**Kenya Power and Lighting Co v Mahinda and another**

**Division:** Court of Appeal of Kenya at Nyeri

**Date of judgment:** 10 June 2004

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**Case Number:** 148/04

**Before:** Omolo, O’kubasu and Deverell JJA

**Sourced by:** Lawafrica

*[1] Advocates Act – Practising certificate – When a practicing certificate comes into effect – Person*

*with the duty of issuing a practicing certificate – Effect of signing a document without a practicing*

*certificate.*

**JUDGMENT**

**Omolo, O’Kubasu and Deverell JJA:** The ruling arises from a notice of motion filed by Kenya Power and Lighting Company Limited as applicant. The applicant is the respondent to civil appeal number 148 of 2004, in which one Chris Mahinda, trading as Nyeri Trading Centre, is the appellant. The appeal is against the ruling of JH Khamoni J dated 25 June 2004. The motion seeks an order “that the appeal herein be struck out on the grounds that the notice of appeal and the memorandum of appeal were signed by Titus Timothy Muthui Kimani an advocate

hereinafter “the advocate”) who was not entitled to act as such, as he did not have a practicing certificate and the appeal is thereby incompetent”. The notice of appeal was signed and lodged on 25 June 2004. The memorandum of appeal was signed and lodged on 13 July 2004. It is not disputed that the advocate was issued with a practising certificate for the year 2004 by the registrar of the High Court but it is clear that it was not approved by the Council of the Law Society until 13 September 2004 and not issued by the registrar until 22 September 2004. The applicant herein submits, that prior to its issue after approval by the Council, the advocate did “not have in force a practising certificate” which are the key words in section 9 of the Advocates Act Chapter 16. The relevant part of that section reads as follows: “Subject to this Act, no person shall be competent to act as an advocate unless:

*a*) . . .

*b*) . . .

*c*) he has in force a practising certificate.” The respondent’s submission was based on the additional fact that the advocate had applied for a practising certificate and paid the fees demanded by the Law Society amounting to a total of KShs 20 510 as early as 25 March 2004, which included the KShs 5 000 practising certificate fee. In his further supplementary affidavit, the advocate deponed: “12. That I kept calling the offices of the Law Society to ask about my practising certificate for the year 2004 as I had paid for it and I was told by the cashier that he gave the doctor’s letter to one Turia to pass over the file to the Council. 13. T hat after going there numerous times and making futile telephone calls to the Law Society offices and after failing to get a solution, I made a telephone call to the secretary of the Law Society about the behavior of the subordinate staff who it seemed had misplaced the doctor’s letter and the secretary promised to take action upon which I received the practising certificate. 14. T hat the delay in receiving the practising certificate despite having paid on time was occasioned by the negligence and carelessness of the Law Society of Kenya, which took the intervention of the secretary to bring to an end.” The first issue for us to decide is whether a practising certificate for which the fee has been paid in advance but which has not been issued for whatever reason, by the registrar of the High Court can be described as being “in force”. The provisions of the legislation and the Court of Appeal Rules

the Rules) that are relevant are the following: Rule 22 which provides that “subject to the provisions of rule 70,

which is irrelevant to the present issue), a party to any proceedings in the court may appear in person or by advocate.” Rule 74

6) which provides that: “A notice of appeal shall be substantially in the form D in the First Schedule hereto and shall be signed by, or on behalf of, the appellant.” Form D which includes the following under the space for the date: “Signed Rule 84

3) and form F in the first schedule have provisions similar in all material effects in relation to a memorandum of appeal. Rule 97

1) which provides that “Any party to an appeal who does not intend to appear in person or by advocate at the hearing of the appeal may lodge in the appropriate registry a statement in writing of his arguments. . .”

It is clear from these provisions that, if the party is not appearing in person, he can only act, in relation to an appeal, through an advocate unless the party is a corporation which has complied with rule 22

2) or is a person under disability where rule 22

3) has been complied with. Although it is not expressly stated in the Rules that an advocate representing a party must be an advocate competent to practice under section 9 of the Advocates Act, this must clearly be the position. Practising certificates are dealt with in Part VII of the Advocates Act from which it is clear that the issue of practising certificates is the responsibility of the registrar of the High Court and not of the Law Society. The practising certificate for the year 2004 exhibited to the advocate’s affidavit in support of the application is dated 22 September 2004 and signed by the registrar of the High Court. In that certificate, the registrar certifies that the advocate “is duly enrolled as an advocate and is entitled to practise as such advocate.” We consider that it cannot be validly argued that, prior to the date of issue of that certificate, the advocate had in force a practising certificate. The precise role of the Law Society in relation to the issue of practising certificates was not explained to us by either party and our attention was not drawn to any regulations dealing with that role. It is probable that it is an administrative arrangement between the registrar and the Law Society under which the latter collects the practising certificate fees on behalf of the registrar along with the fees due to the Law Society and the Advocates Benevolent Association for subscriptions etc. There may also be an administrative arrangement between the Law Society and the registrar whereby the registrar does not issue practising certificates to advocates without first obtaining from the Council of the Law Society, its approval or comment. We, however, cannot descend into the realms of speculation as to the existence or nature of any such arrangements which would not, in any event, affect the legal position under the Advocates Act. We come to our decision based solely on the undisputed fact that no practising certificate for 2004 had been issued to the advocate prior to the signing, by him, of both the notice of appeal and the memorandum of appeal. When those two acts were done by him the advocate was not qualified to act as an advocate with the effect that the two documents were incompetent. A practising certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22 September 2004, it had retrospective effect back to the beginning of 2004. We do not accept this submission. If no practising certificate had been issued when the act was done, the advocate was not qualified to do that act at the time he did it. We accordingly allow the application and hereby order that the notice of appeal and the memorandum of appeal be struck out with costs to the applicant. The effect of this order is that the record of appeal itself must be struck out. For the applicant:

*Information not available*

For the respondent:

*Information not available*