REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mutunga, CJ & P; Tunoi, Ibrahim, Ojwang, Wanjala, SCJJ.)

PETITION NO. 36 OF 2014

—BETWEEN—

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

—AND—

ANAJ WAREHOUSING LIMITED.....RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Mombasa (Nambuye, Okwengu & Kiage, JJA) in Civil Appeal No. 17 of 2013, delivered on 27th February, 2014

JUDGMENT

A. INTRODUCTION

[1] This is an appeal from the Judgment of the Court of Appeal sitting in Mombasa, dated 27th February, 2014 which upheld the decision of the High Court *(Ibrahim J.,* as he then was) in Mombasa Civil Case No. 311 of 2000, ***Anaj Warehousing Limited v. National Bank of Kenya Limited & Registrar of Titles,*** rendered on 26th July, 2011.

[2] The petition is premised upon the following grounds:

(i) the Court of Appeal erred in failing to adjudicate on the validity or otherwise of legal documents prepared by an unqualified person;

(ii) the Court of Appeal failed to consider the parties' intention to enter into a legally binding contract, at the time of executing the legal charge and guarantee documents;

(iii) the Court of Appeal erred in relying upon the case of ***National Bank of Kenya Limited v. Wilson Ndolo Ayah,*** Civil Appeal No.119 of 2002, *which had shortcomings in its statement of the governing law between mortgagor and mortgagee, and which contradicts established legal and equitable principles of justice;*

(iv) the Court of Appeal erred in its interpretation or application of the provisions of Section 34 of the Advocates Act, and in particular as to the intent and purpose of that provision;

(v) the Court of Appeal failed to set down the law, or reconcile the anomaly/variance arising between the interpretation of Section 34 of the Advocates Act, and Section 19 of the Stamp Duty Act regarding the validity of legal documents;

(vi) the Court of Appeal erred and/or misdirected itself by failing to take into consideration the fact that the appellant, being a public financial institution/bank, does not hold the monies it is entrusted with by customers on its own behalf or for its own purposes, but holds the same in the capacity of a trustee on behalf of and in the interest of the public, for purposes, inter alia, of loaning the same;

(vii) the Court of Appeal erred in holding that the respondent had sufficiently proved J. W. Kagwe to have been an unqualified person, on account of not having taken out an annual practising certificate at the material time—yet the respondent did not call evidence in proof thereof, in accordance with Section 30 of the Advocates Act;

(viii) the Court of Appeal erred in failing to interpret and apply the provisions of Section 35 of the Evidence Act, while considering the admissibility of the evidence tendered on behalf of the respondent/plaintiff, as to whether J. W. Kagwe held a practising certificate at the material time;

(ix) this appeal constitutes a matter of general public importance that the Supreme Court ought to resolve with finality—as regards the fate of legal documents and, in particular, conveyance documents prepared by unqualified persons.

B. BACKGROUND

(a) Proceedings in the High Court

[3] The respondent filed a suit on 10th July, 2000 which sought: a discharge from all liabilities and obligations arising from a guarantee dated 29th June, 1994; a declaration that the charge dated 29th June, 1994 (herein after referred to as 'the charge') be set aside, as being void; and an Order directing the Registrar of Titles to effect the discharge of the charge dated 29th June 1994.

[4] The main issue for determination by the High Court was whether the charge was void and unenforceable, as it was drafted, prepared, attested and registered by an unqualified person contrary to Section 34 (1) of the Advocates Act (Cap 16, Laws of Kenya).

[5] *Ibrahim J* (as he then was) in his ruling, applied the doctrine of precedent, thus stating: *"I am bound by the doctrine of precedent to follow the ratio decidendi in the* ***Wilson Ndolo Ayah*** *case, and I do hereby find that the charge dated 29th June 1994 was null, void and invalid."*

[6] Consequently, the High Court entered Judgment in favour of the plaintiff (now the respondent), as against the 1st defendant (now the appellant), by declaring the charge a nullity, and by granting an order directing the Registrar of Titles to discharge the charge in all entries in title documents for the suit premises, registered in the Coast Registry of Titles.

(b) Proceedings in the Court of Appeal

[7] Being aggrieved by the High Court decision the appellant moved the Court of Appeal, on the following grounds:

(a) the trial Judge erred in law and in fact, in purporting to amend the plaintiff's pleadings;

(b) *the learned Judge erred in law and in fact, in holding that the advocate who drew up and witnessed the legal charge dated 29th June 1994, was an unqualified person, as the plaintiff failed to adduce evidence to that effect.*

(c) *the learned Judge erred in law and in fact, by holding that once the plaintiff made the allegation that J W Kagwe did not take out a practising certificate for the year 1994, the onus of proof as regards the said allegation shifted to the first defendant;*

(d) *the learned Judge misdirected himself by holding that PW2 was testifying under the authority of the Registrar of the High Court, and as a representative of the Law Society of Kenya, when no written authority in that regard was produced as evidence;*

(e) *the learned Judge erred in law and in fact, in holding that the charge instruments and guarantees issued by the plaintiff in favour of the 1st defendant, were void, against the weight of the evidence.*

[8] The Court of Appeal *(Nambuye, Okwengu, and Kiage, JJ. A),* on 27th February, 2014 dismissed the appeal, on the ground that it lacked merit.

[9] In dismissing the appeal, the Court of Appeal thus observed:

"The invalidity of such a document had been freshly and authoritatively restated by this Court in National Bank of Kenya Ltd. v. Wilson Ndolo Ayah, Civil Appeal No.119 of 2002 (2009 eKLR) ***when the matter was before the learned Judge. That decision was binding before the learned Judge and he cannot therefore be faulted for following and applying it. This is***

without ignoring the struggles and difficulties referred to as 'a conundrum' by the Judges of this Court who decided that case, that the discovery of the true consequence breach of Section 34 presents. The issue is however not before us, and it is enough to say the learned Judge correctly showed fidelity to the doctrine of *stare decisis."*

[10] Aggrieved by the decision of the Appellate Court, the appellants filed an application for leave/certification in that Court, to appeal further to the Supreme Court, on grounds that this was a matter of general public importance, as it regards the effect of legal documents prepared by unqualified persons contrary to Section 34 of the Advocates Act. Further, the appellant sought an Order of stay of execution pending the hearing and determination of the intended appeal.

[11] Upon hearing the parties, the Appellate Court *(Okwengu, Makahandia & Sichale, JJA),* on 12th November 2014, granted the applicant certification. The Court granted an Order of stay of execution, pending the hearing and determination of the intended further appeal.

[12] In granting certification, the Appellate Court thus remarked:

*"T**he questions [posed] by declaration of the charge as invalid are numerous and therein lies the conundrum. The document having been drawn by an unqualified person, did it render the charge illegal? Is one deemed to be qualified as an advocate upon successful completion of the law school and enrolment as an advocate or upon taking out a [practising] certificate? Is the qualification as an advocate different from qualifying to [practise] law? Isn't the acquisition of a [practising] certificate more of a regulation and hence a technicality which if flouted calls for sanctions against an advocate without rendering documents drawn by such an advocate invalid? Does failure to***

take out a [practising] certificate render an advocate 'unqualified'? What about the injustice caused to a lender? More so when a borrower presents himself before such an *"unqualified"* ***advocate, executes the charge documents and proceeds to draw a huge financial facility as appears to have been the case herein and later turns around and states that the charge document executed by him/her was invalid? What about the equitable maxim that*** *"equity regards as done that which ought to be done"?* ***Can a borrower present himself before an advocate, execute a charge document, offer his/her property as security and later turn around and say, yes, I collected the money, I signed the charge document and I offered my property as security but you cannot enforce the charge because I executed the charge before a lawyer who though qualified to [practise] law, he/she was not qualified as he/she had not complied with the regulation to obtain a practising certificate for that particular year. What if such an advocate, were to act in collusion with such borrowers and/or the bank? Would the courts shut [their] doors and sanction such an injustice? Is the punishment meted out by the Law society of Kenya sufficient to act as a deterrent? If so, why is it that there is a [recurrence] of this bad practice?"***

C. PARTIES' SUBMISSIONS

(a) Appellant

[13] Learned counsel Mr. Lumatete, for the appellant, identified the following issues for consideration by the Court:

> *(i) are all legal documents prepared by an unqualified person invalidated, by virtue of Section 34 of the Advocates Act?*
>
> *(ii) what are the legal implications of an imperfect charge over a legal estate in land?*
>
> *(iii) Should the respondent be allowed to benefit at the expense of the appellants?*
>
> *(iv) does the petition herein constitute a matter, or matters of general public importance?*
>
> *(v) what fundamental legal principles govern the admissibility of documentary evidence, in civil action?*
>
> *(vi) what fundamental principles of law govern the issue of burden of proof, in civil cases?*

[14] Counsel submitted that a legal document in the nature of those referred to in Section 34(1) of the Advocates Act, is not invalidated merely for the reason that the drawer is an advocate who had not taken out an annual practising certificate, in accordance with the provisions of Section 9 of the Advocates Act. He urged that neither Section 9 nor Section 34 of the Advocates Act invalidates legal

documents, or proceedings prepared by an advocate who does not have a valid or current practising certificate at the material time.

[15] Relying on *Halsbury's Laws of England* (4th edition, Volume 44 paragraph 353) to define the term "unqualified person", counsel submitted that proceedings are not invalidated as between one litigant and another, merely by reason of the litigant's solicitor being unqualified.

[16] Counsel urged that the intention of the legislature, in enacting Sections 31, 33, 34 and 35 of the Advocates Act, was to penalise an errant advocate by depriving him or her of the professional fee otherwise due, or by some other punishment—but not to penalise the litigant. Counsel invoked the case of ***Holdgate v. Slight,*** 21 QB 74 in which the Court observed that it would be occasioning injury to both plaintiffs and defendants, if it held that the absence of a practice certificate had the effect of invalidating all proceedings taken in the suit.

[17] Learned counsel submitted that, had it been the intention of the legislature to invalidate such legal documents as are referred to in Section 34(1) of the Advocates Act, then it would have expressly stated so.

[18] Counsel drew analogy with the laws governing the creation and registration of legal instruments: Registration of Titles Act (Cap, 281— now repealed); Indian Transfer of Property Act, 1882 (now repealed); Land Registration Act, 2012; and the Stamp Duty Act. He submitted that, these statutes do not require that an advocate preparing an instrument of charge, should hold a valid practising certificate, as a condition for the charge or disposition to be valid.

[19] Counsel submitted that, to invalidate a charge purely on the ground that the same was prepared by an advocate who did not hold a valid practising certificate, would occasion an injustice to the party who suffers prejudice. Counsel relied on the English case, ***Sparling v. Brereton*** (1866) LJ Eq 64, in which it was held that it would be mischievous, if persons having no power of

informing themselves on the subject, should be held liable for the consequence of any irregularity in the qualification of their solicitor.

[20] It was counsel's submission that the charge-deed had created a valid contract, capable of being enforced on the terms, conditions, covenants and stipulations thereof, by the aggrieved party; and that such stipulations had conferred upon the appellant an equitable interest, that was to be upheld. Therefore in accordance with the rules of equity, the appellants were well within their rights to sell the property by way of public auction, in exercise of their statutory power of sale, and which power of sale was expressly provided for in the charge deed.

[21] Counsel invoked the maxim, "*equity regards as done that which ought to be done*", and urged that the parties' rights and obligations are to be determined by an equitable perception of their relationship. Counsel invoked the English case of ***Walsh v. Lonsdale (1882) 21 Ch D 9,*** which bears the principle that where there is a conflict between the rules of law and those of equity, those of equity are to prevail.

[22] Counsel submitted that it is unconscionable, and offensive to considerations of justice, for the respondents to renege on loan repayment due from them, and secured on the basis of the charge which they now impugn. He invoked the concept of unjust enrichment, as an equitable bar to the respondent's claim, relying on relevant cases: ***Pacific National Investment Ltd. v. City of Victoria*** (2005) 4 LCR; and ***Shah v. Akiba Bank Limited*** (2005) 2 KLR 424**.**

[23] Learned counsel urged that this petition raises matters of general public importance, for this Court to adjudicate upon with finality. What is the status of legal documents prepared by an unqualified person? Should the beneficiary of a grant of loan be accorded immunity from repaying the same, as duly contracted, on the ground that the security deed was prepared by an unqualified person?

[24] The appellant maintains that the respondent failed to show that the advocate in question, J. W. Kagwe, was an unqualified person at the time of preparing the charge. Counsel urged that an advocate should always be perceived as an advocate.

(b) Respondent

[25] Mr. Shah, learned counsel for the respondent, restated the main issue for determination: whether a charge drawn by an advocate who had at the time no practising certificate, was valid or not. And he submitted that, legal documents prepared by an unqualified person are of no legal effect and are void; and holding the same to be valid, would give room for abuse by advocates, who would have no reason to renew their practising certificates.

[26] Counsel cited the cases of ***Geoffrey Oraro Obura v. Koome*** (2001) KLR 109, and ***National Bank of Kenya Ltd. v. Wilson Ndolo Ayah*** Civil Appeal No.119 of 2002, (2009 eKLR), in which the Courts held that it is for the public good, that transactions effected by an unqualified advocate should not be allowed.

[27] Counsel cited the case of ***Kenya Power and lighting Co. Limited v. Mahinda & Another*** [2005] 2 EA, in which the Court of Appeal held that a memorandum of appearance and notice of appeal signed by an advocate who had no practising certificate, were invalid. In ***Belgo Holdings Ltd v. Esmail*** [2005] 2 EA, the High Court stated that it was a criminal offence to practise law without a practising certificate, quite apart from the fact that such action by an advocate would have prejudicial consequences upon his or her client, including the striking out of pleadings.

[28] In ***Huq v. Islamic University of Uganda*** (1995-98) 2 EA, the Supreme Court of Uganda, by majority Judgment, held that documents prepared or filed by such an unauthorized advocate, are invalid, and of no legal effect, as the Courts would not condone illegalities.

[29] In response to the petitioner's invocation of principles of equity, counsel urged that, by the Judicature Act equitable doctrines apply subject to the Constitution and all written laws, and so, are not applicable in this instance, the respondent having relied upon an invalid charge. He distinguished the facts in ***Walsh v. Lonsdale,*** urging that a tenant relying on an agreement for lease, ought to be considered a tenant, as if the lease had been consummated.

[30] Learned counsel submitted that the matter herein does not raise any matter of general public importance, as this was a private agreement between bank and borrower; the point of law brought forward has been conclusively determined by the Court of Appeal in several cases, and needs no further input; there is no uncertainty in the law, and no matter of general public importance has been identified.

[31] It was counsel's contention that a mere apprehension of miscarriage of justice, is not a matter falling to the jurisdiction of this Court; as the matter has been fully canvassed, and considered by the two superior Courts below. Counsel cited the cases of ***Malcolm Bell v. Hon. Daniel Moi & Another*** SC Applic. No 1 of 2013, and ***S. K. Macharia & Another v. Kenya Commercial Bank and Another*** SC Applic. No 2 of 2011.

[32] Counsel urged the Court to dismiss the petition with costs.

D. ANALYSIS

(a) Issue for determination

[33] The submissions and analysis by learned counsel incline this Court to concur with the Appellate Court, that this case involves matters of general public importance, within the meaning of Article 163 (4) (b) of the Constitution, as interpreted in the ***Hermanus Steyn*** case. In granting certification, the Court of Appeal duly identified the questions that remain unanswered by existing precedent. While it is true as Mr. Shah urges, that this was a private agreement between a bank and a borrower, the resolution of the main issue, we believe, transcends the interests of the parties to the dispute, and is of general public interest.

[34] The main issue for determination is:

> *whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of Section 34 (1) (a) of the Advocates Act.*

[35] It is the petitioner's contention that the case of ***National Bank of Kenya Ltd v. Wilson Ndolo Ayah,*** Civil Appeal No.119 of 2002 which was followed by both the High Court and Court of Appeal, had certain shortcomings, in terms of setting down the governing law between mortgagor and mortgagee. Counsel submitted that the said decision was inconsistent with established legal and equitable principles. The petitioner urged that this Court should accord due consideration to the parties' intention to enter into a legally binding contract, at the time of executing the charge and the guarantee documents; and on that basis, reverse the findings of the Appellate Court.

[36] Counsel urged the Court to distinguish Section 34 of the Advocates Act from Section 19 of the Stamp Duty Act, and find that it was not the intention of the legislature to invalidate legal documents or proceedings, that involved the hand of an unqualified advocate. Counsel also urged the Court to apply the doctrine of equity, in particular, the principle that *regards as done that which ought to be done".* He submitted that failure to consider the foregoing elements, would amount to gross injustice, and a sanctioning of unjust enrichment.

[37] Learned counsel for the respondent, in response, urged that, legal documents prepared by an unqualified person are of no legal effect, are void, and to sustain the same would be to open the door for advocates to practise law without renewing their practising certificates. Counsel relied squarely upon the findings of the Court of Appeal in the ***Wilson Ndolo Ayah*** case**.**

[38] Section 34 of the Advocates Act (Cap 16, Laws of Kenya) provides as follows:

> ***"(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

(f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.

"(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

"(3) Any person who contravenes subsection (1) shall be guilty of an offence.

"(4) This section shall not apply to—

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof."

[39] The bone of contention in this appeal emanates from the decision of the High Court in which the presiding Judge made the following pronouncement:

> *"I am bound by the doctrine of precedent to follow the ratio decidendi in the* ***Wilson Ndolo Ayah*** *case and I do hereby find that the charge dated 29th June 1994 was null void and invalid."*

[40] In dismissing the appeal, the Appellate Court too, drew guidance from the decision in the ***Wilson Ndolo Ayah*** case, and even complimented the High Court Judge for showing fidelity to the vital common law doctrine of *stare decisis*.

[41] It is evident, and is not in dispute, that the case both in the High Court and the Appellate Court, was wholly resolved by adhering to the *ratio decidendi* in the ***Wilson Ndolo Ayah*** case. Therefore, we should examine that case, and consider whether its principle still stands, and is the pertinent criterion for resolving the instant matter.

[42] Mr Wilson Ndolo Ayah had sought a declaration that a charge and deed of guarantee, both in his favour, be declared void *ab initio,* and the sum of money advanced to him on the basis of the charge be held to be irrecoverable. On what account should he win this windfall? The said documents were prepared by an advocate who did not hold a practising certificate, and was therefore not qualified to draw the documents, by the terms of Section 34 of the Advocates Act.

[43] His prayers were answered. The trial Court held that the instrument of charge and deed of guarantee having been prepared by an advocate not holding a practising certificate, were a nullity, and the money secured was irrecoverable.

[44] Aggrieved by this decision, National Bank of Kenya Limited appealed to the Court of Appeal. However, disappointment awaited the Bank, the Appellate Court thus determining:

> ***"Whether or not the instrument of charge and instrument of guarantee should be declared invalid*** *ab initio* ***for having been drawn by unqualified advocate is a conundrum. Courts in this country are not in agreement on the effect the absence of a [practicing] certificate will have on validity of documents drawn by such an advocate. Section 34 of the Advocates Act... makes it an offence for an advocate not holding a current [practising] certificate preparing or drawing any document for a client for a fee. Neither the Advocates Act nor any other written law makes provision with regard to the validity or otherwise of such documents. The Stamp Duty Act, unlike the Advocates Act, makes provision in Section 19 saying an unstamped document is inadmissible in evidence. The legislature, we think, not only made the documents unregistrable but also made the document invalid for any other purpose before stamping***."

[45] The Appellate Court went on as follows:

> ***"Section 34... as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the*** *invalidation* ***of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise it is good policy that courts***

enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by the unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The gravamen of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him. There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for [the] public good, more so in a country like ours, which has a predominantly illiterate or [semi-literate] 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 interest of the innocent party should not be swept under the carpet in appropriate cases. However, it should not be [forgotten] 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 [practising] 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 that 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…will discourage excuses being given for…the illegality. [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."

[46] The Appellate Court in arriving at its decision, found guidance in several earlier cases: ***Kajwang' v. Law Society of Kenya*** [2002] 1 KLR 846; ***Obura v. Koome*** [2001] KLR 109; ***Samaki v. Samaki*** Civil Application No. Nai 39 of 1996, and the Ugandan case, ***Huq v. Islamic University in Uganda*** 2 EA (1995-1998) 117.

[47] Even though inclined towards the outcome pronounced, the Appellate Court had made reference to decisions bearing differing orientations, notably, the UK case of ***Sparling v. Brereton*** (1866) LR 2 Eq.64, p. 415, in which the following passage appears:

*"…**It would be most mischievous, indeed, if persons without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualifications of their solicitor. As against third parties, the acts of such a person acting as a solicitor are valid and binding upon the client on whose behalf they are done… I would be***

injuring both plaintiffs and defendants if I were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit."

[48] The decision by the Appellate Court in ***Ndolo Ayah*** was based on certain fundamental assumptions. The first of these was that the phrase *"an unqualified person"* is synonymous with *"an advocate without a current practising certificate"*. On the face of Section 34(1) of the Advocates Act, this assumption is not without merit, especially taking into account the provisions of Section 2 of that Act, which defines "an unqualified person" as *"a person not qualified under Section 9 to act as an advocate"*. Section 9 of the Advocates Act in turn provides that *"...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 practicing certificate"*.

[49] Such provisions, however, to convey their full import, ought to be read together with others in the same statute. For instance, Section 2 of the Act also defines an "advocate", as *"any person whose name is duly entered upon the Roll of Advocate, or upon the Roll of Advocates having the rank of Senior Counsel and...includes any person mentioned in Section 10"*. Section 10 makes no mention of a practising certificate. Sections 12 and 13 of the Advocates Act on the other hand, are devoted to the qualifications for being admitted as an advocate—and these are both academic and professional.

[50] While Section 34 (1) of the Advocates Act forbids *an unqualified person from indirectly or directly taking instructions, or drawing any document relating to the conveyancing of property,* it exempts from this prohibition, "*any person who is employed by an advocate and who is acting within the scope of that employment"*. What is the import of this exemption? Is it to be taken to refer to persons who are not qualified as advocates, such as lay persons, or persons belonging to professions other than law?

[51] Alternatively, can it be assumed that "an advocate without a current practising certificate", being an "unqualified person" within the meaning of Section 34(1) of the Advocates Act, becomes "qualified" when he or she is *employed by another advocate (presumably one with a practising certificate)?*

[52] But if the contrary be true, then would it mean that the law views the acts of "a non-advocate" who is employed by an advocate, more favourably than those of "an advocate without a practising certificate", as regards the preparation of conveyancing and other documents?

[53] What is the real intention of Section 34 of the Advocates Act? Is it aimed exclusively at advocates "without practising certificates", or persons who are not advocates within the terms of Sections 2, 12 and 13 of the Advocates Act? Does one cease to be "an advocate", on account of not taking out a practising certificate? Or does one remain "an advocate", but "one who is not qualified to perform the tasks of an advocate"?

[54] It is plain to us that there are no clear-cut answers to these vital questions. Such a state of uncertainty flows from either, the inelegance of draftsmanship; or equivocation in the expression of parliamentary intent.

[55] The Appellate Court's second assumption, in ***Ndolo Ayah*****,** was that Section 34(1) of the Advocates Act had the effect of rendering all instruments of conveyance prepared by advocates without current practising certificates, null and void for all purposes. It is now clear that such an assumption was not based on any express or implied meaning of Section 34, or other provisions of the Advocates Act. In the reasoning of the Appellate Court, the ground for invalidating such documents rests in *public policy*: citizens must obey the broad intent of the law of the land; and Courts must enforce the law of the land, and deter acts of illegality.

[56] It is true, of course, that such are virtuous objects in a well-conducted socio-political order, that coincide with goals of public policy. However, within

that context, and by the terms of the constitutional law, the Courts are under obligation to resolve live disputes on questions that are governed by quite specific propositions of law.

[57] Thus, the issue still remains: whether Section 34 of the Advocates Act actually invalidates all instruments of conveyance prepared by advocates who do not have current practising certificates. In our opinion, it is essential to establish the main objective of Section 34, as a basis for any conclusions. This Section prohibits unqualified persons from preparing certain documents. It is directed at "unqualified persons". It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practising certificates.

[58] In these circumstances, how does the citizen's position rest? If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practising certificate? Would he or she be in breach of the law if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practising certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.

[59] Is such reasoning in keeping with a perception that Section 34 of the Advocates Act, invalidates all documents prepared by an advocate who lacks a current practising certificate? We do not think so. Section 19 of the Stamp Duty Act, upon which the Appellate Court placed reliance in arriving at its conclusion,

does not in our view, provide a basis for invalidating the instruments in question. Section 19 of the Stamp Duty Act only seeks to render inadmissible for purposes of evidence, all documents which are unstamped. The question before this Court is not the admissibility in evidence, of unstamped documents, but rather *the validity of instruments (which indeed are stamped) prepared by an advocate who lacks a current practising certificate*.

