



REPUBLIC OF KENYA



**KENYA LAW**  
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**Asembo Soko Limited v Equity Bank (Kenya) Limited (Civil Case  
E001 of 2022) [2023] KEHC 27148 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27148 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E001 OF 2022  
RE ABURILI, J  
DECEMBER 21, 2023**

**BETWEEN**

**ASEMBO SOKO LIMITED ..... APPLICANT**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling determines the Amended Notice of Motion dated 3<sup>rd</sup> November 2023 in which the applicant sought the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. Spent
  - e. Spent
  - f. That the consent order executed by the plaintiff and the defendant dated 26th September 2023 and adopted as an order of the court be reviewed to the extent that the applicant to pay the decretal sum by way of monthly installments of ksh 100,000 from the date of the ruling of this application until payment in full.
  - g. That costs be in the cause.
2. The application was supported by the affidavit of George Otwal, the applicant's director, sworn on the 3rd November 2023 as well as the grounds therein.



3. It was the applicant's case that he had been unable to comply with the conditions of the consent order dated 26.9.2023 that required him to pay the respondent ksh 200,000 within 7 days of the order and subsequently settle the balance of ksh 903,570 in four equal subsequent installments.
4. It was the applicant's case that at the time of signing the consent, he anticipated that his business would pick up and do well so as to enable him make the initial deposit of ksh 200,000 but it had not.
5. The applicant averred that he could only afford to pay monthly installments of ksh 100,000 hence the instant application for review.
6. The applicant further averred that since there was no stay of execution orders in place then the respondent was likely to proceed with execution and that in any case, in light of the instant application, the execution against him was irregular, improper and malicious and that no party would be prejudiced if the orders sought were granted.
7. In response, the respondent through one Judith Orengo advocate deposed that the applicant failed to comply with the consent order issued on the 26<sup>th</sup> September 2023 and instead issued a bad cheque in favour of the respondent, which cheque was dishonoured prompting the respondent to report the matter with the police and further instruct the Auctioneers to proceed with execution.
8. The respondent further deposed that from 6<sup>th</sup> October 2023 when instructions were issued to the Auctioneer, the Auctioneer has been unable to locate the property earlier proclaimed.
9. The respondent deposes that the applicant has failed to establish sufficient cause to enable the court to exercise its discretion to order stay of execution or payment by instalments and further that the applicant had had 6 months to pay the amount owed and has not done so nor demonstrated good faith towards settlement of the decretal sum.
10. It was further deposed that the financial statements annexed to the applicant's supporting affidavit are neither stamped nor certified by the issuing institution and further the credits, debits and balances do not match and are likely to have been fabricated.
11. The respondent deposed that the instant application was meant to delay the court process and defeat the course of justice to the respondent's detriment and that the same should not be entertained.
12. The parties' counsel argued the application orally on 28<sup>th</sup> November, 2023. reiterating the depositions by their respective clients.

### **Analysis and Determination**

13. I have considered the Application and the response thereto, the proceedings herein, the oral submissions by learned Counsel for both the applicant and respondent as well as the applicable law.
14. The orders sought by the applicant are generally two-fold. The applicant seeks to stay, set aside or vary the warrants of attachment and proclamation notices issued by the respondent's auctioneer pending the hearing and determination of the instant application. These orders have been overtaken by events and this court will not engage in determination of the same.
15. The second prayer is for an order seeking review of the consent entered into between himself and the respondent on the 26<sup>th</sup> September 2023. This is the only issue for determination before this court.



16. The parties herein entered into a consent dated 26<sup>th</sup> September 2023 in the following terms;
- “By consent, there be a stay of execution on condition that the Judgement Debtor pays ksh 200,000 within 7 days of today and the balance thereof of ksh 903,570 be made or settled in four equal instalments on or before 30<sup>th</sup> of every month from October 2023 in default, execution to issue.”
17. From the record, it is clear that the applicant failed to comply with the terms of the said order and went further by issuing the respondent with a bad cheque, which in itself is a criminal offence. The applicant now seeks this court’s discretion in reviewing the aforementioned consent order so that he can make monthly payments of ksh 100,000. This is vehemently opposed by the respondent who has submitted that the applicant has not shown good faith in its dealings and further has failed to show sufficient cause why it should be granted the orders sought.
18. The law on variation of a consent judgment is now settled to the effect that the variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.
19. Hancox JA (as he then was) in the case of *Flora Wasike v Destimo Wamboko* (1982 -1988)1 KAR 625, held as follows:
- “It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”
20. The Court of Appeal in the case of *Brooke Bond Liebig v Mallya* 1975 E.A. 266 held as follows: -
- “A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”
21. Further, in *Hirani v Kassam* (1952), 19EACA 131, the Court of Appeal with approval cited the following passage from Seton on Judgments and Orders, 7<sup>th</sup> Edition, Vol.1 p.124 as follows:
- “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 on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”
22. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR P. 485 held that:
- “A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.”



23. In the same case, the Court further held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”

24. This Court has not been informed that the Applicant’s Counsel had no authority at all to enter into the consent which case the consent decree/judgment would have been a nullity. See *Kafuma v Kimbowa Contractors* 1974 EA (U) 91.

25. Does the fact that the applicant’s business failed to pick up amount to a reason that would enable this court to set aside the consent judgement of 26<sup>th</sup> September 2023? I do not think so. This is because, at the time the applicant was entering into the said consent, he must have known his financial position for at least the next seven days within which he was supposed to make the payment of ksh 200,000 to the respondent. Further, it is not lost on the court that the applicant, fully aware, went on to issue the respondent with a bad cheque in settlement of that first sum.

26. There having been no evidence placed before this Court that the Defendant/Applicant’s Counsel had no authority to enter into the consent dated 26<sup>th</sup> September and further the applicant having failed to demonstrate a sufficient reason to warrant the court varying the said consent order, I find that Counsel had authority to act for the Applicant and had full mandate to compromise enter into the consent as he did. Therefore, the application before me is devoid of merit. It is hereby dismissed with costs to the Defendant.

27. Mention on 16<sup>th</sup> January, 2024 before the Deputy Registrar.

28. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF DECEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

