**Belgo Holdings Ltd v Esmail**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 23 July 2004

**Case Number:** 244/04

**Before:** Lenaola J

**Sourced by:** LawAfrica

*[1] Advocate – Appearing in court without practicing certificate – All proceedings therein invalid.*

**JUDGMENT**

**Lenaola J:** The orders sought in the application dated 17 May 2004 by the defendant are that the orders issued by this Court on 30 April 2004 be recalled and that all pleadings filed by K Getanda and Company

Advocates be struck out because one K Getanda, advocate, had no practising certificate at all material times. Further, that since a practising certificate is a pre-requisite to the practise of law, a person who does not hold a certificate cannot even sign and file any pleadings in court.

The background to this matter is that on 30 April 2004 upon hearing parties herein on a different application, this Court stayed all proceedings in this suit until the determination of certain other application in High Court civil case number 507 of 2003. The latter suit is related to this one and more substantive issues as regards the dispute between parties were being litigated therein. One of the issues in that suit relates to the instructions given to Messrs. K Getanda and Co Advocates by Messrs.’ Belgoh

Holdings Limited because then and as is now, the directorship of that company is in dispute, I declined to strike out the pleadings merely because of the allegation that the claimant to the directorship did not instruct Messrs.’ K Getanda and Company Advocates to act for the company.

I am now informed by counsel for the applicant that under section 24 of the Advocates Act, Chapter

16 Laws of Kenya, every practising certificate shall bear the date when it was issued and shall be valid only from that date. Mr. K Getanda obtained his certificate on 28 April 2004 and therefore, any action taken by him as an advocate prior to that date was invalid as he was an unqualified person. A number of authorities in support were cited and I shall return to them in the course of this ruling.

In opposition, counsel for the firm of K Getanda and Co Advocates strenuously opposed the application on the grounds firstly, that since there is a stay order as regards proceedings in this suit, and it is mischievous of the applicant to file the instant application in spite of that clear order. Secondly, that if the applicant was unhappy with the order of stay, he ought to have sought a review thereof and not file fresh matters as he has now done. Thirdly, that this Court cannot in the circumstances of this case recall its orders in the manner suggested by the applicant as recall can only be done where there is an error and it must in any event relate to an order or decree that has been properly extracted and I am told that this is not the case in this matter. Counsel cited a number of authorities and distinguished those cited by counsel for the applicant, a matter again I shall shortly return to.

I should say this from the outset so that there is no doubt at all that when the Advocates Act sets out *in*

*extenso* the steps to be taken by a person wishing to practise the discipline of law, there was very good reason for that. The reason as I understand it is so that no quack can pretend to practise law and those who are indeed qualified renew their commitment and adherence to their oath of office every year. By so doing, there is imparted in the practise the kind of discipline that is of utmost importance in the profession of law.

Mr. K Getanda, advocate, is the principal and sole proprietor of the firm of K Getanda and Co Advocates. He actually lied to this Court when asked if he was or was not the sole proprietor of the firm.

The records at the Law Society of Kenya do not bear him out. He is, in any event, the advocate who has been appearing both in this matter and in High Court civil case number 507 of 2003. His lame protestations that he is not the same as the firm is, in my view, weak and unsubstantiated. It is not in doubt that between 1 February 2004 and 28 April 2004 he had no practising certificate. The former date is important because whereas advocates obtain certificates for the period 1 January to 31 December of each year, there is the grace period of 1 January to 30 January given to them. I note, that Mr K Getanda did not take out his certificate for any period prior to 28 April 2004 and his name is not listed in Kenya Gazette Notice number 5077 of 2 July 2004 indicating those advocates qualified to practise law after 1 February 2004.

As regards the likes of K Getanda Advocate, section 34 of the Advocates Act treats them as unqualified to practise law and cannot take instructions or prepare any legal document. That section provides as follows :“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument:

( *f* ) Relating to any other legal proceedings.”

Subsection (2) prescribes the penalty for the offence of doing any of the matters set out above in Subsection 1.

It may be important at this point to note that section 21 of the Advocates Act provides that the practising certificate is meant to “*authorise the advocate named therein to practice*” as such advocate.

More importantly, section 9 of the Act provides as follows:

“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 practicing certificate; and

(*d*) He has in force an annual license.”

It is instructive that these four qualification are not to be read to the exclusion of each other. The use of the word “*and*” means that for one to be qualified to act as an advocate and as shown above, one must have *all* of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and section 34 aforesaid, operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings. Between 1 February 2004 and 28 April

2004, K Getanda, advocate, may have met two (2) or three (3) of the qualifications required by section 9 above and to all intents and purposes he was a person unqualified to practise law during that period.