[60] All through from the trial Court to the Appellate Court, the respondent was the beneficiary of one pillar of the common law tradition: the doctrine of ***stare decisis.*** The picture unfolding from the submissions and analysis in this case, is that there was an inapposite application of that doctrine. Even as ***stare decisis*** assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the Courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up. This principle is typically expressed by *Sir Thomas Bingham, MR* in the United Kingdom's Appellate Court, in ***M. v. Newham London Borough Council*** and ***X. v. Bedfordshire County Council*** [1994] 2WLR 554 at p. 572:

> *"If [the claimant] can make good her complaints..., it would require very potent considerations of public policy... to override* ***the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied".***

[61] Precedent (such as that in ***Ndolo Ayah***), as we have clarified in the foregoing paragraph, is to be perceived, ***in general,*** as the "announced rule"; but in the quest for justice in the context of a particular case—such as the final appeal now before this Court—there is a basis for departing therefrom. This principle of judicialism, in common law practice, is well depicted by Professor Melvin Aron Eisenberg in his scholarly work, ***The Nature of the Common Law*** (Cambridge, Mass: Harvard University Press, 1988) [at p. 63]:

"Because the courts normally use announced rules as their starting points, as a practical matter the deciding court is likely to have a limited number of salient choices in dealing with a precedent. It can accept and apply the announced rule; it can determine that on close inspection the announced rule is not relevant; or it can use a minimalist or result-centred technique to reformulate or radically reconstruct the announced rule, and then apply or distinguish the rule it so establishes".

[62] By virtue of the financial arrangements between the parties in ***Ndolo Ayah,*** monies belonging to the appellant are now held by the respondent, and it is held to be irrecoverable, just on the policy ground that the Courts ought to be seen to deter illegality. The illegality stems from the fact that the conveyance was prepared by an advocate who at the material time, did not hold a current practising certificate. However, such illegality, in our view, is by no means as manifest as that of unjust enrichment, conferred upon the borrower. Could Parliament have intended, by Section 34 of the Advocates Act, the perpetration of such an injustice? The injustice, indeed, multiplies, and subsumes the plane of public interest, in view of the fact that the monies in question were drawn from a public financial institution.

[63] To hold that monies lent in conformity with the provisions of the law, save that the relevant conveyancing instruments were drawn by an advocate who at the time did not hold a practising certificate, are not recoverable, would be to sanction unjust enrichment for unscrupulous borrowers, while depriving innocent lenders—creating a wide scope for fraudulent borrowing. Such a position in law, in our view, does not represent an "announced rule" – precedent that should guide the disposal of the matter now before us. Just as the law frowns upon unscrupulous lenders, especially those whose actions would fetter the borrower's equity of redemption, so also must it frown upon unscrupulous borrowers, whose actions would extinguish the lender's right to realize his or her

security. There is to be, in law, a substantial parity of rights-claims, as between the lender and the borrower.

[64] The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a practising certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practising certificate.

[65] One of the bases of the Appellate Court's decision was founded upon a hypothesis which, in our opinion, should not be the criterion for resolving the question as to the rights of the parties: that since the Advocates Act provides for the recovery of fees by a client whose advocate has not taken out a practising certificate, there would be no harm if the charge documents are annulled. For even if the appellant were to recover any fees paid, it stood to be damnified by the non-repayment of the loan itself.

[66] The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities".

[67] To invalidate an otherwise binding contractual obligation on the basis of ***a precedent, or rule of common law*** even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.

[68] The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document 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 practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

[69] While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate's obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.

[70] We commend this Judgment to the attention of Parliament, the Law Society and the Attorney General so that appropriate legislative action may be taken to address the gaps and inconsistencies now apparent in the Advocates Act as highlighted in paragraphs 48, 49, 50, 51, 52, 53 and 54 herein.

E. DECREE

[71] The facts of this case, the analysis, the application of the law, and the objects of justice as identified, lead us inevitably to a decree incorporating three specific elements, as follows:

(i) The petition dated 5th December, 2014 is hereby allowed.

(ii) The Judgment of the Court of Appeal dated 27th February, 2014 is hereby set aside.

(iii) Costs of this appeal are to be borne by the respondent herein.

DATED and **DELIVERED** at **NAIROBI** this **2nd Day of December, 2015.**

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W. M. MUTUNGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....

P. K. TUNOI
JUSTICE OF THE SUPREME COURT

.....

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA