



**Kikambala Housing Estate Limited v Devani & 8 others & another (Civil Case 2 of 2018 & 58 of 2015 (Consolidated)) [2025] KEHC 9987 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 2 OF 2018 & 58 OF 2015 (CONSOLIDATED)**

**J NGAAH, J**

**JULY 4, 2025**

**BETWEEN**

**KIKAMBALA HOUSING ESTATE LIMITED ..... APPLICANT**

**AND**

**AKASH DEVANI, MONA DOSHI, KARIM ANJARWALLA, ATIQ  
ANJARWALLA, AMYN MUSS, ANNE KIUNUHE, ROSA NDUATI-MUTERO,  
DOMINIC REBELLO AND ALEEM THERANI T/A ANJARWALLA &  
KHANNA ..... 1<sup>ST</sup> RESPONDENT**

**BANK OF AFRICA KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant has moved this Honourable Court through a motion dated 18 February 2025 seeking the following orders:

- “ 1. That this Honourable Court do certify this Application as urgent and service thereof be dispensed with in the first instance.
2. That this Honourable Court be pleased to vacate the hearing date of the main suit as the matter cannot proceed without this Honourable Court derive to a Principal Amount if any being demanded by the 2nd Defendant/2nd Respondent against the Plaintiff/ Applicant.
3. That this Honourable Court be pleased to vacate and declare void the Settlement Agreement dated 11<sup>th</sup> June, 2018 originating from the Mediation by the Parties herein and the subsequent erroneous order issued on 2nd November, 2018.



4. That this Honourable Court be pleased to compel the 2nd Defendant/2nd Respondent to produce in original form to the Plaintiff/ Applicant and certified true copies of the same to this Honourable Court of all debit and credit entries, cheque authority withdrawals, debit entry withdrawals, credit entry withdrawals of the business current account and investment account of the Plaintiff/ Applicant within Thirty (30) days for the purposes of for the purposes of inspection by the Plaintiff/ Applicant to wit;
  - a. Business Current Account Number 02406xxxxxx
  - b. Business Current Account Number 02406xxxxx5
  - c. Investment Account Number 02406xxxxx5
5. That this Honourable Court be pleased to compel the 2nd Defendant/2nd Respondent to produce in original form to the Plaintiff/ Applicant and certified true copies of the same to this Honourable Court of all debit and credit entries, cheque authority withdrawals, debit entry withdrawals, credit entry withdrawals of the business current account and investment account of Elsek & Elsek (K) Limited within Thirty (30) days for the purposes of for the purposes of inspection by the Plaintiff/ Applicant to wit;
  - a. Business Current Account Number 02404xxxxx9
  - b. Business Current Account Number 02404xxxx12
6. That this Honourable Court be please to issue any such orders or reliefs as it may deem fit.
7. That costs of this Application be provided for.”

2. As far as I understand the application, it is made on grounds that a certain financial audit that was to be conducted by a particular firm of auditors is a bone of contention between the parties. That being the case, what the applicant has described as the “a true Principal Amount” which apparently is money owed by the plaintiff, has never been agreed upon.
3. This fact was acknowledged in a mediation report dated 12 March, 2020 and filed before this Honourable Court on 13 March, 2020 when the court highlighted this issue as being being inconclusive. According to the applicant, the question of the outstanding amount can only be resolved once “the original documentations” have been obtained.
4. The said “original documentations” are alleged to be in possession of the 2<sup>nd</sup> respondent. The applicant doubts their authenticity and wants to be accorded an opportunity to examine them to ascertain if indeed it owes any amount to the 2<sup>nd</sup> defendant before the case can be set down for hearing.
5. Amongst the aspects of the documents which the applicant is interested in ascertaining are the signatures on these documents; the alleged questionable deduction by the 2<sup>nd</sup> respondent from the applicant’s investment account of Kshs. 100,000,000/=; and, the debit of the applicant’s other bank accounts with the 2<sup>nd</sup> respondent ostensibly in payment of third parties without the knowledge or consent of the applicant.



6. The applicant's quest for the documentation has, so far, been fruitless hence the instant application. It is further pleaded that:

“ 10. The Plaintiff/ Applicant and the 2nd Defendant/2nd Respondent disputed the use of photocopy documents in the audit exercise only conducted by PKF Mombasa hence the Plaintiff/ Applicant wish to have this Honourable Court conduct the audit process and deriving to a Principal Amount”.

7. The foregoing facts have been verified by the affidavit sworn by Osman Erdinc Elsek who has been identified as the director of the applicant company.

8. The respondents opposed the motion and to that end Idar Kasenge has sworn a replying affidavit in which he has introduced himself as the Head of Recoveries Department in the Bank of Africa.

9. According to Kasenge, the mediation out of which arose the partial settlement to which the applicant has referred was initiated by this Honourable Court to narrow down the issues between the parties. The partial settlement was crystallised into a court order by consent of the parties on 12 June 2018.

10. As far as the appointment of auditors is concerned, it has been sworn on behalf of the respondents that the respondents' advocates proposed two auditing firms through a letter dated 3 August 2018, addressed to the plaintiff/applicant. However, the plaintiff/applicant never proposed its own auditors, and neither did they revert to the Court on the same. In their communication to the applicant, the respondents' advocates disclosed to the applicant that one of the auditing firms fronted by the respondents was a firm of auditors for Anjarwalla & Khanna LLP. Nonetheless, the accounts to be audited had nothing to do with Anjarwalla & Khanna LLP but were for Bank of Africa.

11. The purpose of appointment of the auditors, it has been sworn, was to prepare a report for the court on disputed figures between the parties. The accuracy or veracity of this report will be tested in evidence at the full trial. In any event, the defendants have sworn, according to the consent order, KShs. 364,000,000/= was agreed as the outstanding amount payable by the plaintiff and for which the applicant was willing to sign a charge on certain property or properties pending the audit.

12. As far as the quest by the applicant for certain documents is concerned, the respondents have sworn that those documents were not considered in the auditor's report. The applicant did not avail its own documents for purposes of preparing the audit report because, it is sworn, the applicant denied maintaining any record for the facilities given to it.

13. Upon considering the application, the response thereto together with the respective counsel's submissions in support of and in opposition to the application, I summarise the application as essentially seeking to set aside or vacate the consent order entered by this Honourable Court on 12 June 2015. It is common ground that the order is a culmination of a mediation process out of which a settlement agreement or partial settlement agreement was reached.

14. Some other prayers are to do with the production of documents said to be in possession of the 2<sup>nd</sup> respondent.

15. I found prayer 2 which is the only other substantive prayer in the application rather ambiguous. However, nothing much turns on it because, to the extent that it was seeking the court to vacate a hearing date, it has been overtaken by events. The hearing could not take off on 19 February 2025 because the instant application had been filed in the intervening period and, procedurally, it had to be disposed of first.



16. As far as the prayer for vacating the consent order is concerned, all I can say is to reiterate what the Court of Appeal said in its decision in Civil Appeal No. 81 of 1984, *Flora N. Destimo versus Destimo Wamboka* (1985) KECA 149 (KLR) where it was held:

“It is now settled law that a consent order or judgment has a 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.”

17. In holding as it did, the court cited its predecessor, the East African Court of Appeal which, in *Hirani versus Kassam* (1957) 19EACA 131, adopted a passage in *Setton on Judgments*, 7<sup>th</sup> Edition Vol.1 at page 124, where it was stated:

“Prima facie an order made in the presence and with the consent of counsel is binding on all parties to the proceeding or action, and 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

18. No such grounds have been proved or demonstrated to exist in this application. Based on the material before court, there is nothing that would justify the setting aside, rectification or variation of the impugned consent order.

19. If I have to say anything more on this consent, the record shows that it was entered in June 2018. Why the applicant should be seeking to set it aside in 2025, seven years down the line is a question whose answer I have not been able to gather from the application.

20. For these reasons, I decline the prayer to vacate and declare void the impugned order.

21. As for requisition of certain documents alleged to be in possession of a particular party in the dispute, the proper law to employ is the applicable law in the Civil Procedure Rules and the Law of Evidence on such aspects as production of evidence, discovery, interrogatories etc.

22. That said, the plaintiff's suit or the counter-claim against it cannot be proved by way of interlocutory applications such as the instant one where the material evidence on the outstanding issues is hotly contested. Of course, subject to the appellate mechanisms available to the parties, only a determination of this Honourable Court will resolve the dispute between them.

23. For the foregoing reasons, I hold that the applicant's application is without merit. It is hereby dismissed. The costs of the application will abide the outcome of the suit. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 4<sup>TH</sup> JULY, 2025**

**NGAAH JAIRUS**

**JUDGE**

