



Bankforth Investment Company Limited v Ava Trade Limited (Civil Case E001 of 2025) [2025] KEHC 11737 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL CASE E001 OF 2025
FN MUCHEMI, J
JULY 31, 2025**

BETWEEN

BANKFORTH INVESTMENT COMPANY LIMITED PLAINTIFF

AND

AVA TRADE LIMITED DEFENDANT

RULING

Brief facts

1. The application dated 19th March 2025 seeks for orders of setting aside of the consent dated 26th February 2025 on the grounds that it was obtained through fraud, material representation and want of authority rendering it null and void ab initio. The applicant further seeks for orders of a declaration that the decree issued on 5th March 2025 together with all proceedings leading to it, were obtained through fraud, misrepresentation and abuse of the judicial process and consequently seeks setting aside and prays for issue of orders directing SBM Bank Kenya Limited not to release any funds held by the applicant in Account Numbers 0332xxxxxxx6 and 0332xxxxxxx9 in their Westlands Branch to the respondent for settlement of the decree issued on 5th March 2025.
2. The respondent opposed the application and filed a Replying Affidavit dated 28th April 2025.

Applicant's Case

3. The applicant states that it is a company duly incorporated under the laws of the British Virgin Islands (BVI) and has never being registered nor has it conducted any business in Kenya. The applicant further states that it maintains bank accounts at SBM Bank Kenya Limited Westlands Branch Account No.s 0332xxxxxxx6 and 0332xxxxxxx9.



4. The applicant avers that it previously held funded bank accounts with Chase Bank Kenya which subsequently went into liquidation leading to its funds being transferred to SBM Bank Kenya Limited where they are currently held.
5. The applicant states that the respondent filed the instant suit alleging that it is indebted to the respondent for the sum of USD 426,000 which claim is false and fraudulent. The applicant maintains that it has no knowledge of such indebtedness and has never entered any business relationship or financial transactions with the respondent.

The applicant argues that the purported indebtedness agreement dated 17th July 2024, upon which the respondent's entire claim is based, is a complete fabrication and forgery. The respondent has failed to produce any legitimate evidence to support the claim such as bank records or proof of loan disbursements. Further, the applicant states that the firms of Odhiambo Opar & Co. Advocates and Muiruri & Mwangi Co. Advocates unlawfully filed pleadings on its behalf without any authorization or instruction from it. The firm of Muiruri & Mwangi Co. Advocates executed the consent dated 25th February 2025, which concedes judgment in favour of the respondent. The said consent led to the issuance of a decree on 5th March 2025 and the applicant argues that both the consent and decree are fraudulent as it was not aware of the said proceedings.

6. The applicant avers that it was never served with any court documents related to the matter and the purported service records are falsified.
7. The applicant states that if the execution of the fraudulent decree proceeds, it will suffer irreparable financial harm as the respondent is a shell entity with no real assets or ability to repay any sums that may be unlawfully seized. The applicant further states that the application has been made timeously. Further, the respondent will not suffer any prejudice if the orders sought are granted.

The Respondent's Case

8. The respondent states that the deponent of the affidavit, Daire Ferguson, has not attached any documentary evidence demonstrating his association or connection to the applicant company. Additionally, despite the fact that the deponent states that he resides in Ireland, the supporting affidavit indicates that it was sworn in Nairobi. Thus in the absence of any travel documents proving that he was in Nairobi on 19th March 2025 when he allegedly swore the affidavit in the presence of the Commissioner of Oaths, the affidavit ought to be struck out together with the application. Further, the applicant has failed to meet the strict rules regulating e-signatures and electronic evidence, thus the entire application is incompetent on the ground of a defective affidavit.
9. The respondent states that despite the applicant alleging that the email address through which the said company was served with court papers is a fabricated address, it has not indicated the identity of the valid email belonging to the company.
10. The respondent states that the applicant company was incorporated in the year 2006 in the Republic of Ireland, with its principal seat of operations in the city of Dublin and not in the British Virgin Islands as alleged. The applicant has merely opened an office in the British Virgin Islands as part of its global business expansion efforts.
11. The respondent argues that the applicant cannot claim that it does not conduct any business in Kenya while asserting that it operates two accounts with SBM Bank Kenya limited, Westlands Branch. The respondent further states that the laws regulating banking operations in Kenya do not permit an entity to open a bank account without meeting minimum requirements:- proof of registration in Kenya via a Certificate of Incorporation/Certificate of Compliance if the company is operating a branch in Kenya;



proof of registration with the Kenya Revenue Authority (KRA) via PIN Certificate; evidence of the entity's physical address within Kenya; work permit along with an alien certificate issued by the State Department of Immigration and CR 12 issued as a confirmation of directorship, registered office and email address. Thus, it follows that if the applicant operates two bank accounts in Kenya, such accounts are linked to business operations conducted within the Republic of Kenya.

12. The respondent states that in light of the above, the evidence on record supports that the consent was lawfully entered into without any fraud. Further, the indebtedness agreement dated 17th July 2024 captures in paragraph 2 the registered offices of the applicant company as being in the city of Dublin, Republic of Ireland.
13. The respondent states that the applicant has not challenged the fact that one Fiona Ruth Loughrey, who signed the agreement on its behalf, is an individual unknown to the applicant.
14. The respondent argues that allegations of fraud and misrepresentation are complex factual issues which are advanced in substantive suits and not in applications as advanced by the applicant. Further, the respondent states that the instant suit is validly before the court where the applicant was adequately represented and the matter was concluded.
15. The applicant filed a Further Affidavit dated 25th June 2025 and states that he has attached the company's authority authorizing him to swear and execute the pleadings on behalf of the company. The applicant further refers to Section 5 of the Oaths and Statutory Declaration Act and states that the law does not obligate a deponent to provide proof of travel from their area of residence to the advocate's office every time they depone an affidavit. Further, pursuant to Order 19 Rule 8 of the Civil Procedure Rules, the applicant avers that there is no limitation placed in law for the advance execution of affidavits. The applicant further states that its official email address is info@avatrade.com
16. The applicant avers that it was registered in the British Virgin Islands on 24th July 2006 and subsequently changed its name from Ava Financial Ltd to Ava Trade Ltd. Further, the applicant affirms that it held funded accounts with Chase Bank Kenya limited which was later liquidated, which at the time permitted international companies to open accounts in Kenya without requiring them to be registered in Kenya.
17. The respondent filed a Supplementary Affidavit dated 4th July 2025 and states that the contents of the resolution dated 20th June 2025 confirm that both the deponent and advocate on record were only formally instructed by the applicant as of that date, which is long after the application and supporting affidavit were filed in March 2025 confirming that the deponent and counsel lacked the proper authority to file the pleadings on behalf of the applicant at the material time.
18. The respondent states that under the *Oaths and Statutory Declarations Act*, affidavits must be sworn in the physical presence of a commissioner of oaths, notary public or other authorized officer. Accordingly, if the deponent was not physically present in Kenya at the time the oath was purportedly administered, the affidavit is not only defective but also potentially fraudulent and is therefore liable to be struck out. The respondent further states that the applicant's continued failure or refusal to furnish the immigration documents only serves to reinforce the view that the affidavit was not validly sworn and is therefore inadmissible.
19. The respondent states that an interlocutory application must be anchored on a substantive pleading such as plaint or draft defence, which the applicant has failed to attach and thus ought to be struck out in limine. The respondent further states that it is contradictory and irregular for the applicant to disown its former advocates while simultaneously relying on pleadings by the same firm.



20. The respondent argues that the instant application offends Order 2 Rule 4 of the Civil Procedure Rules which provides that allegations such as fraud must be specifically pleaded in the pleadings.
21. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

22. The applicant reiterates what it deponed in its affidavit and submits that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake. To support its contentions, the applicant relies on the cases of Brooke Bond Liebig vs Mallya (1975) EA 266 and Flora N. Wasike vs Destimo Wamboko [1988] eKLR. The applicant submits that the purported legal representation by Odhiambo Opar & Co. Advocates and Muiruri Mwangi & Co. Advocates was undertaken without its authority, knowledge or consent. The applicant further submits that there are no written instructions, resolutions or authorities issued to the said law firms authorizing them to represent it in the matter, given that it is a limited liability company. Relying on the decision in Wilfred N. Konosi t/a Konosi & Co. Advocates vs Flamco Limited [2017]eKLR, the applicant argues that there was no client advocate relationship and thus the said law firms were acting on their own behalf.

The Respondent's Submissions

23. The respondent reiterates what it deponed in its affidavit and submits that the affidavits ought to be struck out. To support its contentions, the respondent relies on the cases of Nyahururu High Court Civil Appeal Cause No. E022 of 2023; Re Estate Dominicus Odhiambo (Deceased) [2020] eKLR and Mary Gathoni & Another vs Frida Ariri Otolu & Another [2020]eKLR. The respondent further relies on the case of Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd Nairobi (Milimani) HCCC No. 391 of 2000 and submits that the documents filed before the resolution are a nullity in law having been filed without proper authority from the applicant.
24. Relying on the case of Vijay Morjaria Madhusingh Darbar & Another [2000] eKLR, the respondent submits that where an applicant seeks orders to set aside a consent judgment on grounds of fraud, the applicant must strictly prove fraud whose threshold is higher than balance of probabilities but almost on the same plane as beyond reasonable doubt, which the applicant has failed to do.
25. The respondent cites Section 974(1) of the [Companies Act](#) and submits that a foreign company shall not carry on business in Kenya unless it is registered under this part.
26. The respondent argues that where an applicant seeks to have judgment set aside, he bears the onus of attaching a draft defence to the application for the court concerned to exercise its discretion whether or not to set aside the judgment. Relying on the decision in Nelly Wanjiru Njenga vs Robinson Maina & 3 Others [2021] KEELC 1943 (KLR), the respondent submits that the applicant has failed to attach such defence and the failure to do so renders the same defective.

The Law

Whether the application is fatally defective for want of filing a resolution authorizing Daire Ferguson to plead on behalf of the applicant.

27. The respondent is seeking for the application to be struck out on the ground that the applicant did not file a resolution or authority authorizing Daire Ferguson to swear the affidavits on the applicant's behalf.



28. The applicant acknowledged that in its Further affidavit dated 25th June 2025, the applicant annexed an authority granted to Daire Ferguson to act on behalf of the applicant thereby fixing this anomaly as at the inception of the suit, the applicant failed to file the resolution of authority. However, the respondent argues that the resolution is dated 20th June 2025 affirming its position that at the time of filing the application dated 19th March 2025, the deponent did not have the requisite authorization to plead on behalf of the company.
29. Courts have consistently held that the board resolution may be filed at any time before a suit is fixed for hearing. In the case of *Leo Investments Ltd vs Trident Insurance Company Ltd (2014)* eKLR where the court stated:-
-such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore not fatal to the suit.
30. The Court of Appeal in the case of *Spire Bank Limited vs Land Registrar & 2 Others [2019]* eKLR stated as follows:-
- It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.
31. From the foregoing, it is clear that the deponent produced the authority permitting him to swear the affidavits on behalf of the applicant albeit the resolution is dated 20th June 2025. The law is also clear that the absence of the resolution before the suit is heard is not fatal to the suit. Thus, the applicant is at liberty to rectify this anomaly. Accordingly, this court is bound by Article 159(2)(d) of *the Constitution* which enjoins the court to administer justice expeditiously and without undue regard to procedural technicalities and finds that finding that the applicant did not file the requisite authority whilst filing the instant application will amount to a procedural technicality which would impede to the administration of justice.

Whether the affidavits sworn by the applicant are fatally incurable.

32. Section 5 of the Oaths and Statutory Provisions Act provides:-

Every commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.



33. In the case of Regina Munyiva vs Kenya Commercial Bank Ltd (2005) eKLR where an affidavit had been purportedly sworn at Machakos but commissioned in Nairobi, the court stated that:-

The second issue raised by the applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned.

The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia Commissioner for Oaths on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is therefore fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that stamp was just affixed. This court would have no alternative but strike off the replying affidavit as it is not properly commissioned and that means that the application would stand unopposed.

34. In the instant matter, the affidavits in question have been sworn by Daire Ferguson in Nairobi on 19th March 2025 before Lawrence Onger, a Commissioner for Oaths in Nairobi. Thus, the affidavits are compliant with Section 5 of the Act.

Whether the consent dated 26th February 2025 ought to be set aside.

35. The applicant argues that the consent dated 26th February 2025 ought to be set aside as it was entered into through fraudulent means.

36. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of S. M. N vs Z. M. S & 3 Others [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:

- i. Where the consent was obtained fraudulently;
- ii. In collusion between affected parties;
- iii. Where an agreement is contrary to the policy of the court;
- iv. Where the consent is based on insufficient material facts;
- v. Where the consent is based on misapprehension or ignorance of material facts;
- vi. Any other sufficient reason.

37. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.

38. In Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA held the view that:-

It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.

39. The Honourable Judge went further and cited Setton on Judgments & 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.

40. In Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485, Harris J:

1. 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.
2. 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.

41. In Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another [1998] eKLR this court cited a passage in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 stating:-

“ Authority of solicitor- a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction, and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen) [1903] 1 Ch pp817, 818; Little vs Spreadbury [1910] 2KB 658. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice. Welsh vs Roe (1918-9) All ER Rep 620.”

42. Similarly in the Ugandan case of Lenina Kemigisha Mbabazi Star Fish Ltd vs Jing Jeng International Trading Ltd (HCT-OO-MA-344-2012):-

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

43. Lastly in Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated:-

“The compromise agreement 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 circumstance, e.g on grounds of fraud, 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.”

44. Essentially, the above-cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason, which would enable a court to set it aside. The record shows that on 26th February 2025, parties



entered into a consent for judgment to be entered in favour of the respondent for an all inclusive sum of USD 426,000 payable in three days and in default of which, SBM Bank Kenya Ltd to be declared a garnishee and release the sum of USD 426,000 from the applicant's account numbers 0332xxxxxxx6 and 0332xxxxxxx9. The said consent was stamped by both parties' advocates, filed and adopted as an order of the court. Although the applicant argues that it was not aware of the consent nor did it give the said firm of Muiruri & Mwangi Advocates or Odhiambo Opar & Co. Advocates the authority to act on their behalf, it is trite law that a consent order entered by an advocate is binding on the parties because the advocate is presumed to be acting on instructions of his client Furthermore, the applicant has merely stated that they did not authorize the said advocates in entering the consent but the fact that the bank accounts indicated in the consent are the applicant's bank accounts, it goes to show that the advocates were acting on their client's instructions. Such information cannot be obtained by guesswork. Additionally, I am not persuaded by the argument by the applicant that its bank accounts were opened in Kenya without them not having registered a business in this Republic. Section 974 of the *Companies Act* provides that a foreign company shall not carry on business in Kenya unless it is registered under this part. Thus, it is evident that the applicant registered its business in the Republic for it to have been allowed to carry on business and open bank accounts.

Furthermore, the applicant has not denied that Fiona Ruth Loughrey, the debtor's representative who signed the indebtedness agreement dated 17th July 2024 is one of their employees.

45. It is therefore my considered view that the consent dated 26th February 2025 was not entered into fraudulently or through misrepresentation.
46. Consequently, the decree dated 5th March 2025 is lawful and proper. Accordingly, the application dated 19th March 2025 lacks merit and is hereby dismissed with costs.
47. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 31ST DAY OF JULY 2025.

F. MUCHEMI

JUDGE

