



Chepkwony & another v Gulflink Enterprises Limited (Environment and Land Case E271 of 2022) [2023] KEELC 22232 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22232 (KLR)

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

**JO MBOYA, J
DECEMBER 7, 2023**

BETWEEN

ELIUD K CHEPKWONY 1ST PLAINTIFF

SAMUEL PATRICK NJUE 2ND PLAINTIFF

AND

GULFLINK ENTERPRISES LIMITED DEFENDANT

RULING

Introduction and Background

1. The instant suit was filed and or mounted by and on behalf of the Plaintiffs herein and in respect of which same [Plaintiffs'] sought for a plethora of reliefs touching and concerning ownership of all that parcel of land, namely, LR no 209/12040 (I.R No. 226550 Land Survey Plan Number 217464) and LR no 209/120626, respectively.
2. Following the filing and service of the Complaint and summons to enter appearance, the Defendant/ Respondent herein duly entered appearance and thereafter filed a Statement of Defense, wherein same disputed the allegations and or claims alluded to by and on behalf of the Plaintiffs.
3. Other than the foregoing, the Defendant herein thereafter filed an Application dated the 15th November 2022; and in respect of which the Defendant sought an order to compel and/or direct the Plaintiffs' to provide Security for costs. For coherence, the Application for security for costs was heard and disposed of vide Ruling rendered on the 3rd July 2023.
4. For coherence, the Honourable court allowed the Application and directed that the Plaintiffs' do provide security for costs in the sum of Kes.20, 000, 000/= only within 60 days from the date of the Ruling.



5. Be that as it may, the Plaintiffs herein were unable to comply with the timelines set vide and in terms of the Ruling rendered on the 3rd July 2023; and thereafter the Plaintiffs' filed an Application seeking for extension/enlargement of time, within which to provide the requisite security for costs.
6. Notwithstanding the foregoing, the security for costs which was ordered and/or decreed by the Honourable court was (sic) not provided and hence the court proceeded to and dismissed the suit for non-compliance with the court order.
7. Arising from the foregoing, [namely, the failure to provide Security],the Plaintiffs herein have now filed the Application dated the 9th November 2023; and in respect of which same have sought for the following reliefs:[verbatim]
 - i.Spent.
 - ii. That an order do issue to reinstate this suit dismissed on 30TH October 2023.
 - iii. That the Court do find that the Plaintiffs' were prevented by sufficient cause from remitting into a Joint account the Kshs 20,000,000.00 only, already raised and on time as security for costs.
 - iv. That the Court do find that the Plaintiffs have met the substantive issue the Court is interested in, being that they have provided the security for costs in the sum of Kshs 20,000,000 Only, as determined by the Court in the ruling made on 3rd July 2023 and 21st September 2023.
 - v. That the Court do find that the Plaintiffs were not in default of court orders, the Plaintiffs having already raised the requisite Kshs 20,000,000 Only, held by the advocate for lack of a Joint account into which to deposit and or any other receptacle of the funds lawfully.
 - vi. That in the interest of Justice, the Court do issue other or further orders as to the handling of the security for costs already at hand in the sum of Kshs. 20,000,000 only, this far held by the Plaintiff's Advocates.
 - vii. That without prejudice to any other prayer, the court be pleased to consider the options:
 - a. That the Defendant's counsel do themselves procure the joint account into which the funds are to be deposited, and into which the Plaintiff is to deposit the funds it holds within seven (7) days of notification by the Defense (sic) counsel.
 - b. That as an alternative and without prejudice to any other prayer, and or consideration, the court do allow the Plaintiff's Advocates to hold the Kshs 20,000,000 on an undertaking to the Court and to the Defense, to hold the funds as a security for costs in this case, in this Court.
8. The instant Application is premised and or anchored on numerous grounds, which have been enumerated in the body of the Application. Furthermore, the Application is supported by the affidavit of the 1st Plaintiff/Applicant sworn on the 9th November 2023; and in respect of which the Deponent has annexed various documents/annexures in support thereof.
9. Suffice it to point out that upon being served with the instant Application, the Defendant/Respondent duly filed Grounds of opposition dated the 13th November 2023; and in respect of which, same has contended, inter-alia, that the orders sought by and on behalf of the Plaintiffs are not available, insofar as the consent order entered into by the Parties has neither been set aside nor varied.



10. First forward, the instant Application came up for hearing on the 14th November 2023, whereupon the advocates for the respective Parties covenanted to canvass and ventilate the Application by way of written submissions. Consequently and in this regard, the Honourable Court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.
11. Notably, the Plaintiffs thereafter proceeded to and filed their written submissions dated the 16th November 2023; whereas the Defendant/Respondent filed written submissions date the 23rd November 2023.
12. For coherence, both written submissions are on record.

Parties' Submissions:

a.Applicant's Submissions:

13. The Applicant herein adopted the grounds contained at the foot of the Application, as well as the averments contained in the body of the Supporting affidavit. Furthermore, the Applicants herein have thereafter raised, highlighted and canvassed three [3] pertinent issues for due consideration and determination by the Honourable court.
14. Firstly, Learned counsel for the Applicants has submitted that following the delivery of the Ruling on the provision of security for costs, which was rendered on the 3rd July 2023, the Applicants herein made concerted efforts with a view to procuring and obtaining the sum of Kes.20, 000, 000/= only which was decreed by the Honourable court.
15. Additionally, Learned counsel for the Applicants has submitted that despite the concerted and frantic efforts by and on behalf of the Applicants to procure and obtain the monies at the foot of the Ruling of the Honourable court, the Applicants were not able to do so within the decreed timeline.
16. On the other hand, Learned counsel has contended that arising from the failure and/or inability of the Applicants to procure and obtain the sum of Kes.20, 000, 000/= only, within the 60-day period, the Applicants herein filed an Application for extension of time, which Application was granted and thus leading to the extension of time.
17. Secondly, Learned counsel for the Applicants has further submitted that pursuant to and upon the extension of the timeline within which to procure, obtain and/or raise the amount decreed on account for security for costs, the Applicants herein proceeded to and procured the money and thus same were ready to comply with and/or abide by the terms and tenor of the orders of the court.
18. Nevertheless, Learned counsel for the Applicants has submitted that upon obtaining the monies at the foot of the security for costs, same reached out to the Learned counsel for the Defendant with a view to opening and operationalizing the Escrow account within the extended timeline.
19. Be that as it may, Learned counsel for the Applicants has submitted that despite his endeavors to procure assorted documents from Learned Counsel for the Defendant towards operationalizing the Escrow account, the counsel for the Defendant is said to have been reluctant and or unwilling to avail assorted documents to facilitate the opening/operationalization of the Escrow account.
20. In respect of the contention that the Learned counsel for the Defendant was unwilling to avail the requisite documents, Learned counsel for the Applicants has endeavored to and outlined (sic) various efforts that are said to have been made by and on behalf of the Applicants to ensure the operationalization of the Escrow account.



