



REPUBLIC OF KENYA



**KENYA LAW**

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**Automatic Park Services Limited v Kenya Airports Authority (Commercial  
Miscellaneous Application E480 of 2023) [2024] KEHC 13221 (KLR)  
(Commercial & Admiralty) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13221 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
COMMERCIAL MISCELLANEOUS APPLICATION E480 OF 2023**

**JWW MONG'ARE, J  
OCTOBER 28, 2024**

**BETWEEN**

**AUTOMATIC PARK SERVICES LIMITED ..... APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY ..... RESPONDENT**

**RULING**

1. This ruling relates to two applications, the application dated 3<sup>rd</sup> July 2023 by the Applicant and the Respondent application dated 14<sup>th</sup> August 2023. Both applications were canvassed by way of written submissions. For good order, I will first deal with the application dated 3<sup>rd</sup> July, 2023.
2. Automatic Park Services Ltd filed the Notice of Motion application dated 3<sup>rd</sup> July 2023 brought under Section 5(1) of the *Judicature Act* (Cap 8 Laws of Kenya), Part 81, Civil Procedure Rules of England, Section 3A of the *Civil Procedure Act* (Cap 21 Laws of Kenya), and all Enabling provisions of the Law, seeks the following orders:
  - I. spent
  - II. An order denying the Respondent audience in this matter until and unless they purge the contempt of court committed herein by immediately and unconditionally refraining from in any other manner whatsoever or howsoever interfering with the Applicant s' installation, operation and management of the car-parking and revenue management at Wilson, Malindi and Eldoret Airport as directed by the court order made on the 17th June 2023.
  - III. That the CEO/Managing Director, Eldoret Airport Manager and Malindi Airport Manager be detained in prison for a term not exceeding six (6) months for contempt of Court, for



disobeying the orders of this Honourable Court given on the 17th June 2023 by Hon. A. Mabeya J.

- IV. Any other reliefs this court may deem fit
  - V. costs of the application be awarded to the Applicant.
3. The application is premised on the grounds of the face of the record and supported by the affidavit of Adan Hassan a director of the Applicant sworn on 3<sup>rd</sup> July, 2023. He avers the Respondent in blatant disobedience of the court orders of 17<sup>th</sup> June 2023 has barred the Applicant directors from accessing and operating the Malindi and Eldoret Airports parking sites. He urges the court to deny the Respondent audience before this court unless they purge the contempt of court. He states the Applicant has had the Malindi and Eldoret Airport as their machinery and personnel are on the ground
  4. Kenya Airports Authority oppose the application vide the Replying Affidavit of Margaret Munene the Company Secretary sworn on 17<sup>th</sup> July, 2023. She avers the court order of 17<sup>th</sup> June 2023 was not personally served upon the directors of the Malindi and Eldoret Airports and as such was unaware of the court orders. She states the Respondent in compliance with the said orders cancelled the tender reference KAA/OT/HQS/0186/2022-2023. She contends the order was obtained through concealment of material facts, the Applicant has full access and control of the car parking and revenue management at Wilson Airport after the tender was extended with effect from 1<sup>st</sup> August 2021, when the Respondent took over the management of Malindi and Eldoret Airport. The orders of 17<sup>th</sup> June, 2023 were ambiguous as the Applicant was not at the site. She contends the Respondent was not accorded a chance to defend the application dated 14<sup>th</sup> June 2023 and the orders were obtained ex-parte, a fact which was occasioned by the long procurement process by the Respondent in hiring its panel of advocates.
  5. By the submissions the Respondent avers the power to punish a party for contempt is discretionary and should be used sparingly. The Respondent submits the case against a contemnor is higher than that of the balance of probability. It is argued there is no evidence before the court that the directors of Malindi and Eldoret Airport persons being sought to be committed to Civil jail were served with the court orders and the failure to serve them personally the contempt proceedings ought to fail.
  6. The Applicant seeks the court to deny the Respondent audience unless they purge the contempt of court. Section 5 of the *Judicature Act* confers the High Court the discretion to punish for contempt of court. The discretion ought to be exercised judicially, cautiously and depending on the circumstances of each case.
  7. The standard of proof in contempt of court is higher than that of a balance of probability. The court must satisfy itself that there was deliberate and willful disobedience of the court orders as held in *Gatharia K. Mutikika – vs Baharini Farm Ltd [1985] KLR 227* that-

“ A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
  8. This court ought to satisfy itself whether the contemnor is guilty of intention and willful neglect of the orders of the court. The Respondent submits there is no contempt of court as it complied with the court orders by cancelling the tender and the Respondent is in possession and control of the Wilson Airport Car Park Management. According to the Respondent, the Eldoret and Malindi Airports has



been under the maintenance of the Respondent since August 2021 and therefore the orders obtained are unenforceable.

9. Article 50 and 159 2(d) of the 2010 Kenya Constitution enjoins the court to administer justice equitably to all parties through a fair hearing, disregarding procedural and technical errors that do not affect the suit's merits. No party should be condemned unheard.
10. This court agrees with the Applicant 's position that court orders are to be obeyed as held in B vs. Attorney General [2004] 1 KLR 431 where the court held that:

“The Court does not, and ought not to be seen to, make orders in vain; otherwise, the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for the legality, and for the rights of all people.”
11. I am not persuaded that the orders were maliciously and willfully disobeyed. In the interest of justice, I do not doubt in my mind the application dated 3<sup>rd</sup> July 2023 ought to be dismissed with costs to the Respondent.

#### **Notice of Motion dated 14/08/2023**

12. Kenya Airports Authority filed the Notice of Motion dated 14<sup>th</sup> August, 2023 brought under Order 51 Rule 5 of the Civil Procedure Rules, Section 1A, and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. The application seeks:-
  - i. spent
  - ii. That the ruling made on 4<sup>th</sup> July, 2023 allowing the application dated 14<sup>th</sup> June 2023 and all consequential orders therein be set aside and the said application be reinstated for hearing on merit.
  - iii. That the Applicant /Respondent be granted leave to file a response to the application dated 14<sup>th</sup> June 2023.
  - iv. The costs of the application are provided for.
13. The application is premised on the grounds on the face thereon and supported by the affidavit of Margaret Munene sworn on 9<sup>th</sup> August, 2023, in which she avers the Respondent was condemned unheard when the court at the hearing of the application dated 3<sup>rd</sup> July 2023 allowed the application dated 14<sup>th</sup> June 2023, the lack of appearance in court for the hearing of the application was not deliberate but was occasioned by the Respondent had not yet obtained legal representation. She contends the orders in force are prejudicial to the Respondent the same were obtained through concealment of material facts.
14. The application is opposed by the affidavit of Adan Hassan Sheikh which is titled supporting affidavit sworn on 14<sup>th</sup> November, 2023 in which he states that Kenya Airports Authority through its advocate having been duly served appeared in court on 20<sup>th</sup> June, 2023 informed the court it intends to file a response but failed to do so prompting the court on 4<sup>th</sup> July, 2023 proceeded to allow the application of 14<sup>th</sup> June 2023. He argues the Applicant 's application does not meet the requirement for review orders and the court is functus officio on the issue.



15. The provision of Order 51 rule 15 empowers the court to set aside ex-parte orders. this provision amplifies Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus:
- “Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
16. A court should be satisfied that due reasons have been advanced before allowing an application for setting aside ex-parte orders. The Applicant has given a due explanation of the circumstances that led to the ex-parte orders. One of the main concerns raised is the bureaucratic measures put in the appointment of advocates. I am minded that *the constitution* allows a party to representation by counsel of their own choice. The Applicant has also the issue that the order was obtained through the concealment of material facts.
17. In Philip Ongom, Capt vs. Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003) the court held:
- “However, what constitutes “sufficient cause”, to prevent a defendant from appearing in court, and what would be “fit conditions” for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”
18. In my view, the explanation offered by the Respondent is excusable as the same is not a deliberate delay and obstruction of justice.
19. Further, in the administration of justice the law governing the court is Article 159(2)(d) of *the constitution* of Kenya and sections 1A and 1B of the *Civil Procedure Act*, which are concerned with substantive justice as opposed to procedural technicalities. This position was stated in John Nahashon Mwangi –vs- Kenya Finance Bank Limited (in liquidation) (2015) eKLR, where the court held
- “The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 150 of *the Constitution*. Article 50 coupled with Article 159 of *the Constitution* on the right to be heard and the constitutional desire to serve substantive justice to all the parties respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court.”
20. The court has discretionary powers to set aside ex-parte orders issued to do justice. I have considered the arguments raised by Kenya Airport Authority and I am persuaded they constitute a response to the application. In this circumstance denying the Respondent an opportunity to respond to the application would amount to a miscarriage of justice as the Applicant intends to have the Respondent directors committed to civil jail. The reasons adduced by the Respondent are plausible the court ought to satisfy itself on the true position of the issues on the ground.
21. Based on the foregoing, I am persuaded the Respondent has made out a case to invoke this court to exercise its discretion in allowing the application to set aside the order of 4<sup>th</sup> July 2023.
22. From the above findings I make the following orders:-
- i. The ex-parte orders of July 4, 2023 allowing the application dated June 14, 2023 are set aside.
  - ii. Leave is hereby granted to the Respondent to file a Response to the application dated June 14, 2023.



- iii. The Respondent shall within 21 days from the date of this ruling file a response to the application dated June 14, 2023.
- iv. The Notice of Motion dated July 3, 2023 is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Mohammed for the Applicants.

Ms. Wachanga for the Respondents.

Godefrey - Court Assistant

