



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**PETITION NO. 06 OF 2017**

**JOSEPH CHELIMO AND 9 OTHERS.....PETITIONERS**

**VERSUS**

**ASMAN ABONGOTUM KAMAMA.....1<sup>ST</sup> RESPONDENT**

**WILLIAM KASAIT KAMKET.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 2/7/18, the petitioner seeks principally an order that the court “*be pleased to review and set aside from the court record the consent recorded on 5/6/2017 herein between the Petitioner’s and Respondent’s Counsel and all other Subsequent proceedings and consequential orders be set aside*”, on the ground that Counsel then appearing for the Petitioner had no authority to enter into the consent.

2. The proceedings on the entry of the consent judgment on 5/6/2017 were as follows:

*5/6/17*

***Coram: HON. JUSTICE EDWARD MURIITHI***

***COURT CLERK: DAISY***

*Mr Chepkilot for Mr Kibet for the Petitioners*

*Mr Mongeri for 1<sup>st</sup> Respondent and Holding Brief for the 2<sup>nd</sup> Respondent.*

*At 11.05am*

*Mr Lagat for 2<sup>nd</sup> Respondent*

*Mr Mongeri for 1<sup>st</sup> Respondent*

*Mr Chepkilot for Mr Kibet for Petitioners.*

***Mr Chepkilot***

*We have a consent:*

*“By Consent*

*The Petition dated 23/3/17 and the Notice of Motion dated 23/3/17 are withdrawn.*

*1. Costs to be paid by the Petitioners to the Respondents to be agreed or taxed by the Taxing Officer of the Court.*

**Mr Mongeri**

I confirm.

**Mr Lagat**

I confirm.

**Court:**

*Petition dated 23/3/17 and the Notice of Motion dated 23/3/17 are withdrawn with costs to the Respondents to be agreed or taxed by the Taxing Officer of the Court.*

**EDWARD MURIITHI, JUDGE**

**5/6/17.”**

3. In submissions dated 27<sup>th</sup> September 2018, Counsel for the Petitioner’s on record submit that the entry of the consent withdrawing the entire Petition with costs to be taxed or agreed was fraudulent and accuses Counsel then appearing of fraudulent misrepresentation as follows:

***“My Lord, it is clear that the advocate requested to hold brief by the pupil sent by the Petitioner’s advocates fraudulently misrepresented the instructions given to him and as a result induced the Court and the Respondents to enter in to a contract. In that regard, it is the consent recorded on 5<sup>th</sup> June 2018 is marred with fraud and should be reviewed and or set aside. It is good to note that except for the said Pupil Geoffrey Kiptum who is deceased, none of the other advocates have recorded a statement or filed an affidavit detailing the circumstances surrounding the recording of the consent.*”**

*My lords, it’s crystal clear that there was a basis for withdrawing the application since EACC had taken over the matter and thus the substratum of the Notice of Motion dated 23<sup>rd</sup> March, 2017 had been spent. However, there was no basis for withdrawal of the Petition since prayers (b) (c) (d) (e) and (f) of the petition dated 23<sup>rd</sup> March, 2017 had not been addressed and none of the advocates who recorded the consent have recorded a statement or filed an affidavit detailing the circumstances”*

4. Allegations of fraud or fraudulent misrepresentation before the Court against advocates who are officers of the Court have criminal connotation and may amount misconduct punishable under the Advocates Act. See sections 55 and 56 of the Advocates Act.

5. As the motion for review and setting aside of the consent would appear to stand or fall on the alleged fraudulent misrepresentation by advocates for the parties, the determination of which may have consequences on the status of the advocates as officers of the Court, it is prudent and a requirement of the rules of natural justice that the Court gives opportunity to the said advocates to be heard on the matter before a determination on their culpability and otherwise, and its impact on the Notice of Motion for setting aside.

6. Sections 55 and 56 of the Advocates Act give the Court jurisdiction over the conduct of advocates before the court as follows:

***“Advocates to be officers of Court***

***55. Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Tribunal:***

*Provided that the persons mentioned in [section 10](#), other than those included in paragraph (c) of that section, shall not be subject to the jurisdiction of the Disciplinary Tribunal.*

***Savings of disciplinary powers of Court***

***56. Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.”***

**Orders**

7. For the reasons set out above, the Court makes orders that:

1. The Notice of Motion dated 2<sup>nd</sup> July 2018 and Supporting Affidavit shall be served upon the advocates who held brief for counsel on record for the respective parties to the Petition, within 7 days.

2. The said advocates shall be at liberty to file any Replying Affidavits in respect of the allegations leveled against them within 14 days of service.

3. Counsel on record may within 14 days thereafter file supplementary written submissions on the application for review and setting aside of the consent order taking into account affidavits, if any, file by the advocates who were involved in the recording of the consent before the court.

4. The matter shall be mentioned for directions as to the final ruling on the Notice of Motion dated 2<sup>nd</sup> July 2018 on a date to be fixed in consultation with the parties upon this ruling.

5. Costs in the cause

*Order accordingly.*

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Ngaywa Ngigi & Kibet Advocates for the Petitioners.

M/S Mongeri & Co. Advocates for the 1<sup>st</sup> Respondent.

M/S Gordon Ogolla, Kipkoech & Co. Advocates for the 2<sup>nd</sup> Respondent.