



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, SICHALE & KANTAI J.J.A)

CIVIL APPEAL (APPLICATION) NO. 171 OF 2016

BETWEEN

BEATRICE WAIRIMU KARIUKI.....APPELLANT/ RESPONDENT

AND

SOLOMON NJOROGE KIOR.....1ST RESPONDENT/APPLICANT

MRS. TINA LOUISE BELCHER..... 2ND RESPONDENT

CLARA AMY COX.....3RD RESPONDENT

JONATHAN MUNYWOKI MULI.....4TH RESPONDENT

SHADRACK MBAI MBIU.....5TH RESPONDENT

(Being an application to strike out the appeal from the Ruling of the Probate & Succession Court at Nairobi (Kimaru, J) dated 21st November 2014

In

Succession Cause No. 1788 of 2009

Consolidated with

Succession Cause No. 1965 of 2009)

RULING OF THE COURT

This is an old succession dispute concerning the distribution of the estate of one **Anthony John Thomson (Deceased)**. On **21st November, 2014, Kimaru, J** delivered a ruling invalidating the Will of the deceased in which **Beatrice Wairimu Kariuki (Beatrice)** was named a beneficiary of his estate. Beatrice was aggrieved by the said ruling and she instructed her advocate, **Mr. Gikandi Ngibuini** to appeal the decision to this Court which was duly done when Civil Appeal 171 of 2016 was filed on **9th July, 2016**. **Solomon Njoroqe Kiore (Solomon), Mrs. Tina Louise Belcher, Clara Amy Cox, Jonathan Munywoki Muli** and **Shadrack Mbai Mbiu** were named as the 1st, 2nd, 3rd, 4th and 5th respondents.

During the pendency of the appeal and before directions were given as to how the appeal was to proceed, **Solomon** filed an application dated **12th August, 2016** supported by two affidavits sworn on **12th August, 2016** and **7th August 2017** and sought, in the main, to have Civil Appeal No. 171 of 2016 struck

out pursuant to **Rule 84 of the Court of Appeal Rules** (Court's Rules), 2010. **Solomon** raised two primary grounds, that is: that the record of appeal dated **9th July, 2016** was filed by counsel, **Mr. Gikandi Ngibuini** who was unqualified at the time of filing the appeal contrary to sections 9 and 34 of the Advocates Act, Chapter 16 of the Laws of Kenya. Secondly, **Solomon** contended that the record of appeal is defective for not being in conformity to Rule 87 of this Court's Rules. **Solomon** deposed that as of **9th July, 2016**, **Mr. Gikandi Ngibuini** did not hold a practicing certificate for the year 2016 and was only issued with it on **10th November, 2016**.

Correspondence with the Law Society of Kenya had revealed that the practicing certificate had been withheld as **Mr. Gikandi Ngibuini** had not complied with the continuous legal education requirements. Annexed to **Solomon's** affidavit was a letter from the Law Society of Kenya dated **22nd July, 2016**. It stated:

"Dear Sir,

RE: NGIBUINI GIKANDI, ADVOCATE – (P/105/1368/84)

We acknowledge receipt of your letter dated 20th July, 2016 contents of which we have noted.

We confirm that according to our records, Ngibuini Gikandi, Advocate had paid for his practicing certificate for the year 2016 on 26th February, 2016, however, it was withheld due to noncompliance with requirements of Continuous Legal development. He is therefore not certified to practice law.

Yours Faithfully,

FLORENCE MUTURI

DEPUTY SECRETARY

(COMPLIANCE & ETHICS)"

In view of the above letter from the Law Society of Kenya, **Solomon** contended that **Mr. Gikandi Ngibuini** was not qualified as per the Advocates Act to file the record of appeal. Also attached to the supporting affidavit was a tabulation of what **Solomon** alleged to be missing documents in the record of appeal, hence his complaint that the record was wanting in form.

In opposing the appeal, **Mr. Gikandi Ngibuini** swore an affidavit dated **27th February, 2017**. The import of **Mr. Gikandi Ngibuini's** affidavit is that he was admitted as an Advocate of the High Court of Kenya in 1984; that he has held practicing certificates since then; that on **12th February, 2016**, he paid for a practicing certificate for the year 2016; that it was not until **10th November, 2016** that he was issued with the said practicing certificate.

