



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 152 OF 2014**

**JAMES MUNENE THUKU**

**SAMUEL GICHURU MUHIA**

**T/A VIRTUAL PHOTOGRAPHY STUDIOS.....PLAINTIFFS**

**VERSUS**

**ISAAC KIMANI.....DEFENDANTS**

**RULING**

1. Before me is the Plaintiffs' Notice of Motion dated 11<sup>th</sup> September, 2014. They seek orders that:-
  - i. *The Defendant be ordered to release the equipment taken from the Plaintiffs' premises on Thika Road Mall unit number 80, 2<sup>nd</sup> floor being; printing computer, fuji film computer, Nikon D90-camera, tape measure and framed KRA PIN.*
  - ii. *Taj Mall limited be ordered to pay the auctioneers charges.*
  - iii. *The Defendant be ordered to produce the books of account from inception of virtual photography studios Taj Mall ground floor, shop number to 11<sup>th</sup> May, 2014.*
  - iv. *Paragraph 3 and 4 of the consent order be reviewed to read:*
    3. *That the auctioneer charges be paid by the Plaintiff's on proof that rent was owed by the Plaintiffs as of the 11<sup>th</sup> May, 2014.*
    4. *That upon payment of the rent arrears as of 11<sup>th</sup> May, 2014 and payment of auctioneer charges or proof that there was no rent owed by the Plaintiffs as of 11<sup>th</sup> May, 2014, the Plaintiffs shall operate at the Thika road Mall without interference from the Defendant awaiting removal of Esther Wambui Njuguna as the Plaintiff's partner.*
2. The 1<sup>st</sup> Plaintiff swore an affidavit on 11<sup>th</sup> September, 2014 in support of the application. He averred that by the time the management of Taj Mall Limited issued instructions for distress for rent, the only rent owing was for the month of May and June, 2014 which rent was to be paid by the Defendant who had forcefully taken over the business. That the consent order provided for the returning of the equipment that was taken by the Defendant from Thika Road Mall premises, upon proof by the Plaintiffs that the rent arrears have been cleared and the auctioneers fees paid. He contended that the auctioneers fees amounting to KShs. 96,400/00 ought to be borne by the management of Taj Mall Limited or by the Defendant who was in occupation as of 12<sup>th</sup> May, 2014. He alleged that when the Defendant took over the premises, the all the financial records and

receipts remained in the premises and the Plaintiffs are unable to have an audit exercise in the absence of the said documents and they pray that the Defendant be ordered to provide them with the same. He stated that other than the equipment and the records, the Defendant has in his custody original documents relating to Virtual Photography Studio and pray that the said be released.

3. The Respondent opposed the application vide his replying affidavit sworn on 4<sup>th</sup> November, 2014. It was his contention that the consent order required the equipment to be released to the Plaintiff's upon their payment of rent arrears to Taj Mall Limited and auctioneers fees but that no tangible documents from Taj Mall Limited have been furnished to prove that they cleared the rent arrears and auctioneers charges. He denied his obligation to pay auctioneers fees and contended that he had not taken occupation of the premises by 12<sup>th</sup> May, 2014 because it was still closed by Taj Mall Limited management. He stated that he was not in a position to release the equipment as since the Plaintiffs have not made good the terms of the consent order. He denied having custody of the documents alleged by the plaintiffs and stated that in his custody are receipts of purchase of equipment, fit out materials, bank transfer documents of rent deposits and injection of capital to business.
4. The 2<sup>nd</sup> Plaintiff filed a further affidavit on 20<sup>th</sup> January, 2015 contending that the bank statement annexed to the supporting affidavit demonstrated that the Plaintiff was not in arrears of rent and the proclamation and attempted distress was unlawful. He stated that the failure by Taj Mall management to respond to their protests to the proclamation and the Defendant's failure to release the equipment is unlawful. It was contended that the Defendant's allegation that the equipment have been auctioned is untrue as the same are in use. Photos to that effect were annexed.
5. The Defendant filed a further affidavit on 6<sup>th</sup> February, 2015. He contended that rent arrears was not cleared as alleged by the Plaintiffs since Taj Mall management refused to open the premises for him and the Plaintiffs have refused to resolve the issue with Taj Mall management. He stated that the photographs annexed by the Plaintiffs were taken before Taj Mall Auctioned the equipment on 24<sup>th</sup> July, 2014 following an advertisement on 16<sup>th</sup> July, 2014. He contended that Premier Photo Studio does not belong to him and the alleged that the photos have been altered by way of photo shop.
6. The consent referred to by the parties herein was that entered in court on 3<sup>rd</sup> July, 2014 before my sister Lady Justice Ogo. The consent was in the following terms:-

**"... It is hereby ordered by consent:-**

1. ***That the Defendant who is the financier of the business pursue the opening of the business at the Taj Mall and to take control of the business at the Taj Mall to salvage the same. The Plaintiffs should not interfere with the Defendant's operations at Taj Mall Premises.***
  2. ***That the equipment taken from the Thika Road Mall by the Defendant to be released to the Plaintiffs upon payment of rent arrears to the Taj Mall Ltd.***
  3. ***That the auctioneers charges to be paid by the Plaintiffs.***
  4. ***That the Plaintiffs upon payment of rent arrears and auctioneers charges shall operate at Thika Road Mall without interference from the Defendant awaiting dissolution of the partnership.***
  5. ***That the money owed to the Defendant as the financier of the business to be agreed upon after the audit of the business.***
  6. ***That the Plaintiffs to settle the same in instalments to be agreed. "***
7. Having duly considered the depositions and the submissions by parties herein the issues for determination is the condition of the release of the equipment and the audit. From the terms of the consent, the condition to be fulfilled so that the equipment be released to the Plaintiffs was that they had to pay the rent arrears to Taj Mall Limited. The consent seem to be silent on period for the rent arrears claimed. However, I draw an inference that the rent arrears to be paid was that claimed by Taj Mall management as at the time the consent was recorded i.e. rent for May and June, 2014. I say so since at the time the consent was recorded, the Plaintiffs did not contend the claim of rent arrears. The Plaintiffs annexed photos claiming the existence of the equipment which

they say have been put to use by the Defendant. The Defendant on the other hand contended that the photos were taken way before Taj Mall auctioned the equipment when the Plaintiffs, Esther Wambui and the Defendant were actively involved in the business and that the first photo has been altered. The Plaintiffs have not endeavoured to contend the said allegations and therefore they remain uncontroverted. Further, from the photos annexed it cannot be ascertained when exactly the photos were taken. In view of the foregoing, I find and hold that the Plaintiffs failed to settle the rent arrears occasioning the auction. The items auctioned in view of recovery of rent are those outlined in the proclamation. It is therefore taken that Taj Mall Limited has made a recovery of its rent. Having so been recovered and bearing in mind paragraph 2 of the terms of the consent and considering also that the Defendant has not contended having retained the items enumerated prayer i of the application, I find that it is proper for the Defendant to release the said items.

8. As for prayer iii of the application, the Defendant has admitted to having custody of documents which are necessary for the audit. It is proper that he produces the same.
9. Prayer ii and iv fails for the reason that the terms of the agreement are very clear and the Plaintiffs have not satisfied the requirement of alteration or review of a consent order. The Plaintiff was well aware of the terms of the consent. They have not demonstrated that the consent was entered into as a result of fraud or misrepresentation. See **Hirani v. Kassam (1952), 19 EACA 131**, where the following passage from **Seton on Judgments and Orders, 7<sup>th</sup> edition, Vol.1 p.124** was approved 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."***

I in the circumstances decline to grant them.

10. The upshot is that this application succeeds in the following terms:

- a. The Defendant is hereby ordered to release the equipment taken from the Plaintiffs' premises on Thika Road Mall unit number 80, 2<sup>nd</sup> floor being; printing computer, fuji film computer, Nikon D90-camera, tape measure and framed KRA PIN.
- b. Prayer ii, iii and iv are not granted.
- c. Costs shall abide the main suit.

Orders accordingly.

Dated, Signed and Delivered in open court this 27<sup>th</sup> day of March,2015.

J. K. SERGON

**JUDGE**

In the presence of:

Maende h/b for Mr. Amani for the Plaintiffs.

Mrs. Kinyari for the Defendant.