



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
INDUSTRIAL CAUSE NO. 269 OF 2014

ANTHONY SIYUYU KISIANG'ANI.....1ST CLAIMANT

DUNCAN WAFULA WEKESA.....2ND CLAIMANT

VERSUS

NZOIA OUTGROWERS CO. LTD.....1ST RESPONDENT

JOASH WAMANG'OLI.....2ND RESPONDENT

ROBERT KIKAI WAMWANJA.....3RD RESPONDENT

RULING

Before court is an application by way of Notice of Motion dated 10th December, 2014 and also another dated 11th December, 2014 by the 1st Respondent (now Applicant) and Claimants/Applicants respectively and set out as herein below.

The application dated 10th December, 2014 and brought in by way of a certificate of urgency seeks the following orders of court.

1. **That** service of this application be dispensed with in the 1st instance.
2. **That** the 1st Respondent company Nzoia Out growers Co.Ltd be granted leave to commence contempt of court proceedings against;
 - a. OMONDI EDRIS NICHOLAS advocate,
 - b. KOJO VICTOR BRIAN OWINO, advocate and
 - c. MUNUANGO MOSES OMONDI, advocate.
3. **That** an order be made for stay of execution of the decree herein and all consequential orders pending hearing of this application inter-parties
4. **That** the decree and all consequential orders herein be set aside.
5. **That** the contempt of court proceedings herein against FREDRICK NDALA, ALBERT MACHO

and PHILEMONAH BITONYAKE, the 1st RESPONDENT'S Acting General Manager and Directors respectively and their conviction and sentencing respectively be reviewed and set aside.

6. **That** the memorandum of claim dated 30th September 2014 and the Notice of Motion applications dated 30th September 2014 and 15th October 2014 and 5th November 2014 be struck out, or expunged from the record.

7. **That** the court do make a finding that OMONDI EDRIS NICHOLAS, advocate and KOJO VICTOR BRIAN OWINO, advocate and MUNUANGO MOSES OMONDI advocate are guilty of contempt of court for contravening Sections 31 (1) and 39 of the Advocates Act cap 16 Laws of Kenya.

8. **That** upon grant of prayer 6 above, the court do order that OMONDI EDRIS NICHOLAS advocate and KOJO VICTOR BRIAN OWINO, advocate and MUNUANGO MOSES OMONDI advocate be committed to Civil Jail for a period of six months.

9. Cost of the proceedings herein be provided for. and is grounded as follows;

a). The claimants' advocates had no capacity in law to draw and lodge the memorandum of claim and interlocutory applications on record.

b). Edris & Co.Advocates who purported to file the memorandum of claim and applications on record did so in blatant contravention of provisions of the Advocates Act Cap 16.

c). Omondi Edris Nicholas, advocate t/a Edris & Co.Advocates has not taken out practicing certificate of the year 2014.

d). Kojo Victor Brian Owino, advocate, an associate advocate in the law firm of Otieno Ragot & Co.Advocates acted as an agent of Edris & Co.Advocates whose sole proprietor Omondi Edris Nicholas is unqualified to practice as an advocates in contravention of the Advocates Act cap 16 laws of Kenya.

e). The take over of the matter by M.M. Omondi & Co.Advocates by consent executed and filed in court on 3rd December 2014 is deliberate attempt to the proceedings herein (sic) and the attendant contempt of court committed by the advocates purporting to assist Edris & Co.Advocates is contravene the Advocates Act Cap 16.

f). Advocate of (sic) M.M.Omondi & Co.Advocates is equally guilty of contempt of court for he knowingly accepts to take over the conduct of the matter to cover up the illegalities committed by Omondi Edris Nicholas Advocate and Kojo Victor Brian Owino advocate.

g). The memorandum of claim, and all the application filed herein by Edris & Co.Advocates and the proceedings thereof were incurably defective and bad in laws.

h). The memorandum of claim and the applications filed by Edris & Co.Advocates were incompetent and an abuse of the court process.

i). The consent judgment entered into by the law firm of Edris & Co.Advocates and the 2nd and 3rd respondents as against the 2nd respondent and the resultant decree were fraudulent incompetent, and incurably defective.

j). The contempt of proceedings taken against then Acting General Manager, and two Directors of the 1st Respondent Company were illegal.

k). There is discovery of new and important matter which after the exercise of due diligence was

brought to the attention of the trial judge on 3rd December 2014 to the effect that the pleadings filed by Edris & Co. Advocates and proceedings thereof were in contravention of Section 31 (1) of the Advocates Act, but the same was trivialized:-

The application dated 11th December, 2014 by the applicant comes in as of course and seeks the following orders;

1. *This Honourable Court be pleased to order that the following persons be committed to Civil Jail for a period of six months or any other period as this Honourable Court may deem fit, for contempt of court committed on 6/11/2014:-*

a) *Joseph W. Sichangi, counsel for the 1st Respondent.*

b) *Ricky Jomo Mulama, a Director of the 1st Respondent.*

c) *Christopher Sifuna, a Director of the 1st Respondent.*

d) *Laban Mulei, a Director of the 1st Respondent.*

e) *Electine Wabwile, a Director of the 1st Respondent.*

f) *Macklines Wasike, a Director of the 1st Respondent.*

g) *Albert Macho, a Director of the 1st Respondent.*

h) *Philemona Bitonyake, a Director of the 1st Respondent.*

i) *Fredrick Ndala, the suspended acting General Manager of the 1st Respondent.*

2. *In the alternative to prayer 1 above, the contemnors be fined a sum of Kshs.2,000,000 and in default to serve such term in jail as this Honourable Court shall order.*

3. *This Honourable court do make any other order as it may deem fit and just to grant in the interest of justice and in preserving the dignity and integrity of the law.*

4. *This Honourable Court be pleased to declare that Joseph W. Sichangi and/or the law firm of J.W.Sichangi and Company Advocates is not one of the Advocates in the legal panel of the 1st Respondent and as such cannot competently and legally act for the 1st Respondent in this suit.*

5. *This Honourable Court be pleased to declare that Fredrick Ndala, the suspended acting General Manager of the 1st Respondent is not the secretary of the 1st Respondent and as such cannot validly call for a meeting of the board of directors of the 1st Respondent in accordance with Article 39 (3) of the Articles of Association of the 1st Respondent.*

6. *The costs of this application be granted to the Applicants.*

and is grounded on the following;

a) *THAT on 15th October, 2014 this Honourable Court made an order of temporary injunction barring the Board of Directors of the 1st Respondent from holding any meeting pending hearing and determination of the Applicants' Notice of Motion Application dated 15/10/2014.*

b) *THAT on 6th November, 2014 the said contemnors being directors of the 1st Respondent and*

their counsel Mr. Joseph W. Sichangi illegally convened and attended a meeting of the board of directors of the 1st Respondent against the said order of this Honourable court.

c) THAT the said contemnors should now be punished for contempt of court to uphold the dignity of this Honourable Court and the integrity of the law.

d) THAT advocates of the 1st Respondent can only be appointed through an Annual General Meeting and that Joseph W. Sichangi and/or the law firm of J.W.Sichangi and Company Advocates has never been appointed to join the legal panel of the 1st Respondent and that the said Advocate is not one of the Advocates in the legal panel of the 1st Respondent.

e) THAT Fredrick Ndala is not and/or is not qualified to be the secretary of the 1st Respondent and that he cannot legally call for a meeting of the Directors of the 1st Respondent since a meeting of that nature can only be convened by the secretary of the 1st Respondent on the requisition of two directors.

f) That it is in the interest of justice and fairness that the orders sought herein be granted.

When the matter dated 10th December, 2014 came to court on the following day the court declared it urgent and further issued the following orders;

i.

ii. That this application be served onto the respondents forthwith but not later than the close of the day on 15/12/2014.

iii. That the respondents be and is hereby awarded two days leave to make, file and serve a response to the application to the applicant.

iv. That the application be heard inter partes on 18/12/2014 at 900 hours.

v. That the hearing date and orders of court be served onto the respondents in terms of Order No. (ii) above.

At the hearing of the application on 18th December, 2014, Mr. Owino, counsel holding brief Mr. Omondi, for the 1st and 2nd Claimants and also 1st and 2nd Interested Parties in the original claim *inter alia* sought directions as to the process and way forward bearing in mind that there were these two applications and a preliminary objection filed by the firm of Kraido & Company, Advocates for the contemnors to the application dated 11th December, 2014 whereas there is on record another preliminary objection by the firm of M.M.Omondi raising an objection for one of the contemnors in the application dated 10th December, 2014.

Mr. Sichangi, appearing with Mr. Kraido as aforesaid dismissed this and argued that the matter was crystal clear, these issues arising out of practice in that the claim and all pleadings herein were drawn by an unqualified person thus casting doubt as to the validity of the proceedings. He urged the proceeding of the matter as any opposition to the same was by a beneficiary of the outcome of the same.

The court thereon ruled that the matter should proceed and further that it shall open with the hearing of the preliminary objection by the claimants/respondents.

Mr. Owino, counsel for the claimants/respondent above submitted that his preliminary objection is on the Grounds of Opposition dated 17th December, 2014 as follows;

2. The application is misconceived, premature, bad in law, frivolous, scandalous, vexatious and amounts to an abuse of the court process.

3. *The Applicants did not first seek leave of the court as by law required under Section 5 of the Judicature Act as read together with Rule 81 of the Civil Procedure (Amendment No.2) Rules, 2012 of the Supreme Court of England and are purporting to seek the same through prayer number 2 of the application which is illegal and horrid. This is a back-door approach which must not be condoned.*

His position and submission is that inasmuch as the guiding law on contempt proceedings is Section 5 of the Judicature Act, which empowers the High Court and Court of Appeal to exercise the power of the Supreme Court of England in contempt proceedings, Part 81 of the Civil Procedure Amendment Act however provides that leave of court would not be required in the case of breach of court orders. This was established in the authority of **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, 2014 eKLR.**

It is also his submission that there is no compliance with the law in that no leave has been sought before a judge and also that the other requirement of a day's notice to the Attorney-General has not been had. He lastly argues that the jurisdiction of the court is taken away and prays that this application be struck out.

Mr. Sichangi, appearing for the 1st Respondent in the original claim submitted that he did not object to or oppose the submissions on contempt by Mr. Owino. He, however, countered the same by submitting that the contempt the subject matter of these proceedings arose out of different circumstances and therefore the ouster of an application of Section 5 of the Judicature Act aforesaid. Instead, contempt in the circumstances of this case are a clear dictate of statute by virtue of Sections 31 and 39 of the Advocates Act, Chapter 16, Laws of Kenya which provide as follows;

31. Unqualified person not to act as advocate

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.

Again, Section 39 comes out as hereunder;

39. Advocate not to act as agent for unqualified person

Any advocate who acts as agent in any suit, or in any matter in bankruptcy, for any unqualified person, or permits his name, or that of any firm of which he is a partner, to be made use of in any such suit or matter, upon the account or for the profit of any unqualified person or who does any other act enabling an unqualified person to appear, act or practise in any respect as an advocate in such suit or matter, or who in any way assists any unqualified person in any cause or matter in which he knows that such person is contravening or intends to contravene this Act, shall be guilty of an offence.

Mr. Sichangi, in reliance on the above and also in support of his case further submitted that Section 31 of the Act as above restricts unqualified persons to act as advocates and also prescribes the penalties thereof under Section 31 (2) (b) (c). Further, Section 39 of the Act restrains an advocate to act as an agent for an unqualified person and if at all, such advocate shall be guilty of an offence. In the circumstances of this

case, the original actors and the inheriting counsel are both liable for contempt of court for both acting as advocates while unqualified and also acting as an agent for such unqualified persons. These persons are all guilty of committing and perpetuating contempt of court. In such instances, no leave of court is required to institute contempt of court proceedings as this is provided by substantive law. The preliminary objection is not therefore sustainable and falls short of the requirements expressed in the celebrated authority of **Mukhisa Biscuits Co. Ltd vs. West End Distributors Ltd, (1969) E.A. 696** where the Court of Appeal held as follows;

a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

Again,

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

Mr. Yogo for the 2nd and 3rd Respondents in the claim in his submissions followed the line and reasoning of Mr. Owino. He emphasized the necessity for leave to file contempt proceedings and the fatality of failure to secure the same as in the instant case. He further submitted that the Court of Appeal has held that cases belong to parties and lack of a practising certificate does not necessarily render a matter a nullity. He further submitted that the matter of **Titus Kocheyo** has been overthrown by the Court of Appeal but did not elaborate or cite his authority.

The 1st respondent/applicant in opposition to the preliminary objection sought to rely on the authority of **Mohammed Ashraf Sadique & Harbans Singh Soor vs. Mathew Oseko T/A Oseko & Co. Advocates, Misc. Application No.901, 933, 934, 935, 936, 937 of 2007** where the issue of practising by an unqualified person was dealt with at length.

“It is my view and finding, that apart from the criminal liability arising from the contravention of Sections 31 and 34, there are civil consequences also that do arise. As stated by Wambuzi, CJ. In the case of HUQ V ISLAMIC UNIVERSITY OF UGANDA (1995)2 E.A 117 at page 118:

Where an advocate practiced without a valid practicing certificate in any year, he committed an offence and was liable to both criminal and disciplinary proceedings. 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.”

The learned judge in conclusion found and declared the pleadings filed by the firm of Kocewe & Amadi Advocates in contravention of the Advocates Act were therefore invalid, incompetent and of no legal effect. He, in effect found and ordered that the advocates were in contempt of court and imposed various penalties on them same.

