



**PASP & another v EPCP (Acting as Next Friend of SAP - Minor) (Environment & Land Case E005 of 2023) [2023] KEELC 18136 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18136 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E005 OF 2023**

**NA MATHEKA, J  
JUNE 21, 2023**

**BETWEEN**

**PASP ..... 1<sup>ST</sup> APPLICANT**

**DOFP ..... 2<sup>ND</sup> APPLICANT**

**AND**

**EPCP (ACTING AS NEXT FRIEND OF SAP - MINOR) ..... RESPONDENT**

**RULING**

1. The application is dated 23<sup>rd</sup> May 2023 and seeks the following orders;
  1. That this application be certified as urgent;
  2. That the consent executed by both parties dated 8<sup>th</sup> May 2023, be adopted as an order of this court;
  3. That decree for the same be issued urgently;
  
2. The application is based on the supporting affidavit of Tasneem K. Kasmani, and grounds that the Applicants are the parents of the Respondent minor and are currently registered as natural guardians for him on the title deed for Flat No.XX, Tenth Floor, Block C, Second Tower, Mombasa/ Block XXVI/452. That the property is currently making a loss and the Applicants, acting in the best interest of the child, wish to mitigate the loss, by selling the property and reinvesting the proceeds in a profitable investment/ account. That a purchaser has shown interest in the same, however, if the decree is not issued within good time, the sale shall fail and the Minor shall lose the opportunity to mitigate his loss, since the completion date for the same has already expired and the Applicants are at risk of the sale being rescinded. That it is in the interest of orderly administration of justice and fairness that the consent executed by both parties herein, be granted. The applicant subject to the court's orders is willing to abide by any such conditions that may be imposed by this Honourable Court.



3. I have carefully considered this application and the supporting affidavit filed in the matter, as well as the relevant law. The only issue for determination is whether the Court should adopt the consent dated 8<sup>th</sup> May 2023.

4. Order 25 Rule 5(1) of the Civil Procedure Rules, 2010 which deals with the Doctrine of Consents provides as follows;

“Where it is proved to the satisfaction of the Court and the Court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any subject matter of the suit, the Court shall on the application of any party order that such agreement, compromise or satisfaction be recorded and enter Judgment in accordance therewith.”

5. The adoption by Courts of Consents entered into by litigating parties is done in keeping with the spirit of Article 159(2)(c) of the Constitution of Kenya which exhorts Courts to encourage all forms of Alternative Dispute Resolution. The consent entered into between the parties which was dated 10<sup>th</sup> August 2015 provided as follows:-

“By Consent

1. That the Applicants as natural guardians of Samuel Alexander Pereira be vested with authority to sell Flat No. XX, Tenth Floor, Block C, Second Tower, Mombasa/Block/XXVI/452;
2. That the Applicants be directed to accept and keep the proceeds of the above-mentioned sale, to hold the same secure and in trust for Samuel Alexander Pereira with power to call in convert and re-invest the proceeds acting at all times, in the best interests of the child.”

6. I have perused the court record and find that the Applicants are the parents of the Respondent minor as per the attached birth certificate. The Applicants are currently registered as natural guardians for him on the title deed for Flat No.XX, Tenth Floor, Block C, Second Tower, Mombasa/ Block XXVI/452. They claim that the said property is currently making a loss and the Applicants, acting in the best interest of the child, wish to mitigate the loss, by selling the property and reinvesting the proceeds in a profitable investment/ account. This consent has been signed by K.A. Kasmani & Company Advocates for the Applicants and Evelyn Philomena Cotilda Pereira, the Respondent and Next friend of the minor.

7. It is trite that a Consent only becomes binding on parties and attains legal character once it is adopted as an order or judgment of the Court. Authorities to this effect are many. In the case of Church Road Development Co. Ltd vs Barclays Bank of Kenya & Another HCCC No. 296 OF 2006 the court held as follows;

“I wish to point out that my examination of the file records, as earlier pointed out, confirms that the “consent orders” were received in court. They were stamped and filed in this file. BUT they were not recorded in the file by the Deputy Registrar. I hold the opinion that no such consents by the parties or their counsel in a suit, become part of the court proceedings or judicial proceedings until they are so recorded and duly signed by the Deputy Registrar.



The act of recording the consent and signing it, is not merely administrative in my view. It is judicial and holds judicial or legal consequences.”

8. Further in the case of *Simon Ayiembra v Kenya Industrial Estates Ltd* Civil Appeal No. 5 of 2001 Hon. Justice Serگون held that;

“There are only two ways in which a Consent can be legally accepted by the Court; the first instance is when the parties file in Court a fully executed written contract which becomes a Court Order the moment it is domesticated and approved by Court and the second instance is when one of the parties orally addresses the Court on the contents of the proposed Consent thereafter the adversary as called upon to confirm the contents. The names of the parties orally addressing the Court must be recorded and the Court receiving the Consent must then approve and subsequently adopt the terms of the Consent as an Order ...”

9. Finally, the Supreme Court of Kenya rendered itself on this issue in the case of *Geoffrey M. Asanyo & Others v The Attorney General* [2018] eKLR where the court held that;

“Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio. This Court having ruled that the Judgment of the Court of Appeal (dated 13 November 2015) was a nullity; and that Court having not formally adopted the consent by parties, was not yet functus officio.”

10. A Consent entered into between parties is deemed to be tantamount to a contract between said parties and will have the same binding force as a contract. In the case of *Pius Kazungu Mweni & 12 others v Jefwa Nyale & another* [2020] eKLR the court held that;

“A consent that has been filed must go through the process of verification and adoption by the court before it can be considered to be a court order.”

11. In the Practice Directions on Proceedings in the Environment and Land Court, and on Proceedings Relating to the Environment and the Use and Occupation of and Title to Land and Proceedings in Other Courts, Gazette Notice No. 5178 of 25 July 2014. Rule 35 provides as follows;

“35. Where parties at any stage compromise a matter or intimate a settlement outside court, they shall file consent signed by all parties in the matter settling the same. If no settlement is reached, the matter shall be set down for hearing. In all cases, the filed consent shall require the approval and adoption by the court.”

12. In the instance case and from the record there is no suit upon which the application is predicated upon. The consent is entered with a third party called “next friend” one EPCP, who entered appearance on in person (on 8<sup>th</sup> May 2023 same date of the filing the consent and application and through the same Advocates representing the Applicants) and never filed any response to the application or appeared in court. How did this person become next friend? Was there are related succession or probate matter which has not been disclosed to this court? What is also curious is that she was quick to file an appearance but no response was filed to this application. Apart from land and property matters being



emotive and very sensitive this case involves a minor and his best interest comes first. Indeed, the futility of seeking substantive orders without a suit is that this court is unable to verify the facts of this case without having oral evidence adduced.

13. From the above discussion, it is apparent that the prayer for adoption of the consent has been made in vacuum and the same is incapable of being granted. In any event, this court has been unable to verify the consent and satisfy itself that this is in the best interest of the minor. This court has not been able to rule out fraud or collusion. I find this application is not merited and is dismissed with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

