



**Nyaga & 2 others v Ganzala (Civil Appeal E062 of 2024)
[2025] KEHC 12152 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E062 OF 2024**

**F WANGARI, J
JULY 10, 2025**

BETWEEN

MARTIN MURIMI NYAGA 1ST APPELLANT

JAMES KANAE WANGUNYU 2ND APPELLANT

TITUS MWANGI 3RD APPELLANT

AND

BAKARI MWANZA GANZALA RESPONDENT

RULING

1. The 1st and 3rd Appellants filed a Notice of Motion application dated 04/11/2024 pursuant to Order 25 Rule 5, Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Article 159 (c) (d) and (e) of the *Constitution* of Kenya. The 1st and 3rd Appellants pray that the court herein endorses judgment in the appeal as per the consent dated 22/04/2024 and filed in court on 23/04/2024 between the parties. They also prayed for costs.
2. The application is supported by grounds on its face and the annexed affidavit of McMillan E. Jengo sworn on 04/11/2024 that parties herein agreed on settlement of the appeal after negotiating and that the consent dated 22/04/2024 was executed and filed in court. That it is provided under the rules that where there is unequivocal agreement or consent between the parties, the court adopts the compromised consent as an order and judgment of the court.
3. The Respondent filed a Replying Affidavit sworn on 17/02/2025 by Olendi P. D., an advocate having the conduct of the matter and having been authorized by the Respondent, that the Notice of Motion does not properly state the orders sought and is ambiguous, and which orders have been overtaken by events. That the Applicants seek to have this court endorse a consent they failed to comply with and have therefore come to court with unclean hands. That the application before this court is an



afterthought and an abuse of the court process considering it was filed on 04/11/2024 while settlement of the decretal amount in the primary suit was finalized on 22/07/2024.

4. The Respondent states that the Appellants' insurance company, Messrs Kenya Orient Insurance Co. Ltd, before the stay orders in the primary file was issued, paid the decretal amount vide three (3) cheques on 22/07/2024: Cheque No. 19xxx for Kshs. 632,925; Cheque No. 19xxx for Kshs. 600,000; and Cheque No. 19xxx for Kshs. 600,000 which amounted to Kshs. 1,832,925. That on 24/07/2024, Messrs Olendi & Company Advocates was wired Kshs. 841,275 and the Respondent received a sum total of Kshs. 2,674,200.
5. According to the Respondent, the present application was pursued 3 months after the Appellant's insurer had fully paid up the decretal sum. That no duress was exercised upon the insurance company as they were bound by a professional undertaking executed in the primary file. That indeed the parties executed a consent dated 22/04/2024 and filed on 23/04/2024, which consent was never endorsed in court and that it laid out strict compliance timelines that the Appellants failed to meet. That 2 months after filing of the consent, the Respondent sought settlement of the decretal sum but the Appellants were not keen on the same.
6. The Respondent averred that their counsel on record became cognizant of the professional undertaking in the primary suit and communication was made to the Appellants' counsel that the consent had been vitiated by effluxion of time and non-compliance. That on 22/07/2024, the Respondent extracted a decree in the primary file and wrote to Messrs Family Bank Ltd for compliance with the bank guarantee dated 10/01/2022.
7. That the Appellants' counsel was served via their official email xxx.co.uk and that upon issuance of a court sealed decree, Messrs Family Bank Ltd proceeded to comply with the bank guarantee. That compliance with a professional undertaking cannot be duress and that Messrs Family Bank executed a bank guarantee on behalf of Kenya Orient Insurance Company Limited following the primary suit judgment for a sum of Kshs. 2,715,600.
8. The Respondent states that the Appellants' counsel had liberty to lodge the appeal by seeking stay of the judgment and decree in the primary suit but the same was not sought and coupled with the lack of any record of appeal, it was inferred the memorandum of appeal was intended to act as a stay. That on 25/07/2024, they received a stay order in the primary suit which had already been overtaken by events as no execution was in progress. The respondent therefore prayed that the notice of motion application and appeal be dismissed with costs.
9. The Applicants filed a Supplementary Affidavit sworn on 27/02/2025 by Sylvester Kivuva, the Appellants' Assistant Branch Manager, that the application before court is not about whether money has been paid or not, whether the bank guarantee was recalled regularly or not, whether the money paid was sufficient or not, but for endorsement of the consent entered into between the parties and filed in court on 17/02/2025 as judgment of the court.
10. The Applicants state that the consent has inbuilt enforcement mechanisms and the person granted the right to enforce it is the Respondent who cannot purport to enforce it by breaching it. That taking more money than what was provided in the consent judgment is the height of having unclean hands.
11. That the Respondent filed an application to set aside the consent judgment and withdrew it hence there is no challenge at all to the veracity or otherwise of the consent. That the Appellants gave a consent on the appeal and a bank guarantee which if the Respondent abides by its terms the matter is concluded. That there being no legal basis for abandoning the consent judgment on record, the court ought to endorse the same.



12. The application was canvassed by way of written submissions. The AppellantsApplicants in their submissions dated 17th March 2025 argued that the Respondent obtained a decree in the lower court without disclosing existence of the consent judgment to the magistrate. That in dealing with such non-disclosure, the Applicants relied on the holding of the Court of Appeal in Murkhejee v Karachiwalla Nairobi Limited (Civil Appeal (Application) 304 of 2015) (2024) KECA 75 (KLR) (9 February 2024) (Ruling).
13. The Applicants submitted that once there is a consent between the parties, it is the duty of the court to endorse it as judgment of the court as set out in Sinohydro Corporation Limited v Chacha (suing as the administrator of the Estate of Chacha Wagumbo - Deceased) (Civil Appeal 34 of 2021) (2024) KEHC 2921 (KLR) (19 March 2024) (Ruling). The Applicants also cited the cases of Kenya Anti-Corruption Commission v Gilbert Mwangi Njuguna & Another (2018) eKLR, Roy Mutua Kivusyu & Another v Nairobi City County; Nairobi City County Assembly Service Board & Another (Interested Parties) (2019) eKLR and Kenya Anti-Corruption Commission v Magut Agencies Limited & 3 Others (2018) eKLR.
14. The Applicants stated that circumstances under which a consent judgment can be vacated have long been settled by the Court of Appeal in Flora N. Wasike v Destimo Wamboko (1988) eKLR. That the Replying Affidavit does not allege fraud, collusion, agreement contrary to law, mistake or misrepresentation of key material facts. That correspondences on record demonstrate that parties were aware of what they were getting into. That Section 91 of the *Civil Procedure Act* will come into play and after judgment is settled, the appellant has a right to demand for restoration of any amounts paid over and above the consent judgment entered into herein. The Appellants therefore prayed that the Notice of Motion application dated 4th November 2024 be allowed with costs.
15. The Respondent in their submissions dated 31st March 2025 relied on Order 25 Rule 22 (5) of the Civil Procedure Rules and argued that the application herein seeks to have the consent filed on 23rd April 2024 endorsed by this court. That the consent has already been overtaken by events, the decretal amount having been fully released to the Respondent. That therefore, the orders sought cannot be issued as this court would issue the orders in vain pursuant to the holding in the case of Attorney General v Small Wonder Ltd, C.A.C.A. No. 110 of 2009 (Nairobi).
16. The Respondent submitted that the rule of law where an application has been overtaken by events is the striking out of that application upon satisfaction by the court. This position was reiterated in the case of Nadeem A. Kana v Lucy Wambui Mwangi; H.C.C.A. No. E006 of 2020 (Busia). That the present application is moot as was held in the case of Natural World Mombasa Safaris Ltd v Karuri, H.C.C.A. No. E045 of 2022 (Nairobi). This is so according to the Respondent as the Applicant filed a memorandum of appeal but did not embark to file any record of appeal.
17. That parties then filed a consent that was not complied with by the AppellantApplicant and that the Respondent indicated that non-compliance with the terms of the consent broke the same. That the decretal sum in the primary suit was thereafter paid in full by the Applicant. That the present application filed three months later seeking to have the non-complied consent endorsed by court is therefore moot.
18. The Respondent therefore prays that the application dated 4th November 2024 be struck out with costs for reasons that it was fatally defective as drawn, that the decretal amount was paid in full, and that the application is an afterthought.



19. Having considered the Notice of Motion application dated 04/11/2024, the Replying Affidavit sworn on 17/02/2025, the Supplementary Affidavit sworn on 27/02/2025, and submissions by the parties, the issues for determination are: -
- a. Whether the Supplementary Affidavit sworn on 27/02/2025 is properly on record.
 - b. Whether the consent dated 22/04/2024 and filed in court on 23/04/2024 between the parties can be endorsed as judgment in the appeal.
 - c. Who should bear costs.
20. On the first issue, the Respondent pleaded that the Supplementary Affidavit sworn by one Sylvester Kivuva who described himself as the Assistant Branch Manager of the Applicant's insurer ought to be struck out. That it is practice that affidavits should be sworn by either the party directly affected or the deponent's advocate on record. That the entire averments contained in the Supplementary Affidavit bear no probative value and ought to be expunged from the record.
21. The court in *Peter Onyango Onyiengo v Kenya Ports Authority* (2004) eKLR held: -
- “From these definitions, it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest, therefore, that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by Order 3 rule 2 (c) is in my view not correct. In the circumstances, I hold that other than verifying affidavits, which as I have stated must be sworn by the plaintiffs themselves or authorized agents, all other affidavits filed and used in courts are not among the acts covered by Order 3 rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and/or information that he deponed on, that in the rules of evidence would be admissible, mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity courts can under Order 18 rule 7 of the Civil Procedure Rules ignore.”
22. This court has perused the said Supplementary Affidavit and established that it is an ordinary affidavit. However, the deponent is making reference to the consent, an issue he had no personal knowledge of. He is not a party to the consent and a primary source of the evidence presented. Therefore, the supplementary affidavit sworn on 27/02/2025 by Sylvester Kivuva is incompetent.
23. On the second issue, this court has established that after delivery of Judgment on 29/02/2024, the Defendants Appellants filed a Memorandum of Appeal dated 04/03/2024. Afterwards, there were correspondences between the Defendant appellants and the Plaintiff Respondent for an out of court settlement where an agreement was reached. A consent was entered into, dated 22/04/2024, signed by the parties and filed in court on 23/04/2024. The consent was recorded as follows: -
1. “By consent the decretal amount to be paid by the defendant to the plaintiff amounts to Kshs. 2,046,700= inclusive of the costs of the suit.
 2. That the decretal amount shall be paid within 45 days of filing the consent in court.
 3. That in default of payment, the plaintiff is at liberty to execute.”
24. According to the letters by the Plaintiff Respondent dated 10/06/2024 and 10/07/2024 addressed to the Defendants Appellants, the 45 days within which the decretal amount ought to have been paid



lapsed and the Defendants Appellants were not keen on complying with the consent, positions which were clearly communicated to the Defendants Appellants.

25. On 12/07/2024, the Plaintiff Respondent wrote to Family Bank Ltd regarding the professional undertaking dated 10/01/2022 of a bank guarantee that ought to have been fulfilled upon successful hearing and determination of the suit in favour of the Plaintiff. They therefore demanded an immediate release of the sum of Kshs. 2,674,200= being the judgment sum plus costs of the suit awarded. On 22/07/2024, the Plaintiff Respondent duly extracted a decree in the primary suit and the decretal sum was paid in full.
26. Vide the application dated 04/11/2024, the Appellants now seek to endorse the consent as judgment.
27. This court is of the view that a consent filed in court does not automatically become endorsed. Parties are required to attend court and confirm that they agree to be bound by it. It then has to be endorsed as an order of the court for it to be given effect. However, none of these steps were taken regarding the consent in question.
28. In *Edward Acholla v Sogea Satom Kenya Branch & 2 others* (2014) eKLR the court had the following to say regarding endorsement of a consent: -

“Once consent is adopted by the court, it automatically changes character and becomes a consent judgement or order with contractual effect ...”
29. Additionally, despite the consent having been between the parties, the same lapsed on the basis of failure by the Defendants Applicants from complying with the terms. The Defendants Applicants have been indolent and equity does not aid the indolent.
30. On costs, the same follows the event. The matter having been settled, each party to bear its own costs.

Determination

31. In the upshot, this court orders as hereunder;
 - a. The Notice of Motion application dated 04/11/2024 has no merits and is hereby dismissed.
 - b. Each party to bear its own costs.
 - c. File closed.It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JULY, 2025

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HON. F. WANGARI

JUDGE

In the presence of: -

Mr. Kioko Advocate for the AppellantsApplicants

Mr. Olendi Advocate for the Respondent

Ms. Getrude, Court Assistant

