



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 536 OF 2016

DAVID MAKAUCLAIMANT

VERSUS

DEVSON INDUSTRIES LIMITEDRESPONDENT

R U L I N G

INTRODUCTION

1. The claimant brought this suit on 8/7/2016 through the law firm of John Magiya & co. Advocates claiming terminal dues plus compensation for unfair termination of his employment contract by the respondent. The respondent filed her defence on 26/7/2016 denying liability to pay the damages sought by the claimant. Subsequently, the respondent filed the notice of Motion dated 24/1/2017 seeking for orders to dismiss the suit with costs on grounds that Mr. John Magiya Advocate, who signed the claimant's statement of claim had no valid practicing certificate as at July 2016.

2. The claimant opposed the motion through the replying affidavit sworn by his counsel Mr. John Magiya on 12/5/2017. According to the counsel he has since his admission to the bar been taking out practicing certificate without fail. He annexed copy of his practicing certificate as Mi dated 28/9/2016 and contended that the grounds advanced to challenge the suit are not sufficient or reasonable to warrant the orders sought.

RESPONDENT'S SUBMISSIONS

3. The respondent has submitted that under Section 9(a) of the Advocates Act, the claimant's counsel was not qualified to act as an advocate when he failed the suit herein on 6/7/2016 due to lack of a practicing certificate. That under Section 24 of the Act a practicing certificate takes effect from the date when it is issued. Therefore she urged that, although the counsel issued with practicing certificate on 28/9/2016, the said certificate could not have retrospective effect and could not validify what was an illegal action.

4. She relied on *Abdulaziz juma VS Niklisuhi Inr & 2 Others (2013) eKLR*, *Raphael Kavai Maitha & 3 Others Vs Jay Syndicate Ltd & 3 others [2004] eKLR* and *Ibrul Hassan Rizvi Vs Godhansass Bhalessa & Another [2005] eKLR*, where the court struck out incompetent pleadings filed by Advocates without valid practicing certificate. She concluded by contending that Article 159 of the constitution cannot absolve counsel from following the advocates Act and that allowing such documents to remain on record would amount to condoning contempt of court.

CLAIMANT'S CASE

5. The claimant submitted that under Article 159 of the constitution of Kenya, justice ought to be administered without undue regard to procedural technicalities. He relied on the supreme court decision in National Bank of Kenya limited Vs Anay Warehousing Limited [2015] eKLR to urge that, the proper interpretation of Section 9 read with Section 34(1) of the Act the pleadings under attach herein were never rendered invalid by dint it having been prepared by an advocate who at the time had no practicing certificate. He therefore submitted that the application is an afterthought and a delaying tactic by the defence. He further urged the court to uphold the substantive justice contemplated by Article 159 of the constitution as opposed to legal formalities and sustain the suit because it belongs to the party and not the advocate.

ANALYSIS AND DETERMINATION

6. It is common knowledge that as at 6/7/2016 when Mr. John Magaya advocate drew and signed the claimant's memorandum of claim and, 8/7/2016 when he filed it, had no practicing certificate in force. It is also obvious from the record that the advocate was issued with practicing certificate on 28/9/2016. The issue for determination is whether lack of a practicing certificate in force rendered the memorandum of claim incompetent and therefore warranting dismissal *in limine*

Incompetent pleadings

6. I am bound by the Supreme Court decision in National Bank of Kenya Limited case, *supra* where the court held as follows:

“The facts of this case, and its clear merits lead us to a finding and the proper direction in law that, no instrument 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-advocate, or advocates who has been struck of the roll of advocates, shall be void for all purposes”.

7. Although the foregoing Supreme Court decision was in respect of conveyance documents, it is my considered opinion that the same interpretation of Section 9 and 34 of the Act should be the same with respect to pleadings drawn and filed by advocates without possession of current practicing certificate. The only reason for the courts to uphold court documents drawn and filed by advocates without current practicing certificate is to protect innocent litigants who have no notice of the lack of current practicing certificate by their counsel. This seems to be a departure by the Supreme Court from the earlier decisions by the Court of Appeal which seemed bent more to protecting the provisions of the stature that the substantive justice to the litigants. Consequently, I find that the submissions by the respondent are subject to and overridden the Supreme Court decision in the National Bank of Kenya case, *supra* and therefore no longer relevant.

8. Where as it is, in my view, contempt of court for counsel without a current practicing certificate to act as an advocate before the court, substantive justice as contemplated by Article 159 of the constitution requires that an innocent litigant should be excused from illegal acts and omissions of his counsel which he has not condoned. The court should therefore, always shield itself behind Article 159 of the constitution and as much as possible encourage access to justice by sustaining proceedings and rather than sending away litigants from the seat of justice on procedural legal technicalities advocated by the doyens of sharp practice. However, the advocate should who deliberately draws and files documents in court proceedings without current practicing certificate should suffer penalty personally for contempt of court.

DISPOSITION

9. For the reasons that Advocates lack of current practicing certificate does not render invalid pleadings drawn and filed by an advocate, I dismiss the respondent's notice of Motion dated 24/1/2017. Costs in the cause.

Dated, signed and delivered this 3rd November 2017

O N. Makau

Judge