



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1652 OF 2013

(Before D.K.N. Marete)

MIRIAM WAMBUI THIRIKU.....CLAIMANT

Versus

BOMAS OF KENYA.....RESPONDENT

RULING

This is a ruling on a Notice of Preliminary Objection dated 29th October, 2013. The matter arises from an application by way of Notice of Motion dated 18th October, 2013 by the respondent.

It raises a preliminary objection to the proceed thus;

- a. *The Supporting affidavit sworn by Jimmy Okidiang on 18th October 2013 and filed in support of the Application dated 18th October 2013 by the Respondent is invalid for being commissioned by an unqualified Advocate and it offends the provisions of both the Advocates Act Chapter 16 and the Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya*

When the matter came for hearing on 4th December, 2013, Ms. Gathaara, counsel for the claimant raised the issue by submitting that the preliminary objection is on a point of law in that the affidavit sworn in support of the first application dated 18th October, 2013 and sworn by Jimmy Okidiang is invalid as the same was commissioned by an unqualified advocate who is also not a Commissioner of Oaths.

This indeed offends the provisions of the Advocates Act, Chapter 16, Laws of Kenya and the Oaths & Statutory Declarations Chapter 15, Laws of Kenya. This, counsel submitted means that the application dated 18th October, 2013 is incompetent, unattainable, incurable and defective for want of a properly sworn supporting affidavit.

The claimant therefore prays that this court dismisses and further strikes out the application as the court cannot condone documents sworn by unauthorized persons. The swearing Advocate, William Dima has not been active from 2012 and therefore ousted from legal practice or even drawing court documents by S. 5. Advocates Act and S. 2, Oaths & Statutory Declarations Act respectively. This is not only offensive to the Oaths & Statutory Declarations Act, but also S.24 of the Advocates Act, which she submitted renders the Advocate not qualified to act as an Advocate. He was therefore not qualified to act as a Commissioner for Oaths as the law provides that a Commissioner for Oaths must be a practicing advocate.

Counsel sought to rely on the authorities of **Hosea Mundui Kiplagat Vs Sammy Komen Mwaita & 2**

Others where at page 3 a preliminary objection was raised where an advocate without a practicing certificate had commissioned affidavits that were filed with the petition. Achode, J. moved on to strike out the petition as hereunder expressed. She also sought to rely on documents obtained from the Law Society of Kenya Website showing that the advocate was not in active practice since 2012.

Achode, J. addressed the issue as follows;

23. *The Learned Counsel for the 1st Respondent introduced two preliminary issues which I must address first before I delve into the main issues in the Petition. The two issues were first raised when the Parties came to Court for the highlighting of submissions earlier filed.*

- a. *Whether the Affidavits sworn and filed in support of the Petition were Invalid for being commissioned by an unqualified Advocate and therefore, what was the consequence of a finding on their validity on the Petition?*

24. *The 1st Respondent also brought in a Notice of Preliminary Objection to the effect that the Petition is incompetent, untenable and incurably defective for want of properly sworn Affidavits accompanying the Petition. The basis for this Objection is that Affidavits were commissioned by an unqualified Advocate. Therefore, the Affidavits do not comply with **Rule 10(3)(b)** and **Rule 12** of the **Election Petition Rules 2013**, and the **Oaths and Declarations Act**.*

25. *The 1st Respondent provided a letter from the Law society of Kenya as proof of the fact that Mr. Timon Kosgei who commissioned the Affidavits of the Petitioner and his witnesses had not taken out a practicing certificate for the year 2013.*

26. *Under **Section 2** of the **Oaths and Statutory Declaration Act**, only practicing advocates may be appointed as commissioners for oaths by the Chief Justice. Under the **Advocates Act** in **Section 5** a person cannot be qualified to be a practicing Advocates unless:*

“(a) he has been admitted as an advocate;

(b)his name is for the time being on the Roll; and

(c)he has in force a practicing certificate.”

27. *Possession of a practicing certification is a constant condition precedent before one can qualify to act as an Advocate in any respect including as a Commissioner for Oaths. On the validity of a practicing certificate the Advocates Act in Section 24 provides that:*

“(1) Every practicing 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 practicing 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 practicing year, and the order may make such transitional provision in regard to incidental matters as may be expedient.

(3) Every practicing certificate shall expire at the end of the practicing year in which it was issued”

28. *It is not in dispute that Mr. Timon Kosgei who commissioner the Petitioner’s and his witnesses’ Affidavits was not qualified to practice as an Advocate going by the evidence presented by the 1st*

Respondent, which was not denied. The learned Counsel for the Petitioner did not deny this fact and only contended the manner and point at which this issue was raised. On this fact alone, the said advocate is in contravention of the **Advocates Act** and the **Oaths and Statutory Declarations Act**. In particular, the Advocate offends the provisions of **Sections 31, 33 and 34** of the Advocates Act. Consequently, the documents commissioned by an unqualified Advocate are not valid.

29. That being the case, what is the effect on the election Petition? **Rule 10(3)(b)** of the **Election Petition Rules 2013** requires that an election Petition shall be “**supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner.**”

30. **Rule 12** on the other hand requires the Petitioner to file Affidavits of witnesses the Petitioner may wish to rely on simultaneously with the Petition. Thus, the Petition would not be complete without, most importantly, the valid Supporting Affidavits of the Petitioner himself. Similarly, the matters deponed to by the witnesses would have no effect where the same were not commissioned by a qualified advocate. An Affidavit commissioned by an unqualified advocate is as good as an Affidavit not commissioned at all, it is not complete without the attestation clause and is therefore void.

The above observations clearly have a bearing on the matter before this court.

Mr. Masese, counsel for the respondent at this juncture objected to the production of the document from the Law Society of Kenya asserting that this should have come in through a sworn affidavit authenticating the affidavit and source but counsel for the applicant downplayed the same by justifying the source and authority of the same. She further submitted that this information is factual and as such not evidence as alleged.

Mr. Masese chose to oppose the preliminary objection on one ground: that it does not raise a pure point of law. It raises factual issues that require investigation and proof and therefore not supported by the authority of **Mukisa Biscuits Manufacturing Co. Ltd Vs Western Distribution Ltd, 1969 EA. 693** which held that a preliminary objection is in the nature of a demurer and raises a point of law which is argued on the presumption that all facts pleaded are not in dispute and are correct. It is in such circumstances that the court would exercise its jurisdiction to allow a preliminary objection. His submission he argued is but ressed by the authority of **Coast Brakes Ltd Vs Muslim Association, Mombasa & Another** where the court declined a preliminary objection on the grounds of competing arguments. This is as follows;

“...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. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Further, Kasango, J. brought out a case for a preliminary objection as hereunder;

*As stated in the case of **MUKHISA BISCUIT** (supra) for a Preliminary Objection to succeed it has to be based of agreed facts. A Preliminary Objection should not require the Court to ascertain such facts, or to do a fact finding exercise.*

Counsel further submitted that this matter requires documents and is not sustainable in a preliminary objection. Further, the law of evidence provides that only documents from the Government can be produced without calling the author. He denied any linkage with the provisions of the law as submitted by counsel and also submitted that the authorities relied upon, the facts pleaded did not raise an issues. He therefore prayed that the preliminary objection be dismissed to facilitate his pursuance of the application.

Counsel for the applicant in reply submitted that she was not on a fact finding mission. Additionally, the allegation on the qualification of the commissioning counsel are not denied, or at all.

The gist of a preliminary objection is not new to any of us. These are issues raised by parties and touch on actual issues of the law that would on litigation determine the direction of the actual pleadings and suit.

In the circumstances of this cause, a pertinent issue arises on the validity of the supporting affidavit sworn in support of the application on grounds that this was sworn by an unqualified and non-practicing counsel and therefore not valid or effective for the intended purposes. It is argued that this is strictly not a point of law. I disagree.

The submissions and authorities cited by counsel for the parties format a case for the objector/claimant. At no time is a fact that the commissioning authority was not a qualified counsel/advocate denied. The respondent/applicant does not go out of his way to demonstrate a contrary position. There is no contrary demonstration whatsoever or issue on the qualification of William Dima, the commissioning advocate.

I am therefore inclined to allow the preliminary objection and on the same vein strike out the applicants Notice of Motion dated 18th October, 2012 for incompetence and invalidity. The costs of the application shall be borne by the respondent/applicant.

It is so ruled.

Dated, delivered and signed the 7th day of February, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Ms Gathaara instructed by Mwaure and Mwaure Waihiga Advocates for the claimant/respondent.
2. Mr. Masese instructed by the Federation of Kenya Employers for the applicant/respondent.