21. Based on the foregoing, Learned counsel for the Applicants has thus contended that the Applicants duly complied with and/or adhered to the terms and tenor of the order of the court, which required same to provide security in the sum of Kes.20, 000, 000/= only, in respect of the instant matter.
22. Thirdly, Learned counsel for the Applicants has submitted that even though the Applicants procured, obtained and raised the sum of Kes.20, 000, 000/= only, prior to and before the expiry of the extended timelines, same were unable to operationalize the Escrow account because of various reasons, inter-alia, the unwillingness on the part of the Defendant to cooperate.
23. Consequently and in this regard, Learned counsel for the Applicants has thus submitted that the Applicants herein were prevented from complying with and/or adhering to the terms and tenor of the orders of the Honourable court, by sufficient cause, which warrants exercise of discretion of the court.
24. Lastly, Learned counsel for the Applicants has submitted that the Honorable court is seized of and vested with the requisite Jurisdiction to reinstate a suit (sic) which has since been dismissed for want of payment of the security for costs, within the set timeline.
25. Further and in any event, Learned counsel has submitted that the failure to provide security within the set timelines, ought not to be used as a basis to deny and/or deprive a Litigant of the Right of Access to Justice.
26. In support of the submissions that the court is seized of the requisite Jurisdiction to re-instate a suit that has been dismissed for non-compliance with the order for provision of security, Learned counsel for the Applicants has cited and relied on, *inter-alia*, the case of *Fatuma Zanabu Mohamed v Ghati Dennitah & 10 Others* (2013)eKLR, *Alpher Fine Foods Ltd v Horeca Kenya Ltd & 4 Others* (2021)eKLR and *Westmond Holdings SDNBHD v Central Bank of Kenya* (2021)KESC3 (KLR) (8th October 2021), respectively.
27. Arising from the foregoing, Learned counsel for the Applicant has therefore impressed upon the Honourable court to find and hold that the Applicants herein were prevented from complying with and/or adhering by the terms of the order by sufficient cause and/or basis.
28. Furthermore, Learned counsel for the Applicants has contended that insofar as the Defendant/ Respondent has not filed any Replying affidavit, the contents of the supporting affidavit by and on behalf of the Applicants herein, thus remains uncontroverted and hence same ought to be believed and acted upon by the Honorable court.
29. Consequently and in a nutshell, Learned counsel for the Applicants has therefore contended that the application, [which seeks for re-instatement of the suit], beforehand is meritorious and thus ought to be allowed.

b.Respondent's Submissions:

30. The Respondent filed written submissions dated the 23rd November 2023; and in respect of which same has adopted and reiterated the contents of the grounds of opposition filed in response to the Application. Furthermore, the Respondent herein has thereafter raised and canvassed three [3] salient issues for consideration and ultimate determination by the Honourable court.
31. First and foremost, Learned counsel for the Respondent has contended that even though the instant Application is purported to have been mounted and/or filed on behalf of both Plaintiffs, it is contended that the firm of M/s Katwa & Kemboy Advocates, are only on record for the 1st Plaintiff and not otherwise.



32. Further and in any event, Learned counsel for the Respondent has contended that insofar as the firm of M/s Katwa & Kemboy Advocates are only on record for the 1st Plaintiff, the limb of the Application that touches on and/or concerns the 2nd Plaintiff, is therefore premature, misconceived and thus legally untenable.
33. In view of the foregoing, Learned counsel for the Respondent has implored the Honourable court to find and hold that the aspect of the application touching on the 2nd Plaintiff is incompetent and a nullity.
34. Secondly, Learned counsel for the Respondent has submitted that following the delivery of the Ruling by the Honourable court on the 3rd July 2023, the Plaintiffs and in particular the 1st Plaintiff, was unable to comply with the set timelines at the foot of the Ruling rendered on the 3rd July 2023.
35. On the other hand, Learned counsel for the Respondent has submitted that arising from the failure and/or inability of the Plaintiffs and in particular, the 1st Plaintiff to comply with the set timelines, same therefore filed an application dated the 30th August 2023 and in respect of which same sought for extension of time to provide security as hitherto decreed by the Honourable court.
36. Furthermore, Learned counsel for the Respondent has submitted that following the filing of the Application dated the 30th August 2023, the Advocates for the respective Parties entered into a consent on the 21st September 2023, whereupon the timeline for providing the security for costs was extended for a period of a 30 days w.e.f 1st September 2023.
37. Other than the foregoing, Learned counsel for the Respondent has further submitted that when the matter came up for mention on the 23rd October 2023, to confirm compliance with the terms of the consent order hitherto entered on the 21st September 2023, the Applicants herein sought for further indulgence with a view to complying with the orders of the court.
38. Additionally, Learned counsel for the Respondent has submitted that pursuant to and at the prompting of the Applicants, a further consent was entered into on the 23rd October 2023; and wherein the 1st Plaintiff covenanted to operationalize the Escrow account within 7 days.
39. Further and in any event, Learned counsel for the Respondent has submitted that the terms of the consent order entered into and adopted by the Honourable court on the 23rd October 2023, were explicit and also included an automatic default clause.
40. In short, Learned counsel for the Respondent has submitted that come the 30th October 2023, the Applicants and in particular, the 1st Plaintiff/Applicant had not complied with the terms of the consent and thus the automatic default clause took effect.
41. Consequently and in view of the foregoing, Learned counsel for the Respondent has submitted that the dismissal of the Plaintiff's suit was anchored and informed by the explicit terms of the consent which was entered into between the 1st Plaintiff and the Defendant/Respondent and not otherwise.
42. Thirdly, Learned counsel for the Respondent has submitted that to the extent that the parties had entered into a consent, this Honorable court is therefore divested of the requisite Jurisdiction to purport to reinstate the suit, whilst the consent remains in-situ [in existence].
43. Arising from the foregoing, Learned counsel for the Respondent has thus contended that this Honorable court is therefore divested of the Jurisdiction to interfere with the consent that was voluntarily and willingly entered into between the 1st Plaintiff and the Respondent, either as sought or at all.



44. In support of the submissions that the court is divested of the Jurisdiction to reinstate the suit, on the face of an existing consent, Learned counsel for the Respondent has cited and relied on, inter-alia, the case of *Anura Perera v Nation Media Group Ltd & 2 Others* (2015)eKLR, *Flora N Wasike v Destimo Wasike* (1988)eKLR, *Hirani v Kassam* (1952) 19EACA page 137 and *Gateway Insurance Company Ltd v Aries Sprays Ltd* (2011)eKLR, respectively.
45. Premised on the foregoing, Learned counsel for the Respondent has therefore implored the Honourable court to find and hold that the Application beforehand is devoid of merits and thus ought to be dismissed.

Issues For Determination:

46. Having reviewed the Application beforehand and the Response thereto; and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do arise/ emerge and are thus worthy of determination;
 - i. Whether (sic) the purported Application on behalf of the 2nd Plaintiff is Legally tenable or at all.
 - ii. Whether the Honorable court is seized of the requisite Jurisdiction to entertain and grant the instant Application, either in the manner sought or otherwise.

Analysis And Determination

Issue Number 1: Whether the purported Application on behalf of the 2nd Plaintiff is Legally tenable or at all.

47. Before venturing to address and resolve the issue herein before mentioned, it is imperative to state and underscore that the instant suit was filed on behalf of the Plaintiffs herein by the firm of M/s Katwa & Kemboy Advocates. For good measure, at the onset, the law firm of M/s Katwa & Kemboy Advocates were on record for both Plaintiffs.
48. Be that as it may, during the course of the proceedings the firm of M/s Oringe Waswa & Opany Advocates filed a Notice of Change of Advocates and in respect of which same clearly indicated that the firm had been retained and/or instructed to take over the conduct of the 2nd Plaintiffs case.
49. Quiet clearly, the lodgment of the Notice of Change of advocate, which was thereafter duly served upon the firm of, inter-alia, M/s Katwa & Kemboy Advocates, meant that henceforth the firm of M/s Katwa & Kemboy Advocates ceased to have any legal authority and/or mandate to act for or speak on behalf of the 2nd Plaintiff.
50. Suffice it to point out that thereafter the firm of M/s Oringe Waswa & Opany Advocates variously appeared for and on behalf of the 2nd Plaintiff, whereas the firm of M/s Katwa & Kemboy Advocates remained on record for the 1st Plaintiff.
51. Be that as it may, the firm of M/s Katwa & Kemboy Advocates has since filed and mounted the current Application (sic) for and on behalf of both the Plaintiffs, including the 2nd Plaintiff herein.
52. Arising from the foregoing, the question that does arise is whether the firm of M/s Katwa & Kemboy Advocates can lawfully and legally file the instant Application on behalf of the 2nd Plaintiff, prior to and before filing any Notice of Change of Advocates to take over the conduct of the 2nd Plaintiff's case from the firm of M/s Oringe Waswa & Opany Advocates.



53. To my mind, a firm of advocates can only act for and on behalf of a particular Party upon being duly appointed and thereafter filing the requisite document to underpin his/her appointment. For coherence, it is the filing of the requisite document that propels the Firm of advocates to become a Recognized Agent, for and on behalf of the named Party.[See the Provisions of Order 9 Rule 1 of the [Civil Procedure Rules, 2010](#)].
54. Instructively, where a Party had hitherto acted in person (which is not the case herein) upon appointment, the duly appointed firm of advocate is obligated to craft and file the requisite Notice of appointment of advocates in accordance with the provisions of Order 9 Rule 7 of the [Civil Procedure Rules 2010](#).
55. On the other hand, where a particular, Party was hitherto being represented by a different firm of advocates, but same is desirous to effect change of advocate, then the incoming advocate is mandatorily obligated to file and serve a Notice of Change of advocates on all the Parties.
56. For coherence, the relevant provisions of the law that governs the filing and service of Notice of change of advocates is provided for by dint of the provisions of Order 9 Rules 5 and 6 of the [Civil Procedure Rules, 2010](#) whose terms are succinct, explicit and apt.
57. Nevertheless, it suffices to reproduce the said provisions of Order 9 Rules 5 and 6 (*supra*) for ease of reference.
58. Same are reproduced as hereunder;

[Order 9, rule 5.] Change of advocate.

5. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

[Order 9, rule 6.] Service of notice of change of advocate.

6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).

59. In respect of the instant matter, there is no gainsaying that no Notice of Change of advocate has been filed by and on behalf of M/s Katwa & Kemboy Advocates, to warrant same to make any appearance and/or mount any representations on behalf of the 2nd Plaintiff.
60. Pertinently, in the absence of the requisite Notice of change of Advocates, filed and served in accordance with the provisions of Order 9 Rules 5 and 6 of the [Civil Procedure Rules, 2010](#), it is deemed that the advocate that was hitherto on record shall remain on record on behalf of the designated party in respect of all subsequent proceedings, including Review and Appeal.
61. Instructively, the position espoused and elaborated in the preceding paragraph is underpinned by dint of the provisions of Order 9 Rule 13 of the [Civil Procedure Rules 2010](#), which stipulates as hereunder;

[Order 9, rule 13.]



13. Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last-known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly: Provided that, unless and until the advocate has —
- (1)
 - (a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and
 - (b) procured the order to be entered in the appropriate court; and
 - (c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.
62. In a nutshell, the firm of M/s Katwa & Kemboy Advocates having neither filed nor served the requisite Notice of Change of advocates for and on behalf of the 2nd Plaintiff, same are divested of the requisite Locus standi to purport to file and or mount an Application on behalf of the 2nd Plaintiff or at all.
63. Consequently and in view of the foregoing, I come to the conclusion that the impugned Application and in particular, the limb thereof that speaks to the 2nd Plaintiff, is not only premature and misconceived, but same is legally untenable.
64. In the circumstances, my answer to issue number one [1] is to the effect that the firm of M/s Katwa & Kemboy Advocates, are not seized of the requisite mandate and or authority to act for and on behalf of the 2nd Plaintiff and hence any purported action to that effect, is a nullity ab initio.

Issue Number 2 :Whether the Honorable Court is seized of the requisite Jurisdiction to entertain and grant the instant Application, either in the manner sought or otherwise.

65. It is worthy to recall and reiterate that upon the filing of the Application dated the 15th November 2022; which sought for provisions of security for costs, the Honourable court proceeded to and disposed of the said Application in terms of the Ruling delivered on the 3rd July 2023.
66. Instructively, the Honourable court proceeded to and allowed the Application and thereafter decreed that the Plaintiffs herein shall jointly and or severally provide security for costs in the sum of Kes.20, 000, 000/= only. Furthermore, the court also prescribed the timeline for the provisions of security for costs.
67. Be that as it may, the 1st Plaintiff herein thereafter filed an Application dated the 30th August 2023; and in respect of which same sought for, inter-alia, extension of time within which to provide to the security for costs, which had hitherto been alluded to at the foot of the Ruling rendered on 3rd July 2023.
68. Suffice it to point out that the Application dated the 30th September 2023, came up for hearing on the 21st September 2023; whereupon the advocates for the respective Parties entered into a consent disposing of the Application.



69. For ease of reference, the terms of the consent entered into on the 21st September 2023 were as hereunder;
- i. The time for deposit of the security for costs by the plaintiff hearing and in particular the 1st Plaintiff be and is hereby extended for 30 days from the date hereof.
 - ii. The extension herein be and is hereby deemed as last and final extension and in default to comply (sic) the suit herein shall stand dismissed with costs in line with orders of the court made on 3rd July 2023.
 - iii. The 1st Plaintiff to file an affidavit to show the details on (sic) the properties alluded to in the Supporting Affidavit in which the same contents were at the foot of the alleged endeavors of sale. For good measure the details to be availed to court within 14 days of the date hereof.
 - iv. The costs of the application shall be in the cause.
 - v. The matter to be mentioned on 23rd October 2023 for further orders/ directions subject to compliance.
70. On the other hand, the Parties herein returned to court on the 23rd October 2023; with a view to confirming the compliance with the terms of the consent hitherto entered into on the 21st September 2023.
71. Nevertheless, on the said date it transpired that the Escrow account for the deposit of the security for costs, had not been operationalized.
72. Consequently, the Parties entered into a further consent whose terms are as hereunder;
- i. The time for depositing the security for costs be and hereby extended for a further 7 days from the date hereof.
 - ii. Consequently, the 1st Plaintiff or any of the parties shall be at liberty to operationalize the escrow account and to ensure that the deposit of the security for costs is duly made and or effected.
 - iii. Upon due compliance with clauses 1 and 2 hereof the parties shall be at liberty to take further directions on the way forward.
 - iv. However, and in the event of default of the Plaintiff to comply with and/or adhere to the terms of Clause 1 and 2 hereof, the terms of the Order made on 21st September 2023 shall take effect without further reference to the Court.
 - v. The matter shall be mentioned on the 31st October 2023 to ascertain/confirm compliance and thereafter to issue further directions.
 - vi. Costs shall be in the cause.
73. Arising from the terms of the consent that was entered into on the 23rd October 2023, the 1st Plaintiff herein was obligated to ensure that the Escrow account was operationalized. [See clause 2 of the consent order].



74. Be that as it may, when the matter came up for mention on the 31st October 2023, it turned out and/or transpired that the Escrow account had not been operationalized and hence the Honourable court was called upon to interpret and apply the import and tenor of the consent order.
75. Pursuant to the foregoing, the Honourable court thereafter proceeded to and crafted a Ruling, which was delivered on even date, namely, the 31st October 2023; and wherein the Honourable court proclaimed that the terms of the consent order were explicit and in any event, contained an automatic default clause, which was agreed to and embraced by the Parties themselves.
76. Arising from the foregoing, the court proceeded to and indeed proclaimed that the default clause underpinned by clause 4 of the consent order indeed took effect, upon the lapse of the 7-day period which had been alluded to by the Parties. Consequently and in this regard, the court thereafter proclaimed that the suit in question stood dismissed with costs on the basis of the consent order.
77. It is important to underscore at this juncture that the Ruling of the court rendered on the 31st October 2023, which proclaimed the import and tenor of the consent order, has neither been impugned, challenged nor appealed against. Notably, the terms and tenor of the said Ruling remain valid and in force.
78. In the circumstances, there is no gainsaying that the suit herein was actually dismissed on the basis of non-compliance with the terms of the consent duly entered into and embraced by the Parties on the 23rd October 2023.
79. Having come to the conclusion that the suit was dismissed on the basis of non-compliance with the terms of the consent order, which was agreed upon and embraced by the Parties, the question that does arise is whether this court is seized of the requisite Jurisdiction to grant the relief sought at the foot of the current Application, during the lifetime of the consent order, which remains in situ.
80. In my humble, albeit considered view, the consent order which was entered into and embraced by the Parties on the 23rd October 2023; binds both the 1st Plaintiff/Applicant and the Defendant/Respondent and hence the only way that the said consent can be disturbed, varied and/or rescinded is via a suitable application calculated to impeach same and not otherwise.
81. Nevertheless, it is not lost on this Honourable court that the current Application is not one that is intended to impugn and/or rescind the consent. To the contrary, the current application does not even mention the existence of the various consents, inter-alia, the one entered into on the 21st September 2023 and 23rd October 2023, respectively.
82. I beg to point out that even though the 1st Plaintiff/Applicant and his Legal counsel have skirted around the issue of consent order, [which remain on the Court record], that alone does not negate and/or defeat the consent orders.
83. Simply put, the consent orders cannot be run away from by (sic) hiding the head in the sand like an ostrich bird. Conversely, same are to be confronted and dealt with, in the manner known to Law.
84. Finally, it is important to point out that a consent Judgment and/or order can only be set aside, reviewed and/or impugned in limited, albeit circumscribed circumstances, which are known to law.



85. To this end, it suffices to adopt, restate and reiterate the dictum of the Eastern Africa Court of Appeal[EACA], in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266: where the court held as hereunder;

“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.”

86. Furthermore, the circumstances under which a consent Judgment/order can be impeached and/or rescinded were also elaborated upon by the Court of Appeal of Kenya in the case of *Flora N. Wasike v Destimo Wamboko*[1988] eKLR, where the court stated thus;

It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *JM Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

87. Without belaboring the point, it is also important to cite the decision of the Court of Appeal in the case of *Specialized Engineering Company Ltd v Kenya Commercial Bank Ltd*[1988] eKLR, which also emphasized the manner in which a consent Judgment and or order can be rescinded and/or challenged.

88. Finally, it is appropriate to point out that having agreed to and thereafter entered in the consent dated the 23rd October 2023, the 1st Plaintiff/Applicant herein duly bound himself to the terms of the consent, which now have contractual effects upon the Parties thereto.

89. To my mind, the current Application is intended to persuade the court to alter, rescind and/or otherwise rewrite the terms of the consent, which was entered into at arms-length by the Parties.

90. Simply put, the consent which was entered into between the Parties accrued contractual effects and thus the court has no Jurisdiction to interfere with same and/or otherwise re-write same, in the manner sought and/or anticipated at the instance of the Applicant herein. [See the decision of the Court of Appeal in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR].

91. To surmise, it is my humble finding and holding that on the face of the existing consent, which was lawfully entered into and embraced by the Parties herein and which consent has remained in-situ; the Honorable court is divested of Jurisdiction to grant the Application by and on behalf of the Applicants herein.

Final Disposition:

92. From the foregoing discussion [details in terms of the preceding paragraphs] it is evident and apparent that the subject Application which seeks to superimpose adverse orders on the face of an existing consent, is not only premature , but amounts to an abuse of the Due process of the court.



93. In a nutshell, the Application dated the 9th November 2023, is devoid of merits and hence same be and is hereby dismissed with costs to the Defendant/Respondent, to be agreed upon and in default, to be taxed by the Deputy Registrar of the court.

94. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the presence of;

Benson - Court Assistant

Mr. Katwa Kigen for the 1st Plaintiff/Applicant.

Ms Gathoni and Ms Aisha Taib h/b For Mr. Taib (SC) for the Defendant/ Respondent.

N/A for the 2nd Plaintiff.

