



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 315 OF 2017

HARRISON IRUNGU KANYI.....1ST PLAINTIFF/APPLICANT

WILLIAM KANYI HEZEKIAH.....2ND PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT/RESPONDENT

JO-MWAKA AUCTIONEERS....2ND DEFENDANT/RESPONDENT

RULING

1. The application before me dated the 23rd February 2017 and filed on the 23rd February 2017 under certificate of urgency, was brought by the plaintiff seeking orders that:-

i. The application be certified urgent and heard on priority basis and that service of the same be dispensed with in the first instance.

ii. That pending the interrates (sic) hearing of the application the defendants/Respondents, their agents and or servants be restrained by an injunction from advertising in the public and/or the social media and/or in any other manner from seeling (sic) either by public auction and/or prive (sic) treaty the charged property to wit LR No NJABINI TOWNSHIP/363 until this application is heard and Judiciously determined in the interest of justice for all parties concerned.

iii. That the costs of the application be costs in cause in any event.

2. The application was premised on the grounds that:-

a. The Plaintiff/Applicant had always been willing to repay the said loan and had in fact repaid a substantial amount of same.

b. That the interest chargeable of 14.5% per annum was unconscionable in the prevailing economic recession in Kenya.

c. That the honourable court takes judicial notice of the prevailing economic recession in the county.

d. That the economic valuation of the suit property was over Ksh. 40,000,000/= and auctioneers

were notoriously known to cripple and ruin borrowers by selling such properties for peanuts in collusion with bank managers and economic saboteur cartels.

3. The said application was supported by an affidavit of the applicant/plaintiff one Harrison Irungu Kanyi and sworn on the 23rd February 2017.

4. The said application was placed before me in chambers on the 27th February 2017 and was argued by the counsel for the Applicant/Plaintiff one Mr. Michael Waikenya. I granted interim orders of temporal injunction pending inter-parties hearing which was scheduled for the 13th March 2017 further orders were that the Applicant/Plaintiff's counsel effects service to the Respondent/Defendant.

5. On the 13th March 2017 when the Applicant/Plaintiff's application dated 23rd February 2017 came up for hearing, only the Respondents/Defendants' Counsel Mr. Kamau was present in court when the same was called out.

6. Counsel submitted that upon being served with the interim order and the application of the Notice of Motion, they had tried to call Counsel for the Applicant/Plaintiff in order to be served with the Originating Summons, but their calls went unanswered.

7. They then tried to call the Plaintiff's Counsel's colleagues in Nakuru and were informed that he did not practice there anymore. This information raised a red flag and they sought to know from the law society of Kenya (LSK) the whereabouts of Mr. Waikenya Advocate.

8. The law society of Kenya in turn wrote to them vide a letter dated 9th March 2017 Ref No. P.105/1345/45 wherein it was brought to their attention that the said advocate Mr. Waikenya Michael Wanyoike last took out a valid practicing certificate in the year 2012 wherein he had declared that he was the sole proprietor in the firm of Michael W. Waikenya.

9. This information thus provoked the Respondents/Defendants to file a Notice of Preliminary Objection dated the 10th March 2017 where they raised an objection to the effect that the Applicant/Plaintiff's application and suit were hopelessly invalid, void ab initio, totally devoid of merit and mala fides and that the same ought to be struck out in its entirety as the pleadings were incompetent and did not comply with section 2, 9 and 34 of the Advocates Act Chapter 16 Laws of Kenya.

10. Counsel proceeded to submit ex-parte on his point of preliminary objection to the effect that they had not filed their replying affidavit to the application because they had not been served with the Originating Summons by the Applicant/Plaintiff and that despite due diligence to try and locate the Plaintiff's Counsel, they had hit a hard rock as the Counsel had no established chamber/office. They could also not serve him with the Notice of Preliminary Objection.

11. In submitting that the proceedings before this court should be struck out due to the fact that the documents before it were incompetent, Counsel relied on case law as well as the statutes.

12. Section 9 of the Advocate's Act Stipulates as follows:-

No person shall be qualified to act as an advocate unless:

- a. He has been admitted as an advocate
- b. His name is for the time being on the roll and
- c. He has in force a practicing certificate.

13. Section 9 hence states clearly that an advocate can on practice when all the above conditions have been fulfilled.

14. Counsel also relied on section 34 of the advocates act to wit:-

Unqualified person not to prepare certain documents or instruments

(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:

15. Mr. Waikenya was therefore precluded, by operation of section 9 and 34 of the Advocates Act, from taking any instructions and/or filing any documents as well as appearing before any judicial officer while representing a client.

16. Counsel also relied on several authorities while arguing his preliminary objection. He cited the case of Abraham Mwangi Njihia vs. Independent Electoral and Boundaries Commission and 2 others [2013] eKLR where the court of correspondent Jurisdiction, the High court sitting at Milimani held that;

“..the general principle resonating from the High Court and the Court of Appeal is that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out.”

17. In the case of Republic vs. Resident Magistrate’s Court at Kiambu ex-parte Geoffrey Kariuki Njuguna and 9 others [2016] eKLR. The court, while relying on the case of National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Court of Appeal Civil Appeal No 117 of 2002, held that;

“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’.

19. Counsel further submitted that according to a letter from the Law Society of Kenya dated the 9th March 2017, it was clear that Mr. Michael W. Waikenya was not a qualified advocate as the last practicing certificate he held was for the year 2012.

19. He submitted that the pleadings before the court were a nullity and ought to be struck out with costs to the defendant/respondent and the interim orders not to be extended.

20. He further submitted that the Plaintiff/Applicant was free to appoint another counsel to act for him and undertook as a sign of good faith/will to advice his client not to move against the plaintiff’s property in the meantime, pending the decision of this court on the preliminary objection raised.

Determination:

After having set out the analyses of the application and Preliminary Objection herein, the point of determination is whether the proceedings before court should be struck out as prayed by the Respondent/Defendants on the ground that the proceedings and arguments were prepared, filed and submitted respectively, by an unqualified person within the meaning of Section 34 (1) (d) (f) of the Advocate Act.

21. Section 2 of the Advocates Act defines an unqualified person as a person not qualified under Section 9 to act as an advocate.

Section 9 of the Advocates Act provides that,

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 practicing certificate

22. Section 34 (i) of the Advocates Act forbids an unqualified person from directing or indirectly taking instructions, or drawing any documents relating to any other legal proceedings.

23. The intention of section 34(1) of the advocates Act is therefore directed at unqualified persons and prescribes clear sanctions against those who transgress the prohibition, either through civil or criminal proceedings.

24. The wordings of a letter dated the 9th March 2017 Ref No P.105/1345/45 from the Law Society of Kenya was:-

“We have no advocate who has declared to be practicing in the firm of Waikenya and Company Advocates. However we do have an advocate by the name Waikenya Michael Wanyoike advocate, who last took out a valid practicing certificate in the year 2012 and declared to be a sole proprietor in the firm of Michael W. Waikenya.”

25. A look at the documents filed in court by the Plaintiff/Applicant indicates that they were drawn by the firm of Waikenya and Company Advocates but signed by one Kibebo Advocate.

The above letter from the Law Society of Kenya confirmed that indeed Kibebo Ruth Nyambura advocate had paid for her practicing certificate for the year 2017. However the said advocate had declared practicing in the firm of Muthoga Gaturu and Company Advocates – Nakuru.

26. On the 27th February 2017 when this court granted interim orders of temporal injunction pursuant to the application filed on the 23rd February 2017, Mr. Michael Waikenyo presented himself before court and argued the application ex-parte.

The court then directed him to serve the respondents for the hearing of the application inter-parte on the 13th March 2017.

27. The application was served as well as the interim orders but the counsel for the applicant did not turn up on the hearing date to prosecute his application and efforts by the adverse side to trace and effect service were fruitless as he could not be traced because he had no established chamber.

28. In the case of Mukhisa Biscuit Manufacturing Co Ltd –Vs- West End Distributors Ltd [1969] E.A 696, the defunct Court of Appeal of East Africa defined a preliminary objection as one which:

"Consists of a point of law which has been pleaded, or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit. The court further stated that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained on if what is sought is the exercise of judicial discretion".

29. From the authorities herein submitted by the counsel for the respondent/defendant as well as the statute's provisions to wit the advocates act and more so sections 2, 9 and 34, in support of his preliminary objection, it is clear that the Applicant/Plaintiff's representation in court as well as the pleadings were conducted and or drawn by an unqualified person respectively.

30. Mr. Michael Waikenya did not possess a current practicing certificate.

Section 31 of the Advocates Act stipulates that:-

"..... 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 other person in any court of civil or criminal jurisdiction...."

This section then goes ahead to issue sanction to any person who contravenes the provision.

31. Having found so this court finds Mr. Michael Waikenya's conduct was unprofessional and refers this ruling to the relevant body within the Law society of Kenya to take appropriate action against him.

32. The next question for determination would be, having so found that representation of the plaintiff/applicant in court was by an unqualified person and having found that the pleadings were drawn by an unqualified person should the proceedings be struck out?

33. In the case of National Bank of Kenya Limited Vs. Anaj Warehousing Limited [2015] eKLR, the supreme court held that at paragraph 68 that;

"...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 suit 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 name have been struck off the roll of advocates shall be void for all purposes"

34. This court shall adopt the Supreme Court's finding supra as the same is binding to it, and find that the Plaintiffs/Applicants' pleadings were prepared by an unqualified person, and as such they are void for all purposes.

35. The preliminary objection is thus allowed, and the proceedings before this court struck out. Costs of this application shall be borne by the Plaintiffs/Applicants. Interim orders granted on the 27th February 2017 are hereby set aside.

Dated and delivered at Nyahururu this 6th day of April 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE