



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 82 OF 2012**

**(FORMERLY NYERI HCCC 308/1997)**

FREDRICK MUKUA NJIGORU.....1ST PLAINTIFF

KUDGETA WAMUGO NJIGORU.....2ND PLAINTIFF

*VERSUS*

LIQUIDATOR

KENYA NATIONAL ASSUARANCE BANK LTD.....1<sup>ST</sup> DEFENDANT

KENYA COMMERCIAL BANK LTD.....2<sup>ND</sup> DEFENDANT

**RULING**

Mr. Njiru Mbogo filed an application dated 16th May 2012 which was under certificate of urgency. The said application was by way of chamber summons and it sought several orders on behalf of the 2nd plaintiff (Kudgeta Wamugo Njigoru).

The 1st defendant through its Company Secretary cum legal officer filed a replying affidavit of 22 paragraphs. The 2nd defendant did file a replying affidavit to this application through its legal manager. Another application was filed by Kenya Commercial Bank – (2nd defendant). The same is dated 30/5/2012. Though served there has been no response by any of the plaintiffs.

The application dated 30/5/2012 raises a serious issue on Mr. Njiru's standing as an advocate at the time he filed the application dated 16/5/2012. Annexures TAL1 and the record from the Registrar's office confirms that Mr. Njiru Mbogo had not taken out a practicing licence for the year 2012. Mr. Njiru Mbogo though served did not dispute these facts and there are several decisions by the Court of Appeal on this issue. Section 34(1) of the Advocates Act provides:-

***“No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument”.***

In this instance the un-qualification refers to the fact that Njiru Mbogo did not possess a practising certificate for the year 2012. This rendered him unqualified. It further follows that what he did in this matter without a practising certificate is unlawful and an illegality.

The Court of Appeal had this to say in the case of **NATIONAL BANK OF KENYA LTD VS WILSON NDOLO AYAH Civil appeal No.119/2002 [2009] eKLR**

***“However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi illiterate population. There is a need to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interests of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified Advocates will leave them without any assistance of the law.***

***Besides, the Law Society of this country publishes annually, a list of advocates who hold a practicing certificate, for general information. This is a fact we take judicial notice of as courts are also provided with such a list for purposes of denying audience to advocates who do not appear on the list. For the reason the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates Act itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered, although in our view provisions similar to Section 19 of the Stamp Duty Act, should have been included in the Advocates Act to remove any doubt as to the validity of documents drawn by unqualified advocates.***

***It is public policy that courts should not aid in the perpetuation of illegalities, invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality.***

***A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act. For that reason alone the charge and instrument of guarantee in this matter are invalid, and we so hold.”***

When Mr. Njiru filed the application dated 16/5/2012 and made several appearances and consents before this Court, he was well aware he had no practising certificate and ought not to have appeared and/or filed any documents.

I therefore allow the application dated 30/5/2012 and strike out the application dated 16/5/2012. The proceedings that arose during the year 2012 in which Mr. Njiru Mbogo actively participated, are expunged from the record and shall be of no effect. The exparte orders of 18/5/2012 are also set aside.

Costs to the Defendants and 1st plaintiff.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF DECEMBER, 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Mwaniki for 1st Defendant**

**Mr. Njage for 1st Plaintiff – interested party**

**Njue CC**



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