



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 47 OF 2010

TAMARIND MEADOWS LIMITED.....PLAINTIFF

VERSUS

1. ATHI FARM DEVELOPMENT LIMITED

2. FRIDA AFANDI

3. GEORGE SAM ONYANGO

4. DANIEL GICHANGI KARIUKI

5. JOHN FREDRICK ONYANGO.....DEFENDANTS

RULING

The Plaintiff filed this suit on 4th March, 2010. Contemporaneously with the filing of the suit, the plaintiff took out an application under a certificate of urgency seeking *inter-alia* an interlocutory injunction restraining the defendants from entering upon, remaining on, interfering, trespassing and or tampering or in any other way whatsoever dealing with the plaintiff's property known as grant number I. R 71610, Land

Reference No. 337/1642. The suit and the application were on the footing that at all the material times relevant to the suit, the plaintiff had been the registered proprietor of the said parcel of land, herein after "*the suit premises*" and was indeed in possession thereof. However on or about 2nd February, 2010, the defendants wrongfully entered and trespassed upon the suit premises in blatant breach of the law, hence the suit.

The defendants filed their joint statement of defence and counterclaim to the suit on 28th April, 2010 praying that the plaintiff's claim be dismissed with costs and a declaration that the 1st defendant was the registered owner of the same Land reference number 337/1642 and Grant Number I.R 60354.

On 16th August, 2011, the defendants scheduled the case for hearing on 25th October, 2011. Come that day and the plaintiff intimated that it intended to make an application under the Advocates Act since it had come by information that the advocates' of the defendants may have acted in breach of section 32 of the said Act. It required time to file a formal application to canvass the issue. The court duly granted the

request and directed that such application be filed within seven (7) days. On 1st November, 2011, in compliance with the above order, the plaintiff filed a Notice of Motion pursuant to section 3A of the Civil procedure Act, order 51 of the Civil Procedure rules, sections 31-34, 56 and 85 of the Advocates Act and all other enabling provisions of the law.

In the application, the Plaintiff sought that all the pleadings, documents, notices and affidavits drawn and filed by **Mbeya George Mugoye** practising as **Mugoye & Associates Advocates** hereinafter "*Mugoye*" be declared a nullity, struck out and expunged from the court record. It again sought that the Agreement for sale made on 6th July, 2006 and Transfer made on 10th March, 2009 all prepared by **Mugoye** similarly be declared a nullity and be invalidated.

The grounds in support of the application were that **Mugoye** had never complied with section 32 of the Advocates Act. He was therefore in contravention of sections 31, 32, 33 and 34 of the Advocate's Act. Due to the foregoing, all the pleadings, applications, affidavits, conveyance instruments/documents drawn by him and transactions in which he took instructions were a nullity. That he was also thereby in contempt of court, incapable of maintaining any suit and in fact committed offences under sections 33 and 34 of the Advocates Act punishable under section 85 of the Act thereof. Finally, it stated that pleadings drawn by the said advocate were incompetent, null and void.

The affidavit in support of the application was sworn by one, **Joe Mungai**, the managing director of the plaintiff. It was a rehash of what I have already set out hereinabove. Suffice to add that based on the information contained and kept with the Registrar of the High Court, though **Mugoye** was admitted on the role of advocates on 28th October, 2003, he only took out his first practising certificate on 22nd March, 2004 under the employment of **Mussilli & Mussilli Advocates**. Later in 2005 he also took out his practising certificate rather late on 1st April, 2005 under the employment of **Mulwa & Mulwa Advocates**. Therefore the said advocate partially complied with section 32 of the Advocates Act after obtaining his first practicing certificate from 22nd March, 2004 to end of December, 2004 (9 months) and 1st April, 2005 to end of December, 2005 (8 months), a period that was not continuous and does not exceed two (2) years. On 3rd March, 2006, the said advocate obtained a practising certificate for the year 2006 and in his declaration; he stated that he was the sole proprietor of **Mugoye & Associates Advocates**. On the basis of all these information it was the belief of the plaintiff that **Mugoye** was in breach of section 32 for engaging in practice on his own before practising in Kenya continuously on a full time basis for a period of not less than two (2) years after obtaining his first practising certificate in a salaried post either as an employee of the Attorney General or an organization approved by the Council of Legal Education or an Advocate who had been engaged in continuous full time private practice on his own behalf in Kenya for a period of not less than five years. This is the essence of section 32 of the Advocates Act. Therefore the said advocate was in breach of sections 31, 32, 33 and 34 of the Advocates Act and all the documents, notices, affidavits, pleadings conveyance instruments and documents drawn by him together with all and any instructions of whatever nature taken by him were null and void.

