



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 416 OF 2012

(Formerly Eldoret Hccc No. 25 of 2008 (os))

TITO KENYA JUMBA.....1ST PLAINTIFF
GEORGE MUREMA KENYA.....2ND PLAINTIFF
SARAH INGAIZU KENYA.....3RD PLAINTIFF
ALEX IDIONYI.....4TH PLAINTIFF

VERSUS

JOHN KANGWALEI SAWE.....1ST DEFENDANT
CAROLINE J. KIPTUGEN.....2ND DEFENDANT
NATHANIEL KIBET CHEPKEWER.....3RD DEFENDANT

RULING

The application herein is dated 30.9.2014 wherein the defendants who are the applicants seek orders that the orders obtained by the plaintiffs' advocates in 2008 be vacated and that the entire proceedings of 2008 be expunged from record. Ultimately, the entire suit to be dismissed.

The application is based on grounds that the suit was filed on 28.3.2008 by the plaintiffs. In the same year, they appointed the firm of Tarus & Company Advocates who filed an application for injunction which orders were given by the court. However, at the time of filing the said application, the said advocate Mr. Julius Tarus Rutto had no practicing certificate.

The application is supported by the affidavit of Nathaniel Kibet Chepkener who states that he and the 2nd defendant/applicant bought the parcel numbers UG/KIMUMU SCHEME/3175 and UG/KIMUMU SCHEME/3176 from the 1st defendant/applicant. That this suit herein was filed by the plaintiffs/respondents on 28.3.2008. That in the same year 2008, they then appointed the firm of Tarus & Company Advocates who filed an injunction application and the court granted the same. However, at the time of filing this application, the advocates on record had no practicing certificate for the year 2008.

That in the year 2008, the Advocate for the Plaintiffs/Respondent requested for Green Cards in L.R. No. UG/KIMUMU/3176, 3175, 3179, 3180 and 3181. That he is advised by their advocates on record which advise he verily to be true that an advocate must satisfy all the conditions under Section 9 (b)(c) of the Advocates Act. That in the above circumstances, he prays that all the proceedings and orders obtained by the advocate for the plaintiff be vacated.

The firm of Tarus and Company Advocates filed a statement of grounds of opposition instead of a replying affidavit despite the serious allegations in the supporting affidavit. This court finds that the allegations that Mr. Julius Tarus Rutto did not have a practicing certificate when he filed a Notice of Appointment of Advocate on the 1st of April, 2008 are not controverted.

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;

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

Section 22 of the Advocates Act, on the other hand, provides that application for a practising certificate shall be made to the Registrar–

(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate;

(b) by producing evidence satisfactory to the Registrar that the applicant has paid to the Society the fee prescribed for a practising certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and

(c) by producing a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate.

From the foregoing it is clear that an application for practicing certificate is made, *inter alia*, by producing evidence that the prescribed fee for the same has been paid to the Law Society of Kenya. However, there is no affidavit sworn by the plaintiffs' advocate to rebut the allegations by the defendants.

Section 31 of the said Act provides as follows:

(1) Subject to section 83, 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 any other person in any court of civil or criminal jurisdiction.

(2) Any person who contravenes subsection (1) shall–

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.

It is, therefore clear that an unqualified person (thus a person not qualified under section 9 to act as an advocate) cannot *inter alia* institute legal proceedings on behalf of another person and the consequences of such an action are that the advocate is deemed to be in contempt of court and may be punished accordingly and is rendered incapable of maintaining an action for costs in respect of such

services and in addition is guilty of an offence. The section is, however, silent on the fate of the legal proceedings instituted by such an advocate.

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.

Similarly, this section is silent on the fate of the documents drawn, and proceedings conducted, by such an advocate. It is my considered view therefore that documents signed, and proceedings conducted, by an unqualified person are in the same position as documents signed by a person who is not competent, in so far as their legality is concerned. Since the said documents are executed by a person whose signature is not legally recognised, they are, in my view, in the same position as unsigned documents. What then are the consequences of failure by a person to sign documents especially the plaint?

In Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250 Ringera, J (as he then was) held that:

“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity”. See also Onyango Otieno, J’s decisions (as he then was) in National Industrial Credit

Bank Limited vs. Albert Gacheru Kiarie Nairobi (Milimani) HCCC No. 1863 of 1999 and Jane W Kamau vs. Kenya Ports Authority Nairobi (Milimani) HCCC No. 1575 of 1999.

In Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001 consolidated with Vipin Maganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190 the Court of Appeal was of the following view:

“Where a pleading is not signed the same would be struck out rather than being dismissed... A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party’s recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law”.

From the foregoing, it is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently such pleadings are rendered incompetent and are for striking out.

Similar, fate has been held by the Courts in Kenya to apply to cases where pleadings are signed by an unqualified person.

In 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”.

This position was taken in the case of Lucas Njuguna S. Karobia vs. Consolidated Bank of Kenya Ltd HCCC No. 329 of 2005 in which following in the footsteps of Geoffrey Orai Obura vs. Martha Karambu Koome Civil Appeal No. 146 of 2000 and Delphis Bank Ltd vs. Behal & Others [2003] EA 412 at 414, Kajwang vs. the Law Society of Kenya NBI HCCC No 339 of 1999 was distinguished and the Court held that the circumstances of the later case needed to be appreciated within the special

circumstances of the matter.

Whereas I agree with the plaintiff's argument that procedural lapses should not be elevated to fetish in order to override substantive justice, I am unable to accept that the contemptuous institution of proceedings in a manner that is criminalised by the law can be excused as amounting to merely procedural lapses. There are, in my view, good reasons why the law requires that only qualified persons be permitted to institute legal proceedings. The legal profession is one of the few if not the only one whose activities are circumscribed by a special Act of Parliament known as Law Society of Kenya Act. There are very good reasons for ensuring that the activities carried out by the legal profession are regulated. The need for regulations, in my view, is informed by the fact that the acts and omissions of advocates may have far reaching effects on the lives and activities of third parties hence the need to ensure that the people who undertake to render legal services are not only people competent to do so but people whose activities are properly regulated so that in the event of loss sustained by third parties as a result of their activities recourse may be had by those sustaining loss thereby. Accordingly, the requirement to adhere to the provisions of the Advocates Act cannot be dismissed off-hand as being merely procedural or technical in nature.

Whereas, I agree that the provisions of Article **159(2)(d) of the Constitution** should be invoked to aid in ensuring that substantive justice is attained, I do not accede to the argument that the said provision can be called in aid of an act that is declared to be criminal by Legislature. I do not subscribe to the submission that an act which our statute expressly declares to be criminal should be excused by invocation of the Common Law either. Common Law.

Similarly, the overriding objective cannot be resorted to by a party whose act is declared by statute to constitute a criminal offence. Overriding objective, it must be made clear, is case management tool. Even so, in Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010 the Court of Appeal dealing with the said objective stated *inter alia* as follows:

“the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.

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 or takes over proceedings as in this case, it may be prudent for the said advocates to shoulder the consequences of such actions. In John Onger 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”.

It also important, at this stage, to deal with section 24 of the Advocates Act which provides as follows:

(1) Every practising certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day:

Provided that a practising certificate which is issued during the first month of any practising year shall have effect for all purposes from the beginning of that month.

(2) The practising year shall be from the 1st January to 31st December:

Provided that the Council of the Society, with the approval of the Chief Justice, may by order alter the practising year, and the order may make such transitional provision in regard to incidental matters as may be expedient.

From the foregoing it is clear that save for a practicing certificate issued during the first month of the practicing year, a practicing certificate is only valid from the beginning of the date of issue. The practicing year is, unless otherwise provided, from 1st January to 31st December. Accordingly, under section 24 aforesaid, it is only those practicing certificates issued in the course of January that are valid for the whole month of January.

It is therefore, my considered view and I so hold, not without some sympathy to the plaintiffs, that save in cases where section 24 aforesaid applies, a pleading signed and filed by an advocate before issuance of a practicing certificate is incompetent and is liable to be struck out.

Accordingly, the Notice of Motion dated 30th September ,2014 succeeds and therefore this court finds that, the orders obtained by the plaintiffs' advocate in 2008 as from the 1.4.2008 were obtained illegally and therefore the same are hereby vacated. Ultimately, the proceedings for the year 2008 as from 1.4.2008 are hereby expunged from the court record.

The court finds further that no ground has been given for dismissing the entire suit as the claim is based on adverse possession and was not commenced by the advocate on record but by the plaintiffs in person. Costs of the application to the applicant.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE