



REPUBLIC OF KENYA



KENYA LAW
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Okero & 12 others v County Assembly of Nyamira & another (Petition E001 of 2024) [2025] KEELRC 3306 (KLR) (26 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3306 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII

PETITION E001 OF 2024

JK GAKERI, J

NOVEMBER 26, 2025

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 21, 22, 23, 24, 32,
33, 38, 47, 48, 50, 73, 75, 94, 95(5)(A), 118, 159 AND 259
OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3, 4, 6, 7 AND 11 OF THE
FAIR ADMINISTRATIVE ACTION ACT CAP 7L OF THE LAWS
OF KENYA

AND

IN THE MATTER OF UNLAWFUL AND UNCONSTITUTIONAL
IMPEACHMENT OF THE SPEAKER OF THE COUNTY
ASSEMBLY OF NYAMIRA

AND

IN THE MATTER OF ALLEGED INFRINGEMENT AND
CONTRAVENTION OF ARTICLE 1, 10, 32, 33, 38, 47, 48, 50,
94, 118 AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INFRINGEMENT AND CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
CHAPTER FOUR OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

ENOCK O OKERO 1ST PETITIONER



JOEL OMBONGI NYANG'AU	2 ND PETITIONER
MARTHA MARWA	3 RD PETITIONER
ELIJAH SAGWE ABERE	4 TH PETITIONER
LAMECK SIKWEYA	5 TH PETITIONER
EDNAH OBARAPET	6 TH PETITIONER
JELIAH NYAKANGI	7 TH PETITIONER
JANEROSE NYAKUNDI	8 TH PETITIONER
ZIPPORAH MATUNDURA	9 TH PETITIONER
LYDIAH NYAMBOKE MOSIERE	10 TH PETITIONER
ABEL MOKAYA MOSE	11 TH PETITIONER
BEATRICE ONYANCHA	12 TH PETITIONER
EMMANUEL NYAMBEGA GISESA	13 TH PETITIONER

AND

THE COUNTY ASSEMBLY OF NYAMIRA	1 ST RESPONDENT
AG CLERK, COUNTY ASSEMBLY OF NYAMIRA	2 ND RESPONDENT

RULING

1. Before the court for determination is the Applicant's Notice of Motion dated 5th August 2025 filed under Certificate of Urgency seeking Orders that:
 1. Spent.
 2. Spent.
 3. The consent dated 14th July 2025 and adopted as an Order of the court on 31st July 2025 be set aside in its entirety.
 4. This matter be set down for the hearing and determination of the Petition dated 25th October 2024 on its merits.
 5. Costs of this Application be in the cause.
 6. Any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.

2. The Notice of Motion is expressed under Article 23(3) of *akn ke act 2010 constitution the Constitution* of Kenya, Section 12(3)(viii) of the *akn ke act 2011 20 Employment and Labour Relations Court Act* and Rules 3(1) and (2) of the High court Practice and Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Ndubi E. Mokuu Advocate sworn on 5th August 2025, who deposes that by a consent dated 14th July 2025 the respondents agreed to compensate the 1st Petitioner in lieu of reinstatement.



3. That the consent was recorded after the affiant received information from a Section of Members of the County Assembly that they had decided to amicably resolve the matter and it was adopted by the court on 31st July 2025, and on 5th August 2025 the affiant received letters disowning the consent on the ground that it would cripple the operations of the 1st Respondent.
4. That there was no written authorization by the 1st respondent for the consent dated 14th July, 2025 as adopted by the court. That it was based on a misrepresentation by a Section of members of the 1st respondent that the parties had negotiated in good faith and resolved to settle the matter.
5. That the consent was entered into as a result of an inadvertent mistake.
6. That the gross salary of the Speaker of the County Assembly was captured as Kshs.750,000.00 in lieu of Kshs.549,283.00
7. That it was against public policy and would amount to unjust enrichment for the 1st Petitioner to be paid tax payers money for the remainder of the contract for services not rendered and there was a substantive Speaker of the County Assembly.
8. The affiant further deposed that the 1st Petitioner intended to execute the consent from 1st October 2025 and the same ought to be stayed and ultimately set aside for the suit to proceed to hearing and determination.
9. That the instant application was filed timeously.
10. Puzzlingly, the respondents filed a Further Supporting Affidavit sworn by Mr. Duke Onyari, Clerk County Assembly, Nyamira on 12th September 2025 without leave of the court.
11. Mr. Duke Onyari deposed that he was the Secretary of the 1st respondent and according to him neither the 1st nor the 2nd respondent was aware of the consent judgment adopted on 31st July 2025 (wrongly capture as 21st July 2025) and were never consulted.
12. The affiant deposed that the principles of Public Finance were not taken into account and the consent was contrary to public policy.
13. The affiant further deposed that no instructions had been given by the 1st Petitioner and the affiant for the consent to be recorded and it ought to be set side and the Petitioner stood to suffer no prejudice because the suit will be heard on merits.
14. That the respondents stood to suffer immensely and loss of public funds will ensure.
15. That the consent was never discussed.

Respondent's case

16. On 29th October, 2025, the 1st Petitioner's counsel filed grounds of opposition dated 24th October 2025 together with a Notice of Preliminary Objection of even date.
17. In his Grounds of Objection, counsel urged that the Application dated 5th August 2025 was incompetent, misconceived, fatally defective and a gross abuse of court process as it was challenging a valid consent judgment and the court had no jurisdiction to hear and determine it as framed and the applicants ought to have appealed the decision.
18. That the Application was defective for want of a valid Supporting Affidavit as the one record was incurably defective as the advocate on record then could not impeach a consent he consented to in exercise of ostensible authority as an advocate for the respondents.



19. That the Further Supporting Affidavit of Duke Onyari was equally defective, incompetent and void as the affiant was a stranger to the proceedings and lacked capacity to swear the affidavit.
20. That the application was an invitation to the court by the applicants to sit on appeal over its own judgment as the challenge raised related to the correctness and merits of the consent judgment suitable for an appeal.
21. That the Application offended Section 75 of the *Kenya Civil Procedure Act 1975* and Order 43 of Civil Procedure Rules.
22. The affiant deposed that the application offended the doctrine of finality of litigation and undermined the sanctity of consent judgments.
23. Finally, counsel stated that the application was a belated afterthought instituted in bad faith in abuse of the courts equitable jurisdiction and did not demonstrate any of the recognized grounds of setting aside a consent judgment such as fraud, collusion, illegality, mistake of fact or, misrepresentation, and was for dismissal.
24. Contemporaneously, the respondent filed a Reply Affidavit sworn by Mr. Enock O. Okero, the 1st Petitioner on 29th October 2025.
25. The affiant deposed that the Further Supporting Affidavit sworn by Mr. Duke Onyari lacked validity as it was irregular and filed by a stranger to the proceedings.
26. That the applicant's counsel Mr. Ndubi E. Mokuia represented to the court that he had instructions from the clients and the consent dated 14th July 2025 was the culmination of extensive negotiations in meetings attended by the incoming and outgoing speakers, majority leader and counsel for both parties and members of the Nyamira County Assembly Service Board.
27. The affiant provided specific details of the meetings held, venues and attendees from 24th April 2025 to 17th May 2025.
28. That in addition to the consent dated 14th July 2025, other related consents were also reached and adopted and none had been challenged and the applicants were thus acting selectively while retaining and benefiting from other agreements reached at during negotiations.
29. The affiant further deposed that the negotiations were conducted openly with the participation of Senior Officer of the 1st respondent and the allegation that the respondents were unaware of the consent was untrue as the County Assembly Service Board participated in the negotiations so did their advocate and the respondents were bound by his actions and the alleged letters of disownment of the consent were written after its adoption by the court, could not invalidate it retrospectively and the change of mind by respondents was not a ground for setting the consent judgment aside.
30. The affiant deposed that the respondents entered into the consent voluntarily and could not escape its consequences as no demonstrable ground for setting the consent judgment aside had been shown and the alleged mistake on the gross salary of the Petitioner could not vitiate a binding consent which was negotiated.
31. That the court had no jurisdiction to entertain the instant application, the consent judgment could not be reviewed and the 1st Petitioner would suffer prejudice as he had vacated office for the current speaker, Mr. Thadius Nyabaro.



