



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 217 OF 2011**

HATIMY JOINERY WORKS LTD.....APPELLANT

VERSUS

IBRAHIM MUSA MOHAMED .....RESPONDENT

**RULING**

The Notice of Motion application dated 28th November, 2012 and expressed to be brought under order 45 rule 1 order 42 rules 6 of the Civil Procedure Rules and section 1A, 1B, 3A and section 80 of the Civil Procedure Act seeks an order for stay of execution of the Judgment in Chief Magistrate's Civil Case No. 3041 of 2001 and all other consequential orders.

Secondly, that the Court does review its orders of 3rd October, 2012 with a view to varying, setting aside or making an order to having the main appeal heard on merits.

The grounds are that the order of this Court to dismiss the appeal for Want of prosecution was made in error.

That the mistake if any was that of Counsel as he failed to file the necessary papers or take steps to have the appeal heard.

Further that the sofa set in question is still lying at the appellants premises.

It is submitted by Counsel for the applicant that at the time of dismissing the appeal on 3rd October, 2012 for Want of prosecution parties were engaging in an out of Court settlement and that directions had not been taken in terms of order 42 rules 35(1) of the Civil Procedures which provides,

**“ Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant the Respondent shall be at liberty either to set down the appeal for hearing or to apply by summon of its dismissal for Want of prosecution”.**

The appellant relies on the case of **ALI SHEE BWANKWELI – VS- JUA IDDI SALIM CIVIL APPEAL NO. 169 OF 2002 MOMBASA** where Sergon Judge held,

**“ that an application under it shall only be made after directions in the appeal have been taken pursuant to order XLI rule 8B (1) of the Civil Procedure Rules”.**

Counsel for the Respondent submits that on the 20th day of July, 2012, parties entered into a consent in the following terms,

**“ That the appellant in the application dated 21st day of May, 2012 do move the Court by ensuring that the matter is placed before the Judge under order 42 rule 13 within thirty (30) days from the said date. In default, the appeal should stand dismissed”.**

The month elapsed but the applicant did not comply with the consent and the Court struck off the appeal. In the absence of an appeal the Respondent proceeded to execute against the Judgment for the entire claim. Subsequently, the appellant engaged the services of another Advocate who then brought the present application for review and stay orders in respect of Chief Magistrates Civil Case NO. 3041 of 22001.

It is submitted that a review cannot be issued where parties had recorded a consent and Counsel relies on the case of E.A.T.E. C – Vs- WILLIAM ODERA (2006) eKLR whereby the case of Hiram – Vs- Kassam (1952) 19 EACA was cited in approval and the passage from SETON ON JUDGMENT AND ORDERS 7th Edition Volume I page 124,

**“ 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 or those doing 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 general for a reason which would enable the Court to set aside an agreement”.**

The Respondent also submits that there are no new and important matters before the Court that have arisen to occasion the review.

I have perused the record of 20th July, 2012 in which parties entered into a consent as argued by counsel for Respondent to the effect that the appellant was to comply with order 42 rule 13 within thirty (30) days in default of which the appeal was to stand dismissed.

Thirty (30) days did indeed lapse with the appellant doing nothing in compliance with the consent orders and on 3rd October, 2012 the Respondent moved the Court to dismiss the appeal which it did.

Upon perusal of the grounds for the application for stay orders and review I find no new and important matters have arisen after the orders were made and which could not be unearthed by due diligence.

Secondly, and more importantly the orders subject of the application are in the form of a consent by both parties.

A consent order and or Judgment obtains or secures a life of its own and it cannot be set aside varied or reviewed at the whims of one party unless it can be shown that it was obtained by fraud illegality or is against public policy or morality.

The Applicant has not attempted to show the existence of any of the above. The application therefore has no legs to stand on and its dismissed with costs to the Respondent.

Ruling delivered dated and signed this **19th** day of **February, 2014**.

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**M. MUYA**

**JUDGE**

**19TH FEBRUARY, 2014**

**In the presence of:-**

Learned Counsel for applicant Miss Ikanya

Learned Counsel for the Respondent absent

Court clerk Musundi

**M. MUYA**

**JUDGE**

**Miss Ikanya:** I pray for stay of execution for fourteen (14) days.

**Court:** Stay of execution granted for fourteen (14) days.

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**M. MUYA**

**JUDGE**

**19TH FEBRUARY, 2014**