

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
COMMERCIAL CASE NO. E001 OF 2024

GEORGE OTIENO OTWAL T/A

ASEMBO SOKO LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NCBA BANK LIMITED..... 1ST

DEFENDANT/RESPONDENT

MUGANDA WASULWA T/A

KEYSIAN AUTIONEERS 2ND

DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed applications dated 8/8/2025 and 22/1/2026 as well as another one dated 26/1/2026.
2. The application dated 8/8/2025 seeks the following reliefs:
 - i) Spent.
 - ii) That the ruling and Order of this court dated 19/6/2025 be set aside, or reviewed, or nullified,

pending the hearing and determination of this application exparte.

- iii) That Orego & Company Advocates be allowed to come on record for the Applicant, subject to Order 9 Rule 9 of the Civil Procedure Rules.
- iv) That the cost of this application be provided for.

3. The application dated 22/1/2026 is filed by the Plaintiff himself and seeks the following reliefs:

- i) Spent.
- ii) That this court be pleased to grant leave to the Applicant to act in person in lieu of the firm of Orego & Company Advocates.
- iii) That pending the hearing and determination of this application inter parties, the Honourable Court do grant stay of the execution of the Decree herein and sell of the property as per the orders dated 19/6/2025 and the gazette Notice dated 15th January 2026.
- iv) That the Honourable Court be pleased to review its orders made on 19/6/2025 to enable the Applicant make monthly payment of Kshs800,000/= from Kshs1,000,000/=.
- v) That the cost of this application be in the cause.

4. The application dated 26/1/2026 is filed by the Plaintiff's present advocates Mwangambo & Okonjo Advocates which seeks the following reliefs

- i) Spent.
- ii) That the Honourable Court be pleased to grant leave to the firm of Mwagambo & Okonjo Advocates to come on record for the Plaintiff/Applicant.
- iii) That this Honourable Court be pleased to issue an Order of Temporary Injunction to restrain the 1st Defendant /Respondent by itself, its agents, servants, auctioneers (Purple Royal Auctioneers and/or any other auctioneer acting under the instructions of the 1st Defendant/Respondent or advocate from doing any of the following acts, that is to say, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, letting , charging or otherwise howsoever interfering with the Plaintiff's possession and ownership of Land Parcel being LR Nos. South Gem/Ndori/1640, South Gem/Ndori/1710, West Asembo/Nyagoko/2153, West/Asembo/Nyagoko/2154, Kisumu/Kogony/3199, Kisumu/Kogony/6362, Kisumu Kogony/6827 and Kisumu/Korando/3976; pending inter partes hearing and determination of this application and all other applications still pending before the court.

- iv. That this Honourable Court be pleased to issue an Order under the doctrine of lis pendens and Section 106 of the Land Registration Act, previously enshrined under Section 52 of the Indian Transfer of Property Act (1959) (repealed) that during the pendency of this application and all other applications still pending before the court and pending final determination in accordance with the law, all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the charged properties with any land registry, government department and all other registries be and is hereby prohibited in all those places of land known LR Nos. South Gem/Ndori/1640, South Gem/Ndori/1710, West Asembo/Nyagoko/2153, West Asembo/Nyakogo/2154, Kisumu Kogony/3471, Kisumu/Kogony/3199, Kisumu/Kogony/6362, Kisumu/Kogony/6829 and Kisumu/Korando/3976 pending interpartes hearing and determination of this application and all other applications still pending before the court.
- v. That this court be pleased to issue an order of status quo preserving the suit properties South Gem/Ndori/1640, South Gem/Ndori/1710, West Asembo/Nyagoko/2153, West

Asembo/Nyakogo/2154, Kisumu Kogony/3471, Kisumu/Kogony/3199, Kisumu/Kogony/6362, Kisumu/Kogony/6829 and Kisumu/Korando/3976 pending inter partes hearing and determination of this application and all other applications still pending before the court.

vi. That the cost of this application be in the appeal.

5. Further the 1st Defendant filed a replying affidavit dated 31/10/2025 and sworn by Jackson Nyaga which averred inter alia; that he is the legal counsel working for the 1st Defendant thus conversant with the facts pertaining to the matter and duly authorized and competent to swear it on behalf of the 1st Defendant; that it is not disputed that the firm of Bruce Odeny & Company Advocates had been duly instructed by the Plaintiffs and to that effect filed a notice of change of Advocates; that it is trite law that a duly instructed advocate has an implied general authority to compromise and settle the action and that the client cannot avail himself of any limitation by him of the implied authority to his advocates unless such limitation was brought to the notice of the 1st Respondent but the same was not done; that it is settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled which are not carried out; that whoever is seeking to interfere with a consent judgment must show that there was fraud or collusion or that the consent was given without sufficient material facts; that the grounds advanced by the Applicant is that the former

advocates did not seek his instructions before the consent was entered; that at no point was it disputed that the firm of Bruce Odeny & Company Advocates had been duly instructed by the Plaintiffs and that those instructions had not been withdrawn at the time the consent order was recorded; that the Plaintiff has not challenged the entry of the consent on any other ground save only that he claims that he was not informed of the contents of the consent; that a court is not obligated to enquire into the terms on which counsel is instructed by their client in judicial proceedings and neither can the court take upon itself to enquire into the negotiations between learned counsel leading to the consent; that the advocate is presumed to have the authority to compromise or enter into consent orders unless there is clear evidence of fraud, collusion, mistake, misrepresentation; the Applicants cannot challenge the consent judgment just because they were not consulted because any dispute between a client and counsel would amount to professional misconduct and the same ought to be addressed by the relevant bodies; that the application should be dismissed with costs to the 1st Defendant.

6. The Plaintiffs former advocates Bruce Odeny filed a replying affidavit dated 22/9/2025 in response to the Notice of Motion dated 8th August 2025 and which was served upon his office by email on 17th September 2025. The same avers inter alia; that for starters he had no objection to the law firm of Orego & Company Advocates coming on record in their place; that however he had strong reservations to the allegations made

by the Plaintiffs in the application whose intention seems to deliberately malign counsel's good name; that the has been an advocate for 21 years good standing where he has built a solid reputation in his practice earning the utmost trust of his clientele, the courts as well as his peers. That he does not take kindly any attempts to disparage or destroy the said reputation through falsehood and malice; that he was instructed in this matter by the Plaintiff on 24/7/2024 to take over the conduct of the matter from the law firm of Onyango Jonyo & Company Advocates. That the 1st Plaintiff being the sole director, shareholder and owner of the 2nd Plaintiff as per the annexed Notice of Change of Advocate; that in the meanwhile upon court granting the injunction orders on 28/2/2025, the Plaintiff herein instructed his law firm to seek an out of court settlement with the Defendants instead of the matter proceeding to full trial; that the 1st Plaintiff constantly called and kept visiting his office on a daily basis to push them to secure settlement with the Defendant; that following a series of negotiations by both email and telephone with Advocates Pravin Odiyo for the Defendants, a draft consent letter was developed which he personally shared with the Plaintiffs who gave their go ahead to record the same as per the annexed WhatsApp communication extract detailing the conversation as well as the authority to record the same; that upon adoption of the same all was well as the Plaintiffs kept updating him by phone calls on the payments they were making to comply with the terms of the consent; that it was not until sometimes late July 2025 when the 1st Plaintiff called

him complaining that the 1st Defendant's advocate had deducted an excess of Kshs1,000,000/= from his account being their costs of the suit. That the 1st Defendant was entitled to costs but they were yet to file their bill of costs for taxation; that on 12/8/2025, he received a phone call from Advocate Pravin Odiyo for the Defendants to the effect that the Plaintiffs through another law firm had filed an application to set aside the consent order where the Plaintiff denied giving him instructions to record the consent to which he responded that he was not aware of the application as he was yet to be served. That in the meanwhile, he reiterated to advocate Pravin Odiyo that he was indeed instructed to record a consent; that he then immediately called the 1st Plaintiff to inquire whether it was true that they had filed an application to set aside the consent through another law firm. That the 1st Plaintiff initially feigned ignorance but upon further probing, he admitted that he was told to deny the consent by the firm of Orego & Company advocates so that he can buy time. That the Plaintiff's problem seems not to be with the consent but the fact that the Defendant's law firm had recovered an excess of kshs1,000,000/= from his account wherein he contacted Advocate Pravin Odiyo again on the issue of costs to which he insisted that they had not filed any bill of costs but that they relied on the loan agreement which compelled the borrower to meet the legal costs of the 1st Defendant in any event; that he contacted Joel Orego of Ogero & Company Advocates to put the record straight that instructions to record the consent was given by the Plaintiff where he shared with

him the conversation with the 1st Plaintiff. That advocate Joel Orego promised to correct the distorted facts as per the annexed whatsapp communication with Joel Orego; that he assumed all was sorted only to be surprised again with service of this application on 17/9/2025 still containing the distorted facts; that in as much as he may understand the Plaintiff's action to deny the consent having defaulted on the same in order to obtain interim orders to put their house in order, it was totally wrong, unprofessional, malicious and unlawful to misuse the good name of counsel in the process; that accordingly, in as much as he sympathize with the Plaintiffs whose properties are on distress, as an officer of the court and a senior advocate of good standing, he will stand by the truth that he entered into a consent with the express instruction of the Plaintiff.

7. The 1st Defendant appears not to have filed responses to the Plaintiff's applications dated 22nd January 2026 and 26th January 2026.
8. The applications were canvassed by way of written submissions.
9. Learned counsel for the Plaintiff's Mr. Orego filed submissions dated 11th December 2025 but which related to the Plaintiff's application dated 10th September 2025 but the same should have been in respect of the application dated 8th August 2025 since the one dated 10th September 2025 was struck out by this court on 17th September 2025. Nevertheless, the gist of

the Plaintiff's complaint is that he had not given instructions to his erstwhile advocate Mr. Bruce Odeny who purported to enter into a consent with the 1st Defendant without his express authority. Whereas the Plaintiff seeks to have this court set aside the said consent on the ground that it lacked consensus ad idem and further that the Plaintiff is an innocent party who should be protected, the Plaintiff's former advocates filed a comprehensive affidavit in response dated 22nd September 2025 which seems to completely whitewash the Plaintiff's allegations. The said affidavit has laid bare the fact that indeed, the Plaintiff was aware of the consent. It seems that the Plaintiff is unable to meet the loan obligations and is out to use every trick in the book or opportunity to forestall the 1st Defendant from proceeding to realize the securities. The present counsel for the Plaintiff Mr. Otongo, had been advised that he was required to submit on the application dated 8/8/2025 and that he was to be at liberty to amend his colleague's submissions aforesaid so as to reflect the correct application for determination namely 8/8/2025 instead of 10/9/2025. Apparently, learned counsel Mr. Otongo seems not to have filed any submissions regarding the applications dated 8/8/2025, 22/1/20026, and 26/1/2026.

10. The 1st Defendant's counsel Mr. Pravin Odiyo filed submissions dated 11/12/2025 regarding the application dated 8/8/2025 and that he did not file any submissions regarding the Plaintiff's latest applications dated 22/1/2026 and 26/1/2026. It was submitted that the application dated 8/8/2025 is an abuse of court process in that all the issues

in that matter were directly and substantially concluded vide the consent entered into by the parties on 18th June 2025. It was also submitted that the Plaintiff has not met the stringent threshold for setting aside a consent judgment. It was also submitted that the Plaintiff had been represented by his counsel who had authority to enter into the consent and who was deemed to have had express or implied instructions from the Plaintiff. It was contended that the claim by the Plaintiff that he was not consulted should be rejected because the issue between him and his advocate is internal between them. It was also submitted that the application by the Plaintiff is meant to delay the finality of litigations in that the Plaintiff now seeks to re-open concluded proceedings without any legally recognized ground of law. It was finally submitted that if the application was allowed, then consent judgments would be rendered meaningless and that commercial certainty would be destroyed as parties will then be encouraged to repudiate lawful compromises at will and hence the court should firmly reject such conduct so as to protect its own processes and authority. It was finally submitted that the application should be dismissed with costs to the 1st Defendant. The case of Gulf African Bank Limited v Realtek (K) Limited & 5 Others [2025] KEHC 2689 (KLR) was relied.

11. I have considered the three applications together with rival affidavits and submissions filed. It is not in dispute that the Plaintiff has filed three applications all seeking similar orders.

It is also not in dispute that the Plaintiff's application dated 10th September 2025 was struck out by this court on the 17th September 2025 on the grounds that the Plaintiff's then advocates Mr. Oregio lacked the capacity on locus standi to purport to prosecute the said application as he had not secured the requisite right to come on board for the Plaintiff. It is also not in dispute that while the Plaintiff was litigating the application lodged before this court, he also filed other suits at Winam Law Courts namely Winam SPM's Court Civil Case No. E253/2025 and No. E012/2026. It is also not in dispute that the magistrates' court at Winam Law Courts in the two matters has since vacated the interim orders of injunction issued in favour of the Plaintiff herein on the ground that the Plaintiff had misrepresented facts and approached the court with unclean hands. I find the issue for determination is whether the applications dated 8/8/2025, 22/1/2026 and 26/1/2026 have merit. I propose to start with the earlier application dated 8/8/2025 after which the rest will follow.

12. It is noted that the Plaintiff filed the application dated 8/8/2025 in a bid to stem the onslaught by the 1st Defendant who was out to realize the securities that had been offered to enable the Plaintiff obtain some loan monies. This suit was lodged way back in 2024 and that the Plaintiff filed an application dated 13th May 2024 alongside the plaint wherein he sought several interim reliefs pending determination of the suit. This court on

28/2/2025 determined the said application and granted the Plaintiff the interim order of injunction and on condition that he sets down the suit for hearing and to see to it that the suit was concluded within 90 days from the date of the order failing which the orders of injunction shall stand discharged and that the costs of the application were to abide the outcome of the suit. The parties mentioned the matter for some time until they reached an agreement and duly entered a consent dated 18th June 2025 and which was adopted by this court on 19/6/2025 as an order of the court. This court then assumed that the parties were to handle the matter pursuant to the consent aforesaid. It seems the Plaintiff failed to adhere to the terms of the consent and which forced the 1st Defendant to proceed with the process of realizing the securities that had been offered to it by the Plaintiff in consideration of the loans disbursed to him. It was then that the Plaintiff filed the application dated 8/8/2025 through the firm of Orego & Company Advocates wherein he sought a raft of prayers namely, the setting aside of the consent order adopted on 19/6/2025, an order of injunction to stop the 1st Defendant from proceeding to sell the securities, an order granting leave to the firm of Orego & Company Advocates to come on record for the Plaintiff and costs of the application. Further, it is noted that the Plaintiff accused his former advocates M/s Bruce Odeny & Company Advocates of entering the purported consent without his authority. This elicited a sharp response from the Plaintiff's former advocate Mr. Bruce Odeny who filed a

lengthy replying affidavit and denied the allegations levelled against him by the Plaintiff. A thorough perusal of Bruce Odeny's affidavit reveals that the Plaintiff indeed had consultations with his said former advocate which crystalized into the consent now in dispute. Mr. Bruce Odeny has given a chronology of the events and has disclosed that the Plaintiff at the time was in a crisis and therefore needed to buy time so as to forestall the impending sale of his properties.

13. I now need to deal with the prayer for leave to Orego & Company Advocates to come on record for the Plaintiff. The record reveals that the Plaintiff was initially represented by the firm of Onyango Jonyo before Bruce Odeny took over. Now that the Plaintiff is still desirers of changing his advocate, I find that he has a right to do so because as the client, he reserves the ultimate right to hire and fire since he is the principal. Leave to come on board to represent litigants is guided under the provisions of Order 9 Rule 9 of the Civil Procedure Rules which allows new advocates to secure a consent from the former advocates to represent the party or if that is not possible, then they file an application before the courts seeking for such leave. It would appear to me that the said new advocates to the Plaintiff did not manage to secure the requisite consent from the firm of Bruce Odeny and thus the prayer for leave. As it is noted that Mr. Bruce Odeny in his affidavit has indicated that he has no objection to the Plaintiff hiring another lawyer, I find the request for leave to

act for the Plaintiff by the firm of Orego & Company Advocates has merit and is allowed.

14. As regards the prayer to set aside the consent entered between the Plaintiff and the 1st Defendant on 18/6/2025 and adopted on 19/6/2025, there are guiding principles in that regard.

15. In **Samson Munikah practicing as Munikah & Company Advocates -vs- Wedube Estates Limited [2007] eKLR**, the Court of Appeal addressing a similar issue stated as follows:

“This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In Brook bond Liebig (t) Ltd -vs- Mallya [1975] EA 266, the then Court of Appeal for East Africa set out the circumstance in which a consent judgment freely entered into by the parties to a dispute in court would be set aside by the court. Delivering the leading judgment of the court, Law Ag. P expressed himself thus:

‘the circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani -vs- Kasam [1952] (19 EACA 131) where the following passage from Senton on

Judgments and Orders 7th Edition Vol 1 P 124 was approved: prima facie any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action and 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 a reason which would enable the court to set aside an agreement.'"

16. In **Flora Wasike -vs- Destimo Wamboko [1982 - 88]**

1 KAR 266, the Court of Appeal held that:

a. It is settled law that the consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.

b. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.

c. The court would not readily assume that judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise.”

17. It is my considered view that the consent entered into between the Plaintiff and the 1st Defendant can only be set aside if there is fraud, mistake or misrepresentation. The circumstances herein show that the Plaintiff's former advocate had ostensible authority to enter into the consent judgment on his behalf. I find that the Plaintiff has not convinced this court that there was any fraud or mistake or misrepresentation as claimed by the Plaintiff as he has not presented sufficient proof to warrant this court to set aside the consent judgment. It is instructive that the Plaintiff's former advocates have presented credible version to the effect that the Plaintiff had given instructions or authority for the entry of the consent. The Plaintiff appears not to have filed a rejoinder to the comprehensive affidavit of his erstwhile advocate and hence he lost the opportunity to challenge the averments of Bruce Odeny. I find that there is no ground which has been presented to persuade me to interfere with the said consent. I find the Plaintiff's redress seems to lie in pursuing an action against his said former advocate for failing to follow his instructions regarding his dispute with the 1st Defendant. There is the Advocates' Complaints

Commission wherein the Plaintiff can approach and present his grievances against his former advocates over the conduct in handling the matter on his behalf.

18. An analysis of the rival contestations between the Plaintiff, 1st Defendant and the Plaintiff's former advocate leaves no doubt that the present application is an abuse of court process in that all the issues in that matter were directly and substantially concluded vide the consent entered into by the parties on 18th June 2025 and adopted on 19/6/2025. It is clear that the Plaintiff has not met the stringent conditions for setting aside a consent judgment. The Plaintiff's former counsel had clearly represented him and who had authority to enter into the consent and who was deemed to have had express or implied instructions from the Plaintiff. The comprehensive affidavit of Bruce Odeny Advocate left no doubt that he had instructions to represent the Plaintiff and that he went ahead to aver that the Plaintiff was interested in buying time and to forestall the 1st Defendant from proceeding to sell his properties. Hence, the claim by the Plaintiff that he was not consulted should be rejected because the issue between him and Mr. Odeny is internal between them. It seems that the Plaintiff is out to delay the finality of litigations in that he now seeks to re-open concluded proceedings without any legally recognized ground of law. I find that this trend is likely to set a very bad precedent in that consent judgments would be rendered meaningless and that commercial certainty would be destroyed as parties will

then be encouraged to repudiate lawful compromises at will and hence the court should firmly reject such conduct so as to protect its own processes and authority. In the case of **Gulf African Bank Limited v Reatek (K) Limited & 5 Others [2025] KEHC 2689 (KLR)** the Court held that a consent judgment has contractual force, is binding on the parties and can only be set aside on grounds that would vitiate a contract through fraud, collusion, mistake, misrepresentation and/or lack of material facts. Indeed, the consent in issue led to the determination of the matter in that the parties were no longer required to litigate on it and that the Plaintiff was thereafter to proceed to make repayments of the outstanding loan in accordance with the terms of the consent. The Plaintiff therefore should not be allowed to reverse the clock and seek to re-open the matter that had been concluded by consent just because his present financial circumstances cannot sustain him.

19. In view of the foregoing observations, it is my finding that the Plaintiff's application only succeeds in terms of prayer Number 4 thereof namely that the firm of Orego & Company Advocates are granted leave to come on record for the Plaintiff. All the other prayers in terms of prayer Number 2 and 3 stand dismissed with costs to the 1st Defendant.

20. As regards the applications dated 22/1/2026 and 26/1/2026 and in view of my finding aforesaid, I find a determination thereon now becomes moot and that the said applications stand spent. Suffice here to add that the Plaintiff in the

application dated 22/1/2026 seeks to be allowed to act in person as well as for orders of injunction while in the application dated 26/1/2026 the new counsel seeks leave to come on record for the Plaintiff. This presents problems in that the Plaintiff has not elected and decided whether he wishes to act in person or he wishes that his new advocate takes over the matter. This leaves no doubt that the Plaintiff is out to fill the courts with multiplicity of applications for the sole aim of obtaining orders of injunction against the 1st Defendant. Further, the Plaintiff has filed numerous other suits such as in Winam SPM's Court namely Civil Case No.E253/2025 and E012/2026 in which he seeks similar reliefs and in which the trial court has since vacated interim orders that had been issued in favour of the Plaintiff on the ground that he had approached the court with unclean hands and misrepresentation of facts. While this court was hearing the above matter, its attention was drawn to the existence of those cases filed in the lower court at Winam despite the fact that the Plaintiff had already lodged suit in this court way back in 2024. However, in order to ensure that the Plaintiff's new counsel gets an opportunity to represent the Plaintiff I hereby grant only prayer Number 2 of the Plaintiff's application dated 26/1/2026 while the rest of the prayers as well as those in the application dated 22/1/2026 stand dismissed with costs to 1st Defendant. The lower court files that had been presented by Winam Law Courts are hereby directed to be sent back to the relevant registry.

Orders accordingly.

Dated and delivered at Siaya this 19th day of March 2026.

D. KEMEI

JUDGE

In the presence of:

N/A Otango.....for Plaintiff.

Pravin Odiyo.....for 1st Defendant.

N/A.....for 2nd Defendant.

Maurine.....Court Assistant.