

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E099 OF 2024

**NANAK TRUCKING COMPANY LIMITED.....1ST
APPELLANT**

**STANLEY KIPKURUI YEGON.....2ND
APPELLANT**

VERSUS

**ROBERT KIPKOECH LANGAT.....
RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. E. G. Nderitu
(CM) in the Chief Magistrates Court at Molo Civil suit No. E347 of
2021, delivered on 30th April 2024)*

JUDGMENT

1. The appellants were the defendants in the lower court while the respondent was the plaintiff. The respondent vide the plaint dated 21st October 2021 sued the appellants claiming general damages, special damages, future medical expenses, damages under loss of income and costs incidental to the suit plus interest.
2. The facts of the case are that on 30th March 2021 or thereabout the respondent herein was riding motor cycle registration number KMET 222U (boxer make) along Total-Londiani road at railway line bridge area when motor vehicle registration number KCB 185C/ZD 5007(Renault prime mover/Bhachu trailer) veered of its lane and hit the

respondent from behind and subsequently caused the respondent and his pillion passenger serious injuries.

3. In its Judgment delivered on 11th October, 2022, the trial court found the appellants to be 100% liable and awarded kshs. 2,000,000/= as general damages, kshs. 3,489,876/= for loss of future income and kshs. 691,631/= as special damages. The respondent was also awarded costs of the suit plus interest from the date of the judgment until payment in full. The appellant filed the Notice of Motion dated 15/2/2024 seeking to set aside the Judgment entered on 11/10/2022 and substitute it with the consent entered into on 25/5/2023. The same was dismissed on 30/5/2024.

4. The appellants being aggrieved by the said judgment lodged this appeal dated 2nd May, 2024 setting out the following grounds:

- i. That the learned trial magistrate honourable E.G Nderitu misdirected herself in finding that the appellants application dated 15th February 2024 had no merit.***
- ii. That the learned trial magistrate honourable E. G Nderitu misdirected herself in failing to acknowledge that the consent dated 25th May 2023 executed on behalf of the parties is an agreement binding between the parties.***
- iii. That the trial magistrate honourable E. G Nderitu misdirected herself by not considering the issues raised by the appellants/ applicants***

in their notice of motion application dated 15th February 2024, the supporting affidavit by the legal claims officer Beatrice Muriithi and dated 15th February 2024, and consequently coming to a wrong conclusion on the same.

- iv. That the learned trial magistrate misdirected herself in failing to recognize the import of a consent made by parties through their duly recognized representatives, duly crafted by the lawyer on record for the party who without coercion approached the Insurers and compromised the quantum.***
- v. That the learned trial magistrate misdirected herself to restrict himself to the clear wording of the consent which was a written agreement whose terms cannot legally be substituted or supplemented by oral submission or any other extraneous content; the wordings were "judgment delivered on 11th October 2022 be and is hereby set aside and the same be replaced with the consent judgment."***
- vi. That the learned trial magistrate proceeded on wrong principles when assessing the evidence presented by the parties and failed to apply precedents and tenets of the law applicable.***
- vii. That the learned trial magistrate arrived at a decision unsustainable in law; the court cannot***

look for any other intention other than that expressed by the parties.

viii. That costs of this appeal be provided for.

5. The appellants urged the court to allow the appeal, set aside the judgment dated 11th October 2022 and replace it with the consent judgment dated 25th May 2023. Additionally, that the ruling delivered on 30th April 2024 in Molo Civil Suit No. E347 of 2021 be set aside. They also prayed for costs of the appeal.
6. The Appeal was canvassed through written submissions.

Appellants' submissions

7. These were filed by the firm of Samuel Nyambane Advocates on 6th October, 2025. Counsel gave brief facts of the case and identified two issues for determination.
8. The first issue is whether the consent dated 25th May 2023 executed by both the respondent's advocates and the appellants' insurer Jubilee Allianz Insurance Company Ltd compromised the exparte judgment delivered by Hon. E. G Nderitu on the 11th October 2022 in Molo CMCC No. E347 of 2021 and whether parties are bound by the consent.
9. Counsel submitted that the respondent's advocate by entering into a consent acted as an agent of the respondent who must be bound by the terms of the consent. Thus, the trial court erred in its ruling by finding that since the consent had not been filed nor adopted then it did not compromise the judgment of the court. He added that parties are bound by their agreement by putting it in the court record and that the appellants had

the legitimate expectation that once the terms of the consent were honoured, then the claim was fully settled.

10. Reliance was placed on section 59 C of the Civil Procedure Act and the decision in **Daima Bank Limited v Patrick Mweu Musimba [2014] eKLR** where Justice J Kamau held as follows:

“Being a consent and an order of the court, it remains the way it is until amended to provide for penalties and interest. The Respondent cannot take it upon itself; unilaterally to amend the consent to provide for penalties and interest, Until the parties take corrective measure this court will hold both parties to the terms of the consent they filed in court.” “The court must respect the agreement that was entered into by the parties. If it was to re-open the issue of the interest, it would be a travesty and miscarriage of justice as they agreed that the sum of Kshs 10,000,000/= was all inclusive. The parties are therefore bound by the terms of their consent. This court's hands are hence tied and cannot come to the assistance of the plaintiff to remedy the negligence of its counsel.”

11. See also; **John Wairunge Kamau v Phoenix Aviation Ltd [2015] eKLR.**

12. In conclusion, he urged the court to allow the memorandum of appeal dated 2nd May 2024.

Respondent's submissions

13. These were filed by the firm of Odero Okoyo & Company Advocates on 3rd October, 2025. Counsel gave brief background of the case and identified two issues for determination.
14. The first issue is whether the trial magistrate erred in fact and law by dismissing the appellant's application dated 15th February 2024. Counsel submitted that the judgement in respect of this matter was delivered in favour of the respondent here in the sum of kshs. 6,310,145/= whereby upon notifying the applicants, they paid the sum of kshs 3,000,000/= in part settlement of the decretal sum. Thus, the balance was kshs. 3,310,145/= had remained unpaid by the appellants for a period of over several months hence commencement of execution proceedings.
15. The court's attention was drawn to the decision in **Entertainer Trucks Co. Ltd v Paul Macharia Nduati [2021] eKLR** where the trial court appreciated the case of **Justus Mutiga & 2 Others v Law Society of Kenya and Another [2018] eKLR** where the Court of Appeal held as follows;
- “Unfortunately, under the current system, the third parties has (sic) been left at the mercy of not just the percentages imposed under the schedule, but should there be any excess recoverable, he must contend with pursuing the insured personally. In the case of Georgina Wangari Mwangi v David Mwangi Muteti, High Court Civil Case No. 40/2023; it was held that the insurance company is to pay a***

maximum of Kshs. 3,000,000/= which any excess being payable by the insured party. The plaintiff in this case was awarded damages of Kshs 14,612,540.20 out of which only Ksh. 3,000,000/= was payable by the insurer, with the rest being recoverable from the insured.”

16. The second issue is whether the consent dated 25th May 2023 is valid and enforceable. Counsel submitted that the consent referred to by the appellants was not filed and adopted as a judgment of the court and thus the same is unenforceable.

17. In conclusion, he submitted that the appeal lacked merit and it should be dismissed with costs.

Analysis and Determination

18. This being a first appellate court, I am guided by the dictum in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

19. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the parties, I opine that the main issue for determination is whether this appeal is merited.

20. It is not disputed that the trial court entered judgment 11th October 2022 in favour of the respondent for the sum of kshs.6,181,507/=. The appellants argued that after the said judgment was compromised by the consent dated

25th May 2023 entered into by, the respondent's advocate and the appellants' insurer. That as a result of that the parties herein were bound by the said consent. Thus, the trial magistrate erred in law and fact in dismissing their application dated 15th February 2024 which sought for the orders in the aforementioned judgment to be set aside and the same be compromised by the consent.

21. On his part the respondent contends that the consent referred to by the appellants was not filed and adopted as an order of the court and so the same is unenforceable.

22. A look at the impugned ruling dated 30th April 2024 which is the subject of this appeal, reveals that the trial magistrate indicated that both counsel admitted that they entered into a consent post judgment and the same is dated 25th May 2023. However, upon her perusing the court file she confirmed that the said consent was neither filed nor adopted by the court and its existence had only been brought to the attention of the court upon filing of the application by the appellants. Consequently, she dismissed the said application with costs to the respondent.

23. The law is clear that this court as an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in **Mkube v Nyamuro [1983] LLR at 403**, where Kneller JA & Hancox Ag JJA held that as follows;

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

24. I have carefully perused the lower court file and I equally note that the consent dated 25th May 2023 was not filed or adopted as an order of the court as claimed by the appellant. In **Edward Acholla v. Sogea Satom Kenya Branch & 2 others Cause No. 1518 of 2013; [2014] eKLR**, the Court again disabused the idea that a consent cannot be a judgment when it held that:

“A consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with 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.”

25. Similarly, in **Mose & 13 others v Mang; Wangari Ndirangu t/a Wangari Ndirangu & Co. Advocates (Respondent) (Cause 267 of 2014) [2022] KEELRC 14657 (KLR) (27 October 2022) (Ruling)**, the court while dealing with an application dated 27th January 2022 seeking for orders that the consent dated 27th January

2016 be expunged from the court records since the same was not adopted by the court, held as follows;

“Consent of the parties is therefore an expression of an agreement which once achieved must be adopted by the court for an order to issue. It remains an agreement until the same is adopted by the court as its orders for the parties to enforce. This is aptly captured in the case of Wildung v Sanderson [1897] 2 CL that;

A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be forced against him and then raised by way of defence. ...He must when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose.” (Emphasis mine)

26. From the record herein the consent dated 25th May, 2023 was post the Judgment delivered on 11th October, 2022. The said consent was never filed and adopted as an order of the court. It could therefore not be used to set aside the Judgement of 11th October, 2022.

27. I therefore find no reason to make this court interfere with the decision of the trial magistrate which analysed very well the issues raised in the appellants' application and arrived at the right decision.

28. The upshot is that the Appeal herein lacks merit and is dismissed with costs. The ruling by the trial court and dated 30th April, 2024 is upheld.

29. Orders accordingly.

Delivered virtually, dated and signed this 6th day of November, 2025 in open court at Nakuru.

**H. I. ONG'UDI
JUDGE**