicalities, but substantive statutory provisions and that the court has a duty to protect the constitution and all the laws enacted by Parliament.

**Majanja J** in *Abraham M. Njihia vs IEBC & 2 Others*[13] brought the point home when he observed that:- "The general principal resonating from the authorities both from this court and the Court of Appeal is that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out. I have no reason to divert from this principle."

I stand guided by the above principles which I believe represent the correct interpretation of the law. I find that the record of appeal herein was drawn, signed and filed by an unqualified person and therefore the appeal is incompetent and cannot be allowed to stand. I sympathize with the appellant, the foregoing being the legal position the best I can do is to save the appellant from paying costs. Accordingly, in exercise of my discretion in awarding costs, I find that this is not a proper case to condemn the otherwise unfortunate appellant to pay costs for a mistake caused by his advocate. I note that the advocate in question is no longer on record in this matter. I therefore order as follows:-

a) This appeal be and is hereby struck off for being incompetent and the same is dismissed with no orders as costs.

Orders accordingly

Right of appeal 30 days

Dated at Nyeri this 9<sup>th</sup> day of March 2016

**John M. Mativo**

**Judge**

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[1] Cap 16, Laws of Kenya.

[2] Ibid

[3] Ibid

[4] CMCC No. 3 of 2013, Kibera

[5] Petition No. 36 of 2014

[6] {1969} E.A 696 AT PAGE 700

[7] Supra

[8] {1005} 2 E. A. 28

[9]{2005} 1 K L R 753

[10] {2009} E. A. 404

[11] Nairobi Petition No. 37 of 2011, {2011} eKLR

[12] Kisumu H C Civil Appeal No. 21 of 2013

[13]EP No. 3 of 2013, Nairobi.