



REPUBLIC OF KENYA



**Tabouillot v Mbaabu & another (Environment and Land Case
E057 of 2023) [2025] KEELC 4639 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E057 OF 2023
FM NJOROGE, J
JUNE 13, 2025**

BETWEEN

RUDI WOLFGANG VON TABOUILLOT PLAINTIFF

AND

PURITY NJERI MBAABU 1ST DEFENDANT

SYLVERTONE AKHENDA 2ND DEFENDANT

RULING

1. The application for determination is the Defendants' Amended Notice of Motion application dated 3/12/2024 for orders: -
 1. The counsel holding brief for MS Mankone and Co. Advocates, Ms Hilda Kerubo Omboga (P105/12648/16) recuses herself from appearing for and representing the plaintiff in this case as she is prohibited by Mombasa County Government statute from engaging in private practice for as long as she remains a county legal counsel/attorney in the employ of Mombasa County Government;
 2. The court provides for costs of this application, and for the aborted hearing on 24/10/2024;
 3. Ms. Hilda Kerubo Omboga is joined herein ex-debito justitiae so that she can be heard on this amended application only, to avoid her being condemned unheard;
 4. The drawing and filing of the plaint by the said Hilda Kerubo Omboga is an illegal act and contravenes county statute and the *Advocates Act*;
 5. The Plaint is struck out for illegality, for the same reasons as above, with costs and interests on costs to be borne by the Plaintiff or her counsel, in any event.



2. The application is based on the grounds attached and supported by the affidavit sworn by Purity Njeri Mbaabu, the 1st Defendant herein, who stated that when the matter came up for hearing of her application to have the said advocate, Ms. Hildah Kerubo recuse herself, she was forced to amend her application since Ms. Hildah had pulled out of the case and caused a notice of change of advocates to be filed by a different firm. She stated that the act of withdrawal after telling the court on 24/9/2024 that she had resigned from the Mombasa County Government's Legal Department and that she possesses a valid practicing certificate to engage in private practice, was an admission on her part that she misrepresented the facts to the court in order to unjustly enrich herself by engaging in private practice while still an employee of the County Government.
3. The Plaintiff filed a replying affidavit, which he swore on 23/1/2025 stating that the Amended Notice of Motion is not a pleading capable of being amended under Order 8 of the Civil Procedure Rules and that the amendment is at complete variance with the affidavit. The Plaintiff asserted that the application is defective in form and substance for failing to comply with the provisions of the law and that the annexures in the affidavit do not comply with Rule 9 of the Oaths and Statutory Declaration Rules.
4. The Plaintiff further deposed that he initially retained the services of Mankone & Company Advocates to represent him, and that the pleadings were prepared and filed by the said firm. Subsequently, Ms. Mankone informed him that she had requested Ms. Hilda to hold her brief in court. He asserted that no evidence has been presented to show that Ms. Hilda was responsible for drawing, signing or filing of the pleadings in her capacity, and or how she has contravened the *Advocates Act*. He averred that his decision to change his representation was to avoid the back and forth and to cut short the Defendant's delay tactics. To him, the present application is exclusively designed to postpone the hearing of the suit.
5. The application was canvassed by way of written submissions which I have keenly considered.
6. Looking at the reliefs sought, there is no doubt that a number of them are spent at this stage. For instance, Prayer No 1 is spent considering that the said Ms. Hilda long recused herself from representing the Plaintiff. Prayer no. 3 as framed is of no consequence at this stage since the application has been heard and now reserved for determination. Prayer No. 4 is quite ambiguous as it is not certain whether the Defendants want the court to make a declaration or otherwise. The live issues therefore are: -
 - i. Whether the plaint should be struck out;
 - ii. Whether the Defendants are entitled to costs of the application and for the aborted hearing on 24/10/2024.
7. The Defendants contend that the plaint was drawn by Ms. Hilda who was at the time on the payroll of the Mombasa County Attorney's Office; that she had no authority to use the name of M/S Mankone and Company Advocates and that the Plaint was not prepared in the course of that firm's employment. It was the Defendants' argument that by virtue of being an employee of the County Attorney's Office, Ms. Hilda was, by engaging in private practice, in breach of Section 11 of the County Attorneys Act, Chapter 6 of *the Constitution*, Regulation 4, 9 (b), (c), (e) and (f), 11, 13 (a), (b), (c) and (d) and 15 (b) (iii) of the Code of Conduct and Ethical Values and Principles. According to the Defendants, Ms. Hilda's failure to adduce evidence that she was no longer an employee at the Mombasa County Government Attorney's office, when she appeared before this court meant that the allegations of her employment were true.
8. I am hesitant to agree with the Defendants' argument, that Ms. Hilda's failure meant that she was indeed an employee of the County Government. I say so because, under the rules of evidence, it is the



duty of the person who claims the existence or otherwise of a certain fact, to prove or disprove the same. The burden does not shift to the other party. In this case, the Defendants have not exhibited any documentation to ascertain Ms. Hilda's employment status as at the time of filing the plaint. Without such evidence, this Court does not find that they have discharged their burden.

9. In any event, the Supreme Court put the issue of whether documents filed by such persons should be invalidated, to rest. The apex court had the following to say in the case of [National Bank of Kenya Limited -v- Anaj Warehousing Limited](#) 2015 eKLR: -

The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a Practicing Certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practicing certificate.

One of the basis of the Appellate Court's decision was founded upon a hypothesis which, in our opinion, should not be the criterion for resolving the question as to the rights of the parties: that since the [Advocates Act](#) provides for the recovery of fees by a client whose advocate has not taken out a practicing certificate, there would be no harm if the charge documents are annulled. For even if the appellant were to recover any fees paid, it stood to be damnified by the non-repayment of the loan itself.

The Court's obligation coincides with the constitutional guarantee of access to justice and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of [the Constitution](#):

justice shall be administered without undue regard to procedural technicalities".

To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favors the development and enforcement of fundamental rights and freedoms) and 10 of the same.

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.

While securing the rights of the client whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such advocate's obligations



under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.

We commend this Judgment to the attention of Parliament, the Law Society and the Attorney General so that appropriate legislative action may be taken to address the gaps and inconsistencies now apparent in the *Advocates Act* as highlighted in paragraphs 48, 49, 50, 51, 52, 53 and 54 herein.”

In the light of the above decision, Parliament vide Legal Notice Number 11 Of 2017, took the advisory and amended the *Advocates Act* by introduction of Section 34B which provides as follows: -

- “(a) A practicing advocate who is not exempt under Section 10 and who fails to take out a practicing certificate in any year, commits an act of professional misconduct.
- (b) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.
- (c) For the purpose of this section, “legal document” includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.”

10. Though the facts in the present case are slightly different from those in the Anaj case (supra), I am guided by the Supreme Court’s reasoning. There was no contention that Ms. Hilda was and is not a qualified advocate within the meaning of the *Advocates Act*. In that event, and having consideration of section 34B of the *Advocates Act*, I find no ground upon which the validity of the Plaintiff filed in this suit would be adversely affected.
11. The outcome is that the Amended Notice of Motion application dated 3/12/2024 is dismissed with costs. The matter shall be mentioned on 30/10/2025 for directions.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 13TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

