

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL CASE NO. 3 OF 2016

GAMADID TRADING CO. LTD.....
.....PLAINTIFF

VS

GARISSA COUNTY GOVERNMENT & 3 OTHERS.....1ST
DEFENDANT

NATHIFF JAMA ADAM.....2ND
DEFENDANT

ABDULLAHI HUSSEIN.....3RD
DEFENDANT

THE CONTROLLER OF BUDGET.....4TH
DEFENDANT

RULING

1. The matter falling due for determination is an application dated 07.10.2025 seeking for orders as follows:

1) Spent.

2) Leave be granted to the firm of Issa, Dayib & Company Advocates to come on record for the 1st, 2nd & 3^d Defendants.

3) Pending the hearing and determination of this application, the Honourable Court be pleased to stay execution of Consent Judgment dated 16.07.2020 and the Decree therein dated 4.08.2020.

4) The Honourable Court be pleased to set aside the Consent judgment dated 16.07.2025 and any consequential orders therein.

5) The Honourable Court be pleased to order the office of the Auditor General to audit the account and payments made to Gamadid Trading Company Limited by the County Government of Garissa.

6) The Honourable Court be pleased to grant any other orders as may deem fit and necessary in the circumstances.

7) The cost of this Application be provided for.

2. The application is supported with an affidavit of Khadija Ahmed Mohamed, 1st defendant's county attorney who deposed that the 1st Defendant having conducted an internal audit, they learnt that the County Government of Garissa had already paid the Plaintiff a total of Kes. 35,726,167. It was further alleged that there had been non-disclosure of material facts and an arithmetical error in the consent judgment, which could have resulted in the Plaintiff unjustly executing the decree and receiving excess funds at the expense of taxpayers.
3. That by the time the plaint was filed on 28.10.2016, the plaintiff's claim was only Kes. 20,804,580 and that all their attempts to engage the plaintiff through its advocates on record for reconciliation has been difficult as the advocate is hell bent on executing the decree. It was averred that there is an urgent need to have an audit for purposes of knowing the actual and true amount pending payments if any. Consequently, this court was

urged that unless the consent judgment is varied or set aside, the 1st defendant risks being compelled to pay a substantial amount erroneously.

4. The plaintiff/respondent opposed the application via a replying affidavit sworn by Aden Haji Gamadid on 14.10.2025 deposing that all exhibits are required to be securely sealed thereto under the seal of one commissioner and should be marked with serial letters. That the application has been brought late in the day after 5 years, 2 months and 3 days after the consent was adopted as an order of the court on 04.08.2020. That the delay in bringing this suit has not been explained and further, that the requisites to set aside a consent judgment have not been met.
5. It was urged that it was not the business of the court to rewrite agreements for individual parties simply because a party feels that their previous advocate gave them a raw deal. That the discretion of the court is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designated to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
6. It was averred that the idea of settling this matter out of court was mooted by one Muhamad H. Mursal, then the Garissa County Secretary for the period 2013 - 2017 and 2022 - to date vide his letter dated 06.09.2017. That in as much as the defendants allege fraud, it was not demonstrated the actions taken against their erstwhile advocates. Further, that the defendants did not indicate

their calculations based on the principal sum and accrued interest at commercial rates from 17.12.2012 to 16.07.2020.

7. It was deposed that litigation must come to an end and noting that this matter has been in court for a period running 9 years, it was just that the same be concluded for the judgment creditor to be allowed to enjoy the fruits of its judgments by executing the consent judgment. This court was thus urged to dismiss the application herein as the same was a non-starter.
8. Despite the court ordering for parties to file submissions, none was filed by the defendants /applicants.
9. However, the plaintiff/respondent filed its submission thus addressing the following issues for determination:

- a. Whether the 1st, 2nd and 3rd Defendants' Application has been filed inordinately late;**
- b. Whether the 1st, 2nd and 3rd Defendants' Supporting Affidavit offends the mandatory provisions of Rule 9 of the Oaths and Statutory Declaration Rules;**
- c. Whether the Applicants have made out a case for the grant of the Stay Order Orders;**
- d. Whether the Consent adopted on 4th August 2020 should be set aside; and**
- e. Who should bear the costs of this Application.**

10. It was submitted that the application was filed inordinately late—over five years after the consent judgment was adopted—and that the same lacked any explanation for the delay. Reliance was drawn

from the cases of **Standard Ltd vs Wilson K. Kalya (C.A. 306 of 2002)** and **Peter Kungu Waweru vs Stephen Karanja Waweru (C.A 389 of 1996)** where Omolo J. stated that, in his view, a delay of 3 months was inordinate and not deserving of court's discretion.

11. That the defendants only acted after being summoned to court, suggesting their application was reactive rather than proactive. It was further contended that the defendants' supporting affidavit violated Rule 9 of the Oaths and Statutory Declaration Rules as the exhibits were not properly sealed or serialized. That this procedural lapse rendered the documents inadmissible thus urging the court to expunge them from the record.
12. On the issue of stay orders, the plaintiff maintained that the defendants failed to meet the three conjunctive conditions required: demonstrating substantial loss, filing the application without unreasonable delay, and offering security. The plaintiff noted that the case involved a monetary decree and that execution was being pursued in a separate judicial review matter, not in the current file.
13. Regarding the consent judgment, the plaintiff asserted that it was entered freely and with the full knowledge of the defendants who were represented by counsel. That the plaintiff provided evidence of negotiations and part payments made over time and showed that the consent amount was calculated after accounting for accrued interest and prior payments. It was contended that allegations of fraud or miscalculations were deemed vague and unsupported with no particulars provided or actions taken against

the defendants' former advocates. The plaintiff relied on the case **HCCC No. 135 of 1998 Insurance Company of East Africa vs The Attorney General & 3 Others** urging that in a matter of fraud, there must be evidence. That in this case, no such evidence was adduced to support such claim.

14. Similarly, it was urged that the request to involve the Auditor General was not sound noting that the Auditor General was not a party to the suit and lacked jurisdiction to audit private entities like the plaintiff. The plaintiff argued that such audits could be initiated by the county government without court intervention. And finally, the plaintiff requested costs of the application, citing section 27 of the Civil Procedure Act and the case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & Others [2014] eKLR where it was stated** that costs follow the event. This court was urged to dismiss the defendants' application arguing that it was unjustified, procedurally flawed, and devoid of merit.

15. I have considered the application herein and the response thereof. The only issue that germinates for determination is whether the consent judgment dated 16.07.2020 entered by the parties herein should be set aside.

16. The crux of the matter herein is the validity of the consent mutually entered between the parties herein. In determining whether the consent judgment in question ought to be set aside, this court is properly guided by the determination of the Court of Appeal in the case of **Board of Trustees National Social Security Fund vs Micheal Mwalo [2015] eKLR** where the court

enunciated the grounds upon which consent judgment/order may be set aside as follows:

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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.”

17. Similarly, Haris J. in the case of **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485** held that -

“1.A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2.A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such

limitation was brought to the notice of the other side.”

18. In the instant case, it is not controverted that the parties entered a consent judgment dated 16.07.2020 through their then advocates Duncan Muyodi and Ahmednassir Abdikadir, counsel for the plaintiff and the defendant respectively. The same was consequently adopted as the order of the court. The defendant/applicant's main argument is that the consent order should be set aside noting that the plaintiff had previously been paid some amount of money and further, that in his quest to execute the decree herein, the same amounts to fraud. Critically looking at the arguments by the defendant/applicant, one wonders why the said consent judgment ought to be set aside given that on the strength of the very judgment, the defendant/applicant proceeded to partly pay the plaintiff.

19. In my view, it was incumbent upon the defendant/applicant to prove that indeed the execution of the consent judgment was fraudulent. [See Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya].

20. In the case of **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that: -

‘As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case

upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act’.

21. I have perused the documents annexed by the defendant/applicant and of importance to note is the fact that the said documents were simply annexed without much explanation or simply put, they were thrown at the court to make out what was important and what was not. No detailed explanation or demonstration was exhibited to show that indeed the alleged amounts had been paid to the judgment creditor. For instance, exhibit marked KAM-5 purporting to be proof of payment does not demonstrate how much was paid to Gamadid trading company and when.
22. In the same breadth, noting that this being a 2016 matter, the question that begs an answer is why it took so long for the applicant to move this court having made the new discovery which in any event is not established.
23. It is outright that the applicant did not place before the court any evidence of fraud in regards to the alleged money previously paid to the plaintiff/respondent. It is trite that to prove fraud, the defendant/applicant needed more than mere statements in their affidavit. This is so noting that the level of proof in fraud cases goes beyond probable cause. It is telling, for example, that the applicants did not present any evidence of any action to support their claim.

24. It is common knowledge that audit on public funds is done annually. How come it took that long to discover the alleged information? The respondent explained that the amount paid does not include the interest which was calculated at commercial rates hence the reason why the principle amount was higher. That the amount which was paid is admitted but the same does not take care of the principle sum plus interest hence the claim of non-disclosure of material information does not arise. The respondents did not rebut this fact.
25. In a nut shell, the applicants have not demonstrated that they had fully paid or have fully paid the amount due which includes the interest payable before the consent was signed or after. The application is a mere attempt to circumvent the validity of the consent order which in my opinion has not been sufficiently challenged.
26. In view of the above analysis, I do not find any cogent reason to find that payment has been paid fully to satisfy the full outstanding amount. Accordingly, the application is devoid of merit hence dismissed with costs to the respondent.

Dated, signed and delivered virtually this 20th day of November 2025

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J.N.ONYIEGO
JUDGE