

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CASE NO. HCCOMM E492 OF 2025

THE EDIVATS TRADERS
PLAINTIFF/RESPONDENT

VERSUS

THE ESTATE OF GERISHOM DK NJOROGE
DEFENDANT/APPLICANT

RULING

Introduction

1. Before the Court is the Defendant/Applicant's Notice of Motion dated **12th August 2025**, brought under Order 9 Rule 9, Order 10 Rule 11, Order 22 Rule 22, Sections 1A, 1B, 3A of the Civil Procedure Act.
2. The Applicant seeks the following substantive orders:
 - i. Leave for the firm of **Wangai Nyuthe & Co. Advocates** to come on record in place of Oduor Henry John Advocates.

- ii. Stay of execution of the **Consent Judgment** and decree allegedly recorded on **1st August 2025**.
 - iii. Setting aside of the said Consent Judgment and all consequential orders.
 - iv. An order directing **DCI, Embakasi**, to investigate alleged fraud and file a report.
 - v. Unconditional leave to defend the suit.
3. The application is supported by the affidavit of **Mary Wanja Njoroge**, widow of the late Gerishom DK Njoroge. She avers that the Plaintiff or persons acting through it attempted to fraudulently withdraw Kshs. 35,000,000 and Kshs. 75,250,000 from accounts held by the deceased at Equity Bank and Co-operative Bank using the disputed consent judgment.
4. The Applicant contends that the consent judgment was entered into by an advocate (**Oduor Henry John Advocates**) who had no authority to act for the estate, as the deceased had not been substituted and no letters of administration had been issued.
5. The Applicant further asserts that the Plaintiff, contrary to its representations in the plaint, is not a limited liability company but a business name (**BN/2015/383363**), and therefore lacks the legal capacity to sue.

6. It is the Applicant's position that the consent judgment was procured through fraud, misrepresentation, and collusion, and ought to be set aside *ex debito justitiae*.
7. The Applicant additionally seeks an order directing the DCI Embakasi to investigate the circumstances surrounding the suit and the impugned consent.
8. The Applicant filed written submissions dated 24th November 2025.
9. The Respondent, though duly served, did not file any response or participate in the proceedings.

Analysis and Determination

10. I have carefully considered the application, supporting affidavit, and submissions. The issues for determination are whether the application is merited and whether the consent judgment should be set aside.

Change of Advocates

11. The Applicant seeks leave to have **Wangai Nyuthe & Company Advocates** come on record in place of **Oduor Henry John Advocates**.
12. Order 9 Rule 9 of the Civil Procedure Rules, 2010, stipulates that a change of advocates after judgment can

only be effected with leave of the Court or by consent between the outgoing and incoming advocates.

13. In **Lalji Bhimji Sanghani Builders & Contractors V City Council Of Nairobi [2012] KEHC 515 (KLR)**, the Court emphasized the mandatory nature of this requirement, noting that it is intended to protect advocates from being removed without notice and without their fees being secured. The Court stated:

“From the above order 9 at rule 9 it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment.....The mischief order 9 of the Civil Procedure Rules intended to address was to protect advocates or firms of advocates being replaced without Notice and without their legal fees being settled.”

14. In the present case, there is a consent judgment and therefore any change of Advocates requires the court’s sanction of consent from the Advocate being replaced. However, the Applicant contends that the previous advocates had no instructions from the estate.

15. Where no retainer exists, a party cannot be bound by acts done without authority. In the absence of opposition and given the seriousness of the allegations, leave is merited.

Setting aside of the Consent Judgment

16. The core of the application concerns the alleged fraudulent procurement of the consent judgment dated 1st August 2025.
17. The principles governing the setting aside of consent judgments are well established. A consent judgment has the force of a contract and may only be set aside on such grounds as would invalidate a contract—fraud, collusion, misrepresentation, mistake, or lack of authority. See the East African Court of Appeal decision in **Brooke Bond Liebig (T) Ltd v Mallya (1975) EA 266 and the earlier Hirani v Kassam (1952) 19 EACA 131.**
18. Similarly, in **Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485**, the Court held that a consent may only be set aside where obtained through fraud, collusion, or where material facts were not disclosed. The Court was clear that:

“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 that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

19. The Applicant has demonstrated that the deceased died on 19th January 2025, and as at the filing of this suit on 25th July 2025, no letters of administration had been taken out.
20. It is uncontroverted that the family was unaware of the suit and only discovered it when notified by the bank about attempts to withdraw funds pursuant to the consent. It is further uncontroverted that no summons or pleadings were ever served upon the family or estate, and that the family only became aware of the case through their bank after being notified of an order directing the release of funds from the deceased’s account.
21. Without a legal representative, the estate could neither be sued nor issue lawful instructions to counsel. Worse still is the fact that no service of summons or pleadings was served upon the family or estate. This in itself is ground enough for setting aside the impugned consent order.

22. Regarding the Plaintiff's legal capacity to sue, the Applicant presented evidence from the Business Registration Service (**Search BN/2015/383363**) indicating that "The Edivats Traders" is a registered business name, not a limited liability company. A business name has no separate legal personality and cannot sue or be sued in its own name.
23. The Plaintiff's representation in the plaint (as deponed by its Eva Wambui Wainaina, who described herself as director of the Plaintiff) that it was a limited liability company, without proof, amounts to misrepresentation.
24. It is a fundamental principle of law that a business name has no separate legal existence from its proprietor and, therefore, lacks the requisite capacity to sue or be sued in its own name.
25. The Court therefore finds that the suit was instituted by a non-existent legal entity and is incompetent.
26. Further, the Court is of the view that the rapid progression from the filing of the suit in July 2025 to a consent judgment for over Kshs. 100,000,000/= on 1st August 2025, while the estate is unadministered, points to deliberate fraud and collusion.
27. Under Section 3A of the Civil Procedure Act, the Court retains the inherent power to prevent abuse of its processes. In **Steyn v Ruscone [2025] KEHC 6196 (KLR)**, the Court held

that judgments obtained through fraudulent means must be set aside *ex debito justitiae*. The Court was clear that:

“.....a judgment, however final it appeared, could be challenged in subsequent proceedings where it was tainted by fraud. In the same vein, section 3A of the Civil Procedure Act safeguarded the court’s inherent jurisdiction to issue such orders as may be necessary to secure the ends of justice or to prevent an abuse of the court’s process. A judgment obtained through fraudulent means constituted a manifest abuse of that process, and in such circumstances, the court was empowered to set aside the judgment *ex debito justitiae*.”

28. In the present case, the Applicant has demonstrated that the Plaintiff, being a business name, lacked legal standing to commence these proceedings in its own name. It has further been demonstrated by the Applicant that the Defendant's estate lacked legal capacity to be sued, the letters of administration having not been taken.

29. More fundamentally, it is undisputed that the Advocate who purported to act for the deceased’s estate is alleged to have done so with no instructions from the family of the deceased or his estate.

30. From the foregoing undisputed factual averments, this Court is therefore satisfied that the process leading to the consent judgment is tainted with illegality and procedural impropriety. To uphold such a judgment would be to sanction an abuse of the court process and to aid in the potential dissipation of estate assets.

31. Regarding the prayer by the Defendant for leave to defend the suit, the Court observes that ordinarily, where an irregularity arises, a court may set aside a consent or ex parte judgment and thereafter allow the matter to proceed on its merits. However, such a course is only possible where a valid suit exists in law.

32. In the present matter, the Plaintiff lacked the legal capacity to institute these proceedings, and the Defendant, being a deceased person with no appointed legal representative, similarly lacked capacity to be sued. Consequently, no competent suit exists that is capable of being defended.

33. In light of the foregoing, the appropriate remedy is to strike out the suit in its entirety. To permit this suit to stand, or to allow the impugned and fraudulent consent judgment to subsist, would be to perpetuate an abuse of the court process.

34. The Court therefore invokes its inherent jurisdiction to nullify the entire proceedings and directs that criminal investigations

be undertaken into the circumstances under which the impugned consent judgment was recorded.

35. The upshot of the foregoing is that the Court is satisfied that the application is meritorious. The suit is incompetent, fraudulent, and an abuse of the Court process.

36. Accordingly, the Court issues the following final orders:

- i. Leave is granted to Wangai Nyuthe & Company Advocates to come on record for the Defendant/Applicant.
- ii. The purported Consent Judgment dated 1 August 2025 and all consequential orders are hereby set aside in their entirety.
- iii. The Plaint dated 25 July 2025 is hereby struck out for being incompetent, fraudulent, and a nullity *ab initio*.
- iv. The Directorate of **Criminal Investigations (DCI) Embakasi** is hereby directed to investigate the circumstances surrounding the filing, prosecution, and purported compromise of this matter and file a report with the Registrar of this Court within 45 days of this Ruling.
- v. The Deputy Registrar shall forthwith transmit a certified copy of this decision to the Law Society of Kenya (LSK) for their noting, and any necessary action pursuant to their statutory and regulatory mandate.

- vi. Costs of the application and the struck-out suit are awarded to the Defendant/Applicant.

37. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 9TH DAY OF APRIL 2026**



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A - Moses

Attanacha.....for the 2nd Defendant/Co-opBank

Wanda.....for Equity Bank

Chengecha.....for the Applicant

N/A.....for the Respondent