



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 427 OF 2017

DOUGLAS KAMAU NGOTHO.....PLAINTIFF

VERSUS

KINOIYO COMPANY LTD.....1ST DEFENDANT

LAND REGISTRAR NAKURU.....2ND DEFENDANT

RULING

1. This is a ruling in respect of 1st defendant's Notice of Motion dated 23rd April 2018 pursuant to which the following orders are sought:

1. Spent.

2. Spent.

3. That this honourable court be pleased to issue an order of temporary injunction restraining the plaintiff (now defendant) either by himself, servants, agents or anybody claiming under him, howsoever from, selling, transferring, disposing, alienating, constructing or continuing with construction or in any way dealing with Nakuru Municipality Block 12/128 and as the resultant subdivisions pending the inter-partes hearing and determination of this suit.

4. That this honourable court be pleased to set aside and/or in the alternative review its orders of the 19th December 2017.

5. That this honourable court be pleased to strike out the plaintiff's suit.

6. That costs of this application be provided for.

2. The application is supported by an affidavit sworn by Abraham Kipsang Kiptanui, a director of the 1st defendant. When the application came up for inter parte hearing, Mr. Ogola, learned counsel for the 1st defendant urged the court to allow it in terms of prayers 4 and 5 thereof. Among other matters, it is deposed in the supporting affidavit that the plaint and indeed the plaintiff's pleadings were drawn and filed by an unqualified person and should therefore be struck out. In support of this contention, a print out in respect of Mr. Nyaribo Bernard Mongare from the Law Society of Kenya advocates search portal was annexed.

3. In response to the allegation that Mr. Nyaribo is an unqualified person, Mr. Bosire who was present in court holding brief for Mr. Nyaribo stated that he could not dispute the allegation that Mr. Nyaribo was an unqualified person.

4. A little background of the matter is necessary. The plaintiff herein filed this suit and with it Notice of Motion dated 10th November 2017 under Certificate of Urgency. The said application was considered and a ruling on it delivered on 19th December 2017. The application was allowed and an injunction granted in terms of the typed ruling. It is important to note that the application was argued by Mr. Nyaribo personally.

5. When the matter next came up in court on 1st March 2018, this court noted that all pleadings were missing from the file save for the ruling delivered on 19th December 2017. The deputy registrar was ordered to find out the cause of the said state of affairs and to update the record accordingly. I note that as at the date of delivery of this ruling, there is no copy of the original plaint in the file. Instead, there is an amended plaint drawn by B. M. Nyaribo & Co. Advocates and filed on 16th November 2017. There is also no copy of Notice of Motion dated 10th November 2017 which was the subject of the ruling dated 19th December 2017.

6. I have considered the application presently before the court, the supporting affidavit and the submissions. It is the 1st defendant's

contention that Mr. Nyaribo who drew and filed the pleadings in this matter on behalf of the plaintiff is unqualified to practice law owing to the fact that he is suspended by the law society. I have perused annexure AKK 15 and I note that according to the records held by the Law Society of Kenya, the said advocate's practicing status is "suspended." In other words, he does not have any practicing certificate. When faced with the submissions that Mr. Nyaribo is not qualified to practice law, Mr. Bosire did not challenge the allegation. Instead, he indirectly admitted it when he stated that the plaintiff intends to withdraw the suit so as to regularize it. I therefore have no hesitation in finding, as I now do, that Mr. Nyaribo is suspended from practicing law. As such, he is not qualified to act as an advocate in view of the provisions of Section 9 of the Advocates Act which provides:

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 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).

7. For as long as Mr. Nyaribo remains suspended, he is an "unqualified person", a phrase which is defined at section 2 of the Advocates Act as follows:

"unqualified person" means a person who is not qualified under section 9 and includes an advocate who—

(a) is not qualified under section 9;

(b) is not exempt under section 10; and

(c) fails to take out a practising certificate.

8. As an unqualified person, Mr. Nyaribo was precluded from drawing and filing pleadings herein by virtue of the provisions of section 34 of the Advocates Act. The section provides:

(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

a. relating to the conveyancing of property; or

b. for, or in relation to, the formation of any limited liability company, whether private or public; or

c. for, or in relation to, an agreement of partnership or the dissolution thereof; or

d. for the purpose of filing or opposing a grant of probate or letters of administration; or

e. for which a fee is prescribed by any order made by the Chief Justice under section 44; or

f. relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

9. In National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] eKLR the Court of Appeal sated as follows:

Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by the unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The gravamen of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him. There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi illiterate population. There is a need to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interests of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law.

It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality.

A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act. For that reason alone the charge and instrument of guarantee in this matter are invalid, and we so hold.

10. It follows therefore that all the pleadings herein drawn and filed by Mr. Nyaribo including the plaint and amended plaint are all invalid and incapable of commencing proceedings. I therefore strike out the suit with costs to the defendants. The costs shall be paid by Mr. Nyaribo personally and not the plaintiff.

Dated, signed and delivered in open court at Nakuru this 10th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Opondo holding brief for Mr. Ogola for the 1st defendant/applicant

No appearance for the plaintiff

No appearance for the 2nd defendant

Court Assistant: Gichaba