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MR. WAIGANJO'S FILE 38

**LAW SOCIETY OF KENYA**

**BEFORE THE DISCIPLINARY COMMITTEE ESTABLISHED**

**UNDER THE ADVOCATES ACT, 1989**

**MISCELLANEOUS CAUSE NO. D.C.C. 207 OF 2004**

**IN THE MATTER OF ABABU P.T. NAMWAMBA, ADVOCATE**

**AND IN THE MATTER OF THE ADVOCATES ACT**

**JUDGMENT**

This complaint is preferred against Ababu P.T Namwamba, Advocate, by the Law Society of Kenya (LSK) through an affidavit sworn by George M Kegoro, the Secretary thereof. The essence of the complaint by the LSK is:

1. That the Advocate describes himself as 'Chief Counsel' of the Chambers of Justice, which is described as a purely humanitarian law firm in breach of Rule 11 of the Advocates (Practice) Rules, which forbids any description other than that of 'advocate'.
2. That by practicing in the name and style of 'The Chambers of Justice, the Advocate is in breach of Rule 12 of the Advocates (Practice) which forbids an Advocate to practice other than in one's own name.
3. That the description "Chief Counsel" is misleading because it gives an erroneous impression that it is part of an official hierarchy to which advocates in Kenya subscribe and in which Mr. Namwamba has been recognized with the said title.
4. That on 9<sup>th</sup> June 2004, an advertiser's announcement appeared in the Daily Nation, taken out by the Chambers of Justice, entitled, 'One year after the promise'. That the advertisement featured a detailed description and photographs of the Mr.

Namwamba as an advocate, which amount to self promotion and advertising, in breach of Rule 1 of the Advocates (Practice) Rules.

5. That further through a website operated by the said organization, there are numerous passages, whose effect is to aggrandize Mr. Namwamba, who is described as the "Founding Chief Counsel of the Chambers of Justice", and the Chambers described as being "endowed with some of the best legal minds in Kenya's civil sector." Another passage complained of reads "The Chief Counsel, who is the Chief Executive of the Foundation, chairs the Panel. To qualify as Chief Counsel, one must have been in active legal work for not less than five years, with demonstrated commitment to the cause of justice and human rights. Other virtues that are keenly scrutinized are integrity and honesty."

The Complaint avers that as a consequences of the foregoing matters the Advocate is guilty of disgraceful and dishonorable conduct which is unbecoming of an Advocate in violation of the Advocates Act and the Advocates practice rules.

In an affidavit filed with this tribunal on 27<sup>th</sup> January 2005 , the Advocate avers *inter alia* that

1. He qualified as a lawyer in 1998
2. He was admitted to the bar in 2000 and is therefore qualified to use the title "advocate"
3. He founded the chambers of justice a charitable trust in 2002
4. The Chambers of Justice is not a law firm and it does not engage in any commercial activities
5. The Chambers of Justice has never advertised its legal services
6. The Chambers of Justice are entitled to refer to him as Chief Counsel if they so wish
7. The complaint by the LSK is intended to harass, vex and embarrass the advocate.

In a further affidavit dated 4<sup>th</sup> October 2005 the Advocate further deposes that :

1. He has not signed any pleadings or practiced law under the name of Chief Council
2. There are several law firms in Kenya with websites providing similar information with that provided by the Chambers website.
3. He has not sought directly or indirectly instructions for professional business or advertised to attract business unfairly.
4. He has not permitted himself or his law firm to be described otherwise than as advocate in any printed heading business notepaper, legal forms or public advertisement.

The parties were duly represented by Counsel. The LSK by Mr.Nyiha and the Advocate by Ms Mercy Otieno. By an order dated 12 September 2005, this` tribunal directed that the parties do file written submissions. On 11<sup>th</sup> November 2005 our secretariat received the prosecutions submissions. We have to date not received the submissions of behalf of the accused advocate.

The issues raised by these matter are have far reaching implications at this stage in the evolution of the legal profession in Kenya . *The Advocates Act* and *the Advocates practice rules* made there under are intended, in our opinion, to ensure the orderly practice of the profession of law by those admitted into it .

The catch all offence of professional misconduct created by section 60 of the Advocates Act to wit “ disgraceful or dishonorable conduct incompatible with the status of an Advocate” would appear to have been intended to ensure that standards of professional ethics and etiquette would evolve as the character of the profession changed over time .

It is the Advocates (Practice) Rules which creates the specific offences of professional misconduct . In the present case it is alleged that the Advocate has been in breach of rules 2,11 and 12 .

Rule 2 provides that

*'No advocate may directly or indirectly apply to seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly.'*

Rule 11 provides that

*'No advocate or firm of advocates shall, in connection with the practice of the advocate or firm, cause or permit himself or firm name to be described otherwise than as Advocate or Advocates as the case may be, whether by means of printed headings on business notepaper or legal forms, or by means of printed insertions therein, or by writing or typescript or similar means on such notepaper forms, or any name-plate, or in any public advertisement, or in any other manner whatsoever.'*

Rule 12 provides that

*'No advocate shall practice under any name other than his own name or the name of a past or present member or members of the firm.'*

Before we can determine whether the allegations against the Advocate disclose an offence under the rules we are called upon to determine a few factual issues .

Q.1 Is "the Chambers of Justice" a firm ?

### Advocates Accounts Rules

It is important for the advocate to separate his accounts from the clients accounts. The Advocates Accounts Rules contained in the Advocates Act gives clear guide lines as to how client money should be deposited.

"client's money" means money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity, and includes—

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(a) money held or received by an advocate by way of deposit against fees to be earned or disbursements to be incurred; and

(b) money held or received as or on account of a trustee, whether or not the advocate is sole trustee or trustee with others, but does not include—

(i) money to which the only person entitled is the advocate himself, or in the case of a firm of advocates, one or more of the partners in the firm; nor

(ii) money held or received by an advocate in payment of or on account of an agreed fee in any matter;

Section 13 thereof requires the advocate to keep a proper record of accounts at all times.

### Lien

Advocate has a common law lien over a client's document until his/her fees are paid. However, the advocate may not unreasonably exercise his lien to the detriment of the client and hence S. 47 of the Advocates Act declares that the court may make orders for the delivery up by an advocate of a bill of costs, delivery up of any deed, and documents in his possession, custody or power.

Q2. Was Mr. Ababu Namwamba in the "practicing law" of an Advocate in the offices of the Chambers of Justice ?

Q3. Did Mr. Ababu Namwamba as an Advocate advertise or tout for business ?

The advocate concedes that he was described as Chief Counsel of the Chambers of Justice.

He however denies that the Chambers of Justice was or is a law firm. He asserts that organization is a charitable trust, and its work goes beyond legal work extending to legislative drafting and monitoring, public advocacy and reform lobbying.

In our view that there can be no doubt that the accused Advocate was operating under the seal of the Chambers of Justice qua an advocate. Consequently, the rules of professional conduct applicable to advocates were applicable to him . But was he in "the practice of law" as contemplate by the rules ? In our view, if the Chambers of Justice is a law firm then it must follow that the advocate was in the practice of law within the said firm and clearly in breach of rule 11. However, the evidence does not support that proposition. The evidence shows that The Chambers of Justice is registered as a charitable trust, and not a law firm. But what about the various Court records showing that the accused advocate acted on behalf of a number of litigants in a number of suits, under the auspices of The Chambers of Justice ?. We have noted that in all the Court documents that were presented before us the accused advocate used his own name as well as that of the Chambers of Justice. In our view, an advocate practices law within the meaning of the rules if he renders professional services to a client whether he charges a fee for it or not . If an advocate files any legal documents in his or her name and then indicates that he works from the offices of some organization or other, we do not believe that that is tantamount to practicing in the name of that organization within the meaning of Rule 12 . Whereas we believe that the habit of citing

sponsoring organizations in pleadings is misleading ,we do not believe it is illegal,particularly where is clearly indicated that the advocate has been *instructed* by the client with the support of the said organization. If the law was different, the very crucial role played by such organizations in public interest litigation would be impaired.

Within the Chambers of Justice the accused advocate holds the rank of Chief Counsel. Does this mean he has caused or permitted himself to be described otherwise than 'Advocate' within the meaning of rule 11 as alleged by the Law Society ? We do not think so. The Chambers of Justice, its pretensions to the contrary,(including an entry on its website, describing itself as a humanitarian law firm ) notwithstanding, is not a law firm. Within the meaning of the rules. Consequently, the organization is at liberty to describe any or its officers by whatever fashion they so wish.

For us the most difficult question we have had to grapple with has been whether by his various publications and activities the accused advocate has touted or advertised himself in a manner calculated to attract business unfairly. The complainant has presented before us various extracts from the Chambers of Justice Website together with newspaper excerpts in which the accused is featured describing his legal work with the organization in fairly colorful and probably extravagant language . But does this amount to touting or advertising with a view to attracting business unfairly ? We do not think so. Whether self-aggrandizing newspaper coverage is in good taste or not, it is certainly not the same thing as touting.

What we have said is sufficient to dispose of the matter before us. However since the issue of advertising and touting is coming up before us with more frequency we feel obliged to make a few remarks.

We entertain a grave doubt as to whether a blanket ban on advocates from informing their clients and potential clients as to their contact address, areas of specialization, qualifications of advocates, etc, the stuff to be found in a lawyers directory or a firm website, would pass the test of constitutionality.

Section 79 of the Constitution provides that:

**"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any class of person or class of persons) and freedom from interference with his correspondence."**

The Constitution confers upon all persons (including lawyers), a right to communicate information. Advertising is essentially a form of communicating information. This freedom to communicate information can therefore only be abridged in very specific circumstances set out under the proviso to section 79. The burden of showing that a restriction on the exercise of a freedom conferred by the constitution is necessary lies with the party supporting such a limitation.

It is axiomatic that the legal profession has a legitimate interest in maintaining professional standards of ethics and etiquette, including acts of advertising or routing that may put the profession into disrepute. Nevertheless, it can only do so within the assumptions of the Constitution and the law. There is therefore, in our opinion, a distinction between the issue of principle and the issue of manner of implementation. Admitting the right of advocates to inform the public of their services is different from granting a licence for all forms of advertising. We find comfort in the knowledge that this view is gaining favor in many other jurisdictions.



In the United States, since the decision of the Supreme Court in the 1977 case of *Bates v State Bar of Arizona*, the issue is no longer, whether lawyers can inform potential clients of their services but the latitude available in doing so. In that case, two Arizona attorneys placed an advertisement in The Arizona Republic newspaper. This action violated an attorney disciplinary rule that provided: *"A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so on his behalf."* The Court reasoned that this rule served to inhibit the free flow of commercial information and to keep the public in ignorance and it was therefore in violation of the First Amendment. The Court concluded that advertising was not inherently misleading and could play an important role in the determination of whether an individual had a need for legal services and, if so, the method of finding a lawyer to help meet that problem. The court gave no indication of what the appropriate parameters should be, content only to observe that "we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly"

In our view, the time is ripe for the Law Society to revisit the rules on this among other pressing issues.

For the reasons given above. We dismiss all the charges against the accused advocate.

Githu Muigai

Violet Awori

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