



REPUBLIC OF KENYA



**Tindika v Mwacharo & 11 others (Civil Suit E024 of 2023)
[2024] KEELC 4136 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CIVIL SUIT E024 OF 2023**

AE DENA, J

MARCH 20, 2024

BETWEEN

RANDOLPH M TINDIKA PLAINTIFF

AND

KHADIJA SALIM MWACHARO & 11 OTHERS DEFENDANT

RULING

1. This suit was instituted *vide* a plaint dated 28/3/2023 and filed before court on 29/3/2023. Later, the Plaintiff filed an amended Notice of Motion on 18/4/2023. The Plaintiff sought for temporary orders of injunction against the defendants herein with regards to the suit property Kwale/Ng'ombeni/1104.
2. With the revelation that the Plaintiff was in possession of the original title to the suit property and had in fact placed a caution over it, the court issued *status quo* orders on 24/5/2023 pending the hearing and determination of the application.
3. The 1st to 9th Defendants who were by then represented by the firm of Olwande Oballa Advocates were given time to respond to the said application and to further file submissions in dispensation of the same. The rest of the Defendants are represented by the Attorney General's office.
4. In the pendency of the application, the Plaintiff filed a separate Notice of Motion dated 18/9/2023. Noting the nature of the orders sought it was the courts view that the same should be dispensed first. The same is the subject of this ruling. Counsel for the Plaintiff prays for orders;
 1. That this Honorable court do make an order that Mr. Oballa Victor Benson Olwande of Olwande Oballa Advocates has no right of audience before this honourable court having not taken out professional practicing certificate for years 2022 and 2023 *inter alia*.



2. That this Honourable court be pleased to make an order that all the pleadings, affidavits and documents filed by Oballa Victor Benson Olwande and/or Olwande Oballa Advocates be struck out and expunged from the record herein.
3. That costs of this application be provided for.
5. The application is supported by an affidavit sworn by Randolph M Tindika Advocate, the Plaintiff herein. It is averred that the Plaintiff/Applicant made a search to the Law Society of Kenya advocates search engine where he discovered that Mr. Oballa Victor Benson Olwande, Counsel for the 1st, 4th to 9th Defendants had in fact not obtained a practicing license for the years 2022 and 2023. That having failed to be active as a practicing advocate in the said years, he did not have the capacity to prepare the pleadings before this court on behalf of the said Defendants.
6. That the failure to have a valid practicing certificate means that the said Advocate has no right of audience before court and as such the said documents ought to be expunged/struck out from the record of this court. The Applicant seeks that the orders enumerated on the face of the Motion be allowed as prayed.
7. The application is unopposed. Instead, the 1st, 4th to 9th Defendants have appointed the firm of Gichuki Thiaka Advocates and who did file a Notice of Change of Advocates on 19/9/2023 to take over the matter in place of Olwanda Oballa Advocates. I would have expected Mr. Oballa Victor Benson Olwande to file a response to the application as it touches on his personal conduct as an officer of the court and integrity in misrepresenting himself to the public as an advocate but as at the time of writing this ruling, no response had been filed on his part. The Attorney Generals Counsel informed court that she would not participate in the application.
8. The Plaintiff/Applicant filed written submissions on 16/1/2024 and which I have considered.

Determination

9. The qualifications for practicing as an advocate are enumerated under Section 9 of the [Advocates Act](#) Chapter 16 of the Laws of Kenya (herein the Act) as follows; -
Subject to the 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 practicing certificate
10. Section 2 of the [Act](#) defines an unqualified person as a person who is not qualified under section 9 above and is also not exempt under section 10 and fails to take out a practicing certificate. I have reviewed the nature of persons exempted and Mr. Olwande being a private legal practitioner the said provisions would not apply.
11. It has been confirmed that Mr. Oballa Victor Benson Olwande had failed to take out his practicing license for the year 2022 and 2023. The Applicant attached to the affidavit in support a copy of the results from the Law Society search engine (RMT1). The results indeed reveal that Mr. Oballa Victor Benson Olwande practising status was inactive. He had not taken out a practicing certificate for the year 2022 and 2023 as required under the provisions of section 9 of the Act.
12. The court is tasked with making a determination of whether or not the documents on record, filed by Mr. Oballa Victor Benson Olwande should be expunged from the record or not.



13 Section 34 of the Act further 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
 - 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.

14 The Act was amended in the year 2017 to introduce section 34B. The same provides for validity of documents filed by a non-advocate and states that: -

Validity of legal documents

- (1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.
- (2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.
- (3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate."

15 I have had the opportunity of reading the authorities cited by the Applicant. I however came across decisions made later in time. The court in the case of *Samwel Gioche t/a Sagio Contractors v Stanley Mwangi Kiboro & another* [2017] eKLR Angote J. in holding that the failure of the advocate to take out practising certificate cannot invalidate the plaint and pleadings referred to the Supreme court decision in the case of *National Bank of Kenya Limited v Anaj Warehousing Limited* [2015] eKLR, case and stated that;

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 practising 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. Guided by the above provisions of statute and case law cited, it is this court’s finding that despite having been prepared by an advocate without a practising licence, the Defendants documents on record are still valid and form part of the court record. The same will therefore not be expunged from the record.
19. The upshot is the application dated 18/9/2023 is hereby dismissed. The costs of this application shall be paid by Oballa Victor Benson Olwa.

Orders accordingly

RULING DATED SIGNED AND DELIVERED THIS 20TH DAY OF MARCH 2024.

.....

A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

No appearance for the Plaintiff/Applicant

No appearance for the 1st, 4th, 5th, 6th, 7th, 8th and 9th Defendants/Respondents

No appearance for 10th, 11th and 12th Defendants

Mr. Daniel Disii - Court Assistant

