



**Cooperative Bank of Kenya Ltd v Gituma (Environment and Land Appeal  
E021 of 2024) [2024] KEELC 4917 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4917 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E021 OF 2024**

**CK NZILI, J  
JUNE 19, 2024**

**BETWEEN**

**COOPERATIVE BANK OF KENYA LTD ..... APPELLANT**

**AND**

**GEORGE MUGAMBI GITUMA ..... RESPONDENT**

**RULING**

1. On 25.3.2024 this court following an application dated 30.3.2024 granted a stay of execution of the lower court decree on condition that the appellant file a bank guarantee of Kshs.8,500,000/=, as security within 7 days, pending hearing and determination of the application. Further orders given were that the application be served within 3 days for interpartes hearing on 7.5.2024.
2. By a consent dated 27.3.2024 parties varied the orders that Kshs.8,500,000/= in lieu of a bank guarantee be deposited in a joint interest-earning account, in the names of the advocates on record for the parties within 14 days.
3. The consent was to supersede an earlier consent dated 26.3.2024. The account was duly opened and by a letter dated 8.4.2024 and received on 8.4.2024 at 9.13 am M/S Mithega & Kariuki Advocates as joint Account No. xxxx Housing Finance Corporation Bank had been opened and Kshs.8,500,000/= deposited as agreed. A swift transfer confirmation dated 5.4.2021 at 14:20 hours was attached thereto.
4. It appears however that on 8.4.2024 at 16:05 hours, the respondent moved the trial court by a Miscellaneous Application E017/2024 dated 5.4.2024, for orders which were granted to Steven Nyama t/a Lifeline Auctioneers to attach the proclaimed good or property for sale to recover the decretal amount with the assistance of OCS Meru Police Station. The auctioneer was to file an inventory before the court within 7 days of the execution.



5. By an application dated 17.4.2024, the applicant moved this court seeking a stay of the orders dated 8.4.2024 at the lower court, orders of execution, terming the purported execution as illegal and seeks for restitution.
6. By an order dated 17.4.2024 the duty court granted a temporary stay and directed the two applications be heard on 7.5.2024. the applicant on 7.5.2024 opted to abandon the earlier applications, through an application dated 2.5.2024.
7. In the application the court is asked:-
  - a. temporary order a stay of execution of the decree of the lower
  - b. to order the respondent to pay Kshs.8,500,000/= in the joint account alluded
  - c. to order the respondent to pay Kshs.8,500,000/= to the applicant in restitution.
  - d. To order the property title deed No. L.R Nyaki/Kithoka/4195 to be held as security for restitutions of the fund executed against the applicant.
  - e. To order the Land Registrar Meru Central Land Registry to register a restriction against the title L.R No. Nyaki/Kithoka/4165, noting the property is being held as security for restitution of Kshs.17,009,000/= plus costs pending the determination of this appeal.
8. The application is supported by an affidavit of Duncan Matisero, a legal manager for the applicant sworn on 2.5.2024. It is averred that the applicant was served with warrants of attachment by M/ S Lifeline Auctioneers, attached as DM – 02 following which an appeal was filed together with an application for stay of execution. That stay orders were granted on 25.3.2024 on condition that security of Kshs.8,500,000/= million be filed within 7 days. That due to the logistics of procuring and renewing guarantees, parties agreed in good faith to open a joint account within 14 days in the names of the two advocates and to deposit the security.
9. The consent was executed on 27.3.2024 and filed in court awaiting adoption thereof on 7.5.2024. The same is annexed as DM 04.
10. That parties through their advocates proceeded to open the joint account on 27.3.2024 as per a letter attached as DM 05 and a deposit paid of Kshs.8,500,000/= (8.5 million) while awaiting adoption of the consent as per the attachment of the swift remittance slip marked DM 06.
11. That shortly after filling the consent account opening and funding it the respondent through M/s. Steven Nyamu T/A Lifeline Auctioneers in bad faith and contrary to the agreement proceeded to file a Misc. Application Meru Chief Magistrates E017 of 2024 and obtained an order on 8.4.2024 at 4.05 pm to execute as per a copy marked DM 07.
12. That armed with the court order and a contingent of police officers, the respondent proceeded to attach the applicant's goods which necessitated the applicant to authorize the release of Kshs.8.5 million held in the joint interest-earning account to the respondent and further paid Kshs.8,500,000 together with auctioneer costs to avoid attachment as per annexed transfers and communication marked DM 08.
13. The applicant avers that it was jittery that the applicant may proceed to enforce the entire judgment resulting in the release of the original title deed and the charge in favor of the applicant resulting to the loss of substratum of this appeal.



14. Moreover, the applicant deposes that the respondent's action of stealing a match against it and coercing the payment of Kshs.17,009,000/= it was only fair that the orders of payment of Kshs.8,500,000/= be made to a joint account and Kshs. 8.500,000/= be restated to it.
15. Further, the applicant deposes that the respondent should provide security for the monies paid out to him from the execution that he cunningly orchestrated and the property with the title deed should be preserved as per the copy and a valuation report marked DM 09.
16. The application is opposed through a preliminary objection dated 2.5.2024 that:
  - a. The application is overtaken by events since the appellant has satisfied the decree
  - b. There were no orders that have been disobeyed by anyone and thus the prayers for contempt of court amount to abuse of the court process.
  - c. There is a need for the two applications to be withdrawn, struck out or dismissed with costs as the appellant satisfied the decree voluntarily and thus the court is functus officio over this matter.
17. Further, the respondent relies on a replying affidavit of George Mugambi Gituma sworn on 14.5.2024. It is averred that the lower court issued a decree for Kshs.17,000,000/= as per the attached copy marked GMG "1" and in the absence of a stay, M/S Lifeline Auctioneers were instructed and commenced execution to recover the decretal sum by proclaiming the good only for an appeal to be filed and conditional stay orders made on 25.3.2024.
18. It was averred that the applicant failed to file the bank guarantee within 7 days making the orders lapse, paving way for the execution to proceed.
19. The respondent denied that negotiations were undertaken or consents entered into over the stay orders of the lower court decree or any such consent found in court and if there was any such consent, then the same was not adopted by the court and the same cannot be a basis of revival since the decretal sum was paid voluntarily.
20. Further, the respondent deposed that on 8.4.2024, he wrote to the respondent calling for the full settlement of the decree denying the existence of any such consent as per a letter marked GM "3", which was duly received by its lawyers on record.
21. The respondent averred that the applicant voluntarily and out of their own volition and free will, paid a sum of Kshs.8,500,000/= alleged to have been withdrawn out of the joint account which the court did not authorize for its opening, for they ignored the orders of 25.3.2024 as per annexed marked GMG "4" and executed closure form by Manasses Kariuki advocate marked GMG "5" & "6", respectively.
22. Additionally, the respondent deposes that on 16.4.2024 the respondents wrote back to the applicant acknowledging part payment of Kshs.8,509,000/=.
23. The respondent deposes the Kshs.8,500,000/= was done by way of a bank transfer clearly showing that the appellant was notified consented to the payment and proceeded to close the joint account which was opened unprocedurally, illegally and in contravention of the orders made on 25.3.2024.
24. Moreso, the respondent deposes that the appellant is misleading the court and forging documents purporting to be a consent which were never signed by him and were in violation of express orders of the court. The respondent has attached a bundle of consent as GMG "7" which were returned with execution on his part.



25. The respondent also deposes that if there were any such consents, they were required to have been recorded and adopted as orders of the court which was not done as the appellant would have taken an urgent mention dated for the adoption of the same.
26. Similarly, the respondent deposes that his advocate on record received an SMS from Mr. Mugambi Mithega advocate on 16.4.2024 attached as GMG “8”, saying that he was seeking instructions on when the balance of Kshs.8,500,000/= would be paid the next day on 17.4.2024 and eventually Mr. Manasses Kariuki advocate sought for bank particulars where to pay the balance through RTG as per annexure marked GMG “9”.
27. The respondent deposes that all their averments show that the decretal amount was settled voluntarily, freely with full knowledge and without coercion or duress.
28. Again the respondent deposes that the total decretal sum was settled a return or refund cannot issue for the lower court judgment stands and until varied, set-aside or reviewed and that since no court authorized a joint account to be opened or a deposit of Kshs.8,500,000/= be made, the orders made on 25.3.2024 are valid and were not complied with.
29. The respondent deposes that if the applicant had difficulties in complying with the orders made on 25.3.2020, it would have moved to court for an extension of time. Again, the respondent avers that by a letter dated 20.3.2024, it wrote to the Land Registrar Meru enclosing the judgment and the decree who complied and therefore no title deed is retained as per the annexed letter marked GMG “10”.
30. Subsequently, the respondent deposes that there is no need for endless litigation in this matter otherwise it will occasion great hardship and injustice to him.
31. The applicant relies on written submissions dated 13.5.2024. It is submitted that in order to breathe life into the orders on 25.3.2024 and for speedy administration of justice, parties entered into out-of-court negotiations and specifically agreed that a bank guarantee would be a time-consuming exercise that would require renewal periodical.
32. The applicant submits that Order 42 Rule 6 (1) & (2) Civil Procedure Rules is the backbone of stay pending appeal which they have fulfilled. Reliance was placed on Michael Ntoiti Mitheu vs Abraham Kivondo Musau (2021) eKLR, Vishram Ravji Halai vs Thornton & Turpin (1990) KLR 365 Butt vs Rent Restrictions Tribunal (1982) KLR 417 Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR and RWW vs EKW (2019) eKLR.
33. The applicant submits that whereas it paid the decretal sum, the decree had ordered for the title deed to be discharged and the original title released effectively, declaring the security held by the applicant void, hence the unexecuted part of the judgment form part of the substratum of the appeal requiring preservation.
34. In addition the applicant submits that the application dated 22.3.2024 was filed after ten days, following the judgment and that since the respondent has already stolen a march by deceptively executing for the decretal sum, the unexecuted portion of the judgment should be stayed. Reliance was placed on Pamela Awuor Ochieng & another vs Elisha Odari Ogony (2021) eKLR citing with approval Consolidated Marine vs Nampijja & another Civil Application No. 93 of 1989 and Samvir Trustee Ltd vs Guardian Bank Ltd Nairobi Milimani HCC No. 795 of 1999.
35. Regarding stay, the applicant submits that without a stay, the respondent may deal with the land as he so wishes and given the abuse of good faith and the speed with which the respondent proclaimed and coerced it to pay the decretal sum, there is no doubt that the respondent shall tamper with the property to eliminate the substratum of the appeal, hence rendering the appeal nugatory.



36. On the aspect of security the applicant submitted that giving life to the overriding objective as provided under Section 1 of the *Civil Procedure Act*, the parties agreed on the best form of security as a joint account and reduced the same into a duly signed consent, only await adoption on the court. Followed by the opening of the account in good faith and the deposit of Kshs.8,500,000/= only for the respondent to opt for a different mode of execution and coerced it to pay the money. Reliance was placed on *Nduhiu Gitahi vs Warugongo* (1988) KLR 621.
37. Relying on Order 42 Rule 7 (1) of the Civil Procedure Rules the applicant submitted that the court, where sufficient cause is shown by the appellant, require security to be taken for the restitution of any property which may have been taken in execution of the decree or for payment of a value of such property.
38. In this instance, given the purported renegeing of the respondent from consent, there was need to offer security and restitute the sum of Kshs. 8,500,000/= to the joint account, for there to be a fair playing field to the parties as they get into the appeal based on Sections 1 A & 3A of the *Civil Procedure Act*.
39. Reliance was placed on *Nicholas Arap Korir Salat vs IEBC & others* (2013) eKLR. On sharp practice, the applicant submitted that advocates as officers of the court bear the duty to promote administration of justice, by telling the truth in court while desisting from any negative conduct such as dishonesty and discourtesy as held in *Republic vs Mohamed & another* Petition 39 of 2018 (2019) KESC 47 (KLR) (15<sup>th</sup> March 2019) (ruling).
40. In this case the applicant submitted that the respondent advocates on record orchestrated a miscarriage of justice, abused the court process and failed the court in the administration of justice for the action on renegeing on the consent, ran a foul the overriding objective so as to derail or defeat justice in a dishonorable, dishonest and discourteous manner. Therefore, the court is urged to censure the advocate in his personal capacity for the acts preceding the execution.
41. On the preliminary objection, the applicant submitted that the mere fulfillment of a decree does not stop a court from issuing a stay order under Order 42 Rule 7 (1) Civil Procedure Rules, otherwise the preliminary objection is a red herring to delay the hearing of the application. Reliance was placed on *Madhupaper International Ltd vs Kerr* (1985) KLR to stop the appeal being rendered nugatory by ordering the restitution of the fund.
42. What the applicant sought for in the application dated 22.3.2024 was for stay of execution following the proclamation by Ms. Lifeline Auctioneers for Kshs.17,009,000/=, as admitted in the supporting affidavit sworn by Duncan Matisero on 22.3.2024, where he attached copies of the warrants of sale of property, proclamation and fee note received.
43. The court after perusing the application on 25.3.2024 certified the same urgent, granted a conditional stay of execution and listed the matter for interparties hearing on 7.5.2024.
44. It appears that the conditional stay orders were not complied with. Instead, the applicant deposes that in the spirit of breathing life into the court orders, parties engaged in court negotiations and agreed to replace the order of a bank guarantee with alternative security, by opening and depositing half of the decretal amount in a joint interest-earning account in the names of the two lawyers on record for the appellant and the respondent, within 14 days from the date of signing the consent dated 27.3.2024.
45. The respondent denies ever negotiating, executing, filing and endorsing such a consent. Further, the respondent on oath avers that he was not privy to and did not consent to the variation of a court order.



46. From the court record, it appears a consent dated 27.3.2024 was introduced in the e-filing system by MS Mithega & Kariuki Advocates Re. No. E3DYZWDT.
47. The time of filing payment thereof and stamping by the court is not indicated. The body of the consent is as follows:
- “To Deputy Registrar ELC Meru
- Dear Sir/Madam
- Kindly enter the following consent
- “By consent of the parties and their respective advocates the appellant’s application dated and filed on 22.3.2023 is marked as settled in the following terms that:
- i. There shall be stay of execution of the judgment and decree in Meru ELC E031 of 2022, pending the hearing and determination of this appeal, subject to the appellant depositing a sum of Kshs.8,500,000/= in lieu of a bank guarantee in a joint interest-earning account in the name of advocate for the appellant and advocates for the respondent within 14 days of signing this consent.
  - ii. The orders of the court dated 25.3.2024 requiring the appellant to furnish a bank guarantee of Kshs.8,500,000/= are hereby varied and vacated.
  - iii. This consent supersedes any other consent signed by the parties and for the avoidance of doubt, the earlier consent dated 26.3.2024 is hereby set aside”.
48. The consent is signed and stamped by the two law firms appearing for the parties. There was no request by the party who filed the consent for an urgent mention before the court for its adoption and or endorsement.
49. The parties did give a time frame or indicate that it as a condition precedent that the consent be subject to endorsement by the court for it to take effect or whether it was going to await the endorsement of the court on the earlier scheduled inter parties hearing.
50. Be that as it may, the time frame to comply was 14 days. In essence, therefore, the consent was self-executing. Parties opted that it would be acted upon within 14 days. The consent marked the application dated 22.3.2024 as settled subject to compliance with its terms. Parties even consented to vary and vacate the earlier orders of this court. This court has no reason to doubt that the two law firms on record as of 27.3.2024, engaged in out-of-court negotiations signed and executed the consent.
51. It appears however that as of 4.4.2024 both parties were reading from a different script. On his part, the respondent in the letter dated 4.4.2024 was referring to orders made on 25.3.2024 yet clause number 2 of the consent had varied or vacated them by consent on 27.3.2024. It was not a question of lapse after 7 days, but by consent of the parties. In the said letter Ms Gikunda Anampiu & Co. Advocates did not raise any issue as to non-adoption of the consent by the court. It is through a copy of this letter that counsel directed the auctioneers to expeditiously cart away, seize and carry all the proclaimed movables of the applicant’s bank premises both at the Meru and Makutano branches. The said letter appears to have been received by the auctioneer on 4.4.2024 at 10:52 am while it was received by Ms. Mithega & Kariuki Advocates on 8.4.2024.
52. In a letter dated 8.4.2024 the appellant’s counsel on record confirmed the opening of a joint account number 978389 2201 HFC Bank and deposited Kshs.8,500,000/= in the joint account made on 5.4.2024 at 14:20 hours.



53. Going by the RTGS, the account was for Gikunda Anampiu & Co. Advocates and Mithega & Kariuki Advocates relating to Meru CMCC ELC NO. 31 of 2022, George Gituma Mugambi vs the Bank.
54. In response the respondent's counsel denied knowledge of the alleged consent and said that the terms spelt in the said consent were not agreeable to his client. Further, counsel said that the consent had been entered into the court records or adopted as an order of the court for it to be binding on the parties. Counsel also stated that such consent was in clear violation of the existing court order.
55. It appears further that the respondent including executing in the lower court file, filed an ex parte application dated 5.4.2024 and sought an order to attach the proclaimed good or property in Meru ELC No. 31 of 2022. The said orders were issued on 8.4.2024 at 16:05 hours.
56. From the record availed before this court, there is no evidence that there was a decree extracted by the decree-holder in line with the law. Other than the warrants of attachment and sale, no decree was attached. Similarly, form Civil 7 D is blank where the date of decree is supposed to be indicated.
57. Further, one of the reliefs issued to the respondent was for the appellant to execute and hand over to the decree-holder a discharge of charge and hand over the original title deed for L.R No. Nyaki/Kithoka/4195, to the respondent within 20 days and in default, the executive office of the court to execute or sign the relevant instruments thereof. The respondent in his replying affidavit has sworn that he wrote to the Land Registrar Meru for the release of the title.
58. There is no evidence that the respondent complied with the order of the court by serving it upon the appellant within 20 days who defaulted to the alternative route to be employed to execute the decree.
59. In *Koinange Investments and Developments vs Nairobi City Council and others* (2009) eKLR the court cited *Omega Enterprises (K) Ltd vs Kenya Tea Development Authority* (1998) LLR 2525 that a party who knows of an order whether null or void regular or irregular cannot be permitted to obey it but has to come to apply the court to discharge it.
60. The court cited Order 21 Rule 81 (2) of the Civil Procedure Rules that no order shall be made unless notice of the application has been given to all persons against whom such order is made and *Ali Bin Khamis vs Salim Bin Khamis* (1956) 23 EACA 195 that when an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity.
61. The court said that honesty is a great virtue and a man is as great as his word. The court went on to say that though honesty is not a legal principle, it would be unjust to allow a party to mislead another with a view of gaining undue advantage.
62. The court cited *Jose Estates Ltd vs Muthumu Farm Ltd and others C.A No. 228 of 2000*, that considering the speed with which the transaction was completed, one was left with no alternative but to suspect fraud. The court further cited *Charles Ngare Karanja vs Florence Muthoni & another HC Civil Appeal/ No. 971 of 2005*, on the need for an auctioneer to conduct due diligence before execution of a decree.
63. On functus officio, the court said where consent to settle a suit is made on certain conditions and is breached, the court has the right to hear the parties.
64. Section 34 (1) of the *Civil Procedure Act* provides that all questions arising between the parties to the suit in which the decree was passed relating to execution shall be determined by the court executing the decree and not by a separate suit.



65. Order 50 Rule 3 of the Civil Procedure Rules provides that no motion shall be made without notice to the parties effected thereby. In *Speaker of National Assembly vs Njenga Karume (2008) 1KLR 425*, the court said that irrespective of the practical difficulties statutory procedures should not be circumvented.
66. In this application, there was already a proclamation dated 21.3.2024 that had been stayed by the court on 25.3.2024 and later by consent of parties on 27.3.2024 to await compliance within 14 days.
67. While aware of all the above, counsel on record for the respondent instructed the auctioneers to proceed with the execution.
68. The respondents filed a Miscellaneous application and obtained *ex parte* orders on 8.4.2024, without serving the person to be affected by the orders.
69. The respondent's counsel on record has not denied that the consent was signed by him and stamped by the law firm. Neither has he sworn on oath that his signature and official stamp were forged. The law firm has not reported forgery to the DCI for investigations.
70. Again, the respondent has not urged this court to set aside such consent on account of illegality, fraud, mistake or for being obtained through coercion. Similarly, counsel for the respondent has not averred on oath that the signed and executed the consent without instructions from the respondent.
71. As held in *Republic vs Mohammed (supra)*, advocates are officers of the court whose primary duty is to the court and secondly to their instructing clients.
72. In *Rubo Kimngetich Arap Cheruiyot vs Peter Kiprop Rotich (2006) eKLR*, the court observed that it is a decree which is executable and not the judgment itself which has to be drawn, approved, signed and sealed by the court.
73. The court nullified the warrants of attachment and sale during the pendency of a stay and an application for a stay.
74. In *Stephen Mwallyo Mbondo vs County Government of Kilifi (2021) eKLR* the court observed that auctioneers were agents of the court who must follow the law on execution for as held in *National Bank of Kenya Ltd vs Joly Family Stores & another (2005) eKLR* it is the court which gives them authority to execute.
75. In this application parties opted to consent, vary and vacate the court orders. A consent is an agreement that is enforceable in law. It is not for the courts to rewrite contracts for parties but to enforce them. Extrinsic evidence may not be brought to a contract. The court looks at a contract within its four corners, unless mistake, fraud, or illegality is invoked courts will not declare a consent unenforceable.
76. The consent was signed by the parties and was acted upon. See *Flora N. Wasike vs Destimo Wamboko (1988) eKLR*. The two law firms proceeded to supply personal copies of their ID cards signed the account opening forms and proceeded to open a joint account. There was a meeting of mind and the putting in place mechanisms to honour all the terms and conditions of the consent. Even without an endorsement or adoption of the consent by the court, parties acted upon it and actualized the terms to the extent of depositing the funds to the account. The respondent could not therefore in law feign ignorance of the consent, its implication and binding nature as of 4.4.2024. The monies were already in the account four days before 8.4.2024.
77. So, by the time the auctioneers obtained the *ex parte* orders on 8.4.2024, already full compliance with the consent had taken place.



78. Consent orders can only be interfered with if there is duress, mistake, misrepresentation, coercion, fraud or undue influence. In *KCB Ltd vs Specialized Engineering Co. Ltd* (1982) eKLR, the court held that a consent order entered into by consent is binding on all parties to the proceedings and cannot be set aside or varied unless proved to have been obtained by fraud, misrepresentation, collusion or in ignorance of suit facts.
79. The circumstances prior, during and after issuing the consent show that the parties intended to be bound by the consent regardless of whether it was adopted by the court or not. Had the parties required a court order to act on the consent they would not have opened a joint account.
80. The period of 14 days had not lapsed when the respondent's counsel purported to instruct the auctioneers to proceed with the execution. In *Flora N. Wasike vs Destino Wamboko* (supra), the court said a consent judgment or order has a contractual effect and can only be set aside if certain conditions are not fulfilled.
81. In *Frank Phipps and Pearl Phipps vs Harold Morrison* SCCA 86 of 2008, the court held an order obtained by consent of the parties was binding and remained valid and subsisting until set aside by fresh proceedings brought for that purpose. The court said such consent was enforceable while it stands and a party affected by it cannot if he concludes he is entitled to relief simply until it is sought to be enforced against him.
82. In *Cristle vs Cristle* (1951) 2 All ER 574 Lord Denning held that when there is no change of circumstances the court cannot alter or vary the agreement of the parties, unless it is necessary to carry the agreement into effect.
83. In this application, the consent was entered into by legally competent persons, lawyers of standing. The two adjusted wholly and compromised the application dated 22.3.2024, in writing, signed and detailed the agreement. It is clear that the terms and conditions of the agreement were known, agreed upon and timelines indicated to comply. See *Munyiri vs Ndunguya* (1985) eKLR.
84. There was consensus among the two lawyers in very clear terms, they were certainly aware of material facts. There could have been no misrepresentation, mistake or misunderstanding. See *Brooke Bond Leibig vs Mallya* (1975) E.A 266 and *NBK Ltd vs Otieno Ragot & Co. Advocates* (2020) eKLR.
85. Bad faith includes dishonesty, unfairness and conduct that is unreasonable. It occurs where there is a deliberate breach of due process or out of malice. See *Martin Kirima Baithambu vs Jeremiah Miriti* (2017) eKLR.
86. An advocate is an officer of the court under Section 55 of the *Advocates Act* as held in *Republic vs Mohammed and another* (supra). When courts can and do take action against a dishonorable lawyer under Section 57 of the Act as read together with Rule 46 of the Law Society of Kenya Digest of Professional Conduct and Etiquette.
87. The respondent wants this court to help it walk out of an agreement that was willingly and voluntarily signed by his advocates and which was acted upon on the basis that the agreement was in conflict with an earlier order of this court. Courts as held in *NBK (K) Ltd vs Pipeplastic Samkolit (K) Ltd & another* (2002) E.A 503 do not rewrite contracts for the parties. Parties are at liberty to agree on the terms and conditions of their agreements. Courts only hold parties to their bargain.
88. The consent was executed and acted upon by making the deposit. There is evidence of negotiation, the culmination of an agreement and acting on the consummated agreement by 5.4.2024. There was no default by the appellant before the expiry of 14 days as agreed by the parties. The performance of the agreement was made before the deadline.



89. Parties therefore intended to be bound by the contract. Once acted upon by the appellant, the respondent could walk away. He was stopped in law from renegeing on an already completed agreement by invoking non-compliance with an earlier order, already set aside by consent. To hold otherwise would be tantamount to allowing the respondents to unjustly enrich themselves.
90. The irresistible conclusion therefore is that the purported execution of the decree was illegal, irregular, null and void. If allowed to stand it will occasion the applicant grave injustice, yet the application for stay was made within reasonable time. Substantial loss is what is to be stopped from happening likely to render the appeal nugatory. *Butt vs Rent Restriction (supra)*, *Kenya Shell Ltd vs Kibiru & another (1986) KLR 1410*, *Samvir Trusted Ltd vs Guardian Bank (supra)*.
91. The applicant has expressed reasonable fear of repayment of the decretal amount and the title deed changing hand such as it may be out of its reach if the appeal is successful.
92. In *NIC Credit Bank Ltd vs Aquinas Francis Wasike & another (2006) eKLR*, the court held once fear is expressed by the applicant the evidential burden shifts to the respondent to show what resources he has. The respondent has merely indicated that the decree has been sufficiently satisfied hence the matter should be put to rest. The applicant has an undoubted right of appeal. Order 42 Rule 7 (1) Civil Procedure Rules grant this court powers where there is sufficient cause to require security to be taken for the restitution of any property taken in the execution of a decree.
93. The applicant has narrated that the execution herein was hurriedly done in flagrant disregard of the law and a consent duly executed by the parties. See *Penina Nzisa Ngomo & another vs Transnational Bank Ltd (2012) eKLR*.
94. The discretion to grant a stay of execution is unfettered. See *Vishram Ravji Halai vs Thorton & Turpin (supra)*. In *Nduhiu Gitahi vs Warugongo (supra)*, the court said that so long as the opposite party can be protected it is right and proper that security should be given in a way which is least disadvantages to the party giving the security, for the appealed judgment may be affirmed or set aside and therefore was in order to grant to avoid prejudicing the appeal.
95. In the circumstances obtained, I find there is a need to grant a stay of the execution of the decree pending appeal. Since the court has found the purported execution was illegal.
96. I find the purported lifting of a charge against the title by the Land Registrar irregular. The same is vacated and replaced with a restriction against the title register until the hearing of the appeal. Further, if the respondent has proceeded to collect he original title deed contrary to the directive by the trial court, he shall surrender the original title deed to the Deputy Registrar of the court within 3 days from the date hereof.
97. Additionally, the respondent shall also surrender the decretal amount to the custody of the court within 3 days from the date hereof. A notice to show cause shall also be issued to M/s. Lifeline Auctioneers to show cause why disciplinary action should not be taken against them, for proceeding with an irregular execution contrary to the consent of the parties, staying the execution to appear before the court on 24.6.2024 the lower court file be availed for mention on 24.6.2024.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JUNE, 2024**

**In presence of**

C.A Kananu

Kimani for the appellant



Anampiu for the respondent

**HON. C K NZILI**

**JUDGE**

