

**IN THE COURT OF  
APPEAL AT MOMBASA**

**CORAM: GATEMBU, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. E218 OF**

**2024 BETWEEN**

**ALFRED NYADIMO AGUNGA.....APPLICANT**

**AND**

**CHINA COMMUNICATIONS CONSTRUCTION  
COMPANY LIMITED.....RESPONDENT**

*(An application under Rule 59 of the Court of Appeal Rules,  
2022).*

**RULING OF THE COURT**

1. Before us for determination is an application dated 7<sup>th</sup> July 2025 filed by *Alfred Nyadimo Agunga (the applicant)*, who is the respondent in the main appeal against *China Communication Construction Company Limited (the respondent)* which is the appellant in the appeal. In the appeal, the respondent seeks to challenge judgement delivered on 28<sup>th</sup> June 2024 in Mombasa HCCOMM No. E002 of 2021 (*Micheni, J.*).
  
2. After judgment, in an application dated 19<sup>th</sup> July 2024, the respondent sought stay orders against the decision of the High Court pending appeal to this Court. By a ruling delivered on 19<sup>th</sup> December 2024, Micheni, J. allowed the application on the terms that *the respondent deposits the entire decretal amount of Kshs.100,112,768 in an escrow account in the names of counsel on record for the parties within*

60 days, excluding the period between 21<sup>st</sup> December and 13<sup>th</sup> January; that, in default, the stay would lapse and the applicant would be at liberty to execute; and that the costs abide the outcome of the appeal.

3. What followed was non-compliance with the stay orders by the respondent. Instead, it filed an application before this Court under **rule 5(2) (b)** of this **Court's Rules** seeking stay of execution of the Judgment of the High Court pending hearing and determination of the appeal. When the parties appeared before this Court on 3rd March 2025 for hearing of the application, a conditional consent was entered into by the parties, thereby compromising the application. The consent provided in part that:

**"i ;**

**ii. The applicant (the respondent herein) to secure the decretal amount with insurance bond from CIC Insurance within 14 days.**

**iii. "**

4. Again, the respondent failed to adhere to the terms of the consent which is what has precipitated the instant application. The applicant is seeking the following orders:

**"1. Spent;**

**2. That this Court do determine and order that the appellant has failed to show reasonable diligence in the appeal herein by intentionally and deliberately failing to comply and satisfy the terms and conditions as contained in clause or part 2 of the consent order of stay of execution**

**of the judgement of the superior court pending the hearing and determination of the appeal herein made, recorded and adopted on 3<sup>rd</sup> March 2025.**

**3. That upon grant of Prayer 2 above, this Court be pleased to order and compel the appellant herein within limited period of time to secure the decretal sum with an insurance bond from CIC Insurance Company or other reputable insurance company as per the Consent Order made, recorded and adopted on 3<sup>rd</sup> March 2025.**

**4. That upon grant of Prayer 3 above and failure on the part of the appellant to secure the decretal sum with an Insurance Bond from CIC Insurance Company or any other reputable insurance company within the period that the Court shall have set down or stipulated, this Court be further pleased to rescind, vary and/or discharge the said Consent Order of stay of execution of the Judgement of the Superior Court pending the hearing and determination of the appeal herein made, recorded and adopted on 3<sup>rd</sup> March 2025.**

**5. That in the interest of justice and to safeguard the reputation and dignity of this Court, which adopted the said Consent Order of stay of execution, the Court do make such other interlocutory orders as may appear to the Court to be just and convenient.**

**6. Costs of the instant application be borne by the appellant."**

5. The instant application is supported by the grounds on its face and the applicant's affidavit sworn on 7<sup>th</sup> July 2025.

He deposed that the terms of the consent were to be effected

within 14 days from 3<sup>rd</sup> March 2025, which days were to lapse on 17<sup>th</sup> March 2025, but that the respondent did not honour the terms; and that the purpose of a party being directed to either deposit the entire decretal sum or secure the decretal sum with an insurance bond is to safeguard the interests of a successful party to obviate a situation where the party holding a fruitful judgement will not be able to realise its fruits.

