



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT KISUMU**  
**HC. CIVIL CASE NO.55 OF 2012**

**JOSEPH OWINO ABUNGE.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT**

**IGARE AUCTIONEERS.....2ND DEFENDANT**

**RULING**

1. **Kenya Commercial Bank Limited** and **Igare Auctioneers**, hereinafter referred to as the 1st and 2nd Defendant respectively, filed the notice of motion dated 28th September 2013 seeking to have the plaint and subsequent pleadings filed against them be struck out with costs. The application is based on four grounds on the notice of motion summarized as follows:

- a) That suit against the Defendants was filed by a person not competent to act as an advocate for failure to have a valid practicing certificate.
- b) That the same is therefore defective, incompetent and an abuse of the process of the court.

2. The application is supported by the affidavit of Valarie N. Odera who among others deponed as follows;

- (a) That **Maxwell Ogonda Omondi**, who drew, signed and filed the plaint and notice of motion all dated 22nd March 2012, on behalf of the Plaintiff did not have a valid practising certificate at the time and were therefore incompetent and fatally defective.
- b) That the Defendants counsel wrote a letter to the Law Society of Kenya on 16th September 2013 seeking confirmation whether the said Plaintiff's counsel had a valid practising certificate. That they received a reply dated 17th September 2013 confirming that the said advocate did not have a practising certificate in years of 2012 and 2013.

3. The application is opposed by the Plaintiff through the grounds of opposition dated 4th December 2013 filed by his counsel.

4. The counsel for the parties appeared before the court on 27/10/2014 and agreed to file written submissions on the application. The Defendants counsel filed their submission dated 4th March 2016 while the Plaintiff's counsel had filed theirs dated 20th May 2015 on the 21st May 2015. The following is a summary of the rival submissions.

a) **DEFENDANTS COUNSEL'S SUBMISSIONS:**

That the provisions of **Sections 2, 9, 31 and 34 of the Advocates Act**, Chapter 16 of Laws of Kenya shows that an advocate who do not have a practising certificate is unqualified to draw, sign and file pleadings on behalf of another person. That the advocate who signed and filed the suit and notice of motion for the Plaintiff dated 22nd March 2012 did not have a valid practising certificate, and did not obtain one that year and the year after that. The learned counsel referred the court to the case of **Dodson Chiro Mwachunga -V- IEBC & Another, Malindi Election Petition No.160 of 2013** (unreported), **Addul Aziz Juma -V- Nikishi Investment & 2 others** ELC NO.291 of 2013, **Nairobi** in which the case of **Obura -V- Koome** [2001] IEA 175 (Court of Appeal) was quoted, **Anthony Siyuyu Kisiang'ani & another -V- Nzoia Outgrowers Co. Ltd & 2 others**, Industrial cause No.269 of 2014 in which the case of **John Onger Mariaria & 2 Others -V- Paul Matundura** Civil Application No.Nai.301 of **2003** [2004] 2EA 163 was quoted in support of their submission that the Plaintiff's pleadings herein, having been drawn, signed and filed in court by unqualified person should be struck out with costs.

b) **PLAINTIFFS COUNSEL'S SUBMISSIONS:**

That though **Section 9 of the Advocates Act** forbids unqualified persons from doing or engaging in the practise of acting as an advocate and that such a person may face criminal sanctions, the section does not declare that the acts so done by such a person are void ab initio. The learned counsel referred to the following cases of **Njagi -V- Kihara** (2001) IEA 165, **Republic -V- Senior Principal Magistrate, Limuru & Another**, ex parte, **Board of Governors Gitamba Secondary School** (2005) eKLR and **Muniu -V- Giovani** (1997) KLR 613 on his submission that mistake of counsel should not be visited on an innocent litigant.

5. The main issues for determination are as follows;

- a) Whether suit documents drawn, signed and filed by an advocate who does not have a current practising certificate are incompetent and if so whether they should be struck out.
- b) The party to pay the costs.

6. The court has considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, written submissions by counsel and come to the following findings;

- a) That the plaint and notice of motion dated 22nd March 2012 were drawn, signed and filed in court by **Maxwell O. Ogonda & Associate Advocates** for the Plaintiff, namely Joseph Owino Abuge, commencing a case against Kenya Commercial Bank and Igare Auctioneers as the Defendants.
- b) That upon service of the suit papers to the Defendants, their advocates **M/S Mukele & Co. advocates** wrote the letter dated 16th September 2013 to the Law society of Kenya seeking for confirmation " **whether Ogonda Maxwell Omondi Advocate (P.105/ 5030/03) held a valid practising certificate for the year 2012 and 2013** " and received a reply dated 17th September 2013 to the effect that " **Ogonda Maxwell Omondi Advocate did not hold a practising certificate for the year 2012 and does not hold one in the year 2013**". The two letters are annexed to the supporting affidavit to this application.
- c) That the Plaintiff's counsel has not disputed the deposition concerning his drafting, signing and filing the pleadings for the Plaintiff while he did not have a practising certificate. The pleadings drawn, signed and filed by unqualified person for another are a nullity ab initio and ones they are struck out the affected party may in addition to having recourse against such unqualified person, file the suit a fresh subject to the **Limitation of Action Act Chapter 22 of Laws of Kenya**.
- d) That while the court agrees that an innocent mistake of a counsel should not be visited on the party, the failure by the counsel to obtain the practising certificate for two consecutive years (2012

and 2013) and acting on the Plaintiff's brief without disclosing that he had no certificate cannot have been an oversight or mistake that can be reasonably explained. [See **John Onger Mariaria & 2 Others -V- Paul Matundura Civil App. No.Nai.301 of 2003 (2004) 2 E.A 163** quoted with approval in **Anthony Siyuyu Kisiang'ani & Another -V- Nzoia Outgrowers Ltd & 2 others [2015] eKLR** and **Abdul Aziz Juma -V- Nikisuhi Investment & 2 others [2013] eKLR** where pleadings signed by unqualified persons were struck out].

7. That for the reasons set out above, the notice of motion dated 28th September 2013 and filed in court on 30th September 2013 is allowed thereby striking out the plaint and notice of motion dated 22nd March 2013 with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 18TH DAY OF MAY 2016**

In presence of;

Applicants/Defendants Absent

Respondent/Plaintiff Absent

Counsel Mr Ogonda for the Plaintiff/Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**18/5/2016**

18th May 2016

S.M. Kibunja J

Oyugi court assistant

Mr Ogonda for Plaintiff/Respondent

Court: Ruling delivered in open court in presence of Mr Ogonda for the Plaintiff/Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**18/5/2016**