

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: KIAGE, MUCHELULE & KORIR,  
JJ.A.)**

**CIVIL APPLICATION NO. NAI. E246 OF 2025**

**BETWEEN**

**STEPHEN KIMANI KAMAU.....APPLICANT**

**AND**

**THOMAS OUMA AHINGA ..... 1<sup>ST</sup>  
RESPONDENT ARTHUR KANAI KAMAU .....  
2<sup>ND</sup> RESPONDENT BEATRICE NGONYO KAMAU  
..... 3<sup>RD</sup> RESPONDENT MARIA NDUKU KAMAU  
(sued as administrator of the estate of  
RICHARD S. KAMAU - Deceased) ..... 4<sup>TH</sup>  
RESPONDENT REHEMA S. KAMAU .....  
5<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution and setting aside a consent order of the court arising from the judgment and decree of the High Court of Kenya at Nairobi (B. Mwamuye, J.) dated 31<sup>st</sup> October 2024*

*in*

**HCCA No. E562 of 2022  
as consolidated with  
HCCA No. E563 of  
2022)**

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**REASONS FOR THE DECISION ISSUED ON 8<sup>TH</sup> OCTOBER 2025**

1. After hearing the applicant's Notice of Motion dated 10<sup>th</sup> July 2025 on 8<sup>th</sup> October 2025, we rendered our decision on the spot pursuant to **rule 34(7)** of the **Court of Appeal Rules** by dismissing the Motion with costs to the 1<sup>st</sup> respondent. We reserved the reasons for the decision for 7<sup>th</sup> November 2025,

and here we go.

2. The applicant's Motion, the subject of this ruling, sought seven orders, which we condense as follows: stay of implementation of the consent order adopted by this Court on 17<sup>th</sup> June 2025; setting aside, varying and or vacating the consent order dated 17<sup>th</sup> June 2025; deeming the applicant's application dated 15<sup>th</sup> April 2025 as withdrawn with no order as to costs; and, stay of execution of the decree issued in **Milimani CMCC No.6193 of 2012 - Thomas Ouma Ahinga vs. Stephen Kimani Kamau & Others** pending the hearing and determination of the appeal herein.
3. The motion was supported by the averments made in the applicant's supporting affidavit. His case was that through his former advocates, he filed a notice of motion dated 15<sup>th</sup> April 2025 seeking stay of execution of the judgment delivered by B. Mwamuye, J. on 31<sup>st</sup> October 2024. That, without his express instructions, his erstwhile counsel entered into a consent with the respondent's counsel compromising the application, which consent was adopted as an order of the Court on 17<sup>th</sup> June 2025. He deposed that the consent order was entered without his instructions and was detrimental to his interests, and should therefore be set aside. He also averred that he seeks an order staying execution of the decree issued in Milimani Chief Magistrate Court Civil Case No. 6193 of 2012.
4. The 1<sup>st</sup> respondent filed a replying affidavit opposing the application, and terming it frivolous. He averred that the

applicant

has not presented evidence of a complaint against his former counsel for allegedly recording a consent without instructions, and therefore, the orders sought are without merit. Further, that the applicant has no arguable appeal that can be rendered nugatory should execution not be stayed.

5. When the matter came up for hearing, learned counsel, Mr. Wahome, was present for the applicant, while Mr. Mutemi represented the 1<sup>st</sup> respondent. The 2<sup>nd</sup> to 5<sup>th</sup> respondents were absent, though duly served.
6. Learned counsel Mr. Wahome for the applicant addressed two points. Referring to the memorandum of appeal and the affidavit sworn in support of the application dated 15<sup>th</sup> April 2025, counsel urged for a stay of execution, asserting that the appeal is arguable and not frivolous. Counsel submitted that without a stay, the respondent would receive the full decretal amount of Kshs. 8,400,000, making any eventual victory for the applicant "*hollow*" since the respondent might not be able to refund the decretal sum. He cited **Trust Bank Limited & Another vs. Investech Bank Ltd & 3 Others [2000] KECA 11 (KLR)** for the proposition that an applicant will be granted an order under **rule 5(2)(b)** of the **Court of Appeal Rules** upon demonstration of an arguable appeal and where the appeal, if successful, would be rendered nugatory. Regarding the request for review of the consent order, counsel relied on **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1(a)** of the **Civil**

**Procedure Rules**, and submitted

that the Court has the authority to review its orders in cases of fraud, bias or injustice. Reliance was placed on **Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Ltd [2014] eKLR** for the proposition that the Court has residual jurisdiction to open a decided matter in cases of fraud, bias, or injustice. Counsel contended that the consent terms were onerous and contrary to explicit instructions. Relying on **Kenya Commercial Bank Ltd vs. Specialized Engineering Company Ltd [1982] eKLR**, counsel submitted that the consent is for setting aside as it was entered contrary to the applicant's express contrary instructions. Rejecting the contention by the respondent that the application for review of the consent was filed after inordinate delay and without any explanation for the delay, counsel contended that the application was filed immediately the applicant became aware of the impugned consent. In conclusion, the applicant urged that the application be allowed as requested.

7. Opposing the application, Mr. Mutemi, learned counsel, argued that the Motion actually seeks the setting aside of the consent order and not a stay of execution. Further, that the applicant has not annexed the judgment or decree he aims to stay, and neither has he adduced grounds to warrant issuing an order of stay against the judgment in Milimani CMCC No. 6193 of 2012. According to counsel, the application dated 15<sup>th</sup> April 2025, which the applicant sought to withdraw, cannot be withdrawn as it is

spent. Counsel consequently urged that the application be dismissed with costs for being an afterthought and without merit.

8. We reviewed the pleadings and the applicable law, as well as the authorities referred to us by counsel for the parties. In our view, this application raised two issues for determination, to wit, whether the consent order recorded on 17<sup>th</sup> June 2025 should be set aside, and whether an order staying the judgment and decree in Milimani CMCC No. 6193 of 2012 should issue.
9. In our view, the starting point for determining the instant Motion was by answering the question as to whether a case had been made for setting aside the consent recorded by the parties on 17<sup>th</sup> June 2025. The rules for vacating a consent judgment or order are well established. In **AVH Legal LLP vs. Raballa & 8 Others [2023] KECA 232 (KLR)**, the Court identified the following grounds upon which a consent judgment can be set aside:

**“41. We join the long list of the above cited cases by affirming that this Court has residual jurisdiction to re-open a decided case in appropriate and exceptional cases such as when Judgment;**

- a. was obtained by fraud or deceit;**
- b. was a nullity;**
- c. was given under a mistaken belief that the parties consented to it;**
- d. was given in the absence of jurisdiction;**

**e. the proceedings adopted were such as to deprive the decision or Judgment of the character of a legitimate adjudication; or**

**f. it was rendered with fundamental irregularity.”**

10. In **Benjoh Amalgamated Limited vs. Kenya Commercial Bank Limited & Another [2024] KECA 593 (KLR)**, the Court reaffirmed the above grounds and went ahead to warn that:

**“It is clear from decided cases that a party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. Departure from the general principle of finality of court decisions is justified only when circumstances of a substantial and compelling character make it necessary to do so.”**

11. We entirely associate ourselves with the above statements of the law. It is essential to point out that the burden of proving the existence of any of the grounds identified for setting aside a consent order or judgment lies with the applicant. In the present Motion, the applicant averred that the consent was entered into without his instructions. However, he did not place before the Court any evidence in support of the allegation that he did not instruct counsel. It is important to appreciate that the consent was read out to the Court by Mr. Makau, learned counsel, who was on record for the applicant at the time. Despite the applicant faulting the move by his erstwhile counsel, his current counsel conceded during the hearing of the application that the applicant had not taken any step to seek redress against his former counsel. In the circumstances, his case aligns itself to the holding by the Court in **Flora N. Wasike vs. Destimo**

**Wamboko [1985] KECA 149 (KLR) that:**

**“Furthermore *Waugh v H B Clifford & Sons* [1982] Ch 374, is persuasive authority that a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned, and Mr. Dhanjal would seem to have had such authority in this case. I can detect no valid reasons on the record for saying that there exist grounds such as I have referred to which would justify the setting aside of this judgment as a contract...”**

12. We also reiterate the holding in **Waugh vs. H B Clifford & Sons Ltd [1982] 1 Ch 374** regarding the authority of counsel in ongoing litigation, thus:

**“The law thus became well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action: for example, the return of the piano in *Prestwich v Poley* (1865) 18 CBNS 806, 144 ER 662, the withdrawal of the imputations in *Matthews v Munster* (1887) 20 QBD 141 [1886-90] All ER Rep 251 and the highly complicated terms of compromise in *Little v Spreadbury* [1910] 2 KB 658.”**

13. The same principles of law are found in **Kenya Commercial Bank Ltd vs. Specialized Engineering Company Ltd**

**[1982] eKLR**, which was cited by counsel for the applicant in support of the instant Motion.

14. We reiterate that a consent order is in the same class as a contract, and it is not sufficient for the party seeking to set it aside to simply blame his counsel without any evidence of the contrary instructions conveyed to counsel or the steps taken to address the breach of professional ethics by counsel. A party should not be allowed to run away from the onus that arises from a consent order by simply faulting counsel. The least that is expected of such a party is a demonstration that the professional conduct and legal capacity of counsel has been challenged elsewhere through the appropriate channels. We speak not out of turn, for in **Otieno & Another vs. Bodo** [2025] KECA 73 (KLR), similar views were expressed by the Court thus:

**“It is fairly obvious that the learned Judge had these principles in mind as he decided the case. Like him, we are unable to see any scintilla of evidence that there was collusion between the appellants’ former advocates and the respondent’s advocates. Neither did the appellants place before the court any evidence of fraud on the part of their former advocates. All they put before the court was their bald say-so. A consent judgment is a contract of record between the parties entered into with the approval of the court. It is not to be undone easily. To prove fraud or collusion, the appellants needed more than mere statements in their affidavit. It is telling, for example, that the appellants did not present any evidence of any action they have taken against the advocate for acting without instructions if he so acted. In other words, like the trial court Judge, we are not persuaded that the appellants established any of the grounds for**

**setting aside of a consent judgment as established  
in our case law. We**

**conclude that on the evidence there was no showing of fraud.”**

15. We have said enough to show why the application for setting aside the consent had to fail. Having so found, it follows that the applicant’s notice of motion dated 15<sup>th</sup> April 2025, and which he now seeks to withdraw, was spent on 17<sup>th</sup> June 2025 when counsel for the parties recorded a consent on it before the Court. His application in that regard could not be granted, as there was no live application that could be withdrawn.
16. Turning to the prayer for stay of execution, we note that the applicant sought an order staying the judgment and decree of the Magistrate's Court in **Milimani CMCC No. 6193 of 2012 - Thomas Ouma Ahinga vs. Stephen Kimani Kamau**. The jurisdiction of this Court to determine an application for stay of execution under **rule 5(2)(b)** of the **Court of Appeal Rules** stems from the filing of a notice of appeal pursuant to **rule 77** of the **Court’s Rules**. In this application, though no notice of appeal was annexed, we would imagine, as can be gleaned from the citation of the application, that the notice of appeal was filed in regard to the judgment of the High Court in ***HCCA No. E562 of 2022 as consolidated with E563 of 2022***. We note that in his supporting affidavit, the applicant readily and rightly conceded that the judgment of the High Court, which dismissed his appeal, was negative, hence leaving nothing to stay. Indeed, the applicant tendered the negative nature of the judgment of

the High Court as

the reason why he opted to seek an order staying the judgment of the Chief Magistrate's Court. However, as we have already pointed out, the appeal before the Court for which we could exercise our discretion and issue an order for stay is not ***Milimani CMCC No. 6193 of 2012***, but ***HCCA No. E562 of 2022 as consolidated with E563 of 2022***. For that very reason, an order of stay cannot issue as presently prayed. Additionally, were we to issue the order as prayed, this would defeat the very essence of the appellate hierarchy in this country.

17. Our finding is fortified by the decision in **P Girls Secondary School & Another vs. ACY (Suing through her Mother and Next Friend GT) [2023] KECA 29 (KLR)**, where the learned Judges of the Court held that:

**“19. We are also alive to the fact that the applicants’ intended appeal to this court is said to be in respect of a decision of the High Court dismissing the applicants’ application for leave to file an appeal against the magistrate’s judgment out of time. The intended appeal is therefore not against the judgment of the magistrate which the applicants want us to stay. Even assuming that we can stay the decision of the magistrate, the notice of appeal against the decision of Nyakundi, J cannot be used to grant stay against the judgment of the magistrate. On this point we refer to the decision in the already cited case of *Nairobi City Council v Resley* [2002] EA 493. The decision of the High Court and that of the magistrate’s court are different and distinct...**

**20. The applicants may indeed have an arguable appeal against the decision of the High Court but that**

**alone is not enough reason to warrant staying a judgment which, at the moment, has no subsisting appeal at the High Court. In short, the decision the applicants wish to stay is not the subject of an intended appeal or an appeal before this court. In view of what we have stated it would be an exercise in futility to discuss whether an intended appeal, which is yet to be filed, is arguable and whether such a non-existing appeal will be rendered nugatory if stay is not granted. Consequently, we find that this application is without merit and is for dismissal.”**

18. More importantly, the Motion before us seeking stay of execution could not be entertained by this Court, considering that an application dated 15<sup>th</sup> April 2025 seeking similar orders was compromised by the parties through the consent recorded on 17<sup>th</sup> June 2025. Having rejected the applicant’s attempt to set aside the consent, it follows that the application dated 10<sup>th</sup> July 2025 amounted to an abuse of the Court process.
19. Flowing from the foregoing, it is apparent that the Notice of Motion dated 10<sup>th</sup> July 2025 was without any merit at all, hence our dismissal of the same.
20. Before departing this matter, we need to explain why we awarded costs to the respondent. When this matter came up for hearing on 8<sup>th</sup> October 2025, both counsel for the respondent and the Court implored counsel for the applicant to withdraw the application on the aforesaid grounds. However, counsel soldiered on and sought to have the Court deliver a reasoned

ruling on the matter. We also

note that the 1<sup>st</sup> respondent had pointed out these shortcomings in his replying affidavit. Taking the foregoing circumstances into account, as well as the history of the dispute before the Court, we were bereft of reasons for departing from the general rule that costs follow the event. That explains why we awarded costs to the 1<sup>st</sup> respondent, who, in any event, fully defended the application.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of November 2025.**

**P. O. KIAGE**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**. JUDGE OF APPEAL**

**W. KORIR**

.....  
**. JUDGE OF APPEAL**

*I certify that this is a true copy of original.*

*Signed*

**DEPUTY REGISTRAR.**