



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 694 OF 2012

AFRICA TELECOM SOLUTIONS LIMITED.....PLAINTIFF

• **VERSUS -**

KWAKA GENERAL MERCHANTS LIMITED.....1ST DEFENDANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS...2ND DEFENDANT

RULING

1. On 13th October 2014, the plaintiff filed an application which is dated 7th October 2014. Through that application the plaintiff sought the setting aside of the orders which had been issued on 10th June 2014.
2. The orders in issue are in the following terms;

“IT IS HEREBY ORDERED BY CONSENT:

1. ***THAT*** the status quo be and are hereby retained at the suit premises, as the parties are in agreement.
 2. ***THAT*** the Defendant will be entitled to retain possession of the suit premises up and until further orders of this court.
 3. ***THAT*** the plaintiff will retain the Title Deeds to the property with the clear understanding that it will not utilize the same for any dealings whatsoever with the property.
 4. ***THAT*** this position will pertain until the mention of this matter before Court on 25th June 2014 when it is hoped that the parties will have agreed between them on the way forward.
 5. ***THAT*** no order as to costs”.
3. It was the plaintiff’s contention that the parties were all very well aware of the exact *status quo* prevailing on the ground: And the plaintiff insisted that it was the party who was in possession of the suit premises.
 4. Therefore, if the *status quo* which had been prevailing on the ground was to be maintained, it would imply that the plaintiff would remain in possession.
 5. I understand the plaintiff to be complaining that the details of the order dated 10th June 2014 radically changed the actual physical status on the ground, by removing the plaintiff and replacing it with the Defendant. In other words, the order completely changed the position on the ground whilst purporting to maintain the same said position.
 6. On the other hand, the defendant emphasized that on 10th June 2014 the court recorded an order which the parties themselves consented to.

7. As a consent between parties gave rise to a contract, the defendant reasoned that the said orders cannot be set aside unless the plaintiff satisfied the court that there were sufficient grounds that could be used to set aside a contract.
8. But the plaintiff pointed out that the advocate who represented it in court on 10th June 2014 has expressly denied having been party to the consent order which was recorded on that date. The said advocate is **PETER M. MURAGE**, and he has sworn an affidavit to support the plaintiff's application.
9. The pertinent parts of the affidavit of Advocate Murage read as follows;

“6. **THAT** I am not a party to this present matter nor do I have any interests in the suit premises which is the subject matter, and I honestly do not recalling (sic!) recording or signing any consent on 10th June 2014 to an agreement granting the Defendants possession of the suit premises.

7. **THAT** to the best of my recollection I appeared in court on the aforesaid date and at the first instance there was a lot of arguments on the position of the subject matter as at the time each party, myself and the 1st Defendant's counsel, gave divergent or conflicting positions.
 8. **THAT** I am well aware that I made short notes in my copy of the day's cause list and it is evident from my said copy that there is even a variation of the aforementioned position, from the handwriting of a third party not known to me, as borne out in the annexed copy marked **PMM3**”.
10. On the document marked “**PMM 3**”, it was indicated that the case would be mentioned on 25th June 2014, for the parties to agree on the way forward. In the meantime, the *status quo* was to be maintained.
 11. At the bottom of the page there was a different handwriting, which bore the following words;

“The defendant to remain in possession of the land and the plaintiff to remain with possession of the title. No party should dispose of their property/title”.

12. It is that endorsement which Advocate Murage disowned. Yet, it is that message which constituted the integral part of the consent order which was recorded by the court on 10th June 2014.
13. A perusal of the Court records about what transpired on 10th June 2014 appears to vindicate Advocate Murage. I so find because the record shows him as requesting that the *status quo* be maintained. Nowhere did he go further to indicate that the maintenance of the *status quo* implied that the defendant would remain in possession of the suit property.
14. On the other hand, Mr. Kago, the learned advocate for the defendant, told the court that the defendant was in possession of the suit property, whilst the plaintiff was in possession of the title documents. Having made that statement, Advocate Kago requested the court to clarify the position regarding the *status quo* that was being maintained.
15. Thereafter, Havelock J. made it clear that the parties had agreed to maintain the *status quo*. That is the most fundamental pronouncement, in my considered view. I so find because both parties had expressly agreed to maintain the *status quo*. However, the court record does not indicate that both parties had agreed on the factual position which constituted the *status quo* which was to be maintained.
16. A perusal of the orders made on 31st October 2013 shows that the court restrained the defendant from interfering with the plaintiff's quiet possession, occupation and/or use of the suit property L.R. No. 1/1151 (original No. 1158/2/7), which is situated along Lenana Road in Kilimani area of Nairobi. That must mean that as at 31st October 2013, the plaintiff was in actual possession of the suit property.
17. That position is consistent with the defendants' complaint that the plaintiff had used “*Maasai guards*” to take possession of the suit property. That statement was made by the defendants in their application dated 5th November 2013.
18. Had not the plaintiff be in occupation at that stage, the defendants would not have had reason to complain about the *status quo* because it would have meant that it was the defendants who were in occupation.

19. The defendants had complained that the plaintiff obtained possession through unconventional means. And even after the defendants complained to the police officers at the Kilimani Police Station, the police had declined to assist the defendant.
20. Clearly, therefore, the 1st defendant felt that the plaintiff had used unorthodox means to obtain possession of the suit property.
21. In my considered opinion, the 1st defendant's advocate deliberately took advantage of the situation on 10th June 2014, in order to steal a march on the plaintiff. I so find because on that day the plaintiff's advocate was not in court, and had requested Mr. Murage advocate to hold brief for him. Mr. Murage's brief was to request that the *status quo* be maintained. And Mr. Kago advocate was in agreement. Therefore, everything appeared to be completely smooth, except for the fact that Mr. Kago insisted on spelling out the facts constituting what he alleged to be the factual position on the ground. It is then that the learned advocate misled the learned Judge.
22. I find that because the defendants had been restrained from interfering with the plaintiff's quiet possession of the suit property; and as that order had not been varied or set aside, the same remained in force.
23. Accordingly, the cheeky move made by the 1st Defendant, in trying to regain possession, is hereby brought to an abrupt end, for now. I direct that until further orders of the court, the plaintiff will retain possession of the suit property. That means that if the 1st Defendant had obtained possession through the use of the order dated 10th June 2014, he must move out forthwith or else he will be compelled to move out.
24. The costs of the application dated 7th October 2014 are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of March 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Shamalla for the Plaintiff

Mr. Kago for the 1st Defendant.

Mr. Kago for the 2nd Defendant.

Collins Odhiambo – Court clerk.