

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC L MISC NO. E283 OF 2024**

**SPACEMASTER PROPERTIES  
LIMITED ..... APPLICANT / DECREE  
HOLDER**

**VERSUS**

**BAMBOO CASK LIMITED..RESPONDENT/JUDGMENT  
DEBTOR**

**RULING**

1. This suit was marked as settled on 25<sup>th</sup> March 2025, following the filing of a consent between the parties dated 20<sup>th</sup> March 2025, in which they reached a settlement for the entire dispute and which consent was adopted as an order of this court.
2. Subsequently, three applications which are for determination before this Court were filed.

## **Notice of Motion dated 3<sup>rd</sup> October 2025**

**3.** It is filed by the Respondent/Judgement debtor which seeks the following Orders;

**a) Spent.**

**b) Spent.**

**c) Spent.**

**d) That upon hearing and determination of this application, this Honourable court be pleased to stay execution of the consent order entered into on 20<sup>th</sup> March 2025 and any other consequential orders thereto.**

**e) Spent.**

**f) That upon hearing and determination of the instant application, this Honourable court be pleased to set aside ex debito justitiae the consent order entered into on 20<sup>th</sup> March,2025 and all other consequential orders thereto.**

**g) That in the alternative, the Honourable court be pleased to issue an order of status quo with relation to properties being LR No. 209/1245**

**and 209/22352 located in Westlands within Nairobi City County.**

**h) That any other orders as the court may deem fit and just to issue.**

**i) That cost of the suit be in the cause.**

4. The application is premised on grounds on its face and on the supporting affidavit of Duncan Ng'ang'a Njenga, one of the directors of the Respondent. He avers that upon the suit being filed, directors of the Respondent resolved to extend its lease with 18 months, upto October 2026 instead of its previous term of 5½ years, owing to the fact that its previous landlord had sold the suit premises. It therefore entered a consent with the Applicant/Decree holder on the said terms and in a show of good faith, it paid 6 months' rent upfront and proceeded on a massive improvement of its business at costs of about kshs.8,110,000.00.
5. He claims that on 2<sup>nd</sup> September 2025, the Respondent was surprised when it was served with an eviction notice for 15<sup>th</sup>

October, 2025. Subsequently, it discovered that its previous advocates had filed a fundamentally defective consent in conjunction with the Decree holder and contends that mistake of Counsel ought not be visited upon the Respondent, which is an innocent litigant.

6. He asserts that the Respondent/ Judgement debtor's new advocate has discovered that its previous advocates had not been properly on record as they neither filed a Notice of Appointment of Advocates nor a Memorandum of Appearance and that they acted without proper instructions.
7. The application is opposed by the Decree holder vide the replying affidavit of Oliver Tangara, its legal officer. He insists that vide the consent dated 20<sup>th</sup> March 2025, the Applicant's expired commercial Lease Agreement was extended upto 15<sup>th</sup> October 2025 thus the Judgement debtor's allegation that it ought to have been extended upto October 2026, is an afterthought intended to invalidate a

lawfully executed and adopted agreement of the parties. Further, that the Judgement debtor has complied with terms of the said consent by paying rent arrears.

8. He also contends that the Judgement debtor/ Applicant is engaged in an abuse of court and forum shopping as after failing to obtain favourable interim orders herein, it moved the Chief Magistrate's Court at Nairobi vide **MEELC NO. E922 OF 2025** by an application dated 6<sup>th</sup> October 2025 and obtained ex parte orders by misleading the Honourable Magistrate.

**Notice of Motion dated 13<sup>th</sup> October 2025**

9. It is filed by the Judgement Debtor who seeks similar orders as in its application dated 3<sup>rd</sup> October 2024. The Notice of motion is supported by the affidavit of Duncan Nganga Njenga. He avers that upon service of the application dated 3<sup>rd</sup> October 2025 on the Decree holder, on 9<sup>th</sup> October 2025,

it sent a gang to threaten the Judgement debtor and destroy its property. Further, that the Judgement debtor has been forced to employ young men to guard the suit premises, which has proved costly.

**Notice of Motion dated 14<sup>th</sup> October, 2025**

**10.** It is filed by the Applicant/Decree Holder which seeks the following Orders:

**a) Spent.**

**b) That this Honourable court be pleased to grant orders of eviction against the Respondent from the Applicant's properties being Land Reference No.209/1245 and Land Reference No.209/22352, situated in Parklands, Nairobi.**

**c) That the Applicant be granted vacant possession of the properties being LR NO.209/1245 and LR NO.209/22352, Nairobi.**

**d) That a permanent injunction be issued restraining the Respondent/Judgment Debtor or through their personal representatives and**

**assigns from procuring any further dealings in regards to the properties.**

**e) That warrants of execution do issue to Court Bailiff to carry out the eviction against the Respondent and to put the Applicant in possession of the properties.**

**f) That the officer commanding station (OCS) Parklands Police Station be ordered to provide security to the Applicant and to maintain law and order during the eviction.**

**g) That the Honourable court do give any other or further directions in the interest of justice.**

**h) That the costs of the suit and those occasioned by this application be provided for.**

**11.** The application is premised on grounds on its face and on the supporting affidavit of Oliver Tangara, Advocate. He avers that the Decree holder is the registered proprietor of **LR No. 209/1245** and **LR No. 209/22352** and in which premises the Judgement debtor has been a tenant through a commercial Lease Agreement dated 20<sup>th</sup> June 2019, for a

lease term of 5 years and 3 months with the previous owner, (Zaisal Limited).

- 12.** He reiterates that by a consent dated 20<sup>th</sup> March 2025, parties agreed to extend the Lease to 30<sup>th</sup> September 2025 with a grace period of fifteen (15) days to vacate. He points out that the Judgement debtor had filed two (2) others suits on the same subject, being **CMCC/E917/2025** and **ELCLC /E055/2025**, and that the same consent dated 20<sup>th</sup> March 2025 was adopted in **CMCC/E917/2025** while **ELCLC /E055/2025** was closed by Hon. Vincent Kiplagat.
- 13.** He confirms that on 2<sup>nd</sup> September 2025, the Decree holder through its advocates served the Judgement debtor with a notice to vacate the suit premises. He asserts that the Judgement debtor has partly complied with the Decree herein by paying rent by way of cheques but is reluctant to fully comply, thus it should be evicted in the interest of justice.

**14.** The application is opposed by the Judgement debtor vide the replying affidavit of its director, Duncan Ng'ang'a Njenga. He admits that the Judgement debtor did enter into a tenancy agreement which was for a term of 5 years and 3 months with an option of extension and that midway the term of the Lease, its landlord, Zaisal Limited sold the suit premises to the Decree holder, without the Judgement debtor's knowledge. He claims the Judgement debtor confronted Zaisal Limited since it had invested heavily on the suit premises and the said former landlord informed it, that it had a gentleman's agreement with the Decree holder that it would extend the Judgement debtor's Lease and in the event it failed, it would compensate the Judgement debtor with kshs. 20 million. He contends that the Decree holder shortly thereafter served them with an eviction notice, which led to the consent agreement which was meant to extend the lease for about two (2) years upto September 2026 but in the consent a wrong date of September 2025 was erroneously captured. He reiterates that the Judgement debtor is open to

being compensated with kshs. 20 million and being given Ninety (90) days to vacate the suit premises.

**15.** The applications were canvassed by way of written submissions

### **Submissions**

**16.** The Judgement debtor submits that its application to have the consent dated 20<sup>th</sup> March 2025 set aside is merited on grounds of mistake, misrepresentation and collusion, It reiterates that its former advocates without express consent and in cahoots with the Decree holder acted outside the scope of its instructions in executing the said consent by altering its instructions to extend its commercial Lease to 15<sup>th</sup> October 2025 instead of 15<sup>th</sup> October 2026, which was unlawfully captured in the impugned consent to facilitate its eviction.

**17.** It submits that the said advocates did not commit a mere clerical error, but a fundamental variance affecting the

duration of its tenancy and the right to quiet possession of the suit premises and therefore goes to the root and substance of the consent, thereby vitiating it and rendering it incapable of enforcement.

**18.** On its part, the Decree holder submits that at the time of the impugned consent between the parties, the Judgement debtor was represented by Advocates who were officially on record and had authority to compromise the suit on behalf of their client. Further, that there is no evidence that the Judgement debtor informed the Decree holder of any limitation on their advocate's authority and that its own conduct confirms the contrary as it partially fulfilled its obligations under the consent order by settling the outstanding rent.

**19.** It submits that since the Judgement debtor took no steps to challenge the consent until 3<sup>rd</sup> October 2025, seven days before the agreed vacation date, the allegations now claimed to vitiate the consent demonstrates malicious intent, and are

an afterthought aimed at undermining a lawfully executed agreement between the parties.

**20.** It cites the decisions of **Bouchard International (Services) Ltd v M' mwereria [1987] KLR 193** and **James Kanyita Nderitu & Another v. Marios Philotas Ghikas & Another (Civil Appeal No. 6 of 2015) eKLR** to submit that consents unlike default judgements, cannot be set aside ex debito justitiae but only on grounds that would justify setting aside a contract and in this case, no particulars of fraud or collusion have been proved.

**21.** It also submitted that the Judgement debtor cannot escape from a contract after enjoying its benefits while denying its burdens. Further, that the Judgement debtor's conduct of filing multiple applications violates the sub judice rule codified in Section 6 of the Civil Procedure Act.

**22.** With regard to the application dated 13<sup>th</sup> October 2025, it submits that

the allegations that it attacked the Judgement debtor are unsupported by evidence and that it would be illogical to engage in such an illegal conduct while it has a valid Decree of this Court.

23. To buttress its averments, the Decree holder relied on the following decisions: **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR), Board of Trustees National Social Security Fund vs Micheal Mwalo [2015] eKLR, Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485 and Flora N. Wasike v. Destimo Wamboko [1988] eKLR, Purcell v. F.C. Trigell Ltd [1970] 2 All ER 671.**

### **Analysis and Determination**

**24.** Upon consideration of the three instant Notice of Motion applications including the respective affidavits and rivalling submissions, the following are the issues for determination:

- **Whether the consent order dated 20<sup>th</sup> March 2025 and adopted by the court on 25<sup>th</sup> March 2025 should be set aside.**
- **Whether the Applicant/Decree Holder is entitled to enforce the consent dated 20<sup>th</sup> March 2025 and adopted as order of court on 25<sup>th</sup> March, 2025.**

**25.** The Judgement debtor seeks to set aside the consent dated 20<sup>th</sup> March 2025 and adopted as order of court on 25<sup>th</sup> March 2025, entered between the parties herein, on grounds of mistake, misrepresentation and collusion. It cites lack of authority of Counsel, and contends that its former advocates in cahoots with the Decree holder, acted outside the scope of its instructions and altered its instructions to extend its

commercial Lease to 15<sup>th</sup> October 2026 and instead extended it to 15<sup>th</sup> October 2025. Further as a consequence of the mistake, it is faced with eviction despite having invested heavily on the suit premises with the knowledge that its Lease would terminate on 15<sup>th</sup> October 2026.

26. In opposition, the Decree holder contends that the Judgement debtor's Counsel had authority to act for it because if he did not, the Judgement debtor would have promptly raised the issue. It maintains that the impugned consent was entered into voluntarily thus the Judgement debtor's applications are an afterthought designed to frustrate the execution of the decree.

27. The principles for setting aside a consent judgement are well settled. The Court of Appeal stated as follows in the case of **Board of Trustees National Social Security Fund versus Michael Mwalo [2015] eKLR:**

*“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.”*

Emphasis Mine

**28.** Further, the Court of Appeal stated as follows in **Guzzini & another v Tinga & 7 others (Civil Appeal E047 of 2021) [2024] KECA 493 (KLR) (26 April 2024) (Judgment)**;

*“Be that as it may, we hasten to observe that a court is not obligated to inquire into the terms on which counsel is instructed by their client in judicial proceedings. Neither can the court take upon itself to inquire into the conduct of negotiations between learned counsel leading to such consent orders. In the absence of fraud,*

*mistake or misrepresentation, such orders stand (see Frank Phipps & Pearl Phipps v Harold Morrison SCCA 86 of 2008; and Kinch v Walcott and Others [1929] A.C. 482)."*

**29. In Kuwinda Rurinja Co. Limited v Andkuwinda Holdings Limited & 13 others [2019] eKLR**, the Court cited a passage from Seton on Judgments and Orders, 7<sup>th</sup> Edition, Vol. 1 at page 124, which passage was cited in **Hirani vs. Kassam (1952) 19 EACA 131**, as follows:

*".... Although an advocate has ostensible authority to compromise his client's case, employing such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which a client has given him... And if it is shown to the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation ... a court of law would be entitled to conclude that there was fraud or*

***collusion involved and will not uphold the consent order issued.”***

**30.** In this instance the Judgement debtor claims the erstwhile Advocate did not have instructions to enter into the impugned consent. Further, that the Commercial Lease was supposed to be extended to October, 2026 instead of October, 2025. It has sought compensation of kshs. 20 million and being given Ninety (90) days to vacate the suit premises. It claims that its previous landlord had told them that the Decree holder would compensate them with Kshs. 20 million but has not provided any documentary evidence to that effect.

**31.** I note on the 25<sup>th</sup> March, 2025, it is actually the Judgement Debtor’s advocate that had informed the Court that they had reached a settlement and filed the consent dated the 20<sup>th</sup> March, 2025. Further, I note after entry of the impugned consent, on 25<sup>th</sup> March 2025, the Judgement debtor only filed an application on 3<sup>rd</sup> October, 2025 when the Lease was on

the verge of expiry seeking to set aside the consent. The Judgement debtor has not denied it filed two (2) others suits on the same subject, being **CMCC/E917/2025** and **ELCLC /E055/2025**, and that the same consent dated 20<sup>th</sup> March 2025 was adopted in **CMCC/E917/2025** while **ELCLC /E055/2025** was closed by Hon. Vincent Kiplagat. It has further not denied that it settled the rent arrears.

**32.** The Judgement debtor has also failed to furnish the Court with an affidavit from the erstwhile advocate confirming its allegations that the said advocate did not have instructions to enter into the impugned consent. I opine that the reasons advanced to set aside the impugned consent are not plausible. Further, there is no demonstration that there was undue influence or fraud during the negotiations before entry into the consent. In my view the Judgement debtor is not being candid and that is why it filed the two instant applications last minute.

- 33.** Based on the facts as presented while relying on the decisions I have cited above, I find that this is not a clear case where the consent was entered into by fraud, collusion or contrary to Public Policy as claimed. Further, the parties and their advocates consented to compromise this suit and since there is a Decree to that effect, the same can be executed. From the foregoing, I am unable to set aside the consent judgement dated the 20<sup>th</sup> March, 2025 and adopted as an Order of Court on the 25<sup>th</sup> March, 2025.
- 34.** Since I have declined to set aside the consent dated the 20<sup>th</sup> March, 2025 and entered as an Order of the Court on the 25<sup>th</sup> March, 2025, I have no recourse but to allow the Decree holder to execute the impugned order and proceed to evict the Judgement debtor. However, in the interest of justice, I direct that the eviction be effected after three (3) months.
- 35.** In the foregoing, I find the Judgement debtor's two applications dated 3<sup>rd</sup> October, 2025 and 13<sup>th</sup> October 2025 unmerited and will disallow them. I however find the Decree

holder's application dated 14<sup>th</sup> October, 2025 as merited and will allow it and direct that the Judgement debtor be evicted after three (3) months of this Order.

**36.** Costs to Decree holder.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS  
12<sup>TH</sup> DAY OF MARCH, 2026**

**CHRISTINE OCHIENG  
JUDGE**

**In the presence of:**

Fatma for Decree Holder

Bulowa for Echom for Judgement Debtor

Court Assistant: Joan