



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Lakha & O’Kubasu JJ A)

CIVIL APPEAL NO 146 OF 2000

GEOFFREY ORAO-OBURA APPELLANT

VERSUS

MARTHA KARAMBU KOOME RESPONDENT

(Appeal from the Judgment and Order of the High Court at Nairobi

(Justice Ole Keiwua) dated 30th September 1998 in HCCC No 473

of 1998 (OS))

JUDGMENT

This is an application by the plaintiff by way of a Notice of Motion dated and filed on 26 February, 2001 whereby the plaintiff seeks to have the appeal filed by the defendant from the judgment of the superior court (Ole Keiwua J) given on 30 September, 1998, struck out. It is founded on the ground that the appeal is incompetent having been filed by an unqualified person. The appeal turns on the correct interpretation and application of section 9 of the Advocates Act. Section 9 of the Act (as amended) provides:-

“Subject to this 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 practising certificate and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).”

It is not in dispute that one Anthony Khamati who is the advocate on record for the appellant did not hold a practising certificate in the year 2000 in breach of section 9 sub-section (c) of the Advocates Act. The appeal herein was filed on 21 June, 2000 and the memorandum of appeal was signed by the said Anthony Khamati, advocate.

That 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 practising 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 3(1) of the Judicature Act (Cap 8) reads:

3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

(a) the Constitution;

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary

(2)”.

In these circumstances, the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court. Accordingly, we strike out the appeal with costs thereof to the applicant including the costs of the Notice of Motion dated 26 February, 2001.

Dated and Delivered at Nairobi this 8th day of June, 2001

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL