

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**HCCOM NO. E008 OF 2024**

**FREEDOM PLUS LIMITED** .....  
.....**PLAINTIFF**

**VERSUS**

**MARTIN B. JEREMY** .....  
.....**DEFENDANT**

**RULING**

1. The Defendant filed an application dated 15.7.24 seeking the following:
  1. *Spent.*
  2. ***THAT the firm of CHEPKWONY AND ASSOCIATES ADVOCATES BE ALLOWED TO COME ON RECORD BY FILING notice of change of advocates on behalf of the Defendant/Applicant in place of the firm of Muiruri & Mwangi advocates.***
  3. *Spent.*
  4. ***THAT the Honourable Court be pleased to order stay of execution of the orders/judgment issued herein on 9<sup>th</sup> July, 2024 pending the hearing and determination of this suit.***
  5. ***THAT the Applicant be granted leave to participate in this suit by filing pleadings upon service of the same upon the Applicant.***
  6. ***THAT the Honourable Court be pleased to issue any other order as may seem just.***
  7. ***THAT the costs of this Application be provided for.***
  
2. The Defendant’s case is that the consent judgment entered on 9.7.24 in which the Defendant allegedly undertook to pay the Plaintiff a sum of Kshs. 129,770,000/= for a debt he does not know as he does not do any business; that the Defendant’s right to a fair trial was violated as he was never served with any pleadings in this matter; that the Defendant has never instructed one Ms. Njeri or any other advocate to represent him; that he became aware of this matter and the consent judgment on 15.7.24 when a demand was dropped at Absa Bank, Malindi branch requiring it to transfer funds from his account to the Plaintiff’s advocates, Marende Necheza & Company Advocates. The Defendant urged that the Application be allowed in the interests of justice.
  
3. The Plaintiff opposed the Application *vide* grounds of opposition dated 7.10.24. The grounds are that the application is defective, malicious, misconceived, lacking in merit and an abuse of

the Court process; that the Defendant is in debt to the Plaintiff as outlined in the debt recovery agreement dated 15.7.21; that the Application is an abuse of the Court process and the Court is *functus officio* and is bound by its judgment dated 10.7.24 and lacks authority to deviate therefrom; that the Defendant is bound by the consent entered on the 9.7.24 by both parties. The Plaintiff prayed that the Application be struck out with costs.

4. The Defendant swore a further affidavit on 30.8.24 in which he exhibited a forensic examination report which indicates that the signature purported to be his appearing on the debt recovery agreement dated 15.7.21 is a forgery. The said agreement was used to obtain the judgment in question. The Defendant thus averred that the judgment and decree were obtained through forgery, falsification of documents. Further, that a similar case had been filed in Nyamira and that the same orders were set aside. He urged that the orders obtained herein be stayed, set aside and discharged as the Court cannot be used to perpetuate fraud and criminal activities in the eyes of the public. He further urged the Court to note that the suit was commenced on 25.6.24 and concluded in July 2024 and the Plaintiff tried to execute within the same month.
5. Parties' filed their written submissions which I have duly considered.
6. I will begin with whether the firm of Chepkwony & Associates should be allowed to come on record for the Defendant.
7. Order 9 Rule 9 of the Civil Procedure Rules provides:

*When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—*

  - (a) *upon an application with notice to all the parties; or*
  - (b) *upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*
8. The above provision makes it mandatory that change of advocates post judgment must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.
9. The rationale of the provision was set out in the case of **SK Tarwadi vs Veronica Muehlmann [2019] eKLR** as follows:

***In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him.***

10. In the present case, the Defendant has in his Application sought leave for his new advocates to come on record in place of Muiruri & Mwangi Advocates who he says he never instructed to represent him. The Plaintiff opposes this prayer and contends that the said advocates were not served with the Application. The Defendant says that service was effected. However, there is no affidavit of service on record and therefore no evidence of service. Although the Defendant claims to have served the Application, there is no evidence of service.
11. The question before this Court is whether failure to serve the Application on Muiruri & Mwangi Advocates is fatal. My view is that it is not. The Defendant sought leave of the Court in compliance with Order 9 Rule 9(a). What would have been fatal is if the Defendant's advocates had purported to come on record without seeking leave of the Court.
12. I now turn to the prayer for stay of execution and setting aside of the consent judgment. The Plaintiff has opposed the setting aside of the judgment, contending that a consent order entered into by counsel is binding on all parties and cannot be set aside or varied unless fraud or collusion is proved. The Plaintiff asserted that the Defendant's counsel were properly on record and acted on his instructions.
13. The jurisdiction of the Court for review of orders is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules provides:

***45(1) Any person considering himself aggrieved—***

***(1) Application for review of decree or order***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed,***

***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

14. It is the Defendant's contention that the consent judgment was obtained by misrepresentation, collusion and fraud as he had not instructed Muiruri & Mwangi Advocates to act for him in the suit herein. Further that the debt recovery agreement dated 15.7.21 used to obtain the judgment in question was a forgery. He exhibited a forensic examination report prepared by Martin E. Papa, a document examiner. The report indicated that after examination of the signature in debt recovery agreement it was noted that the same does not display individualizing handwriting characteristics and habits that are similar in nature and consistent with the standard signatures in the Defendant's passport, national identity card and specimen signature. Further that the signatures in the Defendant's said documents and that in the debt recovery agreement were not authored by the same person. This finding was not challenged by the Plaintiff. The Defendant also averred that a similar case had been filed in Nyamira and that the same orders were set aside. He exhibited an order to that effect from the High Court at Nyamira dated 21.8.24.
15. None of these contentions were controverted by the Plaintiff. It is trite law that what is not denied is deemed to be admitted. It is stated in **Odger's Principles of Pleadings and Practice in the High Court of Justice 25th Edition**, page 124 as follows:
1. ***Any allegation of fact unless traversed is admitted.***  
***The pleader must either admit or deny every material allegation of fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. To ensure this, Rule 13 provides that any allegation of fact is deemed to be admitted unless traversed and that a traverse may be either by a denial or by a statement of non-admission and either expressly or by necessary implication.***
16. Having failed to deny the allegations that the debt recovery agreement was a forgery, the Plaintiff is deemed to have admitted the same. The material placed before this Court is adequate to lead to the conclusion that the consent judgment was anchored on a forged debt recovery agreement and therefore obtained through fraud and misrepresentation.
17. It is trite that a consent judgment may not be set aside unless the same was obtained by proven fraud or collusion. In **In Re the Matter of the Estate of G K K (Deceased) [2014] eKLR** Lenaola, J. (as he then was) had this to say about the setting aside of a consent order:
- With that context in mind, it is generally agreed that a Consent order is akin to a contract and can only be set aside on the following grounds;***
- (i) that it was obtained by fraud, mistake or misrepresentation.***
  - (ii) that it was obtained by collusion.***
  - (iii) that it was an agreement contrary to the policy of the Court...***

*Similarly Azangalala, J. (as he then was) in Charity Kamama vs East African building Society, HCCC No.1754/1995 quoted with approval the holding of Hancox J. A, who while determining the celebrated case of Flora Wasike vs Destimo Wamboko (1982 – 1988) I KAR 625 stated as follows and following Hirani vs Kassam (1952) 19 EACA 13:*

*“prima facie, any order made in the presence and with the consent of 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 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.”*

18. The disputed consent dated 9.7.24 was signed by the firm of Muiruri & Mwangi & Co. Advocates for the Defendant. It was also signed by the Plaintiff’s advocates on record. The Defendant has denied ever instructing the said advocates to represent him. It would also seem inconceivable that the Defendant who has indicated in his affidavit that he resides in Watamu, would instruct a firm of advocates in Nakuru, to represent him in a matter filed in the High Court at Malindi. The Court finds on a balance of probabilities that the Defendant did not instruct the firm of Muiruri & Mwangi & Co. Advocates to act for him.
19. The Court notes that the Defendant did not make a prayer for setting aside the consent judgment. However, in his affidavits, he urged that the same be set aside. The Plaintiff also submitted on the same. Further, the Defendant prayed for any other order that may be just. Having found as I have, that the consent judgment was obtained through fraud and misrepresentation, the same cannot stand.
20. In the end and in view of the forgoing, I find that the Application dated 15.7.24 is merited and the same is allowed on the following terms:
  1. The firm of Chepkwony and Associates Advocates is allowed to come on record for the Defendant in place of the firm of Muiruri & Mwangi advocates.
  2. The consent judgment dated 9.7.24 is hereby set aside and the suit shall be heard on merit.
  3. The Defendant is granted leave to file pleadings herein which shall be filed and served upon the Plaintiff by 13.2.26.
  4. Mention on 4.3.26 for compliance and directions.
  5. Costs to abide the outcome of the suit.

**DATED, SIGNED and DELIVERED in MALINDI this 30<sup>th</sup> day of January 2026**

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**M. THANDE**  
**JUDGE**