

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. E006 OF 2020**

**MALKIA CLOTHING STORES**  
**LTD.....PLAINTIFF/RESPONDENT**  
**VS**

**MACHAKOS COUNTY**  
**GOVERNMENT.DEFENDANT/APPLICANT**

**RULING**

1.Before this Court is the Notice of Motion dated 26<sup>th</sup> February 2025 seeking the following orders;

***“i. Spent.***

***ii. Spent.***

***iii. Spent.***

***1v.THAT, the consent dated 24<sup>th</sup> March 2021 and filed in court on an even date, and adopted as judgment of the court on 25<sup>th</sup> May 2021 and all the consequential proceedings and court orders (including warrants of arrest) thereto, be set aside.***

***v. THAT, as a consequence of order iv above, the plaintiff’s suit proceeds to trial at the option of the plaintiff.***

***vi. THAT, in view of the discovery of new evidence in this matter, the defendant be granted unconditional leave to amend its***

***defence (the defence dated 10<sup>th</sup> December 2020 and filed in court on the same day.***

***vii. THAT the cost of this application be paid by the Plaintiff/Respondent.***

2.The Application is supported by the affidavit of Julius Kasanga Muindi, the Chief Officer for Finance sworn on 25<sup>th</sup> February 2025. It is deposed that the impugned consent had an error apparent on the face of the record and resulted from a grossly irregular process with little or no adherence to public procurement law. That one 'Nycliff Mwanza' who signed the delivery note for the goods has never been an employee of the Defendant. That they were unable to comply with the court orders because the critical supporting documents were lacking. Also, that there was no tender advertisement by the Defendant in 2015. It was contended that their Defence raises triable issues, there was no contract was executed between the parties and section 68 of the Public Procurement and Disposal Act, Chapter 412C, Laws of Kenya was not complied with.

3.In opposing the Application, the Plaintiff/Respondent filed replying affidavits sworn on 17<sup>th</sup> March 2025 and 11<sup>th</sup> April 2025 by Magdalene Nundu Malika, a director of the Respondent. Magdalene Nundu deposes that the County Attorney is not properly on record as the firm of B.M. Mungata & Company Advocates is on record and neither has he attached the requisite authority from the County to file this application; that as such the application is incurably defective, for violating Order 9 Rule 9 of the Civil Procedure Rules; that the consent

judgment was validly entered into by the parties and has remained unchallenged for nearly four (4) years rendering the current application an afterthought.

4. Further, that the judgment debtor having repeatedly acknowledged the consent judgment in court by actively seeking time to satisfy the same, is estopped from challenging the same at this late stage; that the alleged procurement irregularities are irrelevant and do not constitute a ground for setting aside the judgment and that the claim of missing documents is a mere excuse. Lastly, that the averments do not meet the threshold for setting aside a consent judgment established in the case of ***Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR and Flora N. Wasike vs Destimo Wamboko [1988] eKLR.***

5. Lastly it was contended that the Respondent has gone to great lengths to mislead the court and blur the real issues through diversionary tactics. That the Judgment debtor has engaged in consistent post judgment conduct including attending court, acknowledgment of the decree seeking time to pay and initiating partial payments all of which affirm its full knowledge and acceptance of the consent judgment. Further, that on 17/01/2025, one Erastus Kilonzo Mutua came to court and introduced himself as a representative of the county attorney office on behalf of Julius Kasanga, the chief Finance Officer who could not be traced. On the same day a further consent was signed by the parties to settle to principal sum of Kshs

16,692,000. The court was urged to dismiss the application as it is merely intended to frustrate the decree holder's lawful claim.

6. The Application was canvassed by way of written submissions.

7. The Applicant submitted that the delivery note produced by the plaintiff is signed by a person who was not, has never been, and is not an employee of the County Government of Machakos. That the procurement process was flawed as the Applicant could not even prove whom it delivered goods to, and cannot tell whether the value of the goods it allegedly delivered was Kshs 16,692,000.00 or Kshs 16,392,000.00 and lastly that the interest of protecting public resources outweighs the interest of the Applicant.

