



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1049 OF 2014

REGINA MWERU NJUKU.....APPLICANT

VERSUS

JANE WANDIA.....1ST DEFENDANT

MICHAEL MWANGI KARANJA.....2ND RESPONDENT

ALEX NGOTHO.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Preliminary Objection dated 6th February 2014 raised by the Plaintiff to the following effect:

1. That Julius Kihanya Ndichu Advocate of P.O. Box 30075 – 00100 Nairobi P105/4116/99 allegedly representing the Nairobi City County was and is not qualified to represent a party in court and or prepare or file the Notice of Appointment dated 15th October 2014 and Replying Affidavit allegedly sworn by one Karisa Iha on 24th October 2014 as he did not and does not to date hold a valid practicing certificate.
2. That the said documents are incompetent and should be struck off the record.
3. That the said Julius Kihanya Ndichu Advocate should be ordered to personally bear the costs to be assessed by the court.

In her written submissions, the Plaintiff cited the provisions of **section 34(f)** of the **Advocates Act Cap 16 Laws of Kenya** which prohibits an unqualified person from taking instructions, drawing or preparing documents which includes pleadings. She added that any documents prepared or filed by such an advocate are invalid and of no legal effect on the principal that courts would not condone or perpetuate illegalities as stated in the case of **National Bank of Kenya vs. Wilson Ndolo Ayah in Civil Appeal No. 119 of 2002.**

In their written submissions, the Third Party, Nairobi City County, stated that the Preliminary Objection

is not only flawed, it is also misguided and misconceived. They submitted that Julius Kihanya Ndichu is an officer practicing as such in the Nairobi City County as an advocate in the employment of the County Government. They cited **section 9 of the Advocates Act** which 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; and,**
- b) His name is for the time being on the Roll; and**
- c) He has in force a practicing certificate**

and for the purpose of this Act a practicing 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).”

They further cited section 10 of the Advocates Act which provides as follows:

“Each of the following persons shall, if he holds one of the qualifications specified in paragraphs (a), (b) and (c) of section 13(1) at the time of his appointment to his office, be entitled in connection with the duties of his office to act as an advocate, and shall not to the extent be deemed to be an unqualified person, that is to say-

“(c) any person holding office in a local authority established under the Local Government Act Cap 265.”

On that basis, the Third Party submitted that it is clear that an officer of a local authority is entitled to act and carry out all the functions of an advocate and does not require to hold a practicing certificate to do so. They stated that the said Julius Kihanya Ndichu being an advocate practicing as such in the Nairobi County Government (previously City Council of Nairobi) is duly qualified and can practice as an advocate without a practicing certificate and the pleadings filed by him which the Plaintiff seeks to have struck off are competent.

The Plaintiff filed further submissions in reply to the Third Party’s submissions stating that the new Constitution was promulgated in August 2010 and the City Council of Nairobi was effectively changed to the County Government of Nairobi, a creation of the 2010 Constitution. She further submitted that the said advocate is no longer covered by the provision of **section 10(c)** of the **Advocates Act** but is required to apply and pay for a practicing certificate just like any other advocate who is not exempted under **section 10(a) and (b)**.

It is common ground that Mr. Julius Kihanya Ndichu is an advocate employed by the Third Party and is acting for the Third Party in these proceedings. It is also common ground that Mr. Ndichu did file the Notice of Appointment dated 15th October 2014 and Replying Affidavit sworn by one Karisa Iha on 24th October 2014, which two documents the Plaintiff seeks to be struck off, on behalf of the Third Party. It is also common ground that Mr. Ndichu did not hold a valid practicing certificate at the time of filing those two documents on behalf of the Third Party. The issue arising herein for my determination is whether or not to strike off those two documents filed by Mr. Ndichu on the ground that he did not at the time of filing them hold a valid practicing certificate. My finding turns on the interpretation of **section 10(c)** of the Advocates Act on the question whether Mr. Ndichu falls within the category of persons exempted from the requirement to take out a practicing certificate on the strength of holding office in a local authority established under the **Local Government Act, Cap 265**. It is the submission of the Third Party that Mr. Ndichu does fall within that category while the Plaintiff contends that he does not owing to the abolishment of the City Council of Nairobi as a local authority and the creation of the Nairobi City County under the 2010 Constitution.

On that point, I seek to rely on **section 33 of the Sixth Schedule to the Constitution of Kenya 2010** which provides as follows:

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

The effective of that provision is to establish that Mr. Kihanya, being a person holding office in the Nairobi City County formerly the City Council of Nairobi, does indeed fall within the category of persons covered by **section 10(c) of the Advocates Act** and therefore enjoys the exemption from the requirement to take out a practicing certificate under the said Act. That being my finding, the two documents filed by Mr. Kihanya are properly on the court record and will not be expunged.

This Preliminary Objection is accordingly dismissed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE