



**Tome v Bungoma County Assemby Service Board (CASB) & 2 others  
(Cause E011 of 2022) [2023] KEELRC 1106 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1106 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E011 OF 2022**

**JW KELI, J  
MAY 4, 2023**

**BETWEEN**

**FRANCIS SIMIYU TOME ..... CLAIMANT**

**AND**

**BUNGOMA COUNTY ASSEMBLY SERVICE BOARD (CASB) . 1<sup>ST</sup> RESPONDENT  
THE SPEAKER /CHAIRMAN OF BUNGOMA CASB ..... 2<sup>ND</sup> RESPONDENT  
THE SECRETARY OF BUNGOMA CASB ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The claimant /applicant raised objection to the appearance of the Legal Counsel, Mr. Musumba for the 1st Respondent alongside the law firm of J.O Makali when the suit came up for hearing on the 18th April 2023. Mr. Musumba the legal counsel of the 1st respondent was appearing alongside Ms. Masengeli instructed by J.O Makali as per notice of appointment of even date. The claimant made an oral application challenging the appearance of Mr. Musumba in the proceedings on the ground that he did not hold a current practicing certificate and had not applied for the same contrary to the provisions of section 22 and 23 of the Advocates Act and that Mr Musumba could not as legal counsel appear alongside the law firm. The claimant consequently prayed for the proceedings of 30th January 2023 be expunged from the court's record premised on the foregoing. That the notice of appointment of Mr. Musumba to act alongside the law firm of J.O Makali dated 18th April 2023 be declared null and void.
2. In his oral response, Mr. Musumba stated he had always taken out his annual practising certificate while in private practice. That having joined the public service as legal counsel he was exempt and at same time indicated the county had no exchequer to pay for the practicing certificate.
3. The court directed the issue be canvassed further by way of written submissions. The parties complied. The claimant's submissions dated 26th April 2023 were received in court on the 26th April 2023. The



claimant was in person. The respondent's legal counsel written submissions were dated 18th April 2023 and received in court on even date

## Decision

4. The claimant addressed issues for determination being same as his application. The respondents too. The court opines the issues for determination in the oral application are as follows:-
  - a. Whether or not Mr. Musumba was exempt as county legal counsel from taking out the annual practice certificate?
  - b. What is the fate of proceedings where Mr. Musumba appeared as counsel if not exempt?

### **Whether or not the Mr. Musumba was exempt as County Legal Counsel from taking out the annual practice certificate?**

5. Mr. Musumba did not dispute that he had not taken out practising certificate for 2023 under the Advocates Act. The claimant submits that the legal counsel for the county assembly is not exempt from taking out the practising certificates as stated under the section 10 of the Advocates Act which provides for category of persons entitled to act as advocates without compliance as follows:- ‘10 Certain officers entitled to act as advocates. Each of the following persons shall, if he holds one of the qualifications specified in paragraphs (a), (b) and (c) of section 13(1) at the time of his appointment to his office, be entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person, that is to say—
  - (a) an officer in the office of the Attorney-General or the office of the Director of Public Prosecutions;
  - (b) the Principal Registrar of Titles and any Registrar of Titles; or
  - (c) any person holding office in a local authority established under the *Local Government Act*, (Cap. 265).
  - (d) such other person, being a public officer or an officer in a public corporation, as the Attorney-General may, by notice in the Gazette, specify:

Provided that the officers referred to in this section shall not be entitled to charge fees for so acting.”

6. The Claimant submits that Mr. Musumba being a County Assembly legal counsel does not fall under the local authorities as county governments are functionally independent. That County Assemblies are replica of National Assemblies and their counsel take out practice certificates That the County Attorney Act 2020 does not exempt legal counsel from taking out their annual practice certificates. The claimant cited several persons serving in the county who took out their practicing certificates. Further the claimant submits that since persons under section 10 of the Advocates Act are not allowed to charge fees, the appointment of Mr. Musumba to act along side the law firm of J.O. Makali Advocates creates a problem on the issue of costs hence the notice of appointment should be nullified.
7. The claimant submits that though the ratio decidendi in *Regina Mweru Njuku v Jane Wandia & 2 others* (e KLR)2016 was that persons employed in county executive/ County assemblies are covered under section 10( c) of the Advocates Act the transition period of local authorities lapsed in 2017 hence section 10 (c) of the Advocates Act which applies to defunct local authorities was inapplicable under the new constitution. That Mr. Musumba should be estopped from the proceedings and relied on the Supreme Court decision in *National Bank of Kenya Limited v Anaj Warehousing Limited* (2021)e



KLR where the court addressed applicability of section 34(1) of the Advocates Act :- ..57....This Section prohibits unqualified persons from preparing certain documents. It is directed at “unqualified persons”. It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature.” Further in *Daniel Ogera Obonyo v Edwin Akach Okinda*(2017) e KLR where Justice J.A Makau found the respondent’s counsel was unqualified person hence barred by mandatory provisions of section 34 of the Advocates Act. The claimant relied on other related authorities which the court found were of same effect as the ones cited above.

## The Response

8. The respondents oppose the application relying on the provisions of section 10 (c) of the Advocates Act(*supra*) and section 33 of the sixth schedule to the *Constitution* (2010) which provides;- ‘An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.’ The respondents submit that the County Assembly of Bungoma is a creature of the constitution and legal successor of the defunct municipal councils and relied on the decision in *Regina Mweru Njuku v Jane Wandia & 2 others* e KLR (2016) where justice Mary Gitubi held: ‘The effective of that provision is to establish that Mr. Kihanya, being a person holding office in the Nairobi City County formerly the City Council of Nairobi, does indeed fall within the category of persons covered by section 10(c) of the Advocates Act and therefore enjoys the exemption from the requirement to take out a practicing certificate under the said Act. That being my finding, the two documents filed by Mr. Kihanya are properly on the court record and will not be expunged.’
9. The respondents submits that the non-compliance of advocate of not taking out practice certificate is a separate issue which should be dealt with under disciplinary proceedings against the said advocate and does not go to the substance of the proceedings by the advocate and relied on the decision in *Kyalo Komu v Felix Maliti Mulingata* (2021)e KLR

## Decision of the Court

10. The Advocates Act requires advocates to take out annual practice certificates. Section 9 provides:- ‘Qualifications for practising as an advocate 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;
11. Section 10 of the Advocates Act provides:- ‘Certain officers entitled to act as advocates.Each of the following persons shall, if he holds one of the qualifications specified in paragraphs (a), (b) and (c) of section 13(1) at the time of his appointment to his office, be entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person, that is to say—
  - (c) any person holding office in a local authority established under the Local Government Act,



- (d) such other person, being a public officer or an officer in a public corporation, as the Attorney-General may, by notice in the Gazette, specify:

Provided that the officers referred to in this section shall not be entitled to charge fees for so acting”.

12. Section 34 of the Advocates Act provides:-

‘34. Unqualified person not to prepare certain documents or instruments

- (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—
- (a) relating to the 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 the purpose of filing or opposing a grant of probate or letters of administration; or
  - (e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or
  - (f) relating to any other legal proceedings;

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:

Provided that this subsection shall not apply to—

- (i) any public officer drawing or preparing documents or instruments in the course of his duty; or
- (ii) any person employed by an advocate and acting within the scope of that employment; or
- (iii) any person employed merely to engross any document or instrument.”

13. It was the claimant’s submissions that section 10( c) of the Advocates Act does not cover Mr. Musumba as legal counsel of the Bungoma County Assembly as the transitional clauses under the Constitution (2010) expired in 2017. The court finds that the interpretation given to the transitional clauses by the claimant was not necessary valid for the following reason:- Section 7 of the transitional provisions of the Constitution of 2010 states:- . “Existing laws (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution’ And section 8 reads:- ‘Local authorities All local authorities established under the Local Government Act (Cap. 265) existing immediately before the effective date shall continue to exist subject to any law that might be enacted.” The date of 2017 was thus not applicable omnibus.



14. The court for that reason was persuaded by the authority in *Regina Mweru Njuku v Jane Wandia & 2 others* (e KLR)2016 where justice Mary Gitubi held: ‘On that point, I seek to rely on section 33 of the Sixth Schedule to the *Constitution* of Kenya 2010 which provides as follows:

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name. The effective of that provision is to establish that Mr. Kihanya, being a person holding office in the Nairobi City County formerly the City Council of Nairobi, does indeed fall within the category of persons covered by section 10(c) of the Advocates Act and therefore enjoys the exemption from the requirement to take out a practicing certificate under the said Act. That being my finding, the two documents filed by Mr. Kihanya are properly on the court record and will not be expunged.”

15. The court having upheld the decision of court of equal status in *Regina Mweru Njuku v Jane Wandia & 2 others* (e KLR)2016, which is law unless set aside by superior court, to effect that legal counsel employed in county assemblies are covered under section 10(c ) of the Advocates Act hence need not take out practice certificates, the objection to appearance of Mr. Musumba in the proceedings is dismissed.
16. On whether the proceedings where Mr. Musumba appeared ought to be struck out the respondent in objection to that application relied on the decision in *Kyalo Komu v Felix Maliti Mulingata* [2021] eKLR where Justice Limo made a finding on the issue as follows:- ‘ 23. Furthermore, and more importantly is that, there at the present there is a paradigm shift in the legal position in regard to documents or pleadings drawn by an advocate who may have drawn documents/pleadings without renewing his/her Practicing Certificate (P.C.). Failure by an advocate to take out a Practicing Certificate (P.C), cannot invalidate the proceedings of a court. In the case of *National Bank of Kenya Limited –versus- Anaj Warehousing Limited* 2015 eKLR, the Supreme Court of Kenya put the issue to rest when it made the following observations;

“The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a Practicing Certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practicing certificate.

One of the basis of the Appellate Court’s decision was founded upon a hypothesis which, in our opinion, should not be the criterion for resolving the question as to the rights of the parties: that since the Advocates Act provides for the recovery of fees by a client whose advocate has not taken out a practicing certificate, there would be no harm if the charge documents are annulled. For even if the appellant were to recover any fees paid, it stood to be damnified by the non-repayment of the loan itself.

The Court’s obligation coincides with the constitutional guarantee of access to justice and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in



law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution:

“justice shall be administered without undue regard to procedural technicalities”.

To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person’s property of any description), 20 (3) (a) and (b) (interpretation that favors the development and enforcement of fundamental rights and freedoms) and 10 of the same.

The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

While securing the rights of the client whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.

We commend this Judgment to the attention of Parliament, the Law Society and the Attorney General so that appropriate legislative action may be taken to address the gaps and inconsistencies now apparent in the Advocates Act as highlighted in paragraphs 48, 49, 50, 51, 52, 53 and 54 herein.”

24. In the light of the above decision, Parliament vide Legal Notice number 11 of 2017, took the advisory seriously and amended the Advocates Act by introduction of Section 34B which provides as follows: -

- (a) “A practicing advocate who is not exempt under Section 10 and who fails to take out a practicing certificate in any year, commits an act of professional misconduct.
- (b) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate
- (c) For the purpose of this section, ‘legal document’ includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.”

17. The court upholds the decision in Kyalo Komu v Felix Maliti Mulingata [2021] eKLR by Justice Limo (*supra*) and finds that under section 34 B of the Advocates Act the obligations of advocate to client are not affected by their failure to take out a practising certificate and it would be injustice to strike out documents or proceedings by unqualified advocate. In the instance case the court found Mr. Musumba, Bungoma County Assembly Legal Counsel, was covered under section 10 ( c) of the Advocates Act hence he was exempt from taking out the annual practice certificate. The issue of acting



alongside the lawfirm of J.O. Makali and issue of costs is covered under section 10 of the Advocates Act proviso to wit: ‘Provided that the officers referred to in this section shall not be entitled to charge fees for so acting.’ The county Attorney Act is explicit:- ‘section 11. Private practice prohibited The County Attorney, the County Solicitor and County Legal Counsel shall not engage in any other gainful employment that may result in a conflict of interest.’”

18. In the end the court finds no prejudice will be suffered at all by the claimant for the appearance of Mr. Musumba Legal Counsel alongside the lawfirm of J.O. Makali instructed by the respondents. The oral application by the claimant is dismissed on all grounds. No order as to costs.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF MAY 2023.**

**JEMIMAH KELI**

**JUDGE**

IN THE PRESENCE OF:-

Court Assistant: Lucy Maches

Claimants : Tome

Respondent: Ms. Masekeli Advocate

**Hearing Directions Order**

1. The court having duly admitted all filed documents by the parties on the 18th April 2023 considers all preliminary issues addressed and pleadings closed. The court orders the hearing of the suit to proceed without any further delay. Hearing on the 21<sup>st</sup> June 2023.

**It is so ordered.**

**JEMIMAH KELI**

**JUDGE**

IN THE PRESENCE OF:-

Court Assistant: Lucy Macheso

Claimants : Tome

Respondent: Ms. Masekeli Advocate