6. The applicant stated that his former counsel, M/s. Komora & Associates Advocates wrote a letter dated 7<sup>th</sup> February 2025 reminding the respondent's counsel of the terms of the consent and requested for compliance, but that there was no response; that a follow up letter dated 22<sup>nd</sup> June 2025 was sent to the respondent's counsel, but that it did not elicit any response; that it is important that this Court do order and/or compel the respondent to honour the terms of the consent failure to which the order staying the execution of the judgement and decree of the High Court be rescinded, varied or discharged forthwith pursuant to **rule 59** of this **Court's Rules**.
7. The respondent opposed the application through a replying affidavit sworn by one Mao Honghui, his Acting Project Manager on 10<sup>th</sup> July 2025. He confirmed that the parties compromised the respondent's application for stay on the afore-stated terms of the consent; that its inability to provide the insurance bond was not by design, but that it was because the insurance company which the respondent selected does not offer the kind of bond which the applicant

opted for; and that the specificity of the insurance bond coming from CIC Insurance made it impossible for the respondent to raise the bond through other insurance companies unless otherwise directed by this Court. The respondent therefore prays that the terms of the consent be varied so as to allow the respondent to engage other insurance bond providers or, in the alternative, procure a bank guarantee of an amount to be determined by the Court, which would not tie up a large sum of the respondent's cash flow.

8. In a supplementary affidavit dated 24<sup>th</sup> August 2025, the applicant denies that he agreed with the respondent to settle with CIC Insurance, and that it is the respondent who solely settled on the company; that the respondent singly approached CIC Insurance on 7<sup>th</sup> March 2025, but that it withheld the information that the bond could not be issued, for four months; and that the respondent had the option of approaching the Court with a view to vary the consent order, but chose not to since it is enjoying protection of the stay orders.
9. The applicant deposes that the decretal sum of Kshs.100,000,000 would not cripple the respondent's operations since its financial statements for January 2025 showed that it had a profit of Kenya Shillings Seven Hundred Billion; that, on his part, he has acted in good faith while the respondent has repeatedly flouted court orders and demonstrated bad faith, hence the consent order should be

vacated or be deemed as spent, and that he be allowed to recover the decretal sum.

10. The applicant thus prays that: we dismiss the respondent's prayer for variation of the consent order with costs; lift the stay of execution granted on 3<sup>rd</sup> March 2025; and order immediate payment of the decretal sum.

11. 2025. Learned counsel **Mr. Omwancha** was present for the applicant while learned counsel **Prof. Mumma** together with **Mr. Kimathi** appeared for the respondent.

12. Mr. Omwancha highlighted the applicant's submissions dated 20<sup>th</sup> August 2025 in which he basically restated the background giving rise to the application. In addition, he submitted that a consent has the force of a judgement and binds the parties unless varied or set aside on grounds of fraud, collusion or mistake as was held by the High Court (sitting in Nairobi) in **Anura Perera vs Nation Media Group Limited & 2 Others (2015) KEHC 528 eKLR**; that the purpose of deposit of a security is to ensure that a successful litigant is not deprived of the fruits of his or her judgement as was held by the High Court (sitting in Machakos) in **Total Kenya Limited vs. Emmanuel Ndithya (2021) eKLR**; and that deposit of a security for due performance is a mandatory condition, and that failure to furnish the same disentitles an applicant to an order of stay as was held by the High Court (sitting in Nairobi) in **Allied East Africa Limited & Another**

**vs. First Community Bank Limited (2016) KEHC 8666 eKLR.**

13. On behalf of the respondent, Prof. Mumma, SC. highlighted submissions dated 4th September 2025. According to counsel, since the consent specified that it was only CIC Insurance that was to provide the bond, it became difficult to execute the consent as CIC was unable to provide such a cover; and that the proposal to rescind and/or vary the consent so as to allow the respondent obtain insurance from other providers would be in the best interest of all parties. Reliance was placed on the decision of the predecessor of this

Court                     **Kassam (1952) 19 EACA 131** where it was held that a consent order may be varied where there was insufficient material, misapprehension or ignorance of material facts as at the time of entering the consent. Counsel further submitted that the respondent is willing to deposit a sum of 25% of the decretal sum.

14. We have considered the application, the response thereto, the submissions by both parties and the law. The sole issue that falls for our determination is whether we should allow the variation and/or rescind the consent order dated 3<sup>rd</sup> March 2025.

15. The jurisdiction of this Court to rescind orders is underpinned in **rule 59** of this **Court's Rules, 2022** as follows:

**(1) An order made on an application heard by a single judge may be varied or**

***rescinded***

**by that judge or, in the absence of that judge, by any other judge or by the Court on the application of any person affected thereby, if-**

**(a) the order was one extending the time for doing any act, otherwise than to a specific date; or**

**(b) the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter.**

**(2) An order made on an application to the Court may be varied or rescinded in terms of subrule (1) by the Court.**

16. The respondent being aggrieved by the Judgement and Decree of the High Court dated 28th June 2024, which awarded the applicant Kshs.100,112,768 appealed to this Court, and in the interim, filed an application seeking stay of the Judgment and decree of the High Court. In order to compromise the said application, parties herein recorded a consent dated 3<sup>rd</sup> March 2025. In particular, **Clause 2** of the consent terms which is what is impugned provided:

**“The applicant (the respondent herein) to secure the decretal sum with insurance bond from CIC Insurance within 14 days.”**

17. A plethora of case law exists that lays down the circumstances under which a consent order can be set aside. It is settled law that a consent takes the nature of a judgement or order of a court, and it binds the parties who

entered into it. Failure to adhere to the terms of the consent calls on the aggrieved party to take action, that is commence execution in the event a default clause abounds. The exception to the rule is when the party seeking to set aside and/or vary the consent alleges and proves that it was founded on fraud, collusion or by an agreement contrary to the policy of the Court, as was held by this Court in **Board of Trustees National Social Security Fund vs. Micheal Mwalo (2015) KECA 782 (KLR)** in the following words:

***“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.”***

18. **Hancox, JA.** in the case of **Wasike vs. Wamboko (1985) KECA 149 (KLR)** said in his judgment:

***“It is now settled law that a consent judgement 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.”***

19. Counsel for the respondent conceded that they were unable to fulfil the terms of the consent to provide an insurance bond for the reason that it specified that the bond issuing insurance company was CIC, but which

company did not

offer such services. Indeed, from the email dated 7<sup>th</sup> March 2025 from CIC Insurance (annexure MH-02 to the replying affidavit), the company confirmed that it does not offer such bond services. It is for this reason that the respondent asked that the consent terms be varied so as to allow any other reputable insurance company to provide the bond and/or, in the alternative, it be allowed to deposit 25% of the decretal sum.

20. At the hearing, we sought to know from Mr. Omwancha if he was amenable to have an alternative insurance company offer the bond other than CIC Insurance, and he answered in the affirmative.

21. In our view, the respondent would have, in good faith, at least approached the applicant with a view to vary the insurance company after receiving the communication from CIC Insurance. It did not. At the same time, the applicant did not move to execute the judgment for want of compliance with the consent. What this means is that both parties were on the receiving end. And, taking to mind the facts as presented to us, it is in the interest of both parties and in balancing the scales of justice that we allow the application on the following terms:

- i. The respondent do offer an insurance bond equal to the decretal sum from any other reputable insurance company acceptable to both parties other than CIC.***

**ii. In the alternative, the respondent do execute a bank guarantee equal to the decretal sum from a reputable bank acceptable by both parties.**

**iii. The respondent do comply with either of the orders ((i) or (ii)) above within 30 days of this Ruling failure to which the respondent shall be at liberty to execute.**

22. Finally, we order that the costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of March, 2026.**

**S. GATEMBU KAIRU, CArb, FCIArb**

.....  
**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA, CArb, FCIArb.**

.....  
**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

*I certify that this is the true copy of the original*

**Signed**

**DEPUTY**

**REGISTRAR**