



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 130 OF 2015

BETWEEN

KIWAKA GENERAL MERCHANTS LIMITED.....1ST APPELLANT

MUGANDA WASULWA T/A

KEYSIAN AUCTIONEERS.....2ND APPELLANT

AND

AFRICA TELECOM SOLUTIONS LIMITED.....RESPONDENT

(An appeal from the Ruling and Orders of the High Court at Nairobi (Ochieng, J)

on 10th March, 2015

in

CIVIL CASE NO. 694 OF 2012)

JUDGMENT OF THE COURT

The appellants, **KIWAKA GENERAL MERCHANTS LIMITED**, and **MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS**, the 1st and 2nd appellants respectively filed an appeal against the ruling and orders of Ochieng, J delivered on 10th March, 2015. **AFRICA TELECOM SOLUTIONS LIMITED** was named as the respondent.

A brief background to this appeal is that vide a plaint dated 21st October, 2012 the respondent (the then plaintiff) filed suit against the appellants (the then defendants) and sought several orders. In the plaint, the respondent averred that on 10th June, 2007 it bought all that parcel of land known as LR. No. 1/1151 (original No. 1158/2/7) from one Pasteur Dukuzumuremyi for an agreed consideration of Kshs. 13,500,000/= and immediately thereafter took possession; that he refurbished and improved the suit property by building a town house with residential villas; that on 19th November, 2011 the appellants without any colour of right forcefully entered the suit premises and evicted all and sundry therein.

The appellants filed a Statement of Defence and counter claim dated 10th July, 2013. It was the appellants defence that the suit property was the subject of attachment in Misc. Application No. 949 of 2009 in satisfaction of taxed costs owed by the said Pasteur Dukuzumuremyi to the firm of Lubulellah & Associates; that the 1st appellant was the successful bidder in an auction conducted on 29th September, 2016 in pursuance to orders issued in High Court Misc. Application No. 949 of 2007; that the 1st appellant paid the sum of Kshs. 10,000,000/= and he was issued with a memorandum of sale and a certificate of sale; that the respondent was lawfully evicted following orders issued in HCCC 486 of 2011 and that the respondent fraudulently dealt with property attached in execution of a decree. In the counter-claim, the 1st appellant sought to be declared the owner of the premises. This dispute between the respondent and the appellants is yet to be heard and determined. However, during the said pendency, and following an appearance in court on 10th June, 2014 Ransley J made the following orders:

“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 orders as to costs.”***

The respondent was aggrieved by the orders of Ransley J and sought to have them set aside vide his application dated 7th October, 2014. The respondent’s application was considered by Ochieng J who after hearing the rival arguments came to the conclusion that the appellants had been less than candid on the status quo prevailing on 10th June, 2014 and further that the appellants’ advocate “...

deliberately took advantage of the situation on 10th June, 2014, in order to steal a march on the plaintiff.” (now respondent). The learned judge concluded thus:

“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.”

The appellants were dissatisfied by the said outcome and filed this appeal. In their memorandum of appeal dated 21st May, 2015 the appellants listed no less than 12 grounds of appeal. The appellants faulted the ruling of the High Court on the basis that the learned judge erred in finding that the status quo obtaining on 10th June, 2014 was that the respondent was in occupation of the suit premises as opposed to the appellants.

On 23rd January, 2017 the appeal came before us for plenary hearing. Mr. Kago learned counsel for the appellant and Miss Shamalla learned counsel for the respondents opted to wholly rely on their written submissions as well as their lists of authorities. The appellants’ submissions and list of authorities are dated 22nd November, 2016 and its submissions in reply to the respondent’s written submissions are dated 12th January, 2017. On its part, the respondent relied on its written submissions and his list of authorities

dated 16th November, 2016.

In his written submissions, the appellants faulted the trial judge for finding that the appellants' counsel misled the court and counsel holding brief for the respondent into recording the order of 10th June, 2014 on the status quo of the suit property; in finding that the appellant had "**cheekily**" moved to the suit property by dint of the orders of 10th June, 2014; in finding that the appellant was not in possession before 10th June, 2014; in finding that the respondent retains possession of the suit property; in failing to find that Mr. Munge who held brief for the respondent's counsel on 10th June, 2014 was fully seized of the brief and cannot be allowed to approbate and reprobate and finally, that the motion dated 7th October, 2014 challenging the orders of 10th June, 2014 was vitiated by delay.

In response, the respondent contended that the purported consent order of 10th June, 2014 was vitiated by fraud; that as at 10th June, 2014 there was an order of injunction restraining the appellants from interfering with the respondent's possession of the suit property; that the appellant's counsel misled the court leading to the purported consent order of 10th June, 2014 and that the consent having been fraudulently obtained, cannot stand in the law. The respondent urged us to dismiss the appeal.

This is a first appeal. As a first appeal, we are mandated to analyze and re-evaluate the material placed before the trial court and thereafter arrive at our own independent decision. In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or unless it is based on a misapprehension of the evidence or the judge is shown to have acted on wrong principles in reaching the findings that he/she did. See **Selle & Another v Associated Motor Boats Co. Ltd [1968] EA 123.**

We have considered the pleadings, the affidavit evidence, the rival written submissions as well as the law. In so doing we take cognizance that in making his decision, the learned judge exercised his discretion which we are called upon to be slow to upset. We can only do so if as was held in **Mbogo v Shah [1968] EA 93** the "**... decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken.**"

The impugned ruling of the learned judge dated 10th March, 2015 was made pursuant to an application dated 7th October, 2014 made by the respondent seeking to set aside the orders issued on 10th June, 2014. The respondent challenged the said orders and maintained that **PETER. M. MURAGE**, counsel who appeared on his behalf on 10th June, 2014 vehemently denied having been party a consent that seemed to say that the appellant was in occupation of the suit premises. The crux of this appeal, therefore is to determine the status quo obtaining on 10th June, 2014.

In our analysis of the record, it is not an issue that the respondent vide his plaint dated 29th October, 2012 averred that:

Of paragraph 4 –

"At all material times the plaintiff was the registered owner and/or proprietor and in lawful possession (emphasis added) of all the parcel land known as Land Reference No. 1/1151 (original No. 1158/2/7)..."

In the appellants' statement of defence and counter-claim dated 10th July, 2013, they did not controvert this averment but merely stated that: "**The defendants are strangers to the contents of paragraph 4, 5, 6, 7, 8, 9, 10 and 11 of the plaint and put the plaintiff to strike proof thereof.**" Apart from this general traverse, nowhere did the appellant, in his statement of defence and counter-claim aver that he was in occupation of the suit premises. Indeed, one of the appellant's prayers in its statement of defence and counter-claim was:

“(b) A declaration that the 1st defendant is entitled to mesne profits for the deprivation of use and occupation of the suit property by the plaintiff.”

Apart from the above averments in the appellants and respondent’s pleadings, on 31st October, 2013 the matter was before Havelock J who ordered *inter alia*;

“3. THAT pending the hearing and determination of this application inter partes, a temporary order of injunction be and is hereby granted restraining the Defendants whether by themselves or their agents or servants from interfering with the plaintiff’s quiet possession, occupation and/or use of all that property known as Land Reference No. 1/1151 (Original No. 1158/2/7 situate along Lenana Road in Kilimani area within Nairobi (“the suit property”).

It therefore follows that the appellant having been restrained from interfering with the respondent’s quiet possession of the suit property, it could only mean that on 10th March, 2015 the respondent was in occupation of the suit property and not the appellant.

The above chronology clearly shows that the appellants, contrary to their assertions were not in possession of the suit property and hence the restraining order, restraining them from interfering with the respondent’s quiet enjoyment of the suit premises. It would appear therefore that undue advantage was taken of Mr. Murage Advocate who held brief for Mr. Nyachoti on 10th June, 2014. It is for this reason that the learned Judge found that the applicant had **“cheekily”** sought to obtain occupation of the suit premises to the detriment of the respondent. As stated above, our conclusion is borne by the appellants own pleadings and the restraining injunction order issued by Havelock J on 31st October, 2013. The representations made in court on 10th June, 2014, were as stated by Ochieng J, meant to steal a match against the respondent. It is in view of the foregoing that we come to the conclusion that this appeal is without merit. It is dismissed with costs.

Dated and delivered at Nairobi this 31st day March, 2017.

M. K. KOOME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR