



Swanya Limited v Daima Bank Limited (Civil Appeal (Application) 270 of 2001) [2026] KECA 717 (KLR) (25 March 2026) (Ruling)

Neutral citation: [2026] KECA 717 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 270 OF 2001
JM NGUGI, P LILAN & M SILA, JJA
MARCH 25, 2026**

BETWEEN

SWANYA LIMITED RESPONDENT

AND

DAIMA BANK LIMITED APPLICANT

(Being an application for Review of a Consent Order of the Court of Appeal at Nairobi (Githinji, Kiage & Mohammed, JJ.A.) dated 9th July 2014 in Civil Appeal No. 270 of 2001)

RULING

1. The Notice of Motion before us dated 29th July, 2020 seeks review and variation of the consent order recorded by this Court on 9th July, 2014 compromising the entire appeal. The Applicant, Daima Bank Limited (in liquidation), contends that the consent order has become incapable of execution due to circumstances that were either not within the knowledge of the parties at the time the consent was recorded or have subsequently rendered its implementation impracticable. The Respondent, Swanya Limited, opposes the application and urges the Court to uphold the consent order on the grounds that no legally recognized basis for setting aside or reviewing a consent judgment has been demonstrated.
2. The application specifically seeks the following orders:
 - a. That the terms and conditions of the orders issued on the 9th day of July, 2014 by this Honourable Court be hereby varied and/or reviewed.
 - b. That this Honourable Court be pleased to direct the Appellant/Respondent herein to identify any property belonging to it to be used for purposes of settlement of the decretal amount owed to the Respondent/Applicant and the costs of the suit in the High Court and in this appeal.
 - c. That this Honourable Court do hereby issue an order for attachment of any other property belonging to the Appellant/Respondent herein in place of the contested one.



- d. That this Honourable Court do issue any such further and appropriate orders in the special circumstances of this matter as it deems fit.
 - e. That the costs of this application be provided for.
3. The background to the application is not substantially contested. The dispute between the parties arose in the High Court where the Applicant bank instituted proceedings against the Respondent to recover monies advanced under a loan facility secured by the land known as LR No. 209/12118 (the suit property). The High Court entered judgment in favour of the Applicant for the outstanding debt together with interest and costs, prompting the Respondent to lodge an appeal before this Court. During the pendency of the appeal before this Court, the parties entered into negotiations which culminated in a consent arrangement intended to settle the dispute. That consent was subsequently adopted by this Court as an order on 9th July, 2014.
 4. Under the terms of the consent order, the parties agreed that the suit property, which was registered in the name of the Respondent, would be jointly sold by private treaty. The proceeds of the sale were to be applied, first, toward settlement of the decretal amount arising from the High Court judgment together with the costs of the suit and the appeal. Any surplus was to be remitted to the Respondent.
 5. The consent, therefore, created what may properly be described as a joint execution mechanism. The realization of the decretal sum was to be achieved not through conventional execution processes but through a cooperative arrangement whereby the parties would jointly dispose of the suit property and apply the proceeds toward settlement of the debt.
 6. The present application arises because that mechanism has never been successfully implemented. The Applicant contends that the contemplated sale has proved impossible to effect, and that the dictates of justice necessitate its setting aside; while the Respondent disputes that contention. Its position is that the Applicant freely entered into the consent arrangement and must now abide by its consequences.
 7. The parties filed written submissions: those for the Applicant are dated 20th February, 2026 while those for the Respondent are dated 3rd March, 2021 . The application came up for hearing before us on 25th February, 2026. Learned counsel Mr. George Kangethe appeared for the Applicant while learned counsel Mr. Stanza Rao appeared for the Respondent holding brief for Dr. Fred Ojiambo, SC. Both counsel relied primarily on their written submissions but also made brief oral highlights before us.
 8. The Applicant submits that the threshold for review and setting aside of the consent order recorded by this Court on 9th July, 2014 had been met because the factual foundation upon which that consent was premised had fundamentally collapsed. The Applicant emphasizes that the application was not an attempt by the Applicant to evade a binding consent order or to reopen a dispute merely out of dissatisfaction. Rather, it was, in counsel's words, a compelled return to the Court because supervening events beyond the Applicant's control had rendered the consent arrangement legally and practically impossible to perform.
 9. The Applicant explains that the consent order was premised on a specific execution mechanism agreed upon by the parties: the parties had contemplated the disposal of the suit property, with the proceeds of the sale to be applied toward settlement of the decretal amount owed to the Applicant. However, subsequent to the recording of the consent order, it emerged that the Judiciary had laid claim to the property and that a Kadhi's Court operated on the suit property. As a consequence, vacant possession — an essential precondition for the contemplated sale — has never been achieved and has become impossible to achieve. The Applicant, therefore, argues that the consent order cannot be performed as originally contemplated.