The Defendants further sought to rely on the authority of **Chewaik Management Ltd vs. Fund Board of Trustees & Another, HCCC No.102 of 2012** which authority went out of its way to thrash the subject matter of pleadings drawn and filed by unqualified persons. The learned judge relied on the authority of Sections 9,22,31 and 34 of the Advocates Act as follows;

9. 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;

(d) deleted by Act No. 9 of 2000, s. 57,

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)

Section 22 is as follows;

22. Application for and issue of practising certificate

(1) Application for a practising certificate shall be made to the Registrar—

(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate;

(b) by producing evidence satisfactory to the Registrar that the applicant has paid to the Society the fee prescribed for a practising certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and

(c) by producing a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate.

(2) Subject to section 31, the Registrar, if satisfied that the name of the applicant is on the Roll and that he is not for the time being suspended from practice, shall within fourteen days of the receipt by him of the application issue to the applicant a practising certificate.

(3) The Registrar shall cause one copy of each declaration delivered to him under this section to be filed in a register kept for that purpose, and any person may inspect the register during office hours without payment.

31. Unqualified person not to act as advocate

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.

Further Section 34 also comes out to compliment the impact of action and practice by unqualified persons;

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

Odunga, J. in developing a finding against legal practice by unqualified persons elaborately came out as follows;

*“In my view therefore, documents signed by an unqualified person are in the same position as documents signed by a layman, in so far as their legality is concerned. Since the said documents are executed by a person whose signature is not legally recognised, they are, in my view, in the same position as unsigned documents. What then are the consequences of failure by a person to sign documents especially the plaint? In **Regina Kavenya Mutuku & 3 Others vs. United Insurance Co. Limited Nairobi (Milimani) HCCC No.1994 of 2000 (2002) 1KLR 250** Ringera, J (as the then was) held that:*

*“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity.” See also Onyango Otieno, J's decisions (as he then was) in **National Industry Credit Bank Limited vs. Albert Gacheru Kiarie Nairobi (Milimani) HCCC No.1863 of 1999** and **Jane W. Kamau vs. Kenya Ports Authority Nairobi (Milimani) HCCC No.1575 of 1999**.*

*In **Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No.13 of 2001** consolidated with **Vipin Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No.19 of 2001 (2001) KLR 190** the Court of Appeal was of the following view:*

“Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction... The failure to sign the service copy of the statement of claim if the original is signed is not fatal.. The position in England is that a pleading must be signed either by counsel for the party in person or the party's recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law”.

From the foregoing, it is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently such pleadings are rendered incompetent and are for striking out.

*Similar, fate has been held by the Courts in Kenya to apply cases where pleadings are signed by an unqualified person. In **Kenya Power & Lighting Company vs. Chris Mahinda T/A Nyeri Trade Centre Civil Appeal (Application) No. Nai. 148 of 2004**, the Court of Appeal expressed itself as follows:*

“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 the Law Society. The practicing Certificate for the year 2004 exhibited to the advocates 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 practicing certificate...We come to our decision based solely on the undisputed fact that no practicing 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 practicing 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 practicing certificate had been issued when the act was done, the advocate was not qualified to do that act at the time he did it.”

This position was taken in the case of **Lucas Njuguna S. Karobia vs. Consolidated Bank of Kenya Ltd HCCC No.329 of 2005** in which following in the footsteps of **Geoffrey Orao Obura vs. Martha Karambu Koome Civil Appeal no.146 of 2000 and Delphis Bank Ltd. vs. Behal & Others (2003) EA 412 at 414, Kajwang vs. the Law Society of Kenya NBI HCCC NO.339 of 1999** was distinguished and the Court held that the circumstances of the later case needed to be appreciated within the special circumstances of the matter. I, also concur taking into account that the same beaten path was followed by Kimaru, J in **Brooke Bond (K) Ltd. vs. Sirisia Kerubo Kenyuru HCCA No.34 of 2004** as well as **Raphael Kawai Maitha & 3 Others vs. Jays Syndicate Ltd & 3 Others HCCC No.507 of 2003** and **Willis Evans Otieno and the LSK & 2 Others HCP No.37 of 2011**.

Counsel for the 2nd and 3rd respondents herein propelled the argument that the value of proceeding belong to the litigants and not counsel in support of their case for upholding the preliminary objection but I must admit that this is lopsided reasoning. In the authority of **Chewaik Management Limited (supra)** this was considered at length as here-below.

*It has been contended that the mistakes of advocates should not be visited on clients. In certain cases that position may ring true. However, in certain cases where an advocate contemptuously institutes legal proceedings, it may be prudent for the said advocates to shoulder the consequences of such actions. In **John Onger Mariaria & 2 Others Vs. Paul Matundura Civil Application No. Nai.301 of 2003 (2004) 2 EA 163** it was held that:*

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone... Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.

It is important to take note of section 24 of the Advocates Act which provides as follows;

24. Date and validity of practising certificate

(1) Every practising certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day:

Provided that a practicing certificate which is issued during the first month of any practicing year shall have effect for all purposes from the beginning of that month.

(2) *The practising year shall be from the 1st January to 31st December:*

Provided that the Council of the Society, with the approval of the Chief Justice, may by order alter the practising year, and the order may make such transitional provision in regard to incidental matters as may be expedient.

(3) *Every practising certificate shall expire at the end of the practising year in which it was issued:*

Provided that, where the name of an advocate is removed from or struck off the Roll, the practising certificate (if any) of that advocate shall expire forthwith.

(4) *The Registrar shall enter upon the Roll a note of the date of the issue of every practising certificate.*

From the foregoing it is clear that save for a practicing certificate issued during the first month of the practicing year, a practicing certificate is only valid from the beginning of the date of issue. The practicing year is, unless otherwise provided, from 1st January to 31st December. Accordingly, under Section 24 aforesaid, it is only those practicing certificates issued in the course of January that are valid for the whole month of January. In this case, the practicing certificate was paid for in March 2012 with the result that its validity could not relate back to January 2012.

It is therefore my considered view and I so hold, not without some sympathy to the Plaintiff that save in cases where Section 24 aforesaid applies, a pleading signed and filed by an advocate before issuance of a practicing certificate is incompetent and is liable to be struck out.

The circumstances of this case go a notch higher and bring in the application of Section 39, Advocates Act in that another advocate knowingly comes in to bail out the unqualified ones by purporting to take over their brief and continue its prosecution. The advocates purportedly come in and take over and continue the proceedings on behalf of and in place of the unqualified persons who initiated the matter. This is not denied. Section 39 of the Advocates Act provides as follows;

39. Advocate not to act as agent for unqualified person

Any advocate who acts as agent in any suit, or in any matter in bankruptcy, for any unqualified person, or permits his name, or that of any firm of which he is a partner, to be made use of in any such suit or matter, upon the account or for the profit of any unqualified person or who does any other act enabling an unqualified person to appear, act or practise in any respect as an advocate in such suit or matter, or who in any way assists any unqualified person in any cause or matter in which he knows that such person is contravening or intends to contravene this Act, shall be guilty of an offence.

The applicants seek to invoke this and fault such counsel besides submitting that such counsel is also in contempt of court and should therefore be punished.

What is now on trial is not the application dated 10th December, 2014 as such but the preliminary objection by the Claimants/Respondents seeking to estop the same. Our reference to the law and authorities on the subject therefore only comes to shed light on the applicable law and therefore facilitate a determination of the preliminary objection. The application would have its place in the future unless it is eclipsed by this objection.

The issue for determination therefore is whether the preliminary objection as set out by the applicant is or is not sustainable in the circumstances. The law on preliminary objection's is well set out in the celebrated authority of **Mukhisa Biscuits** (*supra.*) The preliminary objection clearly fits the confines of this authority but as hereinbefore illustrated fails in substance to sustain its upholding.

a preliminary objection consists of a point of law which has been pleaded, or which arises by clear

implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

This is the essence of a preliminary objection. However, the preliminary objection must on its argument, sense, logic and legality be sustainable as to be able to dispose off the suit in the first instance. This is necessarily not the case here.

In the circumstances of this case, the Advocates Act sets out provisions of substantive law that spell out criminal action on the part of people practicing law as unqualified persons. It also provides and cites this as contempt of court. The application of Section 8 of the Judicature Act on contempt is therefore exempted and would not in the circumstances fall in place. The argument and submissions by the claimants and 2nd and 3rd respondents therefore falter and are unsustainable. It is my finding that contempt proceeding in the circumstances are properly before court and should proceed as such.

I therefore dismiss the preliminary objection as presented in the Grounds of Opposition dated 17th December, 2014 with costs to the applicants.

Delivered, dated and signed this 18th day of March 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Omondi for the 1st and 2nd Claimant now Respondents and also 1st and 2nd Interested Parties in the original claim.
2. Mr. Yogo for the 2nd and 3rd Respondents.
3. Mr. Sichangi & Kraido for the 1st Respondent in original claim now Applicant.