Petitioner's submissions

32. Concerning the court's jurisdiction to entertain the Application to set aside the consent judgment, Mr. Omoke, for the 1st Petitioner submitted that the court had no jurisdiction on the ground that the Notice of Motion was incompetent, misconceived and fatally defective as it was an invitation to the court to sit on appeal over its own judgment and it was *functus officio* .
33. Reliance was placed on Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR, to underscore the essence of jurisdiction and urge that on adoption of the consent judgment dated 14th July 2025, the court became *functus officio* and the applicant ought to have gone to the Court of Appeal in lieu of invoking review jurisdiction improperly and was abusing the court process.
34. As to whether the consent judgment can be set aside, reliance was placed on Michael V Kiunga [2025] KEHC 14725 (KLR), Board of Governors Changamwe Secondary School V Commissioner of Lands & 2 others [2015], which cited Hirani V Kassam [1952] 19 EACA 131, Flora N. Wasike V Destino Wamboko [1988] eKLR, Brooke Bond Liebig Ltd V Mallya [1975] EA 266 and Monyenye & another V Obure [2024] KEHC 9359 (KLR) to emphasize the circumstances in which a consent judgment may be set aside such as fraud, collusion, misrepresentation, mistake or non-disclosure among others, to urge that the respondent Applicants had not provided sufficient grounds for the consent judgment to be set aside.
35. On the incompetency of the Notice of Motion, counsel placed reliance on Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others [2009] KLR 229, to urge that the instant application fell within the definition of abuse of court process as it was actuated by bad faith to harass, vex and prejudice the 1st Petitioner and in addition, the Notice of Motion had no Supporting Affidavit as the one sworn by Mr. Ndubi E. Mokuia offended Rule 9 of the Advocates Practice Rules as held in Musau & 2 Others V Kiamba [2025] KEELRC 3525 (KLR), Mawando Ltd V Thousand Palm Beach Ltd & 2 others [2019] KEELC 2420 (KLR) which cited Republic V Nairobi City County Government & 6 Others Ex Parte Mike Sonko Mbuvi to urge that the Supporting Affidavit was void and the Further Affidavit was filed by an outsider to the case and without leave of the court.
36. Without a Supporting Affidavit as ordained by Order 51 Rule 4 of the Civil Procedure Rules, the Notice of Motion was incurably defective and was liable to being struck out.
37. Reliance was further placed on the sentiments of the court in Stephen Mukiri Ndegwa & another V Kenya Commercial Bank Ltd [2021] KEHC 8537 (KLR) on the authority of the advocate who has been duly instructed, to compromise the suit.

Respondent's submissions

38. Counsel submitted that the consent judgment dated 14th July 2025 ought to be set aside because it was based on information received from a section of members of the County Assembly, the Accounting Officer of the respondents was not privy to the consent, it was based on misrepresentation by a Section of members of the 1st respondent and was a consequence of an inadvertent mistake on the part of the respondents Advocate, the amount cited as the 1st Petitioner's salary was incorrect, it was based on an illegality, was contrary to public policy and lack of budgetary allocation. That the Speaker of the 1st respondent did not authorise its recording and the 1st Petitioner stood to suffer no loss or prejudice.
39. According to counsel' the respondents advocate had no written consent to record the consent dated 14th July 2025 and no instructions had been given.



40. Whereas the provisions of Article 159(2)(c) of *akn ke act 2010 constitution the Constitution of Kenya* was cited on the doctrine of finality of litigation, no judicial authority or pronouncement was relied upon and counsel urged the court to allow the application.
41. It is trite that whenever a notice of Preliminary Objection is filed it ought to be disposed of at the earliest possible because of its potential to terminate the suit but at that stage.
42. As to whether the 1st Petitioner respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection, the issue was uncontested and the court is satisfied that the threshold encapsulated by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] E. A. 696* has been met.
43. Similarly, the respondent's Notice of Preliminary Objection raises several arguments including the court's jurisdiction to hear and determine the instant application.
44. It is trite law that jurisdiction is everything as espoused by Nyarangi J. A. in his celebrated sentiments in the *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (supra)*.
45. See also *Equity Bank Ltd V Bruce Mutie Mutuku t a Diani Tours & Travel [2016] eKLR*, *Joseph Kamau Muthee Kamu & another V David Mwangi Gichure & another [2013] eKLR* and *Lemita Ole Lemein V Attorney General & 2 others*.
46. Counsel for the 1st Petitioner argues that the Supporting Affidavit sworn by Ndubi E. Mokuia Advocate of the High Court on 5th August 2025 offended Rule 9 of the Advocates (Practice) Rules.
Counsel cited the decision in *Musau & 2 others V Kiamba [2025] KEELC 3525 (KLR)*.
47. The pith and substance of the respondent's objection is that the Advocates (Practice) Rules prohibits an Advocate from swearing an Affidavit on contentious matter as Mr. Ndubi E. Mokuia Advocate did having been the applicant's advocate.
48. That the Supporting Affidavit was fatally defective, incompetent and a nullity.
49. Rule 9 of the Advocates Practice Rules provides:

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

In *Ibrahim & another V Zumzum Investment Ltd [2024] KECA 862 (KLR) Odunga JA* held:

The general rule is that advocates should not swear affidavits in contested matters. Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swear an affidavit in contested matters potentially of exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits. That was the opinion in the case of *Magnolia Pvt Limited V Synermed Pharmaceuticals (K) Ltd (2018) eKLR* in which advocates were cautioned from swearing affidavits on their clients' behalf..."



See also *Hakika Transport Services Ltd V Albert Chulah Wamimitaire* [2016] eKLR and *Pattni V Ali & others* [2005] IEA 339 [2005] IKLR 269.

In *Turea Ltd t a Dr. Mattress V Mohamed* [2022] KECA 1271 (KLR) P. Nyamweya JA held:

... On the Affidavit filed in support of the application that was sworn by the Applicant's advocate, under rule 9 of the Advocates Practice Rules, it is not the mere swearing of an affidavit that renders it defective but the swearing of an affidavit on contentious issues of which he or she has no knowledge of. The said rule has a proviso that expressly states as follows..."

50. The learned Judge declined to strike out the Supporting Affidavit for inter alia, the matters deponed upon were within the knowledge of the advocate and others were legal.

In *Magnolia Pvt Ltd V Synermed Pharmaceuticals (K) Ltd* (supra) the court stated:

Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

Similarly, in *Pattni V Ali & Others* (supra), the court stated that:

... is of course right that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of Order 18 Rule 2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information, the sources of which he can disclose and state the grounds for believing the information".

51. In *Nedim Mohamed & another V Zumzum Investment Ltd & another* (supra), Odunga JA held that the facts deponed by counsel were within his knowledge and was the best person to have sworn the affidavit. The Judge dismissed the objection as there was nothing wrong.
52. According to counsel for the respondent the Supporting Affidavit was irregular and thus a nullity by dint of Rule 9 of the Advocates (Practice) Rules.
53. A reading of Rule 9 of the Advocates (Practice) Rules reveals that it does not expressly bar an advocate from swearing an affidavit on matters within his or her knowledge and which he or she can establish as demonstrated by the decisions of G. V. Odunga JA and P. Nyamweya JA in the decisions cited elsewhere in this ruling.



54. Relatedly, in *Magnolia Pvt Ltd V Synermed Pharmaceuticals (K) Ltd* (supra), the court was imploring advocates to avoid doing so not because it was prohibited but because of the unforeseen eventualities of litigation.
 55. In the instant case, the Affidavit by Ndubi E. Mokuia Advocate relates to matters that were within his knowledge and had not cited anyone else but himself.
 56. He swore about the consent dated 14th July 2025 adopted as a judgment on the court on 31st July 2025 and that the respondents had agreed to compensate the respondent in lieu of reinstatement and it was recorded after he received requisite information from unnamed members of the County Assembly and subsequently received letters dated 4th August 2025 disowning the consent.
 57. In the court's view, all the matters deponed were well within counsel's knowledge and could prove them.
 58. Ultimately, the court is not persuaded that the fact that Ndubi E. Mokuia Advocate swore the Supporting Affidavit rendered it incompetent or fatally defective as to render the instant application liable to be struck out for being incompetent.
 59. In *Charles Muthama Musau & 2 others V Daniel Mbithi Kiamba* (supra) relied upon by the respondents counsel, the appellate court struck out paragraphs 7 – 15 of the Supplementary Affidavit on the ground that they contradicted the submissions by counsel who had sworn the Affidavit.
 60. Whereas the decision of E. O. Obaga J. cited by the 1st Petitioner's counsel is persuasive authority, the court is bound by the sentiments of the Court of Appeal in *Kamlesh Mansukhlal Damji Pattni V Nasir Ibrahim Ali & 2 others* (supra), and those of G. V. Odunga JA and P Nyamweya JA cited elsewhere in this Ruling.
 61. For the foregoing reasons the court is not satisfied that the respondent has proved its case to justify the striking out of the applicant's Supporting Affidavit sworn on 5th August 2025.
 62. To that extent, the Applicant's Notice of Motion dated 5th August 2025 is not incompetent.
 63. Be that as it may, the respondent's Notice of Preliminary Objection raised other grounds which require examination and disposal.
 64. Contrary to the counsel for the respondent's argument that a consent judgment cannot be impeached, it could, on certain grounds prescribed by law otherwise by way of appeal as suggested by the counsel. It can be set aside pursuant to an application analogous to the one before the court.
 65. A consent judgment may be impeached on various grounds including fraud, collusion, there was no consensus between the parties, public policy, mistake, misrepresentation, duress or undue influence.
 66. See in this regard *Brooke Bond Liebig (T) Ltd V Mallya* [1975] E. A 266, *Flora Wasike V Destimo Wamboko* 1982 – 88 I KAR 266 *Kenya Commercial Bank Ltd V Benjoh Amalgamated Ltd & another* Civil Appeal No. 276 of 1997, *Diamond Trust Bank of Kenya Ltd V Plypanels Ltd & others* Civil Appeal No. 243 of 2002, *Samson Munikah V Wadube Estates Ltd* [2007] eKLR KECA 176 (KLR), *Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd* [1982] KLR 485 and *Board of Trustees National Social Security Fund V Michael Mwalo* [2015] eKLR and *Lukio Otieno & another V Churchill Omolo Bodo* [2025] KECA 73(KLR).
- Nothing turns on this ground.



67. Similarly, the contention that Section 7 of the *akn ke act 1924 3 Civil Procedure Act* prevented the re-opening of a consent judgment under the doctrine of finality of litigation does not deny a party from seeking the setting aside of a consent judgment on any of the recognized grounds nor the provisions of Article 159(2) of *akn ke act 2010 constitution the Constitution* of Kenya.
68. Finally, the Further Supporting Affidavit sworn by Mr. Duke Onyari filed 12th September 2025 was filed without leave of the court.
- Similarly, it is unclear to the court under what rule the Further Supporting Affidavit was filed.
- The Further Supporting Affidavit sworn on 12th September 2025 cannot stand and it is accordingly expunged from the record.
69. As regards the doctrine of a probation and reprobation, it is an equitable principle whose purpose is to discourage a party from blowing hot and cold or fast and loose as held in *State of Punjab & others V Dhanjit Singh Sandhu*, Civil Appeal No. 5698 – 5699 of 2009.
70. It simply means that where a party knowingly accepted the benefits of a contract or order or conveyance it is estopped from denying its validity or binding effect on such party.
71. In this case, the respondent has not demonstrated the benefit the applicants enjoyed from the consent bearing in mind that it disowned it in less than one (1) week after its adoption as a judgment of the court.
72. In sum, the court is not satisfied that the applicants were estopped from impeaching the consent judgment.
73. In the end the court is satisfied that the respondent's Notice of Preliminary Objection dated 24th October 2025 is devoid of merit and it is dismissed.

Analysis

74. This case has had a long and chequered history dating more than one (1) year and is one of the several suits filed in October 2024 after the suspension and subsequent impeachment of the then Speaker of the Nyamira County Assembly, the Petitioner.
75. The court can only hope and trust that the matter will not remain outstanding for another year after this ruling.
76. The applicants' sought the setting aside of the consent judgment dated 31st July 2025 on the grounds that its advocate had no written authority to consent on the matter, some members of the 1st respondent misrepresented facts to counsel, counsel entered into the consent mistakenly and there was a mismatch in the gross salary, hence a mistake.
77. The applicant also alleged that the consent judgment was against public policy and the 1st Petitioner would be unjustly enriched.
78. While the applicants averred and their counsel on record submitted that there was justifiable cause or reason for the court to set aside the consent judgment dated 31st July 2025, the respondent deponed and his counsel submitted that the applicants had not proved any basis on which the court could ground the setting aside of the consent judgment as no evidence of the alleged grounds had been adduced. Thus, the threshold to set aside a consent Order had not been satisfied.



79. Contrary to the respondent counsel's contention that a consent judgment or Order could be impeached or challenged, it could and if the basis of the challenge was evidentially demonstrable, the consent judgment or Order would be set aside or varied in certain circumstances.
80. Significantly, it is essential to underline the principle that a consent judgment or Order is equivalent to a legally enforceable agreement between the parties.
81. The foregoing principle has been underscored in countless decision of the Court of Appeal and the High Court. In *Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (supra)* Harns J held:
 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..."
- Similarly, in *Lukio Otieno & another V Churchil Omolo Bodo (supra)* the Court of Appeal held:
 A consent judgment is a contract of record between parties entered into with approval of the court. It is not be to sundone easily..."
82. As regards challenging of a consent judgment or Order, there is sufficient judicial authority on the circumstances in which a consent order or judgment may be set aside or varied.
83. In *James Kanyiita Nderitu & Hellen Njeri Nderitu V Marios Philotas Githikas & Mohammed Swalel Athmen [2016] KECA 470 (KLR)* the Court of Appeal stated:
 It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example grounds of fraud, mistake or misrepresentation (see *Brook Bond Liebig (T) Ltd V Mallya [1975] EA 266*; *Flora Wasike V Destimo Wamboko [1988] KLR 429* and *Kenya Commercial Bank Ltd V Benjoh Amalgamated & another CA No. 276 of 1997*)."
84. The foregoing sentiments were cited with approval in *Chali Lwambi Mwalembe & Thomas Lwambe Mwatembe V Freedom Ltd [2025] KECA 252 (KLR)*.
85. Further, in *Samson Munikah , Practising as Munikah and Co. Advocates V Wadube Estates Ltd [2007] KECA 176 (KLR)* the Court of Appeal stated:
 This appeal raises the vexed question: What are the circumstances in which a consent judgment may be set aside. In *Brooke Bond Liebig (T) Ltd V Mallya [1975] EA 266*, the court of Appeal for East Africa set out the circumstances in which a consent judgment 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:
86. 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 on Judgments and Orders, 7th Edition, Vol 1 P. 124 was approved:
 Prima facie, any Order made in the presence and with 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 reason which would enable the court to set aside an agreement.



No such circumstances have been shown to exist in this case. There is no suggestion fraud or collusion. All material facts were known to the party who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham J said in the introduction to the passage quoted above from Hiranis case , a court cannot interfere with a consent judgment except in the circumstances as would afford good ground for varying or rescinding it...”

Mustafa JA the Ag. Vice president expressed similar sentiments.

The Court of Appeal expressed similar sentiments in Board of Trustees National Social Security Fund V Michael Mwalo (supra).

87. As will become clearer later in this ruling, the sentiments of Law Ag. P. in Brooke Bond Liebig (J) Ltd V Mallya applied on all fours to the facts of the instant case.
88. As regards the authority of an advocate, the sentiments of Harris J in Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (supra) are instructive, thus:

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”.

89. Similarly, in Mwalambe & another V Freedom Ltd (supra), the Court Appeal held:

Undeniably, advocates are recognized agents of parties on behalf of whom they make their appearances and address the court. In so acting, an advocate is bound to obey the instructions of his her principal, in this case the client, and should neither exceed nor fall short of those instructions lest he she be held liable for any misrepresentation he she may make. The general assumption unless otherwise proved, is that an advocate being the authorised agent of a party, is deemed to be fully authorised by his her client and that whatever he she transacts is assumed to be within the full knowledge and authority of the client”.

90. Regrettably, in the instant case Mr. Ndubi E. Mokuia advocate deponed that he had no authority from the applicants to enter into the consent but had been acting for the Applicants herein and held himself out to the court and to other advocates as one who had authority to pursue the matter to finality.
91. Counsel for the respondent did not require the written authority the affiant indicated that he did not have and assuming it was necessary for him to proceed with the adoption of the consent, why did counsel proceed?
92. Having been instructed by the applicants, the counsel and his law firm had not only express and implied authority, they also had customary or usual authority of an agent appointed by agreement and additionally ostensible or apparent authority based on his conduct which counsel for the respondent relied upon and executed the consent dated 14th July, 2025, which the court too relied upon and adopted the consent as an Order of the court on 31st July 2025. Clearly, Mr. Ndubi E. Mokuia was estopped from denying that he had no authority to negotiate and execute the consent herein.
93. More significantly, however, the affiant did not avail any scintilla of evidence to demonstrate that indeed he had no written authority to proceed in the manner he did.
94. See Ndirangu V Commercial Bank of Africa [2002] 2 KLR 603 where the court held that one had to show that the advocate had no instructions to enter into a compromise.



95. In the instant case, counsel had full control over the conduct of the trial and had the requisite authority. In the court view, nothing turns on this allegation.
96. The unchallenged evidence by the respondent vide his Replying affidavit sworn on 24th October 2025 leave no doubt that there were negotiations and meetings preceding the execution of the consent.
97. The respondent identified the dates, venues and attendees of the meeting and the applicants counsel was present all of them.
98. Concerning the alleged mistake on the respondent's salary that it was not Kshs.750,000 but 549,283 as captured in the consent, copies of the respondent's payslips on record for September 2024 and December 2024 show that the respondent's gross salary was Kshs.766,503.00 and was more in December 2024 owing to payment of arrears of sitting allowance.
99. At common law a mistake of fact can only render a contract void where it is proved that there was no contract at all and the mistake was common, such as, non-existent of the subject matter; or the mistake was mutual, where parties were at cross purposes and thus, no agreement arose. In such a case, the contract is a nullity for want of consensus ad idem or agreement.
100. In the instant case the alleged mistake or error, if any, was clerical and could not vitiate the consent and in any event the parties could consensually agree to amend the figure but as shown above, no mistake of fact was demonstrated.
101. Thirdly, in Paragraph 7 of the Supporting Affidavit the affiant stated that the letters he received disowning the consent contended that the consent would cripple the operations of the 1st respondent, which respectfully was not one of the grounds on which a consent Order or Judgment may be set aside.
102. Finally, on the alleged misrepresentation by an unnamed sections of the membership of the 1st respondent, the affiant was in the court's view less than candid. A sweeping statement that some unnamed individuals misrepresented facts to him on an unknown date and time is undoubtedly puzzlingly.
103. A common law, a party relying on misrepresentation in an attempt to rescind the contract is obligated to evidentiary demonstrate that it was a misrepresentation of a material fact intended to be relied upon by the other party to the contract and was false or untrue and the maker was aware of its falsity and loss ensued.

Significantly, the nature of the misrepresentation ought to be proved as well. Was it negligent, fraudulent or innocent?
104. Based on the Supporting Affidavit sworn on 5th August 2025, it is unclear as to who made the false representation, when it was made whether it was material and its nature.
105. It is trite law that a party seeking the setting aside of a consent order or judgment is duty bound to produce evidence to prove that the circumstances of the case justified the setting aside of the order or judgment.
106. It is not enough to pose or state the grounds or allegations relied upon and leave them unsubstantiated as it happened in this case where no evidence that the advocate had no instructions, mistake or misrepresentation was availed. Put in the alternative, to impeach a consent Order or Judgment it must be shown that the alleged vitiating circumstances existed, on a preponderance of probabilities.

See in this regard Board of Trustees National Social Security Fund V Michael Mwalo (supra) and Mwalambe & another V Freedom Ltd (supra).



107. Finally, when the application for adoption of the consent dated 14th July 2025 was filed on 15th July 2025 under Certificate of Urgency, the court did not deem it urgent and adoption was slated for 31st July 2025. If the applicants herein or its counsel or both had any concerns about the consent, they had more than 2 weeks to raise them and object to the adoption of the consent as an Order or Judgment on the court on 31st July 2025.
108. Intriguingly, the consent dated 14th July 2025 was filed by the applicants counsel on record then on 15th July 2025 at 7:18:14.
109. In the court's view, the change of mind after the consent was adopted by the court was an afterthought which also explains the haste with which the instant applicant was made.
110. The sentiments of the Court of Appeal in *Mwalambe & another V Freedom Ltds* (supra) are worth restating in conclusion:
- We can only guess that what precipitated the grievance was a change of mind following adoption of the consent, for which this court cannot come to their aid. They just have to live with the binding terms of the consent judgment they voluntarily entered into”.
111. These sentiments apply on all fours to the circumstances of the instant case.
112. Flowing from the foregoing it is discernible that the applicants' Notice of Motion dated 5th August 2025 is for dismissal and it is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 26TH DAY OF NOVEMBER 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of *akn ke act 2010 constitution the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *akn ke act 2010 constitution the Constitution* and the provisions of Section 1B of the *akn ke act 1924 3 Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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