



**Bagwasi v Transworld Pharmaceuticals Ltd & 2 others (Civil Appeal E047 of 2024) [2025] KEHC 16165 (KLR) (10 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E047 OF 2024  
DKN MAGARE, J  
NOVEMBER 10, 2025**

**BETWEEN**

**SAMSON CHWEYA BAGWASI ..... APPELLANT**

**AND**

**TRANSWORLD PHARMACEUTICALS LTD ..... 1<sup>ST</sup> RESPONDENT**

**ELM PHARMACY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JOSHUA NYAKONI BAGWASI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal from the ruling and order of Honourable Wahinya Kugwa (RM) on 28.02.2024 in Kisii CMCC No. 503 of 2021. The ruling related to an application to set aside a consent entered on 29.09.2021. The Appellant was a Third Defendant in the lower court while the 1<sup>st</sup> Respondent was the plaintiff. The second and third respondents were the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the lower court.
2. The matter started with the unfortunate death of Koina Onyancha advocate in September 2021. The information was common knowledge to all the parties in the matter. While his body had been recently buried, the consent was entered on 29.09.2021 between M/s Nyamweya and Company Advocates and the three defendants. The three defendants are now the appellant and the second and third Respondents.
3. There is a single signature appearing against all the three defendants. That is Joshua Nyakoni Bagwasi, Elm Pharmacy Limited and Transworld Pharmaceuticals Ltd. The same was filed on the same day as well as notices to act in person. It is not indicated that the notices were to be served upon the firm of M/s Koina Onyancha and Company Advocates. There were no submissions from the second and third Respondents.
4. Subsequently the impugned application was filed seeking the following orders:



- a. ...
  - b. ...
  - c. ...
  - d. The honourable court be pleased to review and or set aside the consent orders of 29.09.2021.
5. The grounds were that the appellant did not execute the consent for adoption. They also sought to lift the warrants of arrest in place. The appellant stated that he instructed Koina Onyancha Advocate who unfortunately died. When he instructed the new advocate, he perused the file and found the consent. This resulted in the current application.
  6. The 1<sup>st</sup> Respondent filed a replying affidavit on 25.10.2023 through Kenneth Wagancha Ngugi. He averred that the consent was signed and returned to them. He stated that there was no record of any complaint to the police over the forgery. It was their view that there was no proof of fraud. They stated that Order 41 requires discovery of new matters [the order is irrelevant to the question at hand]. It was their case that review is related to discovery of new evidence, error apparent on the face of the court and or any other sufficient reasons.
  7. The court dismissed the application on 28.02.2024 for lack of merit resulting in the appeal herein. The appellant filed an appeal based on the following grounds:
    - a. The learned trial magistrate erred in law and fact by failing to ascertain the fact that the disputed consent wasn't executed by the Appellant, where on the face of record, the consent was signed by a single person as the signature is the same for the 3 defendants.
    - b. The Honourable learned trial magistrate erred in fact and law by failing to understudy the fact that the Appellant was a stranger to the contents of the consent as his then advocate, the late Koina Onyancha did not inform him of the said consent and further failing to consider that the late Koina Onyancha died before the said consent was entered.
    - c. The Honourable learned trial magistrate erred in fact and in law by failing to make a determination that the evidence tendered by the appellant was credible and dependable in making a decision that is/was accurate and concise.
    - d. The Honourable learned trial magistrate erred in law and fact by failing to understudy the fact that the disputed consent has caused warrants of arrest to be issued against the appellant.
    - e. The learned Honourable learned trial magistrate acted on wrong principles in exercise of his discretion hence arrived at an erroneous decision.
    - f. The learned magistrate erred in law and in fact in refusing to set aside the purported consent order.
    - g. The ruling by the learned trial magistrate is/was unbalanced and fraught with errors and/or misunderstandings.

### **Submissions**

8. The matter proceeded by way of submissions. The first respondent filed submissions dated 11.09.2023. They raised an issue of the firm of Ms. Bosire Gichana and Company Advocates being on record. They stated that the said firm ought to have filed a notice of appointment and not a notice of change from Koina Onyancha and Company Advocates. They stated that a suit was filed together with an order of arrest before judgment. It was their case that defence was filed. They negotiated with the late advocate



who unfortunately died before the consent was recorded. The defendants paid one or two installments and then stopped. They were brought to life when execution was imminent when the application was made.

9. They submitted that forgery of signatures is not a question of review under Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Act*. Reliance was placed on the case of *Bank of Africa Limited v Mits Electrical Company Limited & 2 others* [2023] KEHC 20016 (KLR). In that case, A Mabeya, J, stated as follows:

I note further that a review application ought to be filed without unreasonable delay. In the present case, judgment was entered on 17/9/2020. The present application was filed on 21/9/2021 which was more than a year later which in my opinion constitutes unreasonable delay. The applicant did not explain the inordinate delay. It seems that the applicant only sprung to action when the threat of execution of the judgment was looming against her.

10. The appellant filed submissions dated 03.09.2025. They sought that the appeal be allowed. Reliance was placed on the case of *Samson Masaba Munikah practicing as Munikah & Company Advocates v Wedube Estates Limited*, where the court stated as follows:

This appeal raises the vexed question: (of) What are the circumstances in which a consent judgment may be set aside? In *Brooke Bond Liebig (T) Ltd V. Mallya* [1975] E.A. 266, the then Court of Appeal for East Africa set out the circumstances in which a consent judgment freely entered into by the parties to a dispute in court, would be set aside by the courts. Delivering the leading judgment of the Court Law Ag. P. expressed himself thus:

“The circumstances in which a consent judgment may be interfered with were considered by this

Court in *Hirani v. Kassam* [1952] 19 EACA 131 where the following passage from *Seton on Judgments and Orders*, 7th Edn., Vol 1, P. 124 was approved:

Prima facie, any order made in the presence and with the consent of the 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.

11. Reliance was placed on the *Jirongo & another v Board of Trustees of the National Social Security Fund (Environment & Land Case 364 of 2011)* [2015] KEELC 853 (KLR) (3 June 2015) (Ruling) where L.N. Gacheru J stated as follows:

It is now settled that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, for example, fraud, mistake or misrepresentation or if certain conditions remain to be fulfilled, which are not carried out. *Brooke Bond Liebig (T) Limited – vs- Maliya* (1975) E.A. 266 where the Court held that:

Prima facie, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or action, and 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 material facts, or in misapprehension or in ignorance of material facts, or in general for reason which would enable the court to set aside an agreement.



12. They stated that it is breach of natural justice to impose a consent on the appellant who had not signed the same. They prayed for setting aside the consent in so far as it relates to the Appellant.

### Analysis

13. This matter turns on a simple question, that is, whether there was a consent settling the matter. Some of the parties engage in skulduggery, chicanery and subterfuge in order to obfuscate the real issues in controversy. I was surprised that the 1<sup>st</sup> respondent raised this late in the day, the question of the appellant's advocate not being properly on record.

14. The parties must be cognizant that submissions are not evidence. Mwera J, posited as follows when postulating on what is the role of submissions are. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

15. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, where the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

16. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”



17. I was tempted to dismiss the same upfront as it was an ambush. However, the decision on the issue is at the very centre of the appeal. The question is based on the fact that there was no consent. The appellant maintained that he had not signed the consent hence, there was no consent. This in effect is what was discussed in the case of *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others* [1998] eKLR, where the court stated as follows:
- Mr. Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission I agree. There cannot be as far as third parties are concerned interference with due administration of justice when the ex-parte order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void.
18. Therefore, the court must first deal with the issue of whether there was a consent for which judgment resulted or there wasn't. The applicant maintained that he had a duty to follow the progress of his case. This part is not clear since the appellant already had an advocate. If it is true that he was to follow up, then it is an admission that he was not involved in the consent.
19. It is clear that the consent entered into was signed by one person. The same is a replica of a signature of the third Respondent in the document filed as a guarantee. There are twin issues that need to be decided. The consent and application to act in person appears to terminate the services of Ms. Koina Onyancha and Company Advocates. The second question is whether the consent was signed by the appellant.
20. However, in this case, the consent and notice to act in person were filed simultaneously with the consent. The notice to act in person was not effective before it was served. Even where a party is acting in person, Order 9, rule 8, provides as follows:
- (1) Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modifications.
  - (2) The address for service given under subrule (1) shall comply with Order 6, rule 3.
21. The advocate was deceased. The firm needed to be served or service be dispensed with. It is cavalier to proceed on the basis that filing of notice to act in person was sufficient. It needed to be served or an order dispensing service be made.
22. The demise of an advocate did not remove the firm of advocates on the record. Order 9, rule 5 provides as follows regarding change of advocates:
- A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
23. The process related to death is circumscribed in the law. The change of advocate was not effective before service. There was no attempt to serve the firm. There is no evidence that the firm ceased or was not being managed by any other advocate. Without service, the former firm was deemed to be on record. Ipso facto, the firm of Bosire Gichana and Company Advocates was correct in filing a notice of change of advocates from the firm of Koina Onyancha and Company Advocates.



24. The next issue was whether the 3<sup>rd</sup> Respondent had authority to sign on behalf of the Appellant. Related to this is whether, the success of the appeal is predicated upon success of a criminal case or reporting to the police. The appellant did not claim that the 1<sup>st</sup> Respondent forged his signature. It is the 3<sup>rd</sup> defendant who signed on behalf of the Appellant. I cannot see an authority of the said third Respondent to sign. It is not lost that they did not write any document appointing one to act for the other. A document signed without authority is not worth the paper it is written on. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] KECA 816 (KLR), the Court of appeal [Waki, Nambuye & G.B.M. Kariuki, JJ.A] posited as follows on what constitutes fraud as encapsulated in Black's Law Dictionary:

Fraud consists of some deceitful practice or willful deceive, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

25. Further, such a signing is a nullity and not tenable in law. What to do with such signing was addressed in *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

26. A consent signed without authority meets the threshold set out for setting aside consents. Getting a judgment fraudulently like the 1<sup>st</sup> Respondent did, is highly irregular and frowned upon. What to do with irregular judgment was addressed in the case of *James Kanyiiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR), where the court of appeal [Makhandia, Ouko & M'noti, JJ.A] posited as follows:

We have already emphasized that the once an irregular default judgment is brought to the notice of the court, the court will set it aside as a matter of right and that the court may set aside such judgment even on its own. We do not think, in the circumstances of this case, the trial judge can be faulted for setting aside the irregular default judgment. Apart from Marios, the fact that the default judgment was irregular was brought to the attention of the Court by the administrator of the estate of Androniki, the owner of the original parcel, as well as by Athman, who claimed to have acquired ownership thereof through adverse possession. The court was therefore not expected to shut its eyes to the glaring irregularities we have pointed out above regarding the default judgment.

27. Having found that the consent was meant to steal a match on the appellant after his advocate died, there is no option other than to set aside the impugned consent. It is a scar on the administration of justice and anathema to good conscience and a right to natural justice.

28. The small issue of the fraud having not been reported is not serious. A party has control on how to vindicate their rights. There is no bar from initiating civil proceedings when fraud is discovered. In any



case there is no time bar to initiating criminal proceedings. Of importance, Section 193 of the criminal procedure code provides as follows:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

29. The same is true of civil proceedings. There is no bar of picking either civil proceedings or criminal proceedings to the exclusion of the other. Conversely, there is no harm of civil proceedings proceeding without criminal proceedings. All in all the court is satisfied that the appeal is merited and is accordingly allowed.
30. What then are the orders the court ought to issue? The consent is predicated on a joint and several liability. I have already found that the same was null and void. The first reason was noninvolvement of the firm on record. The second aspect is that the 3<sup>rd</sup> Respondent signed on behalf of the Appellant without authority to do so. The results then become a fruit of a poisoned tree. The entire fruit must be thrown out. All the good, the bad and the ugly must go. This is the essence of fraud. There is no need to sever the cases when the consent was fraudulent. It does not mean that the same cannot be used as an admission on part of the 3<sup>rd</sup> Respondent and or the 2<sup>nd</sup> Respondent.
31. An issue was raised that a defence had not been filed. This is neither here nor there. We are not dealing with ex parte judgment but a fraudulent consent.
32. Lastly the 1<sup>st</sup> respondent was of the considered view that the matters raised do not constitute grounds for review under Order 45 rule 1 and Section 80 of the Civil Procedure Rules. They however, did not address the question of setting aside. I find that the fraud on part of the respondents, ipso facto, was a sufficient reason for setting aside the impugned consent. The ground is thus untenable but a bid to clutch to straws in a sinking ship.
33. In the end the appeal is allowed, and in lieu thereof, the application dated 19.10.2022 is allowed.
34. The next question relates to costs of the appeal and the application in the court below.
35. The issue of costs is governed by Section 27 of the [Civil Procedure Act](#), which provides as follows:
  - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
36. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.



37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows:
18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.
38. The appellant was a successful party. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not defend the appeal. The 1<sup>st</sup> respondent defended strenuously in spite of knowing that the consent was a fruit of a poisoned tree. Costs must thus follow the event and the party who is holding a short end of the stick.
39. The Appellant shall have costs of Ksh. 90,000/= payable by the first Respondent. The matter shall be fixed for hearing.
40. As I depart, I note that the first respondent attempted to steal a match by seeking for warrants of arrest before judgment. There is no provision of the law for such. The law provides only for attachment before judgment. Parties must avoid at all times making arrest a means of execution of the first report. It is always the last resort and post judgment. Shortcuts, like the one the first Respondent took, lead to pain and gnashing of teeth.

### **Determination**

41. In the circumstances the court issues the following orders:
- a. The appeal is allowed with costs of Ksh. 90,000/= to the appellant payable by the 1<sup>st</sup> Respondent within 30 days, failing which execution shall issue.
  - b. The purported consent dated 29.09.2021 is set aside as a nullity *ab initio*.
  - c. The court is unable to save any part of the consent since it is tainted with fraud.
  - d. The matter be mentioned on 18.12.2025 in the court below to confirm closure of pleadings and directions for hearing.
  - e. This file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE.**

**JUDGE**



In the presence of: -

No appearance for the Appellant

Mr. Okara for C.D. Nyamweya for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

