REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 10

72 of 2006

OCHANDA ONGURU T/A

OCHANDA ONGURU & CO. ADVOCATES.....PLAINTIFF/APPLICANT

V E R S U S

ASHA SHARIFF ALWY ABRAAR.....DEFENDANT/RESPONDENT

RULING

In the motion on notice dated 24th February, 2009, the plaintiff (hereinafter "the applicant") seeks two main orders namely: (i) that the court be pleased to stay execution and (2) that the court be pleased to review and set aside the consent order dated 4th March, 2008 and consequential orders arising therefrom. The motion is based on the grounds that counsel instructed to act for the applicant had at the time, no practicing certificate and acted contrary to the applicant's instructions; that there are mistakes and errors on the face of the record; that there are adequate and sufficient reasons to warrant an order of review and that there are important matters justifying review. The application is supported by the plaintiffs affidavit in which the said grounds are elaborated.

The application is opposed and there are grounds of opposition filed by advocates for the defendant (hereinafter "the respondent"). The grounds, in the main, challenge the application on the basis that the applicant has not satisfied the requirements of order XLIV Rule 1 of the Civil Procedure Rules. The Respondent further contends that counsel instructed acted as the applicant's agent and his acts bind the applicant who has a remedy against the said counsel.When the application came up before me for hearing counsel agreed to file written submissions which was done by 10th July, 2009.

I have considered the application, the supporting affidavit, the grounds of opposition and the submission of counsel. Having done so, I take the following view of the matter. Having moved the court under Order XLIV Rule 1 of the Civil Procedure Rules, the applicant had to show that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or that there was sufficient reason to review the decree or order. The application must also have been made without unreasonable delay.

The applicant's grievance is two fold. First that at the time of instructing counsel, he was under the

impression that he held a valid practicing certificate but as it turned out he did not which fact was not within his knowledge. Secondly that he instructed counsel to hold his brief and prosecute the applications in question but not to enter into any consent. In the premises the consent recorded was without instructions and is therefore null and void. That contention is not without authority (See Obura –V- Koome [2001] 1 EA 175).

The respondent has not filed an affidavit in opposition to the application. The factual averments as presented in the applicants affidavit in support of the application therefore remain unchallenged and that position is that the consent order sought to be reviewed and set aside was entered into by an advocate who had no practicing certificate at the time and who had no instructions to consent to anything but prosecute the applications in question. In Obura –V- Koome (supra) an appeal was struck out because, it had been lodged by an advocate who did not hold a valid practicing certificate. The Court of Appeal said as follows:-

"*In these circumstances the memorandum of appeal is incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this court or in any other court.*"

In the language of the Court of Appeal the advocate who purportedly entered into the consent that is being challenged was not entitled to appear and conduct any matter in this court or in any other court at the time. This fact distinguishes this case from Flora N. Wasike –V- Destimo Wamboleo [1982-88] 1 KAR 625 in which the instructed advocate therein had ostensible authority to compromise the suit or consent to judgment. The court proceeded on the premise that the advocate held a valid practicing certificate.

In Anaj Ware-housing Ltd –V- National Bank of Kenya Ltd and Another [CA No. 259 of 2003], which was cited by the respondent, the court did not make a definite finding that the advocate who had prepared and signed the appeal did not have a valid practicing certificate. The court indeed found that the submission that the appeal was incompetent was without foundation. Did the court mean that the allegation that the appeal had been prepared and signed by an advocate who had no valid practicing certificate without foundation? Or did the court mean that validity of a practicing certificate was not significant. The issue in my view was not resolved.

The decision in Obura –V- Koome (supra) was however definite and can only be discredited by another Court of Appeal decision in definite terms. For now however, I am bound by that decision. That being my view of the matter, the plaintiffs application dated 24th February, 2009 must be allowed. An order is therefore granted in terms of prayer 2 thereof.

Costs shall however, be in the cause.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 2nd DAY OF SEPTEMBER, 2009.

F. AZANGALALA

JUDGE

Read in the presence of: -

Mr. Suchack holding brief for Kasmani for the Respondent and Mr. Obara holding brief for Ochanda for the applicant.

F. AZANGALALA

JUDGE

2.9.2009