



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 213 OF 2017

DAMARIS WANJIKU GITONGA.....1stPLAINTIFF/APPLICANT

VERSUS

DORCAS WANJIRU KIMANI.....1stDEFENDANT/RESPONDENT

RACHEL WANJIRU WARUI.....2ndDEFENDANT/RESPONDENT

MARY NYACHEKE.....3rdDEFENDANT/RESPONDENT

MIRIAM WACHERA4thDEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 4th May 2017 brought under *Order 2 Rule 15(1)(d) and (3), of the Civil Procedure Rules and all other enabling provisions of the Law* where the Applicant seeks that:

- i. The Defendants' Memorandum of Appearance dated the 15th September 2015 , the written statement of defence and accompanying pleadings dated the 1st October 2015 be struck off (sic) with costs and the plaintiff's suit be set down for formal proof.
- ii. That costs of this application be paid by the Defendants/Respondents.

2. The Application was premised on the grounds that:

- a. The pleadings were drawn and filed by Waikenya & Co Advocates. The proprietor is Waikenya Michael Wanyoike registration number P. 105/877/77 who is an inactive. He is not authorized by Law or qualified to practice, represent the Defendants, draw and file pleadings.
- b. They (sic) pleadings drawn and filed by Waikenya & Co Advocates are an abuse of the court process.
- c. In the interest of Justice.(sic)

3. The Application was further supported by an affidavit sworn on the 4th May 2017 by M/s Purity K. Mbabu, an Advocate of the High court of Kenya and Counsel for the Plaintiff/Applicant herein to the effect that:

- i. The Defendants' Memorandum of Appearance, defence and accompanying pleadings filed on the 15th September 2015 and 6th October 2015 respectively, were drawn and filed by Waikenya & Co Advocates and signed by R.N Kibebo for Waikenya & Co Advocates
- ii. That the Advocate practicing as Waikenya & Co Advocates full name is Waikenya Michael Wanyoike. His personal Registration No. is P. 105/877/77 and his status according to the Law society of Kenya Advocates Search engine is inactive since 2013.
- iii. That he is barred by section 31 of the Advocates (sic) from acting as an Advocate. He does not hold a practicing certificate hence not qualified to act as an Advocate under Section 9 of the Advocates (sic)
- iv. That he is barred by Section 34 of the Advocates Act from taking instructions , drawing and filing pleadings hence the pleadings drawn and filed by the firm are an abuse of court process hence the application seeking to have them struck out.

v. That he cannot employ an advocate to work under his name hence the signing by R.N Kibebo for the firm is in vain.

vi. That in the interest of justice that the application be allowed.

4. The Application was argued by M/s Wamiti Counsel for the Plaintiff/Applicant who relied on what was deponed in the sworn Affidavit of M/s Purity K Mbabu to submit that the pleadings drawn by the said firm of Advocates were incompetent and an abuse of the court process and should be struck out, counsel also relied on the decided cases of;

Peter Karuiru Gachira vs. Leonard Wanjohi Murage & another [2016] eKLR as well as

Kenya Power and lighting Company Ltd vs. Chris Mahinda t/a Nyeri Trade Center [2005] e KLR.

5. Counsel further submitted that despite service of the application upon the firm of Waikenya & Co Advocates, there was no response confirming that the application was not opposed.

6. Counsel's conclusion was that there was no evidence on record that Michael Waikenya held a practicing certificate in 2015.

Determination

7. I have read the respective pleadings and submissions of the counsel for the Plaintiff/Applicant as well as looked at the documents annexed thereof in support of their case as summarized herein above.

8. The issues for determination in this matter are:

- i. Whether the written statement of defence and the accompanying pleadings dated the 1st October 2015 should be struck out.
- ii. Whether the proprietor of Waikenya & Co Advocates one Mr. Waikenya Michael Wanyoike is authorized by Law or qualified to practice, represent the Defendants, draw or file pleadings.
- iii. Whether the pleadings drawn and filed by Waikenya & Co Advocates are an abuse of the court process.

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 as follows:

Subject to this Act, 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 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).

It is therefore clear that a person is not qualified to act as an advocate unless all the said three conditions are fulfilled.

From counsel's submission and the evidence attached herein, none of the above conditions have been fulfilled by Mr. Waikenya Michael Wanyoike.

Section 34 of the said Act on the other hand provides as follows:

(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:

Provided that this subsection shall not apply to—

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

Penalty for pretending to be advocate.

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to—

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof.

9. 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.

10. 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.

11. The Status of Mr. Waikenya Michael Wanyoike according to the Law society of Kenya search engine is that he has been inactive since the year 2013.

12. This court dealt with a similar issue in **Nyahururu ELC No 315 of 2017 Harrison Irungu Kanyi and Another vs. Equity Bank Limited and Another** where the Law Society of Kenya vide a letter dated 9th March 2017 Ref No. P.105/1345/45 had written to counsel for the Respondents/Defendants informing him that the said advocate Mr. Waikenya Michael Wanyoike had lastly taken 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.

13. That being the case, the written statement of defence and the accompanying pleadings dated the 1st October 2015 were drawn while Mr. Waikenya was inactive meaning that he was not certified to practice.

14. The court finds that Mr. Michael Waikenya did not possess a current practicing certificate as per the time he drew and filed pleadings on behalf of the Defendant's.

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....”

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

16. Having been guided by the relevant statute, this court finds that 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.

17. The next question for determination would be, having so found that the pleadings were drawn by an unqualified person should the same be struck out?

18. 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”

19. Similarly in the case of **Kenya Power & Lighting Company vs. Chris Mahinda T/A Nyeri Trade Centre Civil Appeal (Application) No. Nai 148 of 2004**, the Court of Appeal expressed itself as follows:

“Practicing Certificates are dealt with in Part VII of the Advocates Act from which it is clear that the issue of practicing certificates is the responsibility of the Registrar of the High Court and not the Law Society. The practicing Certificate for the year 2004 exhibited to the advocates affidavit in support of the application is dated 22nd September 2004 and signed by the Registrar of the High Court. In that Certificate the Registrar certifies that the advocate is duly enrolled as an advocate and is entitled to practice as such Advocate. We consider that it cannot be validly argued that, prior to the date of issue of that Certificate, the advocate had in force a practicing certificate...We come to our decision based solely on the undisputed fact that no practicing certificate for 2004 had been issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal. When those two acts were done by him the advocate was not qualified to act as an advocate with the effect that the two documents were incompetent. A practicing certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22nd September, 2004, it had retrospective effect back to the beginning of 2004. We do not accept this submission. If no practicing certificate had been issued when the act was done, the advocate was not qualified to do that act at the time he did it”. (My own emphasis)

20. It has been contended that the mistakes of advocates should not be visited on clients. In certain cases that position may ring true. However, in certain cases where an advocate contemptuously institutes legal proceedings, it may be prudent for the said advocates to shoulder the consequences of such actions.

In **John Ongeri Mariaria & 2 Others Vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent”.

21. It is therefore my considered view and I so hold, not without some sympathy to the defendant that pleadings drawn and filed by an advocate who has no practicing certificate at the time is incompetent and is liable to be struck out.

22. Accordingly, the Notice of Motion dated 4th May 2017 filed in this court on 9th May 2017, succeeds with the result that the Defendants' Memorandum of Appearance dated the 15th September 2015, the written statement of defence and accompanying pleadings dated the 1st October 2015 herein are struck out with costs to the plaintiff.

Dated and delivered at Nyahururu this 9th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE