



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

MISC. CIVIL CASE NO. 19 OF 2017

MAHENZO COMMUNICATIONS LTD.....APPLICANTS

-VERSUS-

COUNTY GOVERNMENT OF BOMET.....RESPONDENTS

RULING

1. On the 18th May 2017 this court entered a consent on the application dated 15th May 2017 to the effect that the dispute between the applicant and the Respondent is hereby referred to an arbitrator for hearing and expeditious disposal. Secondly, that the chairman for the time being of the chartered Institute of Arbitrators is hereby identified as the appointing authority for purposes of appointing a suitable Arbitrator to hear and determine the dispute between the applicant and the Respondent.

Subsequently, the Respondent filed an application dated 27th day of February 2018 seeking an order that to the effect that the consent recorded on 17th May 2017 and issued on 18/5/2017 referring the matter/dispute to Arbitration be set aside vacated and or discharged.

2. (a) The grounds being that on the date of 17th May 2017 when the said consent was recorded, the Advocate CHEMUTAI CAROLYNE did not have in her possession a valid practicing certificate and neither was she authorized to practice law.

(b) That the date of making the consent the said advocate had not paid for her practicing certificate yet 1st February of each succeeding year is the end of period when the fees for payments of practicing certificates is supposed to have been completed and the rules complied with.

(c) Section 34 of the Advocates Act bars an unqualified person from drawing documents and entering into contracts on behalf of clients.

3. The claimants submissions dated 8/3/2018 and which are expressed to be in response to those of the applicant dated 8/3/2018, it is acknowledged that the law does not allow an unqualified person to act as an Advocate.

Counsel for the Respondent Mr. Mutai places reliance on S.2 of the Advocates act which defines an unqualified person as “a person not qualified under S.9 of the Advocates Act to act as an Advocate”.

S.9 provides:- “Subject to this Act, no person shall be qualified to act as an advocate unless;

(a) he has been admitted as an Advocate, and;

(b) his name is for the time being on the roll; and

(c) he has in force, a practicing certificate and for the purpose of this Act, a practicing certificate shall be deemed to be in force at any time while he is suspended by virtue of S.27 or by an order under S.60(4).

Counsel also relies on the decision of the case of Belgo Holdings Ltds –vs- Esmail (2005) 2EA 28 which was on S.9 of the Act and where it held. “It is instructive that these four qualifications are not to be read to the exclusion of each other... for one to be qualified to act as an advocate.... one must have all of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and S.34 aforesaid operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings”.

The circumstances under which a consent order can be set aside were discussed in the Court of Appeal case Samuel Wambugu Mwangi –vs- Othaya Boys High School Civil Appeal No 7 of (2014) eKLR. It cited with approval the case of Brooke Bond Liebig Limited -v- Maluya (1975) EA 266 “where it was stated that prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement”.

Counsel for the claimant is in agreement with the principles of the law cited by the Respondent but differs on their applicability to the facts and circumstances surrounding the involvement of Carolyne Chemutai in the matter.

It is conceded that she was undoubtedly not qualified to practice law as an Advocate at the time but the court is called upon to establish the extent and legal involvement and to note

- (a) That she did not participate in the drawing of the application filed by the claimants advocate
- (b) That the Respondents were served through the county law office and discussions were held with senior officials of the county government.
- (c) That Carolyne Chemutai did not participate in the said discussions.
- (d) That by 17th May 2017 an agreement had been reached following intensive discussion.
- (e) That on 18/5/2017 Advocate for the claimant was in court accompanied by 4 officers from the County Law Office who were under instructions to their concurrence.
- (f) That upon presentation of the draft consent order Chemutai Carolyne stood up in court alongside counsel for the claimant to confirm the consent.

It is the contention by counsel for the claimant that Chemutai Carolyne played a peripheral role which should not be used to render the consent order null and void.

The main issue before the court is whether Chemutai Carolyne had in possession a valid practicing certificate at the time the consent order was made.

It has been conceded that she had none. The principles of the law on practicing certificates for Advocates and consent orders as submitted by counsel for the Respondents have not been distinguished and or submitted to be irrelevant but have been submitted and agreed to be the applicable law. The main contention by the claimant is that Chemutai Carolyne played a peripheral role in the discussions which resulted to the consent.

The court record of 18.5.2017 indicates that Mr. Opiyo for the claimant had informed the court that the Bomet County Govt had instructed an Advocate and he was waiting for them.

The court fixed the matter for mention at 2.30 p.m.

At 2.30 p.m Miss Chemutai appeared for the Respondents and informed the court that they had a consent. She did sign the consent as advocate for the Respondent and Mr. Opiyo signed as advocate for the applicant. Its on that basis that the court made an order adopting the consent as an order of the court.

At the time, she did not pass a valid practicing certificate through she signed the consent as an advocate for the Respondent.

This consent was given without sufficient material facts and its hereby set aside.

Ruling delivered and signed this 18th day of May 2018 and the presence of learned counsel for claimant Mr. Opiyo learned counsel for the Respondent absent.

M. MU YA

JUDGE

18/5/2018

Certified typed of the ruling to be furnished.

M. MU YA

JUDGE

18/5/2018

The process may be commenced De Novo as per request of the parties as soon as practicable.

M. MUYA

JUDGE

18/5/2018