



Thungu & another v Otiemo (Suing as the Legal Representative of the Estate of Mary Anne Auma Ohana (Deceased)) (Civil Appeal E008 of 2025) [2025] KEHC 9513 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E008 OF 2025**

**DK KEMEL, J
JULY 3, 2025**

BETWEEN

WILLIAM THUNGU 1ST APPELLANT

ELDOROT EXPRESS BUS LIMITED 2ND APPELLANT

AND

JAMES OHANO OTIEMO RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY ANNE
AUMA OHANA (DECEASED)**

RULING

1. The Appellants have filed an application dated 13/6/2025 seeking the following reliefs;
 - i. Spent.
 - ii. That the Honourable Court be pleased to grant an order of stay of warrants of attachment dated 23/5/2025, Proclamation Notice and Auctioneer's Bill dated 28/5/2025 in Siaya CMCC E064 of 2022 James Ohana Otiemo (Suing as the Legal Representative of the estate of Maryanne Auma Ohana) pending the hearing and determination of the application herein.
 - iii. That the Honourable court be pleased to grant an order of stay of attachment, advertisement and/or subsequent sale of the Appellants motor vehicle registration Number KCW 084E and other properties pending the hearing and determination of the application herein.
 - iv. That the Honourable court be pleased to review the consent order dated 30/1/2025 adopted by the court and have the half decretal sum of Kshs475,000/= deposited in court.



- v. That the Honourable court be pleased to review the consent order of 30/1/2025 adopted by court and order that the payment of Ksh475,000/= paid to the Respondent's counsel on 9/6/2025 is paid as part payment of compliance with condition for stay pending appeal.
 - vi. That pending the inter partes hearing and determination of the application, the court do set aside the warrants of attachments dated 23/5/2025, the proclamation and auctioneer's bill dated 28/5/2025.
 - vii. That the costs of the application be in the cause.
2. The application is supported by the grounds set out thereunder and by the affidavit of Mary Ongong'a, learned counsel for the Appellants sworn on even date. The Appellants' gravamen is inter alia; that the parties entered into a consent on 30/1/2025 regarding the issue of security and an order for stay of execution pending appeal. That the Appellants' Insurer Directline Assurance Company had been facing internal wrangles among its shareholders which led to freezing of its accounts thereby making it hard to comply with the conditional order of stay of execution. That the Applicants' insurer has since managed to pay half of the decretal sums to the Respondent's Advocate; that the Appellants' former advocates brought complications even though they had prepared the requisite bank account forms; that a new firm of advocates Kairu MCourt came on board and duly served the Respondent's counsel with the requisite forms for signature but that the same were not returned for onward transmission to the bank; that due to the delays, the Applicants were unable to comply; that the Respondent has proceeded to execute for the whole decretal sums despite even having been paid half thereof and have issued warrants for the attachment and sale of the Appellants' motor vehicle registration No. KCW 084E; that the Appellants tools of trade now run the risk of being attached, advertised and sold yet the Respondent has already been paid half the sums; that the circumstances and reasons for non-compliance of the orders of 30/1/2025 are beyond the Applicants' control; that the Applicants are willing to have the remaining decretal sums of Kshs475,000/= deposited in court within 30 days; that there is need to protect the subject of the appeal; that the Applicants' appeal will be rendered nugatory if the orders of review and stay are not granted; that the Respondent will not suffer any prejudice if the application is allowed; that the court do allow for extension of time to comply with the earlier orders of stay of execution; that the application has been made without undue delay.
3. The application was vehemently opposed. The Respondent's counsel M/s Maureen Akoth Okumu swore a replying affidavit dated 18/6/2025 wherein she averred inter alia; that the parties recorded a consent dated 30/1/2025 vide Siaya HC Misc. Application No. E029/2024 wherein the Appellants were to deposit the security in the form of cash payment to the Respondent's counsel while a similar amount (balance) would be placed in an interest earning account in the Joint names of the Advocates; that the Appellants failed to bring to the attention of the court the challenges they were facing; that the Appellants did not comply within 45 days as agreed and waited a further 53 days before moving the court; that the Respondent was legally allowed to proceed with execution of the decree in default of compliance of the consent order; that the Applicants have not demonstrated any difficulties in applying for enlargement of time before the 45 days elapsed or even shortly thereafter. That the Applicants have been indolent all along and should not benefit from the eye of equity; that the court cannot set aside the consent order unless there is evidence of fraud but which the Applicants have failed to prove; that the Applicants' present counsel is not properly on record; that the application should be dismissed with costs.
4. The application was canvassed by way of written submissions. Both parties duly complied.
5. I have considered the Appellants' application as well as the rival affidavits and submissions. It is not in dispute that the parties herein entered into a consent on 30/1/2025 wherein they agreed that the



Appellants be granted an order of stay of execution of decree in Siaya CMCC No. E064/2022 upon the Appellants depositing the sums of Kshs475,000/= to the Respondent's advocate while a similar amount be deposited into a joint interest earning account in the names of both advocates within a period of 45 days failing which the stay shall lapse. It is also not in dispute that the Applicants did not comply with the aforesaid consent within the stipulated period and as a result the Respondent proceeded to execute the decree by taking warrants of attachment. It is also not in dispute that the Applicants made a belated payment of Kshs475,000/= to the Respondent's counsel on 9/6/2025. It is also not in dispute that the Applicants are yet to comply with the second limb of the order to deposit the sum of Kshs475,000/= into a joint interest earning account in the names of both advocates. I find the issue for determination is whether the consent dated 30/1/2025 should be reviewed.

6. The power of review is provided for under Order 45 Rule 1 of the Civil Procedure Rules as follows:

“ Any person considering himself aggrieved –

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review; may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

From the foregoing provisions, the Applicants are under obligation to show that upon discovery of new and important matter or evidence which after the exercise of due diligence was not within their knowledge or that there is an error apparent on the face of the record or for any other sufficient reason.

7. A careful analysis of the Applicants' averments in their affidavit in support do not reveal that there is discovery of new matters which were not within their knowledge at the time the consent was entered into or that there is an error apparent on the face of the record. The Applicants do not rely on those grounds and that they seem to be fronting the angle of sufficient reasons.
8. It is trite that parties who enter into a consent voluntarily must be bound by the terms thereof and must fulfil the said terms within the agreed timelines. The courts have expressed themselves on this aspect. For instance, in the case of *Flora Wasike Vs. Destimo Wamboko* (1988) eKLR, the court of appeal held as follows:

“ It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out.”

Again, in *Brook Bond Liebig Ltd Vs. Mallya* [1975] EA 266 the court held:

“ A court cannot interfere with a consent judgment except in such circumstances as would afford good grounds for varying or rescinding a contract between parties.”



Also, in Kenya Commercial Bank Vs. Specialized Engineering [1982] KLR the court held:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or in grievance of such fact in general for a reason which would enable the court to set aside an agreement.”

9. The Applicants have maintained that their insurer Directline Assurance Co. Ltd has some challenges wherein its shareholders were embroiled in wrangles and which caused the Applicants to delay in complying with the consent dated 30/1/2025. The Respondent has countered this by contending that the Applicants are not candid with the court as they had plenty of time to come back to the court to seek for extension of time to comply. It is thus clear that the Applicants appear to have taken their sweet time before coming back to court. It is instructive that the Applicants only complied with the first limb of the order namely to pay the sum of Kshs475,000/= to the Respondent's advocate which they did on 9/6/2025 and thereafter filed the present application seeking to be granted more time to deposit the remainder of the security into court. It is noted that the Applicants had been granted 45 days to comply with the terms of the consent but that they failed to do so thereby compelling the Respondent to proceed and execute the decree. The Applicants failed to approach the court in time if they needed to be given more time to comply. Nothing prevented them from doing so before the lapse of the 45 days or even a few days thereafter. The Applicants are now approaching the court almost five months later. I find the Applicants have not demonstrated any evidence to the effect that they had challenges in coming to court to seek for enlargement of time. It seems the Applicants opted to wait for the wrangles among the shareholders of their insurer to be resolved and then come to court for orders. The Applicants were fully aware that upon the lapse of the 45 days, the Respondent would be at liberty to execute the decree. It is noted that the Respondent has just done that and hence he cannot be faulted for taking such a move. I find the Appellants' application has been made quite late in the day. It is also instructive that the Applicants do not fault or raise any issue with the consent dated 30/1/2025 to justify same to be set aside and or interfered with.
10. The Applicants have contended that they have partially complied with the consent order by paying the Respondent's counsel the other half of the sums and now want to be permitted to deposit the other half into court. I find the Applicants having agreed to the terms of the consent were bound to comply with all the terms as set out and hence the Applicants' claim that they have partially complied with the consent order is not legally sound as there was no provision for partial compliance. As earlier noted, the Applicants were aware that the court's doors are open and ought to have approached the court in time and explain their challenges. However, they did not move to the court for appropriate orders. They just did not bother despite the reality that the 45 days stay of execution would elapse. I find that the Applicants did not have such luxury to pick and choose which terms to comply with and which to ignore and when to approach the court for variation of the consent order.
11. The Applicants have claimed that their appeal will become nugatory if the orders sought are not granted. It is noted that the Applicants have not thrown the gauntlet to the Respondent to the effect that the Respondent is a person of straw and will not be able to refund the monies in the event of success of the appeal. As the said issue was not canvassed by the parties, one therefore cannot tell if the Applicants will have challenges recovering the monies already paid to the Respondent. It is common ground that once the appeal succeeds and the judgment of the trial court set aside, the Respondent is under obligation to refund the monies to the successful Appellants. In the event of failure to refund



the monies by the Respondent, the Applicants will resort to the available court processes to ensure compliance.

12. In view of the foregoing observations, it is my finding that the Appellant/Applicants application dated 13/6/2025 lacks merit. the same is dismissed with costs.

DATED AND DELIVERED AT SIAYA THIS 3RD DAY OF JULY 2025.

D. KEMEI

JUDGE

In the presence of:

Tesot.....for Appellants/Applicants

N/A M/s Okumu.....for Respondent

Okumu.....Court Assistant

