

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E068 OF 2023

HAVI CONSTRUCTION COMPANY LIMITED.....1ST
APPELLANT

RAJINDER SINGH DHUPAR.....2ND
APPELLANT

VERSUS

WAKS STORES AND HARDWARE LIMITED....1ST
RESPONDENT

SAMUEL KAGITHI WAITHAKA.....2ND
RESPONDENT

PARDIP SINGH DHUPAR.....3RD
RESPONDENT

HARMEET SINGH DHUPAR.....4TH
RESPONDENT

HARPREET SINGH DHUPAR.....5TH
RESPONDENT

*(Being an appeal from the ruling of the honourable chief
magistrate Hon. Stela Atambo CM delivered on 28th November
2023 in Thika Civil Suit No. E670 of 2021)*

JUDGEMENT

1. This appeal is premised on the interpretation of a consent order that was entered into by the parties in a bid to have the dispute settled amicably. The Consent order vacated the interlocutory judgment by outline mechanisms for settling the amount owed. Prior to the consent order, the appellants had filed an application dated 9th March 2022 seeking stay of execution of the interlocutory judgment. Further, an objector also filed an application challenging his inclusion as a garnishee.

2. In the course of the proceedings, a Consent Order dated 1st February 2023 was entered into that outlined the obligations of the parties towards the settlement of the amount due. It was a term of the consent that failure to abide by the consent would resuscitate the order dated 6th December 2022.
3. When the parties were unable to abide by the terms of the consent, the trial court relied on clause 6 of the Consent Order and reverted to the order of 6th December 2022 without conclusively making a determination on the fate of the pending application for stay of execution.
4. Aggrieved and dissatisfied with the ruling of the court the appellants lodged the instant appeal on grounds that:
 - i. The learned trial magistrate erred in law and in fact by reaching a decision that the three pending applications dated 9th March 2022, 8th November 2022 and 24th January 2023 were all compromised by the Consent Order Recorded on the 1st February 2023 in Court despite the said Consent being an outcome of a court annexed mediation which is an outright miscomprehension and misapplication of law and facts.***
 - ii. The learned magistrate misdirected herself and erred in law and fact by bringing the dispensation of the application within the ambit of a Consent yet they were within the ambit of a Court annexed mediation***
 - iii. The ruling of the trial court is unsupported by law.***
5. The appellant prayed that the ruling be set aside.

6. The court directed that the appeal be canvassed through written submissions.
7. The Appellants submitted that their application dated 9th March 2022, challenging the execution process and the objectors' application dated 24th January 2023, challenging the attachment of properties claimed to belong to third parties, were still pending when the consent order was entered into. There was no evidence on record to suggest that the recording of the consent in any way compromised these applications. Yet the trial magistrate proceeded that the said applications had been compromised without a substantive determination on the manner in which the same was done.
8. The Appellants further submitted that consent orders are contractual in nature and only bind the parties to the extent of their express terms. The Consent order dated 1st February 2023 did not have any statement expressly withdrawing, compromising or setting aside the application by the applicant nor that of the objector. Courts are barred from implying in consent terms that which the parties had not intended. Reliance was placed on **Kenya Commercial Bank Limited versus Specialized Engineering Company Ltd [1980] KEHC 11KLR.**
9. The overall conduct of the trial court denied the Appellants their right to fair hearing. Therefore, the appropriate relief is that the matter be remitted to the trial court to be determined on its own merits.
10. The Respondent submitted that the Applications dated 9th March 2022 and 24th January 2023 both sought stay of execution. However, the same were overtaken by events by circumstances that occurred during the pendency of the applications, resting with the trial court's directions of 1st February 2023.

11. Also, the fact that the Garnishee had already been discharged from the proceedings meant that there were no active proceedings against the Garnishee, it was thus unconscionable for the appellant to allege to be acting on behalf of a party that is no longer a party to the proceedings.
12. The fact that no appeal was ever preferred against the consent order meant that it remained as an enforceable order of the court. Therefore, only an appeal was capable of setting it aside.
13. The Respondents thus prayed that the appeal be dismissed.
14. I have gone through all the material placed before me and I am of the view that the substratum of the Appellant's case is whether the trial court properly directed itself in apportioning liability and whether the trial court erred in failing to make an assessment on quantum.
15. **Selle v. Associated Motor Boat Company [1968] EA 123** is probably the most seminal authority on the review scope of the High Court as the first appellate forum for matters emanating from the sub-ordinate courts:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. I have considered the pleadings herein and the Record of Appeal and I find that there is no dispute that the parties entered into a consent, the issue is whether the said consent compromised all the applications including the one

seeking stay of execution of the judgment in default. I have taken the liberty to reproduce the consent order at the heart of this dispute:

**WAKS STORES AND HARDWARE
LIMITED.....1st Decree
Holder**

**SAMUEL KAGITHI WAITHAKA.....2nd Decree
Holder**

Vs

**HAVI CONSTRUCTION COMPANY LIMITED.....1st
Judgement Debtor**

**RAJINDER SINGH DHUPAR.....2nd Judgment
Debtor**

AND

**Gulf African
Bank.....Garnishee**

AND

**PARDIP SINGH DHUPAR.....1ST
RESPONDENT**

HARMEET SINGH DHUPAR.....2ND RESPONDENT

HARPREET SINGH DHUPAR.....3RD RESPONDENT

ORDER

This matter coming up for directions before Hon. S. Atambo (CM) on 1st February 2023 in open court in the presence of counsels representing all the parties herein:

IT IS HEREBY ORDERED BY CONSENT:

- 1. THAT orders issued on 6/12/2022 be and is hereby vacated on the following conditions:***

- 1) Both Judgment debtors and decree holders counsel on record shall open a joint account whereby the Judgment debtors will deposit Ksh. 2 million within 30 days hereof.**
- 2) Counsel for both decree holder and judgment debtor to meet and do a reconciliation of the accounts in respect of the goods supplied and the calculation of interest, and possible waiver thereof based on documents filed and acknowledgement of debt.**
- 3) Based on the above, the parties will agree on a new negotiated by consent judgment amount from which the decree holders will be paid Ksh. 2 million held in the joint advocates' account.**
- 4) Upon the takeover, the Garnishee be paid first the full amount owed by the borrowers.**
- 5) The Decree Holders and the Judgment Debtors to agree as at order no. 2 above and on modalities of payment of the by consent negotiated judgment amount within the 30 days.**
- 6) In Default of any of the above clauses, orders of 6/12/2022 are automatically reinstated together with consequences thereof.**

2. THAT mention for update, directions and further consultations in open court on 8/3/2023 at 2pm.

17. Due to the crucial role of the order dated 6/12/2022 to these proceedings, I have taken the liberty to reproduce the order as hereunder:

“THAT pending the hearing/ determination/ compromise and or withdrawal of the garnishee application dated 8/11/2022, an order be and is hereby issued barring the dealing with LR. NO. 15153/6(L.R 12806) RIVER VIEW ESTATE KIAMBU COUNTY and the garnishee is no longer interested in exercising its statutory power of sale, for reasons that the judgment debtor may conspire with others to sell LR. NO. 15153/6(L.R 12806) RIVER VIEW ESTATE KIAMBU COUNTY way below its forced price of Ksh. 48,820,000,000.00 so as to only pay its indebtedness to the garnishee and get away scotch free in settling its indebtedness of Ksh. 19,568,849.00 (plus costs and interests) to the decree holder until 31.12.2022.”

18. Hancox JA (as he then was) in **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625**, held as follows:

“It is now 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.”

19. Similarly, the Court of Appeal in **Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR P. 485** held 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 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.”

20. Having set out the legal effect of a consent order, it is crucial to determine the nature and breadth of the consent order that the parties entered into.
21. A perusal of the order dated 6/12/2022 that the parties were to revert to in the event of default of the consent order shows that it dealt primarily with the garnishee's application dated 8/11/2022. Therefore, for the order to be reverted to as a consequence of default, it simply means that the position to be reverted to was the application of the garnishee dated 8/11/2022. Notably, it is admitted by all parties that the participation of the garnishee in the proceedings had been overtaken by time. The garnishee had since been discharged and was no longer a party to the dispute.
22. With that said, it follows that the consent order did not compromise all the applications as alleged by the Respondents. The only application that had been compromised by the consent order was the garnishee application, that is why a default of the consent automatically reverted to the order dated 6.12.2022.
23. Essentially, for the consent order to meet the threshold of a judgment, it needed to have conclusively determined the rights of the parties in the dispute. The Supreme Court has had an opportunity to make a determination as to what a judgment of a court is. In **Richard Nyagaka Tong'i v. Chris Munga N. Bichage & 2 others SC Petition No. 17 of 2014; [2015] eKLR**, the Court interrogated the existing legal regime: The Civil Procedure Act, the Appellate Jurisdiction Act and the Supreme Court Act as well as the prevailing caselaw from the Court of Appeal and concluded thus:

***“[45] From the foundation of current case law, we would hold that a ‘Judgment’ is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court.*”**

24. Flowing from the above, can it be rightly stated that the consent order finally determined the rights and obligations of the parties in all the applications before court? I answer in the negative. The consent order that the parties willingly entered into by no means compromised the applications made by the Appellants, the consent order was limited to the issues that sought to be addressed by the order of 06.12.2022, no wonder it was the fall back in the event of default of the consent order.
25. Based on the above, the trial court therefore erred in the unprocedural bypassing of the appellants application when in fact the same remained unadjudicated by a court of competent jurisdiction.
26. While this court reiterates the fact that a consent is binding on the parties and can only be set aside when there is evidence of fraud, misrepresentation, coercion or any other vitiating factors, the court cannot impute a term that was not expressly stated in the consent order nor imply an obligation that the parties did not bind themselves.
27. In the instant case, I do note that the Consent order did not expressly state that it was compromising all the applications that were pending before court, instead, it aptly captures the directions that the court gave when the parties appeared on 1st February 2023.

28. Having stated the above, I find that the instant appeal is merited and the same is hereby allowed. I

hereby remit the case back to the trial court for the hearing of the appellants application dated 9th March 2022 and the objector's application dated 24th January 2023 on merit. Since the application dated 8/11/2022 has already been overtaken by events, there is no reason for the same to be remitted for hearing and determination.

29. Final disposition: Appeal is allowed. Each party to bear their costs.

Dated, Signed and Delivered virtually this 30th day of April, 2026.

**HON. T. W. OUYA
JUDGE**

In the presence of:

Muthoka for 3rd to 5th Respondent

Okiror for the 1st & 2nd Appellants

No appearance for 1st & 2nd Respondent