

REPUBLIC OF KENYA



IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

CTC NO. 25 OF 2016

KENEDY NYANGEWA.....1ST CLAIMANT
MOSES NYAKERI2ND CLAIMANT
JAMES MABICHA3RD CLAIMANT
CHARLES BIRUNDU4TH CLAIMANT

VERSUS

GUSII MWALIMU SACCO
SOCIETY LTD 1ST RESPONDENT
NYAMACHE ROBERT ONWONG'A2ND RESPONDENT

RULING

1. On 25/4/2017 this case came up for hearing of a Preliminary objection filed by the 1st respondent. We wish to reproduce the grounds as captured in the notice dated 17/8/2016. The suit is objected to on the grounds;
 - (a) That the drawer of the pleadings herein has no locus standi to draw, plead and as file any legal documents, act and/or in any way and/or make representation on behalf of any party.
 - (b) That the drawer of the documents is a process server and/or a busy body and cannot purport to draw court documents.

- (c) That the drawer of the documents is not a registered organization/ union and/or SACCO legally empowered to act on behalf of the claimants herein.
 - (d) That the claim therefore has filed is totaling defective and an abuse of court process and ought to be struck out and/or dismissed on the first instance.
2. The claimants have filed a reply to the notice of the preliminary objection. They insist that the drawer of the pleading is a registered firm qualified to draw pleadings and act for them.
 3. Ms Odeny submitted before us that NAMU MARK AND ASSOCIATES is not qualified to file this case on behalf of the claimants. That as registered debt collectors they have no powers to act as advocates before this Tribunal. That even the power of Attorney relied on was not signed before this suit was filed that the case should be struck out.
 4. In response James Namu introduced himself as the Director of Namu and Associates Agency. That he is a debt collector. That the claimants have the right to choose him to act for them.
 5. We have considered the preliminary objections. A preliminary objection, as was held in the case of MUKHISA BISCUIT MANUFACTURING CO. LTD -Vs- WEST END DISTRIBUTORS LTD 1959 E.A. 696;

“.. .is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained as if what is sought is the exercise of judicial discretion”.

6. The respondent in this matter has raised objection on the question whether NAMU MARK AND ASSOCIATES AGENCIES is qualified to represent the claimants before this Tribunal. Qualification to act for other parties before a court or Tribunal is a matter of law. This is a point which if raised successfully will dispose of the entire suit. We find that the objection fits the definition given in MUKHISA case above.

7. We now move to the merits or otherwise of the objection. The facts are straight forward. The firm calling itself Namu Mark and Associates Agencies is registered under the registration of Business Names Act. The certificate which is on the court record certifies that James Peter Namu and Everline Moraa Namu are duly registered to carry business under that name. The claimants in this matter are adults who are members of Gusii Mwalimu Sacco Society Ltd. James Namu the Director of the firm submitted that he is an agent of the claimants for purposes of filing this suit. That he has powers of attorney. The respondent submitted that the agency is practicing law illegally against the provisions of the Advocates Act.

8. The Director of the agency has clearly drawn pleadings and appeared before the Tribunal acting for the claimants. We were told that the power of attorney is not registered. That the same is defective. In our view the issue before us is bigger than whether the agency has a valid power of attorney. A power of attorney does not convert one into an Advocate under the Advocates Act. It allows the one donated such powers to act as if he is the donor. In fact the person granted powers of attorney can appear in person or instruct an advocate to appear for him. In this case this is not what has happened. Namu Mark Agencies is not a party to this case. The Claimants are still the parties. The agency has drawn pleadings and its director stood at the bar representing his clients. He has boldly stated that he has instructions to act for them.

9. The above findings take us to the Advocates Act Cap 16 Laws of Kenya. Section 9 provides that no person shall be qualified to act as an advocate unless he is admitted as an advocate, his name is on the roll of advocates, and he has in force a practicing

certificate. Under Section 34(1) of the Act it is an offence for an advocate not holding a valid practicing certificate to draw pleadings and act, as an advocate. More specifically Section 31 provides;

“(1) subject to section 83, no unqualified person shall act as an advocate, or as such cause any 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 jurisdiction.

(2) Any person who contravenes sub section (1) shall

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

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the cause of so acting; and

(c) in addition be guilty of an offence.

10. The Agency herein and its Director do not pretend to be advocates. They fall squarely under the provision of Section 31 of the Advocates Act. They are unqualified persons, who have acted as advocates by drawing pleadings, instituting a suit and trying to prosecute it before this Tribunal. They are being paid for it. For Mr. James Namu he is taking this as any other business where he can charge fees for services rendered. The reading of Section 31(1) and (2) shows that he has acted against clear provisions of the law.

11. The question then is what is the fate of the case instituted for the claimants by unqualified persons. In the National Bank of Kenya Ltd – Vs – Wilson Ndolo Ayah the court of appeal held that the court cannot perpetuate an illegality. In that case the court was

dealing with an advocate who had not taken out a practicing certificate. The entity before us is not an advocate of any stripe or colour. This is a person we have already found that he is in contempt of the Tribunal and committing a crime. Nothing done in furtherance of the offences can be validated. The statement of claim and any subsequent pleadings filed by Namu Mark Agencies and Associates are null and void.

12. The high court in HCCA No. 21 of 2013 JOHN LANGAT – Vs – KIPKEMOI and 2 others stated that;

“It is criminal under suit 34 of the Advocates Act for an advocate to practice without a practicing certificate. The section is not procedural technicality. It is a substantive statutory provision. This court is enjoined to protect not only the constitution but also all laws enacted by pursuant. It has a duty to protect the Advocates Act. The provisions of Article 159 (2) (d) would not condone such an act”.

13. We fully adopt the above passage by Justice A. O. Muchelule substituting section 34 with section 31 of the Act. The claimants have a recourse against the unqualified persons. The Tribunal should endeavor to protect the interests of the public, who may be taken advantage of by crooks and imposters.
14. It should be clear that this objection and ruling is not about Namu Mark’s right to conduct business or the directors’ right to livelihood. It is about protecting the wider public from mischief by unqualified and unauthorized persons. It is about enforcing the laws of this country including the Advocates Act.
15. It is manifestly clear that we are convinced that the firm of Namu Mark Agencies and Associates is unqualified to bring this suit. The Preliminary Objection is merited. It is upheld. The result is that the statement of claim is hereby struck out with costs to the respondents.

16. The costs in this matter should in our view be paid by the firm that has occasioned the claimants the loss. The firm of Namu Mark agencies will pay the respondents costs. The claimants who instructed the Agency will bear own costs.

Orders accordingly.

Signed
A. ITHUKU
CHAIRMAN

Signed
N. KITIWA
MEMBER

Signed
H. SHIDIYE
MEMBER

Order:

Ruling delivered in open court. Mr. Ochuka holding brief for Mose & Millino for Respondent. James Namu is absent.

Signed
A. ITHUKU
CHAIRMAN
15/6/2017