8. Counsel for the Applicant contended that the County Attorney was properly on record and there is no violation of Order 9 Rule 9 of the Civil Procedure Rules, because the defendant/applicant filed a notice of appointment of advocate and served it from its official email [countyattorney@machakos.go.ke](mailto:countyattorney@machakos.go.ke) to the email [Akimaniadvocates@gmail.com](mailto:Akimaniadvocates@gmail.com) via email on the 22nd day of February, 2025, at 11:46 am. It was also submitted that the plaintiff/respondent is fully aware that B.M. Mung'ata & Company Advocates no longer acts for the respondent/applicant, and has always dealt with Machakos County Government directly and that due to the strained relationship with the defendant/applicant, B.M. Mung'ata & Co.

Advocates has filed several applications to cease acting for the defendant/respondent, thus it is, and is still impracticable for the said B.M. Munga'ta & Co. Advocates to consent and have the Office of County Attorney, take over from the 'mess' that it occasioned the respondent/applicant.

9. Secondly, it was submitted that the County Government structure mirrors the National Government structure. A County Government is a creature of the constitution; it is not a corporation in the context of the Civil Procedure Act and Civil Procedure Rules. Accounting Officers such as the Chief Officer Finance (Julius Muindi Kasanga) have authority to swear affidavits on their own behalf, and on behalf of the government they serve.
10. Thirdly, it was submitted that the appointment of Julius Muindi Kasanga as Chief Officer for Finance of the Machakos County Government, grants him sufficient authority to swear an affidavit on his own behalf and on behalf of the Machakos County Government. In support of its submissions, reliance was placed on the following cases; ***Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485, Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR, Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 and Makula International Ltd Vs His Eminence Cardinal Nsubuga and Another [1982] HC.***

11. For the Respondent, it was submitted that the application, and all documents filed by the said office post-judgment, are fatally incompetent and in breach of Order 9 Rule 9 of the Civil Procedure Rules and this court should not entertain proceedings filed in breach of express procedural rules.
12. Secondly, it was submitted that the consent judgment is valid and binding. That at no time did the Defendant ever challenge the advocate's authority or raise any concern until the current application nearly four years later. Thirdly, that the applicant has not established sufficient ground for setting aside the consent judgement. In support of its submissions, reliance was placed on the cases ***Kenya Pipeline Company Limited -Vs- Lucy Njoki Njuru [2014] eKLR, Boniface Kiragu Waweru -Vs- James K. Mulinge & Another [2015] e KLR, Monica Moraa -V- Kenindia Assurance Co. Ltd. [2010] eKLR, Victor Mabachi & Another V Nurtun Bates Ltd [2013] EKLR, Flora N. Wasike V Destimo Wamboko [1988] eKLR, Kenya Commercial Bank Ltd V Benjoh Amalgamated Lt Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485d & Another [2017] eKLR, Hirani V Kassam [1952] 19 EACA 131, Board Of Trustees of The National Social Security Fund V Michael Mwalo [2015] eKLR, Victor Mabachi & Another v Nurtun Bates Ltd [2013] eKLR, Board Of Trustees Of The National Social Security Fund V Michael Mwalo [2015] eKLR and Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & others [2009] eKLR:***

## **ANALYSIS AND DETERMINATION.**

13.I have considered the application, the rival affidavits and submissions of the parties and find that the issue for determination is whether the threshold for setting aside the consent order has been met.

14.The impugned consent judgment was entered into on 24<sup>th</sup> March 2021 and adopted as an order of the court on 25/5/2012 by Kemei J. I have perused the court record and deduced the following;

- i. The Plaintiff was filed on 17/11/2020 and on 2/12/2020, the firm of M/S B.M. Mungata & Company Advocates entered appearance and filed a defence on 10/12/2020.***
- ii. Before the consent order was adopted as an order of the court, the Defendant through his advocate confirmed that the consent was in order by stating that 'that is the position'.***
- iii. Subsequently, a bill of costs was filed and vide a ruling of the Hon Analo, the same was taxed at Kshs 604,814.54.***
- iv. The execution proceedings commenced after service of the decree and there were notices to show cause extracted and served upon the defendant/Applicant, the Department of Finance and the advocate for the Defendant***
- v. Warrants of arrest were issued against the Chief Officer Finance on 15<sup>th</sup> June 2023 and on 17<sup>th</sup> January 2025.***
- vi. On 4<sup>th</sup> February 2025, the OCPD Machakos appeared before this court and stated that he could not find the Chief Officer finance and the County Attorney had been instructed to appear on his behalf.***

15. In the case of **Brook Bond Liebig Ltd -vs- Mallya (1975)**

**E.A 226 at 269** it was stated that:

***“A court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”***

16. The grounds for rescinding a contract include fraud, collusion, misrepresentation, or that the agreement is contrary to the policy of the court. (See the case of **Okore v Wambui (Civil Appeal E012 of 2022) [2025] KEHC 9021 (KLR)**).

17. The Court of Appeal in the case of **Mwalambe & another v Freedom Limited (Civil Appeal E022 of 2023) [2025] KECA 252 (KLR)** stated as follows;

***“Undeniably, advocates are recognized agents of parties on behalf of whom they make their appearances and address the court. In so acting as an agent, an advocate is bound to obey the instructions of his/her principal, in this case the client, and should neither exceed nor fall short of those instructions lest he/she be held liable for any misrepresentation he/she may make. The general assumption, unless otherwise proved, is that, an advocate being the authorised agent of a party, is deemed to be fully authorised by his/her client and that whatever he/she transacts is assumed to be within the full knowledge and authority of the client.***

***30. Unfortunately, in this case, the appellants failed to substantiate the allegations that their counsel did not have authority to execute the consent judgement. The element of fraud or misrepresentation on the former appellants’***



***advocates was not demonstrated, not even by a simple sweeping statement that they had taken any action against the counsel for misrepresenting their instructions to the court. This is a conclusive testament that they knew that they could not support the assertion that they had not instructed the counsel to sign and file the consent judgment. We are therefore not persuaded that the appellants were not aware of the terms of the consent.”***

18. In this case, there is no proof of fraud, mistake or misrepresentation raised against Counsel. There is also no allegation that the Advocate who entered into the consent on behalf of the Applicant did not have instructions to enter into or to record the consent. The Applicant's contention is that it has been completely unable to satisfy the decree arising from the consent judgment for reason that no goods were supplied to the Applicant. That there had been no tender that would have culminated in such a debt in the first place and further that the documents that were used as proof of performance of the contract giving rise to the sum in the consent were, issued by persons who were not employees of the Applicant. If indeed that is the case then would it be in order for this court to allow the consent judgment to stand? In my view it would be against the policy of the court to allow such a consent to stand more so, given that the Applicant being a public organ the funds involved are public funds. Whereas this court is not impressed by the length of time it has taken for this application to be filed given the steps this court has taken in an effort to ensure that the Respondent enjoys the fruits of its judgment, it cannot

ignore the issues raised by the Applicant as that would amount to acting whimsically. While I am alive to the inconvenience this may occasion the Respondent, it is my finding that the issues raised by the Applicant are deserving of interrogation by this court by way of hearing the case on merit. The Respondent will not suffer any prejudice as it will have an opportunity to adduce evidence to prove its claim and to test the evidence of the Applicant through cross examination.

19. On the issue of appointment of the County Attorney, my finding is that that is a procedural issue which should not be used to defeat this application. It is instructive that the County Attorney came into this matter after this court issued a notice to show cause against the Chief Officer Finance following an application made by Counsel for the Respondent. His coming into the matter was not opposed by Counsel for the Respondent.

20. I think I have said enough to show that this application is merited. The same is allowed and orders are granted as follows;

- a. The consent judgment entered herein on 25<sup>th</sup> May 2025 be and is hereby set aside.**
- b. That the suit shall now be heard on its merits.**
- c. That the Applicant shall bear the costs of this application while any other costs shall be in the cause.**

Orders accordingly.

**Ruling signed, dated and delivered virtually on this 14<sup>th</sup> day of November 2025.**

**E. N. MAINA**

**JUDGE**

**IN PRESENCE OF:**

Mr. Kimani for Exparte/Applicant/Respondent

No appearance for Respondent/Applicant

C/A: Geoffrey

ORIGINAL