COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL 119 OF 2002

NATIONAL BANK OF KENYA LTD.....APPELLANT

AND

WILSON NDOLO AYAH.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Milimani)

(Ransley Commissioner of Assize) dated 15th November, 2001

in

HCCC NO 1723 of 1997)

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JUDGMENT OF THE COURT

National Bank of Kenya Limited, the appellant in the appeal before us, was the defendant in Nairobi High Court Civil Case NO. 1723 of 1997, with Hon. Wilson Ndolo Ayah, the respondent herein, as the plaintiff. In that suit the respondent prayed for, among other relief's, a declaration that a charge and Deed of Guarantee, both in favour of the appellant, dated 23rd July 1990 and 17th October, 1990, respectively were null and void *ab initio*, and that the sums of money they purportedly secured were irrecoverable. Both documents were executed by the respondent for the benefit of a company known as Bungu Investments Ltd, and were drawn by one V. Nyamodi, advocate.

At the trial the Court found as a fact that on the respective dates the two documents were drawn V. Nyamodi, did not hold a current Advocates Practicing Certificate, and was therefore not qualified to draw those documents in view of the provisions of **section 34** of the Advocates Act, Cap 16 of the Laws of Kenya. That was the main ground the respondent relied on in seeking a declaration as earlier on stated, among other reliefs. Following the trial court's findings as aforesaid, the court concluded that the instrument of charge and deed of Guarantee aforesaid were null and void *ab initio*, with the result that the money they secured which had grown from the initial figure at Kshs. 10 million to Kshs. 57,308,137/50 was irrecoverable. The court gave judgment in terms and thus provoked this appeal.

There are twenty five grounds of appeal, but a careful reading of them reveals that the appellant's complaints revolve round the trial court's finding that the charge and deed of guarantee were void *ab initio*, and the manner the trial court framed its judgment.

The background facts are largely not in dispute. On 23rd July 1990 the respondent executed a charge

over property known as L.R. No 7336/14 situate in Nairobi, in favour of the appellant to secure repayment by Bungu Investments Limited of Kshs 10 million as:

"**May then or at any time thereafter be due and owing by the Principal to the Bank on the security of the Guarantee together with Commission and other usual bank charges and all other costs, charges and expenses (legal costs being as between advocate and client) as shall or may be paid, incurred or suffered by the Bank in anywise in connection with the assertion or defence of the Bank's rights under the guarantee and this charge and as also for the protection and defence of the mortgaged property and for the demand, realization and recovery of all moneys by the Guarantee and hereby secured and together with interest (as well after as before any judgment) at the rate provided by the guarantee and calculated on daily balances and debited monthly by way of compound interest and the bank need not inform the chargor of any change in the rate of interest so payable."**

As at the date the charge was drawn, there was no deed of guarantee in existence. A deed of guarantee was drawn later on 17th October, 1990 and executed by the respondent on the same day. In that deed the respondent bound himself, upon demand in writing made on him by the bank to pay to the bank:

"**all sums of money which may now be or which hereafter may from time become due or owing to the Bank anywhere from or by the principal either as principal or surety and either solely or jointly with any other person upon current banking account bill of exchange or promissory notes or upon loan or any other account whatsoever or for actual or contigent liability including all usual banking charges."**

The guarantor also bound himself to secure repayment of the sums payable by granting a first legal charge over his immovable property to wit L.R. NO. 7336/14, Nairobi, which property was the subject mater of the charge dated 23rd July 1990. Like that charge, the deed of guarantee was executed to secure repayment by Bungu Investments Limited, of a sum not exceeding Kshs. 10 million, and in addition interest, costs and other expenses.

The charge document is shown at the bottom of the last page thereof, to have been drawn by V.A. Nyamodi & Co, Advocates, Cargen House, 4th Floor, Harambee Avenue, P O Box 51431, Nairobi. The deed of Guarantee, however, does not show who drew the document. The respondent however, testified that it was drawn by V.A. Nyamodi, as she was the person who presented the document to him for signature and that he signed it in her presence. She witnessed his signature. Indeed there is a stamp reading V.A. Nyamodi (Mrs) Advocate, P O Box 51481, Nairobi, affixed against a signature on the part of the document where the attesting person is supposed to sign.

George Kegoro, the then Secretary of the Law Society of Kenya testified on behalf of the respondent that on the material dates the charge and deed of guarantee were drawn and executed V.A Nyamodi, an advocate, did not hold a current practicing certificate. The appellant through its witness, Samuel Maraga Nyachae testified that Mrs. V.A Nyamodi prepared the charge document and, in his view, regarding a document of that nature even him could attest to its signing. The witness also conceded the respondent's contention that the Kshs. 10 million secured by the two documents was initially lent without any security. The witness also suggested that there was money other than the Kshs 10 million which was included in the total sum claimed.

The respondent amended his plaint twice. His amended plaint was dated 20th July 2000. The re-amended plaint bears the date 16th October, 2000. In his judgment, however, Philip J. Ransley, then a Commissioner of Assize, has not made any reference to the re-amended plaint. He started his judgment in the following terms.

"**The plaintiff by his amended plaint dated 17th July 1997 seeks the following relief from the**

defendant."

17th July 1997, was not the date of the amended plaint, but of the plaint. By rules of pleading an amended pleading replaces the existing one and speaks as from the commencement of the action. In the case of **Eastern Radio v. Patel [1962] EA 818**, Gould J.A quoted with approval the words of Collins MR. in **Sneade v Wotherton Barytes** and **Lead Mining Company [1904] 1 KB 295,** as material, as follows:

"**It appears to me that the writ as amended becomes for this purpose the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum... upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed."**

The reference to the amended plaint by the Commissioner of Assize, is the basis of one of the appellant's grounds of appeal, that there were serious procedural irregularities in the writing of the judgment which adversely affected the appellant's case.

The respondent in his amended plaint introduced the issue concerning the validity of both the charge and deed of guarantee on account of those documents having been prepared in contravention of the provisions of **section 34(1)** of the Advocates Act, Cap 16 Laws of Kenya. It was in the amended plaint that the respondent prayed, on the main, for a declaration that the two documents were null and void *ab initio.* The re-amended plaint in effect corrected the provision of the law which had been breached. The amended plaint indicated that the two documents had been prepared in contravention of **S. 34(1)** of the Law Society Act Cap 18 Laws of Kenya, instead of the Advocates Act. In view of that, we see no prejudice which was caused by the trial court referring to the amended plaint instead of the re-amended plaint.

The other issue raised, with regard to the writing of judgment relates to the failure of the trial court to deal with the appellant's re-amended written statement of defence and counterclaim.

In its counterclaim the appellant prayed for judgment for the principal sum of Kshs. 10 million Bungu Investments Ltd had allegedly borrowed, together with interest and other charges in all, totaling Kshs. 57,308,137.50. Its case as pleaded and supported by oral testimony of its witness and supporting documents was that the respondent personally admitted he negotiated a repayment arrangement on behalf of Bungu Investments Ltd, and at some stage, admitted the money was owing. It is true the learned Commissioner of Assize did not consider that evidence. His view, upon a finding that the charge and deed of guarantee had been prepared in contravention of **S. 34(1),** aforesaid, was that those documents were not enforceable. Having come to that conclusion, there was no necessity of dealing with the counter-claim or the defence the appellant had to the claim. The question then which immediately presents itself is whether the trial court was right in holding that the charge and deed of guarantee were invalid and therefore unenforceable.

Section 34(1) of the Advocates Act, as material provides thus:-

"**34 (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument.**

(a).....

(b).....

(c).....

(d).....

(e) For which a fee is prescribed by any order made by the Chief Justice under Section 44; or

(f).....

