



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE NO.776 OF 2012

(FORMERLY HIGH COURT CIVIL CASE NO. 194 OF 2011)

EPHANTUS MIHIGO NGOTHO.....PLAINTIFF

V E R S U S

JOHN KWONGWALEI SAWE.....1ST DEFENDANT

BARNABAS K. KIPTUM.....2ND DEFENDANT

R U L I N G

(preliminary objection seeking to strike out pleadings filed by an advocate who did not hold a practising certificate; court relying on a supreme court and court of appeal decision, which held that such pleadings ought not to be struck out; preliminary objection dismissed)

This ruling is in respect of a preliminary objection taken by the respondents to this Originating Summons (who for ease of reference, I will refer to as the defendants). The defendants seeks that the suit herein be declared incompetent having been filed by an unqualified person and that the same should be struck out with costs.

This suit was commenced by way of an Originating Summons which was filed on 9 November 2011 through the law firm of M/s C.D. Nyamweya & Company Advocates. The applicant in the Originating Summons (whom for ease of reference I will refer to as the plaintiff) sought to be declared the owner of the land parcel Uasin Gishu/Kimumu Scheme/3174 by way of adverse possession. The defendants filed a replying affidavit contesting the claim and on 24 January 2014, this preliminary objection was filed alongside an affidavit sworn by the 2nd defendant, annexing a copy of the search engine page of the Law Society of Kenya where the name of Mr. Nyamweya Charles Duke, practising as C.D. Nyamweya & Company Advocates, appears. The same shows that Mr. Nyamweya did not hold a practising certificate in the year 2011 and that he was “inactive.”

When the matter came up before me on 31 October 2018, Mr. Nyamweya was present and he asserted that he had a practising certificate in the year 2011. I gave Mr. Nyamweya 7 days to file any affidavit to show that he actually held a practising certificate and listed the preliminary objection for hearing on 28 November 2018.

On this day, Mr. Nyamweya did not turn up in court. Neither had he filed anything to show that he did hold a practising certificate in the year 2011 when the pleadings herein were drawn and filed. The only inescapable conclusion that this court can reach is that Mr. Nyamweya did not have a practising certificate in the year 2011.

Mr. Chebii, for the defendants applied that the whole suit should be struck out and relied on two authorities, that of *Annah Kimiti vs Eric Tarus Kibiwott & 25 Others, Eldoret HCCC No. 29 of 2000* (unreported) and the Court of Appeal decision in the case of *National Bank of Kenya vs Ayah (2009) KLR 762*. I have considered Mr. Chebii’s submissions alongside the two cited authorities.

The question whether pleadings filed by an advocate who has not taken out a practising certificate has vexed the courts for a long time. The initial approach as exemplified by the decision of *National Bank vs Ayah*, was to have all documents prepared by an advocate who held no practising certificate nullified. Thus for conveyancing documents, such as a charge, which is what was in issue in the *National Bank of Kenya v Ayah*, case, these would be declared null and void and of no effect. For pleadings, these would be struck out as happened in the case of *Annah Kimiti vs Eric Tarus* relied on by Mr. Chebii.

This thinking appears to now have changed. The Supreme Court in the case of *National Bank of Kenya Limited vs Anaj Warehousing Limited, Supreme Court Petition No. 36 of 2014 (2015)eKLR*, basically overturned the Court of Appeal decision in the case of *National Bank vs Ayah*. The issue in the *Anaj Warehousing* case was similar to that in the *Ndolo Ayah* case. A charge had been prepared by an advocate who had not taken out a practising certificate. The High Court (Ibrahim J as he then was) held that he was tied to the principle of stare decisis and followed the Court of Appeal decision in the case of *Ndolo Ayah*, and proceeding to declare the charge null and void. The matter went to

the Court of Appeal which upheld the decision of Ibrahim J. A further appeal was made to the Supreme Court and the Supreme Court had a different view of the matter. It held as follows :-

(paragraph 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.*

The above was of course in respect of conveyancing instruments. But what about court pleadings?

The Court of Appeal recently had occasion to decide such a matter in the case of *Peterson Ndungu & 6 Others vs Kenya Power & Lighting Company Limited, Nairobi Civil Appeal No. 208 of 2015 (2018)eKLR*. In this matter, the Employment and Labour Relations Court set aside a judgment upon an application being filed that the pleadings were drawn by an advocate who did not have a practising certificate. The Court set aside the judgment and the matter proceeded to the Court of Appeal where the appeal was allowed. The Court stated as follows:-

24. By parity of reasoning of the Supreme Court decision in the Anaj Warehousing Case, we find and hold that no pleadings, documents or submissions become invalid under Section 31 of the Advocates Act only by dint of their 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 whose names have been struck off the roll of advocates shall be void for all purposes.

It does therefore appear following these two decisions, that a court ought not to strike out pleadings filed by an advocate who did not have a practising certificate at the time that he filed the said pleadings.

There are of course public policy considerations, as pointed out by Mr. Chebii, which militate against allowing an advocate who does not hold a practising certificate to continue filing pleadings. Without firm sanctions, advocates will not take out practising certificates and will continue filing pleadings and avoid complying with the law yet reap the benefits of legal practise. However, as matters stand, I am bound by the doctrine of precedent and bound to follow the above two decisions of the Supreme Court and Court of Appeal.

For those reasons, I have little option but to dismiss the preliminary objection.

I will not however make any orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH NOVEMBER, 2018

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT - ELDORET