



**Hayer Bishan & Sons Ltd v Agwena (Environment and Land Appeal  
E002 of 2025) [2025] KEELC 4952 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E002 OF 2025**

**E ASATI, J**

**JULY 3, 2025**

**BETWEEN**

**HAYER BISHAN & SONS LTD ..... APPELLANT**

**AND**

**ENOSH AGWENA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 26<sup>th</sup> June, 2025 brought on behalf of the Appellant pursuant to the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) and section 1A, 1B and 3A of the [Civil Procedure Act](#).

The application seeks of orders that;

- a. The honourable court be pleased to enlarge/extend time within which to deposit the decretal sums as per the consent of 16<sup>th</sup> April, 2025 by a further 120 days.
  - b. The honourable court be pleased to issue any other order as it may deem fit, just and appropriate.
  - c. The costs of the application be in the cause.
2. The grounds upon which the application was brought are that having been dissatisfied with, and aggrieved by the judgement and Decree of Hon. E. A. Obina (SPM) delivered on 13<sup>th</sup> January, 2025 in the Chief Magistrates Court at Kisumu in MCELC/E017/2023 *Enosh Agwena v Hayer Bishan Singh & Sons Limited*, the Applicants herein appealed against it, the aforesaid appeal has been initiated vide a Memorandum of Appeal filed on 16<sup>th</sup> January, 2025, in the impugned judgement, the lower court awarded the Respondent herein compensation for alleged trespass, vide a consent order dated 16<sup>th</sup> April, 2025, the parties herein consented to depositing the decretal amount within 30 days, that unfortunately, on the previous day, the director of the Applicant was taken ill and admitted in Kisumu



then later flown out of the country for specialized treatment, that the Appellant having appealed against the entire judgement stands to have the appeal rendered nugatory unless orders sought herein are granted, that the Respondent herein has instructed the Pambo Investment Auctioneers to proceed to execute, the managing director of the Respondent is critically ill and was flown to London Hospital, United Kingdom for treatment while the remaining director who is the biological daughter of the managing director accompanied him for treatment, that in the circumstances, it would be unfair for the Respondents to execute since the directors are currently out of the country for medical reasons and that the Respondent has not shown his ability to settle the decretal amount in the event that the judgement of the lower court is set aside and appeal allowed.

3. The application was supported by the averment in the Supporting Affidavit sworn by Charanjit Singh Hayer on 28<sup>th</sup> June, 2025 and the annexures thereto.
4. The application was opposed vide the contents of the Replying Affidavit sworn by Enosh Agwena on 29<sup>th</sup> June, 2025, the Supplementary Affidavit sworn by the same deponent on 30<sup>th</sup> June, 2025 and the Grounds of Opposition dated 29<sup>th</sup> June, 2025.
8. The application was heard orally on 3<sup>rd</sup> July, 2025. It was submitted on behalf of the Applicant that the delay in complying with the consent order was occasioned by the sickness of the Applicant and that the Applicant prays that the court may accommodate it and allow the application. That the court has inherent jurisdiction to entertain and allow the application.
5. On behalf of the Respondent, it was submitted that the timelines for compliance with the consent were set in a consent order recorded before the trial court after negotiations. That the consent order also provided for execution in case of default. That a review of the consent order can only be sought before the court that recorded the consent and that the consent had not been challenged.
6. Counsel submitted further that the court lacks jurisdiction to entertain the application. That sickness is not one of the grounds for vitiating a consent order and that the Applicant being a Company Limited, sickness of the deponent of the Supporting Affidavit should not stop operations.
7. I have considered the application and the grounds advanced in opposition thereof.
8. This matter is before this court on appeal. The appeal does not arise from the consent order dated 16<sup>th</sup> April 2025 but from the judgement delivered by the trial court on 13<sup>th</sup> January, 2025.
9. The powers of this court when sitting on appeal are provided for in section 78 of the [Civil Procedure Act](#) to be;
  - a. to determine a case finally;
  - b. to remand a case;
  - c. to frame issues and refer them for trial;
  - d. to take additional evidence or to require the evidence to be taken and
  - e. to order a new trial.
10. These powers are applicable and to be exercisable in respect of the subject matter of the appeal. In the present case, the consent order is not the subject of the appeal. Secondly, the court is not being called upon to exercise any of the powers aforementioned but to review the consent order recorded in the trial court file before the trial court.
11. No explanation has been given why the application was not filed before the trial court.



12. Order 42 Rule 6 pursuant to which the application was brought deals with stay of execution pending appeal.
13. The court finds that that application is not only improperly before this court but also unmerited as it does not demonstrate the grounds for varying a consent order.
14. The application is dismissed. Costs to the Respondent.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 3<sup>RD</sup> JULY, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:-

Maureen: Court Assistant.

Marthia for the Appellant/ Applicant

Obiero for the Defendant/Respondent

