REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. CASE NO. 86 OF 2015

BETWEEN

ECOBANK KENYA LIMITED.

……PLAINTIFF

AND

ATTAIN ENTERPRISES LIMITED……1ST DEFENDANT

MARROSY KING NYABWARI……2ND DEFENDANT

FELIX OGAMBA……3RD DEFENDANT

RULING

Introduction & Background

1. The 2nd Defendant ("the Defendant") has filed the Notice of Motion dated 29th September 2025 under **section 1A,1B, 3, 3A and 80** of the ***Civil Procedure Act***, **Order 22 Rule 22,Order 45 Rule 1,2,3 & 5 and Order 51 Rule 1** of the ***Civil Procedure Rules*** seeking to set aside the consent judgment and decree dated 9th March 2016 and re-open the suit for fresh hearing. Alternatively, he seeks to have the court

declare the decree null and void. The application is supported by the grounds on its face and the Defendant's affidavit sworn on 22nd September 2025. It is opposed by the Plaintiff through the replying affidavit of its counsel, Steve Luseno, sworn on 14th October

2025. The application was canvassed by way of written submissions which are on record and I have considered the same together with the pleadings and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

2. The primary issue for the court's determination is whether the court ought to review its orders of 1st September 2025 and set aside the consent entered into by the parties on 17th February 2016 and subsequent decree issued on 9th March 2016. The parties agree that under **section 80** of the ***Civil Procedure Act*** and **Order 45** of the ***Civil Procedure Rules***, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review.

3. Further, in the court's ruling of 1st September 2025, I rehashed the principles of setting aside a consent order. In ***Brooke Bond Liebig v Mallya*** **[1975] EA 266 [1975] EA 266** Mustafa Ag. VP expressed the following principle as follows;

> *The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable*
> *a court to set aside or rescind a contract. In this case the parties and their*
> *advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.*

4. In **Wasike v Wamboko [1985] KECA 149 (KLR)** Hancox JA cited ***Setton on Judgments and orders (7th edition) vol 1 page 124***, and reiterated that;

> *"Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them… and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the*

policy of the court…; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."

5. And in **Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] KEHC 11 (KLR)** Harris J correctly held inter alia, 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.*
>
> *A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.*

6. The Defendant's case is anchored on grounds of fraud and/or collision, a mistake and/or error on the face of the record and discovery of new

evidence. The Court of Appeal in ***National Bank of Kenya Limited v Ndungu Njau*** **[1996] KLR 469** explained what constitutes an error of law apparent on the face of the record and the scope of review:

> *A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.*

7. On the ground of discovery of new, important and material evidence, the Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza [2009] KECA 422 (KLR)** held as follows:

> *The motion before the superior court was based on the discovery of new facts. However, <u>it is not every new fact that will qualify for interference</u>*
>
> *<u>with the judgment or decree sought to be reviewed</u>. In the words of the rule itself, it is*

"……discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed……."

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is

not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

8. Having analyzed the pleadings, the rival submissions, and the established legal principles governing review and setting aside consent judgments above, it is clear to me that the Defendant has not made out a sufficient case for review and setting aside and I say so for a number of reasons. First, the Defendant claims that the court record does not show the consent was recorded and that the Plaintiff had already sold the charged property. However, the court record and handwritten proceedings from 17th February 2016 that have been annexed by the Plaintiff show the consent was dictated and recorded before the court (Sewe J.,) . I am also in agreement with the Plaintiff's submission that a further perusal of the court record indicates that the Defendant himself swore an affidavit on 3rd March 2025 admitting that his advocates reviewed the file and found the consent was recorded and adopted. Therefore, his current contrary claim is not new evidence but rather, a statement in self-contradiction.

9. The Plaintiff has also demonstrated that in **Misc. Cause No. 597 of 2012**, a DCI investigation found that the title for the charged property was a forgery. Therefore, there was no valid property to sell and this evidence was always available since 2017 and could have been raised earlier and cannot be deemed as new. It is therefore my finding that there is no discovery of new and important evidence as contended by the Defendant.

10. Second, the Plaintiff states that the court failed to determine the issue of the charged property and that this is an error apparent on the face of the record. As stated above, an "error apparent" must be self-evident without elaborate argument. The Defendant is essentially arguing the court should have considered a point he now raises which is a ground for appeal, not review. Thus, I find that there is no error apparent on the face of the court's record warranting a review.

11. Third, the Plaintiff has claimed fraud and collusion by his former advocates. However as stated above, a consent entered by a duly instructed advocate is binding on the client. The Plaintiff annexed letters showing the Defendant's former advocates actively corresponding about the decree and even proposing payment plans. The Defendant also paid Kshs. 500,000.00 towards the debt. These facts clearly negate and discount any claim of fraud, collusion, or lack of

instructions. Furthermore, the Defendant does not dispute signing the personal guarantee and the consent was a direct result of that guarantee. The court has also already ruled in the decision of 1st September 2025 that **section 44A(4)** of the ***Banking Act*** does not apply to court decrees and that is a settled finding, not a review ground.

12. Fourth, I am in agreement with the Plaintiff's submission that the Defendant's conduct is nothing more than an abuse of the court process. He has shifted arguments multiple times, from blaming advocates, to denying knowledge of the consent to claiming *in duplum*, to claiming a missing record. He previously admitted the consent was on record but he now denies it, he attempted insolvency proceedings to stall execution, which failed and the Plaintiff's counsel aptly quoted that the Defendant's case has moved "from the false through the ridiculous to the embarrassing." As the court noted in its previous ruling, the Defendants appear hell bent on preventing the Plaintiff from enjoying the fruits of its judgment which accrued 10 years ago in 2016 and which situation cannot be countenanced by the court.

Conclusion and Disposition

13. The upshot is that the application by the 2nd Defendant dated 29th September 2025 is dismissed with costs to the Plaintiff

DATED SIGNED AND DELIVERED virtually at NAIROBI this 8th

DAY of MAY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Mutunga for the Plaintiff/Respondent
2. Mr. Mburu for the 2nd the Defendant/Applicant
3. N/A for the 1st Defendant
4. Amos- Court Assistant