



REPUBLIC OF KENYA



Cherutich v Mburu & 4 others; Equity Bank Limited (Interested Party) (Environment & Land Case 4 of 2013) [2025] KEELC 3671 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 4 OF 2013**

CK YANO, J

MAY 8, 2025

BETWEEN

SHADOCK CHEPKIYENG CHERUTICH PLAINTIFF

AND

SAMMY MUIRURI MBURU 1ST DEFENDANT

DAVID SONGOK LAGAT 2ND DEFENDANT

HESBON MOKONO 3RD DEFENDANT

UASIN GISHU DISTRICT LAND REGISTRAR 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

AND

EQUITY BANK LIMITED INTERESTED PARTY

RULING

1. The 3rd Defendant/Applicant filed the instant application under certificate of urgency vide Notice of Motion dated 12th November, 2024 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That the Honourable Court to order the applicant to liquidate the balance of KShs. 387,801/= to be paid in monthly instalments of KShs 30,000/= until full settlement.
2. The application was based on the grounds on the face of it and the supporting affidavit of the 3rd Defendant [hereinafter “the Applicant”]. He deponed that the Plaintiff instituted the suit herein, where the Defendants were ordered to pay KShs. 517,801/- as costs. That he paid KShs. 130,000/-,



receipt of which the Plaintiff acknowledged, and consented to settle the balance of KShs. 387,801/- within 45 days. He deponed that at the time, he was expecting payments from third parties who owed him money, but they never paid. Further that his business is not doing well and he has no other source of income.

3. The Applicant explained that he did not dispute the balance, only that he is unable to pay it all in a lump sum. He added that he had paid KShs. 30,000/- to the Respondent through his advocate as a sign of good faith towards settling the said costs. He deponed that this court has discretion under Order 21 Rule 12 of the Civil Procedure Rules to order payment of a decreed amount to be settled by way of instalments. He deponed that the application was made in good faith, without undue delay, and that the Plaintiff would not suffer any prejudice as he will eventually enjoy the fruits of his judgment.
4. Through the Grounds of Opposition dated 18th November, 2024 the Plaintiff/Respondent opposed the Motion on grounds that:- it is devoid of merits [sic] and amounts to abuse of the court process; it is res judicata in view of the consent orders dated 26th September, 2024 ordering a lump sum payment within 45 days; it is calculated at frustrating the Respondent from recovering his costs; the Applicant is a man of means as demonstrated in the proclamation notices attached to the application dated 6th September, 2024 and the replying affidavit dated 24th September, 2024; the Applicant's proposal to pay Kshs. 30,000/- monthly is unreasonable and unacceptable since it will take over a year and 6 months to pay the said amount; and finally that the application was made in bad faith and after inordinate delay.

Submissions:

5. When the matter came up for mention on 11th March, 2025, this court directed that the application would be canvassed by way of written submissions which were duly filed by both parties.

3rd Defendant/Applicant's Submissions;

6. In the 3rd Defendant/Applicant's submissions dated 27th March, 2025, Counsel explained the background of the dispute culminating in the instant Motion. Counsel submitted that the Applicant has so far paid a total of KShs. 240,000/- leaving a balance of KShs. 277,801/=, which he seeks to liquidate in instalments of KShs. 30,000/= until payment in full. She submitted that the Applicant is facing significant financial difficulties due to the tough economic times that make it impossible to settle the balance in a lump sum.
7. Counsel for the Applicant argued that the court had discretion under Order 21 Rule 12 of the Civil Procedure Rules to allow him to settle the balance in instalments. Counsel urged that the Respondent would suffer no significant prejudice if the application is allowed as the judgment amount will be fully settled, and further that the Applicant had proposed a reasonable instalment plan. She relied on *Freight Forwarders Ltd v Elsek & Elsek (K) Ltd* [2012] eKLR, High Court of Tanganyika in *Rajabali Alidina v Remtulla Alidina & Another* [1961] and *Lavington Security Limited v Nairobi City Water & Sewerage Company Ltd* [2014] eKLR.
8. As to the allegation that the application is res judicata, Counsel submitted that the instant Motion does not fall within the purview of res judicata since there is no fresh suit filed by the Applicant. Counsel also submitted that the Applicant was basically seeking to review the terms of the consent. Counsel submitted that under Order 22 Rule 7[2], more than one application for execution may be made if previous modes of execution do not lead to satisfaction of a decree. Counsel further clarified that the Applicant sought to apply for a variation of the terms of the consent adopted on 26th September, 2024 based on changed financial circumstances.



9. In addition, Counsel submitted that this being the court that issued the decree being executed, Section 34 of the *Civil Procedure Act* empowers it to hear and determine this application without filing a separate suit, and for that reason, the court is not functus officio. Counsel cited the case of *Lawrence Mokaya v Alice Onseria* [2019] eKLR. Counsel submitted that the Applicant had demonstrated bona fides and willingness to settle the decretal sum and she urged the court to allow the application.

Plaintiffs/Respondents submissions:

10. In the Respondent's submissions dated 17th March, 2025, counsel opined that the application offends the provisions of section 7 of the *Civil Procedure Act* in view of the consent recorded on 26th September, 2024 wherein the Applicant was required to pay the amount in issue in 45 days. That the prayers forming the subject of the present application revolves around payment of costs in instalments which issue was conclusively addressed in the consent dated 26th September, 2024. Counsel for the Respondent argued that the Applicant herein has not sought to review the consent order dated 26th September, 2024 and therefore the application is res judicata. Counsel further argued that the financial capabilities of the applicant was squarely within his knowledge when he recorded the consent dated 26th September, 2024 and contended that the application herein is an abuse of the court process purely calculated at delaying payment of the amount in issue.
11. The Respondent's counsel cited the provisions of Order 21 Rule 12 of the Civil Procedure Rules and relied on the case of *Keshvaji Jethabhai and Bros Ltd v Saleh Abdulla* [1959] EA where the court laid down the following principles in applications seeking for liquidation of decretal sum and costs in instalments: -
- a. Whilst Creditor's rights must be considered, each case must be considered on its own merits and discretion exercised accordingly;
 - b. the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
 - c. the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion, and;
 - d. hardship of the debtor might be a factor, but it is a question in each case whether indulgence can fairly be given to the creditor without prejudicing the creditor.
12. Counsel for the Respondent argued that the proposal to liquidate the balance of costs in monthly instalments of Kshs. 30,000/= is not agreeable to the decree holder for the reason that the same is calculated at frustrating him from recovering his costs. That the Applicant has not demonstrated his bonafides and means or sufficient cause to enable the court exercise its discretion in his favour.
13. Counsel for the Respondent argued that the proposal is unreasonable and unacceptable for the simple reason that the applicant will take 13 months to pay the amount in issue. That the Respondent is entitled to the costs awarded bearing in mind that costs were assessed by a ruling dated 28th April, 2023. It is the Respondent's submission that in the worst case scenario, the Applicant should pay the said amount in 2 equal monthly instalments.
14. The Respondent's counsel reiterated that the application is unmerited and urged the court to dismiss it with costs to the Respondent.



Analysis and Determination;

15. I have considered the Application, the grounds of opposition as well as the written submissions by learned Counsel for the 3rd Defendant/Applicant and for the Plaintiff/Respondent and the applicable law. I find two issues herein arising for determination:
- i. Whether the 3rd Defendant/Applicant has met the threshold for review and/or variation of a consent order; and
 - ii. Whether the Application is res judicata.

a. Whether the 3rd Defendant/Applicant has met the threshold for review and/or variation of a consent order

16. On 26th September, 2024 counsel for the 3rd Defendant/Applicant and counsel for the Plaintiff/Respondent agreed to compromise the application dated 16th September, 2024 by recording a consent whose terms were as follows:-

“1. that the Plaintiff/Respondent do acknowledge payment of KShs. 130,000/-. The balance of KShs. 387,801/- be paid within a period of 45 days, failing which execution to issue. The auctioneers fees be agreed or taxed.”

17. Both Counsel for the Applicant and Counsel for the Respondent herein were present and agreed to the terms of the consent. From the court record, which the court has perused, Counsel for the Respondent amended the initial consent as presented by Counsel for the Applicant, to add the bit allowing execution in default of payment. Counsel for the Applicant, however, accepted the amendment. The consent was then adopted as an order of the court. The above consent is the subject matter of this application.
18. Although the Applicant has curated this as an application seeking to be allowed to settle the decretal sum by way of instalments, I have no doubt in my mind that what he actually seeks is a variation and/or review of the consent order above mentioned. Moreover, it was admitted in the Applicant's submissions that he was basically seeking to review the terms of the consent. Counsel further admitted that the Applicant was seeking a variation of the terms of the consent adopted on 26th September, 2024 based on changed financial circumstances.
19. Courts have power under Section 80 of *Civil Procedure Act* and Order 45 Civil Procedure Rules to review their judgments and/or orders. However, this power is fettered when it comes to consent judgment or orders. One of the informative cases that informs review or variation of consent orders is that of *Hirani v Kassam* [1952] 19 EACA 131, where the then East African Court of Appeal set out the circumstances in which a consent freely entered into by parties to a dispute in court may be reviewed, varied or even set aside as follows: -

“It is now well settled law that a consent judgment or order has 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: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

‘It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge



of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract’.”

20. The Court of Appeal in the above case cited the statement in Seton’s Judgments and Orders 7th Edition Vol 1 page 124 which reads as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings for action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement.”

21. Further, in Brooke Bond Liebig Ltd v Mallya [1975] EA 266, once again the same court held that:-

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

22. The law on variation of a consent order is now settled, and is to the effect that it can only be done on grounds that would allow for a contract to be vitiated. These grounds include, but are not limited, to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.
23. The Applicant herein has not set forth any of the aforementioned grounds as the basis upon which he seeks a variation of the consent order. There was no allegation that the consent was procured by fraud, collusion, illegality, mistake or misrepresentation. The Applicant did not allege that the consent was contrary to court policy, or that it was made in the absence and/or in ignorance of material facts.
24. To my understanding, the Applicant accepted and acknowledged the legality of the consent. The only problem he has raised is that his financial situation has changed and he is now unable to comply with the consent order. But much as I sympathise with the Applicant’s position, under the law, a change in his financial position is not sufficient ground to warrant a review or variation of a consent order sought herein. Moreover, the Applicant’s allegation that his business is doing poorly is not supported by any evidence.
25. As earlier indicated, the consent order was made by the Parties’ Advocates on record herein. Since both Advocates were properly on record for the Parties herein, it goes without saying that they had authority to act for their respective clients and had full mandate to compromise the former application as they did.
26. I am persuasively guided by the High Court in Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485, where it was held that 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. In any event, this Court has not been informed that the Applicant’s Counsel had no authority at all to enter into the consent.
27. Without a doubt, this court has authority under Order 21 Rule 12 of the Civil Procedure Rules to allow a judgment debtor settle the decretal sum in instalments. However, the fact remains that the parties herein already had an opportunity to approach the court for the orders sought in this Motion prior to the consent. They opted instead to enter into a post-judgment agreement on how the decretal sum would be settled, being the Consent recorded in court on 26th September, 2024. To allow the



instant Motion will be tantamount to review and/or variation of the consent order where no sufficient grounds have been established for it.

b. Whether the Application is res judicata;

28. The Respondent has also opposed the Application on grounds that it is res judicata courtesy of the consent recorded on 26th September, 2024. Section 7 of the Civil Procedure Act Cap 21 which provides that:-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

29. Section 7 above sets out the test for determining the application of the doctrine of res-judicata in any given case, which test has been summarized in numerous cases such as Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads:-

- i. the matter in issue is identical in both suits;
- ii. the parties in the suit are the same;
- iii. sameness of the title/claim;
- iv. concurrence of jurisdiction; and
- v. finality of the previous decision.

30. Whenever the question of res judicata is raised therefore, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.

31. The similarity in parties and the competence of the jurisdiction are not in doubt in this instance. The only issue is whether the issue of review and variation of the consent order has previously been dealt with by this court. This court is very aware that the doctrine of res judicata applies even to Applications. However, in the instant suit, there has been no previous application seeking a review and/or variation of the consent order adopted on 26th September, 2024. The answer to that is therefore in the negative, meaning that the doctrine of res judicata does not apply in this instance.

Orders:

32. The upshot is that the reason given by the Applicant for his inability to comply with the consent may be factually true, however, as already stated, it is not enough to upset a valid consent. It is for this reason that I find the 3rd Defendant/Applicant's Notice of Motion dated November 12, 2024 is without merit. The same is hereby dismissed with costs to the Respondent.

33. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 8TH DAY OF MAY, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO



ELC, JUDGE

Ruling delivered in the virtual presence of:-

Ms. Kemboi holding brief for Mr. Karuga for the 3rd Defendant/Applicant.

Ms. Kibet holding brief for Mr. Kibii for the Plaintiff/Respondent.

No appearance for 1st, 2nd, 4th and 5th Defendants.

No appearance for Interested party.

Court Assistant - Laban.

