



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. APPLICATION NO. 5 OF 2003**

**KAZUNGU KAHINDI MWENI ..... APPLICANT**

**- VERSUS -**

**MWANGO RAJAB ..... RESPONDENT**

**R U L I N G**

The Application is brought under order 20 rules 11 (2) of the Civil Procedure Code and Section 3A of the Civil Procedure Act. It seeks the following orders:

1. That the execution of the consent judgement dated 19th June, 2003 be stayed pending the hearing and determination of this application.
2. That the applicant/judgement debtor be permitted to pay the decretal amount of Kshs.100,000/= together with costs and interests by way of Instalments of Kshs.10,000/= per month commencing 19th July, 2003 till for and find payment of the whole decretal sum.
3. That the consent judgement directing that the Decretal sum be paid within 30 days from 19th June, 2003 be altered to allow payment by instalments.
4. That the costs of this application be provided for. The first prayer.

The first prayer was granted when the application came up for hearing Ex-parte. The brief history of the matter is that the Respondent filed a claim as against the applicant in his capacity as the personal representative of the Estate of Ngumbao Mweni claiming interest in building situated at Kilifi. The matter which had been filed at Kilifi as SRMCC.95/2000 was heard and judgement delivered in favour of the Respondent. The Applicant being dissatisfied with the courts finding filed a Notice of appeal and proceeded to apply and obtained an order for a stay pending the said Appeal. The said orders were granted ex-parte on 17.1.03. However the hearing of the application inter-partes was adjourned by the parties severally on the grounds that they were negotiating settlement out of Court. This continued upto the 20.5.03 when the parties through their respective Advocates recorded a consent which effectively disposed off the application for stay as well as the intended Appeal. The consent is recorded in the following manner before Judge Lawrence Ouna.

*“By con sent the judgements in Kilifi SRMCC NO.95/2000 between Mwango Rajab (plaintiff) –vs- Kazungu Kahindi Mweni (Defendant) delivered on 4 th July, 2003 be and is hereby set aside. By further consent judgements be entered for respondent (Original Plaintiff) aga inst applicant (original/Defendant in the sum of Kshs.100,000/= together with costs and interest payable within*

*30 days from the date hereof. In default the respondent (Original Plaintiff) be at liberty to levy execution. Further the interim orders in force be discharged forthwith and the applicant (original Defendant) be at liberty to pursue his rights. If any against any occupant of the house forming subject matter of this suit. Costs to be borne by the applicant (original Defendant) payable to Respondent (original plaintiffs)”*

In prayer No.2 and 3 the applicant is seeking basically the same order as he seeks to have the part of the consent binding him to pay the Decretal sum of Kshs.100,000/= within 30 days set aside and in its place he be allowed to settle the claim by monthly instalments of Kshs.10,000/=. The reasons advanced by the Counsel Mr. Abisai is that the plaintiff's former Advocates did not have his instructions to commit him into paying the sum of Kshs.100,000/= within 30 days. He further says the applicant is not in a position to pay the said sums in one instalment which including costs comes to Kshs.155,216/=. He describes his only source of live-hood as income from a kiosk and the only other property is a residential house at Kilifi. His Counsel further submitted that under the Provisions of Order 20 rule 11(3) the court has power to alter the Decree.

In response, Mr. Murima for the Respondent opposed application on grounds that a party seeking to alter a consent judgement has to prove either fraud, mistake or misrepresentation. In this case he submits that is not the case. He sought to rely on the decision in FLORAN WASIKE –VS- ESTIMO WAMBOKO (1982 – 88) K.A.R. 625.

As to the Provisions of Order 20 rule 11, he submitted that the same only applies to decretal passed by the court other than by consent. The main issue for consideration is whether the Applicant has made out a case to warrant the setting aside part of the consent entered into by the parties. In the case of Flora Wasike, the onus is upon the party seeking the court's discretion to prove he has good reasons and which have to fall within the reasons that can warrant the revoking of a contract. In case, the applicant has simply said his Counsel had no authority to commit him to pay the sum in 30 days. He seems to be picking only part of the consent. The Advocate is his Agent and the law binding on Agent and Principle relationship would come into play. It would appear this line of action was prompted by the proclamation of the applicant's house default. As at the time of hearing of the application he had not made any attempt to pay any portion of the amounts outstanding.

He has further only alleged his source of income is from a kiosk but has not provided any evidence to prove so and to show how much he indeed earns from the kiosk. In the circumstances, the court finds it difficult to believe that he can only raise 10,000/= per month. In the circumstances the application is dismissed with costs.

**Dated and Delivered at Mombasa this 26th day of September, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**