



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 64 of 1995

CHAIRMAN & SECRETARY - TABLIGH FLYSABULLAHI MARKAZ

SELF HELP GROUP.....APPELLANTS

VERSUS

DAVID MOTUKU NZAURESPONDENT

Coma: J. N. Mwera J.

Mrs. Nzei Advocate for Appellant/Applicant Mr. P. M. Mulwa Advocate for Respondent Court Clerk Ndolo

RULING

On behalf of the Appellants two applications were filed in this court and they were argued simultaneously by Mrs. Nzei on 19th January, 1996. Mr. F. Mulwa appeared for the Respondents and opposed them both. The first application was a Chamber Summons dated 2nd August, 1995 in which three main prayers featured: that leave be granted to amend the Memorandum of Appeal with the draft amended memorandum being deemed as filed and served; that there be a stay of execution in this suit until the intended appeal is determined and lastly that the Appellants attached property be released/restituted to them. A long affidavit in support by one Juma, the Chairman (the 1st Appellant) and Chairman of the 2nd Appellant was filed.

The second Chamber Summons dated 13th November, 1995 prayed that all proceedings, judgement and orders in P.M.C.C.No. 303/95 be declared a nullity for the reasons that Mrs. Nzei deposed to in her supporting affidavit. There was a prayer similar to the first application that all the Appellant's properties attached in suit No. 303/95 be released but that the Respondent or his counsel Mr. P. M. Mulwa pays the auctioneer's charges.

Considering the filing of an amended Memorandum of Appeal, according to 0.41 r.1B, a party may amend the Memorandum of Appeal at any time without the leave of court before the court gives directions under 0.41 r.8B - i.e. the appeal being listed before a Judge in Chambers to give directions. An effort to find out from the record as to whether directions had been given earlier under r.8B did not yield much. In that case the draft of the intended amended Memorandum of Appeal is deemed filed and served without necessarily seeking this court's leave. But if r.8B had been complied with, this court gives leave to the Appellant to file the amended Memorandum of Appeal and that already filed should be deemed duly filed and served. Mr. Mulwa seemed to be of the view that the merits of the appeal be considered by the court first. But if that was correctly his impression this court is minded to state that such a requirement

is not envisaged under 0.41 r*1B.

As to the prayer for stay of execution and release of attached property that is to feature alongside a similar prayer in the second application of 13th November, 1995.

In this application Mrs. Nzei argued that Mr. F. M. Mulwa was not competent to file and prosecute .M.C.C.NO. 303/95 as he was not a holder of a current practising certificate as envisaged by the law and the submission flowed thus:-

0.3 R.1

"r1 Any application to or appearance or act in any court required or authorised by law to be made or done by a party in such court may, except where otherwise expressly provided by law for the time being in force, be made or done by the party in person, or by his recognised agent or by an advocate duly appointed to act on his behalf: Provided that"

There then follows a proviso not really of our concern here. A recognised agent is stated but not an advocate whose definition appears in the Advocates Act (Cap. 16).

"advocate" means any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and includes any person

mentioned in S. 10."

And s. 9 (Cap. 16) states in the relevant part:-

"S.9 Subject to this Act, no person shall be qualified to act as an advocate unless -

- (a)**
- (b) his name is for the time being on the Roll; and**
- (c) he has in force a practising certificate; and**
- (d) 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 60(4)"

And further the same Act talks of unqualified persons not to prepare certain documents or instruments. The relevant part in S.34 says:-

"S. 34(1) No unqualified person shall either directly or

Indirectly, take instructions or draw or prepare any document or instrument -

- (a)**
- (b)**
- (e)**
- (d)**
- (e)**

(f) relating to any other legal proceedings

And the section goes on to say that such person should not accept fee, gain or reward for the drawing of the documents/instruments stated above. Simply put such an unqualified person is prohibited to draw those documents and should therefore not be paid for drawing them up. If such a sum is paid out the person paying should recover it as a civil debt. S.34(3) then states that any person contravening sub section 1 shall be guilty of an offence and liable to a fine not exceeding Kshs.25,000/- or imprisonment for a term not exceeding 2 years or to both.

There is a bar on unqualified persons acting as advocates in the Advocates Act aforesaid:

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

(2) Any person who contravenes sub section (1) shall -

(a) be deemed to be in contempt of court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken and may be punished accordingly, and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of S0 acting, and

(c) in addition be guilty of an offence and liable to a fine not exceeding twenty five thousand shillings or to imprisonment for a term not exceeding two years or to both."

So both ss. 31 and 34 are clear on unqualified persons who conduct proceedings or draw up legal documents. The punishment for culprits under the 2 sections is clearly set out.

After setting out the law, Mrs. Nzei asked this court to nullify all the proceedings that went on in P.M.C.C.NO. 303/95 because Mr. Mulwa was not an advocate as the law requires that he filed that suit, prosecuted it, got judgement and orders when he was not qualified to do so. That he was neither the party or the recognised agent or an advocate to conduct all that on behalf of the Respondent. All he did was unlawful and thus of no validity at all hence nullifying those proceedings.

