



4 (40)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

CORAM: OMOLO, O'KUBASU & DEVERELL, J.J.A.

Civil Appeal (Appli) 148 of 2004

BETWEEN

KENYA POWER & LIGHTING COMPANY APPLICANT/RESPONDENT

AND

CHRIS MAHINDA T/A NYERI
TRADE CENTRE RESPONDENT/APPELLANT

*(Application to strike out an appeal from the ruling and
order of the High Court of Kenya at Nyeri (Mr. Justice
Michael Khamoni) dated 25th June, 2004*

in

H.C.C.C. NO. 37 OF 2004)

RUL'NG OF THE COURT

This ruling arises from a Notice of Motion filed by Kenya Power & Lighting Company Ltd. as applicant. The applicant is the respondent to Civil Appeal No. 148 of 2004 in which one *Chris Mahinda* trading as Nyeri Trading Centre is the appellant. The appeal is against the Ruling of *J.H. Khamoni J.* dated 25th 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 practising certificate and the appeal is thereby incompetent."

The Notice of Appeal was signed and lodged on 25th June 2004.

The Memorandum of Appeal was signed and lodged on 13th 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 13th September 2004 and not issued by the Registrar until 22nd 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 Cap16*.

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 Shs.20,510/- as early as 25th March 2004 which included the Shs. 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. That 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. That 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..... Appellant
Advocate for the appellant."*

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 22nd 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

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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
22nd 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.

Dated and delivered at Nyeri this 10th day of June, 2005.

R.S.C. OMOLO
.....
JUDGE OF APPEAL

E. O. O'KUBASU
.....
JUDGE OF APPEAL

W. S. DEVERELL
.....
JUDGE OF APPEAL

I certify that this is a
True copy of the original.

DEPUTY REGISTRAR