Jacob Oluochi Ondeko, John Ondeko & Margaret Musembi Ondeko v Praxedes P Mandu Okutoyi, Chimmy Omamo Olende & Kenya Hospital Association; Madison General Insurance Kenya (Interested Party) (Civil Case 25 of 2008) [2021] KEHC 12539 (KLR) (Civ) (8 July 2021) (Ruling)

Jacob Oluochi Ondeko & 2 others v Praxedes P Mandu Okutoyi & 2 others; Madison General Insurance Kenya (Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 12539 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 25 OF 2008

GV ODUNGA, J

JULY 8, 2021

BETWEEN

JACOB OLUOCHI ONDEKO ..... 1ST PLAINTIFF

DR JOHN ONDEKO ..... 2ND PLAINTIFF

DR MARGARET MUSEMBI ONDEKO ..... 3RD PLAINTIFF

AND

KENYA HOSPITAL ASSOCIATION ..... 1ST DEFENDANT

DR PRAXEDES P MANDU OKUTOYI ..... 2ND DEFENDANT

DR CHIMMY OMAMO OLENDE ..... 3RD DEFENDANT

AND

MADISON GENERAL INSURANCE KENYA ..... INTERESTED PARTY

RULING

1. On 29th January, 2019, I delivered a judgement in this case in which I granted the following orders:

    1. The 1st plaintiff is hereby awarded a total of Kshs 43,460,000.00 being general damages for pain, suffering, loss of amenities, costs of the minder, future medical expenses and loss of earning capacity to be paid jointly and severally by the 1st and 3rd defendants.

2. Kshs 1,071,080.00 being special damages to be paid jointly and severally by the 1st and 3rd defendants to the 1st plaintiff.

3. Kshs 1,000,000.00 each to the 2nd and 3rd plaintiffs.

4. A declaration that the purported the acknowledgement of Debt/Guarantee dated 02/04/2005 extracted given by the 2nd plaintiff to the 3rd Defendant to pay Kshs. 1,056,490.26 being hospital costs is unenforceable as against the 2nd Plaintiff.

5. The awards in (1) and (3) above shall accrue interests at court rates from the date of this judgement till payment in full.

6. The award in (2) shall accrue interests at court rate from the date of filing of the suit till payment in full.

7. The costs of this suit are awarded to the plaintiffs and the 2nd defendant at the normal scale to be paid jointly and severally by the 1st and 3rd defendants.

2. By a Motion on Notice dated 28th July, 2020 and amended on 15th March, 2021, the 1st Defendant herein, Dr. Praxedes P. Mandu Okutoyi (hereinafter referred to as the Applicant) seeks the following orders:

1) This application be certified urgent and heard ex-parte in the first instance.

2) The firm of Mohammed Muigai LLP be granted leave to come on record on behalf of the Applicant.

3) The order of 25th February 2019 directing that the 1st Plaintiff be awarded Kshs. 43,460,000.00 being general damages for pain, suffering, loss of amenities, costs of minder, future medical expenses and loss of earning capacity to be paid jointly and severally by the Applicant and 3rd Defendant. Kshs. 1,071,080.00 being special damages to be paid jointly and severally by the Applicant and 3rd Defendant to the Plaintiff be and is hereby vacated and/or set–aside and/or reviewed.

4) This Honourable Court be pleased to set aside the Partial Consent dated 1st March 2019 for want of instructions.

5) In the alternative, the Honourable Court be pleased to give leave to the 1st Defendant/Applicant to liquidate the balance of her share of the judgment sum awarded to the Plaintiffs herein, being Kshs. 8,122,008.00 or as the Court may review plus interest as per the partial consent dated 1st March 2019 in installments of Kshs. 2,000,000.00 down payment within a period of 30 days from the date of the order, and monthly installments of Kshs 200,000.00 to be paid on the last date of each subsequent month until final settlement.

6) That the Honourable Court be pleased to restrain the Plaintiffs/Respondents from levying execution herein for as long as the 1st Defendant/Applicant pays the proposed monthly instalments.

7) The Honourable Court be pleased to make such other orders and/or such directions as it considers appropriate for the proper, fair and effective determination of the Application before it.

8) The costs of this Application be provided for.

3. The said application is based on the following grounds:

   a) The Plaintiffs herein filed suit against the Defendants seeking compensation for negligence and/or carelessness in management, treatment and care by the Defendants.

   b) That the Interested Party, being the Applicant's insurer, instructed Mathenge Robert Githaiga who entered appearance and acted on behalf of the Applicant until the matter was finalized and judgement entered.

   c) By an order issued on 25th February 2019, this Honourable Court directed that the 1st Plaintiff be awarded Kshs. 43,460,000.00 being general damages for pain, suffering, loss of amenities, costs of minder, future medical expenses and loss of earning capacity to be paid jointly and severally by the Applicant and 3rd Defendant. Kshs. 1,071,080.00 being special damages to be paid jointly and severally by the Applicant and 3rd Defendant.

   d) Upon issuance of the judgement and subsequent decree, the Counsel filed a Partial Consent on behalf of the Applicant, dated 1st March 2019, without seeking her consent. The terms of this Consent were such that the Applicant would be obliged to pay the 1st, 2nd and 3rd Plaintiffs Kshs. 24,071,713.02, together with interest and costs.

   e) After the proceedings had been concluded, it came to the attention of the Applicant that the Counsel provided to her by the Interested Party was ineligible to act on her behalf as he lacked a valid practicing certificate. This was based on a letter dated 4th April 2019 from the Law Society of Kenya on the status of Robert Githaiga Mathenge.

   f) Sometime in April 2019, the Applicant then lodged a formal complaint with the Interested Party regarding the inadequate representation provided to act for her in the matter. The Interested Party has since instructed another firm of Advocates, K Itonga & Company Advocates, to act on behalf of the Applicant.

   g) However, since the complaint was lodged before the Interested Party, it has ignored, neglected, refused and/or otherwise failed to resolve the issue.

   h) The lack of resolution of this concern raised by the Applicant is prejudicial to the Applicant as it falls squarely on the issue of liability arising from the decree.

      i) The Applicant has attempted to have this matter settled out of court but her proposals have been rejected by the Plaintiffs. It has become necessary for the Applicant to invoke the jurisdiction of this Court to have the outstanding decretal amount settled in instalments.

   j) The 1st Defendant/Applicant has substantially settled her share of the decretal sum and reduced it from Kshs. 24,071,713.02 to Kshs. 8,122,008.00. The Applicant has been strained financially and plaintiff has rejected her proposals to settle the matter out of Court.

   k) No prejudice will be occasioned to the Respondents.

   l) It is fair and just that this application be allowed.

4. According to the Applicant, vide a contract dated 22nd October, 2004, the interested party herein, Madison General Insurance Kenya, undertook to provide her with a doctor's professional indemnity cover. Accordingly, the interested party secured legal representation in this suit on her behalf as they were bound to do under the said policy. The interested party therefore instructed Mathenge Robert Githaiga to act on her behalf till the determination of the matter. In compliance wither obligations

the Applicant cooperated with the interested party in the conduct of the suit and the proceedings by attending trial and giving evidence as was required of her.

5. It was averred that unknown to the Applicant, after the delivery of the said judgement and the issuance of the decree, a partial consent was filed on behalf of the applicant herein by the said advocate on 1st March, 2019 in which the Applicant was obliged to pay the 1st, 2nd and 3rd Plaintiffs Kshs 24,071,713.02 together with interest and costs. However, after the conclusion of the proceedings, the Applicant learnt that retained on her behalf by the Interested party, Madison General Insurance Kenya, was ineligible to act for her as he lacked a valid practicing certificate at the time the proceedings were instituted. This information was based on the letter dated 4th April, 2019 from the Law Society of Kenya on the status of Robert Githaiga Mathenge. It was the Applicant's belief that as a result she was not given proper legal representation and as a result, the outcome of the said suit was not fair to her as she was denied the right to proper legal representation.

6. It was averred that in April, 2019, the Applicant lodged a formal complaint with the Interested Party through the firm of Mohammed Muigai LLP, regarding the inadequate representation given to her in the matter and the interested party proceeded to instruct the firm of K. Itonga & Co. Advocates to act on her behalf but despite raising the issue of inadequate representation, no legal advice has been received by her from the new counsel. Similarly, her instructions to the said advocates to apply for stay of execution were ignored. Instead the said advocates told her to appeal the decision if she was dissatisfied with it.

7. Based on legal advice received from the firm of Mohammed and Muigai, LLP, she applicant believed that the actions of the interested party were in breach of their obligations, both contractual and fiduciary, for which she is entitled to redress.

8. She therefore believed that it is in the interest of justice that the execution of the judgement be stated and that the said judgement be set aside.

9. In a further affidavit, the Applicant averred that through her advocates on record, she engaged the Plaintiffs in negotiations in order to settle the decretal sum in instalments as follows:

    a. Kshs. 3,000,000.00 to be paid in the following manner – Kshs 2,000,000.00 lump sum payment to be made up front and Kshs. 1,000,000.00 to be paid within 14 days of receipt of the first payment;

    b. Kshs. 200,000.00 monthly instalments until the decretal sum is fully settled with increments when possible.

10. However, the Plaintiffs have declined to accept her said proposal, a proposal which, in her view, is reasonable and will settle the matter affably.

11. The Applicant disclosed that she is currently employed as an anaesthetist at Kenyatta National Hospital and she intends to raise the funds to settle the decretal amount largely from her salary and loans that she will be servicing. The Applicant disclosed that her gross salary is Kshs. 509,254.00 but after taxation and deductions, her net salary is Kshs. 76,589.35. She therefore sought to have the application dated 28th July 2020 determined by way of paying the decretal sum as indicated above.

12. Suffice to say that the Applicant also swore an affidavit in response to the averments made by the 1st Plaintiff herein.

13. In her submissions the applicant indicated that it was not keen to pursue orders 3 and 4 of the Application (as amended). Instead, she was going to address the court on orders 5 and 6 of the

Amended Application, which is whether the Applicant should be allowed to liquidate the decretal sum in instalments, and whether a stay of execution ought to be issued as long as the Applicant complies with the proposed payment plan.

14. According to the 1st Defendant, the law on liquidating decretal sums by monthly instalments is a settled principle in Kenyan jurisprudence. Order 21 Rule 12 of the Civil Procedure Rules 2010 provides that where and in so far as a decree is for the payment of money, the court may for any sufficient reason, order that payment of the decretal amount shall be postponed or shall be made by instalments, with or without interest. The 1st Defendant relied on the case of Keshvaji Jethabhai & Bros Limited vs. Saleh Abdulla [1959] EA 260 as well as Lavington Security Limited vs. Nairobi City Water & Sewerage Co. Ltd [2014] eKLR where the Court asserted that of great significance in an application of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the Applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay. Further reliance was placed on Freight Forwarders Limited vs Elsek & Elsek (K) Limited (2012) eKLR and Singh Gitau Advocates vs. City Finance Bank limited (2013) eKLR, the common thread being that the court could allow settlement of a decretal sum by way of instalments if a debtor was unable to pay in lump sum, if the application was made in good faith and the monthly repayment were reasonable. She also cited Gas Link Limited vs. Haren D. Mandavia T/A Everest Enterprises [2014] eKLR and Odunga's Digest on Civil Case Law and Procedure, 3rd Edition, Vol. 6 and the case of National Bank of Kenya Ltd v John K Cheruiyot and another, Kisumu High Court civil case number 258 of 2001.

15. It was submitted that from the foregoing jurisprudence, it can be inferred that it is discretionary for the Court to grant order 5 and 6 as sought in the instant Application and that discretion is guided by the following principles as borrowed from the various aforementioned authorities:

    a. Whether sufficient reason has been shown.

    b. Whether there is good faith on the part of the judgment debtor and the conduct of the parties.

16. On whether sufficient reason has been shown, it was submitted that the Applicant is employed as an Anaesthetist at Kenyatta National Hospital. As deposed in her Further Affidavit sworn on 3rd February 2021, her gross salary is Kshs. 509,254.00. However, after taxation and deductions, she earns a net salary of about Kshs. 76,589.35, which means that the Applicant is facing dire financial crisis making her unable to liquidate the decretal amount as a lump sum. It is on this basis that Applicant seeks to be allowed to liquidate the decretal amount in instalments. If the Applicant is forced to settle the decretal sum in lump sum, the Applicant will run bankrupt before the entire decretal amount is settled thereby denying the Plaintiffs part of their judgment.

17. Further to the foregoing, the Court made an award of Kshs. 43,460,000.00. Of this amount, the Applicant was liable to pay Kshs. 24,071,713.02. The Applicant has substantially settled the decretal amount and reduced it to a total of Kshs. 8,122,008.00 which is what the Plaintiff's seek to execute as against her. This means that the Applicant has settled two thirds (2/3) of the decretal amount which is a fair proportion of the decretal sum. Accordingly, the Applicant has demonstrated her bona fides to have the decretal amount settled.

18. The Applicant submitted that the Applicant has always acted in good faith towards settling the decretal amount and it is on this conduct that a substantial amount of the decretal sum has been settled. Apart from having settled the decretal sum, the Applicant has engaged the Plaintiffs in negotiations with various proposals. However, the Plaintiffs have remained adamant to her proposals which position has left the Applicant with no option but to apply for orders from this Court to have the decretal sum liquidated by means of instalments.

19. The Court was urged to be guided by the case of Gas Link Limited v Haren D. Mandavia T/A Everest Enterprises (supra) where Ogola J. ordered that a decretal sum of Kshs. 3,906,401.00 be liquidated in lump sum instalment of Kshs. 1,500,000.00 and a monthly instalment of Kshs. 150,000.00 until payment in full. In the applicant's view, the above proposal is judicious and will enable the applicant to settle the outstanding decretal sum.

20. In response to the said application, the 1st Plaintiff set out the background of the suit and disclosed that following the decision of Medical Practitioners and Dentists Board which found the Applicant culpable, the Applicant instructed the firm of Mohammed Muigai Advocates for challenge the said decision and High Court Civil Appeal No. 1048 of 2007 was filed together with an application for stay of execution which application was dismissed.

21. It was averred that following the delivery of the judgement herein, no appeal was lodged hence the decision became binding upon the 1st and the 3rd Defendants and the Applicant cannot be allowed to reopen the matter. Following the said decision, the Plaintiff's costs were taxed in the sum of Kshs 4,115,667.30. He disclosed that so far, a substantial portion of the decretal amount had been satisfied by the 1st and 3rd Defendants on diverse dates leaving only the sum of Kshs 8,122,088.80 outstanding.

22. The 1st Plaintiff contended that the Applicant was represented by several lawyers at the various stages of the proceedings and that the Applicant's defence was in fact drawn by the Applicant's current lawyers. It was averred that the status of the said advocate was known to the Applicant way back in April, 2019 yet there is no evidence that the Applicant has lodged a complaint against the said Mr Robert Githaiga, against whom allegations have been made yet he is not a party to these proceedings.

23. According to the1st Plaintiff there is no obligation placed upon him to find out whether the Applicant's lawyer had a valid practicing certificate prior to prosecuting the case. Since there is no evidence the name of the said Robert Githaiga has been struck out from the Roll of Advocates, it was deposed that he remains a qualified advocate and the fact that he did not have a practicing certificate for the period in question did not disqualify him as an advocate.

24. In the 1st Plaintiff's view, the partial consent recorded herein does not absolve the Applicant from liability since there exist a judgement against her. In any case, the said partial consent has been partly implemented with the Applicant's knowledge, a substantial portion thereof having been settled hence no reason to set the same aside. Further, no basis has been laid for setting the same aside. It was disclosed that the Applicant, through her advocates, wrote to the interested party pushing for the settlement of all the monies and threatening action if the same was not done. It was therefore deposed that this application is an abuse of court process and contended that the grant of stay would be more prejudicial to him than to the Applicant. However, in the event that the Court is inclined to grant the stay sought, the Applicant should be ordered to deposit the decretal sum so as to protect the interest of the plaintiffs.

25. As regards the prayer for payment of the outstanding decretal amount of Kshs. 8,122,008.80/= in instalments, the Plaintiffs opposed the same for the following reasons:-

    i. That the 1st Defendant has never been keen on settling the decretal amount in the first place as is evident in her application seeking to set aside the Judgment in its entirety and the grounds in support thereof.

    ii. That there has been unreasonable delay in making the application as Judgment in this matter was delivered over two years ago. The sole purpose of the application is therefore to frustrate execution proceedings in this matter.

iii. That the Plaintiffs already accommodated a request for payment of a portion of the decretal amount in instalments by the 1st Defendant's insurer, Madison Insurance Company Limited. To this end, Madison Insurance Company paid a sum of Kshs. 20 Million in five instalments way back in the year 2019. The 1st Defendant was at all material times aware of the same and the fact that she was to make necessary arrangements to secure the difference being the stated current outstanding amount.

iv. That the 1st Defendant has to-date not made any efforts towards reducing the outstanding decretal amount and only purported to file the instant application in apprehension of the looming execution.

v. That the 1st Defendant has not deposited any amount since the last deposit made by Madison Insurance and more specifically on 30th July 2019, as a show of good faith towards the payment of the outstanding amount. Ordinarily the 1st Defendant should have shown its bona fides by arranging prompt payment of a fair portion of the outstanding amount and is therefore underserving of the Court's indulgence.

vi. The proposal is unreasonable as it does not purport to deposit a fair proportion of the outstanding debt and if allowed, it will take over 30 months or about 3 years to settle the decretal sum.

vii. The mere fact that the Applicant is hard pressed or is unable to pay in full at once is not sufficient reason for this Honourable Court to allow their application, ordinarily, the Applicant should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt.

viii. The 1st Defendant in paragraph 4 of its amended application dated 15th March 2021 seeks an order to have the Partial consent dated 1st March 2019 set aside for want of instructions yet in Paragraph 5 of the same amended application requests the Court to rely on the Partial consent to grant its orders.

26. It was the Plaintiff's contention that the application by the 1st Defendant for orders to restrain the Plaintiff's from levying execution for as long as the 1st Defendant pays the proposed monthly instalments is premature and an abuse of the Court process as it is based on the presumption that the 1st Defendant's Application to pay the decretal sum will be allowed by the Court. Further, the said application is an afterthought, abuse of the Court process, a non-starter and a proper candidate for dismissal with costs.

27. On behalf of the Plaintiffs, reliance was placed on to the case of National Bank of Kenya Limited vs. Anaj Warehousing Limited [2015] eKLR as well as the High Court decision in Republic v. Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 Others (2016) eKLR.

28. It was submitted that the reasoning of the Supreme Court in Anaj Warehousing Limited case can easily be extended to the situation presented by application of Section 31 of the Advocates Act where a lawyer instructed by a client who is acting in good faith draws pleadings and addresses the court on a matter only for it to be discovered that the lawyer did not have a practising certificate. It was therefore urged that the 1st Defendant/Applicant cannot thus purport to set aside the whole Judgment for reason of the Advocate not having a practising certificate at the time of hearing the matter since it is with no shadow of doubt that due procedure was followed by this honourable Court, witnesses were called and documents examined before the Court delivered its Judgment, hence the Order.

29. The Court was urged to note that the 1st Defendant herein was not only represented by counsel alleged not to have the Practising Certificate but also by the firms of Mohammed & Muingai Advocates, Miller and Company Advocates, Njoroge Regeru Company Advocates as can be established by the Court records. Further, and as already stated in the statement of facts, this complaint was handled at various levels including SAEC, PIC, Medical Board and the Court in which the 1st Defendant/Applicant was represented by counsel and was found to be culpable at all the levels. Additionally, the 1st Defendant/Applicant has not demonstrated that she has filed any complaint against the said Mr. Robert Githaiga yet she claims that she was not professionally and adequately represented by the said lawyer for not having a practising certificate. This can only be interpreted to mean that the advocate has not been sued because the applicant does not seriously believe in what they have put forth as their case.

30. Based on the foregoing, it was submitted that the order should not be vacated as the suit was heard and determined on merits and no appeal has been filed and therefore the Orders of this Court is binding upon all parties herein.

31. As regards the issue whether the 1st Defendant/Applicant has established the judicially underscored principles for setting aside a consent order, it was submitted that the 1st Defendant's/Applicant's allegations are unfounded and are intended to mislead this Honourable Court as the partial consent has been implemented partly and a substantial portion of the sums subject thereof have been settled in the full knowledge of the 1st Defendant/Applicant. Additionally, the 1st Defendant/Applicant has not demonstrated the judicially underscored principles for setting aside a consent order to warrant this Court's exercise of discretion. In this regard the Plaintiffs cited Esther Targok Ayabei & Another vs. Kihenjo Njuguna & Another (2019) eKLR where reference was made to the case of Wasike v. Wamboko (1988) KLR 429 and Geoffrey M. Asanyo & 3 others vs. Attorney General [2018] eKLR.

32. According to the Plaintiffs, there is no established allegation of fraud, mistake, misrepresentation or coercion on the part of 1st Defendant against Mathenge Robert Githaiga and no evidence furnished to this Court to demonstrate that the said consent was obtained fraudulently therefore there is no reason for the consent order to be set aside. Further, the 1st Defendant was at all material times was aware of the Application/suit which gave rise to the Partial consent order dated 1st March 2019.

33. It was submitted that whereas the 1st Defendant/Applicant seeks an order to have the Partial consent dated 1st March 2019 set aside for want of instructions yet in Paragraph 5 of the same amended application requests the Court to rely on the Partial consent to grant its orders, this is a double standard demonstrated by the 1st Defendant/Applicant.

34. On whether the 1st Defendant/Applicant has met the threshold for grant of an order for the payment in instalments of the outstanding decretal sum, the Plaintiffs relied on Order 21 Rule 12 of the Civil Procedure Rules as well as the decision in Nairobi in Diamond Star General Trading LLC v. Ambrose D O Rachier Carrying on business as Rachier & Amollo Advocates (2018) eKLR and submitted that Order 21 rule 12 gives the court a wide discretion and this discretion must be exercised in a judicial and not an arbitrary manner. The Court was urged to be guided by the principles of granting orders of payment by way of instalments in addition to the case of Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah [1959] EA 260, where the Court stated as follows:

> " Defaults if due to the recession (if such it can be called) might be no fault of the debtors and in some circumstances might have been properly taken into consideration by the court in favour of the debtor when consideration was given to an application for installments; hardship is a factor which has been recognized by superior courts. It is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably

prejudicing the creditor, who can be granted compensation by way of interest on the amount at any time outstanding. There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by installments, the court may be well entrusted with discretion to arrange the payment of a debt by installments, but when a contract is distinctly made for payment on a date certain for purpose of enabling the creditor to obtain punctual payment, the circumstances that the payment is secured by an hypothecation of property ought not deprive him of that right. If the reason assigned amounts to nothing more than an inability to pay that is not sufficient reason why execution should not at once proceed...The length of time for repayment is a consideration and where the rate of installments which had been ordered would have taken some ten years to pay off the appeal court directed the sale of the property hypothecated. If the debtor is hopelessly embarrassed in his circumstances, there is little use in attempting to save him from the consequences of his own improvidence or misfortunes...The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting installments and ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt although this is not a condition precedent for the exercise of the discretion of granting installments. Each case has to be decided on its own merits, the predominant factor being the bona fides of the debtor. Another consideration would be the ability of the debtor to pay substantial installments so that the repayment of the decretal sum would not be unreasonably delayed... The existence of sufficient reason will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and installments should be directed where the defendant shows his bona fides by offering to anything like a fair proportion of his debt at once...Because a person has been doing big business it does not follow that he should be able to pay his debts, which might well be proportionately larger."

35. Reliance was also placed on Hildegard Ndalut v. Lelkina Dairies Ltd & Anor (2005) eKLR where the Court observed that in persuading the Court to allow payment by way of instalments the defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt. While the 1st Defendant/Applicant has made an unreasonable proposal for the settlement of the outstanding decretal sum of Kshs. 8,122,008.80/- plus interest, the 1st Defendant/Applicant has however not shown any seriousness in reducing the outstanding decretal amount.

36. It was submitted that the Application herein has been filed 2 years after Judgment was delivered, which amounts to undue delay, which delay is not explained to this Court.

37. Another consideration, according to the Plaintiffs, would be whether the order for payment by instalments would prejudice the creditor and occasion injury. The Plaintiffs contended that as the judgment creditors, they are entitled to payment of the decretal amount which they should receive promptly to reap the fruits of the judgment after their journey in pursuit of this justice in Court took over 11 years from the date of filing the case to the date of its determination. If the Court were to allow the proposed instalments, it was contended that it will take about 30 months or close to 3 years to settle the amount in full. This will actually bring the total period taken to fully realize justice to (13 and ½) years. This, according to the plaintiffs, by all means will not be just and fair to the Plaintiffs who continue to incur expenses towards the medical care and treatment as a result of the condition, employment of a full time helper to constantly help the 1st Plaintiff and trauma.

38. In this case it was submitted that the liability to pay the decretal sum arose out of medical negligence that was occasioned by the 1st Defendant/Applicant. Liability having risen as a result of the Applicant's negligence and the Plaintiffs continually incurring expenses as a result of the same should warrant this court to dismiss the Applicant's prayer for an order of payment by instalments.

39. It was submitted that the Plaintiffs have already accommodated a request for payment of a portion of the decretal amount in instalments by the 1st Defendant's insurer, Madison Insurance Company Limited. To this end, Madison Insurance Company paid a sum of Kshs. 20 Million in five instalments way back in the year 2019. The 1st Defendant was at all material times aware of the same and the fact that she was to make necessary arrangements to secure the difference being the stated current outstanding amount and does not need a Court Order to do so and as such are undeserving of the Court's indulgence.

40. The Plaintiffs contended that all factors put into consideration, it is only just and fair that the Plaintiffs be paid the outstanding decretal sum promptly in enjoyment of their successful litigation as the prayer for the instalment order by the 1st Defendant/Applicant is only intended to delay the realization of the judgment. In their view, this Application is a game of gamble being displayed by the 1st Defendant/Applicant and goes further to prove that the instant application is just but a mere delay tactic as the Applicant's prayer seeking to restrain the Plaintiff's from levying execution herein as long as the 1st Defendant/Applicant pays the proposed monthly instalments is premature as it is based purely on the presumption that the Defendant's Application to pay the decretal sum will be allowed.

41. It was therefore submitted that in light of the foregoing, the instant Application is an abuse of court process and has been employed as a delaying tactic by the 1st Defendant/Applicant hence the 1st Defendant/Applicant is not entitled to the remedies sought and the court was urged to dismiss the application with costs.

42. The application was similarly opposed by the 3rd Defendant via the following grounds of opposition:

    1) The application is an abuse of court process having regard to the nature of the claim and the time taken to conclude the trial.

    2) The 1st defendant's remedy, if any, lies in making a claim against her insurers who appointed the advocate in question.

    3) The 1st defendant was required to satisfy her share of the decretal sum immediately. She cannot complain about her advocate persuading the decree holder's advocates to pay by instalments.

    4) The 1st defendant has not in her application stated grounds upon which she asks the judgment to be vacated, reviewed and/or set aside.

    5) The trial was protracted and a large number of witnesses testified. It would be a waste of judicial resources which are scarce to set aside the judgment.

    6) The plaintiffs' costs were taxed and allowed at Kshs. 4,115,667.30 on 8th May 2020. Setting aside the judgment will lead to all parties incurring substantial legal expenses.

    7) The 3rd defendant has satisfied its share of the decretal sum and indeed overpaid the costs. A refund of Kshs. 1,035,567.85 is due from the first defendant.

    8) Other grounds and reasons to be set out in the affidavit of Maxwell Maina to be filed herein.

43. The 3rd Defendant also relied on a replying affidavit sworn by Maxwell Maina, its legal officer on 10th February, 2021. According to the deponent, the 3rd Defendant did not appeal the judgement but instead decided to pay its share of the decretal sum plus costs to the plaintiff. An understanding was reached between the 3rd Defendant's insurer and that of the Applicant to settle the decretal sum and the costs equally. Pursuant thereto, the 3rd Defendant's insurer on 27th February, 2019 paid half of the decretal sum inclusive of interest to the plaintiff's advocates being Kshs 23,977,594.00 and following the taxation of costs in the sum of Kshs 4,111,667.30, its insurer on 17th June, 2020 paid to the plaintiff Kshs 3,093,401.00 being settlement of the costs which was an overpayment of Kshs 1,035,567.85 which the 3rd Defendant has sought to be reimbursed.

44. It was averred that throughput the proceedings, the Applicant was represented by the firm of Robert Githaiga & Company Advocates till 8th May, 2019 when the firm of K. Itonga & Company Advocates applied to come on record for the Applicant. It was averred that the 3rd Defendant was not privy to any negotiations between the Applicant and the Plaintiffs regarding the consent entered into for the settlement of the decretal sum by the Applicant.

45. The deponent noted that from the documents adduced in this application by the Applicant and the Plaintiffs, it appears that the Applicant and/or her insurers have paid part of the decretal sum leaving a balance of Kshs 8,122,008.00 outstanding.

46. It was deposed that the Applicant has not taken issue with the judgement or the manner in which her advocate conducted the matter on her behalf hence there is no basis for reviewing the judgement. The 3rd Defendant took the view that it was upon the Applicant to ensure that her advocates had a practicing certificate.

47. Based on legal advice, it was averred that the application for review ought to have been made without inordinate delay. However, in this case though the Applicant has exhibited a letter dated 4th April, 2019 from the Law Society of Kenya informing her that her then advocate was unqualified, it is not clear why the applicant did not apply sooner if she was aggrieved by her advocate's conduct. If it was the insurer that appointed the sad advocate, the 3rd Defendant was of the view that the Applicant ought to have complained against her insurer.

48. Taking into account the period that the trial took, spanning 6 years spread over 22 days with a total of 16 witnesses testifying including 4 experts as well as the expenses involved, it was averred that it would be unjust to reopen the case more so as no basis has been laid for doing so since to do so would be a waste of scarce judicial resources.

49. It was submitted on behalf of the 3rd Defendant that the Applicant's alleged discovery is not a sufficient ground for review of the judgment or order awarding damages and that the applicant's reprieve, if any, lies with her insurer and not in these proceedings. It was submitted that the applicant has not set out grounds on how her advocate's conduct impacted the outcome of the proceedings and how she is aggrieved. In her application she only protests that a consent was entered after judgment without her knowledge setting out terms of payment of the decretal sum and costs which terms were in fact favourable to applicant in the timelines within which to pay the decretal sum.

50. The third defendant relied on the case of National Bank of Kenya Limited vs. Anaj Warehousing Limited [2015] eKLR where the Supreme Court held that no work done or instrument drawn by an advocate without a valid practicing certificate will be deemed void. Having regard to the principles set out in Article 159 of the Constitution, the Supreme Court was of the view that courts should not be held hostage by technical and procedural considerations. The case would have been different however, if the applicant's representative was a non-advocate.

51. The Court was urged to adopt this reasoning to this case because while the applicant's advocate did not hold a practicing certificate in the period these proceedings happened, he was still an Advocate of the High Court of Kenya. This court was urged not to sacrifice the length of time and resources dedicated to completing this matter on the altar of technical procedure.

52. It was submitted that the applicant had not presented grounds for review of the judgment or orders awarding damages to the plaintiffs and has shown herself to be more concerned about the execution process after judgment had been delivered.

53. It was further submitted that there was unreasonable delay from the time the applicant learnt that her advocate was not qualified to practice, sometime in April 2019 to the time the application was made yet equity demands that once a party knows they have been wronged they ought to move swiftly to preserve their rights. It was the 3rd Defendant's view that 2since the applicant is jointly held liable for the significant sum of over Kshs. 45,000,000.00 had she been aggrieved with her legal representation during the trial and supposed that the outcome would have been different had her advocate been qualified, she ought to have made the application as soon as she became aware of her advocate's conduct.

54. In support of the submissions the 3rd Defendant relied on Francis Origo & Another vs. Jacob Kumali Mungala [2005] eKLR where it was held that it is important to bring an application for review without unreasonable delay. In this case, the Applicant has not explained to this court why she delayed in bringing the application. Reliance was similarly placed on the holding of the Court in Showind Industries Ltd vs. Guardian Bank Ltd & another [2002] eKLR that delay defeats equity where a party alleges a wrong and did make it known to the court in reasonable time.

55. It was further noted that the applicant had not shown actions she has taken against her insurer or the advocate in order to redress the harm she alleges. Curiously, it was submitted, the applicant did not protest the terms of the partial consent entered when it granted a stay of execution which she enjoyed for as long as the decretal sum was paid in instalments. It is only when the plaintiffs took out execution proceedings that the first defendant ran to court. The first defendant cannot have her cake and eat it too. The 3rd Defendant therefore prayed that the application be dismissed on this basis.

56. It was further submitted that this application before this court was made soon after the plaintiffs obtained warrants of sale of movable property and appointed auctioneers to carry out execution and that the applicant was made to avoid and/or delay execution. According to the 3rd Defendant, this applicant is an after-thought as the applicant did not protest payments made by her insurer on the basis that she was aggrieved by her representation. She enjoyed conditions of stay granted under the partial consent and did not request her insurer to cease paying the plaintiffs due to the inadequate legal representation she alleges she suffered. The Court was urged to observe that the plaintiffs in good faith entered a consent with the applicant allowing the decretal sum to be paid over a certain period in instalments. The applicant did not comply with the terms of the consent when her insurer paid to the limit of her indemnity cover, and she has run to court on a different pretext to avoid execution proceedings.

57. It was submitted that the Applicant's conduct post delivery of the judgement and that there was no explanation why the Applicant abandoned the prayers for review while it was on the basis of the said prayers that the stay was obtained. hence it is clear that this application was made only for the purpose of avoiding execution.

58. Based on the decision in the cases of Paul Otieno Mungla t/a Paul Mungla & Co.Advocates vs. Anne Achieng Ajanja [2015] eKLR and Protus Wekesa Munialo vs. Nzoia Sugar Company Ltd and Joni

Consult Auctioneers (Auctioneer) [2020] eKLR it was submitted that there has to be an end to the litigation to allow the parties move on.

59. As regards the prayer for payment by instalments, the Court was urged to have regard to the applicant's conduct noting that this application was to prevent the plaintiffs from executing against her after they obtained warrants of attachment.

60. It was contended that since the third defendant has overpaid costs to the plaintiffs by Kshs. 1,035,567.85. it has the right to be reimbursed by the applicant in line with the holding of the court in Dubai Electronics – Vs – Total (K) Ltd & 2 Others HCC NRB Civil 870/98 and indicated that the 3rd Defendant intends to put in an application for the recovery of this sum at an appropriate time.

61. It was the 3rd Defendant's case that the application before the court lacks merit and is an abuse of court process aimed at avoiding execution proceedings. It ought to be dismissed.

Determination

62. I have considered the issues raised in this application.

63. Although in the submissions filed herein, the 1st Defendant indicated that she did not wish to pursue orders 3 and 4 of the Application (as amended), it was not expressly indicated that the said prayers were being abandoned. Accordingly, I will proceed to deal with all the prayers before me.

64. It is clear that the only ground for seeking to have the judgement delivered herein reviewed and set aside is because the Applicant's advocate did not have practicing certificate during the time of the proceedings. That contention was based on the letter dated 4th April 2019 from the Law Society of Kenya in which it was disclosed that Mathenge Robert Githaiga Advocate last took out a valid practicing certificate in the year 2015 and that he was not certified to practice law for the years 2017, 2018 and 2019. From the record of these proceedings the hearing of the case commenced on 29th November, 2012. It is therefore clear that for three years that the proceedings continued the said advocate was properly certified to represent the Applicant and it is not alleged that during the said period his representation of the Applicant was wanting. Therefore, even if this Court is to agree with the Applicant that the proceedings conducted by the said advocate on her behalf were null and void due to want on the part of her advocate of a valid practicing certificate, the court would only be justified in setting aside the proceedings that took place during the period when the said advocate was not certified to practice.

65. However, the status of actions taken by an otherwise duly qualified advocate during the time when he was not certified to practice by the Law Society of Kenya has been the subject of litigation in this country and in other jurisdiction including our own Supreme Court.

66. The High Court of Uganda (Ntabgoba, PJ) had occasion to deal with the matter in Isaac Kasiba Lule vs. Administrator General & Another Kampala HCCS No. 19 of 1996 in which while citing Sparling vs. Gretton [1866] 2 LR EQ 64 at 67 and Holgate vs. Slight 21 L.J (QB) and distinguishing the jurisprudential position prevailing under the former Constitution, expressed himself as hereunder:

> "The court is therefore faced with the question whether to strike out the application in which case the applicant's claims and prayers to set aside the distribution of the estate and order an equitable distribution following the law should be denied. The court is also faced with striking out the action on the ground that it is based on documents, which are a nullity according to the earlier decisions in which case the applicant will be denied the rightful share of his father's estate...To accept the earlier decisions in the face

of the new Constitutional provision which provides that justice shall be administered without undue regard to technicalities, would be to have undue regard to technicalities. To strike out the application on the ground that the papers supporting it were prepared and presented by uncertified lawyer would be in contravention of Article 126(2)(e) of the Constitution because it would act an injustice to the applicant who is seeking an equitable distribution of the assets of his late father which he contends was distributed in disregard of the applicable law. In view of Article 126(2)(e) which was not in force when the earlier decisions were decided those authorities appear to have no justification and have become mere technicalities...Proceedings taken on behalf of a defendant by a solicitor who had not renewed his annual certificate will not be set aside as irregular; the right of the solicitor to recover his fees, and not the interest of the client (who is not bound to ascertain if his solicitor is duly qualified to practice) being alone affected by the want of proper qualification. The cases at Common Law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a Solicitor who causes a Solicitor to act for a client without being duly qualified, the proceedings themselves are not void. It would be most mischievous indeed if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their solicitor against third parties, the acts of such person acting as a solicitor are valid and binding upon the client on whose behalf they are done. The client who might ascertain by iniquity that his solicitor was on the roll would have no means of finding out if his certificate was taken out and stamped at the proper time. An attorney, though uncertified may do acts in his capacity of attorney, but the result will be that he will, in such case, lose his fees. The name of the solicitor in this case was found in the Law List for 1865, which are prima facie evidence that he is duly qualified. According to the old statutes, an attorney who did not take out his certificate for one whole year required re-admission, his admission having been rendered void and himself incapable of practicing. But under the new law, an attorney neglecting to produce a certificate does not require re-admission. His name remains on the roll but he is incapable of recovering any fees for business done by him while he shall have been acting without a certificate. The Court would be ignoring the plaintiff and the defendant if it were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit."

67. In this case, just like in the above case, it is not contended that Mr Githaiga was not duly qualified and admitted as an advocate of the High Court. It is not contended that his name has been struck off from the Roll of Advocates. His only "deficiency" is that he had not renewed his practicing certificate for the years 2017, 2018 and 2019. Having been admitted as an advocate, he is not required to be readmitted. He is only required to apply for renewal of his practising certificate. Of course the authorities are agreed that he is not entitled to costs for professional services rendered during the period when he was not certified to practice as an advocate.

68. The position was settled by the Supreme Court in National Bank of Kenya Limited vs. Anaj Warehousing Limited [2015] eKLR where it expressed itself as hereunder:

> "(57) Thus, the issue still remains: whether Section 34 of the Advocates Act actually invalidates all instruments of conveyance prepared by advocates who do not have current practising certificates. In our opinion, it is essential to establish the main objective of Section 34, as a basis for any conclusions. This Section prohibits unqualified persons from preparing certain documents. It is directed at "unqualified persons". It prescribes clear sanctions against those who

transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practising certificates.

(58) In these circumstances, how does the citizen's position rest" If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practising certificate" Would he or she be in breach of the law if after the service, it turned out that the advocate lacked a certificate" The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practising certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.

(59) Is such reasoning in keeping with a perception that Section 34 of the Advocates Act, invalidates all documents prepared by an advocate who lacks a current practising certificate" We do not think so. Section 19 of the Stamp Duty Act, upon which the Appellate Court placed reliance in arriving at its conclusion, does not in our view, provide a basis for invalidating the instruments in question. Section 19 of the Stamp Duty Act only seeks to render inadmissible for purposes of evidence, all documents which are unstamped. The question before this Court is not the admissibility in evidence, of unstamped documents, but rather the validity of instruments (which indeed are stamped) prepared by an advocate who lacks a current practising certificate.

69. The Court added:

[60] All through from the trial Court to the Appellate Court, the respondent was the beneficiary of one pillar of the common law tradition: the doctrine of stare decisis. The picture unfolding from the submissions and analysis in this case, is that there was an inapposite application of that doctrine. Even as stare decisis assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the Courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up. This principle is typically expressed by Sir Thomas Bingham, MR in the United Kingdom's Appellate Court, in M. v. Newham London Borough Council and X. v. Bedfordshire County Council [1994] 2WLR 554 at p. 572:

> "If [the claimant] can make good her complaints..., it would require very potent considerations of public policy... to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied."

(61) Precedent (such as that in Ndolo Ayah), as we have clarified in the foregoing paragraph, is to be perceived, in general, as the "announced rule"; but in the quest for justice in the context of a particular case such as the final appeal now before this Court there is a basis for departing therefrom. This principle of judicialism, in common law practice, is well depicted by Professor

Melvin Aron Eisenberg in his scholarly work, The Nature of the Common Law (Cambridge, Mass: Harvard University Press, 1988) [at p. 63]:

> "Because the courts normally use announced rules as their starting points, as a practical matter the deciding court is likely to have a limited number of salient choices in dealing with a precedent. It can accept and apply the announced rule; it can determine that on close inspection the announced rule is not relevant; or it can use a minimalist or result-centred technique to reformulate or radically reconstruct the announced rule, and then apply or distinguish the rule it so establishes."

(62) By virtue of the financial arrangements between the parties in Ndolo Ayah, monies belonging to the appellant are now held by the respondent, and it is held to be irrecoverable, just on the policy ground that the Courts ought to be seen to deter illegality. The illegality stems from the fact that the conveyance was prepared by an advocate who at the material time, did not hold a current practising certificate. However, such illegality, in our view, is by no means as manifest as that of unjust enrichment, conferred upon the borrower. Could Parliament have intended, by Section 34 of the Advocates Act, the perpetration of such an injustice" The injustice, indeed, multiplies, and subsumes the plane of public interest, in view of the fact that the monies in question were drawn from a public financial institution.

70. It was further held that:

(63) To hold that monies lent in conformity with the provisions of the law, save that the relevant conveyancing instruments were drawn by an advocate who at the time did not hold a practising certificate, are not recoverable, would be to sanction unjust enrichment for unscrupulous borrowers, while depriving innocent lenders' creating a wide scope for fraudulent borrowing. Such a position in law, in our view, does not represent an "announced rule" – precedent that should guide the disposal of the matter now before us. Just as the law frowns upon unscrupulous lenders, especially those whose actions would fetter the borrower's equity of redemption, so also must it frown upon unscrupulous borrowers, whose actions would extinguish the lender's right to realize his or her security. There is to be, in law, a substantial parity of rights-claims, as between the lender and the borrower.

(64) The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a practising certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers" We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practising certificate.

(65) One of the bases of the Appellate Court's decision was founded upon a hypothesis which, in our opinion, should not be the criterion for resolving the question as to the rights of the parties: that since the Advocates Act provides for the recovery of fees by a client whose advocate has not taken out a practising certificate, there would be no harm if the charge documents are annulled. For even if the appellant were to recover any fees paid, it stood to be damnified by the non-repayment of the loan itself.

(66) The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfillment of

the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities".

(67) To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.

(68) The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

(69) While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate's obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject."

71. That case was relied upon by the High Court in Republic v. Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 Others (2016) eKLR where the said Court expressed itself as hereunder:

> " A claim in law and a course of action belongs to the client and not the advocate. It is hard to justify, in this era where the Constitution (at Article 159) commands the courts to privilege the ideals of substantive justice as opposed to legal formalism, statutory interpretation which bereaves a party of a valid substantive claim because his or her lawyer failed to adhere to a procedural requirement unrelated to the claim in question."

72. In this case, the dispute between the parties herein, as noted by the 3rd Defendant, spanned 6 years with hearing spread over 22 days with a total of 16 witnesses including 4 experts testifying. In my view, to hold that the trial was a nullity due to the failure by the Applicant's own advocate to take out a valid practicing certificate, when none of the other parties have raised the issue, just on the policy ground that the Courts ought to be seen to deter illegality stemming from the fact that the said proceedings were conducted by an advocate who at the material time, did not hold a current practising certificate, would be patently unjust. However, just like the Supreme Court opined, such illegality, in my view, is by no means as manifest as that of the injustice that is bound to be visited upon the other parties to the litigation arising from the Applicant's own commission or omission through her agents, the insurers. Parliament could not have intended, by Section 34 of the Advocates Act, the perpetration of such an injustice particularly under the current Constitution under which Article 159(2)(b), (d) and (e) provides that:

(b) justice shall not be delayed;

(c) ....

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

73. The said Section 34 of the Advocates Act must be read in light of the aforesaid Article is mandated by Clause 7(1) of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) which provides that:

> All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

74. In my view to construe Section 34 of the Advocates Act, in the circumstances of this case, without due regard to the justice of the case would militate against the letter and spirit of Article 159 of the Constitution.

75. In light of the foregoing I find no merit in the application in so far as it seeks to have the judgement reviewed.

76. The Applicant also seeks an order for setting aside the partial consent dated 1st March, 2019 for want of instructions. The consent order that is sought to be set aside in these proceedings was, no doubt, entered into by counsel who were duly instructed to act in the matter generally for their respective clients. In such circumstances the general rule was laid down by the Court of Appeal Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997 in where it was held that:

> " A solicitor has a general authority to compromise on behalf of a client, if bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice...A consent order can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be settled which are not carried out."

77. The locus classicus in applications for setting aside consent orders or judgements is the Court of Appeal decision in Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625. In that case the Court expressed itself as hereunder:

> " It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons...Prima facie a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement...A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between

the parties...In the instant case, while the Judge did not in terms record the parties' 'or their advocates' consent to the consent judgement he entered, nevertheless the original record shows that both parties were represented by advocates and that the consent judgement was recorded in their presence. The universal practice is to record that a judgement or order is by consent, if that be the case, and it is difficult to believe unless demonstrably shown otherwise that the court would so head the judgement if it were not the case, at least so far as the Judge was aware. Furthermore, a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned...But it would be no mean task for a party to a decree by consent to prove that the decree is invalid on the grounds referred. It is abundantly clear that the appellant was a ready and willing party to the material judgement by consent and that the terms and consequences of the judgement were explained to her."

78. The East African Court of Appeal on its part in Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266 noted that:

> " In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which give rise to the setting aside of a consent agreement existed."

79. However, as was held by the Court of Appeal in J M Mwakio vs. Kenya Commercial Bank [1987] KLR 513:

> " To have contractual, that is to say, binding effect, there must be a concluded agreement, with all the terms in it settled and ascertained, with nothing remaining to be done."

80. It is clear that the client has the right to repudiate a consent purportedly entered or to be entered on his or her behalf where he or she has not given such instructions. This clearly comes out in Stephen Kasozi and 2 Others vs. People's Transport Service [1990-1994] EA 162 in which it was held that:

> " If the parties before the Court admit that one of the events has happened which gives the court jurisdiction, and there is no reason to doubt the bona fides of the admission, the Court is under no obligation to make further inquiry as to the question of fact: but apart from such admission the court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act...As a pure statement of principle a judge may interview when a compromise is put forward to him, but that does not entirely describe the whole position...The Court may intervene if, for instance, the authority of one of the advocates is withheld by the client to enter into the compromise. It may be that the client himself objects in court, when he discovers what has happened. It would obviously be invidious for the Court to make any order arising out of that kind of misunderstanding. But there is clearly a limit to the Court's intervention...It is not generally for the Court to impose its idea of what is best for the parties. On the one hand the early despatch of the litigation may be of great benefit to the parties, and on the other hand, the Court may well not be aware of all the circumstances of the parties, which if known, would incline the Court to accept the compromise. The one matter of which the Court must be sure, is that the parties entered into the agreement of compromise, and that that compromise was what they thought best suited themselves. It is therefore wise for the Court, to test the acceptance of the compromise, if that is possible, and there are many authorities relating to the precautions, which should be taken, when a consent judgement is entered...After a compromise has been put forward, the Judge ought not to think that his duty lies in

examining the evidence because he had not recorded all the evidence. If the learned Judge had decided to intervene rightly or wrongly, in principle she should have said so at once, and rejected the compromise. The appellants might then have called further evidence to support their case, and the respondent could have offered its defence. Having apparently accepted the compromise, the parties could only have expected that judgement for the appellants would have been entered and the damages assessed. It was not right to take them by surprise and judge the matter on part of the evidence, without intervening to reject the compromise."

81. In this case no allegation has been made based on the conditions for setting aside a consent order. As was appreciated by the Supreme Court in Geoffrey M. Asanyo & 3 others vs. Attorney General [2018] eKLR:

> "(98) In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved. As a matter of fact, the validity of the consent has never been the issue in these proceedings."

82. In this case the said consent had the effect of reducing the Applicant's liability to only half of what is due to the Plaintiff. In the judgement, the 1st and 3rd Defendants were held jointly and severally liable. Ringera, J (as he then was) in Kenya Airways Limited vs. Mwaniki Gichohi & Another Nairobi (Milimani) HCCC No. 423 of 2002 dealt with the doctrine of joint and several liability and held that:

> "The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s)."

83. What I understand by that decision is that in a joint and several liability, the successful party is at liberty to either execute the decree against the judgement debtors together or only execute against one of them for the whole or part thereof save that the creditor cannot execute for the full amount against all the creditors as that would amount to double compensation. In other words, whatever is realised against one debtor must be taken into account in seeking recovery from the other debtor. In this case, the Plaintiffs are at liberty to execute against both the 1st and the 3rd Defendants at once for the whole amount or choose only one of them or execute against them for different amounts.

84. What this means that even if the partial consent herein were to be set aside, nothing would bar the Plaintiffs from seeking payment for the sum unrealised from the 3rd Defendant from the Applicant herein at the Plaintiffs' option.

85. In this case there is no sufficient explanation given by the Applicant why she did not move the court immediately to set aside the said consent upon getting knowledge of the same instead of waiting till after a substantial part thereof has been settled by her insurer to do so. In Diamond Trust Bank of Kenya Ltd vs. Ply & Panels Limited & Others Civil Appeal No. 243 of 2002 [2004] 1 EA 31, Omollo, JA noted that:

> "Where the consent was written on the letterheads of the advocates there cannot have been undue influence by one side over the other and more so where the Respondents came to

know of the Judgement almost immediately and yet did not come to court until some 5 months later after the grace period had run out...The burden on a party who alleges that there was in fact no consent or that the consent was invalid is a heavy burden...Advocates have ostensible authority to reach a compromise on behalf of their clients."

86. On his part Githinji, JA stated that:

> "So long as a counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action...The compromise of a disputed claim made bona fide is a good consideration and the Court cannot interfere with it unless in the circumstances which would afford a good ground for varying or rescinding a contract between parties...The legal consequences of recoding a compromise under Order 24 Rule 6 of the Civil Procedure Rules is that the decree is passed upon new contract between the parties superseding that original cause of action...The court has jurisdiction to set aside a consent judgement it is shown to have been based on an agreement induced by misrepresentation and the misrepresentation must be shown to have in fact influenced the representee into an agreement. The conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside a compromise. Excessive delay in making an application to set aside may be construed as an affirmation of the compromise depending on the circumstances of each case. If the representee having discovered the misrepresentation either expressly declares his intention to proceed with the contract, or does some act inconsistent with intention to rescind the contract, he is bound by his affirmation...Where the consent judgement impugned has been executed the Courts are less likely to set aside the consent judgement."

87. In this case, it is clear that the Applicant enjoyed fully the part of the consent that is beneficial to her before seeking to challenge the consent. As was held in Catholic Relief Services Ltd. vs. Transami Uganda Limited Nairobi (Milimani) HCCC No. 428 of 2002:

> "Sometimes the convenience of one party may be the inconvenience of the other and it is the duty of the Court to ensure that there is parity of convenience for all parties, but not one party alone."

88. It is therefore clear that the conduct of the applicant subsequent to the entry of a consent is a factor to be considered in determining whether or not the consent was recorded with his/her blessings. To my mind, a party who waits for too long after the recording of a consent while enjoying the part favourable to him/her, only has himself/herself to blame if after exhausting that part he/she realises that the remaining part is not as juicy as the part he/she enjoyed.

89. In the premises, it would clearly be inequitable to allow this prayer.

90. As regards the prayer for payment by instalment, Order 21 rule 12 of the Civil Procedure Rules provides:

> (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree- holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.

91. Dealing with that provision the Court in Diamond Star General Trading LLC v. Ambrose D O Rachier Carrying on business as Rachier & Amollo Advocates (2018) eKLR at paragraph 38 explained that Order 21 rule 12 gives the court a wide discretion and this discretion must be exercised in a judicial and not an arbitrary manner.

92. The principles guiding the grant of an application for settlement of decretal sum by instalments are now well documented. In Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah [1959] EA 260 the Court stated:

> " Defaults if due to the recession (if such it can be called) might be no fault of the debtors and in some circumstances might have been properly taken into consideration by the court in favour of the debtor when consideration was given to an application for instalments; hardship is a factor which has been recognised by superior courts. It is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor, who can be granted compensation by way of interest on the amount at any time outstanding. There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by instalments, the court may be well entrusted with discretion to arrange the payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for purpose of enabling the creditor to obtain punctual payment, the circumstances that the payment is secured by an hypothecation of property ought not deprive him of that right. If the reason assigned amounts to nothing more than an inability to pay that is not sufficient reason why execution should not at once proceed...The length of time for repayment is a consideration and where the rate of instalments which had been ordered would have taken some ten years to pay off the appeal court directed the sale of the property hypothecated. If the debtor is hopelessly embarrassed in his circumstances, there is little use in attempting to save him from the consequences of his own improvidence or misfortunes...The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments and ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt although this is not a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominant factor being the bona fides of the debtor...Another consideration would be the ability of the debtor to pay substantial instalments so that the repayment of the decretal sum would not be unreasonably delayed... The existence of sufficient reason will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and instalments should be directed where the defendant shows his bona fides by offering to anything like a fair proportion of his debt at once...Because a person has been doing big business it does not follow that he should be able to pay his debts, which might well be proportionately larger."

93. Likewise, in A Rajabali Alidina vs. Remtulla Alidina & Another [1961] EA 565 Law, J (as he then was) expressed himself as follows.

> " The court's discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner and the onus is on the defendant to show that he is entitled to indulgence under this rule...It is for the defendant to show "sufficient reason" for indulgence being shown to him, and the court is immediately faced with a difficulty in this respect as the learned resident magistrate has not stated what reasons put forward by the defendant he considered sufficient to justify the exercise of the court's discretion in the defendant's favour...Powers given to the court should be exercised with a due consideration for the interests of the creditor as well as those of the debtor and the matters to be taken into consideration by the Court in an application for payment by instalment are:
>
> (i) the circumstances in which the debt was contracted,
>
> (ii) the conduct of the debtor,
>
> (iii) his financial position,
>
> (iv) his bona fides in offering to pay a fair portion of the debt at once.
>
> If these tests are applied to the respondent, it will be seen that he does not make a good impression. From the examination, he must have been on the verge of bankruptcy when he ordered for the goods from the appellant. Although he has been paid for the goods which he bought from the appellant and re-sold, he did not pass on a single cent of his money to the appellant. When asked for the money by the appellant, the respondent offered him twenty percent in full settlement. This casts some light on the respondent's bona fides. He had apparently enough money to be able to offer to pay twenty percent of his debt in full settlement, but he did not make any payment when his offer was refused. Another indication of the respondent's lack of bona fides can be found in the fact that when the respondent consented to judgement, his advocate offered to pay the debt by monthly instalments but when the matter came before another magistrate this offer was reduced without explanation...Although the amount of instalments and the period for their repayment is a matter for the discretion of the court, which discretion is to be exercised within bounds, if the result of the decree is that it would take the plaintiff more than seven years to recover the amount due to him, it constitutes a virtual denial of the decree holder's rights."

94. It was therefore observed in Hildegard Ndalut v. Lelkina Dairies Ltd & Anor (2005) eKLR that in persuading the Court to allow payment by way of instalments the defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt.

95. In this case, the circumstances that led to the Applicant's liability though found by this Court to have been negligent cannot be said to have been intentional or contumelious. The case before this court was a claim for professional negligence. These circumstances must be distinguished from, for example, a situation where a person facing bankruptcy and knowing only too well that sooner or later, the hammer will fall on his properties, takes a credit well aware that he is financially embarrassed. In this case the Applicant has offered to make a substantial down payment of Kshs 2,000,000.00 within 30 days. She has shown the hardship facing her. Her circumstances have not been challenged. Though this offer

could have been made much earlier, this court cannot take it against her that by pursuing her legal rights she was setting out to delay the day of reckoning.

96. As was held by Madan, J in Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243:

> "In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

97. In the premises, I find that the Applicant has shown bona fides and her application in so far as the payments by instalment is concerned is merited. However, this application is dated 28th July, 2020. She ought to have made payments as per her proposal as a mark of good faith.

98. Accordingly, I order that the 1st Defendant/Applicant do liquidate the balance of her share of the judgment sum awarded to the Plaintiffs herein, being Kshs. 8,122,008.00 plus interest as per the partial consent dated 1st March 2019 in instalments of Kshs. 2,000,000.00 being the proposed down payment together the accrued monthly instalments for the months of August, September, October, November, December, all of 2020 and January, February, March, April, May, June and July, 2021 totalling Kshs 4,400,000/- within a period of 30 days from the date of the order, and monthly instalments of Kshs 200,000.00 to be paid on the last date of each subsequent month being August, 2021 till final settlement. As long as the said payment is made on due dates, the Plaintiffs/Respondents shall be restrained from levying execution. However, in default of any one instalment on due date, the total outstanding amount shall be due and payable and the Plaintiff will be at liberty to execute.

99. The costs of this application are awarded to the Plaintiffs to be borne by the 1st Defendant/Applicant and it is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF JULY, 2021.

G V ODUNGA

JUDGE

In the presence of:

Ms Jemator for Ms Nungo for the Plaintiff

Ms Aremo for Mr Mogere for the Applicant/1st Defendant

Ms Songok for the 3rd Defendant

Ms Obade for the Interested Party**