As regards **Solomon's** contention that the record of appeal was incomplete, it was deposed that he (**Solomon**) was at liberty to include the documents left out by filing a supplementary record of appeal.

The applicant vide his affidavit dated **3rd August, 2017** responded to **Mr. Gikandi Ngibuini's** affidavit. He reiterated that as at **9th July, 2016**, when **Beatrice's** counsel filed the record of appeal, **Mr. Gikandi Ngibuini** was not certified to practice law.

On **7th March, 2019**, the motion came before us for plenary hearing. The applicant appeared in person. There was no representation from the firm of **Kimani Kamucho** for the 2nd and 3rd respondents (in the appeal) despite service of a hearing notice upon them on **25th November, 2009**. **Mr. Steven Nzeku** appeared for the 4th and 5th respondents (in the appeal). Learned Senior Counsel **Dr. Kamau Kuria**, teaming up with **Mr. Gikandi Ngibuini** appeared before us and opposed the applicant's motion.

In urging the motion, the applicant relied on his submissions filed on 28th **February, 2018**, lists of authorities filed on 4th **March, 2019** and made oral highlights of his written submissions. The applicant reiterated that **Beatrice's** counsel, namely, **Mr. Gikandi Ngibuini** did not have a practicing certificate at the time he filed the appeal and secondly, that the record of appeal was incomplete; that the record contains irrelevant documents; that the record contains false allegations presented as facts, in particular, that he (**Solomon**) was charged for engaging in criminal activities, an allegation which is false; that the appeal seeks to improperly enjoin the 4th and 5th respondents and finally, that the appellant has wrongfully included in her record of appeal property identified as **No. 1012/47/2**. In **Solomon's** view, the record of appeal was for striking out.

In opposing the motion, **Dr. Kamau Kuria** highlighted the written submissions filed on 28th **February, 2018**. Counsel elaborated that once **Mr. Gikandi Ngibuini** was made aware of the fact of his non-compliance with the continuous legal education requirements, he immediately resolved the issue(s) and he was subsequently issued with a practicing certificate dated 10th **November, 2016**.

It was **Dr. Kamau Kuria's** further submission that the application to strike out the appeal on the basis that it was filed by counsel who did not have a practicing certificate is based on outdated law. A parallel was drawn to the situation obtaining in the Supreme Court decision in **National Bank of Kenya Ltd v Anaj Warehousing Ltd [2015] eKLR** in regard to conveyancing instruments drawn by advocates not holding practicing certificates. The Supreme Court determined that no instrument or document of conveyance becomes invalid under **Section 34(1) (a) of the Advocates Act** for the reason that it was prepared by an advocate who did not hold a current practicing certificate.

Consequently, being in an analogous situation, **Mr. Gikandi Ngibuini** remains a qualified advocate in terms of **Sections 12 and 13** of the **Advocates Act**. The Court was urged to find that failure by **Mr. Gikandi Ngibuini** to hold a practicing certificate at the time of filing the appeal did not go to the jurisdiction of the court to hear the appeal or to the root of the dispute and did not occasion the respondents any prejudice.

As regards the non-compliance with Rule 87 of this Court's Rules, reliance was placed on the decision of this Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** wherein it was stated that courts strive to sustain rather than to strike out pleadings on purely technical grounds. It was reiterated that under **Rule 92(1) of the Court's Rules** a respondent may file a supplementary record of appeal to include documents which are necessary for the proper determination of an appeal. The Court was referred to **SACCO Societies Regulatory Authority v Biashara SACCO Society Ltd [2013] eKLR** where this Court held that a competent record of appeal cannot be struck out on the basis of missing documents as this defect is curable under Rule 92.

Learned counsel **Mr. S. Nzaku**, representing the 4th and 5th respondents (in the appeal) opposed the application and associated himself with the submissions of **Dr. Kamau Kuria**.

In a brief response, the applicant maintained that it is an offence to practice without a practicing certificate (Section 9 of the **Advocates Act**).

