



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 978 OF 2013

JOHN AYAWO ONEKO AND 5 OTHERSPLAINTIFF

VERSUS

TITUS MAITYA KYONDO AND 2 OTHERS.....DEFENDANT

RULING

The Plaintiff filed the instant suite vide a plaint dated 8th August 2013 and contemporaneously with the plaint the Plaintiff filed a notice of motion application seeking a temporary injunction against the Defendants from evicting them and/or interfering with the Plaintiffs use and occupation of plot **No. 8442 Embakasi**. The plaint and the notice of motion were drawn and filed by Okach & Co. Advocates and signed by **G.O. Okach Advocate**.

Mr. Okach Advocate for the Plaintiff/ Applicants appeared before me on 22nd August 2013 when he urged the application dated 8th August on behalf of the Plaintiffs which application was stated to have been served as per the affidavit of service by **Benedict Nthenge Musyoka** sworn on 21st August 2013 and filed in court on 22nd August 2013. There was no attendance in court on the part of the Defendants who had not filed any appearance and/ or any response to the application. The application therefore was unopposed and proceeded exparte and the orders sought were granted as prayed.

On 28th August 2012 the Law firm of **Wainaina & Karimi Advocates** acting for the 3rd Defendant filed a notice of motion application under a certificate of urgency expressed to be made under Order 2 Rule 15(1) (b), (c) and (d), order 45 Rules 1 and 2 and order 51 Rule 1 of the civil procedure Rules 2010 and all other enabling provisions of law. The notice of motion inter alia seeks the following orders:

1. That there be a temporary stay of the orders issued by this Honourable court on 22nd August 2013 pending the hearing and determination of this application.
2. That the pleadings filed herein be struck out.
3. That this Honourable court does review the orders issued on

22nd August 2013.

4. That such other and/or further orders be made as this Honourable court may seem fit and just.

Inter alia the application is grounded on the following grounds:-

- a. The pleadings in this matter have been drawn, signed, and filed by an Advocate who is suspended from legal practice and thus not qualified and unauthorized to draw court documents.
- b. That the Advocate for the Plaintiffs/Respondents appeared and addressed this honorable court on 22nd August 2013 knowing very well that he does not hold a current practicing certificate.
- c. The 3rd defendant/Applicant is the registered owner of the land Reference **Number 8442** located at **Mwiki Njiru** in the city of Nairobi.
- d. There is concealment of material facts in this matter by the Respondents in that:-
 - The respondents did not disclose to the court about the existence of another suit before this court being **HC ELC NO. 424 of 2012** involving the same issues on the same land and the various orders that are in place.
 - The respondents have misled the court to issue orders that are in total conflict with the orders issued in **ELC No. 424 of 2012**.
- e. The respondents know the registered offices of the 3rd Defendant applicant which are at Hughers Building and they intentionally failed to serve the pleadings and application on the 3rd Defendant.

The Defendants application is further supported on the grounds contained in the supporting affidavit of **Patricia Sheth** a manager of the 3rd Defendant sworn on 28th August 2013. That although the Plaintiff's advocate was served with the Defendant's application on

5th September 2013 as per the affidavit of service by **Dominic Mutunga** sworn and filed in court on 10th September 2013 the Plaintiff have not filed any response to the application. The 3rd Defendant's application dated 28th August 2013 was listed before me for hearing on 19th September 2013 when even though the Plaintiff's Advocate had been served with a hearing notice on 11th September 2013 as per the affidavit of service filed by **Dominic Mutunga** a process server on 19th September 2013 there was no attendance in court by the Plaintiffs Advocate or by the Plaintiffs and I proceeded to hear the application exparte. **Mr. Waweru Gatonje** Advocate appeared with **Wainaina Kimani** Advocate for the 3rd Defendant. In the absence of a response to the application by the Plaintiff, counsel relied on their filed pleadings and stressed that where an unqualified person draws any pleadings such pleadings are incompetent and must be struck.

The counsel urged the court to strike out the pleadings drawn by the Plaintiff's Advocate as he did not possess a practicing certificate at the time he drew the pleadings and that he in fact had been suspended as an advocate at the time.

I have considered the application by the 3rd Defendant and the grounds adduced in support of the same and I further considered the authorities that have been referred to me and I am persuaded that the suit by the Plaintiff cannot be sustained. The Law Society of Kenya vide their letter of 27th August 2013 confirmed Mr. Okach George Owino of Okach & Company Advocates does not hold a current practicing certificate and that he last held a practicing certificate in the year 2010. The letter went further to state that Okach George Owino was on 1st July 2013 suspended from legal practice for a period of six(6) months in disciplinary cause number **2991/96**. This letter is annexed to the 3rd Defendant's supporting Affidavit and marked "**PS**"-3.

