REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 40 of 1998

MAECEOM CONSULTANTS.....PLAINTIFF

versus

KERIO VALLEY DEVELOPMENT AUTHORITY.....DEFENDANT

RULING

The defendants herein who are Messrs Kerio Valley Development Authority vide their letter ref KVDA/HQS/PRJ/630/VOL.XVI dated 6/3/97 wrote to the plaintiff Maeceom Consultants. The subject of the letter was valuation of Turkwell George Hydro Power Station. It was in reply to the letter from the plaintiff dated 3/3/97. In this letter the defendants indicated that they were happy to inform the plaintiffs that they (plaintiffs) had been commissioned to undertake the valuation of Turkwell Hydro Power Station and all the associated works. The appointment was under Cap 532 (the Valuers Act) of the Laws of Kenya

heir remuneration is in line with the third schedule of the Valuers (Forms and Fees) Rules 1995. The scope of the works involve the valuation of the following among others:

1. The plant and machines
2. The dam and associated works.
3. The power line (transmission line) from Turkwell to Lessos
4. All the station buildings
5. The road network within the project area.
6. All the movable assets including furniture, electrical equipment, vehicles etc.
7. Water supply and drainage network
8. Any other assets that fall within the station.

The plaintiffs were further informed that they were expected to commence the exercise immediately and were to work closely with the departments of engineering and water resources and finance of the defendant. The works were to be completed within the next three months.

On 14/4/97 the plaintiffs vide their letter ref MC/05/Va1/01/97 referring to the defendants' letter No KVDA/HQS/PRJ/630/VOL.XVI filed their first fee note as well as the valuation report. It was made up as follows.

(a) Land and improvements - Kshs 42,923,625.00

(b) Plant and machines - Kshs 22,099,075.00

(c) Furniture - Kshs 89,843.00

(d) Transport expenses - Kshs 110,000.00

Total - Kshs 65,222,543.00

The defendants on receipt of that valuation report and the plaintiffs' letter aforesaid, replied vide their letter dated 13/5/97 signed by Mr P.K. Chemweno, Managing Director Ref. KVDA/HQS/PRJ/63001/Vol.XVII. The contents are that they were pleased to inform the plaintiffs that they had received and evaluated the plaintiffs' report dated 14/4/97. That as per the Valuers Act Cap 532, the defendants' evaluation indicates that the fee is Kshs 65,149,700.00 instead of the indicated Kshs.65,222,543.00. It was further indicated that however some assets e.g. land which had been set aside by the government should have been omitted. Additional fee for the civil works is very high. The plaintiffs were requested to reconsider bringing down the fee to a reasonable figure. It was further commented that it is their view that all expenses incurred during the exercise should have been borne by the plaintiffs themselves. The letter ended by saying that they look forward to a favourable response.

The plaintiffs responded vide their letter dated 19/5/97 ref MC/05/Val/01/97 referring to the defendants Ref KVDA/HQS/PRJ/63001/Vol.XVII. The letter was addressed to the managing director of the defendant. It is headed Revised Fee Note. The contents are that further to their earlier fee not and after consultations with yourselves the plaintiffs were pleased to revise the fee payable to themselves as hereunder:-

(a) Land and improvements - Kshs 42,923,625.00

(b) Plant and machines - Kshs 22,099,075.00

(c) Furniture - Kshs 89,843.00

(d) Transport expenses - Kshs 110,000.00

Total - Kshs 65,222,543.00

Rebate Kshs 9,570,000.00

Net Total - Kshs 55,652,543.00

The letter ended by saying that they will appreciate a quick settlement of the amount.

The defendants' response to the foregoing letter is not exhibited but it appears that there was a further revision by the plaintiffs vide their letter dated 26/5/97 Ref. MC/05/Val/01/97 also in reference to the defendants' letter Ref. KVDA/HQS/PRJ/63001/Vol.XVII. The heading is Turkwell Gorge Hydro Power Project Valuation Fee note. It referred to the defendants' letter dated 23/5/97. The replies were that it is the plaintiffs' considered professional opinion that the item in question ie. Civil work and improvement had been correctly valued and therefore the plaintiffs could not change the value. However in view of the defendants request the plaintiffs were giving the defendants a further reduction in their charges on the said items as shown. The plaintiffs trusted that that was going to be a final revision of their fee note as no more revision would be accepted. The revision was as hereunder:-

1. Civil work and machinery - Kshs 23,570,400.00

2. Plant and machinery - Kshs 22,099,075.00

3. Furniture - Kshs 89,843.00

Total Kshs 45,759,318.00

On 5/2/98 the plaintiffs sent a letter of demand demanding Kshs 45,759,318.00. On 20/2/98 the plaintiffs filed this suit against the defendants claiming a liquidated claim of Kshs 45,759,318.00, interest and (a) above from 3rd May 1997 until payment in full, costs of this suit and any other remedy that this honourable court may find just and fit to grant.