In response **Mugoye** stated that he was a dully qualified advocate within the meaning of section 12 of the Advocates Act having been admitted as an Advocate on 28th October, 2003 and duly entered on the roll of advocates. Upon admission he was employed first, by **Messrs Mussili & Mussili Advocates** and thereafter by **Messrs Mulwa & Mulwa Advocates**. He verily believed that he was not in breach of any provisions of law and was and or still acting within the confines of law. The sale agreement was drawn by **Messrs Rachier & Amollo Advocates** and not him in any event. The application was therefore an afterthought and punctuated with malice as the plaintiff was trying to dwell on matters that do not touch on the substratum or merits of the suit. Otherwise the plaintiff was abusing the court process by using delaying tactics meant to prejudice and embarrass him in his capacity as the defendants' counsel and delay fair trial of the case.

When the application came before me for *interpartes* hearing, **Mr. Liko**, learned counsel for the plaintiffs and **Mr Were** for the defendants agreed to canvass the same by way of written submissions. Subsequently, they filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

To my mind three issues emerge for determination in this application.

§ Whether **Mugoye** is unqualified person within the meaning of section 9 of the Advocates Act.

§ Whether he has complied with section 32 of the Advocates Act.

§ Whether documents the plaintiff is urging the court to strike out were drawn by him as unqualified person.

Dealing with the 1st issue, it is common ground that **Mugoye** was admitted as an advocate and his name duly entered on the roll of advocates on or about 28th October, 2003. It is also common ground that on 31st, October, 2003, **Mugoye** was employed by the firm of **Mussilli & Mussilli Advocates** and later, **Mulwa & Mulwa Advocates**. It is also common ground that **Mugoye** has been tacking out practising certificates as required to-date. Section 9 of the Advocates Act gives qualification for one to act as an advocate-

§ He must have been admitted as an advocate

§ His name must be on the roll of Advocates

§ He has in force a practising certificate

To my mind therefore, **Mugoye** is an advocate within the meaning and understanding of section 9 of the Advocates Act having fulfilled the aforesaid conditions. Nowhere in the application has the plaintiff stated and or adduced any evidence to the extent that **Mugoye's** name has been removed from being a member of the law society of Kenya, or suspended from practice, or a complaint has been lodged with the disciplinary Committee of the Law Society of Kenya as to the Advocate's Practice under the name and style of **Mugoye & Associates** nor the Advocate having failed to take out a practising certificate during the period when the pleadings were drawn and filed by him.

Has **Mugoye** breached the provisions of section 32 of the Advocates Act? I do not think so. **Mugoye** was called to the bar on 28th October, 2003 and earned his first employment on 1st November, 2003. He was in salaried employment first with **Mussilli and Mussilli**, advocates and later with **Mulwa & Mulwa advocates**. He left **Mulwa and Mulwa advocates** on 28th February, 2006 presumably to set up his own practice. It is a matter of common notoriety and knowledge that practising certificates are not issued on the spot upon payment of fees by advocates seeking the same but they are always sent to the Advocates at later date by the Registrar of the High Court of Kenya. It is therefore erroneous for the plaintiff to suggest that the date appearing on the practising certificate is deemed to be the date when the advocate took out the Practising Certificate. If that was the case, most of the advocates would be locked out of practice during the period when their practising certificates are being processed by the Registrar. Indeed what courts have been insisting on in such cases are receipts showing when such an advocate paid for his annual practising certificate. I think that it does augur well for counsel for the plaintiff to engage the court in minute calculations of the periods when **Mugoye** is alleged to have taken out his annual practising certificate so as to determine whether he had attained the threshold of 2 years envisaged by section 32 of the Advocates Act.

A casual calculation of the aforesaid period in any event will clearly show that **Mugoye** had been in salaried employment for a period in excess of twenty four months' in compliance and fulfilment of the requirements of section 32 of the Advocates Act contrary to the allegations by the plaintiff.

From the documentation on record, they show that **Mugoye** set up his firm in the year 2006. By then he had practised with **Mussilli & Mussilli Advocates** from 1st November, 2003 to 1st March, 2005 when he joined **Mulwa & Mulwa Advocates**. On record, there are practising certificates for the years 2004, 2005 and 2006. This clear evidence that by the time **Mugoye**, set up his practice, he had already attained the threshold of having practised for a continuous period of two years as a salaried employee. As

correctly observed by **Onyancha, J** in the case of **Mohammed Ashraf Sadigue Harbans Singh Soor vs Mathew Oseko T/A Oseko & Co. Advocates**, the duration of two years may be served from time to time and may also be served under more than one employer, nevertheless the cumulative period must add up to 24 months. But again even if I was to agree with the plaintiff, which are these documents that they wish to be struck out. They are not annexed to the application. A court cannot issue an order in vacuo. Similarly there are no documents annexed to the application alleged to have been drawn by **Mugoye** during the practice years of 2003, 2004, 2005 and 2006.

The last issue I wish to address is whether there are any documents drawn by **Mogoye** as unqualified person. The answer to this question is pretty obvious. In view of what I have already stated, this application to have the document drawn by **Mugoye** be declared a nullity, struck out and expunged from the record is incompetent, vexatious, frivolous and flagrant abuse of the court process. It is self-evident that during the period under review, **Mugoye** never failed to meet the requirements of section 9 and 32 of the Advocates. In any event the sale agreement being the only document identified, and to whose attention this court has been drawn to, dated 16th July, 2006 was not even drawn by **Mugoye**. It was drawn by **Messrs Rachier and Amollo Advocates**. The plaintiff has not alleged that **Rachier & Amollo Advocates** contravened any provisions of law in drawing the agreement of sale sought to be impugned. Yes, the transfer dated 10th March, 2009 being another document that my attention has been drawn to was drawn by **Mugoye**. This was 6 years following his admission to the bar. There is no evidence adduced by the plaintiff that the said document was drawn by **Mugoye** as an unqualified person. The evidence on record points to him being a qualified person to draw such a document.

In conclusion, the plaintiff has not shown how **Mugoye** did not comply with section 32 of the Advocates Act, nor has it alleged that **Mugoye's** employment was terminated at any given time during the period of his employment. It is apparent that there was no termination of **Mugoye's** employment and at no time did he cease to be in salaried employment before the expiry of 2 years from the date of his employment.

The plaintiff's computation of the period that **Mugoye** has been in practice is erroneous. According to the plaintiff, **Mugoye** first obtained practising certificate on 22nd March, 2004 to end of December, 2004 (9 month's) and 1st April, 2005 to end of December, 2005 (8 months) a total of only seventeen (17) months.

As I have already stated elsewhere in this ruling it is common knowledge that applications for practising certificates are always channelled through the Law Society of Kenya. It is the Registrar of the High Court who then processes the applications. Ordinarily, much as the applications may be made in good time, the Registrar may take a bit of time to process them. So it is not the date on the practising certificate that counts. An advocate may very well apply for renewal of his practising certificate in December of the previous year only to be given such certificate in February or March of the following year. In those circumstances, I do not think it would be fair to start computing time on the basis of the date on the practising certificate. Rather it should be the receipts of the payment for the renewal of annual practising certificate that should be focused on. The plaintiff should have provided those receipts. After all it is it that made the allegations. In civil proceedings he who asserts must prove

The application lacks merit. It is accordingly dismissed with costs to the defendant.

RULING DATED, SIGNED and DELIVERED at MACHAKOS, this 6TH day of JULY, 2012.

ASIKE-MAKHANDIA
JUDGE