



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION NO. 671 OF 2010.

IN THE MATTER OF THE ESTATE OF GERISHOM MUGUHELI MANANI.

AND

IN THE MATTER OF ERICA AZENGA MUGUHELI:.....PETITIONER.

AND

IN THE MATTER OF MABLE MUSINZI LUMULA:.....OBJECTOR.

RULING

INTRODUCTION.

1. The deceased herein GERISHOM MUGUHELI MANANI died on 1st May, 2006. Grant of Letters of Administration were issued to ERICAH AZENGA MUGUHELI and confirmed on the 27th day of November, 2014 and the deceased's estate distributed accordingly.

Applicant case.

2. The petitioner has filed the Notice of Motion dated 19th October, 2015 brought pursuant to section 9 and 31 of the Advocates Act Cap 16 laws of Kenya, the Constitution of Kenya, the Law of Succession Act Cap 160 Laws of Kenya seeking for orders that:-

- 1. Hearing of the application dated 6th October, 2015 filed by the firm of Elung'ata and Company Advocates on behalf of the 2nd respondent be stayed pending the outcome of this application;*
- 2. That this court do find and declare that one JOSEPH SHEM ELUNG'ATA who filed the said application on behalf of the 2nd respondent purporting under the style and name of ELUNG'ATA AND COMPANY ADVOCATE is an unqualified person within the definition of section 9 of the Advocates Act Cap 16 Laws of Kenya;*
- 3. That the Honourable court do find and declare that JOSEPH SHEM ELUNG'ATA acted in contempt of court when filing the application dated 6th October, 2015 and when filing the previous pleadings in this matter and when appearing before the court on various occasions under his name and/or the name of ELUNG'ATA AND COMPANY ADVOCATES purporting to be representing the 2nd respondent;*
- 4. One JOSEPH SHEM ELUNG'ATA practicing as ELUNG'ATA AND COMPANY ADVOCATES*

be found guilty of contempt of court under section 31 (2) (a) of the Advocate Act Cap 16 Laws of Kenya and be punished accordingly by a sentence to a term of imprisonment of not exceeding three years or to such longer or short term as the honourable court shall order;

5. That the application dated 6th October, 2015 be struck out;

6. That any other document filed in this matter by the 1st respondent and/or in the name of ELUNG'ATA AND COMPANY ADVOCATES be struck out and similarly anything done by or in the name of ELUNG'ATA AND COMPANY ADVOCATES be struck out and similarly anything done by or in the name of the aforesaid in this matter be and is hereby declared null and void;

7. The two respondents be condemned to pay the costs of the entire proceedings and of the instant applications.

3. The application is based on the grounds that the 1st respondent has from the year 2010 acted as an advocate for the 2nd respondent in this matter under the name of ELUNG'ATA AND COMPANY ADVOCATES. After searching on the status of the 1st respondent, the applicant found out that he had not taken out a practicing certificate for the last six (6) years from the year 2009.

4. He adds that the law does not condone the conduct of unqualified persons purporting to act for litigants in court and does not recognize documents filed by the aforesaid or activities engaged in furtherance of their cause or causes. He contends further that the application dated 6th October, 2015 and all pleadings and documents filed by the 1st respondent in this matter and all previous actions of the 1st respondents in and outside the court with regard to this matter while purporting to be acting as an advocate remain unlawful, invalid, incompetent, null and void and done purposely in furtherance of contempt of court.

5. The applicant further claims that the 2nd respondent is liable to pay costs of this litigation because of her conduct, and because she engaged the applicant who is her mother in law and the grandmother of her children. The application is further buttressed by the supporting affidavit of the applicant sworn on the same date wherein she explains in detail what she has stated on the grounds herein.

Respondent's case.

6. The application is opposed. There are two replying affidavits one by MABLE MISINZI LUMALA the 2nd respondent and the second one by JOSEPH SHEM ELUNG'ATA both dated 11th February, 2016. Mr. Elung'ata denied having been instructed by Mable Musinzi Lumula to act for her in this matter. He claims to have held brief for one MARY FRANCIS LUKERA advocate of the Federation of WOMEN LAWYERS who acts for the 2nd respondent in this matter. He also claims that it is the said MARY FRANCIS LUKERA who filed the initial summons for Revocation of Grant dated 5th April, 2011 and that at no time did the firm of ELUNG'ATA AND COMPANY ADVOCATES file a Notice of Change of Advocates replacing MARY FRANCIS LUKERA. He adds that his competence as an advocate does not have any bearing on this matter. He wants the application herein dismissed.

7. In her response the 2nd respondent maintains that she has never instructed the firm of ELUNG'ATA AND CO. ADVOCATES and by extension Mr. Joseph Shem Elung'ata to act for her in this matter. She explains that she instructed FEDERATION OF WOMEN LAWYERS in Kenya Kisumu Branch to act for her in this cause. She confirms that the summons for revocation of grant were filed by MARY FRANCIS LUKERA Advocate of FIDA Kisumu office on 13th April, 2011 "see MML." She also confirms that at no time has the firm of M/s. Elung'ata & Co. Advocates come to file a Notice of change of Advocates replacing FIDA-K in this matter.

8. All the 2nd respondent knows is that the 1st respondent has been holding brief for MARY FRANCIS LUKERA ADVOCATE. She depones further that at all material times she has been getting advice and direction from MARY FRANCIS LUKERA ADVOCATE.

9. She also claims that the applicant wants to hide behind the veil of the incompetence or otherwise of the 1st respondent to deny her and her children the fruits of her judgment and that the applicant has brought this application after she has benefitted from an illegality. She also claims that the application dated 6th October, 2015 exposes the applicants conduct which the applicant is trying to stop. He also claims that the applicant extracted and caused a false and wrong final confirmed grant issued by this honourable court on 16th October, 2014 and dated 27th November, 2014 to be extracted and later filed with the Lands Registrar and Kakamega and Vihiga Lands Registry. She adds that the applicant has totally failed to abide and adhere to any of the final orders of the court.

Submissions.

10. Mr. Musiega Advocate, for the applicant herein made oral submissions. To him the main issue is with the application dated 5th October, 2015 drawn by Advocate Elung'ata which he wants struck out and the proceedings thereafter be declared null and void and the said advocate be held in contempt of court because he did not have a valid practicing certificate. He submits that since 2009-2015 the advocate was practicing without a valid practicing certificate. He makes mention of section 31 Advocates Act which penalizes an unqualified person who acts as an advocate.

11. He explains what it takes to qualify as a practicing advocate and that is by having a valid practicing certificate. He claims that the respondents have avoided the issue of the practicing certificate. He relies on the case of **WILSON NDOLO AYA VS. NBK** where the Court of Appeal held that documents prepared by unqualified persons are null and void.

12. The 2nd respondent also made oral submissions. She also filed written submissions dated 9th September, 2016. She explains how she approached FIDA for assistance after she was left out together with her children in the succession herein in respect to her husband's estate. FIDA filed for revocation of the grant issued to her mother-in-law the applicant herein. Mr. Elung'ata was then requested to hold brief in the matter which was thereafter heard and determined. She submits on what happened after confirmation of grant and how the deceased estate was distributed.

13. She complains that the ruling of the court has not been complied with. She adds that all throughout the hearing no objection was raised in Elung'ata Advocates status. She wants the application dismissed.

Determination.

14. The one and only issue for determination is whether the 1st respondent JOSEPH SHEM ELUNG'ATA is an unqualified person within the definition of section 9 of the Advocates Acts Cap 16 Laws of Kenya and if so whether the documents filed by him and or in the name of ELUNG'ATA AND COMPANY ADVOCATES be struck out and anything done by him or in the name of the aforesaid firm be declared null and void.

15. From the record, it is not in doubt that the 1st respondent filed pleadings on behalf of the 2nd respondent in this matter. Mary Francis Lukera from FIDA Kenya only filed the 1st objection on 26th January, 2011 and another one on 5th April, 2011 after withdrawing the one of 26th January, 2011. On the 7th June, 2011 the affidavit of means of distribution was drawn by ELUNG'ATA & CO. ADVOCATES. The same firm of Advocates also filed an affidavit of protest on 26th January, 2012 a replying affidavit on 27th April, 2012, submissions dated 12th December, 2012 and Affidavit of Protest dated 6th October, 2015. There was no notice of change of advocates by the firm of Elung'ata & Co. Advocates.

16. I have no doubt therefore that the firm of Elung'ata and Company Advocates drew pleadings on behalf of the 2nd respondents. It is also on record that M/s. Elung'ata appeared in court on various occasions and he was representing the 2nd respondent herein. The question therefore arises whether while preparing pleadings and appearing before court was the 1st respondent having a valid practicing

certificate. Was he qualified to act as an advocate in all these instances? The answer is in the negative.

17. JOSEPH SHEM ELUNG'ATA did not have a valid practicing certificate. He has not denied this fact in his response. His profile from the Law Society of Kenya shows that he has been inactive since the year 2009. See annexure "EAM1" in the affidavit of the applicant.

18. Having considered the application and the responses together with the submissions both oral and written, the following is my view of the matter herein. The Constitution of Kenya at Article 50 (1) gives every person a right to have any dispute that can be resolved by application of the Law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body. It follows therefore that a right to bring a dispute to court for determination is a constitutional right.

19. Once the dispute is in court Article 159 (2) (b) and (d) of the Constitution enjoins the court to dispense justice without delay and without undue regard to technicalities. On the other hand Article 48 guarantees a right to access to justice.

20. Order 9 Rule 1 of the Civil Procedure Rules provides that:

"Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf."

21. Order 9 Rule 5 of the Civil Procedure Rules allows a party who has engaged an advocate to change advocates and one who had acted in person to appoint an advocate to act for him. It is not in dispute that even though instructions were taken by MARY FRANCIS LUKERA ADVOCATE from the 2nd respondents herein, it is the 1st respondent who later on took over the matter. He did not take it expressly by filing a NOTICE OF CHANGE OF ADVOCATE but by his actions which implied that he acted for the 2nd respondent. We have seen above that he literally did everything for the 2nd respondent in this cause. He was therefore in breach of the provisions of Section 9 of the advocates Act that prohibits a person with no practicing certificate from acting as an advocate.

22. I don't think that the 2nd respondent was aware all along that Mr. Elung'ata the 1st respondent had no practicing certificate and I don't think that applicants counsel was also aware of this otherwise he should have raised this issue way back.

23. Counsel for the applicant A.B.L. Musiega has relied on the case of **WILSON NDOLO AYA VS. NBK** where the Court of Appeal held that documents prepared by an unqualified person are null and void and should therefore be struck out.

24. However the supreme court in the **case of Pet no 36 Of 2014 National Bank Of Kenya Limited Vs Anaj Warehousing Limited** Overruled Ndolo Ayah case supra by holding;

"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)(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."

25. This is the question that this court is tasked with right now to determine i.e. whether to strike out the pleadings herein in their entirety or not.

26. The issue of unqualified persons acting as advocates has been with us for quite sometime. We have

seen especially during the election Petitions that the courts struck out petitions because the persons purporting to be advocates had no practicing certificates. Other courts have refused and or declined to issue orders to strike out pleadings. One of the cases where the court declined to strike out pleadings is the case of **TULIP APARTMENTS LTD & ANOTHER VS. SOUTHERN CREDIT BANKING CORPORATION LTD. & ANOTHER, NAIROBI H.C.C.C. No. 284 of 2002.**

27. This is a case that was decided on 16th May, 2002 by RIMITA J. as he then was where he declined to strike out pleadings; he held that it would not have been fair to visit the failure of an advocate who is in the roll of advocates and who has not been suspended whose only fault is his failure to renew his practicing certificate upon a party who had no idea that the said advocate had no practicing certificate. In reaching this decision RIMITA J. observed that, the Advocates Act Cap 16 Laws of Kenya has not provided for the consequences of the failure of an advocate to take out a practicing certificate on pleadings signed by such advocate.

28. Rimita J. concluded that since none of the parties was aware that the advocate concerned had no practicing certificate none of the parties should be punished for the said advocate's failure to take out a practicing certificate. He therefore dismissed the preliminary objection that concerned the competency of the application that was before the court, which was signed and filed by an advocate who had no practicing certificate.

29. There is also the well known case of **KAJWANG VS. LAW SOCIETY OF KENYA [2002] 1 KLR** that was decided by two judges of the High court. In this case a preliminary objection was raised and the court urged to declare the proceedings a nullity and the appeal to stand struck out on the ground that the advocate who appeared for the appellant had not taken out a practicing certificate. In dismissing the Preliminary Objection, the court held that proceedings are not invalidated merely by reason of the advocate for one of the parties being unqualified. The court held further that the client should not be made to suffer for the mistake of the advocate and that the penalties for practicing without a practicing certificate is to punish the unqualified advocate and not the litigant.

In the case of **Holdgate v. Slight, 21 QB 74** the Court observed that it would be occasioning injury to both plaintiffs and defendants, if it held that the absence of a practice certificate had the effect of invalidating all proceedings taken in the suit.

30. It will therefore be against all tenets of justice to grant the prayers sought herein by the applicant. Although the position in this country has for quite some time varied on the issue as to the validity or otherwise of pleadings prepared and filed by an advocate without practicing certificate the Supreme court case of **Anaj Warehousing Limited** supra has settled the law and affirmed the school of thought that **failure by an Advocate to take out a practicing certificate does not invalidate the pleadings drawn and filed in court by such advocate on behalf of a party.**

31. The position in England is also settled that, the proceedings are not invalidated on account of or by reason only of a solicitor disqualification. It would be unjust therefore to punish an innocent litigant for the mistake of his advocate in which he is not a party.

32. By invalidating pleadings and all proceedings taken in a suit results in an injury to both the plaintiff and the defendant not to mention waste of judicial time. The invalidation of pleadings and proceedings taken in a suit on account of the advocate's failure to take out practicing certificate does not lead to a just and expeditious conclusion of the matter. Instead it creates room for more disputes and suits for the court to deal with and exposes litigants to more costs. To arrest this the legislator enacted sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya which were reinforced by Article 159 (2) (b) and (d) of the Constitution.

33. This particular cause was actually determined and confirmation of grant issued. It is because of the implementation of the confirmed grant that brought rise to the application by the 2nd respondent dated 6th October, 2015. To counter this application the applicant raised a first one on the respondents by filing the instant application. I find no merit in the applicant's application and the same is dismissed with costs to

the 2nd respondent.

34. As a matter of concern this court advises the 1st respondent and any other advocate for that matter who knows that he doesn't have a practicing certificate to update his books with the Law Society of Kenya.

SIGNED, DATED AND DELIVERED at KAKAMEGA this 5TH day of OCTOBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

..... **for the Petitioner.**

..... **for the Objector.**

..... **Court Assistant.**