We have considered the application, the parties' respective affidavits and their written as well as oral submissions, the authorities cited and the law.

In his motion, **Solomon's** position was that **Beatrice's** counsel was at the time of preparing and filing the record of appeal an '**unqualified person**' as per the **Advocates Act** and hence, the record is invalid. In the Supreme Court decision of **National Bank of Kenya Limited v Anaj Warehousing Limited** (supra) the issue of an unqualified advocate *vis-à-vis* one who is not in possession of a current practicing certificate was considered. In respect of Section 34 (1) (f) of the **Advocates Act**, the Court stated:

“This section prohibits unqualified persons from preparing certain documents. It is directed at “unqualified persons”. It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent

as to the effect of documents prepared by advocates not holding current practicing certificates.” (emphasis added).

It is our understanding that the Supreme Court distinguished ‘unqualified persons’ such as those struck off the roll of advocates and non-advocates from advocates not holding current practicing certificates. This led to the eventual finding that:

“No instrument or document of conveyance becomes invalid under Section 34(1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”

As stated above, the distinction of an unqualified person vis-à-vis an advocate who does not have a current practicing certificate was clarified in the Supreme Court decision of **National Bank of Kenya Ltd vs. Anaj Warehousing Limited** (Supra). In the instant matter, **Solomon** contended that at the time **Beatrice**’s counsel filed the appeal, he was not in possession of a current practicing certificate. This was not denied as **Mr. Gikandi Ngibuini** had not complied with the continuous legal education requirements until **10th November, 2016** when he was issued with a practicing certificate. The lack of a practicing certificate is distinct from the lack of qualification to practice as a lawyer. It is documents prepared by the latter that are invalid. It is for this reason that **Dr. Kamau Kuria** termed **Solomon**’s assertion of the appeal being invalid as being based on outdated law. We agree. **Mr. Gikandi Ngibuini** cannot be said to have been an unqualified person so as to render the record of appeal prepared by him as invalid. Further, the Supreme Court was also of the view that the **“spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client”**, to the extent whereby a litigant such as **Beatrice** cannot be penalized for the omissions of her advocate. This by no means absolves the advocate of his obligations as he remains liable in any criminal or civil proceedings, as well as any disciplinary proceedings to which he may be subject. Indeed as pointed out by the Supreme Court:

“While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.”

As for the missing documents, Rule 92(1) of this Court’s Rules provides a remedy where, in the eyes of the respondent, documents crucial to the determination of the appeal are missing. Rule 92 (1) provides:

“92(1). If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal”.

Therefore, the rules provide for the filing of a supplementary record by a respondent (in this case **Solomon**) in the event that the record of appeal is incomplete. Indeed, in **SACCO Societies Regulatory Authority v Biashara SACCO Society Ltd** (supra), this Court held:

“We cannot strike out a competent appeal because it is alleged that a document that ought to have been in the record of appeal was not included. If that were the case Rule 92 would serve no purpose.”

As to whether the record contains irrelevant documents, or whether the record contains false or erroneous allegations presented as facts and as to whether parties or subject matters have been wrongly included in the appeal are not grounds for striking out a competent record of appeal under Rule 84 of this Court’s Rules. These are contested facts that go into the merits (or demerits) of the appeal. As held by this Court in **Nakumatt Holdings Limited & another v Ideal Locations Limited** [2018] eKLR it is only upon hearing of the main appeal that an informed, reasoned and considered determination can be made in

regard to contested facts or issues, not in an application under Rule 84 to strike out the record of appeal.

We are also guided by the decision of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others** (supra) that cautions the drastic approach of striking out appeals on the basis of procedural infractions. It was held that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.” (Emphasis added).

The appellant, unless otherwise shown, has a right to have her appeal heard and determined on merit.

The upshot of the above is that we have come to the conclusion that the applicant has not demonstrated that the appeal is deserving of the drastic order of striking out as prayed. We find no merit in the motion dated **12th August, 2016**. It is hereby dismissed with costs to **Beatrice’s** counsel **Mr. Gikandi Ngibuini** and the 4th and 5th respondents.

Dated & Delivered at Nairobi this 5th day of July, 2019.

P. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR