



REPUBLIC OF KENYA



KENYA LAW
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**Saronera Limited v Were & 2 others (Civil Case E321 of 2022)
[2025] KEELC 4520 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE E321 OF 2022
CA OCHIENG, J
JUNE 16, 2025**

BETWEEN

SARONERA LIMITED PLAINTIFF

AND

MOHAMED ABDI WERE 1ST DEFENDANT

HUSSEIN HASSAN AMIN 2ND DEFENDANT

JOSEPH NAMADA SIMONI 3RD DEFENDANT

RULING

1. The Plaintiff initiated this suit seeking to recover Kshs.20 million being the refund of a deposit paid to the 2nd and 3rd Defendants towards acquisition of the 1st Defendant's property known as LR No. 3734/252 following termination of a sale agreement. The suit was compromised by a consent dated the 11th May 2023. Subsequently, the 2nd Defendant filed a Notice of Motion application dated the 19th November 2024 which is for determination. He seeks the following Orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to vary, review or set aside or stay of execution of the terms of the consent dated 17th July 2023 entered against the Defendants and all consequential orders pending the hearing and determination of this application inter-parties.
 - c. Spent.
 - d. That the orders staying the warrants of arrest against the 2nd Defendant in execution to remain in force until availability of funds from the County Government of Nairobi.
 - e. That costs of this application be awarded to the 2nd Defendant/Applicant.



2. The application is premised on grounds on its face and on the 2nd Defendant's supporting affidavit. He avers that judgment was entered in favour of the Plaintiff through a consent dated the 17th May 2023, but he has not been able to comply with the terms due to hard economic terms and non-payment of suppliers by Nairobi City County, which is also expecting remittance from the National Government.
3. He claims that the terms of the consent were given without sufficient material payment of contracts involving third parties who are not parties to the suit. Further, that it was also obtained by mistake/ misrepresentation as the advocate on record for the 2nd Defendant at the time is also the 3rd Defendant in the suit. He avers that he is willing to settle the claim herein upon funds being released and that unless stay is granted, the Plaintiff is likely to execute against him, through warrants of arrest.
4. The application is opposed by the Plaintiff vide the replying affidavit of its director, Stephen Njoroge Gikera. He avers that rather than paying the amounts owed, the 2nd Defendant filed an application dated 5th July 2023 seeking stay of execution of the consent dated 11th May 2023 and requested an extension of time to allow him forty five (45) days to refund the decretal amounts owed to the Plaintiff, but the application was dismissed vide a Ruling dated 2nd October 2023. Further, that following the Ruling, the Plaintiff sought to execute the Decree herein through attachment and sale, of which warrants of attachment and sale of the Defendants' movable property were issued, but they were returned unexecuted as the auctioneer was unable to locate any assets belonging to the Defendants for attachment and since the Defendants' assets could not be traced, the Plaintiff applied for and was granted warrants of arrest on 7th November 2023, for the arrest and committal of the Defendants to civil jail for failing to pay the judgment debt.
5. He contends that the issue of awaiting payment from the County Government of Nairobi was never part of the consent recorded in court and was not discussed by the parties prior to the adoption of the consent, as the judgment of this court.
6. The 2nd Defendant filed a supplementary affidavit in rebuttal to the Plaintiff's response. He avers that after the Plaintiff paid the deposit towards purchase of the suit property, it was reserved for it for a period of two years until the said suit property deteriorated and thus needed repairs and renovations. Further, that he used the deposit to repair the house reserved for the Plaintiff. He reiterated that he is committed to pay the balance of Kshs.7.5 million from payments expected from Nairobi City County.
7. He claims that the entire warrants of arrest in execution of Decree are flawed as they emanated from material non-disclosure on the true status of account as the Plaintiff failed to disclose that the balance owed was Kshs.7.5 million and not Kshs. 13.5 million.
8. The 3rd Defendant also filed a replying affidavit. He contends that his role in the case was that of a transacting advocate who happened to equally hold a Power of Attorney for the 1st Defendant jointly with the 2nd Defendant for the protection of the mother title to the property, which was being developed into town houses. Further, that the Plaintiff's director in a sitting between 2nd Defendant and himself, was advised and it was agreed that on his behalf and on behalf of the 1st Defendant, he was going to remit Kshs.12.5 million and the balance was to be paid by the 2nd Defendant from expected earnings from Nairobi City County as he had built a road as a contractor for Nairobi City County and was awaiting payment.
9. Further, that it was also agreed that the 1st Defendant and himself would be taken out of this court's proceedings. He opined that having participated in the consent, there is no basis to set it aside since it has been acted upon, to the extent that 2/3rds of its value having been paid and what remains is simply its fulfilment /completion by the 2nd Defendant.



Submissions

10. The 2nd Defendant in his submissions reiterated his averments as per his affidavit. He argued that he had demonstrated that there was misrepresentation of facts, which made him accept the terms of the consent dated the 17th July 2023. Further, that there was conflict of interest due to the fact that the 3rd Defendant was also acting for the 1st and 2nd Defendants as their advocates. He further submitted that he had satisfied the conditions for grant of stay of execution under Order 42 rule 6 (1) of the [Civil Procedure Rules](#) and urged the court to lift the warrants of arrest issued herein arguing that they were secured due to material non-disclosure, non-service of the Notice to Show cause by the Plaintiff and on the basis that the Plaintiff never wanted the court to know that it had been paid Kshs.12.5 million and what remains is Kshs.7.5 million. To buttress his averments, he relied on the following decision: [Flora N. Wasike v Destimo Wamboko](#) [1988] eKLR; [Hirani v Kassim](#) (1952) E.A 131 .
11. On its part, the Plaintiff submitted that since the consent in question has been partially fulfilled as acknowledged by the 1st and 3rd Defendants, the assertion that it was entered into due to misrepresentation and mistake because of the position held by the 2nd Defendant is unfounded. It also submitted that the 2nd Defendant failed to meet the threshold required to set aside the consent herein. To support its arguments, it relied on the following decisions: [Isaac Kamau Ndirangu v Commercial Bank of Africa](#) [2002] eKLR, [Arinaitwe v Kalsi & 2 Others](#) (Environment & Land Case 243 of 2017) KEELC 13651 (KLR) (13 October 2022) and [Up Ways Investments Limited v HF Group \(Formerly Housing Finance Company of Kenya Ltd\) & 2 Others](#) [2020] eKLR.

Analysis and Determination

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the following are the issues for determination: Whether the consent dated the 17th July 2023 should be reviewed or set aside. Whether warrants of arrest against the 2nd Defendant should be stayed until availability of funds from the County Government of Nairobi.
13. It is not disputed that the Plaintiff and the Defendants entered into the consent dated the 17th July 2023, by which it was agreed that the Defendants would refund Kshs.20 million to the Plaintiff on or before 30th June 2023. It has emerged that Kshs.12.5 million has been ostensibly paid by the 1st and 3rd Defendants leaving a balance of ksh.7.5 million, which the 2nd Defendant admits he is liable to pay. In execution, warrants of arrest have been issued. The 2nd Defendant now claims that in entering into the aforementioned consent, there was material non-disclosure of facts in that, it was not disclosed that he was expecting to satisfy the decree after being paid as a supplier/contractor by Nairobi City County. The 2nd Defendant has also sought stay of execution of the warrants of arrest issued against him.
14. In the case of [Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited](#) [2015] eKLR, the Court of Appeal in laying down the basis for setting aside a consent judgement or order stated as follow:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of [Flora Wasike v. Destimo Wamboko](#) (1982 -1988)1 KAR 625, said in his judgment at page 626 -"It is now 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 Ltd* Civ. Apps 28 of 1982 and 69 of 1983, This Court in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 held:- "A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement." Emphasis mine

15. While in *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR, the Court of Appeal held as follows:

"A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."

16. In this instance, the 2nd Defendant claims that there was misrepresentation in the entry of the consent. I note the consent has partially been enforced. Based on the facts as presented while relying on the decisions cited, I find that the 2nd Defendant has not proved fraud, collusion or coercion in the entry of the impugned consent. In the foregoing I decline to set aside the impugned consent as sought.

17. On seeking of stay of execution of the warrants of arrest pending the payment to the 2nd Defendant by Nairobi County Government, Order 42 Rule 6 of the *Civil Procedure Rules* provides that:

"No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

18. On stay of execution, the Court in *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR held that:

"The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exists any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice ..."

19. In this instance, the 2nd Defendant has sought for stay of the warrants of arrest claiming he is expecting certain payment from the Nairobi City County. The 2nd Defendant however did not provide an indication on when the payment is expected. Based on the facts as presented while relying on the decisions cited, I opine that the 2nd Defendant has not demonstrated what prejudice he stands to suffer if the stay is not granted. To my mind I am of the view that by the time the 2nd Defendant was executing the consent dated the 17th July, 2023, he must have known that he was expected to settle the decretal sum emanating therefrom. Further, it is almost two years since the entry of the impugned consent.

20. It is against the foregoing that I find the 2nd Defendant's Notice of Motion application dated the 19th November, 2024 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE 2025

CHRISTINE OCHIENG

JUDGE



In the presence of:

Kimanzi for 2nd Defendant

Ms Amemba for Namada for 1st and 3rd Defendant

Ms Opondo for Plaintiff

Court Assistant: Joan

