



**Chepkwony & another v Gulflink Enterprises Limited (Environment & Land Case E271 of 2022) [2023] KEELC 22593 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22593 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E271 OF 2022**

**JO MBOYA, J  
OCTOBER 31, 2023**

**BETWEEN**

**ELIUD K. CHEPKWONY ..... 1<sup>ST</sup> PLAINTIFF**

**SAMUEL PATRICK NJUE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GULFLINK ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

1. On the 3<sup>rd</sup> July 2023, this Honorable court rendered and/or delivered a Ruling pertaining to and in respect of an Application dated the 15<sup>th</sup> November 2022; which Application was filed by the Defendant herein.
2. Furthermore, it is appropriate to underscore that the Application dated the 25<sup>th</sup> November 2022; had sought for provision of Security for Costs to be paid by and on behalf of the Plaintiffs herein.
3. Suffice it to point out that vide the Ruling rendered on 3<sup>rd</sup> July 2023; the Honourable court allowed the Application for security for costs and thereby decreed that the Plaintiffs herein shall deposit security for costs in the sum of Kes.20, 000, 000/= only; and which sum was to be deposited in an Escrow Account in the name of the Advocates for the respective Parties.
4. Be that as it may, before the timeline for deposit of the security for costs lapsed, the Learned Counsel for the 1<sup>st</sup> Plaintiff filed an Application seeking for extension of time within which to deposit the security for costs. For coherence the Application for extension of time came up for hearing on the 21<sup>st</sup> September 2023; whereupon same was allowed and timelines extended by a further 30 days.
5. First forward, the matter herein was thereafter listed for mention on the 23<sup>rd</sup> October 2023; to confirm compliance and thereafter to issue further directions. However, on even date, the advocate for the Parties entered into a consent albeit on terms.



6. Arising from the terms of the consent, which was entered into on the 23<sup>rd</sup> October 2023, the counsel for the Parties agreed to mention the matter on the 31<sup>st</sup> October 2023. Instructively, the matter was indeed mentioned on the 31<sup>st</sup> October 2023.

### **Parties' Submissions:**

#### **1<sup>st</sup> Plaintiff's Submissions:**

7. When the instant matter was called out for mention on the 31<sup>st</sup> October 2023, Learned counsel for the 1<sup>st</sup> Plaintiff sought to address the court on various issues pertaining to and concerning compliance with the terms of the consent which was entered into on the 23<sup>rd</sup> October 2023.
8. Firstly, Learned counsel for the First Plaintiff submitted that despite the terms of the consent, the Escrow account, which had been decreed by the court was yet to be opened and/or operationalized. However, Learned counsel added that the failure to open and operationalize the Escrow account was not attributable to the 1<sup>st</sup> Plaintiff.
9. Secondly, Learned counsel for the 1<sup>st</sup> Plaintiff also submitted that same has since filed an Application dated the 30<sup>th</sup> October 2023; under certificate of urgency and which Application learned counsel invited the court to consider and thereafter give directions thereon.
10. Additionally, Learned counsel also submitted that at the foot of the Application dated the 30<sup>th</sup> October 2023, same has explained the difficulties encountered in the construction of the Escrow account, which was decreed vide the order of the court issued on the 3<sup>rd</sup> July 2023.
11. Lastly, Learned counsel for the 1<sup>st</sup> Plaintiff submitted that owing to the fact that same has since filed an Application and coupled with the fact that the Escrow account has not been operationalized, same invited the Honourable court to consider the totality of the circumstances before making an order dismissing the Plaintiff's suit for want of compliance with the requirement to deposit the security for costs.

#### **Defendant's Submissions:**

12. Learned counsel for the Defendant submitted that the matter is before the court for mention to confirm whether the 1<sup>st</sup> Plaintiff has since complied with the terms of the consent order which was entered into and endorsed by the court on the 23<sup>rd</sup> October 2023.
13. Furthermore, Learned counsel for the Defendant has submitted that it was evident and apparent that the 1<sup>st</sup> Plaintiff has since failed, neglected and/or otherwise refused to abide by the terms of the consent.
14. Additionally, Learned counsel for the Defendant submitted that the consent order which was entered into by the Parties on the 23<sup>rd</sup> October 2023; was self-contained and included an automatic default clause, whereby the 1<sup>st</sup> Plaintiff's suit would stand dismissed without further reference to court.
15. Lastly, Learned counsel for the Defendant also submitted that on the face of the consent order, which included a default clause, this Honourable court became *Functus officio* and thus the court cannot be invited to make any further orders, which are at variance with the consent entered into and endorsed on the court record.



### Issues For Determination:

16. Having reviewed the submissions made by and on behalf of the Advocates for the respective Parties and having taken into account the terms of the consent which was entered into on the 23<sup>rd</sup> October 2023; the following issues do arise and are thus worthy of determination;
  - i. Whether the consent order entered into and endorsed by the court on the 23<sup>rd</sup> October 2023 contained a default clause and if; so whether the default clause took effect automatically upon default.
  - ii. Whether the court is *Functus officio*.

### Analysis And Determination

#### **Whether the consent order entered into and endorsed by the court on the 23<sup>rd</sup> October 2023 contained a Default clause and if; so whether the default clause took effect automatically upon default.**

17. Before venturing to consider the issues itemized herein before, it is instructive to recall that this Honorable court made and/or delivered a Ruling on the 3<sup>rd</sup> July 2023, whereupon, the court ordered and directed the Plaintiffs to deposit the sum of Kes.20, 000, 000/= only in an Escrow account in the names of the advocates for the respective Parties.
18. On the other hand, even though the deposit was to be made within 60 days from the date of the Ruling, the 1<sup>st</sup> Plaintiff herein thereafter filed an Application seeking for extension of time within which to comply with the terms of the court order. For good measure, the Application by the 1<sup>st</sup> Plaintiff was allowed by consent on the 21<sup>st</sup> September 2023.
19. Moreover, the instant matter was listed for mention on the 23<sup>rd</sup> October 2023, with a view to confirming compliance by the 1<sup>st</sup> Plaintiff and thereafter to make further directions. However, when the matter came up on even date, the advocates for the Parties entered into a further consent.
20. Pursuant to the consent entered into on the 23<sup>rd</sup> October 2023, the Parties agreed on various terms *inter-alia* a term to the effect as hereunder;

“However and in the event of default on the part of the Plaintiff to comply with and/or adhere to the terms of clauses 1 and 2 hereof; the terms of the order made on the 21<sup>st</sup> September 2023 shall take effect without further reference to court”
21. It is instructive to underscore that the clauses which have been referred to directed the First Plaintiff to facilitate the opening and operationalization of the Escrow account and to ensure that the deposit of the security for costs is duly made and/or effected.
22. Notably, the obligation to open and operationalize the Escrow account was placed on the Plaintiffs or any of the Plaintiffs and thus the 1<sup>st</sup> Plaintiff cannot be heard to pass the buck as pertains to who was chargeable with the obligation.
23. Notwithstanding the foregoing, the point which is of critical concern related to the existence of a default clause; and the implication thereof, in the event a default and/or non-compliance does arise.



24. To my mind, the advocate for the 1<sup>st</sup> Plaintiff and the Defendant contracted at arm's length and thereby understood the legal implications and consequences of the terms of the consent, which same dictated to the Honourable Court.
25. Suffice it to point out that the advocates for the concerned Parties appreciated and indeed understood that in the event of default and/or non-compliance, the Plaintiff's suit was to stand dismissed for want of compliance with the terms of the consent that had hitherto been entered by the Parties and endorsed on the court record on the 21<sup>st</sup> September 2023.
26. Arising from the foregoing, when the matter came up for mention, the obligation of the court was merely to confirm compliance or otherwise; and in the event of default, the court had no alternative but to activate the default clause.
27. Instructively, when the matter came up for mention on the 31<sup>st</sup> October 2023, the court was informed that the Escrow account had not been opened and operationalized. Consequently and in this regard, it was evident that the default clause, whose terms had been set by the advocates for the Parties took effect and thus became operational, without much ado.
28. Perhaps at this juncture, it is imperative to state that where Parties enter into a consent same become bound by the terms thereof; and the said terms cannot be varied, altered and/or derogated from by one Party, albeit without the consent of the other. Simply put, the terms of the consent have contractual effects on the Parties, unless otherwise reviewed and/or set aside.
29. To this end, it is appropriate to take cognizance of the dictum in the case of *Flora N Wasike v Destimo Wamboko*[1988] eKLR, where the Court of Appeal stated and held thus;

“It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam* (1952) 19 EACA 131, at 134, as follows:

“The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders* (7th edn), vol 1, P 124, as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 the court to set aside an agreement.”
30. From the foregoing holding, it suffices to point out that the court was bound by the terms of the Consent that was entered into and thereafter endorsed by the court on the 23<sup>rd</sup> October 2023. Consequently and in this regard, the court had no other alternative but to actualize and proclaim the tenor of the consent which was indeed binding on the Parties thereto.
31. In answer to issue number one, I therefore find and hold that the default clause, which was inserted by the Parties themselves, indeed took effect and thus the suit herein stood dismissed without any further order.



**Whether the court is *Functus officio*.**

32. Other than the question that the default clause indeed took effect and thus rendered the suit dismissed, there is also the aspect pertaining to and concerning whether by dint of the consent order, this court became *Functus officio*.
33. Suffice it to point out that the Parties themselves agreed that in the event of default and/or non-compliance, the suit was to stand dismissed without further reference to court. In my humble view, the Parties by themselves acknowledged that the moment a default arose and/or accrue, the terms of the consent would be actualized and/or take effect automatically.
34. Arising from the foregoing, the position that becomes evident is that the Parties agreed that the court would have no more mandate and/or authority to speak to the suit, in the event of default and/or none compliance.
35. Notably and in my humble view, the wording of the consent rendered the court *functus officio* as pertains to the question of deposit of security for costs and hence the various submissions, which were made by and on behalf of counsel for the 1<sup>st</sup> Plaintiff, were certainly without lawful basis.
36. In a nutshell, the suit by and on behalf of the Plaintiffs stood dismissed for want of compliance with the order for deposit of security, unless the said order is reviewed, varied and/or rescinded; which was not the case.

**Final Disposition:**

37. Arising from the analysis, whose details are elaborated in the preceding paragraphs, it is evident that indeed the terms of the Consent order, which was entered into by the Parties, automatically took effect upon default and/or none compliance.
38. Consequently and in the premises, I come to the conclusion that on the basis of Clause 4 of the consent order endorsed on the court record on the 23<sup>rd</sup> October 2023; the Plaintiff's suit indeed stood dismissed with costs to the Defendant.
39. For the avoidance of doubt, I hereby proclaim that the suit is indeed dismissed with costs to the Defendant, for none compliance with the terms of the Consent order which was entered into by the Parties and duly adopted by the court.
40. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of:

Benson - Court Assistant.

Mr. Katwa Kigen for the 1st Plaintiff.

Ms. Gathoni h/b for Mr. Taaib Ali SC for the Defendant.

N/A for the 2nd Plaintiff.

