



**Wil Developers & Construction Ltd & another v Agrofarm Products Ltd & 9 others (Civil Suit E355 of 2022) [2026] KEHC 6025 (KLR) (Commercial and Tax) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 6025 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E355 OF 2022**

**PM MULWA, J**

**APRIL 30, 2026**

**BETWEEN**

**WIL DEVELOPERS & CONSTRUCTION LTD ..... 1<sup>ST</sup> PLAINTIFF  
JOHNSON MWANZIA WAMBUA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AGROFARM PRODUCTS LTD ..... 1<sup>ST</sup> DEFENDANT  
KAMOMA VENTURES LTD ..... 2<sup>ND</sup> DEFENDANT  
BONIFACE KAMAU MACHARIA ..... 3<sup>RD</sup> DEFENDANT  
CLIFFORD OKOTH ONGUNGO ..... 4<sup>TH</sup> DEFENDANT  
CLIFF MOSETI OBWOGI ..... 5<sup>TH</sup> DEFENDANT  
ALLAN KIPROTICH CHESANG ..... 6<sup>TH</sup> DEFENDANT  
ESTHER KALUNGU NGOTHO ..... 7<sup>TH</sup> DEFENDANT  
DAVID KAHU AMBUKU ..... 8<sup>TH</sup> DEFENDANT  
ELYSHA ONYANGO OSWAGO ..... 9<sup>TH</sup> DEFENDANT  
AGRO INTERNATIONAL LIMITED ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling concerns the Notice of Motion dated 15<sup>th</sup> April 2025 by the 6th Defendant/Applicant brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Orders 10 Rule 11, 12 Rule 7 and 42 Rule 6 of the Civil Procedure Rules.



2. The application principally seeks the following orders:
  - a. Stay of execution arising from the Default Judgment dated 28<sup>th</sup> April 2023 and the subsequent decree dated 4<sup>th</sup> August 2023 pending the hearing and determination of the application;
  - b. Setting aside of the default judgment dated 28th April 2023 and all consequential orders, in so far as they relate to costs and interest;
  - c. That the issue of costs and interest be admitted for a hearing in accordance with the consent order dated 15th May 2024;
  - d. Costs of the application.
3. The application is premised on the grounds on the face of the record and supported by the affidavit of Allan Kiprotich Chesang. He deposes that a default judgment was entered against him, the 1<sup>st</sup> and 10<sup>th</sup> Defendant on 28th April 2023 for a sum of kshs 17,700,000 without proper service. Learning of the judgment, he instructed counsel and successfully obtained conditional leave to defend, alongside interim stay orders pending the hearing of his application.
4. He avers that the dispute was subsequently resolved through negotiations on 13<sup>th</sup> March 2023, which was to culminate in a consent order that was to be adopted in court on 15<sup>th</sup> May 2024, under which he undertook to settle the principal sum of Kshs. 17,700,000 by instalments. The said consent further provided that the issue of interest and costs would either be agreed upon by the parties or, failing agreement, be referred to the Court for determination.
5. The Applicant states that he complied fully with the consent by paying the entire principal sum. However, no agreement was reached on interest and costs. Despite this, the Deputy Registrar proceeded to assess and tabulate interest based on the default judgment, instead of referring the issue to the Court as contemplated under the consent.
6. It is his contention that the said action was irregular, contrary to the consent order, and exposes him to execution for sums not properly determined by the Court. He further avers that unless the orders sought are granted, he stands to suffer prejudice through unlawful execution.
7. The Applicant maintains that the application has been brought without delay, in good faith, and in the interest of justice, and urges the Court to allow the same.
8. Opposing the application, the Alice Wangari Mwanzia, a director of the 1<sup>st</sup> Plaintiff, swore a Replying Affidavit on 22<sup>nd</sup> July 2025. She deposes that the Plaintiffs suffered substantial financial losses, including a sum of Kshs. 17,700,000/-, arising from transactions involving the Defendants, which they contend were fraudulent and jointly undertaken. Consequently, the Plaintiffs pursued both civil and criminal proceedings, culminating in charges against the Defendants in Milimani Criminal Case No. 694 of 2018.
9. It is further deponed that while some Defendants entered appearance, others, including the 6<sup>th</sup> Defendant, failed to do so, leading to entry of default judgment on 23<sup>rd</sup> January 2023 for substantial sums against various Defendants, including the 6th Defendant. The said judgment has neither been set aside nor appealed against.
10. The deponent states that execution proceedings ensued, resulting in issuance of a Notice to Show Cause and subsequently a warrant of arrest against the 6<sup>th</sup> Defendant. Despite initial difficulties in enforcement due to the 6th Defendant's status as a public office holder, the Plaintiffs persisted.



11. She avers that the 6<sup>th</sup> Defendant made settlement proposals, including a deposit and instalment payments, which were partly honoured but ultimately not complied with in full. Upon arrest and presentation before the Deputy Registrar, the 6<sup>th</sup> Defendant was committed to civil jail in the absence of a viable repayment proposal.
12. Subsequently, the parties entered into consent arrangements to stay execution and facilitate repayment by instalments. However, the deponent maintains that such consents were limited to settlement modalities and did not compromise or extinguish the existing judgment or pending applications.
13. The Plaintiffs' position remains that the judgment entered on 23<sup>rd</sup> January 2023 is valid, binding, and enforceable, and that efforts to agree on interest and costs have been frustrated by the 6<sup>th</sup> Defendant's failure to engage meaningfully.
14. Despite directions that the application be heard by way of written submissions on the 6<sup>th</sup> Defendant filed submission dated 17<sup>th</sup> November 2025.
15. The 6<sup>th</sup> Defendant submits that the consent order of 15<sup>th</sup> May 2024 superseded and varied the earlier default judgment and decree, rendering it the only binding instrument between the parties. He contends that a consent order has contractual effect and is final unless set aside on recognized grounds, relying on *Flora N. Wasike v Destimo Wamboko* [1987] eKLR and *Hirani v Kassam* (1952) 19 EACA 131, where it was held that such orders are binding and cannot be varied absent fraud, mistake, or misrepresentation.
16. On interest, the Defendant argues that no contractual, statutory, or legal basis exists for its award. He submits that interest prior to suit must be grounded in substantive law, citing *Highway Furniture Mart Ltd v PS Office of the President* [2006] eKLR and *Kipchumba v BOG Tambach Teachers Training College* [2019] eKLR, which affirm that such interest is only recoverable where expressly provided for. He further relies on *Sharif Salim v Malundu Kikava* [1989] eKLR to emphasize that the award of interest is discretionary and must be exercised judiciously.
17. On costs, the Defendant contends that no adverse order should issue, as the matter was resolved by consent and no party can be said to have succeeded. Reliance is placed on *David Kipturn Korir v KCB* [2021] eKLR, where the Court held that in such circumstances, each party should bear its own costs.

### **Analysis and determination**

18. I have noted a discrepancy in the dates of the default judgment as presented by the parties. The Plaintiffs contend that a default judgment was entered on 23<sup>rd</sup> January 2023, whereas the Applicant states that it was entered on 28<sup>th</sup> April 2023. Upon careful perusal of the record, it is evident that the date of 23<sup>rd</sup> January 2023 relates to the request for judgment, while the default judgment itself was entered on 28<sup>th</sup> April 2023.
19. Having considered the application, the affidavits both in support and in opposition, together with the submissions of the 6<sup>th</sup> Defendant, the single issue for determination is whether the application is merited.
20. I will first address the effect of the consent order before turning to the merits of the application. A consent judgment or order has contractual effect and is binding upon the parties unless set aside on



grounds that would justify the setting aside of a contract. In *Flora N. Wasike v Destimo Wamboko* [1987] eKLR, the Court held:

“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 aside a contract.”

21. In the present case, the consent order expressly provided that the Applicant would settle the principal sum, while the issues of interest and costs were to be either agreed upon by the parties or determined by the Court. That consent was duly adopted as an order of the Court on 15<sup>th</sup> May 2024 and has not been set aside or impugned on any recognized legal ground.
22. In my view, the effect of that consent was to vary the earlier decree to the extent of the parties' agreed obligations. The Plaintiffs cannot approbate and reprobate by accepting payment under the consent while simultaneously reverting to the default judgment as a basis for claiming interest and costs. Such conduct is legally untenable.
23. I therefore find that the consent order dated 15<sup>th</sup> May 2024 superseded the default judgment to the extent of the matters addressed therein and remains binding upon the parties.
24. The next issue for consideration is whether a stay of execution should issue. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010, in which it provides three conditions must be met to warrant an order of stay of execution;
  - i. That substantial loss may result to the applicant unless the order is made.
  - ii. That the application has been made without unreasonable delay.
  - iii. Security as the court orders for the due performance
25. The above principles were enunciated in the case of *Butt v Rent Restriction Tribunal* [1979] where the Court of Appeal held that the power to grant stay is discretionary and must be exercised in a manner that does not render an appeal or intended defence nugatory.
26. Although the present application does not arise in the context of an appeal, the foregoing principles apply *mutatis mutandis*. The Court is required to balance the competing rights of the parties. In this regard, it is not disputed that the 6<sup>th</sup> Defendant settled the principal sum in accordance with the consent order. Notwithstanding that fact, the Plaintiffs have moved to execute against the 6<sup>th</sup> Defendant on the basis of the default judgment, which, as already found, has been varied by the consent order.
27. I am satisfied that if execution were to proceed in respect of the contested sums before determination of the issues of interest and costs, the Applicant would suffer prejudice, particularly in relation to a substantial and disputed component of the decree.
28. In the circumstances, I am of the view that this is a proper case for the grant of a conditional stay of execution.
29. As regards the setting aside of the default judgment, the Court's discretion is anchored under Order 10 Rule 11 of the Civil Procedure Rules is well settled. In *Shah v Mbogo* [1967] EA 116, the Court held that such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a litigant who has deliberately sought to obstruct or delay the course of justice.
30. Further, in *James Kanyita Nderitu & Anor v Marios Philotas Ghikas & Anor* [2016] KECA 470 (KLR) where the Court of Appeal distinguished between regular and irregular judgments and held that even a



regular judgment may be set aside where the defendant demonstrates a plausible defence raising triable issues.

31. In the present case, it is not controverted that the Applicant has fully complied with the consent order by settling the entire principal sum. The remaining dispute relates to interest and costs, which, by the express terms of the consent, were to be agreed or determined by the Court. In those circumstances, the Plaintiffs' attempt to revert to the default judgment for purposes of computation of interest is, with respect, untenable.
32. I find that the default judgment was, by operation of the consent order dated 15<sup>th</sup> May 2024, set aside. The consent, having been duly adopted as an order of the Court, effectively displaced the earlier judgment and decree insofar as it redefined the parties' obligations. To permit reliance on the default judgment, particularly in respect of interest and costs, would be inconsistent with the binding terms of the consent and would occasion injustice to the Applicant who has complied with the agreed terms.
33. The Court's discretion under Order 10 Rule 11 of the Civil Procedure Rules is aimed at achieving substantive justice. In the present circumstances, justice is best served by giving full effect to the consent order, which constitutes the operative framework governing the parties' rights and obligations
34. Accordingly, I hold that the consent order set aside and superseded the default judgment, and the parties are bound to proceed strictly in accordance with the terms of the said consent, including the determination of interest and costs.
35. In the result, and for the foregoing reasons, I find that the Notice of Motion dated 15<sup>th</sup> April 2025 is merited.
36. Consequently, I make the following orders:
  - a. A stay of execution of the default judgment is hereby granted in respect of the default judgment dated 28<sup>th</sup> April 2023 and the decree arising therefrom;
  - b. The default judgment is hereby set aside;
  - c. The issue of interest and costs shall, if not agreed between the parties, be placed before this Court for determination in accordance with the consent order;
  - d. Each party shall bear its own costs of the application.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Mr. Kinyua for Plaintiff

Mr. Mwangi for 1<sup>st</sup>, 6<sup>th</sup> & 10<sup>th</sup> Defendants

Court Assistant: Lispa