Mr. Mulwa did admit that he was not a holder of a current practising licence from the inception to the conclusion of P.M.C.C.NO. 303/95. He told the court that he had delayed in applying for one. He added that the errors/defects of this type should not be visited on his client by invalidating all the proceedings in P.M.C.C.NO. 303/95 at all.

So what is the fate of the applications herein or indeed the whole proceedings in the lower court in P.M.C.C.NO. 303/95?

It is not in dispute that Mr. Mulwa instituted the suit P.M.C.C.NO. 303/95 by signing the Plaint on or about 29th March, 1995. On 3rd May, 1995 Mr. Mulwa submitted for the Plaintiff (Respondent here) that a summary judgement be entered. The Defence also submitted and on 9th May, 1995 the learned trial magistrate was satisfied that such a judgement should issue (under 0.35).

The Applicants instructed counsel who filed an application to set aside the summary judgement. Both Mr. F. M. Mulwa and Mrs. Osolika (for the present Appellants) were heard. The lower court was not impressed with the Appellant's application to set aside. It was dismissed on 28th June, 1995 i.e. the Respondent was at liberty to execute the summary judgement. Execution followed and the Appellant's properties were attached. But a stay of execution was granted and it remains in force with the attached goods stored by the auctioneer.

After recounting the law and the admission by Mr. Mulwa it needs no further propounding. Mr. Mulwa was not holding a current practising certificate when the lower court concluded the proceedings on or about 28th June, 1995 and thereafter ordered execution. Mr. Mulwa started the proceedings and concluded them holding out himself as an advocate qualified to conduct such affairs. This was not correct. It was against the law and indeed unethical. This court is not made aware as to why Mr. Mulwa was not certified to practise as an advocate until 28th August, 1995 when he paid for such a certificate or got one valid w.e.f. 3rd August, 1995 but this court finds it near impossible to consider that Mr. Mulwa was not breaking the law and he did not know it. Definitely he knew, the senior counsel he is, and well acquainted with the legal provisions governing the practice of law in this country. This court finds it not easy to believe that Mr. Mulwa did not have a current practising certificate before 31st August, 1995 because he delayed in applying for one. Mr. Mulwa could have shown much respect for this court if he stated forthrightly what the circumstances were. He did not. He did not do the same to the learned trial magistrate who went on to hear Mr. Mulwa all through hopefully all the time believing him to be a qualified person - an advocate to conduct the civil proceedings before him. This is a blot on Mr. Mulwa as a senior counsel before this court and the one below. He acted as he did knowingly and deliberately all contrary to the law.

After all the foregoing this court deems it fair to confirm an order of stay in the execution of the decree arising from the lower Court's order of 28th June, 1995. It is fair and let the intended appeal be heard and considered on merits. This court also feels that in all fairness the attached goods be released to the Applicants forthwith. to act for him. It has turned out on Mr. Mulwa's own admission that he was not qualified to act as an advocate before 31st August, 1995 when these proceedings went on with lower court. He was unqualified by virtue of S.31 (l) of the Act.

This court however does not consider that the proceedings in the lower court be nullified. They were conducted by an unqualified person Mr. Mulwa who acted as an advocate but they are not null and void at all. First, the law does not say so. The Advocates Act only prescribes punishments to such an unqualified person adding that such a person cannot maintain a suit for costs against his "client" in those

proceedings (s.31 2(b)). To this court's mind this necessarily implies that the proceedings involved remain valid. Second, the appeal filed as amended remains an appeal if the lower court proceedings remain valid. Here let that be the case. May the Respondent put up his side of the case when the appeal is heard.

Lastly this court is greatly constrained to observe that Mr. Mulwa's conducting of the case in the lower court while he knew he was not certified to do so as per the law is one of the most unfortunate and least commendable act on the part of a lawyer and Mr. Mulwa is a senior one. Such conduct undermines the law, the ethics and the practice of the profession. It should be deprecated in the strongest terms possible and all should be done to avoid such conduct.

The matter is no longer before the lower court for due action under s. 30 of the Act and in any case Mr. Mulwa appears to have taken out a practising certificate which as per S. 24 expired on 31st December, 1995. Following the last incident this court orders Mr. Mulwa to verify to the Deputy Registrar Machakos that he has applied for a practising certificate in 1996. It is also deemed proper that a copy of this Ruling goes to the local Law Society of Kenya branch which should also furnish a copy to the Law Society of Kenya Headquarters for any action it deems necessary.

In summary, it is ordered:-

- (i) The draft amended appeal on record be deemed filed and served.
- (ii) The properties attached in P.M.C.C.NO. 303/95 be released forthwith to the Appellant.
- (iii) The auctioneer's charges be borne by Mr. F. M. Mulwa the counsel for the Respondent

personally.

(iv) A copy of this Ruling be served on the local Bar Association branch for onward transmission of a copy to the Law Society of Kenya Headquarters for its consideration.

(v) The Deputy Registrar to verify from Mr. Mulwa if he has applied for the 1996 practising certificate.

(vi) Both applications succeeds with costs.

Delivered on 1st February, 1996.

J.W. MWERA

JUDGE