



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE , KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 150 OF 2010

BETWEEN

SILVANO NYAGA PETER APPELLANT

AND

MISHECK SILVERIUS NJIRU..... RESPONDENT

(Appeal against the Ruling of the High Court of Kenya at Embu

(W. Karanja, J.) delivered on 28th July 2009

in

HCCC No. 42 of 2004)

JUDGMENT OF THE COURT

1. The appellant filed High Court Civil Case No. 42 of 2004 at Embu against the respondent. The plaint and other pleadings were filed by the appellant in person. Subsequently, the appellant instructed an advocate by the name of Mr. Njue Njeru to conduct the proceedings. The advocate conducted the proceedings before the High Court and judgment was delivered. It later turned out that Mr. Njue Njeru had been struck off the Roll of Advocates and did not have a practicing certificate and was thus an unqualified person under the provisions of section 9 of the Advocates Act, Cap 16 of the Laws of Kenya.
2. When this fact came to light, an application was made to review the judgment. The application was premised on the ground that there was an apparent error on the face of the record. The error cited was that the appellant's case was conducted by an advocate who had no current practicing certificate. The learned Judge on hearing the application pronounced herself as follows:

“The law is clear; any pleadings drawn or filed by an advocate who has no practicing certificate are a nullity. The point in this case, however, is that the counsel in question was instructed and retained by the applicant herein upto the end. He has now instructed another counsel and moved the court after he lost his case to nullify the said judgment..... I appreciate the law as encapsulated in Section 9 of the Advocates Act and very succinctly expounded in the K.P.L.C – v- MAHINDA decision. I nonetheless note that the same law is unsympathetic to persons who create unlawful

situations and seek to rely on the same to get orders in their favour. The plaintiff/applicant is the one who instructed and maintained on record counsel who was unqualified. He should be left to reap the fruits of his actions. The fact that his counsel was not licensed to practice would have been discovered with a little diligence... If I can mention this, I have also read the judgment in question and my view is that even if this case was reopened, the plaintiff has no snowball's chance in hell to win this case. This court will not allow the applicant to use his own misdeed to subvert justice because that is what he is trying to do. My finding is that his application lacks merit and the same is hereby dismissed with costs to the Respondent.”

3. Aggrieved by the ruling of the learned Judge dismissing the application for review, the appellant has moved to this court and filed the appeal subject of this judgment. Two grounds of appeal were cited:
 - i. ***That the learned Judge erred in law in misapprehending and misinterpreting the holding in the KPLC versus Mahinda {2005} 2E.A. 102 decision to the detriment of the appellant.***
 - ii. ***That the learned Judge erred in law and fact of punishing the appellant for misconduct of unqualified counsel.***
4. At the hearing of the appeal, learned counsel Mr. George Gori appeared for the appellant while the respondent, Misheck Silverius Njiru, was in person.
5. Counsel for the appellant elaborated on the grounds of appeal stating that the learned Judge erred by failing to take into account that the plaint and pleadings in the High Court case was drafted, signed and filed by the appellant in person. That if the advocate who conducted the matter was unqualified, it is the proceedings and not the pleadings that were a nullity. He urged this court to set aside the Ruling by the learned Judge and find that the pleadings as filed before the High Court were not a nullity.
6. The record of appeal shows that Mr. Njeru Njue, the unqualified advocate participated in the proceedings before the High Court the very next day after he had been struck off the Roll of Advocates. He cross-examined witnesses and even filed his submissions and appeared to take the judgment.
7. The respondent, Misheck Silverius Njiru, appearing in person opposed the appeal admitting that the appellant had drawn and signed the plaint and other pleadings in person. However, he submitted that it was the mistake of the appellant to engage an unqualified advocate and he should bear the consequences of his mistake. He submitted that the appellant should exercise his remedy against the unqualified advocate instead of re-opening the High Court case.
8. This being a first appeal we are reminded of our primary role namely, to re-evaluate and re-analyze the facts as they were before the trial judge and then arrive at our own conclusions on the issues in controversy as between the appellant and the respondent and give reasons for the same. See the case of **Jabane v Olenja [1986] KLR 661** at pg 664 it is reported that:

“...this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870.”

9. We have considered the submissions by counsel for the appellant and reply by the respondent. We have also considered and examined the Ruling delivered by the learned Judge set out above and examined the decision in **KPLC versus MAHINDA {2005} 2E.A. 102** and have come to the decision in the **KPLC versus Mahinda** laid emphasis on the time when the act was done. The Court of Appeal stated this in part: **“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.”** Since there is no contrary view we are satisfied that indeed the said advocate had no mandate to conduct the

proceedings on behalf of the appellant. We therefore find that the learned Judge should have struck out proceedings from the date when the unqualified Mr. Njue Njeru came on record. The pleadings filed prior to his coming on record should not have been affected.

10. The present case is distinguishable from facts in the case of **Belgo Holdings Limited – v- Esmail Nairobi Civil Case No. 244/04**. In the Belgo case, the unqualified advocate had filed the pleadings in the suit and the entire proceedings were struck out. The court correctly stated that **“where an advocate failed to take out a practicing certificate, the matter was no longer a mistake on his part but in fact, it deprives him of any capacity to sue as an agent of any litigant.”** In the present case, the pleadings were not filed by an unqualified person but by the appellant in person. We find that the learned Judge erred in failing to appreciate this fact and thus misinterpreted the facts and arrived at a wrong conclusion.

11. We accordingly allow the appeal, set aside the Ruling and orders of the learned Judge made on 28th July, 2009 and substitute it with an order of review that the proceedings in HCCC No. 42 of 2004 from the date when the unqualified Mr. Njue Njeru came on record be and is hereby struck out. The judgment delivered pursuant to the struck out proceedings be and is hereby declared a nullity. Bearing in mind the circumstances that led to this appeal we make no orders as to costs.

Dated and delivered at Nyeri this 4th day of July, 2013

ROSELYN NAMBUYE

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR