



REPUBLIC OF KENYA



**Ongata Works Limited v Kenya Airport Authority; Middle East Bank Kenya Limited (Interested Party) (Civil Case E174 of 2023) [2024] KEHC 7940 (KLR) (Civ) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E174 OF 2023**

**JN MULWA, J**

**JUNE 27, 2024**

**BETWEEN**

**ONGATA WORKS LIMITED ..... PLAINTIFF**

**AND**

**KENYA AIRPORT AUTHORITY ..... DEFENDANT**

**AND**

**MIDDLE EAST BANK KENYA LIMITED ..... INTERESTED PARTY**

**RULING**

(On Application Dated 5/12/2023 Prayer No. 4)

1. On the 18/10/2023 the court upon on a motion dated 17/10/2023 filed by the plaintiff directed that the motion be served and return for interpartes hearing on 30/10/2023 and further that:

“---In the meantime, an order of *status quo* as at this hour is issued and shall be observed by both parties upto 30/10/2023----”

2. On 30/10/2023, parties were not ready to proceed with the hearing of the motion. The Applicant sought that the orders of *status quo* do remain in force as the process of arbitration is undertaken.

3. By consent of the parties Advocates the court referred the dispute for arbitration and ordered that:-

---in the premises *status quo* as at today’s date shall remain in force....”

The court’s orders were extracted and issued on 2/11/2023.



4. It appears from the parties communication and correspondence thereafter that I have seen that each holds a different interpretation of the court orders of *status quo* thereby necessitating the Applicant to seek court's interpretation and clarification of its orders on 18/10/ 2023 and 30/10/2023.
5. By an application dated 5/12/2023 brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules the Applicant/Plaintiff sought orders:-
  1. Spent
  2. That the pending hearing and determination of this application, this Honorable Court does issue prayer 2 of the Notice of Motion application dated 17<sup>th</sup> October, 2023 to the effect that the Defendant/Respondent by itself, its employees, servants, agents, successors, assignees or any one acting or claiming through or under the defendant be restrained by way of temporary injunction from terminating the contract dated 6<sup>th</sup> August, 2021 between the Applicant and the Respondent.
  3. That pending hearing and determination of this Application this Honourable court does issue prayer 4 of the notice of motion application dated 17<sup>th</sup> October, 2023 for an order suspending the 14 days' notice issued by the respondent preservation of the site and restraining the Respondent by itself its servants, agents or any person acting on its behalf from taking any action that is detrimental to the contract No. CI/014/2021 doe Tender No KAA/OT/ES/ANGAMA/0093/2020-2023 for proposed rehabilitation and e3xpansion of Angama (Olkurruk) Airstrip phase 1.
  4. That this Honourable court be pleased to clarify the *status quo* orders given on 30<sup>th</sup> October, 2023 and issued on 2<sup>nd</sup> November, 2023.
  5. That the costs of this application be in the cause.
6. This ruling is therefore in respect to the application, and particularly prayer no. 4, wherein a clarification of the *status quo* orders dated 18/10/2023 and 30/10/2023 is sought.

The Applicant/Plaintiff and the Respondent/Defendant filed written submissions dated 8/02/2024 and 12/02/2024 respectively. The court has considered the same.
7. The Applicant's/Plaintiff's submissions are on the interpretation of the *status quo* orders on the 18/10/2023 which the court clarified upon being requested by the respondent which was done verbally to the effect that the order was to remain in force upto the determination of the arbitration proceedings and therefore the clarification having been made by the court, the issue was settled.
8. On whether the applicant was entitled to the orders sought in the application dated 5/12/2023 it is the applicants submissions that the conduct of the respondent had the effect of derailing the commencement of the arbitration process that would likely cause public funds to be wasted if the project is not completed without undue delay.
9. The applicant thus urged the court to affirm its directions on *status quo* orders and proceeds to grant the rest of the prayers as prayed for.
10. For the respondent, its submissions are on the import and effect of the *status quo* orders dated 18/10/2023 wherein the court directed that the *status quo* prevailing at the time should be observed upto 30/10/2023 which order was then extended on 30/10/2023 pending hearing and determination of the dispute in arbitration proceedings.



11. It is further submitted that on 18/10/2023 the *status quo* was that a notice of termination of the contract had been issued but no action had been taken by the applicant and therefore the order of 18/10/2023 did not hinder the termination notice from becoming effective as claimed by the applicant.
12. Citing the case *Saifudeen Abdullahi & 4 others* in Mombasa High Court Misc. Civil Cause No. 11 of 2012, it submitted that an order of *status quo* to be maintained is different from an order of injunction both in terms of principles for grant and the practical effect of each adding that an order of *status quo* merely leaves the situation of things as they stand pending the hearing of the reference.
13. According to the respondent as at 30/10/2023 when the court verbally confirmed the *status quo* order to last up to determination of the arbitration proceedings the contract had already been terminated vide the notice of termination dated 11/10/2023 and therefore, the order could not have been intended to withdraw the termination letter or revive the contract that had already been terminated and relied on the case *Shammers Plaza Limited vs. National Bank Limited* [2015] eKLR to the effect that *status quo* means present situation, the way things stand at the time the order is made, the existing state of things.
14. The Respondent too made brief submissions on whether an injunction order stopping the termination of the contract is merited and argued in its totality that the orders are unmerited and the Respondent is ready to have the works undertaken by the applicant measured and settled through the arbitration process.
15. Upon the above rival submissions, the issues that I find necessary to determine in my view is what was the *status quo* on the 18/10/2023 and 30/10/2023 as concerns the contract, subject of these proceedings.
16. The notice of termination of the contract issued by the defendant to the plaintiff is dated 11/10/2023 and received on 12/10/2023 by the Plaintiff. It read at the last paragraph:-

“Following your breach of the above provisions of the contract, and non-compliance with several reminders, you are hereby notified that within the expiry of 14 days from the date of this letter, your contract will stand terminated”
17. The notice to terminate the contract is said to have been issued pursuant to clause 15.2 of the contract executed between the parties. I have considered clause 15.2 of the contract. The notice of termination is not in dispute.

What is in dispute is whether it took effect on the day it was issued, or upon expiry of 14 days of the letter of termination, or within the 14 days.

The notice having been issued on 11/10/2023, the 14 days would have lapsed on 25/10/2023. On 18/10/2023 when the court gave the impugned *status quo* order the notice period had not lapsed. That order of 18/10/2023 contained the intentions of the court and not the clarification the court gave on 30/10/2023 upon request by the defendant.
18. It is to be noted that the impugned order of the court dated 18/10/2023 was *ex parte* upon a certificate of urgency wherein the court directed that the application was to be served and parties return for hearing *inter partes* on 30/10/2023.

However, when the parties attended court on 30/10/2023 they by their advocates, consented to the dispute being referred to arbitration, which the court did, pursuant to clauses 15.3 and 20.4 of the contract executed between both parties on 6/08/2021.



19. On 30/10/2023 when the dispute was referred to arbitration the court clarified to the parties that the *status quo* order issued on 18/10/2023 was to remain in force and had the effect that the contract between the parties would remain the same as it was upto the determination of the arbitration proceedings. On this date the court did not grant new *status quo* orders. It only clarified what the order of 18/10/2023 was made to and the intention of the court at the time it was issued the 18/10/2023.

This meant that only the notice of termination of the contract had been issued and served upon the plaintiff and would take effect upon expiration of 14 days, being the 25/10/2023. However, as at 25/10/2023 midnight, the notice of termination of the contract would have taken effect and the contract would have been practically terminated had the plaintiff not approached the court by the motion under review.

The court therefore disagrees with submissions by the defendant that there was an order of *status quo* issued on 30/10/2023 as none was issued by the court by a verbal clarification of the only order issued on 18/10/2023.

20. *Black's Law Dictionary*, 9<sup>th</sup> Edition defines "*status quo*" as "the situation as it exists"

This position has been further elucidated in superior court decisions among them as hereunder

- a. In *Republic vs. National Environment Tribunal, ex parte Palm Homes Limited & another* [2013] eKLR, Odunga J. stated:

"When a court of law orders or a statute ordains that the *status quo* be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining the *status quo* is meant to preserve the existing state of affairs .... *status quo* must therefore be interpreted with respect to existing factual scenario..."

- b. In *TSS Spinning & Weaving: Company Ltd vs. NIC Bank Limited & Another* [2020] eKLR, the court explained the purpose of a *status quo* order as follows:

"In essence therefore, a *status quo* order is meant to preserve the subject matter as it is/existed, as at the day of making the order. *status quo* is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention."

- c. In *Kenya Airline Pilots Association (KALPA) vs. Co-operative Bank of Kenya Limited & Another* [2020] eKLR, the purpose of a *status quo* order was explained as follows:

".....By maintaining the *status quo*, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the *status quo* ante cannot be restored thereby rendering nugatory its proposed decision."



21. Apart from preserving the substratum of the subject matter, the court has also found an order of *status quo* as a case management strategy, where the court is keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit.

In the case of *Texaco Ltd vs. Mulberry Ltd* [1972] 1WLR 814, the court held:-

“The end result is that *status quo* orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders, but also when the court is of the view that as a case management strategy it would be more proportionate and appropriate without prejudicing one party but both to issue a “*status quo*” order”

22. The undeniable thread running across the said decisions is that:

The circumstances as at the time when the order is made is to be maintained and is meant to preserve the existing state of factual state of affairs, the situation on the ground as they existed before the suit is filed; and by maintaining the *status quo*, the court safeguards the substratum of the subject matter of the dispute before it pending determination of the same as ably held in *Kenya Airline Pilots Association* (*supra*)

23. It is not in dispute further that the parties consented to the dispute being referred to arbitration before the motion under review could be heard interpartes.

That being the case, it is safe to hold that the interrogation and determination of the application interpartes was put on hold. This is in line with Provisions of Section 7 of the *Arbitration Act* No. 4 of 1995 where a court may issue interim measures of protection and preservation before or during arbitral proceedings.

Section 6 thereof provides for stay of legal proceedings where the subject of an arbitration agreement as follows:-

6 (2) provides that

Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

24. In *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 others* [2010] eKLR and *Seven Twenty Investments Ltd vs. Sandhole Investments Kenya Limited* [2013] eKLR the courts held the position that if the subject matter of arbitration proceedings is in danger of being wasted an order of *status quo* should be granted to preserve it pending the arbitration proceedings including termination of contracts. These orders are intended to operate as holding orders pending the outcome of the arbitral proceedings.

25. In the instant application under review, termination of the contract between the parties if not stayed by the status orders would no doubt obviate the need for the arbitration process and render it an academic exercise and in this case, the contract works would be extinguished.

See also *Ongata Works Limited v. Tatu City Limited* [2018] eKLR.

26. The Court of Appeal in *Shimmers Plaza Limited v. National Bank of Kenya Limited* (2015) eKLR defined “*status quo*” as follows:-

“*status quo*” in normal English palace means the present situation the way things stand at the time the order is made, the existing state of things. It cannot therefore relate to the past or



future occurrences or events. We cannot see what can be ambiguous about that order. All it meant was that everything was to remain, as it was at the time that order was given.

27. Equally, this court fails to understand or see what is ambiguous or opaque about its order of 18/10/2023, and reiterates that at the material date 18/10/2023, the plaintiff had been served with a 14 days' notice of termination of the contract. It would have taken effect on 25/10/2023. The order of *status quo* was given before the effective date. Had the defendant intended that the termination notice would take effect immediately, it would have stated so in plain and clear words like this notice shall take effect immediately upon receipt of the notice. This is not the case in these proceedings.

In the meantime, and in between, the contract between the parties remained, as it was, the then existing state of things the present situation.

28. That is why the plaintiff in my view, approached the court seeking an order of injunction by its motion dated 17/10/2023 at prayer No. 2, to restrain the Defendant from terminating the contract dated 6/08/2021 between itself and the defendant. The said contract was never terminated. The notice of termination never took effect. It shall remain in force pending and or during the arbitration proceedings up and until the proceedings are concluded.

For the above special circumstances, the court finds it is appropriate to order each party to bear own costs of the application dated 5/12/2023.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**JANET MULWA**

**JUDGE**

