

KENYA / JUDGMENT

Afro Drip Limited v Racharky Construction Limited & another

[2026] KEHC 12977 (KLR)

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COURT

High Court

BEFORE

MN Mwangi

CASE / FILE NUMBER

Commercial Appeal E007 of 2025

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMA NO. E007 OF 2025

AFRO DRIP LIMITED.....APPELLANT

-VERSUS-

RACHARKY CONSTRUCTION LIMITED.....1ST RESPONDENT

PASCHAL MWANDIKU MUTUA.....2ND RESPONDENT

(*Being an Appeal from the Ruling of the Chief Magistrate Hon. Lucy Ambasi, delivered on 11th December 2024 in CMCC No. 2780 of 2020*)

JUDGMENT

1. The appellant filed a suit in the Lower Court against the respondents vide a plaint dated 23rd June 2020, which was subsequently amended on 6th August 2021, seeking judgment for the sum of Kshs.5,399,860.00, costs of the suit and interest on (a) & (b). The appellant's case was that it entered into an Agreement with the 1st respondent on or about 13th January 2020 for the supply of liner materials at an agreed price of Kshs.11,899,860.00, payable within three (3) months.

2. The appellant averred that for the first three (3) months, the 2nd respondent was able to make part payment of Kshs.1,500,000/= on 26th February 2020, Kshs.1,000,000/= on 10th March 2020 and Kshs.4,000,000/= on 16th March 2020, leaving an outstanding balance of Kshs.5,399,860.00, which remains unpaid. The appellant contended that the respondents committed to defray the debt, whereof the parties herein signed an Agreement dated 7th July 2020. Thereafter, the respondents issued the appellant with two cheques for Kshs.450,000/=, which bounced upon presentation for encashment. The appellant asserted that despite several attempts to amicably resolve the matter and upon formal demands being issued through its Advocates, the respondents have failed, neglected, or refused to settle the outstanding sum.
3. The appellant claimed that the respondents failed to enter appearance in the suit despite service of Summons. Consequently, the appellant requested for judgment in the sum of Kshs.5,399,860.00, vide a request for judgment dated 2nd December 2021. The record shows that this request was checked on 10th January 2022 and thereafter, Judgment was entered for the appellant against the respondents on 21st January 2022. A decree for Kshs.6,667,421.65 and costs of Kshs.193,182.72 was subsequently issued on 23rd June 2022.
4. The appellant then applied for execution of the said decree vide warrants of attachment of moveable property in execution of decree for money, and a warrant of sale of property in execution of decree for money, both dated 29th July 2022. The said warrants were however returned unexecuted, vide a letter dated 15th November 2022, for reasons that the Auctioneer was unable to locate the judgment debtor's assets and properties. The appellant again took out warrants of attachment of moveable property in execution of decree for money, and a warrant of sale of moveable property in execution of decree for money dated 9th December 2022, but the said warrants were also returned unexecuted, vide a letter dated 5th June 2023, for reasons that the Auctioneer was unable to locate the judgment debtor's assets and properties.
5. Consequently, the appellant took out a Notice to Show Cause dated 7th August 2023, requiring the 2nd respondent or his Advocate to appear before Court on 30th August 2023 to Show Cause why execution should not be granted. The Notice went further to state that the 2nd respondent's presence would be dispensed with if the sum of Kshs.7,175,562.54 being the balance of the decretal sum with interest, cost of execution and Court collection fees were lodged in Court before the said date.
6. The record shows that the respondents vide a Notice of Appointment of Advocates appointed the law firm of M/S Acheru Mufuaiya & Company Advocates. When the aforesaid Notice to Show Cause came up for hearing, the parties indicated to the Trial Court that they had agreed and settled the matter vide a Consent dated 18th September 2023, which Consent was adopted as an Order/Judgment of the Court on 4th October 2023. The matter was marked as final and the file closed. The appellant contended that the respondents did not comply with the terms of the aforesaid Consent, and it took out another Notice to Show Cause dated 14th December 2023 against the respondents. The said Notice was scheduled for hearing on 22nd

January 2024.

7. Subsequently, the respondents filed a Notice of Motion application dated 16th February 2024 pursuant to the provisions of Order 8 Rule 3(1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other provisions of the law, seeking orders **inter alia,** for the Court to set aside the Interlocutory Judgment entered in favour of the appellant and grant the respondents leave to defend their case as they were not properly served with pleadings in the matter. The respondents claimed that their newly appointed Advocates had informed them that the Honourable Court had entered Interlocutory Judgment against them on 21st January 2022 and that the matter had been proceeding **ex parte**. They contended that that they were never served with any pleadings or Court documents and were therefore unaware of the suit, and were shocked to learn that Judgment had been entered against them.
8. The respondents deposed that upon perusal of the Court file, their Advocates discovered that the firm of Achero Mufuayia & Company Advocates was on record purportedly acting for them, yet they maintained that they never instructed that firm and that any information presented to the Court by the said Advocates was false. They asserted that the Interlocutory Judgment was irregularly obtained due to lack of service and that they have a good defence to the suit. They further stated that the Judgment exposes them to imminent execution without being afforded an opportunity to be heard. They nonetheless expressed willingness to settle the decretal sum by instalments and attached a cheque for the sum of Kshs.100,000/= as a demonstration of good faith.
9. In opposition to the said application, the appellant filed a replying affidavit sworn on 12th March 2024 by Mr. Maingi Musyimi, an Advocate of the High Court of Kenya and learned Counsel for the appellant. Mr. Maingi averred that due to the outstanding decretal sum of Kshs.7,175,500/=, a Notice to Show Cause dated 7th August 2023 was duly served upon the 2nd respondent herein. Mr. Maingi stated that the firm of Achero Mufuayia & Co. Advocates filed a Notice of Appointment and appeared in Court, where Mr. Achero indicated that he had instructions to settle the matter out of Court, prompting engagement between Counsel, and correspondence ensued in which the respondents were copied and acknowledged the proposed arrangement. Mr. Maingi stated that a Consent was thereafter executed on 18th September 2023 and adopted as an Order of the Court on 4th October 2023.
10. Mr. Maingi contended that despite the Consent and concessions made, including waiver of part of the interest, the respondent failed to comply, leading to the issuance of another Notice to Show Cause (NTSC), which was duly served upon both the respondent and their Advocates. He indicated that the Court subsequently allowed the Notice to Show Cause (NTSC) due to their non-attendance. He asserted that the said application was merely intended to delay execution, as the respondents had already admitted liability by expressing willingness to settle the decretal sum by instalments. Counsel averred that the issue of allowing the respondent to defend the suit is moot, and the application should be dismissed.

11. The Trial Court delivered a Ruling dated 11th December 2024, allowing the application dated 16th February 2024 as prayed. The Court then issued Orders **inter alia,** setting aside the Interlocutory Judgment and granting leave to the respondents to defend the suit, and directed that their defence and list as well as witness statements be filed within 30 days from the date of the Ruling.
12. Aggrieved by the said Ruling, the appellant filed a Memorandum of Appeal dated 13th January 2025, raising the following Grounds of Appeal -
13. The Learned Magistrate erred in law and fact by allowing the application by the respondents and consequently setting aside the **ex-parte** Judgment;
14. The Learned Magistrate erred in law and fact in misconstruing and misapplying the facts propounded by the parties in respect to the application dated 16th February 2024 and thereby resulting to a wrong conclusion;
15. The Learned Magistrate erred in law and fact in failing to appreciate that the grounds for setting aside of an **ex-parte** Judgment were ousted or foreclosed by existence of a Consent Order adopted by the Court on 6th November 2023 whereof the Ruling was rendered **per incurium** (sic);
16. The Learned Magistrate erred in law and fact in misapplying the principles in respect to setting aside of **ex-parte** Judgment;
17. The Learned Magistrate erred in law and fact by disregarding material facts in respect to existence of an affidavit of service of Summons, a Consent Order, failure to attach a draft defence and an admission of indebtedness in the supporting affidavit dated 16th February 2024; and
18. The Learned Magistrate erred in law and fact in failing to make a finding that the respondent's Notice of Motion dated 16th February 2024 lacked merit and therefore was ripe for dismissal.
19. The appellant's prayer is for the Appeal to be allowed with costs and that the Orders issued by Hon. Lucy Ambasi (CM) on 11th December 2024 in **Milimani CMCC No. 2780 of 2020** be set aside. The appellant further prays that the Notice of Motion dated 16th February 2024 filed in the Lower Court be dismissed with costs, and that the Consent Order dated 4th October 2023 be upheld, with the appellant being granted liberty to enforce its terms.
20. The instant Appeal was canvassed by way of written submissions. The appellant's submissions were filed on 8th December 2025 by the law firm of Maingi Musyimi & Associates Advocates. I however note from the Court record and the Case Tracking System that despite the respondents being given several opportunities to file their written submissions in opposition to this Appeal, they did not do so.

21. Mr. Maingi, learned Counsel for the appellant submitted that by allowing the Notice of Motion dated 16th February 2024 and setting aside the **exparte** Judgment, the Trial Court effectively sat on Appeal over a matter already conclusively settled through the Consent dated 18th September 2023 and adopted as an Order of the Court on 4th October 2023. He argued that the Trial Court was **functus officio** and lacked jurisdiction to reopen the matter, since the Consent Order was never set aside or appealed against, nor was its setting aside sought in the respondents' application. Counsel contended that the Trial Court's finding on the Consent, without first setting it aside amounted to a fundamental error, and was **per incurium** (sic), as explained by the Court of Appeal in **Heritage Insurance Company Limited v Angatia & 3 others** [2024] KECA 1458 (KLR).
22. Counsel asserted that the finding that the respondents were not properly represented was erroneous and ignored clear evidence on record, including email correspondence showing that the respondents were aware of, and participated in the negotiations leading to the Consent. He maintained that the claim that the law firm of Achero Mufuayi & Co. Advocates lacked instructions is dishonest and unsupported.
23. Mr. Maingi relied on the Court of Appeal cases of **Wasike v Wamboko** [1985] KECA 149 (KLR) and **Mwalambe & another v Freedom Limited** [2025] KECA 252 (KLR), and submitted that the Trial Court misdirected itself by treating the application as one seeking to set aside a Consent Judgment rather than an **ex parte** judgment, and further misapplied the settled principles for setting aside such judgments.
24. He further referred to the case of **Nelly Wanjiru Njenga v Robinson Maina & 3 others** [2021] KEELC 1943 (KLR), and submitted that the Interlocutory Judgment was regular, as there was no credible challenge to service of Summons, and that the respondents failed to demonstrate a meritorious defence, having not annexed a draft defence as required. Mr. Maingi further submitted that the respondents admitted the debt in their supporting affidavit by proposing to settle the decretal sum by instalments, rendering any reopening of the case unnecessary and prejudicial to the appellant.

ANALYSIS AND DETERMINATION.

1. This being the 1st appellate Court, this Court has a duty to analyze and re-evaluate the evidence adduced before the Lower Court and reach its own independent conclusion. See **Williamsons Diamonds Ltd vs. Brown** [1970] EA 1 and **Ramji Ratna and Company Limited vs Wood Products (Kenya) Limited**, Civil Appeal No. 117 of 2001.
2. I have re-examined the Record of Appeal and given due consideration to the written submissions by the appellant's Counsel. The issue that arises for determination is whether the Trial Magistrate erred in fact and law by setting aside the Interlocutory Judgment when there was a Consent Order/Judgment on record.

3. The power of a Court to set aside an interlocutory judgment is discretionary and must be exercised judiciously and not capriciously. Such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a party who has deliberately sought to obstruct or delay the course of justice. Setting aside of interlocutory judgments is provided for under Order 10 Rule 11 of the Civil Procedure Rules, 2010, which states that -

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

1. The Court of Appeal in the case of **Abdalla Mohamed & another v Mbaraka Shoka** [1990] KECA 49 (KLR), set out the tenets a Court should consider when dealing with applications for setting aside interlocutory judgments to include -
2. ***Whether there is a regular judgment;***
3. ***Whether there is a defence on merit;***
4. ***Whether there is a reasonable explanation for any delay;***
5. ***Whether there would be any prejudice.***
6. The issue of regular judgments was addressed in the case **Mwala v Kenya Bureau of Standards EA LR** [2001] 1 EA 148, where the Court stated –

...to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.

1. On examination of the Affidavit of Service sworn on 15th November 2021 by Mr. Francis Musyoka Nguthu, a Court Process Server, in support of the request for judgment dated 2nd December 2021, this Court notes that he averred that on 16th September 2021, he received copies of the Plaint and Summons dated 6th & 12th August 2021, from the law firm of Maingi Musyimi & Associates Advocates, with instructions to serve the respondents.
2. He deposed that upon making inquiries from the appellant's representative, he established that the respondents had relocated from their previous offices and their current whereabouts were unknown. He averred that as a result, he effected service by sending the pleadings by email to the respondents' email addresses and dispatching the same via registered post to the address indicated on the 1st respondent's CR-12, namely P.O. Box No. 48575-00100. Additionally, he stated that he served the 2nd respondent through WhatsApp

using the mobile number 0726666770. Bearing in mind the foregoing averments, this Court is satisfied that these modes of service are in line with the provisions of Order 5 Rules 22B & 22C of the Civil Procedure Rules.

3. Subsequently, an Interlocutory Judgment was entered against the respondents on 21st January 2022. It is manifest from the respondents' affidavit in support of the application seeking to set aside the Interlocutory Judgment that they did not substantively challenge the contents of the Affidavit of Service. In the absence of such a challenge, and in light of the presumption of regularity accorded to duly sworn affidavits of service, this Court is persuaded that the Interlocutory Judgment entered on 21st January 2022 against the respondents was regular.
4. On the issue of whether the respondents demonstrated that they had a plausible defence raising triable issues to warrant setting aside of the Interlocutory Judgment, it is instructive to note that the respondents did not annex a draft statement of defence to their application before the Trial Court. The importance of annexing a draft defence cannot be overstated, as it enables the Court to assess whether the intended defence raises *bona fide* triable issues. Accordingly, the absence of a draft defence, coupled with the respondents' own admission of indebtedness in their supporting affidavit, significantly undermines any assertion that they have a meritorious defence to warrant the setting aside of the Interlocutory Judgment entered in favour of the applicant on 21st January 2022.
5. Upon perusal of the Record of Appeal, it is evident that after the entry of the Interlocutory Judgment the parties' Advocates engaged in negotiations culminating in a Consent dated 18th September 2023, which was adopted as an Order of the Court on 4th October 2023. The legal effect of a Consent Order is well settled.
6. The Court of Appeal in the case of **Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others** [2019] KECA 928 (KLR), considered the circumstances in which a Consent Order may be set aside as hereunder –

*The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig Vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;*

“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.”

*And in the case of *flora n. wasike vs destimo wamboko* [1988] eKLR 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.”

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.

1. The Court of Appeal in *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] KECA 390 (KLR), considered the circumstances that would lead to a Consent Order and/or Judgment being varied and/or set aside and held that –

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

1. An Advocate is presumed to have authority to act on behalf of a client, and any acts done within that capacity are binding unless the lack of authority is clearly demonstrated.
2. In this case, the respondents claimed that the law firm of Achero Mufuayi & Company Advocates acted without instructions. It is however evident from the Record of Appeal that the Advocates for the appellant and the respondents' Advocates being the law firm of Achero Mufuayi & Company Advocates, had several email correspondence wherein the respondents were copied and the 1st respondent responded by stating that it was agreeable to the terms of the Consent and they should get the matter started since it would manage. That is captured on page 69 of the Record of Appeal. No credible evidence was tendered to demonstrate fraud, mistake, or misrepresentation sufficient to vitiate the Consent. More importantly, the respondents did not seek the setting aside of the Consent Order in their application before the Trial Court.
3. In the circumstances, this Court finds that the Consent dated 18th September 2023, having been adopted as an Order of the Court on 4th October 2023, remained valid, binding, and enforceable. The respondents neither sought nor established any legal basis for having it set aside, and the Trial Court therefore had no justification for disregarding the said Consent.
4. This Court agrees with Mr. Maingi's submissions that the doctrine of **functus officio** is applicable in this case. It is trite law that a Court only becomes **functus officio** after performing all its duties in a particular case. The Supreme Court of Kenya in expounding on the doctrine of **functus officio** in the case of *Raila Odinga & Others v IEBC & Others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius, in “*The

Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,”* (2005) 122 SALJ 832 as follows-

The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.

1. Accordingly, once a Court has conclusively determined a matter and embodied that determination in a final Order or Judgment, the Court becomes **functus officio** and cannot reopen the matter except in the limited circumstances provided by the law.
2. Therefore, by setting aside the Interlocutory Judgment without first addressing or setting aside the subsisting Consent Order, the Trial Court effectively reopened a matter that had already been finally determined. This constituted a clear misdirection in law and an improper exercise of judicial discretion.
3. In view of the foregoing, this Court finds that the learned Trial Magistrate misapprehended the facts and misapplied the applicable legal principles in setting aside the Interlocutory Judgment in issue. The discretion to set aside the said Judgment entered on 21st January 2022 against the respondents was therefore not exercised judiciously.
4. In the result, this Court is satisfied that the Appeal herein is merited. It is hereby allowed in the following terms -
5. **The Orders issued by Hon. Lucy Ambasi, Chief Magistrate, on 11th December 2024 in Milimani CMCC No. 2780 of 2020 are hereby set aside;**
6. **The Notice of Motion dated 16th February 2024 filed in the Lower Court is hereby dismissed with costs;**
7. **The Consent Order dated 4th October 2023 is hereby upheld and the appellant is at liberty to enforce its terms; and**
8. **The costs of the Appeal shall be borne by the respondents.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 12th day of August 2026. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Maingi Mutisya for the appellant

No appearance for the respondents

Mr. Muthomi – Court Assistant.

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