I, therefore, agree and I am bound by the holding in *Obura v Koome* [2001] 1 EA 175. In that matter, the Court of Appeal held that where an advocate who had no practising certificate at the time that a memorandum of appeal was filed, the said memorandum of appeal was found to be “incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court”. The appeal was struck out.

I was also referred to and I agree with the reasoning of Ole Keiwua J (as he then was) in *Prashilee Ltd v Rabai Road Estate Ltd* High Court civil case number 2336 of 1994 where the learned Judge held categorically that where an advocate failed to take out a practising certificate, the matter was no longer a mistake on his part but in fact “deprives such a person of any capacity to sue as an agent of any litigant under the provisions of our Civil Procedure Rule”.

I reject the submission in this regard by counsel for the respondent when he cited the case of *Njagi v*

*Kihara,* [2001] 1 EA 167 where Mulwa J (as he then was) attempted to side step the clear wording of section 9 of the Advocates Act. In that case, the learned Judge although aware of the Court of Appeal decision in the *Obura v Koome* case (*supra*) above and without distinguishing it, stated as follows:

“To my mind, I do not think that documents duly drawn, signed and filed in court, and which the court has acted upon, by an unqualified person and were specifically an advocate because his name is in the Roll of Advocates under section 2, should be expunged from the records and done away with.”

With respect and since I am not bound by that decision, I shall not apply the learned Judge’s wisdom of interpretation to the matter before me and I reiterate my view as earlier outlined.

One other pint arose which is a corollary to the above and this was the submission that even if the advocate was unqualified to sign any pleadings, his mistake should not be visited upon an innocent litigant. I think that this submission should not be sustained in our courts. Advocates are not a special breed of Kenyans whose actions can be excused because they are advocates. The Advocates Act has given mandatory conditions to be met by a person who wished to practise law. One of them is that a practising certificate must be obtained. A grace period of one month is given to enable those who are inadvertently unable to comply, to do so. Worse, it is an offence punishable under criminal law to practise without such certificate. How can one then justify a court of law countenancing both breach of statute and the commission of a crime because there is the risk of innocent litigants being affected?

I agree with Ibrahim, J in *Dubai Bank Kenya Limited v Cane Cars Africa Ltd*, High Court civil case number 68 of 2003 when he says that the intention of the Legislature must be looked at in interpreting law and that where the intention is clear, effect must be given to it. In that case he declined to strike out a verifying affidavit which had omitted the name and address of the advocates because in his view that “*was a mere irregularity in form*”. However, in the instant case, I am of the view that Ole Keiwua, J (as is the case here) in the *Prashilee Ltd* case (*supra*) above captured the intention of the Legislature and interpreted it as follows:

“In this case, Mr Oseko is in contempt of this Court by virtue of having instituted this suit contrary and in breach of section 31(2) of the Advocates Act. To my mind, anything done pursuant to such breach of a statutory provision and in contempt of court is not a mere mistake like failing to file an appeal out of time. It is an offence and must be viewed as such. Anything done pursuant to and in preparation for the breach of the said statutory provision cannot be saved by the fact that it was committed not by the principal but by an agent.”

Section 3(1) provides that:

“Subject to section 83, no unqualified person shall act as an advocate or as such cause 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 prosecution.

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

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

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

( *c*) I n addition be guilty of an offence and liable to a fine not exceeding twenty five thousand shillings or imprisonment for a term not exceeding two years or both.”

Turning back to the case before me, it does not matter, I think, that a party may suffer the effect of striking out of its pleadings because of its advocate’s actions. When an offence is committed; when contempt of court is committed; when statute is breached, the law must take its full course and the injured party I am certain, has a remedy against the advocate whose actions caused the injury to it.

Having so held, I am told by counsel for the respondent that since I granted orders of stay of all actions in this suit, I should not allow any party to raise any other matter in that suit unless the orders are raised. With respect, the issues now raised are such that this Court should recall its earlier orders. If the actions taken all along in this suit were a nullity for reasons I have laboured to explain above, and where there is as is apparent, contempt of court the earlier orders can be recalled even if no party so applies. To my mind, this Court has the inherent power on its own motion to put right what is wrong, more so where a party has benefited from the commission of an offence which was not disclosed to court. I do not see merit in the contention that an application for review was the only way to let the court know that the advocate was unqualified to file pleadings and therefore, all earlier orders ought to be vacated.

Without belaboring the point, all and any pleadings filed by K Getanda Advocate between 1

February 2004 and 28 April 2004 are hereby struck out and the order herein made on 30 April 2004 based on submissions made by the said K Getanda is hereby recalled and the order of stay of proceedings is set aside.

This being my finding, the application dated 17 May 2004 is hereby allowed with costs. The Law

Society of Kenya should be supplied with a copy of this ruling.

Orders accordingly.

For the plaintiff:

*Information not available*

For the defendant:

*Information not available*