



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 694 OF 1998
AFRICA TELECOM SOLUTIONS LTD.....PLAINTIFF
VERSUS
KIWAKA GENERAL MERCHANTS.....1ST DEFENDANT
MUGANDA WASULAWA T/A KEYSIAN AUCTIONEERS.....2ND DEFENDANT

RULING

1. The defendants, **KIWAKA GENERAL MERCHANTS LIMITED** and **MUGANDA WASULWA** Trading as **KEYSIAN AUCTIONEERS**, have brought the application dated 18th March 2015, seeking stay of the orders made on 10th March 2015, until their appeal was heard and determined.
2. On 10th March 2015 the court had ordered that the plaintiff, **AFRICA TELECOM SOLUTIONS LIMITED**, should retain possession of the suit property.
3. The court had further directed that if the 1st defendant, **KIWAKA GENERAL MERCHANTS LIMITED**, had obtained possession of the suit property, they had to move out or they would be forced to move out.
4. The defendants were dissatisfied with the said decision of the court and they filed a Notice of Appeal, on 13th March 2015.
5. When canvassing the application for stay of execution, Mr. Kago, the learned advocate for the defendants, submitted that it was **KIWAKA GENERAL MERCHANTS LIMITED** (hereinafter, “*Kiwaka*”) who had been in possession of the suit property at all material times.
6. *Kiwaka* pointed out that on 18th November 2011, the court ordered that the suit property be handed over to it, with vacant possession.
7. Thereafter, when **AFRICAN TELECOM SOLUTIONS LIMITED** (*hereinafter “African Telecom”*) asked the Court of Appeal to declare that the ownership and possession of the suit property, was in favour of the said African Telecom, the Court of Appeal is said to have declined.

8. In the result, Kiwaka insists that it continued to retain both ownership and possession of the suit property. Therefore, when this court ordered that the plaintiff should retain possession of the suit property, Kiwaka finds that order to be wholly inconsistent with the factual position, on the ground.
9. Miss Shamalla, the learned advocate for African Telecoms, submitted that the court had never given to Kiwaka, authority to develop the suit property.
10. Apparently, the court had previously only ordered that the status quo be maintained. Therefore, if Kiwaka had developed the suit property, then it is said that Kiwaka had contravened the orders of the court.
11. African Telecoms also submitted that Kiwaka had failed to demonstrate to this court, the nature of the loss it would suffer if this court did not stay execution.
12. As far as African Telecoms were concerned, the Court of Appeal had, so far, expressed the view that neither Kiwaka nor African Telecoms was the registered owner of the suit property.
13. According to Miss Shamalla, the Court of Appeal had only made a determination on the issue as to whether or not there was an arguable appeal. Therefore, African Telecoms was of the view that the Court of Appeal had not yet made a determination on the question of the ownership of the suit property.
14. In any event, the plaintiff (African Telecoms) insists that it is the party who is in possession of the suit property. It also says that the current dispute was about the possession of the suit property, and not that of ownership.
15. In the Ruling dated 10th March 2015, this court did not purport to deal with the issue of the ownership of the suit property.
16. The matter before me concerned possession. Indeed, the particular issue was as regards the *status quo* prevailing on the ground.
17. Even now, the two parties are not agreed about what constitutes the *status quo* prevailing. Each of the parties insists that it is the one in possession of the suit property.
18. But I also note that Kiwaka have expressed the fear that if the orders given on 10th March 2015 were executed, that would have the consequence of upsetting the apple cart. It would alter the situation on the ground.
19. On the other hand, African Telecoms have not told me that the failure to immediately execute the contentious orders, would upset the prevailing situation.
20. It therefore appears to me that it was more probable than not that Kiwaka was in actual possession. That situation needs to be safeguarded, whilst Kiwaka was exercising its fundamental right to challenge my decision through its intended appeal.
21. In my considered opinion, if the subject matter were to be altered, so that its character was completely altered before the applicant exercised its right of appeal, a grave injustice may have been occasioned.
22. In order to safeguard the subject matter of the intended appeal, I now order that there shall be a stay of execution of the orders made on 10th March 2015 until the appeal is heard and determined.
23. The costs of the application will be in the cause in the substantive appeal. If the appeal should succeed, the applicant will also have the costs of this application. But if the appeal should not succeed, for any reason, the costs of this application will be awarded to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of June 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Shamalla for the Plaintiff

Kago for the 1st Defendant

Kago for the 2nd Defendant

Collins Odhiambo – Court clerk.