



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 227 OF 2015**

**SAMUEL GIOCHE T/A SAGIO CONTRACTORS .....PLAINTIFF**

**VERSUS**

**STANLEY MWANGI KIBORO .....1<sup>ST</sup> DEFENDANT**

**ADSITE LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Application dated 7<sup>th</sup> March, 2016, the 2<sup>nd</sup> Defendant is seeking for the following orders:

***a. That the Plaint and the accompanying Application, both dated 17<sup>th</sup> November, 2015 herein be struck out and the same be dismissed.***

***b. That the 2<sup>nd</sup> Defendant/Applicant be paid the costs of the Application.***

***c. That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that the Plaint and the accompanying Notice of Motion were drawn and filed by a person who was unqualified to act as an advocate and that the Plaint and the Application should be struck out in their entirety with costs to the 2<sup>nd</sup> Defendant.

3. The Plaintiff filed Grounds of Opposition in which he averred that the Application is an affront to the decision of the Supreme Court in the case of ***National Bank of Kenya vs. Anaj Warehousing Limited, Petition No. 36 of 2014.***

4. The 2<sup>nd</sup> Defendant's advocate filed submissions in which he distinguished the current case and the Supreme Court's decision in Petition No. 36 of 2014.

5. Counsel submitted that the Supreme Court forbade the invalidation of documents or instruments of conveyance prepared by an advocate not holding a current practicing certificate.

6. The 2<sup>nd</sup> Defendant's advocate submitted that the Supreme Court did not invalidate Section 34 of the Advocates Act; that all other documents prepared by advocates who have not taken out a practicing certificate for the current year are invalid and should be struck out and that the pleadings on record should

be struck out.

7. The Plaintiff's advocate has not denied that as at the time of filing the Plaint dated 17<sup>th</sup> November, 2015 and the Notice of Motion of the same date, he did not have a practicing certificate.

8. Section 34 (1) (e) and (f) of the Advocates Act provides that no unqualified person shall take instructions or draw or prepare any document or instrument for which a fee is prescribed by any order made by the Chief Justice under Section 44 or relating to any other legal proceedings.

9. Section 34 (2) on the other hand provides that any money received by an unqualified person in contravention of the Section may be recovered by that person by whom the same was paid as a civil debt recoverable summarily and the person shall be guilty of an offence.

10. The Plaintiff's advocate submitted that the Supreme Court only dealt with the issue of instruments of conveyance in the *National Bank of Kenya case (supra)* and not pleadings.

11. Indeed, before the Supreme Court's decision, the High Court and the Court of Appeal were unanimous that pleadings filed by unqualified persons ought to be struck out (*See Lucy Mwethya vs. Nairobi Bottlers Limited & 3 others (2012) eKLR and Geoffrey Orao-Obura vs. Martha Karambu Koome (2001) eKLR*).

12. In the *National Bank of Kenya Limited case (supra)*, the Supreme Court was called upon to determine the effect of legal documents prepared by unqualified persons contrary to Section 34 of the Advocates Act. The Supreme Court identified the issue for determination as follows:

***“Whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practicing certificate, within the meaning of Section 34(1) (a) of the Advocates.”***

13. It would therefore appear that the Supreme Court was called upon to determine the provisions of Section 34(1) (a) of the Advocates Act – which deals with preparation of documents or instruments relating to conveyancing of property and not pleadings filed in court. The question that I should address is whether indeed the Supreme Court in the *National Bank case (supra)* went beyond the interpretation of Section 34(1) (a) of the Advocates Act viz-a-viz the Application before me.

14. The reading of the Supreme Court's decision shows that the court dealt with the entire provision of Section 34 and not just Section 34(1) (a) as submitted by the Defendants' counsel. The court stated as follows:

***“(53) What is the real intention of Section 34 of the Advocates Act? Is it aimed exclusively at advocates without practicing certificates, or persons who are not advocates within the terms of Sections 2, 12 and 13 of the Advocates Act? Does one cease to be an advocate on account of not taking out a practicing certificate? Or does one remain an advocate but one who is not qualified to perform the tasks of an advocate.”***

15. While answering the above question, the Supreme Court stated as follows:

***“In our opinion, it is essential to establish the main objective of Section 34. This Section prohibits unqualified persons from preparing certain documents. It is directed at unqualified persons. It prescribes clear sanctions against who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practicing certificates... The transgressor, in our view, is the advocate, and not the client... The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.”***

16. Although the Supreme Court was dealing with the issue of whether a conveyance instrument prepared

by an unqualified person could be invalidated, the reasoning of the court as quoted above shows that any document, including pleadings, drafted by an advocate who does not have a current practicing certificate cannot be invalidated on that ground alone.

17. According to the Supreme Court's decision, the sanctions prescribed by Section 34(2) of the Advocates Act are applicable in a situation where an unqualified advocate prepares the documents/instruments prescribed under Section 34(1).

18. The court was however clear that in situations where the documents/instruments prescribed under Section 34 by other categories of unqualified persons, like non-advocates or advocates whose names have been struck off the roll of advocates, such documents are void for all purposes.

19. The evidence before me shows that Koskei Emanuel Kipkirui was an advocate as at the time of filing the Complaint and the Application dated 17<sup>th</sup> November, 2015.

20. The mere fact that the said advocate did not have a valid practicing certificate cannot invalidate the Complaint and the Application.

21. For those reasons, I dismiss the Application dated 7<sup>th</sup> March, 2016 with costs to the Plaintiff.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**