On 5/3/98 the defendants entered an appearance through counsel and on 12/3/98 filed a defence denying paragraphs 3,4,5,6,7,8 and 9 of the plaint and put the plaintiff to strict proof thereof.

The plaintiffs then filed an application vide order 6 rule 13(l) a,b,c and d and order 35 rule 1(a) and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking orders that this honourable court be pleased to strike out the respondents' defence dated 12/3/98 and file don the same date.

2. That judgment be entered for the applicant as prayed in the plaint:-

(a) in the sum of Kshs 45,759,318.00

(b) interest on (a) above from 3rd May 1997 until payment in full.

(c) Costs of this suit

(d) Any other remedy that this honourable court may find just and fit to grant.

3. That the respondents be condemned to pay costs of the application.

On 16/6/98 in the presence of two counsel for the plaintiff and counsel then on record for the defendant the following consent order was made:-

1. By consent judgment is hereby entered for the plaintiff in the sum of Kshs 22,188,918.00, costs and interest as prayed in the plaintiff dated 17/2/98.

2. There be stay of execution on this sum for 14 days hereof.

3. The balance of the claim of Kshs 23,590,400.00 be determined upon the hearing of the notice of motion dated 4/5/98.

4. Costs of today's application be in the cause.

5. Hearing on 24/7/98 of the application dated 4/5/98.

A decree was drawn and signed by the Deputy Registrar and Execution process set in motion. There were attachments made in the execution of the decree in part.

This prompted the defendants' to come to this court by way of certificate of urgency under section 3 and 3A of the Civil Procedure Act, order 44 rule 1, order 21 rule 22 of the Civil Procedure Rules seeking orders that service of the application be dispenses within the first instance.

2. That there be a stay of execution of the court's judgment pending the hearing of this application.

3. That the court's judgment entered by consent dated 16/6/98 be reviewed on the grounds that there are sufficient reasons to review the same.

4. That costs of the application be provided for.

The application is supported by a supporting affidavit of Paul Chemwono the Managing Director.

Following the deponements of the managing director in the supporting affidavits of the application for review, counsel for the plaintiff/respondent successfully sought and was granted leave to issue summons to the advocate then on record for the defendant to appear for cross-examination alongside the managing director of the defendant. Meanwhile the said advocates had also filed an application seeking to be joined as interested parties.

In his cross-examination Mr Chebseba relying on exhibits 1-5 maintained that they were given instructions by the defendants to enter appearance and they did enter appearance in this matter, that they had had dealings with the defendants before and it is not true that they always receive instructions in writing, that one can perfectly receive instructions on phone, that after entering appearance they received a file on this matter containing correspondence on this matter, that the defendants were not denying that work had been done, that what they were disputing is the quantity of costs that the plaintiffs vide their letter of 26/5/97 made it clear that there would be no more reductions, that upon perusal of the correspondences between the parties they as counsel formed the opinion that the defendants had no defence to the plaintiffs' claim and the managing director told them to put in a holding defence which they did, after doing so he was told to negotiate for instalments and advised to enter a consent on the undisputed item which he did, that after receiving an application for summary judgment he was not instructed to defend in by filing a reply and no reply has been filed todate and instead he was advised to enter into a consent and negotiate the instalments that there has been no reply to the application for summary judgment he was not instructed to defend it by filing a reply and no reply has been filed todate and instead he was advised to enter into a consent and negotiate the instalments, that there has been no reply to the application for summary judgment by the defendants to date, and that on 13/7/98, 20/7/98, 22/7/98 met with the Financial Controller of the defendant a Mr Shikokoli, the Deputy Managing Director Mr Cherop and their Legal Clerk and they discussed on how to repay off the debt, that there is no letter from the defendant to his firm, that they should not have entered judgment and none to the Law Society of Kenya that they acted without instructions nor unprofessionally, that the affidavit of Chemeno is not true as every move they made in the matter was in accordance with instructions, that they received instructions on phone and it is not necessary that instructions must be in writing, they can be on phone or verbal.

When cross-examined by counsel for the defendant currently on record Mr Chebseba reiterated that they were told to file a holding defence, that the original figure was for Kshs 65,000,000.00 and it kept coming down, that he did not write back to the defendants to confirm the conversation between the managing director of the defendant, that he was the one personally seized of the matter subject of these proceedings, agreed that since they had not put in a reply to the application for summary judgment technically they had no audience, that the provisions quoted in the application for summary judgment apply where no defence has been filed while herein a defence had been filed, that the defence on record does not admit the claim, that their firm seeks to come into the matter in order to protect their interests, he agreed that he relies on privileged communication between him and their client but it was necessary to exhibit them because it had been alleged that they had no authority to enter into the consent in the manner they did, he still maintains that the defendant had no dispute over 2 items forming the basis of the consent judgment, that he was not aware that authority had to be obtained from the government first, that they had had dealings with the defendant before and at no time was he made aware that authority had to be obtained from the government first, that no authority was required from the government to enter into the consent complained of.

Mr Chemweno the managing director of the defendant and the deponent of the supporting affidavit to the application never appeared for cross-examination. The court was informed that he had not been traced.

In his oral submissions in court counsel for the defendant/applicant maintained that they are entitled to the reliefs sought on the following grounds:-

1. That they have good grounds for asking the court to set aside the consent order because at the time the consent order was made the defendants' counsel then on record had no written authority from the defendants to enter into the same and therefore does not bind the defendant to that judgment.

2. That the plaintiffs had filed an application for summary judgment and since counsel for the defendants had not filed a replying affidavit in respect of the same counsel had no audience before the court and he had no capacity to enter into the said consent.

3. That the managing director Mr Chemeno has deponed in paragraphs 5 and 6 of the supporting affidavit that he did not give authority to enter into the consent.

4. That Mr Chebseba the then counsel on record narrated what transported between his office and Mr Chemweno but he conceded that no consensus was reached on any figure and the correspondences tended to show that more was to be done before the final figure is reached.

5. That there was no ratification of the action of the officer by the board neither was the action of the Authority ratified by the government through the parent ministry as its projects have to be funded from the central government since the Authority is a creature of the government through statute. That it is evident that the ministry was not consulted when work started and if the judgment is allowed to stand the Authority will have difficulty funding it.

6. That the applicant has demonstrated that he has shown various reasons as to why they want the consent judgment set aside. Relying on the case of Brooke Bond Liebig (T) Ltd v Mallya (1975) EA 266 he submitted that the court had jurisdiction to set aside the current judgment even where the same was entered into in the presence of counsels and the parties.

The plaintiffs' counsel on the other had submitted at length in opposition and the relevant points relied on by them are:-

1. Relying on the case of National Bank of Kenya Limited v Ndungu Njeru Nairobi CA No 211/96 counsel submitted that the application is incompetent because being an application for review the grounds should have been stated in the main body of the application.

2. That the applicants have not satisfied the ingredients for review as there is no allegation that there is discovery of new and important matter which they could not discover earlier on with due diligence when the consent was made neither have they said that there is mistake or error apparent on the face of the record. Review is meant to correct an apparent error on the part of the court and never on the part of an advocate which error must be self evident.

3. That since execution was levied the prayer for stay of execution was overtaken by events.

4. That the application was filed before Mr Birech came properly on the record and so the same is incompetent.

5. That Mr Chebseba the then advocate from the defendant on record explained what happened and the managing director has not come to court to counter that allegation and the probable inference to be drawn from Mr Chemweno's failure to attend court is that he knows his deponents are not true.

6. On the allegation that there were no written instructions it is clear that there is no rule of law or practice quoted which says that all instructions from a client to an advocate must be in writing and the practice is that, instructions are either received verbally or in writing. Neither have they contended that the said advocate was not properly on record.

7. That in the circumstances of this case counsel then on record could have entered into a consent with or without a written authority as he had full conduct of the brief.

8. That counsel was right in relying on the letter stating that the figures on civil works and improvement were still high while those on the other items namely plant and machinery and furniture were acceptable. The figures on acceptable items total to Kshs 22,188,918.00 which form the basis of the consent. The counsel herein was within his express, ostensible and implied authority as an agent to enter into the consent. They have not shown that the advocate went outside his brief as all they are alleging is that the instructions were not in writing and this court should hold that a client's instructions whether verbal or in written bind the client.

9. If the consent was invalid the deputy managing director and legal officer of the defendant could not have called on Mr Chebseba after entry of judgment to make proposals for payment by instalments. These are principal officers of the defendant.

10. The application was filed belatedly to obscure the real issues between the parties after realizing that they do not have sufficient funds to meet the claim and that is why there has been no official complaint or protest against the advocate lodged either in court or to the Laws Society of Kenya. The consent is proper as the advocate stated that he was not under any mis-apprehension or mistake and that he knows clearly what his instructions were regarding the consent.

11. If counsel for the applicant argues that since Mr Chebseba had not filed grounds of opposition and replying affidavit to the application for summary judgment then he Mr Chebseba had no audience in law then the same thing applies to the present counsel on record as he too has not filed a replying affidavit to that application. It is the plaintiff's stand that order 50 of the Civil Procedure Rules requires a party to file grounds of opposition and replying affidavit if they oppose the same. They need not file anything if they are consenting.

12. That the consent entered into herein is binding on the parties as there is no suggestion or allegation of fraud or collusion and or mistake.

13. That the supporting affidavit of Mr Chemweno is full of untruths as demonstrated by Mr Chebseba and if Mr Chemweno believed what he said then he should have availed himself for cross-examination to counter Mr Chebseba's allegation and since he did not turn up the only logical conclusion to be inferred from his conduct is that he knew that he had deponed to false houds. This is so because after entry of consent judgment he sent his deputy and legal clerk of the defendant to work out proposals for instalments and not to protest at the entry of judgment.

14. That Mr Chemweno's allegations in his affidavit that the defendant is a creature of statute and authority for its action has to come from central government is not true and cannot be believed because he is the one who commissioned the works as the managing director and nowhere in his letter does he mention having received authority from the central government to commission the works. Even if he needed authority from the central government and he acted without such authority that is internal or indoor arrangement between the defendant and the third party and it has nothing to do with a third party who was commissioned to do work and has already done the work. The defendant cannot hide under an umbrella of central government authority and escape to pay.

15. That the Act creating the defendant namely Cap 441 of the Laws of Kenya creates the office of the managing director and if a third party deals with the defendant he is dealing with the managing director and nowhere in that Act does it say that when dealing with the authority you look back to the parent ministry neither does it say that the Authority is an agent of the parent ministry. On the face of the Act it is the managing director who is vested with powers to enter into contracts and carry out the day to day affairs of the defendant.

16. That the correspondences exhibited show that it had been agreed in principle that the fees were going to be charged in accordance with the Valuers Act and it was agreed in principle that the basic fee of Kshs

65,000,000.00 and over and all that the defendants were asking for was a reduction in the figures which the plaintiff acceded to and stated in their last correspondence before filing the suit that that was the final reduction and no more reductions were going to be made and when the demand letter was served there was no protest from them that the matter was still under negotiation.

17. When the plaint was filed and the defendants filed a defence they did not plead that the amount in the plaint was being negotiated or that it was in dispute. The defence filed is a general denial.

18. That since the current defendants' counsel has admitted that work was carried out to the requirement of the applicants/defendants it will be unconscionable to allow them escape the responsibility of paying by shifting last minute blame on to their counsel who was only doing his work as instructed.

19. Lastly that the applicant defendant cannot avail himself of the defence of privileged communication between a client and advocate because having questioned and challenged the actions of their advocate they called for an explanation from their counsel which he can only do by referring to the correspondences exchanged between them.

In reply counsel for the defendant/applicant had this to say:-

1. That the application is not incompetent because order 6 rule 12 and order 50 rule 12 states:

(a) That no technical objection can be allowed on any pleading.

(b) That the substance of the application is clear and so the applicant should be heard on merit and technicalities should not be resorted to in the interest of justice.

(c) That authorities cited show that applicant as an aggrieved party is within the provisions of the law when he seeks review and they rely on the reason that they have shown.

2. That request for stay of execution has not been overtaken by events as the process of execution has not been fully accomplished as the decretal sum has not been fully paid.

3. That application is incompetent as it was filed the same day as the notice of charge and all that remained was service on to the outgoing counsel.

4. That the authorities are distinguishable from the circumstances of this case as in the cited cases the parties were present in court with their counsels while herein the parties were not present when the consent was made.

5. That the letter commissioning the works was signed by Mr Chemweno and was not signed by the chairman of the Authority neither does it bear the seal of the Authority. The right to enter into contracts is reserved to the Authority under the Act.

6. That the letter commissioning work cannot be taken as the contract because if that was so there would be no correspondences bringing the figures downwards thus showing that the parties had not reached a consensus.

Upon hearing both parties on this application it is not disputed that one Paul Chemweno who was at the time the managing director of the defendant authority wrote a letter dated 6.3.97 Ref. KVDA/HQS/PRJ/6301/VOL.XVII to the plaintiffs commissioning them to carry out valuation work of Turkwell Gorge Hydropower station. They were to carry out valuation on 8 items namely:

1. Plant and machinery

2. The dam and associated works

3. The power line (from Turkwell to Lessos)

4. All the station buildings

5. The road network within the project area

6. All the movable assets including furniture, electrical equipment, vehicles etc.

7. Water supply and drainage network

8. Any other assets that fall within the station.

It is not disputed that the plaintiffs carried out that valuation and sent a fee note to the defendants. The first vide the plaintiffs letter Ref. No MC/05/Val/01/97 dated 14.4.97. The total amount demanded was Kshs 65,222,543.00 made up as hereunder:

1. Land and improvements - Kshs 42,923,625.00

2. Plant and machines - Kshs 22,099,075.00

3. Furniture - Kshs 89,843.00

4. Transport expenses - Kshs 110,000.00

This was sent to the defendant alongside the valuation report. The defendant reacted to that letter vide their letter dated 13.5.97 bearing the same reference number. The contents are that they had received the report and evaluated it. That as per the Valuers Act their evaluation indicates that the fee is Kshs 65,222,543.00 instead of the indicated sum of Kshs 65,222,543.00. The same letter added that some assets like land which had been set aside by the government should have been omitted and further that the fee for civil works is very high. They were asked if they could consider bringing down the fee to a reasonable figure. It was also their view that all the expenses incurred by the plaintiffs should have been borne by them.

The plaintiffs responded vide their letter dated 19.5.97 bearing the same reference number and this bore the total amount in the fee note as Kshs 55,543.00 made up as hereunder:

1. Land and improvements - Kshs 42,923,625.00

2. Plant and machines - Kshs 22,099,075.00

3. Furniture - Kshs 89,843.00

4. Transport expenses - Kshs 110,000.00

The defendants' reaction to this in their letter dated 23.5.97 under similar reference on the same subject, the contents are: <u>We still find the figure very high particularly under the item civil works and improvements. Could you revise the corresponding fee further downwards. The other two items are acceptable</u> (emphasis mine).

This gave birth to the third and last fee note vide letter dated 26.6.97. This brought down the fee to Kshs 45,759.00 made upon hereunder:-

1. Civil works and improvements Kshs 23,570,400.00

2. Plant and machinery Kshs 22,099,075.00

3. Furniture Kshs 89,843.00

It is clearly indicated in this document that "it is our considered professional opinion that the item in question i.e. civil works and improvements has been correctly valued and therefore cannot change the value. However in view of your request we are giving you a further reduction in our charges on the said item as shown. We feel that this will be the final revision of our fee note as no more revisions will be accepted. (emphasis mine). There is no reaction from the defendant to this letter. This was followed by a demand note dated 5.2.98 and the amount demanded was the amount shown as the final figure in the last revised fee note. There is no reply to the demand note and this gave birth to the plaint followed by a defence and then an application for summary judgment. The defendants did not respond to that application and in fact to date no response has been filed. On the date fixed for the hearing inter parties is when the consent was struck and recorded.

There is no dispute that the counsel then appearing for the defendant had authority to file documents on their behalf and appear in court on their behalf. Everything else he did for them is not being challenged save for the consent.

The reasons for seeking review of the same consent order was adduced by the defendant/applicant and the responses of the plaintiff/respondent to those points are already on record outlined earlier on in this ruling and I will not repeat them here.

In the courts opinion there are 3 major points for determination:-

1. whether the application is competently before this court.

2. whether the consent should stand or not stand on the facts presented herein by both parties.

3. whether the consent should stand or not stand as presented by the position in law in line with Cap 441 L.O.K. The Kerio Valley Development Authority Act the defendant and as per the principles enunciate din the decided cases.

Concerning the first question counsel for the plaintiff/respondent stated as per the principle in the case of National Bank of Kenya v Ndungu Njau Nairobi CA 211/96 the application is incompetent as it does not state the grounds in support in the main body of the application. I have perused the application dated 23.7.98 and find that it is indicated in the heading after the citations of the rules that it is grounded upon the affidavit of Paul Chemweno and other grounds to be offered at the hearing. Indeed the authority cited stated clearly that in an application for review grounds should be stated in the body of the application in line with order 50 rule 7. As submitted by the applicants counsel order 50 rule 12 precludes this court from dismissing matters on points of technicalities instead of hearing them on merit. Further order 50 rule 7 states clearly that where the grounds are not clearly stated in the body of the application but there is an affidavit in support that suffices. Herein it is stated in the upper part of the body of the application that the application is grounds on the affidavit of Paul Chemwono and other grounds to be offered at the trial. If the plaintiff/respondent was not satisfied with that generality then he should have asked specifically for further and better particulars to be supplied. He did not do so and so he has to be content with what he was given.

Another minor issue on competence was that the current counsel filed the application before he had come on to the court properly as he had not served the notice of change on Mr Chebseba. Indeed that was the position but since the situation was correct and since no miscarriage of justice or prejudice was suffered that does not affect the validity of the application. I am satisfied the application is properly before me and it will be disposed off on merit.

As regards the second question the brief facts presented herein are that counsel then appearing on record for the defendant/applicant a Mr Chebseba who appeared in court and was cross examined received documents from the defendant concerning this case among them what I have refered to already. Upon perusing them he formed the opinion that the defendant agrees that the work was commissioned and that

the fee was to be charged in accordance with the Valuers Act, that the fee was raised according to the Valuers Act, that despite this the defendant asked a reduction on the fee chargeable hence the two revision notes, that after demand note and filing of plaint and upon perusing the documents and plaint he saw that they had no defence and upon discussion it was decided that he puts in a holding defence and indeed the defence is general. Since the main case is still pending I will not analyse the pleadings. Soon the application for summary judgment was filed and after the discussion and advice from him he was okeyed to enter into a consent for the sum consented to. In doing so he had in mind the defendants' letter dated 2.5.97. In this letter the defendants' comments are that "they still find the figure on civil works and improvements still very high. The other two items are acceptable." The other two items being acceptable are the plant and machinery and furniture whose aggregate figure total the amount in the consent judgment.

It is the stand of the current defendant/applicants counsel that the correspondences show that no final figure had been agreed upon. That there is no response from the defendant on the last fee note that they had accepted the same neither is there a response to the demand note accepting the amount. Indeed there is none. But Mr Chebseba maintains that they agreed with this client verbally on the phone and in discussions between them.

The current counsel on record for the defendant has countered this by saying that there is no written authority from the defendant to Mr Chebseba instructing him to enter into the consent. Indeed there is none but as submitted by the plaintiff/respondents counsel not every instructions from a client to his advocate is in writing. The defendant counsel now on record has not challenged this assertion and I take it that that is the position. In fact he has not displayed any written instructions from his client to file this application. The instructions could be written or verbal. It therefore follow that what Mr Chebseba stated on oath that he had verbal instructions could be true. He is an experienced counsel. He had full conduct of the brief in this matter. He says he went through the correspondences and he formed an opinion that there was no defence to the two items if not the entire claim.

In my own opinion after perusing the correspondences I am of the opinion that the correct interpretation of the same is that the plaintiffs stood by their last fee note that they were not going to give any further reduction.

2. It is clear that the way the fees were charged was not in dispute but what the defendant was doing was pleading for a reduction and indeed the plaintiff came down twice and after saying he was not going to come down again and gave a demand note any reasonable lawyer would op in that they meant what they said in their last fee note.

3. The defendants letter of 23.5.97 gives an impression to any ordinary reader that they had no quarrel with the reduction given on the two items which were acceptable save for the items of civil works. In fact this court thinks strongly that that is what the message in the letter seems to convey.

That aside the applicants counsel further states that the parties were not present in court when the consent was recorded. Indeed this was the position. The legal implication of this will be dealt with when answering the last question.

It was further contended that since the defence counsel then on record had not put in a reply to the application for summary judgment he had no audience and no capacity to enter into the consent as he had no locus standi in court. As submitted by the plaintiffs counsel if that argument were to be upheld by this court then it will mean that the current counsel also has no audience as todate no reply to the application for summary judgment has been filed by the defendant.

In the courts opinion the correct position is that, that is not the position. Even order 50 rule 16 under which such audience can be denied states clearly that such counsel or party can be allowed to address the court with permission from the court.

Secondly lack of audience would be called into question if the application were to be argued on that date

but not to record a consent or take further proceedings in the matter. Such counsel who has filed a defence and entered appearance cannot be denied audience. In fact it is on the basis of the same defence and memo of appearance that the current counsel has audience in court currently.

In view of the foregoing I find that Mr Chebseba has audience before court when the entered into the consent complained of.

The other aspects of facts to be considered is the basis of the challenge of that consent. Counsel relies on the ingredients of sufficient reasons. The sufficient reasons are based on the deponements of Mr Chemweno. These are the deponements which prompted the outgoing counsel Mr Chebseba to apply to join the proceedings. He put in an affidavit and he was cross-examined at length on his deponements and he stood by them and where possible supported them by documents exchanged between the parties.

Mr Chemweno on the other hand was not traced for cross-examinations. Counsel for the plaintiff has urged the court to draw an adverse inference at his failure to attend court on the basis that he knew that his deponents were false because if he had not given instructions to enter into the consent he could not have sent his deputy and the legal officer of the defendant to enter into negotiations for instalments.

2. They could have written a letter to the counsel then on record or to the Law Society complaining about the conduct of the counsel then on record.

It is correct as stated by Mr Chebseba in his cross examinations and as evidenced by the exhibits exhibited that they had full instructions, after entry of consent they were advised to appeal against the consent or negotiate for instalments over a long period. In the absence of Mr Chemweno's appearance and cross examination on his about turn in the whole affair as displayed by his affidavit and the letter to the former counsel dated 21.7.98 produced by him as exhibit 5 leaves the assertions of Mr Chebseba on record given in his cross examination intact and unchallenged. Mr Chemweno's attendance for cross examination was crucial as it was necessary to test the truthfulness of his deponents and correspondences. His failure to attend for cross examination whether deliberate or otherwise leave the values of his deponents watered down and creates a possible doubt to whether he stands by the truthfulness of the same or not.

The last aspect of facts is the plea by the current counsel that they should be heard on the application for summary judgment. As submitted by the plaintiff/respondents counsel they have not stated on what grounds they wish to be heard on as they have not filed a replying affidavit to that application showing what they intend to put forward since they wee served with that application.

Secondly only half of the amount was sliced off and comprised in the consent being challenged the remaining half has been left pending the outcome of the disposal of the application for summary judgment or further negotiations on the matter. No explanation has been given as to why no leave has been sought to file any papers in opposition to that application at lease in respect to the remaining amount not comprised in the consent. Presentations of such facts to the court gives the court a clear picture as to whether there is a genuine complaint or not.

Turning to the legal aspect of the matter I find that the first contention is that Mr Chemweno had no authority from the parent ministry or central government to commission the works, that the works were not commissioned by the chairman of the board neither are they supported by a resolution of the board. The applicant relies on the provisions of the Kerio Valley Development Authority Act Cap 441 L.O.K. In fact this is the contention contained in the affidavit in support and Mr Chemweno's letter to the former counsel dated 21.7.98 ref: KVDA/HQS/PRJ/630/Vol. XVIII written after they had been notified of entry of the consent judgment. The plaintiff has countered this by arguing that that is not the position in law.

The authority is established under section 3 of the said Act. Indeed it is a creature of statute. Section 3 states "There is hereby established an authority which shall be a body corporate by the name of the Kerio Valley Development Authority with perpetual succession and a common seal, and which shall be capable in its corporate name of:

(a) suing and being sued

(b) taking, purchasing or otherwise acquiring, holding, charging and disposing of property moveable or immovable.

(c) borrowing and lending money

(d) entering into contract

(e) doing or performing all such things or acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate."

Indeed section 3 shows that the Authority is a creature of statute. But the heading of the same shows that upto creation the Authority was not to be allowed to grow but it was created as an adult child or grown man or woman who upon birth was given the power and authority by the parents to stand on its own and manage its own affairs fully. There is no reference that any of its actions were subject to ratification by the parent. In fact the word ratification does not appear anywhere in the creating section. To date the court has not been shown any board meeting minute exhibited neither has Mr Chemwno said so in his deponent that the authority failed to ratify his actions or have refused to do so.

Indeed section 6 of the Act requires that all documents be under seal. I agree such a contract should have been under seal in accordance with section 6 of the Act. However in as much as the commissioning letter the subsequent correspondences on the matter are not under seal so the letter denouncing the transaction which is dated 21.7.98 and produced by Mr Chebseba as exhibit 5. If the earlier letters have no forces of law then the subsequent ones also have no force of law because they too have no seal of the Authority affixed on them.

The key player in this matter is the managing director whose office is created under section 9 of the said Act section 9(1) gives power to the managing director to be responsible for the execution of the policy of the Authority and for the control and management of its day to day business.

2. Subsection 2 gives him delegated powers over staff affairs.

Section 9 gives the managing director sweeping powers. It does not say that in matters of the policy of the Authority he has to seek ratification from the board. Indeed he was given what is popularly termed sweeping or blanket powers. He has powers to do anything in the name of the policy of the Authority. Valuation of property of the authority can be stated to be a policy of the Authority. There is no specific outline of what he should do or not do and this creates room for out-stepping of the bounds in the defendants opinion but in law Mr Chemweno is covered.

Section 11 of the Act gives two sources of funds namely money provided by parliament and funds borrowed by the Authority and any moneys accruing to the Authority. There is no mention in this section to the effect that authority has to come from parliament before any activity is funded or proposed to be funded by parliament can be undertaken by the Authority. The Authority is a legal person capable of being sued and suing. It has power to enter into contracts. This power is vested in the chief executive who is the managing director with no specific limitation and he very well bonafidely believed and rightly so that he could commission works of such magnified without recourse to anybody else. His action is therefore protected under section 14 of the Act. He may have done his work badly but as submitted by the counsel for the plaintiff/respondent that is an internal disciplinary matter which has nothing to do with a 3rd party who had no idea of what the inside of the defendants house looks like. The Authority cannot complain about Mr Chemweno's commissioning the works single handedly and condone his back pedalling on the issue or about turning single handedly. Indeed he did not involve the central government when the works were being commissioned neither has he involved them when he is trying to denounce or renounce what he did.

The position in law is that he was within the parent Act when he did what he did and he is trying to go

outside the parent Act in trying to undo what he did. He can only undo what he did within the law. He knew he cannot and that is why he could not face the law by presenting himself for cross examination.

The position as shown by the cases is as hereunder:-

In the case of Purcell v F.C. Trigeli Ltd (trading as Southern Window and General Clearing Co and Another 3 AER 671 where the District Registrar made a consent order that the defence of both defendants should be struck out unless the interrogations were answered within ten days. On appeal it was held inter alia that there was no ground for setting aside the counsel order for a consent order whether interlocutory or final must be given full contractual effect and could only be set aside on grounds which would justify setting aside a contract.

In the case of Hansrajrammal Shah v West Lands General Stores Properties Limited (1965) EA 642 it was held inter alia that the appellant had not withdrawn his instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action accordingly the advocate had the necessary authority to agree to the fixing of the mesne profits as appellants counsel and agent.

In the case of Brooke Bond Liebig (T) Ltd v Maliya (1975) EA 266 it was held inter alia that a consent judgment may only be set aside for fraud, collusion or for any other reason which would enable the court to set aside an agreement.

In the case of Flora N Wasike v Destimo Wamboka (1982-88) 1 KAR 625 it was held inter alia that it is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.

2. An advocate would have ostensible authority to compromise a suit or consent to judgment so far as the opponent is concerned.

3. The court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it demonstrably show otherwise.

In the case of Kenya Commercial Bank Limited v Benson Amalgamated Limited and Muiru Coffee Estate Limited Nairobi CA No 276/97. The Court of Appeal after reviewing the decided cases on the subject held that the principles in the cited cases are the correct principles to be applied to application to set aside consent judgment and or orders.

Applying the principles in the above cases to the facts of this application I find that the key consideration is whether the consenting counsel has authority to do so. If he has authority then he is empowered to enter into a consent. Herein the court has already ruled that Mr Chebseba had authority to appear before the court on behalf of his client and enter into the consent complained of.

It has been argued on behalf of the applicant/defendant that parties were not present. As evidenced by the foregoing authorities it is not necessary that a party be present before his counsel can enter into a consent. Where counsel has instructions from his client, he is in conduct of the whole case he has ostensible authority to compromise the case like in this case.

The foregoing cases go to show that a consent judgment or order can only be set aside on grounds of fraud, mistake, collusion and or misrepresentation which are the same grounds for setting aside a contract. The applicants are not relying on any of the above matters. They are relying on sufficient reasons. In view of what I have stated above, no sufficient reason has been given to warrant a review because:-

1. The advocate had ostensible authority and instructions to represent the defendant and therefore to comprise the suit or part of the suit.

2. Interpretation or construction of the letter giving rise to the consent shows that the items consented

upon were not objected to by the defendants.

3. The defendant as a body corporate does not require any ratification of its actions by the central government and what Mr Chemweno did on behalf of the defendant was within the law.

4. The issue of privilege does not assist the defendants as they are the ones who behaved in such a way that they forced their advocate to come to court to defendant his conduct in the handling of the matter and there is no way he could have done that without exhibit the privileged communications.

As submitted by the respondents' counsel there is no rule or provision which has been cited by applicants' counsel that in a situation such as the one displayed herein counsel cannot resort to privileged communication to defendant himself.

In view of what I have stated above the application is refused with costs to the respondent.

Dated at Eldoret this 8th day of February 1999.

Read and delivered at Eldoret this 23rd day of February 1999.

R NAMBUYE

JUDGE