



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL APPLICATION 698 OF 2009
IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS (JUDICIAL REVIEW)
AND
IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA
AND
IN THE MATTER OF WANJA G. WAMBUGU T/A W.G. WAMBUGU AND COMPANY
ADVOCATES
BETWEEN
REPUBLICAPPLICANT
AND
THE DISCIPLINARY COMMITTEE LAW SOCIETY OF KENYARESPONDENT
AND
NGOVI MWASAINTERESTED PARTY
EX-PARTE
WANJA G WAMBUGU T/A W G WAMBUGU & COMPANY ADVOCATES
RULING

On 31st May, 2011 the Ex-parte Applicant and the Respondent filed a consent dated 30th May, 2011. The consent reads as follows:-

“(a) The Notice of Motion dated 21st December, 2009 be and hereby allowed and be marked as settled in terms of prayers (a) and (b) therein.

(b) Each Party to bear own costs.”

The Interested Party opposed the adoption of the consent. He argued that his interests have not been taken care of by the consent. The Interested Party told the court that the decision (judgment of the Respondent) which the consent seeks to quash contained an order in which the Ex-parte Applicant was directed to pay him Kshs.1,479,549.70. The consent would therefore affect his interests and yet he was not party to the same. The Interested Party therefore submitted that the consent is illegal and unjustified in that he was not included in its formulation and yet adopting the same would adversely affect his interests.

In reply to the Interested Party’s objection, the Ex-parte Applicant argues that the Respondent by entering the consent has admitted that its decision is ultra vires. The Ex-parte Applicant is of the view that the dispute is between the Ex-parte Applicant and the Respondent and the Interested Party has no role to play in this case.

The Interested Party joined these proceedings by virtue of Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 which provides that:-

“The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”

The Interested Party was the complainant in the Advocates Disciplinary Committee Miscellaneous Cause No. 23 of 2008. He was therefore directly affected by the decision of the Respondent. If the decision of the Respondent is quashed the Interested Party will be affected adversely. This case is not solely between the Ex-parte Applicant and Respondent. It also involves the Interested Party. The Interested Party is not a mere passenger in these proceedings. A consent can only become valid when the same is signed by all parties involved in a case. In this case the Ex-parte Applicant and the Respondent have proceeded to enter consent and ignore the Interested Party. This is wrong.

In judicial review proceedings, when parties decide to record a consent the court has a duty to closely study the consent and see if the same is in the public interest. The fact that parties have reached an agreement is not enough. This view is found in paragraph 16-071 of the 6th edition of **De Smith’s Judicial Review** where the scholars (H. Woolf, J. Jowell and A.L. Sueur) opine that:-

“A significant proportion of claims, given permission to proceed, are withdrawn before the full hearing. If the parties agree about the final order to be made, the court may make the order without a hearing if it is satisfied that the order should be made. Because of the public interest involved in many judicial review claims, the parties cannot determine for themselves what order should be made. The court will not make an order if it is not in the public interest to do so. In addition, if a decision of a court or tribunal is the subject of the claim, it would be wrong for that decision to be altered merely by agreement of the parties. The court must be satisfied that this is appropriate.”

In the case before me, I find it inappropriate to adopt the consent dated 31st May, 2011 between the Ex-parte Applicant and the Respondent. The consent has clearly locked out the Interested Party and justice demands that the Interested Party should have been involved in the crafting of the said consent.

I therefore reject the consent dated 30th May, 2011 and direct the parties to take a hearing date for highlighting of submissions in respect of the substantive Notice of Motion dated 21st December, 2009 so that the court can deliver its decision on the same. Costs will be in the cause.

Dated and signed at Nairobi this 30th day of May , 2012

W. K. KORIR
JUDGE