



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC. APPLICATION NO. 27 OF 2018

(FORMERLY MACHAKOS MISC CAUSE NO. 129 OF 2010)

REPUBLIC.....APPLICANT

VERSUS

THE KAJIADO NORTH, LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

KILI OLE SANGAIRE.....INTERESTED PARTY

EX PARTE.....SAILOJI OLE KALUNCHU PARANTOI

RULING

What is before Court for determination is the Interested Party's Notice of Motion dated the 25th March, 2015 brought pursuant to Order 45 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all the other enabling provisions of the law.

The Interested Party seeks the following orders:

1. Spent.
2. THAT there be a review of the Ruling dated the 6th March, 2015 delivered by this Honourable Court in the said same date.
3. THAT this Honourable Court be pleased to dismiss the entire proceedings of the Judicial Review filed by the Advocate KAAKUA JULIUS RIES since it has been established through LAW SOCIETY OF KENYA (LSK) letter dated 17th March, 2015, that the said Advocate was not licensed to practice law in the year 2010 when he moved to this Honourable Court for Judicial Review of the subject in issue.
4. THAT the costs of this Application be borne by the Ex parte Applicant.

The application is premised on the grounds that the advocate KAAKUA JULIUS RIES did not have a practicing Certificate for the year 2010, hence he was not qualified to practice as such, in accordance with section 28 of the Advocates Act. The Ex parte applicant's advocate KAAKUA JULIUS RIES purportedly used the Business name of messrs NYENDE & CO. ADVOCATES to file for judicial review, without instructions from the said law firm, hence he is not properly on record. Despite the Applicant being granted leave to file the substantive motion for Judicial Review on 9th June, 2010, to remove to the High Court and quash the entire proceedings, findings, ruling and or award made by the Kajiado District Land Disputes Tribunal, he has never done so and neither has he invited the Applicant for any hearing of this matter but has continued to enjoy the Court Orders issued, hence leave granted should be set aside. The Interested Party has a good ground to seek the dismissal of the Orders granted to the ex parte applicant's Advocate on 9th June, 2010.

The application is supported by the affidavit of JAMES OGOTI AGATA who is an advocate acting on behalf of the Interested Party who deposes that on 6th March, 2015, he wrote a letter to the LAW SOCIETY OF KENYA seeking a confirmation as to whether KAAKUA JULIUS RIES who is the advocate on record for the Ex parte Applicant in MACHAKOS ELC CASE No. 129 of 2010 is licensed to practise law. He claims that on 17th March, 2015, the LAW SOCIETY OF KENYA responded to him and confirmed that KAAKUA JULIUS RIES Advocate did not take out a Practicing Certificate for 2010 and was hence not licensed to practise law.

The Ex parte Applicant did not file a replying affidavit to oppose the application. However, the Court has not seen any evidence to confirm the application was duly served upon him.

The Interested Party filed his submissions that I have considered.

Analysis and Determination

Upon perusal of the Interested Party's Notice of Motion dated the 25th March, 2015 including the supporting affidavit as well as considering submissions filed therein, the following are the issues for determination:

- Whether there should be a review of the Ruling of the Court dated the 6th March, 2015.
- Whether the entire proceedings of the Judicial Review herein should be dismissed.

Order 45 rule (1) of the Civil Procedure Rules provides as follows: '**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**'

It is not disputed that NYENDE & COMPANY ADVOCATES were on record on behalf of the Ex parte applicant at the time he was seeking leave to institute judicial review proceedings herein. It is not in dispute that the Ex parte applicant was granted leave on 9th June, 2010 to institute a substantive motion on judicial review proceedings in accordance with Order 53 rules 1 and 2 of the Civil Procedure Rules. The Judge further ordered that the Leave so granted was to operate as a stay of the award or ruling made by the Kajiado North Land Disputes Tribunal on 10th December, 2009 and any subsequent orders, ruling or confirmation of the said tribunals award or ruling thereof.

The Interested Party claims no substantive motion was filed but on perusal of the Court records, the ex parte applicant through Nyende & Company Advocates thereafter filed a substantive motion on 29th June, 2010. The Interested Party has claimed that the advocate KAAKUA JULIUS RIES filed the judicial review application in the name of Nyende & Company Advocates. From the records it emerges that Nyende & Company Advocates were on record for the Ex parte Applicant, at the time of seeking leave to apply for judicial review. Insofar as the said Advocates sent a letter dated the 31st May, 2012 to the Interested Party's lawyers, and copied to the Deputy Registrar, Machakos, stating that they were not properly on record for the Ex parte Applicant and that KAAKUA JULIUS RIES used their name to file an application on behalf of the Applicant, but they did not file a Notice to Cease Acting for him in accordance with the Civil Procedure Rules. From the annexures in the affidavit in support of the instant application, the LAW SOCIETY OF KENYA has confirmed that KAAKUA JULIUS RIES did not take out a practicing Certificate in 2010 and hence was not allowed to practise law.

I note none of the Respondents have filed a replying affidavit to the instant application, which in essence means that all the averments contained herein remain uncontroverted.

In so far as the Respondents did not file a replying affidavit, I have had a chance to peruse the substantive application for judicial review and I note it raises pertinent issues which ought to be heard and determined on its merits.

In the case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR**, the Supreme Court held as follows: '**The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), 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 practising 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".**

[67] 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 favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.

[68] 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 practising 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.

[69] While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising 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.'

While relying on the principles established by the Apex Court in Kenya, I find that even if KAAKUA JULIUS RIES advocate did not possess a practicing certificate in 2010 when he filed the substantive application for judicial review, I will hesitate to punish the ex parte

applicant herein by proceeding to defeat his clear intention of seeking justice on a mere point of technicality which contradicts the guiding principle established in **Article 159(2)(d)** of the **Constitution which stipulates that: “justice shall be administered without undue regard to procedural technicalities”**.

It is against the foregoing that I will decline to allow the application dated the 6th March, 2015 seeking to dismiss the entire judicial review proceedings and direct that the substantive judicial review application be set down for hearing on its merits within sixty (60) days from the date hereof.

Costs will be in the cause.

Dated signed and delivered in open court at Ngong this 17th day of October, 2018

CHRISTINE OCHIENG

JUDGE