



**Galmagai & another v Syuki & another (Miscellaneous Civil Application  
522 of 2019) [2024] KEHC 6279 (KLR) (Civ) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6279 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION 522 OF 2019**

**JN NJAGI, J**

**MAY 30, 2024**

**BETWEEN**

**OSMAN GALMAGAI ..... 1<sup>ST</sup> APPELLANT**

**DANIEL MURIITHI MUTHENGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETERSON MUSILU SYUKI ..... 1<sup>ST</sup> RESPONDENT**

**ANNA KAMENE MUSILI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appeal for the appellants herein, HCCA No. 631 of 2019, was dismissed by this court on 7<sup>th</sup> October 2022 for failure to attend court. The appellants filed an application dated 6<sup>th</sup> October 2023 seeking to have the appeal reinstated. The parties on the 20<sup>th</sup> June 2024 recorded a consent reinstating the appeal on condition of the appellants filing/serving a complete Record of Appeal within 21 days of the 20<sup>th</sup> June 2023 in default of which “the application dated 6<sup>th</sup> February 2023 will stand dismissed and the dismissal order of 7<sup>th</sup> October, 2022 in respect to the appeal revived with costs to the respondent.”
2. The consent was adopted as an order of the court on 20<sup>th</sup> June 2023.
3. The respondents have now filed an application dated 17<sup>th</sup> October 2023 stating that the appellants failed to comply with the conditions of the consent and as a result the appeal stands dismissed. They are seeking that the money deposited in court by the appellants as security amounting to Ksh.1 million be released to them since there is no appeal pending.
4. The appellants on their part through their counsel told the court that they have filed the record of appeal. However, that they have not managed to file a supplementary record of appeal because they have not obtained typed copies of proceedings. That they have no control of typing of proceedings.



That they have been following the same with the Executive Officer of the court and have even written protest letters. Therefore, that it is not in the interest of justice for the appeal to be dismissed over something they have no control over. That there will be no prejudice if the appellants are given more time.

5. I have considered the grounds in support of the application and the request by counsel for appellants that they be given more time to comply with the consent orders. The terms of reinstatement of the appeal were conditional on the appellants filing and serving the record of appeal within 21 days of the consent order, failure to which the appeal stood dismissed. Since the appellants did not comply with the terms of the consent order there is no appeal pending before this court.
6. A consent order is binding on parties unless set aside by the court for reasons of fraud or misrepresentation. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd* (1982) KLR P. 485 held 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 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.”
7. There are no such allegations in this matter. In any case the appellants have not moved the court to set aside the consent orders or for extension of time. The appeal thereby stands dismissed.
8. There being no appeal pending in court, the application by the respondents to release the money deposited in court is allowed as prayed.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of;

Miss Gakii holding brief Mr Kavita for Appellants

Miss Ndunga holding brief Mr Nyamu for Respondents

Court Assistant – Amina

30 days Right of Appeal.

