



**Voks Fashions Limited v Baraza (Miscellaneous Application  
E017 of 2025) [2025] KEELRC 1501 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1501 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E017 OF 2025**

**JW KELI, J  
MAY 23, 2025**

**BETWEEN**

**VOKS FASHIONS LIMITED ..... APPELLANT**

**AND**

**MAKENJI BARAZA ..... RESPONDENT**

**RULING**

1. On or about 8<sup>th</sup> January 2025, a consent was recorded between the Applicant's Advocates, OP Ngoge Advocates and the Respondent's Advocates, Ajulu & Associates in Nairobi ELRCA No. E006 Of 2024 between the parties. The effect of the consent was to authorise the release of a decretal sum of Kshs.886,505/-, held in court, to the Respondent and the Applicant's advocate in agreed proportion. The Applicant asserted that the said consent was entered into without its knowledge, instructions, or authority, and was null, void, and of no legal effect. The applicant filed the instant miscellaneous application by way of Notice of Motion application dated 28th January, 2025 and filed in court on even date seeking the following orders: -
  - a. This Honorable Court do grant leave to the Applicant to reopen the case for hearing and determination.
  - b. This Honorable Court be pleased to revise and/or set aside its orders made on 16th January, 2025, which directed the transfer of the decretal amounts as per the consent entered into by the Applicant's Advocate.
  - c. This Honorable Court be pleased to order a refund of the decretal amounts deposited with the Court to the Applicant, as the decree had already been executed.
  - d. This Honorable Court do stay any further execution of the decree or payments pending the hearing and determination of the Applicant's intended appeal. 5. The costs of this application be provided for.



2. The application was based on the grounds on the face of the application and the affidavit of Vijay Kanjibhai Chawda dated 28<sup>th</sup> January 2025. Chawda stated that the impugned consent was entered into without his knowledge, instructions or authority as the Director of the applicant company. That at the time the consent was entered into the Decree had already been executed and the respondent had fully realised the decretal amounts as indicated in Exhibit 2. The said exhibit was the transfer of the funds to the Judiciary bank account. Chawda asserted that the funds ought to be released to the applicant instead of being released to the respondent or being transferred to the escrow account between the parties' advocates.
3. The advocate on record in the appeal (E006 of 2024) where the consent was entered was Peter Ngoge, Advocate. Mr. Ngoge filed a replying affidavit dated 14<sup>th</sup> February 2025 in opposition of the application and stated that the applicant failed to comply with the conditional Order of stay of sale of the Motor vehicle granted by the court on 18<sup>th</sup> November 2024 pending appeal. That the decretal sum was Kshs. 1,158,081.27. (PON3). The Advocate averred that the law firm of Ajulu and Associates for judgment debtor emailed him on the 4<sup>th</sup> January 2025 to the effect that the sale of the motor vehicle had been done by auctioneer and the decretal sum had not been fully settled (PON4). That the applicant went behind his back and deposited the sum of Kshs. 886,505 in court under his lawfirm, OP Ngoge & Associates advocates (PON5). Since as the decretal sum was not satisfied on the sale of the motor vehicle, the judgment debtor was entitled to continue with execution or to have the sum deposited in court under OP Ngoge law firm, released to the decree holder, rendering the intended appeal moot and academic. That he entered into negotiations with the respondent in good faith leading to the consent where he managed to reduce the payable decretal sum from 1158081.27 to Kshs. 655,000. That he had authority to enter into the consent. That he was the advocate on record in appeal no E006 of 2024 and did not file any Notice of Appeal to challenge the consent judgment recorded on 16<sup>th</sup> January 2025. The advocate asserted that the filing of the miscellaneous application by another advocate was meant to bypass a mandatory provision of Order 9 Rule 9 of the Civil Procedure Rules to his detriment as the advocate on record. He prayed for costs to be taxed at a higher scale for abuse of the court process.
4. The Respondent filed a replying affidavit dated 31<sup>st</sup> January 2025 in Appeal No. E006 of 2024, where the impugned consent was filed. He stated that the applicant did not comply with the court order on deposit and deposited the money in court on 31<sup>st</sup> December 2024 when the order of the court had expired on 18<sup>th</sup> December 2024. That the applicant did not communicate with the respondent on the auctioneer costs. That the money deposited in court was less than the decretal sum. That as at time of deposit of the money in court the motor vehicle had been sold for Kshs. 360,000 which rendered the appeal stillborn and overtaken by events. That the Kshs. 360,000 was utilised to defray storage yard charges of Kshs. 157000, auctioneer charges for Kshs. 161,362 and Kshs. 41638 remitted to the decree holder advocate as part of the decretal sum (MB3, MB4 AND MB5 was the certificate of sale, auctioneer particulars and the letter forwarding the sum of Kshs. 41,638 to his advocates. That the details of the sale was shared with the applicant's advocates, who started negotiations leading to the consent filed in court.

## **Decision**

5. The application was canvassed by way of the pleadings and written submissions of the parties.

## **Whether the application was merited**

Applicant's submissions



6. Whether the Consent is binding. It is a trite principle of law that a consent order is binding upon the parties unless it is demonstrated that the same was procured through fraud, collusion, mistake, misrepresentation, or was entered into without authority. This position was succinctly enunciated in the case of *B.M.Musyoki & Co. Advocates v Horticultural Crops Development Authority* [2016] KEHC 4090 (KLR) wherein the Court stated: - "The East African Court of Appeal on its part in *Brooke Bond Liebig (T) Ltd. vs. Mallya* Civil Appeal No. 18 of 1975 [1975] E,A266 expressed itself as follows: - "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement... It is well settled that a consent judgement can be set aside only in certain circumstances, e.g., on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.". In the instant case, the Applicant has contended that its former advocates acted without authority, and as such, the consent recorded on 8th January 2025 is incapable of binding the Applicant and is liable to be set aside *ex debito justitiae* (as of right).
  
7. b) Whether the Orders of 16th January 2025 ought to be Reviewed or Set Aside. The jurisdiction to review orders of this Honourable Court is anchored under Section 80 of the *Civil Procedure Act* and Order 45 Rule I of the Civil Procedure Rules. The law permits review on grounds including, inter alia:
  - a). Discovery of new and important evidence; b). Error apparent on the face of the record; Any other sufficient cause. The case of 120191 KEHC 6379 (KLR) the Honourable court stated that: - "8. I find it useful to examine the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section 80 *Civil Procedure Act* and Order 45 Rule 1. Section 80 of the *Civil Procedure Act* provides as follows: - 80. Any person who considers himself aggrieved- (a) by a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit. 9. Order 45 Rule I of the Civil Procedure Rules, 2010 provides as follows: - 45 Rule I (l) Any person considering himself aggrieved- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) By a decree or order from which no appeal is hereby allowed, and who from the 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 or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay. "
  
8. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or: (b) on account of some mistake or error apparent on the face of the record, or (c) -for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay. In the present case, the Applicant's plea for review is predicated upon sufficient cause, being the entry of a consent without its authority or knowledge, which constitutes a fundamental



vitiating factor. Further, the Applicant asserts that the decree in the primary suit had already been fully satisfied, rendering the subsequent release of funds to the Respondent both erroneous and unjust. Given these circumstances, the Applicant has demonstrated grounds that fall squarely within the parameters of Order 45 Rule of the Civil Procedure Rules, justifying the setting aside of the orders of 16th January 2025, in the interest of justice and to prevent an abuse of the court process.

9. C) Whether the Decretal Sums Ought to be Refunded. The sum of Kshs. 886,505/-, being the decretal sum deposited in court, was no longer due or owing to the Respondent, having already been satisfied through execution. Consequently, any release of the said funds to the Respondent was improper and unjustified. This Honourable Court is therefore invited to exercise its discretion to compel immediate refund of the funds to the Applicant to forestall unjust enrichment and to preserve the sanctity and integrity of the judicial process.
10. d) Whether the Suit Should be Reopened and Stay of Execution Granted. The inherent jurisdiction of this Honourable Court, as enshrined under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, empowers the Court to make such orders as may be necessary for the ends of justice and to prevent abuse of the court process. The Applicant has exhibited a clear and arguable basis for the reopening of the suit to allow for its determination on merits and for the preservation of its rights pending appeal. Absent such orders, the Applicant stands to suffer irreparable loss, whereas no prejudice would be occasioned to the Respondent if the status quo is maintained pending the appeal.

## Decision

11. The court adopted a consent by the parties in ELRCA NO. E006 OF 2024 between the parties. Without change of advocates the applicant file the instant miscellaneous application to challenge the Consent order in the appeal and through a different law firm of Gopichndara & Co advocates. The court finds that the said law firm was not properly on record. They ought to have filed notice of change in the appeal No. E006 OF 2024 where the impugned order was filed. Failing to do so and taking into account the existence of another law firm On record for the applicant namely, OP Ngoge Advocates, the court finds the instant application was improper as submitted by Mr.Ngoge and prejudicial to his interest as the instructed advocate.
12. On the merit of the application the court found that it was not true the decretal sum was fully settled on sale of the motor vehicle as evidenced by the documents of the sale by the Respondent in his replying affidavit dated 31<sup>st</sup> January 2025 which was not controverted by the applicant.
13. The other ground for the application was that the consent was entered by advocate without authority. The applicant relied on the authority in BMMusvoki Co Advocates v Horticultural Crop Development Authority 2016 e KLR wherein the Court stated: - "The East African Court of Appeal on its part in Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] E,A266 expressed itself as follows: - "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement... It is well settled that a consent judgement can be set aside only in certain circumstances, e.g., on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract."The Court holds that that the only reason advanced by the applicant to set aside the consent order which would have been viable was the full settlement of the decretal sum which was the court found was not true. OP Ngoge Advocates was properly on record and that is why the applicant deposited the money in court court



under the law firm name. The East African Court of Appeal on its part in Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] E.A.266 expressed itself as follows: - "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement." I found that the applicant did not meet the foregoing threshold to warrant setting aside of the Consent Order entered on its behalf by the advocate on record OP Ngoge.

14. The court on a merit basis found no reason to interfere with the consent judgment by the court dated 16<sup>th</sup> January 2025. Litigation must come to an end. For the foregoing reasons the court will not order any further costs in the matter. The matter was marked as settled and file closed.
15. Each party to bear worn costs in this application.
16. The file is marked as closed.
17. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY , 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant : Mr. Ngoge on record - absent

Applicant – Sanjay

Respondent:-Ajulu

