IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 253 OF 2012

BETWEEN

NGOMENI SWIMMERS LIMITED ……..…….…… APPELLANT

AND

KATANA CHARA SULEIMAN ……...……...…… RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Malindi (Meoli, J.) dated 28th May, 2012

in

H.C.C.C. No. 161 of 2010)

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JUDGMENT OF THE COURT

Ngomeni Swimmers Ltd, *"the appellant"* on 23rd December, 2010 lodged a suit against **Katana Chara Suleiman** *"the respondent"* in the High Court of Kenya at Malindi. The suit was lodged through **Messrs Wesley John & Associates** being **Civil Suit No.161 of 2010**. In the suit the appellant sought for a permanent injunction against the respondent restraining him from trespassing or encroaching on its portions of land known as **Numbers 24845** and 248**46** respectively, *"the suit premises"*. Apparently, the appellant was the registered proprietor of the suit premises. However, the respondent had without colour of right trespassed on the same and erected pillars as beacons without the appellant's consent and knowledge.

The defence by the respondent was to the effect that the firm of Advocates that filed the suit on behalf of the appellant did not exist. Similarly he contested the existence of an advocate by the name Wesley John who had signed the plaint. Apart from denying the rest of the averments in the plaint, the respondent maintained that there was no claim known in law disclosed by the suit. Otherwise he was the duly registered proprietor of the suit premises under **Title No. Ngomeni Settlement Scheme 892** issued to him.

In the course of the exchange of pleadings, the Respondent filed a Notice of Motion application dated 23rd February, 2011, seeking that *"the Hon. Court be pleased to struck (sic) out the Plaintiff's/ Respondent's entire suit."* The application was anchored on the grounds that:-

*"a) The alleged Advocate by the name **of Wesley John or Austin** does not exist in the Roll of Advocates.*

b) The alleged firm of WESLEY JOHN & ASSOCIATES ADVOCATES OR WESLEY JOHN & AUSTIN ADVOCATES is an unregistered firm, owned by a person who is not existing or has not qualified to be an Advocate of the High Court of Kenya.

c) The pleading (sic) of the Respondent are fatally defective, cannot be cured by either change of Advocate or in any form of amendment."

Where pertinent the respondent deponed that he had established that the alleged counsel for the appellant was not a qualified advocate. In support of this contention the respondent annexed a letter from the law Society of Kenya confirming that there was no advocate in their records by the name Wesley John nor was there a registered law firm in the name of Wesley John & Associates Advocates or Wesley John & Austin Associates Advocates. On that basis therefore the suit ought to be struck out as it was lodged by a person not recognized or authorized by law.

In response, the appellant filed two affidavits dated 11th March and 21st November, 2011 respectively. In all these affidavits, the appellant's counsel, **Kamau Kinyanjui** sought to discount the deposition regarding his non-existence and that of his law firm. In a nutshell, he claimed that as at the time of swearing the affidavit, he held a current practicing certificate having been issued to him in January, 2011. He also held a practicing certificate in 2010 when he lodged the suit. Similarly the law firm Wesley John & Associates Advocates was registered on 26th December, 2007 under the Registration of Business Names Act and upon restructuring, it changed its name to Wesley John, Austin & Associates on 7th October, 2010. That by a deed poll dated 13th April, 2011 he had changed his name from Kamau Kinyanjui or John Kamau to Wesley John Kamau.

Hearing of the Application *interpartes* took off on 19th March, 2011 before **Meoli, J**. The submissions by Mr Ogeto and Mr Kamau, learned counsel for the respondent and appellant respectively were along the same lines as the affidavits filed by the parties to the application.

By a Ruling delivered on 28th May, 2012, the Learned Judge allowed the application and ordered that the suit be struck out with costs to the respondent. Further, the Learned Judge was of the view that the conduct of the appellant's Counsel amounted to subterfuge and thus condemned him to bear the said costs personally.

It was in light of these orders that this Appeal was lodged. 12 grounds were advanced in support thereof. However at the subsequent hearing of the appeal the appellant's Counsel condensed and argued all the grounds solely as ground 12, which is in these terms:-

*"The Learned Judge erred in law in misinterpreting and misapplying and also failing to apply the relevant and requisite provisions of the Advocates Act (**section 34 and 35**), Advocates (Practice) Rules (**rules 11 and 12**), the Civil Procedure Act 2010 (**section 1B 1(c),** Civil Procedure Rules 2010 (**Order 45 Rule 1 and Order 2 Rule 9**), Registration of Business Names Act (**sections 6,9 and 23**) to the facts and documentary evidence and material before the Honourable Court, consequent to which the Honourable Judge arrived at findings and rulings which are untenable and sustainable (sic) in law and thereby occasioned a miscarriage of justice upon the Appellant and the Advocate concerned against whom a condemnatory order of costs was punitively made."*

In the meantime on 18th June, 2012 the respondent filed Notice of Grounds affirming the decision of the High Court. Pursuant to the leave of court given on 8th April, 2014, the parties agreed to dispose of the Appeal by way of written submissions; with all submissions being on board on 29th April, 2014.

According to the Appellant, the learned trial Judge erred in failing to recognize and address herself to the fact that the Plaint was signed by an authorized person, namely **James Muisyo, Advocate.** This

information was said to have been contained in the Affidavit of **Ahmed Mohamed Kilalo,** sworn on 19th July, 2012. However, it is instructive that this information was only brought to fore long after the ruling sought to be impugned had been delivered. Counsel went on to submit that the provisions of **sections 34** and **35** of the Advocates Act require that documents be prepared by a qualified person which was not the case herein. In support of this proposition, the appellant relied on the decision in the case of **National Bank of Kenya Limited vs. Ayah (2009) KLR p.762.** In the Appellant's view, the contention by the Respondent that the firm of **Wesley John & Associates Advocates** was a non-registered entity was untrue; a fact that the Learned Judge failed to recognize despite the overwhelming documentary evidence placed before her. The appellant further submitted that the court's overriding concern should have been the provisions of **section 9** of the **Advocates Act** and that since the Plaint was signed by a qualified person within the meaning of this section, the same was unimpeachable. The appellant argued further that none of the annexures it had tabled before the trial court reflect subterfuge as held by the learned Judge; that the said annexures were valid documents and, within the public domain. That condemning counsel to bear costs was unfair and would only have been warranted if the said counsel either initiated the suit without instructions from the appellant or was guilty of subterfuge, both acts of which he had not committed. The appellant thus prayed that the appeal be allowed and Orders of 28th May, 2012 be set aside with costs.

On his part, the respondent reiterated the submissions he had made in the High Court and emphasised that at the time of filing suit, there was no Advocate known in law as **Wesley John Kamau;** that since Kamau Kinyanjui and/or John Kamau was yet to register his deed poll at the time that his alleged law firm lodged the suit then Wesley John Kamau did not exist; that the registration of the Deed Poll and its subsequent gazettment was done in 2011 and in law that is when Wesley John Kamau came into being, that Kamau John Kinyanjui was the Advocate duly recognized by the Law Society of Kenya (LSK) at the time of filing suit; that having not been a recognized Advocate then, **Wesley John Kamau** could thus not claim to have been a proprietor of the firm of **Wesley John & Associates Advocates;** that in any event, the firm of **Wesley John & Associates Advocates** was an illegal outfit as it violated **Rule 12** of the Advocates (Practice) Rules, since its sole proprietor was a person who had no capacity to act as an Advocate; that even if the pleadings filed were by a qualified Advocate, the same were rendered invalid by the fact that they were drawn in the name of an unrecognized law firm. Finally, the respondent urged us to expunge the Appellant's submissions on record for having been filed out of time.

From the pleadings, the Ruling of the High Court as well as the written submissions before us, two issues call for determination;

> *1. Whether the suit in the High Court was or not filed by an unqualified person and if so, the effect thereof*
>
> *2. The order against counsel for the appellant to pay costs personally.*

Prior to dealing with the substantive issues aforesaid, it is necessary to resolve the question of whether the appellant's submissions should be expunged from the record for having been filed out of time. From the record, it is quite apparent that none of the parties complied with our order of 8th April, 2014 requiring them to file written submissions within 7 days of each other. Is that reason enough for us to expunge the appellant's written submissions already on record? We do not think so! Under **Article 159(2)(d)** of the **Constitution**, courts are required to administer justice without undue regard to technicalities of procedure. See **Harit Sheth T/a Harit Sheth Advocates v Shamas Charani,** [**2014] eKLR -** where it was stated, that

> *"The Constitution urges us to look at the broader perspective, the circumstances of the case and with that in mind, seek to uphold the wider interests of justice."*

Despite the appellant's neglect to file its submissions in time pursuant to this court's directions of 8th April, 2014, the delay of about 16 days cannot in this case be said to have been so inordinate as to occasion any prejudice on the respondent. The respondent is not innocent either. He is just as guilty as the appellant for he also filed his written submissions 7 days late. Further, by the time the respondent was

filing his submissions on 29th April, 2014, the appellant's submissions were on record having been filed on 24th April, 2014. He therefore had every opportunity to combat or confront all the issues raised by the appellant in its submissions.

It is not in dispute that the firm of **Wesley John & Associates Advocates** is duly registered under the registration of Business Names Act, considering the certificate of registration dated 26th December, 2007 as well as a notice of change of particulars dated 7th October, 2010 that are on record. According to the said documents, the particulars of the firm's proprietors are given as Wesley John Kamau in the original certificate of registration and later, as Wesley John Kamau and Austin Micah Shikule based on the certificate of registration of a change of particulars. These were the proprietors of the firm as at 23rd December, 2010 when this suit was filed. However, no practicing certificates were tendered in evidence bearing the names of the said proprietors as at the time of filing suit. Thus it can be safely concluded or assumed that they did not have practicing certificates in their respective names. The law prohibits unqualified persons from engaging in business as Advocates. Under **Section 34** of the **Advocates Act**;

1. *No unqualified person shall either directly or indirectly, take instructions or draw or prepare any document or instrument-*

   a. Relating to 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 which a fee is prescribed by any order made by the Chief Justice under Section 44; or

   e. relating to any other legal proceedings

It would appear therefore that any documents prepared and lodged in violation of this provision of the law are invalid and of no legal import. Essentially that was the holding in the case of **National Bank of Kenya Ltd** (supra). The record shows that the suit was lodged by Messrs Wesley John & Associates on 23rd December, 2010. The proprietor of that firm of Advocates as already stated were Wesley John Kamau and Austin Micah Shikhule. No practicing certificates for whatever year were exhibited with regard to Micah Shikhule. It was therefore difficult to tell whether this person is an advocate or even a lawyer. The only practicing certificates on record for the years 2010 & 2011 are in the names of Kamau John Kinyanjui. Clearly therefore the firm of Wesley John & Associates which lodged the suit was an illegal outfit in so far as the lodging and prosecuting the suit was concerned as no evidence of practicing certificates in the names of the alleged proprietors of the law firm if at all, were tendered in evidence. They were thus not qualified advocates in and by purporting to file and prosecute the suit they indeed acted violation of **section 34** of the Advocates Act.

In a bid to extricate itself from the consequences of this state of affairs, the Appellant, through the two Affidavits afore said, contended that **Kamau John Kinyanjui** was an Advocate of the High Court of Kenya; whose practicing certificates were issued to him in 2010 and 2011. It was further contended, that the names **Wesley John Kamau** and **Kamau John Kinyanjui** refer to one and the same person; pursuant to a Deed Poll dated 13th April, 2011 and published in the Kenya Gazette of 20th May, 2011 vide Notice No. 5596. However, at this stage, it is instructive to note that both the execution and gazettment of the Deed Poll came *after* the filing of the suit. As such, even if the two names refer to one and the same person; that is neither here nor there. Wesley John Kamau was the alleged advocate at the time of filing suit. It therefore follows, that the advocates Practicing Certificate in the name of **Wesley John Kamau** should have been tendered in evidence. Instead, the 2010 and 2011 practicing certificates tendered reflects his alias, Kamau John Kinyanjui.

The question that arises is, as at 23rd December, 2010, was Wesley John Kamau authorized to practice as

an Advocate? According to **section 9** of the **Advocates 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*
>
> *d. he has in force an annual licence."*

In view of this provision, the answer to the above question is a resounding no. The letter from the Law Society of Kenya proves as much. No rebuttal evidence was tendered in by the Appellant to indicate otherwise. If at all there existed an Advocate by the name of Wesley John Kamau, nothing would have been easier than for his Practicing Certificate to be tabled before court.

Having established that the law firm that filed the plaint was an illegal outfit, could the plaint have stood? In our humble view, it could not. As it is, the law prohibits Advocates from practicing in names other than their own. According to the provisions of **Rule 12** of the **Advocates (Practice) Rules**;

> *"No Advocate shall practice under a name other than his own name or the name of a past or present member or members of the firm."*

As at the time of filing suit, the proprietor of the firm of ***Wesley John & Associates*** **Advocates** was **Wesley John Kamau.** He was not an advocate known in law then. In view of his want of qualification, it follows that the firm was also incompetent by dint of **Rule 12** aforesaid. On the same note, the appellant's contention that the Plaint was signed by Joseph Muisyo, a competent advocate does not advance the appellant's case any further. There is nothing to show that indeed Joseph Muisyo was an advocate or that the signature on the plaint was his. It also appears that even if the said Joseph Muisyo was an advocate and indeed signed the plaint the same can still be impugned on account of being an advocate not in the employment of the firm nor did he indicate that he had signed the plaint on behalf of the firm of Wesley John & Associates. In an affidavit sworn by one, **Ahmed Mohamed Kilalo** on record, he depones at paragraphs 14 and 15 thereof thus:

> *"14. THAT I also remember that in the month of December 2010, on the instructions of my boss, Mr. Wesley J. Kamau, I took the Plaint in this matter to Mr. JOSEPH MUISYO ADVOCVTE to sign on our firm's behalf as there was great urgency then to file the Plaint and Mr. MUISYO had at Mr. W. J. KAMAU's request agreed to sign the same on our firm's behalf. To my knowledge, Mr JOSEPH MUISYO was at that material time in possession of a practicing certificate for the year 2010.*
>
> *15. THAT in my present (sic) Mr. JOSEPH MUISYO signed the Plaint on our firm's behalf and I personally duty (sic) filed the same in court on the 23rd December 2010."*

From the above, it is not clear what the relationship of Joseph Muisyo and the firm is. We doubt whether it is legally tenable for an advocate with no connections whatsoever to a firm of advocates can be called upon to sign documents on behalf of such a firm. Further the appellant's argument may have held water had the plaint been filed in his name thereafter. Finally we do not think that by even Muisyo signing the plaint on behalf of the firm, he thereby corrected the illegality. The firm was an illegal outfit in law if it portrayed itself as a law firm. At the time of filing suit, the said Kamau Kinyanjui held himself out as Wesley John Kamau; an unqualified person in terms of **section 9(c)** of the Advocates Act. Consequently, the Plaint thus filed was incurably defective and the trial court was right in striking it out on that basis.

Further, the argument by the Appellant that the Plaint was drawn and signed by one **Joseph Muisyo, Advocate** is misleading as this evidence was, as already stated elsewhere in this judgment never tabled at

the hearing of the application. It is trite law that pleadings are binding not just on the parties, but on court as well - *see* **IEBC & Another v Stephen Mutinda Mule & 3 others*;* Court of Appeal at Nairobi, Civil Appeal No.219 of 2013 eKLR.** In light of this, the appellant cannot be allowed to rely on the contents of the Affidavit of **Ahmed Mohamed Kilalo,** as the same was sworn on 19th July, 2012 and filed in court long after the *interpartes* hearing of the application and long after the delivery of the ruling being contested.

The award of costs normally follow the event and it is in any event at the discretion of the trial court. (See **section 27** of the Civil Procedure Act)**.** In determining whether an Advocate should be condemned to bear costs personally, his conduct in the matter is of paramount importance. Where an Advocate's conduct is plainly unjustifiable for instance, if he deliberately misleads the court and or client, craftly interpretes or misinterpretes the law, his conduct is oppressive and blatantly aimed at achieving ulterior motives an order for costs also known as '*wasted costs*' can be made against him personally. We must hasten to add that the above list of indiscretions is not exhaustive. At the end of the day, each case must be determined on its own facts. Suffice to add that before the order is made, the Advocate in question is entitled to be heard in rebuttal. In **Myers v Elman (1)(1939) 4 ALL E.R. at page 509**, **Lord Wright** explained the grounds on which this jurisdiction can be exercised. He said *"The matter complained of need not be criminal. It need not involve Reculation or dishonesty. A mere mistake or error of judgment is not generally sufficient but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus a solicitor may be held, bound by certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit, which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity … It would perhaps be more accurate to describe it as conduct which involves failure on the part of the solicitor to fulfil his duty to court and realize his duty to aid in promoting, in his own sphere, the cause of justice …*" Under Kenyan law, this right of an Advocate to be heard before he is condemned to bear wasted costs has been echoed in the case of **J.B Kohli & others v. Bachulal Popatlal, (1964) E.A. 219** in which it was held in part that:

> *"But before the court exercises this summary jurisdiction to mulct a solicitor in costs it must first give that solicitor an ample opportunity to direct the complaint against him and to answer it. As Lord Wright pointed out in Myers v Elman (1) (1939) 4 ALL E.R at pg.508) All that is necessary is that the judge should see that the solicitor has full and sufficient notice of the nature of complaint made against him, and full and sufficient opportunity of answering it."*

From the record, the learned Judge's decision to penalize the appellant's counsel in costs personally appears to have been informed by the Advocate's conduct. The court stated in part that;

> *" 11. 'The business of practicing Advocates is regulated under the Advocates Act, and I consider it mischievous that Mr. Wesley John Kamau has attempted to front a certificate of registration of a business name to camouflage the apparent flouting of the express provisions of the Advocates (practice Rules). In effect, Mr Wesley John was practicing law under a disguise, the very proscription in Rule 12 of the Advocates (Practise) Rules …. ….…"*
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> *13. I find it necessary to comment, in conclusion, that it is disappointing that valuable court time has been taken up in matters peripheral to the parties' dispute in particular the court deprecates, the conduct of Mr John Wesley Kamau. As a senior officer of the court, he appears to have chosen to engage the court in a game of smoke and mirrors, rather than take full responsibility for filing the suit in the name of a fictitious advocates' firm rather than his own name. He will personally bear the costs occasioned by the application and the entire suit"*

In this appeal, the Appellant has come out protesting very strongly against these allegations of subterfuge. Nonetheless, no satisfactory explanation was given as to why the Appellant's Advocate chose to file suit in the name of an unqualified person. In addition, as earlier stated, the Replying Affidavit indicated the signatory of the impugned Plaint as being **Kamau Kinyanjui**, only for him to later change and attribute the signature to Joseph Muisyo. On the other hand, the certificate of registration of change of particulars gave **Wesley John Kamau** and **Austin Micah Shikhule** as the firm's proprietors. By virtue of **Rule 12**

(supra), the lawful practitioners in the said firm would have been the two named proprietors and their associates. Having established that Kamau Kinyanjui and Wesley John Kamau are now one and the same person it would be expected that the said Wesley John Kamau had a practicing certificate in force at the time. None was produced. In the Affidavits filed in response to the application, the Advocate continues to use the names Wesley John Kamau and Kamau Kinyanjui interchangeably to describe himself. This in our view can only be said to have been calculated to add to and compound the suberfuge. It is thus not in doubt that the said Advocate was deceptively trying to conceal the fact that the Plaint was filed by an unqualified person. That is the very definition of subterfuge, to which the advocate must be held to account. Nonetheless the advocate was entitled to a Notice, that the court was contemplating making a wasted costs order against him if he persisted in that conduct.

Subterfuge simply means employing tricks or deception in order to achieve a goal or a clever plan or idea used to escape, avoid, or conceal something. It is clear from the record that is the game the appellant's counsel had engaged in all along. However, the record does not show that such Notice was given calling upon such counsel to show cause why a wasted costs order should be made against him for his misconduct. Therefore the order was made unilaterally which was wrong. Much as it was in the discretion of the court to make such order, we feel that discretion was exercised rather whimsically as the appellant's counsel was condemned unheard. On this ground the appeal shall succeed to that limited extent.

We would therefore allow the appeal partially by setting aside the order compelling Wesley John Kamau to pay personally the costs occasioned by the application as well as the suit. In substitution thereof we order that the costs of the application as well as the suit in the High Court be borne by the appellant. The appellant has lost and won in this appeal in equal measure. The order for costs that best commends to us is that each party should bear its or his own costs of this appeal.

Dated and delivered at Malindi this 9th day of October, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

……..

JUDGE OF APPEAL

F. SICHALE

……..…

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR