



Freedom Limited v County Government of Kilifi & another (Environment & Land Case 71 of 2019) [2023] KEELC 20380 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 71 OF 2019
MAO ODENY, J
OCTOBER 5, 2023**

BETWEEN

FREEDOM LIMITED APPLICANT

AND

THE COUNTY GOVERNMENT OF KILIFI 1ST DEFENDANT

RAINDROPS LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of a notice of motion application dated August 24, 2022 the plaintiff/applicant seeking the following orders; -
 - a. That the matter be marked as fully settled with no orders as to costs.
 - b. That in the alternative this court do enter judgment in reliance on the consent filed and adopted on December 9, 2019.
 - c. That costs of this application be in the cause.
2. The basis of the application is on the grounds on the face of the application and the supporting affidavit sworn by Brian Kirimi Borona, the Plaintiff's advocate. Mr. Borona deponed that the genesis of the present suit was an application dated August 27, 2019 where a temporary injunction was issued against the defendants restraining them from trespassing or entering the Plaintiff's premises known as Plot No. 1948/MN/V, demanding cess payment, clamping motor vehicles, and machinery equipment.
3. Counsel further deponed that the 2nd defendant at all material times acted as the 1st defendant's agent and on December 9, 2019, the plaintiff and 1st Defendant recorded a consent marking the suit settled with no orders as to costs.



4. It was counsel's submission that on January 29, 2021, this court delivered a ruling adopting the said consent.
5. The 2nd respondent opposed the application vide a Replying Affidavit sworn on November 9, 2022 by Sebastian Kazungu identified as the 2nd respondent's General Manager. Mr. Kazungu deponed that the 2nd defendant was sued in its own capacity and not as an agent of the 1st defendant. That they engaged the services of an advocate to defend the suit and in the process incurred costs. He indicated that the 2nd defendant was not opposed to have the matter settled, as long as the plaintiff or 1st defendant bore their costs.
6. The 2nd defendant further deponed that they were not involved in the negotiations that culminated to the aforementioned consent hence not binding.

Plaintiff's Submissions

7. Counsel for the plaintiff submitted that there was a clear principal-agent relationship between the two Defendants and as such, the acts of the principal were binding to the agent. In this case, the consent entered into by the 1st defendant was binding on the 2nd defendant.
8. Counsel relied on the cases of *Industrial and Commercial Development Corporation v Patheon Limited* [2015] eKLR; *St. Mary Academy Limited and another v Grace Njeri Mukora and another; Yvonne Jeruto and another –contemnors* [2021] eKLR and urged the court to allow the application as prayed.

2nd Defendant's Submissions

9. It was counsel's submissions that the 2nd defendant was not a party to the consent negotiations despite being sued in their own capacity and not as agents. Counsel further submitted that the consent could not be binding on the 2nd defendant and that the 2nd defendant was entitled to costs to compensate for the trouble occasioned in defending the suit.
10. Counsel relied on the case of *Ransa Company Ltd v Manca Francesco and 2 others* [2015] eKLR; and *Cecilia Karuru Ngayu v Barclays Bank of Kenya and another* [2016] eKLR on the right to be heard.
11. On whether the 2nd defendant was entitled to costs, counsel relied on section 27 of the *Civil Procedure Act* and the case of *DGM v EWG* [2021] eKLR; *Morgan Air Cargo Limited v Everest Enterprises Limited*; and *Cecilia Karuru Ngayu v Barclays Bank of Kenya and another* [supra]. And urged the court to dismiss the application with costs.

Analysis And Determination

12. The Plaintiff instituted this suit by way of a plaint dated 22nd August 2019 seeking prayers inter alia that the 1st and 2nd Defendants be permanently restrained from trespassing or entering the Plaintiff's property and a declaration that the acts of the said Defendants were in breach of article 40 of *the Constitution*. Alongside the plaint was a chamber summons application to have the matter admitted for hearing during the High Court recess, and a Notice of Motion application dated August 22, 2019 seeking interlocutory injunction orders against the 1st and 2nd defendants.
13. The 2nd defendant entered appearance on September 10, 2019; filed grounds of opposition and a replying affidavit both dated September 18, 2019 in opposition to the aforesaid notice of motion. The 2nd defendant also filed written submission on October 15, 2019 in respect of the application.



14. The plaintiff and 1st defendant however recorded a consent on December 5, 2019 settling the issues between the two parties. A perusal of the said consent establishes clearly that the 2nd defendant was excluded. Order No. 3 thereon reads;

That the suit be and is hereby marked as settled between the Plaintiff and the 1st Defendant with no orders as to costs.

15. It is therefore clear that the dispute between the Plaintiff and the 2nd defendant still exists. Indeed, Olola J recorded as much in his ruling dated 29th January 2021. He observed under paragraph 3 that ‘‘ By a consent ...marked the suit as between the parties as settled with no order as to costs thereby rendering the dispute herein solely between the Plaintiff and the 2nd defendant.’’
16. I agree with the 2nd defendant’s submissions that the 2nd defendant, who was sued as a party on its own, defended the pleadings on its own, had a right to be included in the consent negotiations. Failure to which, the consent could not be binding to the 2nd defendant.
17. The applicant submitted that the 2nd defendant was an agent of the 1st defendant, if this was the case then he should have sued the 2nd in its capacity as an agent and not as an individual party. I find that the 2nd defendant was sued an individual and not as an agent of the 1st defendant, therefore I find that the consent recorded between the plaintiff and the 1st defendant does not bind the 2nd defendant. Judge Olola indicated this in his ruling.
18. It is trite law that costs follow the event. In the present case, since the 2nd defendant had no objection to the suit being marked as settled, I am satisfied that they are entitled to costs for the trouble occasioned to them by the Plaintiff, in participating in these proceedings.
19. The application dated August 24, 2022 lacks merit and is therefore dismissed with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF OCTOBER, 2023.

M.A. ODENY

JUDGE

