



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal (Appli) 60 of 2008

**STANDARD CHARTERED BANK KENYA
LTD.....APPLICANT/RESPONDENT**

AND

MECHANICAL ENGINEERING PLANT LTD

ERNEST MUNGAI KAMAU

**FLORENCE NJERI KAMAU
RESPONDENTS/APPELLANTS**

(Application to strike out an appeal from the ruling of the High

Court of Kenya at Milimani Commercial Courts, Nairobi

(Azangalala, J) and the consequential orders issued in

accordance therewith dated 12th March, 2008

in

H. C. C. No. 92 of 2007 (Milimani Commercial Courts)

RULING OF THE COURT

This application has been brought by the Standard Chartered Bank (“the applicant”) under **Rules 42, 47 and 80** of this Court’s Rules. It seeks an order that the:

“Record of appeal herein lodged in the Registry on 16th April, 2008 as well as the Notice of Motion pending before this Honourable Court in Civil Application No. Nai. 44 of 2008 lodged in the Registry on the 25th March, 2008, be struck out forthwith.”

The grounds set out on the face of the application are as follows:

“1. The firm of Onindo & Associates, Advocates, does not have locus standi to represent the

Appellants as the principal officer therein Mr David O. Onindo was struck off the roll of advocates on the 21st April, 2004 and he has not held a valid practicing certificate since the year 1991. As a result the intended Appellant's record of appeal herein and notice of motion lodged in this Honourable Courts registry, being Civil Application No. Nai. 44 of 2008 and lodged on 25th March, 2008 ought to be struck out.

2. Mr Dominic Onindo who is neither a partner nor an associate in the firm of Onindo & Associates Advocates has purported to draw documents in the said firm's name and to represent himself as engaged as an advocate therein at a time when in fact he was not in possession of a Current Practicing Certificate and, in addition, he is employed as an associate advocate in the firm of Owino K'Ojwando and Company Advocates. As a consequence all documents drawn by him ought to be struck out.

3. Mr Onindo Cheryl who despite being neither a partner nor an associate in the firm of Onindo & Associates Advocates informed this Honourable Court on the 1st April, 2008 that he is a partner therein and as a consequence misled the Court to grant him audience and to make an order irregularly.

4. The Appellants record of appeal lodged on 16th April, 2008 as drawn is fatally defective, is a gross abuse of the process of the Court and the same ought to be struck out forthwith."

The appeal herein arises from the decision of Azangalala, J delivered on 12th March, 2008. The notice of appeal was lodged in this Court on 14th March, 2008 by the appellants' previous advocates, Wekesa & Company. That document is not the subject of challenge in this application.

On 8th April, 2007, Onindo & Associates filed a notice of change of Advocates on behalf of the appellants, and having come on record as such advocates, filed the record of appeal on 16th April, 2008. It is not in dispute that the record of appeal was prepared and certified as correct by Dominic Onindo, purporting to be an "Advocate of the High Court of Kenya practicing as such in the firm of Messrs Onindo & Associates, Advocates". It is also not in dispute that the practicing certificate issued to Dominic Onindo for the year 2008 is dated 18th April, 2008. As we noted before, the memorandum of appeal was lodged in this Court on 16th April, 2008.

The respondents' contention is that Dominic Onindo "did not have in force a practicing certificate" which are the key words in **Section 9** of the **Advocate's Act, Cap 16**. The relevant part of that section states as follows:

"Subject to this Act, no person shall be competent to act as an advocate unless:-

(a)

(b)

(c) he has in force a practicing certificate."

The respondents' submission, in this regard, was based on the fact that although Dominic Onindo applied for a practicing certificate on 10th March, 2008, and paid the required fee on that date, he was issued with the practicing certificate on 18th April, 2009. We are not told why the application for the said certificate was made as late as in March, when the certificate was intended to cover the period beginning January 2008. For example, both the practicing certificates in respect of Onindo Likuyu Cheryl and Onindo M. Dominic, annexed to the supporting affidavit of Cheryl Onindo, show that the certificates are issued on, and applicable from, the 1st day of January in their respective years. Clearly, we must assume that the application in respect of Dominic Onindo was submitted out of time.

This is what is deponed to in Cheryl Onindo's supporting affidavit:

“8. THAT I am informed and which information I verily believe to be true by Dominic Onindo that he has a valid practicing certificate for the year 2008. Annexed marked “COIV” is a copy of the practicing certificate issued to him on 18th April, 2008.

9. THAT I am informed and which information I verily believe to be true by Dominic Onindo that he applied for this year’s practicing certificate on 10th March, 2008, paid the requisite fee and was issued with receipts. Copies of the receipts are annexed to this Affidavit marked “COV”.

10. THAT I am informed and which information I verily believe to be true by Dominic Onindo that, upon payment of the requisite fee Dominic Onindo was told to wait for his practicing certificate which he would receive from the Registrar of the High Court through post within 14 days.

11. THAT the practicing certificate was not issued until 14th April, 2008 more than 1 month after he had applied for it.”

The issue before us is whether a practicing certificate for which the fee has been paid in advance but which has not been issued, for whatever reason, by the Registrar of the High Court can be described as being “in force”.

This Court had the occasion to consider the same issue in **Kenya Power & Lighting Company Ltd vs Chris Mahinda T/a Nyeri Trade Centre, Court of Appeal at Nyeri – Civil Appeal No. 148 of 2004** when it delivered itself as follows:

“The provisions of the legislation and the Court of Appeal Rules (the Rules) that are relevant are the following:-

Rule 22 which provides that “Subject to the provisions of rule 70, (which is irrelevant to the present issue), a party to any proceedings in the Court may appear in person or by advocate.”

Rule 74 (6) which provides that:-

“A Notice of Appeal shall be substantially in the form D in the First Schedule hereto and shall be signed by or on behalf of the appellant”

Form D which includes the following under the space for the date:-

“Signed Appellant _____

Advocate for the appellant.”

Rule 84 (3) and form F in the first schedule have provisions similar in all material effects in relation to a memorandum of appeal.

Rule 97 (1) which provides that “Any party to an appeal who does not intend to appear in person or by advocate at the hearing of the appeal may lodge in the appropriate registry a statement in writing of his arguments”

It is clear from these provisions that, if the party is not appearing in person, he can only act, in relation to an appeal, through an advocate unless the party is a corporation which has complied with rule 22 (2) or is a person under disability where rule 22 (3) has been complied with.

Although it is not expressly stated in the Rules that an advocate representing a party must be an advocate competent to practice under section 9 of the Advocates Act this must clearly be the position.

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 of the Law Society. The practicing certificate for the year 2004 exhibited to the advocate's 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 practising certificate. The precise role of the Law Society in relation to the issue of practising certificates was not explained to us by either party and our attention was not drawn to any regulations dealing with that role. It is probable that it is an administrative arrangement between the Registrar and the Law Society under which the latter collects the practising certificate fees on behalf of the Registrar along with the fees due to the Law Society and the Advocates Benevolent Association for subscriptions etc.

There may also be an administrative arrangement between the Law Society and the Registrar whereby the Registrar does not issue practising certificates to advocates without first obtaining from the Council of the Law Society its approval or comment.

We however cannot descend into the realms of speculation as to the existence or nature of any such arrangements which would not in any event affect the legal position under the Advocates Act. We come to our decision based solely on the undisputed fact that no practising 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 practising 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 practising certificate had been issued when the act was done the advocate was not qualified to do that act at the time he did it."

We say the same in the case before us. The practicing certificate issued to Dominic Onindo for the year 2008 was issued on 18th April, 2008 and was valid and applicable from that date. It did not have, and could not have had, retrospective application. Accordingly, when the memorandum of appeal was lodged in this Court on the 16th April, 2008, the advocate concerned was not qualified to do that act at the time he did it.

Accordingly, we allow the application and hereby order that the record of appeal herein, together with the notice of motion pending before this Court dated 25th March, 2008 be and are hereby struck out. Each party shall bear their own costs.

Dated and delivered at Nairobi this 17th day of July, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR