



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Winding Up Cause 2 of 2012

IN THE MATTER OF EQUITY BANK LTD

AND

IN THE MATTER OF THE COMPANIES ACT

EQUITY BANK LTD. RESPONDENT

VERSUS

NEPTUNE CREDIT MANAGEMENT LTD. PETITIONER

RULING

1. The application for determination was filed by the Petitioner on 28th August, 2012 and brought pursuant to **Sections 9, 31, 32, 33, 34, 56 & 85** of the *Advocates Act*, **Order 9 Rule 1 & 2, Order 2 Rule 15** and **Order 51 Rule 1** of the *Civil Procedure Rules (2010)* and **Sections 1A, 1B & 3A** of the *Civil Procedure Act (2010)*. The Petitioner seeks Orders *inter alia* that all pleadings, applications, bills of cost and proceedings filed by Ong'anda & Associates for and on behalf of the Petitioner be expunged and the resultant Ruling of this court dated 13th March, 2012 be set aside. The application is premised on the grounds that Arnold Ong'anda, an Advocate practising in the name and style of Ong'anda & Associates, drew and filed pleadings herein on behalf of the Petitioner, without having taken out a Practising Certificate for the year 2012. It maintained that the action by the said Advocate contravenes the provisions of **Section 9 and 34 (1)** of the *Advocates Act* and as such the entire claim before court is incompetent and should be struck out.
2. The application was supported by the Affidavit of Bryan Yongo, the Managing Director of the Petitioner, sworn on 28th August, 2012. The deponent contended that the documents prepared by the Advocate were invalid as they were prepared by an unqualified person. The said Advocate was prohibited from taking instructions, drawing or preparing any documents and, as such, any documents so prepared should be expunged, set aside and struck out from the record.
3. In opposing the Application, the Respondent filed Grounds of Opposition, dated 16th October, 2012. The Respondent contended therein that the application is an abuse of the court process and that the claims by the Petitioner/Applicant are unsubstantiated. The Petitioner/Applicant should not benefit from an illegality that it knew or ought to have known but did not choose to disclose at the material time. In the Respondent's view, the application is brought with an ulterior motive to avoid payments due to the Respondent.

4. The issue for determination arises from the allegation that the Advocate, Arnold Ong'anda, practicing in the name and style of Ong'anda & Associates, was disqualified from practicing as such since he had not taken out his Practicing Certificate for the year 2012. It was alleged by the Applicant, that such Advocate was prohibited and so barred from drawing, taking instructions or preparing any documents or instrument, as provided for under the Advocates Act. **Section 9 (c)** of the Advocates Act provides that;

“Subject to this Act, no person shall be qualified to act as an advocate unless:-

(c) he has in force a practicing certificate.”

Section 31 of the same Act further provides that;

“31. (1) Subject to Section 83, no unqualified person shall act as an advocate or as such cause any summons or other process to be issued, or institute, carry on or defend any suit or proceedings in the name of any other person in any court of civil or criminal jurisdiction.”

Section 34 (1) reads;

“34. (1) No unqualified person shall, either directly or indirectly take instructions or draw or prepare documents or instruments.”

The rules as regard to an unqualified advocate are thus clearly spelt out and any advocate who contravenes such rules is guilty of contempt and subject to the sanctions prescribed for practicing as an advocate when he/she does not hold a Practicing Certificate. The effect of the failure to obtain a Practicing Certificate on the validity of the documents drawn by the Advocate concerned is what is in issue here.

5. In its Supporting Affidavit, the Petitioner/Applicant annexed a copy of the LSK website search page marked **“BY-1”** which showed the said Advocate's status as **“Inactive”**. I was given to understand that what that status means is that the advocate is not certified to practice as an advocate for that specific year, in this case, being 2012. In support of its Application, the Petitioner/Applicant relied on a number of authorities including National Bank of Kenya v Wilson Ndolo Ayah [2009] eKLR, Musiara Ltd v Ntimama [2004] 2 KLR, Mohamed Ashraf Sadique & Another v Mathew Oseko t/a Oseko & Co. Advocates [2009] eKLR and Equity Bank Ltd v Capital Construction Co. Ltd & 3 Others Civil Suit No. 645 of 2009. The common thread that pervades through these authorities is that there was undisputed evidence as to the status of the advocates indicted for practicing without being in possession of valid Practicing Certificates. For example, Onyancha, J in his Ruling in Mohamed Ashraf Sadique & Another v Mathew Oseko t/a Oseko & Co. Advocates (supra) made the observation and considered the Ruling of Lenaola, J in Belgo Holdings Ltd v Esmail (2005) 2 E.A 28 where at page 30 the learned Judge held;

“...the reasons as I understand it, is so that no quack can pretend to practice law and indeed those that are qualified renew their commitment and adherence to their oath of office every year. By so doing there is imparted in the practice the kind of discipline that is of utmost importance in the profession.”

6. In the authorities cited as aforesaid, there was no dispute as to the qualifications of the advocates to practice (in some of the cases, the advocate concerned was called to Court to confirm or deny the allegations of being unqualified see Mohamed Ashraf Sadique & Another v Mathew Oseko t/a Oseko & Co. Advocates). In the present case, there seems to be a dispute as between the parties. Such dispute is as to whether the Applicant has tendered sufficient evidence to the Court to show that the said Advocate indeed did not have a Practicing Certificate for the year 2012. What is shown and produced before the Court is a photo capture of the LSK's Advocates Search Engine webpage marked **“BY-1”**, showing that the Advocate was **“inactive”**. It is the Respondent's contention that this is not evidence that the Advocate did not have a Practicing Certificate at the material time. It is known, and is indeed the practice, that an Advocate may be compliant and be qualified to practice as an advocate but the LSK,

which is charged with the responsibility of updating advocates' status, sometimes delays in exercising this mandate. On another occasions, this Court whose mandate it is to issue Practicing Certificates is slow in doing so. In my opinion, the Petitioner/Applicant should have exercised reasonable due diligence and procured from the Law Society of Kenya, a letter detailing the true position as to the said Advocate's status, not merely relying upon information from the website.

7. In making such determination, it is for the Court to ensure that no injustice is occasioned to litigants. In dispensing and exercising this role, this Court needs to be convinced, beyond any doubt, that it is making an informed decision based on all and correct facts placed before it. Further, it suffices to say, that the Court should not perpetuate any illegality as regards its process as it is the custodian of the law. It should not be seen to condone illegality of whatever nature. However, in my view, in light of the paucity of the evidence tendered by the Petitioner/Applicant in support of its Application, this Court has insufficient evidence upon which to rely so as to allow the application. In the circumstances, I find that the application lacks merit and I dismiss the same with costs to the Respondent.

DATED and delivered at Nairobi this 1st day of March 2013.

**J. B.HAVELOCK
JUDGE**