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."

It was not in dispute that Mrs. V Nyamondi did not hold a practicing certificate as at the date she drew the two documents. She was qualified as an advocate having successfully gone through law School. However, qualifying as an advocate is quite different from qualifying to practice as an advocate. There are legal sanctions prescribed for acting as an advocate when one does not hold a current practicing certificate. That may be so. However, it's the effect of the failure to obtain a current practicing certificate on the validity of the document drawn by the advocate concerned which is in issue. The answer to this issue depends on the purpose of **section 34** of the Advocates Act. Mr Ojiambo for the appellant submitted before us that **Section 34** is intended to protect the public from unqualified persons but not to punish a person who unwittingly goes to those unqualified people for legal services. He cited the case of **Ombogo v Standard Chartered Bank of Kenya Ltd. [2000] 2 EA 481.** In that case this Court, differently constituted, held that the Advocates Act is geared to ensuring proper conduct on the part of practicing advocates. It does not deal with the issue we posed earlier. And in **Shaw v Groom [1970] 2 B (C.A)** the Court of Appeal in England held as per head note (2) that:-

"**.....where an illegality was committed in the course of performing a legal contract, the test as to the enforceability of the contract was whether on a true consideration of the relevant legislation as a whole Parliament had intended to preclude the plaintiff from enforcing the contract"**

The point Mr Ojiambo was urging by citing the two authorities above, among others, were that Mrs. Nyamodi's failure to take a practicing certificate was not a matter which went to the legality of the document she prepared. It only relates to public policy which emphasizes the need for people who deal with the public to be appropriately qualified before they can offer services at a fee. Mr Ojiambo emphasized that one does not need to be an advocate to draw a charge or an instrument of guarantee. There is nothing in the law which makes a charge or instrument of guarantee illegal merely for not being drawn by an advocate holding a current practicing certificate.

Whether or not the instrument of charge and instrument of guarantee should be declared invalid *ab initio* for having been drawn by an unqualified advocate is a conundrum. Courts in this country are not in agreement on the effect absence of a current practicing certificate will have on the validity of documents drawn by such an advocate. **Section 34** of the Advocates Act, which we reproduced earlier makes it an offence for an advocate not holding a current practicing certificate preparing or drawing any documents for a client for a fee. Neither the Advocates Act nor any other written law makes provision with regard to the validity or otherwise of such documents. The Stamp Duty Act, Cap 480 Laws of Kenya, unlike the Advocates Act, makes provision, in **section 19,** making an unstamped document inadmissible in evidence. The Legislature, we think, not only made the document unregistrable but also made the document invalid for any other purpose before stamping.

We earlier set out Mr Ojiambo's submission on the object of section 34 of the Advocates Act as also other provisions of the Act. This Court in **Ombogo v Standard Chartered Bank of Kenya Ltd** (supra) held that the Advocates Act is geared to ensuring the proper conduct on the part of practicing advocates. However, in **Geoffrey Orao Obura v Koome [2001] KLR 109** this Court in effect went further and held that a memorandum of appeal signed and filed by an advocate who did not hold a current practicing certificate was incompetent arguing that the advocate was not entitled to sign and file that document. In a short judgment the Court, as material, rendered itself as follows:-

"**The contention on behalf of the applicant appears to us to be well founded. However, Mr. K'Owade for the respondent, submitted that section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common**

law of England. It is said that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example for his not having a proper practicing certificate in force. With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the Advocates Act and not the Common Law in England. The provisions of section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this Court is to be exercised in conformity with the Constitution and subject thereto, all other written laws."

Section 9 makes provision for qualifications for practicing as an advocate, and the qualifications include having in force a current practicing certificate.

In **Kajwang' v Law Society of Kenya [2002] 1 KLR 846**, the High Court (Amin & Mulwa JJ) did not follow the decision in **Obura v Koome** above. Instead they adopted the minority view in the Ugandan case of **Huq v Islamic University in Uganda [1995-98] EA 117**. Tsekooko JSC, as material, rendered himself as follows:-

"**The provisions of the Advocates Act did not render invalid pleadings drawn or prepared by an advocate who did not have a valid practicing certificate. Deeming such pleadings or documents to be illegal would amount to a denial of justice to an innocent litigant who innocently engaged**

the services of such an advocate."

That court was dealing with the provisions of ***section 14 (1)*** of the Advocates Act of Uganda, which as material, provides as follows:

"**14 (1) Any Advocate not in possession of a valid practicing certificate or whose practicing certificate has been suspended or cancelled who practices as an advocate shall be guilty of an offence."**

So, in effect, **section 14 (1*),*** above, is the same as our **section 34** of the Advocates Act. The majority decision in the Ugandan case, above, was to the same effect as this Court's decision in **Obura v. Koome**, and **Samaki v. Samaki Civil Application No. Nai. 39 of 1996 Wambuzi**, C.J, in the above Ugandan case was categorical. He said:-

"**Any documents prepared or filed by such an advocate were invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities."**

There are several other High Court decisions on this issue, some which follow **Obura v. Koome**, and some which adopt the dissenting views in the Ugandan Case. The latter decisions appear to us to be departing from the doctrine of precedent, as the High Court in this country is bound by decisions of the Court of Appeal. It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to.

If for any reason a Judge of the High Court does not agree with any particular decision of this Court, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter.

It is also important to consider the English position. The position at common law which was rejected by this Court in **Obura v. Koome**, is succinctly stated in **Spirling v. Breneton [1866] LR 2 Eq. 64** by Sir W. Pagewood V.C. He penned as follows:

"**The cases at common law seems to show that although great difficulties are thrown in the way of his recovery of his costs a solicitor who acts for a client without being duly qualified, the proceedings themselves are not void. It would be most mischievous indeed, if persons without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their solicitor. As against third parties the acts of such a person**

acting as a solicitor are valid and binding upon the client on whose behalf they are done. A client who might ascertain by inquiry that his solicitor was on the roll would have no means of finding out if his certificate was taken out and stamped at the proper time. I do not, therefore, think myself justified in interfering because, at the time when the appearance was entered, the solicitor had no certificate .... I shall be injuring both the plaintiffs and defendants if I were to hold that the absence of a certificate has the effect of invalidating all proceedings taken in the suit."

A fine of Kshs.50,000 is provided under **section 85** of the Advocates Act for acting as an advocate while not holding a practicing certificate. The advocate is also liable to disciplinary proceedings. Besides, any money received by an unqualified person in contravention of **section 34** of the Advocates Act is recoverable summarily by the person by whom the same was paid, as a civil debt. A fine of Khs.50,000 may not be deterrent enough as in some cases advocates get a fee which may run into millions of shillings particularly those who, like V. Nyamodi who are on a retainer.

Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by the unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The gravamen of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him. There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi illiterate population. There is a need to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interests of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law.

Besides, the Law Society of this country publishes annually, a list of advocates who hold a practicing certificate, for general information. This is a fact we take judicial notice of as courts are also provided with such a list for purposes of denying audience to advocates who do not appear on the list. For that reason the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates Act itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered, although in our view provisions similar to ***section 19*** of the Stamp Duty Act, should have been included in the Advocates Act to remove any doubt as to the validity of documents drawn by unqualified advocates.

It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality.

A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act. For that reason alone the charge and instrument of guarantee in this matter are invalid, and we so hold.

Having come to that decision we find no necessity of dealing with the other grounds of appeal, more so because they revolve round the issue we have just dealt with. That being our view of the mater we hold that this appeal lacks merit and it is accordingly dismissed. Considering the facts and circumstances of this case, we are disinclined to make any order on costs.

Dated and delivered at Nairobi this 4th day of December, 2009.

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR