



**Oketch & another v Mwenda & another (Suing as the Legal Representatives
of the Estate of Simon Maina Mwenda (Deceased)) (Civil Appeal
E091 of 2025) [2025] KEHC 14365 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E091 OF 2025
G MUTAI, J
OCTOBER 9, 2025**

BETWEEN

DOMINIQUE OMONDI OKETCH 1ST APPLICANT

SGS KENYA LIMITED 2ND APPLICANT

AND

REBECA WANJA MWENDA 1ST RESPONDENT

NZULA KIASYO MWENDA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SIMON
MAINA MWENDA (DECEASED)**

RULING

1. The application before me is dated 8th August 2025. The appellants/applicants seek the following orders: -
 - a. Spent;
 - b. This honourable court be pleased to reinstate the terms of the consent recorded in court on 3rd July 2025, and allow the applicants to deposit the decretal sum in a joint interest-earning account to be opened in the name of counsels on record for the parties herein; and
 - c. Any other or further orders as this honourable court may deem fit to grant in the circumstances.
2. The grounds upon which the application is based are, in the main, that the parties herein entered into a compromise on 3rd July 2025 vide which the application for stay of execution was allowed on condition that the decretal sum would be deposited in a joint interest erring account. However, this was not done



because the appellants/applicants' counsel suffered a personal tragedy, to wit, that his sister succumbed to a prenatal birth complication on 7th July 2025, which forced him to concentrate on moving her mortal remains from Kitui for interment in Migori. It is stated that, due to the subsequent activities and the poor internet connection in his rural home, he was unable to communicate effectively with counsel for the respondent, and the period within which compliance could be made lapsed before he could deposit the money.

3. The application was opposed. The counsel for the respondents filed grounds of opposition dated 26th September 2024, vide which it was stated that the application had been overtaken by events as the respondent had executed the decree. It was further stated that the applicants had come to court with unclean hands and were therefore undeserving of the relief sought.
4. The application was canvassed by way of oral submissions, which I have considered.
5. I note that it is a common ground that the respondent executed and was paid the decretal sum. This happened after the appellants/applicants failed to deposit the decretal sum in court as had been agreed by consent. The consent had strict timelines.
6. What the appellant /applicant seeks vide the motion before me is to vary that consent on account of what may best be described as extenuating circumstances, that is to say, the death of the applicants' counsel's sister and the subsequent and consequent logistical challenges. Can the court lawfully do so?
7. It is trite law that the court may not interfere with a consent judgment or order unless there are exceptional circumstances warranting such action. Special or exceptional circumstances would be those that could justify the setting aside of a contract.
8. In the case of *Hirani v Kassam* [1952] 19 EACA 131, it was stated that:-

“prima facie, any 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 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.”
9. The above case was quoted with approval by Law, acting JA, as he then was, in the case of *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266.
10. It hasn't been shown that there was fraud, misrepresentation, or mistake in this case, or that the consent was contrary to public policy. That isn't what the appellants/applicants' counsel is saying. The consent was regular in every respect. Rather, the grounds are the extenuating circumstances the counsel for the appellants/applicants found himself in.
11. The court feels deeply for the appellants' counsel and condoles with him on his loss. The concern he had for his dearly departed sister is worth celebrating. That said, there is a regular judgment before the court below. The parties herein agreed to prevent the respondents from enjoying the fruits of a judgment in their favour on certain conditions which were not met. The consent was the parties' own doing. I do not think that the stringent test for setting aside a consent order or judgment has been met.
12. Even if it had been met, which isn't the case, I note that the decretal sum was paid over to the respondents. It would seem to me that allowing the application would amount to closing the stable after the horse has bolted. It may not be possible to undo what has happened.



13. Under the circumstances, I am of the view that the application is one for dismissal. I dismiss the same. Given the reasons for the delay, I order that the costs shall be in the cause.

14. It is so ordered.

DATED AND SIGNED AT MOMBASA, THE 9TH DAY OF OCTOBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of :-

Mr Rabut, for the Appellants/Applicants;

Mr Mkomba, for the Respondents; and

Arthur - Court Assistant.