10. The Applicant further submits that the legal principles governing review of consent orders supported the Applicant's case. While acknowledging that a consent order has contractual effect, counsel argued that it may nonetheless be set aside on the same grounds that would justify rescission of a contract. Those grounds include mistake, absence of material facts, illegality, or circumstances rendering performance impossible. Counsel relied on authorities including *Flora Wasike v Destimo Wamboko* [1988] eKLR and *Hirani v Kassam* [1952] 19 EACA 131, and further referred to the decision in *Samuel Mbugua Ikumbu v Barclays Bank* [2015] eKLR, where the Court affirmed that a consent may be revisited where material facts were not within the knowledge of the parties at the time the consent was entered. In counsel's view, the present case falls squarely within that principle because the parties entered into the consent without knowledge of the Judiciary's competing interest in the property.
11. Addressing the Respondent's argument that the application had been brought after inordinate delay, counsel submitted that the Applicant had not slept on its rights. Rather, the intervening period following the recording of the consent order had been spent attempting to implement the consent arrangement. The Applicant states that the Applicant had attempted to facilitate the sale of the property, engaged the Respondent in negotiations, and sought to engage relevant actors, including the Judiciary, in order to secure vacant possession. Only when those efforts proved unsuccessful did the Applicant return to Court seeking review. The Applicant, therefore, argues that the delay complained of was explained and arose from genuine attempts to perform the decree rather than neglect or indifference.
12. The Applicant also contends that the consent order imposed joint obligations on both parties. The order contemplated a joint mechanism for selling the property and required cooperation from the Respondent, including the provision of documents necessary to facilitate the transaction. According to the Applicant, the machinery of sale could only function through mutual performance. The Applicant submits that such cooperation did not materialise and that the Respondent failed to render effective assistance in facilitating vacant possession of the property.
13. Invoking what counsel described as the prevention principle, the Applicant argued that a party cannot rely on non-performance where that party has itself contributed to the impediment preventing performance. In counsel's submission, the Respondent cannot now rely on the failure of the joint-sale mechanism when that failure arose in part from lack of cooperation and the existence of encumbrances affecting the property.
14. Finally, the Applicant submits that maintaining the consent order would effectively convert a binding decree into a hollow declaration. The joint-sale mechanism had stalled, the decretal sum remained unpaid, and interest continued to accrue while the Applicant remained deprived of the fruits of its judgment. Counsel, therefore, urged the Court to review the consent order, acknowledge that the joint mechanism had failed, and restore the matter to a posture that would allow realization of the underlying debt.
15. The Respondent opposes the application and urged the Court to decline the invitation to set aside the consent order. The Respondent submits that the application failed to meet the strict legal threshold required to disturb a consent judgment and that the Court should be slow to interfere with a settlement freely negotiated and recorded before it.
16. At the outset, the Respondent emphasizes the settled principle that a consent order has contractual effect and may only be set aside on the limited grounds that would justify rescission of a contract. The Respondent submits that courts have consistently held that consent judgments should not be lightly interfered with, particularly where they were entered into voluntarily and with the benefit of legal representation. In counsel's view, the Applicant had not demonstrated any of the recognised grounds



for setting aside a consent order, such as fraud, misrepresentation, mistake, or other circumstances capable of vitiating a contract.

17. The Respondent further argues that the present application was fatally undermined by delay. It was submitted that the consent order was recorded in July, 2014 while the present application was brought many years later. In counsel's view, such a prolonged lapse of time was inordinate and undermined the finality of litigation. Counsel contended that a party who voluntarily enters into a consent arrangement should not be permitted to revisit that arrangement many years later in the absence of compelling justification.
18. Counsel also disputed the Applicant's contention that the consent order had become incapable of implementation. According to the Respondent, the Applicant's complaint amounted to practical difficulty rather than legal impossibility. The Respondent submits that the fact that challenges may have arisen in executing the agreed mechanism does not provide a lawful basis for undoing a consent order. The property identified in the consent order, counsel argued, had been mutually agreed upon by the parties as the mechanism through which the decretal sum would be satisfied, and the Applicant should remain bound by that bargain.
19. In addition, counsel suggested that the Applicant's true objective was to escape the limitations of the consent arrangement and revive broader enforcement options that the consent order had effectively regulated. The Respondent argues that permitting the application would undermine the certainty and reliability of consent judgments and discourage parties from resolving disputes through negotiated settlement.
20. Finally, the Respondent submits that granting the relief sought would prejudice the Respondent by reopening a dispute that had already been resolved through negotiation and by exposing it to renewed enforcement proceedings that the consent order was intended to regulate. For those reasons, counsel urged the Court to uphold the consent order and dismiss the application with costs.
21. The principles governing the setting aside or variation of consent judgments are well settled. A consent judgment has contractual effect and may only be set aside on grounds that would justify rescission of a contract.
22. The locus classicus remains *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, where this Court held that a consent judgment may only be set aside on grounds which would justify the setting aside of a contract. The same principle was articulated earlier in *Hirani v Kassam* [1952] 19 EACA 131.
23. Courts have also recognized that where the factual foundation upon which a consent judgment rests collapses, the Court retains jurisdiction to intervene. In *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 and *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Ltd* [2015] eKLR, courts accepted that consent orders may be revisited where material facts undermine the basis upon which the agreement was reached.
24. The Applicant argues that the present case falls within that category. The Respondent counters that the Applicant knew of the Kadhi's Court occupation at the time the consent judgment was entered into.
25. Before delving into that substantive question, we first turn to a preliminary hurdle raised by the Respondent: that the present application is defeated by inordinate delay. It was submitted that the consent order sought to be set aside was recorded on 9th July, 2014 whereas the present application was brought more than six (6) years later, and that the Applicant cannot be permitted to reopen a consent arrangement which it freely entered into after such a prolonged lapse of time. The Applicant's response was that the delay was neither deliberate nor unexplained. According to the Applicant, the intervening period was spent in efforts to implement the consent arrangement, including attempts to facilitate



- the sale of the suit property in accordance with the mechanism agreed upon by the parties. Those efforts, however, ultimately proved futile, largely because vacant possession of the property could not be obtained and because the property itself became the subject of claims by the Judiciary.
26. While we accept that courts must approach applications seeking to disturb consent orders with considerable caution and that unexplained delay may weigh against the exercise of the Court's discretion, the circumstances of this case call for a more contextual evaluation. Where a party demonstrates that the intervening period was spent attempting to give effect to the very order it now challenges, the passage of time does not necessarily bar the Court from examining whether the consent order has since become incapable of practical implementation. In such circumstances, the central question becomes not simply the length of time that has elapsed, but whether the order whose preservation is sought remains capable of lawful and practical operation. It is to that question that we now turn.
 27. In our view, the real question is whether the consent mechanism itself is capable of implementation. The consent order required a joint sale by private treaty. Such a transaction ordinarily requires vacant possession and a title capable of being transferred. It is necessary at this point to make an institutional observation. The material placed before the Court shows indubitably that the suit property is presently occupied by the Kadhi's Court and that the Judiciary asserts an interest in it. The question before us is whether the consent mechanism can realistically operate in those circumstances. The material before the Court indicates that it cannot. This would mean that the joint-sale mechanism has effectively stalled.
 28. Courts do not act in vain. Where an order of the Court has become incapable of practical implementation, the Court retains jurisdiction to intervene. This principle flows from the inherent jurisdiction of courts to ensure that their processes do not degenerate into instruments of futility. Judicial orders are intended to produce real legal consequences and not merely theoretical declarations. Where the factual conditions necessary for the operation of an order have fundamentally altered or ceased to exist, the Court must retain the authority to revisit its own orders so that its processes remain directed toward practical justice rather than procedural formalism. In the present case, the futility of the consent order arises in large part from the claim by the Judiciary to the ownership of the suit property. The execution mechanism contemplated by the parties has, therefore, not merely faltered; it has become incapable of lawful or practical operation. In such circumstances, it would be inimical to the proper administration of justice for this Court to insist upon the mechanical preservation of an order whose implementation has become unattainable.
 29. There is an additional and weighty consideration. As alluded to above, the material placed before the Court indicates that the suit property, which formed the substratum of the consent arrangement, is presently occupied by the Kadhi's Court and is legally claimed by the Judiciary. While it is neither necessary nor appropriate in the present application for this Court to determine the ultimate ownership of that property, the existence of that claim fundamentally alters the context in which the consent order was intended to operate.
 30. Courts must be astute not to lend their authority to processes that may inadvertently facilitate the alienation of property claimed to be public land or disrupt premises presently used for the administration of justice. To do otherwise would place the Court in the paradoxical position of supervising an execution process that risks undermining the institutional conditions necessary for the administration of justice itself. The collapse of the factual and legal substratum upon which the consent order rested, therefore, provides an additional and compelling reason for the Court to intervene.



- 31. In light of these considerations, we are satisfied that the consent order recorded by this Court on 9th July, 2014 can no longer serve the purpose for which it was intended. The mechanism through which the parties agreed to settle the dispute has lost its factual and legal foundation, and the Court cannot insist upon the continued preservation of an order whose implementation has become both impracticable and institutionally problematic.
- 32. However, the appropriate course in these circumstances is not to attempt to redesign the execution mechanism or to substitute alternative enforcement arrangements within the confines of the present application as the Applicant prays. Rather, the proper remedy is to restore the parties to the position they occupied prior to the recording of the consent so that the dispute between them may be determined through the ordinary adjudicative processes of this Court. The setting aside of the consent order, therefore, has the effect of reviving the appeal for hearing on its merits.
- 33. Ultimately, the authority of the Court is best vindicated not by preserving orders whose factual foundation has collapsed and whose enforcement risks undermining public interest anyway, but by ensuring that its processes remain instruments of practical justice, institutional integrity, and fidelity to the public interest in the proper administration of justice. Where circumstances have overtaken the assumptions upon which a consent order was premised, the Court must acknowledge that reality and restore the parties to the ordinary course of adjudication rather than perpetuate an execution mechanism that has become incapable of lawful or practical implementation.
- 34. Accordingly, the Notice of Motion dated 29th July, 2020 is allowed only to the extent that the consent order recorded by this Court on 9th July, 2014 is hereby set aside. Consequently, the appeal shall stand restored for hearing and determination on its merits.
- 35. Each party shall bear its own costs of the application.
- 36. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2026.

JOEL NGUGI

***JUDGE OF APPEAL**

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P. LILAN

JUDGE OF APPEAL

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MUNYAO SILA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