Under the provisions of section 9 of the Advocates Act cap 16 Laws of Kenya an Advocate who does not hold a current practicing certificate or one who is suspended is deemed to be an unqualified person. Section 9 of Advocates Act 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**
- d. Deleted**

And for the purposes of this Act a practicing certificate shall be deemed not to be in force at anytime while he is suspended by virtue of section 27 or by an order under section 60 (4).”

The wording of section 9 is in mandatory terms and it is not ambiguous and the effect is that an advocate must satisfy all the conditions under (a) (b) and (c) to act as an Advocate for a party. I have recently in the case of **ABDUL AZIZ JUMA –VS- NIKISHI INVESTMENT & 2 OTHERS [ELC NO. 291 OF 2013 (unreported)]** considered the application of section 9 of the Advocates Act cap 16 Laws of Kenya in a similar situation where an advocate filed pleadings when he did not possess a current practicing certificate. In the **Abdul Azizi Juma case (supra)** whose ruling I delivered on 11th July 2013 relying on the court of Appeal cases **OBURA –VS- KOOME (2001) IEA 175 and STANDARD CHATERED BANK –VS- MECHANICAL ENGINEERING PLANT LTD& OTHERS [2009] EA404** where the court of Appeal held that pleadings drawn by a person who did not hold a practicing certificate at the time he drew them are incompetent, I like the court of Appeal out a plaint drawn and signed by the Advocate on 25th February 2013 notwithstanding that the Advocate obtained his practicing certificate for 2013 on 8th May 2013. The court of Appeal in the **Standard Chartered Bank case (supra)** had held that a practicing certificate cannot have a retrospective effect and application and is valid from the date it is issued. This meant obtaining the practicing certificate in May 2013 could not cure the defects in the pleadings drawn earlier in February 2013. The letter were simply drawn by an unqualified person. Section 34 of the Advocates Act cap 16 Laws of Kenya sets out the acts that an unqualified person cannot do and under section 34 (j) (e) and (f) those acts would include the drawing of pleadings and I am in agreement with Hon. Justice Ngaal Jairus, in his holding in **H.C petition No. 5 of 2013 (Nyeri)** that the documents drawn by a person who holds no practicing certificate are illegitimate when he observed thus:-

“ The petitioner’s counsel fits the description of an unqualified person as defined in section 2 of the Act because he did not have a practicing certificate to qualify to act as an advocate at the time he drew and filed the petition herein until the 1st July, 2013 when he obtained the requisite certificate. It follows that under section 34 of the Act he could not directly or indirectly take instructions or draw or prepare any document relating to a legal proceeding such as the petition herein. Accordingly, the instructions he took the instruments or documents he drew or prepared relating to this petition are all illegitimate and deficient of any force of law”

In the matter before me I am satisfied G.O.Okach Advocate who drew, signed and filed the plaint and the application for the Plaintiffs lacked the capacity to act as an advocate and the documents he drew are incompetent and must be struck out. Being cognizant of the plight of the members of the public who routinely have to deal with persons who hold themselves out as qualified advocates I in the **Abdul Aziz Juma case (supra)** sounded a caution for members of the public who seek the services of Advocates which I repeat here that:-

“It is incumbent for the instructing clients to ensure the advocate they choose to instruct holds a practicing certificate. The non observance of the provision can easily lead to the invasion of the legal practice by ‘quacks’ who have no qualification. It should therefore be a primary duty and obligation of legal practitioners to ensure they at all times hold current practicing certificates otherwise the consequences for failure to conform are devastating. The Law Society of Kenya (LSK) has in recent times made it easy to access the details and particulars of all advocates including their status and hence members of the public should have little difficulty to access information on the status of advocates.”

As I have held that the plaint and all the pleadings filed by the Plaintiff’s Advocate are incompetent and are for striking out that should be sufficient to dispose this matter but I wish to make one other

observation.

The 3rd Defendant has averred that the Plaintiff concealed the existence of an earlier suit **HC ELC No. 424 of 2012** where the 3rd Defendant is the Plaintiff and the 4 named Defendants and 16 others. Although the 5 Plaintiffs names are not shown as parties in that suit it is clear from the annexed plaint that the suit property is the same and there is an order of injunction issued in that suit in favor of the Plaintiff (the 3rd Defendant in instant suit). The order of injunction issued in the instant suit is in conflict with the earlier order of injunction issued on 20th July 2012. There ought not to be any conflicting orders in any matter. Had the existence of the earlier order been brought to my attention at the time the Plaintiff's counsel was before me on 22nd August 2013, I would not have granted the order of injunction that I did in favour of the Plaintiffs. In the circumstances I hereby vacate the said order as it was obtained through concealment and/or non disclosure of material facts. I for all the reasons set out above order that the suit initiated by the plaint that I have held to be incompetent for being drawn, signed and filed by an unqualified person be struck out and I award the costs of application and the suit to the 3rd Defendant.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 8th day of October 2013

J. M. MUTUNGI

JUDGE

In presence of

.....Plaintiff

.....Defendant