



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 52 OF 2019

COSMAS WAFULA NGUTUKU.....PLAINTIFF/RESPONDENT

VERSUS

JOHN WAITHAKA

JOHN WAITHAKA KIARIE

RICHARD WAINAINA WAWERU.....DEFENDANTS/APPLICANTS

RULING

The application is dated 27th May 2019 and is brought under Section 31 (1) Advocates Act (Cap 16), Advocates (Practice) Rule 11 (iii) seeking the following orders;

1. That this application be certified as urgent and service be dispensed with in the first instance.
2. That the court declares the suit by the plaintiff/applicant a nugatory ab initio.
3. That the court dismisses the whole suit and its pleadings.
4. That any orders given by this court be declared nugatory to this effect.
5. That the applicant's Advocate be struck out from the record and any documentation filed and any orders given be taken out from record thus the whole suit known as court ELC No. 52 of 2019 Kakamega be struck out from this honourable court.
6. That the court denies the said applicant's advocate audience till he is credited to practice as an advocate.
7. That costs of this application be provided for.

It is based on the grounds that, the advocate on record for the plaintiff/applicant is not credible to practice as an advocate as he has been inactive thus has been practicing under false pretence and thus any advocacy done through his practice is a nugatory.

The respondent submitted that, the application is misconceived, biased, bad in law and an abuse of the court process. That the application dated 27/5/2019 offends the gist of Article 159 (2) d of the Kenyan Constitution respecting procedural technicalities. That the 1st and 2nd defendants' application herein is a nullity, lacks legal merit so that the same ought to be dismissed with costs to the plaintiff. That the pleadings should be maintained and the issue is just the audience.

This court has considered the application and the submissions therein. It is not disputed that at all material times, Mukhooli David Kaukha practicing as Mukhooli & Associates Advocates did and still does not possess a practicing license.

Section 31 of the Advocates Act states that;

(i) 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.

(ii) Any person who contravenes sub-section (I) shall be

(b) incapable of maintaining any suit or any costs in respect of anything done by him in the course of so acting, and –

(c) in addition be guilty of an offence.

The Advocates Act Cap 16 is the statute governing the practice of advocates in this country. Section 9 lays out the requirements for one to practice:

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

(a) He has been admitted as an advocates and

(b) His name is for the time being on the Roll; and

(c) He has in force a practising certificate and for the purpose 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)”.

The consequences of infringement of this provision are spelt out in Sections 31, 33, 34 and 40. In the cases of *Geoffrey Oraro- Obura vs Martha Karambu Koome*, Court of Appeal Civil Appeal No 146 of 2000, *Solomon Kamau Njuguna vs Barclays Bank of Kenya Ltd*, Court of Appeal Civil Appeal No 186 of 1997, *Kingsway Tyres and Automart Ltd vs Abon Retreating and Co Ltd and 3 others*, High Court Civil Case No HCCC No 56 of 1998 (Milimani) and *Melidi Khan vs Kuldeep Singh Charola, & 3 others*, High Court Civil Case No 1796 of 1995 the ruling in these cases is that proceedings conducted by an unqualified person are null and void, documents drawn, signed and filed by unqualified persons are void *ab initio*, and in all these cases, the applications, complaints and / or appeals drawn signed and / or filed by an unqualified person were struck out.

In the cases **Lumumba & Kaluma Advocates -vs- Kenya Railways Corporation (2011) e KLR, Mohammed Ashraf Sadique & Another, Mathew Oseko t/a Oseko & Company Advocates (2009) e KLR, Ngomeni and Swimmers Ltd -vs- Katana Charo Suleiman (2014) e KLR** a law firm registered as a partnership where one or more of the partners do not hold a practicing certificate is an illegal entity and is unqualified to practice or engage in legal practice in terms of **Section 31, 37 and 39** of the **Advocates Act**. Such firm of advocates is liable to punishment under **Section 39 thereof**.

Again also in the case of *Abraham Mwangi Njihia v Independent Electoral and Boundaries Commission & 2others* [2013] eKLR the court held that;

“The general principle resonating from the authorities both from this Court and the Court of Appeal is that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out. I have no reason to divert from this principle.”

I see no reason to depart from the position taken by the authorities cited above. I find that the pleadings in this matter were drawn, signed and filed by an unqualified person and are void *ab initio*. I find this application has merit and I strike these pleadings out with costs to the 1st and 2nd Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH JULY 2019.

N.A. MATHEKA

JUDGE