



**Nkiura & Barbengi (Suing as the Joint Liquidators of the Moi University Sacco Society Limited Under Liquidation) v Cooperative Bank of Kenya Limited & 4 others (Civil Suit 40 of 2018) [2025] KEHC 12558 (KLR) (10 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 40 OF 2018  
RN NYAKUNDI, J  
SEPTEMBER 10, 2025  
(FORMERLY ELDORET ELC NO 106 OF 2018)**

**BETWEEN**

**HESBON NKIURA & JOEL KIPSANAI BARBENGI (SUING AS THE JOINT LIQUIDATORS OF THE MOI UNIVERSITY SACCO SOCIETY LIMITED UNDER LIQUIDATION) ..... PLAINTIFF**

**AND**

**THE COOPERATIVE BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
FRANCIS B. KOMEN ..... 2<sup>ND</sup> DEFENDANT  
MICHAEL K KANGOGO ..... 3<sup>RD</sup> DEFENDANT  
MONICAH J KEINO ..... 4<sup>TH</sup> DEFENDANT  
DAVID K KIPTOO ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

Representation

M/s Kamau Lagat & Co. Advocate

M/s Joseph C. K Cheptarus & Co. Advocates

M/s Mulondo Oundo Muriuki & Co. Advocates

1. What is pending before this court is a Notice of Motion dated 9.12.2019 expressed under the Provisions of Article 189 (a), Article 258, Article 259 of *the constitution* of the Kenya 2010, Section 1A 1B and 3A of the *Civil Procedure Act* cap, 21 Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 56 of the *Land Registration Act*, Section 78 (1) of the *Land Act* No 6



of 2012 Section 90, 96 and 97 of the Land Act No 6 of 2012, Section 66 (n) of the Co-operative Societies Act (cap 490) and Rule 15 of the Auctioneer's Rule seeking orders as follows:

- a. Spent.
  - b. The Honourable Court be pleased to stay execution of the consent dated 16<sup>th</sup> May 2019 adopted as orders issued on 6<sup>th</sup> November, 2019 pending the hearing and determination of this application inter.
  - c. That Honourable court be pleased to stay execution of the consent dated 16<sup>th</sup> May 2019 adopted as orders issued on 6<sup>th</sup> November 2019 pending the hearing and determination of this application interparties.
  - d. The consent order entered into by the Plaintiffs and the 1<sup>st</sup> Defendant herein on 16<sup>th</sup> May 2019 adopted on 6<sup>th</sup> November 2019 and all other subsequent and consequential orders be set aside
  - e. Costs be awarded to the Applicants.
2. The application is anchored on grounds that:
- a. The Respondents herein entered into consent on 16<sup>th</sup> May 2019.
  - b. The consent dated 16<sup>th</sup> May 2019 was adopted as orders of the court on 6<sup>th</sup> November 2019.
  - c. The commissioner for cooperative Development did not authorize the plaintiff under section 66 (n) of the co-operative societies Act (cap 490) to compromise the suit as it did vide the consent dated 16<sup>th</sup> May 2019.
  - d. The consent order was entered into without the knowledge, authority and or consent of the commissioner for cooperative Development as required by law.
  - e. The consent order was done in fragrant breach of the law as is in Kenya now.
3. It is further annexed by a replying affidavit by Joel Kipsanai Barbengi (Liquidator) which states as follows:-
- a. That I am one of the liquidators/plaintiffs and competent to swear this affidavit in this suit and on behalf of the joint liquidators of the Moi University Sacco Society Limited.
  - b. That as the liquidators/plaintiff we have read, understood and set out our grounds in response to the Notice of Motion dated 9/12/2019 under certificate of urgency dated 9/12/2019 and the contents of paragraph 1 to 37 of and the 2<sup>nd</sup>-5<sup>th</sup> defendant/applicants supporting affidavit dated on 10/12/2019 with two annexures in this matter.
  - c. That in a letter dated 3/8/2018 the 1<sup>st</sup> defendant/respondent to the 2<sup>nd</sup> defendant /respondent and copied to the 2<sup>nd</sup> to 5<sup>th</sup> defendant as the former chairman, treasures, secretary and chief executive officer respectively of MUSCO ltd giving a notification of sale property namely title number LRNO. Eldoret/Municipality/Block 4/321 MUSCO Towers in the mane of Moi University Co-operative Society (Under Liquidation) which is now non-existent and whose chairman and other officials namely the 2<sup>nd</sup>-5<sup>th</sup> defendants/applicant are no longer in office.
  - d. That in the Kenya gazette Notice No 6391 of 29/6/2018 the Deposit-taking license of Moi University Sacco Society Limited was revoked by the Sacco Society Regulatory Authority (SASRA) Under the Sacco Societies Act.



- e. That the commissioner for co-operative Development cancelled the registration of and appointed liquidators the plaintiffs for the Moi University Sacco Society Limited (Under Liquidations) by the cancellation/liquidation order dated 29/6/2018.
  - f. That the cancellation/liquidation order dated 29/6/2018 by the commissioner for co-operative Development was in the Kenya gazette Notice No 6971 of 13, July 2018 advertised or published accordingly.
  - g. That a license revocation and asset preservation at MUSCO Towers Tenants was prepared by the Saco Societies Regulatory authority (SASRA) and handed over to the liquidators the plaintiffs of MUSCO ltd on 2.7.2018.
  - h. That we oppose the application and the granting of any orders including the stay of execution of the consent dated 16/5/2019 which was adopted as orders issued 6/11/2019 and the setting aside of the consent order entered into by us the plaintiff and the 1<sup>st</sup> defendant and all other subsequent and consequential orders as prayed by the 2<sup>nd</sup>-5<sup>th</sup> defendant on the basis.
4. In answer to the application, 1<sup>st</sup> Defendant through Stanley Kibor filed a replying affidavit asserting as follows: -
- i. I have read and understood the Notice of Motion dated 9<sup>th</sup> December, 2019 and the affidavit in support thereof sworn by Francis Komen, Micheal Kangogo Monicah Keino and David Kiptoo. I have also been advised by the 1<sup>st</sup> Defendants' Advocate Messrs, Oundo Muriuki & Company Advocates on the various legal issues and wish to respond as hereunder: -
  - ii. The 2<sup>nd</sup> 5<sup>th</sup> Defendant, application is frivolous, vexations, mischievous and otherwise an abuse of court process deserving to be struck out with punitive costs.
  - iii. For starters, I am advised by our advocates on record Messrs Oundo Muriuki & Company Advocates whose advice I verily believe to be true that the prayer for stay of execution of the consent is ill informed since there is no positive order emanating from the consent that is capable of being stayed.
  - iv. I am further advised by our advocate whose advice I verily believe to be true that a consent order has contractual effect and can only be set aside on grounds which would justify setting a contract aside such as fraud, mistake or misrepresentation, or if certain conditions remain to be fulfilled, which are not carried out. In the instant case, the 2<sup>nd</sup>-5<sup>th</sup> Defendant have not demonstrated why the consent should be set aside.
  - v. The allegations of illegality of the consent for non-involvement of the commissioner of co-operative Development are spurious for reasons that:
    - a. The commissioner of co-operative Development is not a direct party to the suit.
    - b. The Plaintiffs were appointed by the commissioner of Co-operative and were thus at all times acting under his superintendence hence the 2<sup>nd</sup>-5<sup>th</sup> Defendant's cannot be heard to say the Commissioner of co-operatives was not involved.
  - vi. The 2<sup>nd</sup>-5<sup>th</sup> Defendant's failure to enjoin the commissioner of co- operative Development as an interested party to the Application where his involvement or lack thereof in the consent would be confirmed betrays the 2<sup>nd</sup>-5<sup>th</sup> Defendant's knowledge that they are fully aware of the connection between the plaintiff.



- vii. Put differently, no evidence has been adduced by the 2<sup>nd</sup> and 5<sup>th</sup> Defendant that the commissioner of cooperative development is unaware of the consent herein.
- viii. In the same vein the allegation that the consent amounts to a waiver of the statutory obligation on the part of the 1<sup>st</sup> defendant to issue all requisite statutory notice is false for reasons that:
  - a. The 1<sup>st</sup> respondent had already issued a 30 days' notice on 17<sup>th</sup> July 2017.
  - b. Upon Lapse of the 30 days that 1<sup>st</sup> Respondent proceeded to issue the 90 days statutory notice on 31<sup>st</sup> August.
  - c. The 1<sup>st</sup> Respondent had also issued a 40 days' Notice to sell to the Moi University Sacco Society Limited on 3<sup>rd</sup> August 2018.
- ix. The important of the consent was for re-issuance of the 40 days' notice to the liquidators who had not been served with the 40 days' notice since they had not been appointed at the time of issuance of the notice to Moi University Sacco Society Limited. The allegation that the consent offends the provisions of the Land Act with respect to issuance of the statutory notices are thus unfounded.

## Decision

5. The power of the court to vary or revoke an order of consent is contained in Order 12 Rule 7 of the Civil Procedure Rules. However, the general rule is that a court does not have the jurisdiction to change a final order after it has been perfected. The court is required to assess the timeliness of the application as also influenced by other critical factors in respect of grounds which have been discussed over time on setting aside the consent order or judgement. It is trite law that the consent order once adopted by the court has the same effect as one arrived at after a trial and a conclusive judgement or ruling is pronounced by the court. The only exception is that the parties cannot appeal against a consent judgment unless with leave of the court
6. The court in *Tigner-Roache & Co. V. Spiro* (1982) 126 in reference to consent orders for the principle that "Where a consent order appears to incorporate the conclusion of negotiations between the parties a court will not vary the said order by giving a party additional time to comply with its terms. In such matters the court must determine whether a true binding contract was created "to which is superadded the command of the judge and which bears his imprimatur, or whether it is a mere order of the court to which the parties agreed or did not object. In the latter case the court has the jurisdiction to extend or abridge the time within which a party is required to do an act. Smith, J.A went on to state that where the order evidence a real contract the court will not as a general rule interfere with the terms.  
  
This was also the position taken by the court in *Windsor Commercial Land Company Limited & Others v Century National Merchant Bank Trust company Limited & Another* SCCA No. 114/05
7. It is also crystal clear from our very own jurisdiction that the courts have adopted a restrictive approach to vary or revoke an order of consent. The statutory law and the case law do not provide an open door permitting a court to reverse its decision merely because a party wishes the court so to do. A court therefore will only re-visit a consent order previously made if an Applicant seeking to revoke that order shows some change of circumstances or demonstrate that he or she was misled in assenting to the terms of the consent. The consent order before this court is highly contentious as one reads the affidavits from both parties. It has also taken so long for the Applicant to file an application seeking this revocation. However, my reading of the record shows that there have been numerous correspondences to the in-charge court registries to avail the file so that the application could be heard and determined.



It is trite law that a consent order has all the attributes of an order made after a contest in a plaint, originating summons, claim, or petition save that once adopted by the court it is not appealable nor set aside at whim. The jurisprudence being generated from our courts provides of course a few exceptions to impeach the consent order, for example the correction of a clerical error, or the clarification of the judgement, or a variation to facilitate the working out of the order. The authorities show that where a consent order evidences or embodies a real contract between the parties the court will only interfere with it on the same grounds as it would with any other contract, for example misrepresentation, mistake or fraud. Therefore, while it appears that a consent order embodies the conclusion of negotiation between the parties, the court will give effect to it where one party is in breach, and will not vary it by giving extra time to perform its terms. (See the principles in *Flora Wasike v Destimo Wamboko* (1982-1988) KAR 625, *Brooke Bond Liebig v Mallya* 1975 E.A 266, *Hirani v Kassan* (1952) 19EACA 131, *Kenya Commercial Bank Ltd v Special Engineering co. ltd*

8. These concepts of mistake, fraud, misrepresentation of facts are loaded doctrines of law and who ever alleges any of them in seeking a remedy has the standard and burden of proof under Section 107 (1) 108 & 109 of the *Evidence Act*. The Black's Law Dictionary delved into this legal field and shade light as follows: - fraud is defined as knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is a tort, but in some cases (especially when the conduct is willful) it may be a crime.

Misrepresentation is defined as: The Act or an instance of making a false or misleading assertion about something usually with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion. (2) The assertion so made an incorrect, unfair or false statement an assertion that does not accord with the facts and Mistake: as "An error misconception, or misunderstanding an erroneous belief (2) Contracts. The situation in which either (i) the parties to a contract did not mean the same thing or (2) at least one party had a belief that did not correspond to the fact of law. As a result, the contract may be voidable.

9. Where the parties settle a dispute and a court enters a judgment underpinned in the parties' consent, that judgment or ruling in many ways once adopted is like a judgment entered on the merits after full trial before a judge or magistrate. It is enforceable in the same way as any other judgment and is not subject to a collateral attack by a party who may be feeling aggrieved on any of the terms in the consent. What the consent judgement does, is to achieve two objectives in a dispute. First it represents an agreement between the parties settling the underlined disputes and providing the entry of judgment in a pending or contemplated action covering the subject matter which was due to be decided by the court on the merits. Second, a consent judgement also represents the entry of such a judgment by a court with all that this means in the way of committing the parties to implement the judgment of its costs. Essentially, it is a form of a decree of the court and by having it signed the intention to be bound by the given terms is sealed.
10. The million-dollar question is whether the Applicants have satisfied the criteria to set aside the consent judgement. In the ensuing affidavit and application, the grounds of departure as pleaded in the motion comprise of the fact: That the commissioner for cooperative Development did not authorize the plaintiff under Section 66 (n) of the *co-operative societies Act* (cap 490) to compromise the suit as it did vide the consent dated 16<sup>th</sup> May 2019, The consent order was entered into without the knowledge, authority and or consent of the Commissioner for co-operative Development as required by law.
11. The history of this litigation is very clear from the record if the order dated 29.6.2018 by one Mrs. Mary Mungai OGW Commissioner for Co-operative Development as herein stated is anything to go by:



The Cooperative Society of Cap 490 (Laws of Kenya) Cancellation/Liquidation Order :  
Whereas, the deposit taking license of Moi University Sacco Society Limited has been revoked under Section 27(1) of the Sacco Societies Act, 2008 and WHEREAS OF the Commissioner for Co-operative Development is of the opinion that the Society ought to be dissolved under Section 61 (1) of the Co-operative Society Act, I hereby cancel the registration for the said Co-operative Society and order that it be liquidated.

Further pursuant to Section 65 of the Co-operative Societies Act, I appoint Mr. Hesobo M Kiura -Principle Co-Operative Officer of Nairobi and Mr. Joel Kipsanai-Senior Co-Operative Auditor of Iten, Marakwet County to be the joint liquidators for a period not exceeding one (1) years and authorize them to take into their custody all the properties of the said society including such books and documents as are deemed necessary for completion of the liquidation.

12. This was followed by the gazette Notice No. 7601 dated 20.7.2018 with the date of Kenya Gazette being 27.7.2018 expressly providing as follows: Take Notice that Moi University Sacco Society Limited (Under liquidation) having been dissolved in accordance with Section 61 (1) of the co-operative Development and Hesbon M Kiura and Joel KipSanai Baribengi having been appointed joint liquidators by the Commissioner for co-operative Development pursuant to Section 65 of the cooperative Society Act (cap 490) and that pursuant to Section 66 (1) (a) of the co-operative societies Act and Rule 48 of the co-operative Societies rules (cap 490) on admission of claims against the society the liquidation through Joseph C.K Cheptarus & Company Advocates shall proceed to carry on the business of the society as far as may be necessary for the proper liquidation of the affairs of the society unless creditors with claims against the society submit such claims against the society (under liquidation) at the societies head office Moi University P.O Box 23-20107 Moi University between 8.00am to 5.00pm from Monday to Friday being the appointed place, day and time for admission of claims within sixty (60) days from date of the publication of this notice in Kenya Gazette
13. The legal representation in the proceedings Under Art. 50 (2) (g) of the Constitution was as follows: For the 1<sup>st</sup> Defendant it was Messrs Mulondo, Oundo, Muriuki & Company Advocates. As for the 2<sup>nd</sup> Defendant, he invited the court to represent himself, the same applied to the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendant in formalizing their self representation. The 1<sup>st</sup> interested party was represented by Nyanga & Mugisha Advocates.
14. During the pendency of the proceedings on 20<sup>th</sup> May 2019 the following written consent was lodged in the High Court Registry with the following details:  
Our Ref: MOM/CIV/HOM/166/17  
Your Ref: TBA  
The Deputy Registrar  
High Court of Kenya at Eldoret  
Eldoret Law Courts  
Eldoret  
Dear Sir/Madam  
Re: Eldoret HCCC No. 40 of 2018  
Hesbon M. Kuria & Joel Kipsanai (S/A Joint Liquidators of Moi University Sacco Society Limited [Under Liquidation]) -vs- Co-operative Band of Kenya Limited & 4 Others



We refer to the above matter where parties have agreed to record the following consent.

That by consent, it is hereby agreed that this matter is compromised in its entirety on following terms;

1. The 1<sup>st</sup> defendant shall re-issue the 40 Days' Notice to Sell.
2. The 1<sup>st</sup> defendant shall be at liberty to proceed with sale of the property upon lapse of the 40 Days' Notice in the event of default in clearing of the full arrears.
3. The 1<sup>st</sup> defendant shall apply the proceeds of sale towards settling the outstanding debt.
4. The balance of the proceeds of sale shall be remitted to the Plaintiffs for distribution to Musco Creditors.
5. The matter be and is hereby marked as settled in its entirety upon filing of this consent.
6. Each party shall bear its own costs.

We shall be most obliged.

.....

Signed Signed

Joseph C. K. Cheptarus & Co. Oundo Muriuki & Company Advocates for the Plaintiff  
Advocates for the 1<sup>st</sup> Defendant

15. This written consent was 6<sup>th</sup> day of November 2019 adopted by the High Court in a session presided over by H.A Omondi J and from that date henceforth it moved from being a consent of the parties to a Judgment of the High Court. The elements of a judgment from the various legal texts and case law is now well settled. For example, according to Black's Law Dictionary. 8<sup>th</sup> Edition a judgment is defined as follows:

“A court's final determination of the rights and obligations of the parties in a case.”

Whereas an agreed judgment is defined as follows:

“A settlement that becomes a court judgment when the Judge sanctions it. In effect an agreed judgment is merely a contract acknowledged in an open court and ordered to be recorded, but it binds the parties as fully as other judgments also termed consent judgment; stipulated judgment; and judgment by consent.”

16. This consent judgment in contention was sanctioned by the Court within the provisions of the Civil Procedure Rules.
17. The bone of contention in the new Notice of Motion by the Applicants is to the effect that the consent was not approved by the Commissioner of Co-operatives. For a better understanding of this course of action it is necessary to lay down the provisions of Section 66 of the Co-operative Society's Act on the powers of a liquidator. Thus; To appoint a day, in the prescribed manner, before which the creditors whose claims are not already recorded in the books of the co-operative society shall state their claims for admission, or be excluded from any distribution made before they have proved them; To institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the society; To appoint an advocate to assist him in the performance of his duties; To refer disputes to the Tribunal in the prescribed manner; To determine from time to time the contributions to be made by the members and past members, and by the estates of deceased members of the society, to the funds of the society To



investigate all claims against the society, and subject to this act, to decide questions of priority arising between claimants; To call such meeting of members and creditors as may be necessary for the proper conduct of the liquidation; To sell the movable and immovable property and rights of action of the society, by public auction or private contract with power to transfer the whole thereof to any person or company or to transfer the same in parcels; To carry on the business of the society as far as may be necessary for the proper liquidation of the affairs of the society; To take possession of the books, documents and assets of the society; To arrange for distribution of the society in a convenient manner a scheme of distribution has been approved by the Commissioner; To give such directions in regard to the disposal of the books and documents of the society as may appear to him to be necessary for winding up the affairs of the society; To compromise, with the approval of the Commissioner, any claim by, or against, the society; To apply to the Commissioner for his discharge of the Commissioner, any claim liquidator after completion of the liquidation proceedings.

18. Looking at the case at bar, first, there is documentary evidence that the society was indebted to the 1<sup>st</sup> defendant, Cooperative Bank of Kenya. The bank facilities for account of MUSCO was indeed the subject matter of this litigation before the High Court. In the second stretch, by dint of the Gazette Notice No. 6971 dated 29<sup>th</sup> June 2018 the Commissioner for Cooperatives Development cancelled the Deposit taking licence of MUSCO under Section 27(1) of the Sacco Society's Act and dissolved the society under Section 61(1) of the Cooperative Society's Act and ordered that it be liquidated. Further, pursuant to Section 65 of the Cooperative Society's Act an appointment of Hesbon Kiura Principal Cooperative Officer Nairobi and Joel Kipsanai Senior Cooperative Auditor of Iten Marakwet County to be joint liquidators for a period not exceeding one year. This appointment was followed by further gazette notices one dated 30<sup>th</sup> June 2019 being an extension order for appointment of liquidator. The same read as follows:

“Whereas by an order dated 29<sup>th</sup> June 2018 the Commissioner for Cooperatives Development appointed one Hesbon Mbutia Kiura and Joel Kipsanai as joint liquidators for Musco for a period not exceeding one year and whereas the said appointed liquidators have not been able to complete the liquidation now therefore I extend the period of liquidation with effect from 30<sup>th</sup> June 2019 for a period not exceeding one year in the said appointment.”

19. The liquidation of Musco is not disputed. The appointment of the liquidators is also not in dispute and the terms of reference are as per the provisions of Section 66 of the Act. In that temporary appointment there are many functions to be discharged by the liquidator. One of it for purposes of this litigation is the power to sue or be sued on behalf of the Society under liquidation.
20. Looking at the sequence of the events, KOMM Advocates represented the Cooperative Bank of Kenya, the 1<sup>st</sup> Defendant at the initial stages but later the firm of Oundo Muriuki took over the litigation whereas the firm Joseph C. K. Cheptarus & Company Advocates acted for the Plaintiff pursuant to Article 50 (2) (g) of *the Constitution*. From the Court record these two law firms on 20<sup>th</sup> May 2019 filed a written consent setting out terms of settlement of the dispute as between the Plaintiffs and the 1<sup>st</sup> Defendant. These two parties happen to be the main actors to this commercial cause. The consent judgment in question was sanctioned by the trial Judge H. A. Omondi and from there henceforth it was no longer a consent agreement of the parties but a judgment of the court capable of being enforced and executed by the litigants/parties. The impugned consent prima facie was signed by the Legal representative for both the Plaintiff and the 1<sup>st</sup> Defendant exercising the powers on behalf of their client under Article 50 (2) (g) of *the Constitution*.



21. The Court in the case of Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd [1982] KLR 485 held that:

- “ 1. 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 collusion or by an agreement contrary to the policy or the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

22. In my considered view, the legal representation of both law firms on record in drafting and endorsing the consent judgment dated by the Court Registry on 20<sup>th</sup> May 2019 has not been impeached. There is no evidence that they were acting on their own motion and not for the interest of their respective clients under instructions as settled under the law under the provisions of the *Advocates Act* and the constitutional imperative on legal representation under Article 50 (2) (g) of our supreme law. The consent adoption was a judicial process and the structural interdicts as drawn in the consent agreement were upheld as an appropriate relief to settle the dispute.

23. The Applicant’s complain that the impugned consent was filed as a writ of execution erroneously without first seeking approval from the Commissioner of Cooperatives. First and foremost, it must be understood from the very beginning, the words used in the legal impugned instrument dated 20<sup>th</sup> May 2019. It starts with the words ‘that by consent’, this usually will embody a genuine contract between the parties which resolved their disputes which had been earlier on filed in Court for hearing and determination, and in essence that contract must be given a contractual effect. That is why the law emphasizes fundamentally that a consent order may only be set aside on the same grounds that will justify the setting aside of a contract which has been entered into by competent parties with full knowledge of the material issues. The terms of this impugned consent precisely reflect the dispute in question which was waiting the session Judge to hear and resolve after granting a temporary injunction under Article 40 Rule 1 & 2 of the Procedure Rules.

24. Where do the Applicants seek leave of this Court to throw away the consent which is now repository judgment which settled the dispute few years back? Is this question of approval a material factor to this consent? In my considered view, I answer in the negative as follows: That clause of approval by the Commissioner of Cooperatives does not advance the mode in which that approval is to be given either in writing or oral by the liquidator. The liquidators were legally, regularly, properly and correctly appointed under the terms set out under Section 66 of the Cooperatives *Societies Act*. That appointment did not stop there, the key actors to the dispute proceeded to appoint the Solicitors, Legal Counsels or Advocates of the High Court duly licensed under the *Advocates Act* to carry out and practice according to their calling under the Laws of Kenya including in consonant with Article 50 (2) (g) of *the Constitution*.

25. This dispute was settled by consent way back on 6<sup>th</sup> November 2019, although I have seen correspondences speaking of a missing file. It is also true from the record that the matter was mentioned before H. A. Omondi J on 22<sup>nd</sup> July 2020 but there is no indication of any pending application which could have been a subject matter for a directional mention before this court. Therefore, in my view a



court may also refuse to set aside a consent order that it would have otherwise set aside on the basis of delay in making of the application to set aside. Incidentally for the Applicant, their legal sword to invite this court to exercise discretion is based on a clause in Section 66 on the question of approval which in term should invalidate the consent order. My position in this matter as I have already alluded to, is that the clause of approval cannot invalidate this consent and subsequent judgment of the court on adoption.

26. Taking cue from the interpretation of the language in the Statute which must be read into contextually, I am of the view that the provisions of a Statute have to be read harmoniously and not by cherry picking one clause to the disadvantage of the well thought out other provisions of significance. For one to find out the exact connotation of a word, we must look to the context in which it is used. There are no words which have an absolute meaning and no words can be defined in vacuo, or without reference to some context. In this application before me all procedural processes which act as a litmus test on the legitimacy of the appointment of the liquidator were complied by the Commissioner of Cooperative Societies. He or she was not to police every step taken by the liquidator as outlined in the provisions of the Statute. The liquidator exercised the statutory powers in good faith and in line with the well laid down mandate. For one to impeach the consent on that clause of approval is to misconstrue the letter and spirit of the law. Finally, on this issue I remain ordained by the famous words of Justice Oliver Wendell in the case of *Towne v Eisner*, 245 U.S 425 [1918] in which he remarked; The word is not a crystal transparent and unchanged. It is a skin of a living thought and may vary in colour and content according to the provisions and the time in which it is used.

27. Just as a final dessert on this cause of action, the Court in *Michael Causwell and Anor v Dwight Clacken and Anor* CA No. 129/2002 the Supreme Court of Jamaica added its voice as herein stated:

“ A Consent Order has all the attributes of an order made after a contest save that the parties cannot appeal without leave. It is not in dispute that generally a Judge may not change a final order once it is perfected and entered. There are, of course, a few exceptions, for example the correction of a clerical error, or the clarification of the judgment, or a variation to facilitate the working out of the order. The authorities show that where a consent order evidences or embodies a real contract between the parties the court will only interfere with it on the same grounds as it would with any other contract, for example misrepresentation, mistake or fraud.”

28. The three major components in this dictum are never the touchstone concerning the interpretation of the consent of the impugned consent order. The Consent Order was valid, duly adopted by H. A. Omondi J as she then was now sitting at the apex Court of Appeal and the present forum of the High Court has no jurisdiction to set aside the consent. For the aforesaid reasons the deed of settlement lodged in the High Court Civil Registry on 20<sup>th</sup> May 2019 and adopted by the session Judge on 6<sup>th</sup> November 2019 as signed by the parties constitutes the judgment and decree of this court. The Respondent be and is hereby awarded costs of this litigation.

29. It is so ordered.

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 10<sup>TH</sup> DAY OF SEPTEMBER 2025.**

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**R. NYAKUNDI**

**JUDGE**



Email:

info@komm.co.ke

cheptarusjoseph@gmail.com

paul@komm.co.ke

paul@oundomuriuki.co.ke

