



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO 339 OF 1999**

**T.J.F KAJWANG'.....APPELLANT**

**VERSUS**

**LAW SOCIETY OF KENYA.....RESPONDENT**

**(Appeal from the Original Conviction and Sentence by the Advocate's Disciplinary Committee in D.C.C. No 84 of 1997 dated 6th August, 1999)**

**RULING**

This is a preliminary objection raised by the respondent in this appeal against the proceedings, participation and or involvement of the appellant's advocate. Mr T.J.F Kajwang on 15 February 2001 and 15 March 2001 in this appeal, who it has since emerged, did not have annual practicing certificate at the material time.

The quarrel between these litigants arose out of the decision of the Advocates Disciplinary Committee of the respondent on 6th August, 1999 to strike off the name of the appellant from the Roll of Advocates. It is against this decision that the appellant has filed this appeal.

This appeal was heard on 15 February, 2001 with the appellant's advocate. Mr T.J.F Kajwang canvassing the grounds of appeal for his client. The hearing was subsequently adjourned to 15 March 2001, as the respondents' advocate, Mr E. Gaturu, was going to attend a meeting of the respondent.

On 15 March 2001, the learned counsel for the appellant Mr T.J.F Kajwang picked up from where he had left off, vigorously pursuing his client's cause. Thereafter, the hearing was adjourned to 19 and 20 June 2001.

On 19 June 2001, like the biblical Saul on the road to Damascus, the learned counsel Mr E. Gaturu had been struck or so it seems, by lightning and had seen the grounds for the dismissal of the appellants' appeal. He filed this Notice of Preliminary Objection that because the learned counsel for the appellant Mr T.J.F. Kajwang did not have in force a current practising certificate on the two previous occasions he had prosecuted the appeal, then he was an unqualified person within the meaning of S 2 of the Advocates Act Cap 16 and was therefore in contempt of court.

Further, the learned counsel, Mr Gaturu in the Notice of Preliminary Objection seeks to declare the

proceedings void and a nullity, having been conducted by an unqualified person, and for all the submissions made by the unqualified person to be expunged from the court record and accordingly have the appeal struck but out with costs.

In his submissions, Mr Gaturu for the respondent informed the court that Mr Kajwang for the appellant applied for his annual practicing certificate on 6/4/2001, after he had prosecuted / conducted the appeal before us. He went further that no person can practise without an annual practising certificate, and that it was the respondent which had the information on the status of a person with regard to his practising certificate, which is a necessity. He submitted therefore that this was an infringement of the law by the appellant's advocate, and accordingly all submissions made with regard to prosecute / conduct the appeal be expunged.

Mr Gaturu raised a further point that an appeal having been filed by an unqualified person is itself bad, and having not applied for this year's practicing certificate, Mr T.J.F Kajwang cannot benefit for any of the months of January or February having had no practicing certificate.

Mr T.J. F Kajwang having regularized his qualifications with the Society, again defended the appellant's appeal, he submitted that the preliminary objection as raised was a belated attempt to delay the hearing of the appeal as he had completed his submissions and it was the respondent's turn to reply.

The learned counsel proceeded to argue that the preliminary objection does not go to the entire root of the case as the appellant can re-institute the appeal. This exercise is a futile one and it amounts to a waste of court's time.

He proceeded to answer the respondent's submissions thus: Any defect of qualification of an advocate should not be visited upon a client, as an innocent party unaware of the qualifications portfolio of his advocate. He contended that the provisions of the Advocates Act, Cap 16 support these submissions, S.31 thereof in particular where the penalties for infringement of S.9 of the Act are laid out. These penalties the learned counsel submitted, are unidirectional; they are geared at punishing the offender and not the client.

Mr Kajwang, the appellant's advocate, further submitted that having had the custody of records indicating his qualifications portfolio, and not having raised any eyebrow at the beginning that there was this defect, then, the respondent cannot benefit from its own initial non-disclosure. He further urged us to uphold the retrospectivity of his annual practising certificate which he has subsequently obtained, and had paid the prescribed fee for the full year in respect of which no objection was raised by the respondent and no impediment as such exists.

It has not been denied that custody of the qualifications portfolio of advocates in this country, particularly as relating to the annual practicing certificate is with the respondent in this appeal. Equally conceded by the respondent is the fact that an inquiry as to the qualifications of advocate can be made at its offices who will then dust their archives to retrieve requisite individual files of counsel, upon which individual status on qualifications can be obtained.

In this appeal, for two hearings, there was no objection by the learned counsel of the Society, indeed the society itself as to the presence and / or participation of the learned counsel for the appellant, Mr T.J.F Kajwang. Further, it is the Society itself which, as we have said above, has the custody on this relevant information. What the Society has done or indeed appears to have done is to basically sit on the information and utilise it when, albeit belatedly, it is most convenient to them.

Selective concealment and utilization of information, such as what the Society seems to have done here, is not one of the practices and / or procedures favoured by the court, or indeed any other court for that matter. The onus was on the Society, where it intended to raise an issue, to bring out all the facts as were relevant to the notice of the court at the earliest possible opportunity.

Instead, the Society in its own wisdom, decided to bring forth these issues, after the alleged contemnor, Mr T.J.F. Kajwang had closed his submissions for the clients' cause. It was the turn of the Society to reply to these submissions, but as it is, another string of litigation i.e a complaint about defective qualification has now been brought forth by the Society.

We do not see how the Society can benefit from its own shortcomings. A fundamental tenet of litigation is to set out the points of dispute early in advance and for disclosure of all relevant information. Having defaulted and gone against this tenet, the issue of raising a preliminary objection on qualifications of the appellant's advocate by the is of little aid to the respondent. The Respondent by not raising the objection at the beginning of the appeal will deny the applicant the right to resort to the provisions of Order 3 Rule II of the Civil Procedure Rules which provides some safeguards where like in the instant case an advocate has not taken out a practising certificate. The Order could not have been made in vain. Had this objection been raised at the earliest opportunity, there might well have been serious implications for the appellant advocate.

Several authorities were cited before us, Mr Gaturu citing *Geoffrey Oraro- Obura vs Martha Karambu Koome*, Court of Appeal Civil Appeal No 146 of 2000, *Solomon Kamau Njuguna vs Barclays Bank of Kenya Ltd*, Court of Appeal Civil Appeal No 186 of 1997, *Kingsway Tyres and Automart Ltd vs Abon Retreating and Co Ltd and 3 others*, High Court Civil Case No HCCC No 56 of 1998 (Milimani) and *Melidi Khan vs Kuldeep Singh Charola, & 3 others*, High Court Civil Case No 1796 of 1995. The consensus in these cases is that proceedings conducted by an unqualified person are null and void, documents drawn, signed and filed by unqualified persons are void *ab initio*, and in all these cases, the applications, plaints and / or appeals drawn signed and / or filed by an unqualified person were struck out.

Mr Kajwang for the appellant cited two cases, *Salim Kazungu v K.P.A.* High Court Civil Case No 1436 of 1998 and *Khalid Mohammed Butt and others vs Edward Rurii Kanjabi and others*, HCCC No 6062 of 1992. The consensus in these cases is however that the client cannot be made to suffer an injustice as a result of the defective qualifications of his advocate, he should be given an opportunity to instruct another advocate, who can then take over from where the advocate with defective qualifications left off.

But be that as it may, the objection raised against their appeal is not that it is frivolous, vexatious, or an abuse of the process of court, see *Joseph Okumu Simiyu v Standard Chartered Bank Ltd* HCCC No 899 of 1994. It is not contested with regard to the merits or otherwise of the grounds of appeal or even the *locus* of the appellant or jurisdiction of the court at this juncture. All that is claimed, is that the actions of a person other than the litigant, his advocate, who had shortcomings in the delay of a renewal of his annual practising certificate are therefore sufficient grounds to annihilate the appeal, and accordingly the appeal be dismissed.

The Advocates Act Cap 16 is the statute governing the practice of advocates in this country. S.9 lays out the requirements for one to practice:

“Subject to this Act, no person shall be qualified to act as an advocate unless:

(a) He has been admitted as an advocates 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)".

The consequences of infringement of this provision are spelt out in S.31, 33, 34 and 40. All these consequences are, as submitted by the learned counsel for the appellant, unidirectional, they are aimed at punishing the unqualified person. As noted in *Angela Nyawira Njagi versus Sarah Njoki Kihara*, HCCC No 936 of 2000 the Act is absolutely silent on the actions so done in contravention of these sections, nothing is said about the fate of the suit, application or appeal. As such, the only reasonable and logical interpretation of these sections of the Act is that actions so done are not void *abinitio*.

This is buttressed by the provisions of the Civil Procedure Act, Order 3 rule II of the Civil Procedure Rules. This rule allows for the defendant/ plaintiff/appellant/respondent to apply to court for an order that the advocate for the plaintiff/defendant/respondent as the case may be, has ceased acting for that party. The ingredients of fair play are succinct; it is an application on notice to the other party. At no time or juncture is there allowed an application to dismiss a suit/application/appeal merely because of defective qualifications of the advocate. The commitment to do justice for this court must remain sacrosanct.

Order 3 Rule II despite allowing for an application of that nature is also itself silent on when it is discovered that the advocate has been acting, with no practising certificate. This is succinctly answered by the Common Law. In *Richards v Bostock* (1914) 3 LR 70, where the court when faced with such a situation stayed the action until the plaintiff could consult another solicitor, or take whatever other steps was appropriate. We emphasize that in the absence of a specific legislation declaring such proceedings null and void. It is the common law which is applicable.

The requirements for practice of Advocates in Kenya are verbatim the requirements for practise as solicitors in England, as laid out in S.1 of the Solicitor Act 1974 which are:

(a) he has been admitted as a solicitor

(b) his name is on the Roll of Solicitors the time in question

(c) he has in force a certificate issued by the Law Society authorizing him to practise as a solicitor"

The disqualification's provisions are verbatim, see S.20 of the Solicitors Act vis a vis S. 31 of the Advocate Act. The Solicitors Act like our Act is also silent on the question of what happens to the proceedings where an Advocate without a certificate had acted. However, as to proceedings, the position is set out in *Halsburys Laws of England*, Vol 44 and 4th Edition Par 353 thus:

"Proceedings are not invalidated between the litigant and the opposite party merely by reason of the litigants' solicitor being unqualified, for example by his not having a proper practising certificate in force."

This has been the position since the 1866 decision of *Sparling vs Brereton* (1866) 1 LR 64, where Sir Page Wood VC held that such actions/ proceedings are valid and binding upon the clients as against third parties. We find this decision very persuasive and compelling, and we accept it as the law, which should apply in this instance as well.

Mr Kajwang is an advocate of this honorable court; his name is in the Roll of Advocates. He is still bound by the Oath he took upon admission, and this does not fluctuate depending on the presence or otherwise of his practising certificate as an officer of this honorable court and the absence of the certificate for a short period cannot be said to have deprived him of that privilege. This is because he remains qualified professionally and is therefore not subject to dereliction of duty or professional misconduct.

He does not require readmission to the Roll; his name is in the roll, what the laws does not allow him to do is enumerated under the relevant sections of the Advocates Act, and at no time is he allowed to recover any fees for business done by him whilst he shall have been acting without a practising certificate. Of course, he is still answerable to the statutory penalties.

It would indeed be mischievous and a miscarriage of justice if persons who have no power of informing themselves on the regularity or otherwise of qualifications of their advocates, were made to bear the prejudice as consequences of such irregularity. An advocate so contravening the statute is amenable to the penalties enumerated thereunder; and it would indeed be most unjust if a client, as innocent as he may be, were made to shoulder the errors of his advocate regarding his qualifications, more so as in the instant case where the Respondent did not challenge the credentials of the counsel as to the *bona fide* for the entire period taken in the hearing of the application. This is even made worse because the respondent keeps custody of those records.

Mr Gaturu put the arguments that Members of the public can obtain the relevant information from the official Gazette or from the offices of the Law Society in Nairobi. He also argued that the Law Society has a duty to regulate the profession and therefore these stringent measures are necessary.

We find Mr Gaturu's arguments, as arguments for the sake of arguments. It is simply not practicable to expect the members of the public to be reading the Kenya Gazette or to even know where the Law Society offices are to make inquiries. Neither is it practical to expect litigants to be demanding of Advocates the certificates when they seek Advocates' professional services. It is agreed that the Society has the duty to regulate the profession hence the punitive provision in the Advocates Act. These are sufficient to punish an Advocate who contravenes the Act for the purposes of regulating the provision.

The Supreme Court of Uganda was faced with a similar issue in *Prof Syed Thug vs The Islamic University in Uganda*, Civil Appeal No 47 of 1995. Wambuzi C.J and Karokora J.S.C. agreed that the proceedings and documents drawn, signed and filed by an unqualified person are illegal and void *ab initio*.

However, Tsekooko, J.S.C was of a different view, he held:

"I think that deeming as illegal documents prepared by an advocate without a practising certificate amounts to a denial of justice to an innocent litigant who innocently engages the services of such an advocate. A litigant would hardly inquire from an advocate if the particular advocate has a valid certificate. This is the business of the courts, and the law council to say that litigants who engage advocates without practicing certificates do so at their peril is harsh because the majority of our people would not know which advocate is not entitled to practice."

He concluded that such documents should not be regarded as illegal and invalid simply because the advocate had no valid practising certificate when he drew or signed such documents.

Just as Osiemo J in *Khalid Mahmood Butt and Others v Edward Rurii Kanjabi and Others*, (supra) Tsekooko opined that it would be an infringement of the Constitution if pleadings were declared invalid

by reason of signature by an advocate who does not possess a valid practising certificate.

We agree with this view that the documents should not be declared invalid due to defective qualifications of the signatory. It would be a great disservice to litigants if they were constrained to inquire from the society or the courts of the qualifications of every advocate they do want to engage. It would be an affront to logic that, where extrapolated, actions of doctors, engineers, pharmacies, accountants or any other professional requiring an annual practising certificate, be deemed illegal, invalid and void *ab initio* merely because the person conducting such actions did not have in force the required certificate.

We do appreciate that the court would be guilty of condoning an illegality if the recovery of costs by an advocate with defective qualifications is allowed. But the relevant disciplinary mechanism as administered under the Advocates Act are appropriate remedial measures of such illegality, and not litigants/clients who should bear the sweeping brunt of the illegality and striking out of pleadings.

In the present application, we are also of the view that the client should not bear this draconian penalty with striking off of his application as he could not have known by a stretch of imagination that his counsel was under an impediment, real or imaginary, which would affect this right of audience in court of the applicant. Mr T.J.F Kajwang, having clearly violated the provisions of the Act 16 hence amenable to the relevant disciplinary mechanism, and not Mr Otieno Kajwang, the litigant.

Thus Mr T.J.F Kajwang by appearing before us and conducting the appeal, knowing or is deemed to have known, that he did not have a valid practising certificate required under the Advocates Act as provided under Section 31 (2c) is guilty of an offence for which there is a fine of Kshs 20,000 and in default an imprisonment for a period of six months.

We are also of the view that this preliminary objection would not determine the appeal as envisaged in the case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd* [1969] E.A 696 which we still regard as good law on preliminary objections.

For these reasons, the objection is overruled.

**Dated and delivered at Nairobi this 14th day of June, 2002**

**S.M AMIN**

**J.K MULWA**

**JUDGE**

**JUDGE**



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