

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. E1133 OF 2024**

**AWORKY GENERAL SUPPLIES LTD & ANOTHER .....**  
**APPELLANTS**

**VERSUS**

**PETER WANYONYI WANELOBA .....**  
**RESPONDENT**

**RULING**

**Background**

1. This ruling concerns the Notice of Motion Application dated 31st October 2024 wherein the Respondent/Applicant seeks orders to strike out the Appellants' appeal on the ground that the impugned judgment and subsequent decree were settled by consent, thus rendering the appeal incompetent under Section 67(2) of the Civil Procedure Act.
2. Judgment in the lower court (Milimani SCCC No. E1435 of 2023) was delivered on 13th October 2023 following a full hearing. It is alleged that parties thereafter engaged in negotiations culminating in a consent dated 16th August 2024, which provided for settlement of the decretal sum within thirty days. It is however not clear, from the record,

if the said consent was filed in court or adopted as an order of the court. The record of appeal and the supplementary record of appeal do not contain the said consent.

3. The Appellants however subsequently filed an appeal on 3rd October 2024, challenging the original judgment. Prior to the filing of the appeal, by a separate consent order adopted by the court on 20th August 2024, the Appellants were granted leave to file an appeal out of time on condition that they deposit the decretal sum of Kshs. 629,341 in a joint interest-earning account, which they complied with.
4. The Applicant now contends that the appeal is incompetent, while the Appellants oppose the Application contending that it is misconceived, incompetent, and an abuse of the court process.
5. The application was canvassed by way of written submissions which I have considered.

### **Analysis and Determination**

6. After considering the pleadings and the parties' respective submissions, I find that the following issues arise for determination:

***a) Whether the judgment of the lower court was a consent judgment.***

***b) Whether the appeal is barred under Section 67(2) of the Civil Procedure Act.***

***c) Whether the Appellants have a valid right of appeal.***

7. On the issue of the consent judgment, the Applicant argued that the consent dated 16th August 2024, relating to payment of the decretal sum, effectively converted the original judgment into a consent judgment, thereby barring any appeal.
8. It is trite law that a consent judgment is one entered into with the agreement of the parties and adopted by the court as its judgment. The legal position is well settled in ***Brooke Bond Liebig Ltd vs. Mallya [1975] EA 266***, where it was held that a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract.
9. Similarly, in ***Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd [2017] eKLR***, the Court emphasized that a consent judgment has contractual effect and can only be set aside on grounds such as fraud, mistake, or misrepresentation.
10. From the material before the Court, it is evident that the original judgment of 13th October 2023 was delivered after a full hearing on merits. It is also evident that the consent of 16th August 2024 arose post-judgment and concerned mode of settlement of the decretal sum, not the determination of liability or quantum.

11. As I have already stated in this ruling there is no evidence that the said consent was formally adopted as a judgment or decree thereby replacing the original judgment.
12. Section 67(2) of the Civil Procedure Act provides that:  
  
**“No appeal shall lie from a decree passed by the court with the consent of parties.”**
13. In ***Board of Trustees NSSF vs. Michael Mwalo [2015] eKLR***, the Court reiterated that for Section 67(2) to apply, the decree must be one passed by consent of parties.
14. In the present case, the decree appealed against emanates from a judgment delivered on merit, not from a consent of the parties.
15. The Court therefore finds that the impugned judgment was not a consent judgment within the meaning of Section 67(2) of the Civil Procedure Act (CPA).
16. On whether the appeal is barred under Section 67(2) CPA, I find that given the above finding, this provision is not applicable to the present circumstances.
17. It is my view that the post-judgment consent on settlement, if any, does not extinguish the right of appeal unless it is shown that parties intended to compromise the entire dispute and substitute the judgment with a consent decree. The authority in ***Kenya Power & Lighting Co. Ltd vs. Okoth [2024] KEHC 6887 (KLR)*** confirms that a

consent order is binding, but only to the extent of its terms. It does not automatically convert a prior judgment into a consent judgment unless expressly adopted as such.

18. This Court is therefore not persuaded that the appeal is barred by Section 67(2) CPA.

19. On whether the Appellants have a right of appeal it is trite that the right to appeal is statutory and unless expressly granted, does not exist. (See **Attorney General vs. Bala [2023] KECA 117 (KLR)**)

20. In this case the appeal arises from the Small Claims Court, and Section 38 of the Small Claims Court Act grants a right of appeal to the High Court. The record shows that the Appellants sought leave to appeal out of time, which was granted by the court on 20th August 2024, by consent.

21. The Appellants complied with the conditions imposed by the court, including deposit of the decretal sum.

22. Further, the delay in filing the appeal has been explained by the Appellants as arising from failure by the court to promptly avail the judgment through email or the e-filing system, a position not substantially rebutted.

23. The Court is satisfied that the appeal was properly regularized through leave of the court and that the Appellants' right of appeal has been lawfully invoked.

24. My finding is that striking out the appeal, under these circumstances, would offend the constitutional principles of access to justice (Article 48) and the right to a fair hearing under Article 50 of the Constitution.

25. On whether the appeal is an abuse of Process, the Applicant contended that the appeal is an afterthought and an abuse of court process. This court however notes that the Appellants sought leave before filing the appeal, leave was granted by a court of competent jurisdiction and the stay conditions imposed by the court have been complied with. I find that there is no evidence of fraud, misrepresentation, or bad faith sufficient to warrant striking out the appeal at this stage.

26. In sum I find that the instant application is not merited and I therefore make the following final orders:

- 1. The Notice of Motion Application dated 31st October 2024 is hereby dismissed.**
- 2. The appeal shall proceed to hearing on merits.**
- 3. The costs of the Application shall be borne by the Respondent/Applicant.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2026.**

**HON W. A. OKWANY**  
**JUDGE**

**In the presence of**  
**Ms Nzuki for Applicant/Respondent**  
**Ms Kanyi for Respondent/Appellant**  
**Abdirzak - Court Assistant**

ORIGINAL