



**Kenya Aerotech Limited v Kenya Airports Authority (Civil Appeal
E041 of 2022) [2023] KEHC 17671 (KLR) (Civ) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 17671 (KLR)

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

CIVIL

CIVIL APPEAL E041 OF 2022

DO CHEPKWONY, J

FEBRUARY 17, 2023

BETWEEN

KENYA AEROTECH LIMITED APPELLANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application dated February 11, 2022 in which the Applicant is seeking for orders that;
 - a. Spent;
 - b. Spent;
 - c. Pending the inter partes hearing and determination of this Appeal, this Honorable Court be pleased to grant a temporary order of injunction restraining the Respondent whether by their employees, servants, agents or anyone acting under their instructions whatsoever from in any manner whatsoever from evicting the Applicant/Appellant from all the premises/airports it operates from, within different airports in the Republic of Kenya that have been granted to it by the Respondent, denying access of the Applicants/Appellants employees to their respective work stations, grounding of any of the Applicants/Appellants equipment, disconnecting any of the utilities used by the Applicants/Appellants in the performance of its obligations to its clients and used by the Applicants/Appellants carrying out its core business to its various clients as contained at Clause 6 of the Concession Agreement dated 21st September, 2012;



- d. Costs of this Application be provided for in any event.

Applicant's Case

2. The application is premised on its face and in the depositions in the Supporting Affidavit of Andrew Wachira sworn on February 11, 2022. According to the deponent;
 - a. The Respondent vide its letter dated February 9, 2022 demanded that the Applicant/Appellant pays it a colossal sum of Kshs 63,170,772.46 and USD 32,580.12 within Forty-Eight (48) Hours of the receipt of the said letter.
 - b. The said letter is *ultra vires* the express provision of Clause 10 (1) of the Concession Agreement dated September 21, 2012 which is explicit that the notice has to be for a period of Thirty (30) Days and gives the Applicant a further Thirty (30) days to remedy the default from the date of receipt thereof.
 - c. The Respondent in making the said demand for payment of the said amounts the Respondent is trying to coerce the Applicant/ Appellant to pay amounts that are statute barred by dint of the provisions of the Limitation of Action Act, as the amounts predate back to the year 1996.
 - d. The matter from which this Appeal emanates, the Respondent did not file any counterclaim for any monies due to it but merely filed a statement of Defence, in which no amount has ever been claimed.
 - e. It is contended that without following any provision of Law, the Respondent has now threatened to evict the Applicant/Appellant from the Airport premises it granted to the Applicant/ Appellant by the Respondent at the expiry of the said period of Forty-Eight (48) Hours.
 - f. The substratum of the instant Appeal is bound to be defeated should the Respondent make good its threat because once the Applicant/Appellant is ejected from the various premises it occupies, it will be near impossible to get back.
 - g. The threat to evict the Applicant and/or interfere with any of its operations will subject the Applicant to enormous loss and damage as it stands to be sued by the various airlines with which it has contractual obligations to provide ground handling services and over 500 of its employees risk being laid off.
 - h. The operations of the Applicant/Appellant are of a unique nature that is solely carried out at the airports where it offers ground handling services and all its equipment and machinery are incapable of being used anywhere else, as they are solely used for loading and offloading cargo from aircrafts amongst other things for the benefit of the airlines and planes.
 - i. The Applicant/Appellant has offered the said services to the various airports within the Republic of Kenya since the year 1971 and has at all material times been compliant with the requirements set out by the Respondent and its predecessors and is bound to suffer loss and damage.



- j. The Applicant/Appellant is likely to be prejudiced by the actions of the Respondent if the restraining orders sought are not issued as the entire substratum of this Appeal will be lost.
- k. Damages could not be an adequate remedy in the event the contemplated actions of the Respondent are carried out, thus the balance of convenience tilts in favour of the Applicant/ Appellant. It is the Applicants/Appellants prayer that it is necessary that this Honourable Court issues injunctive Orders as prayed so that the issues are determined once and for all and the substratum of the instant Appeal is not lost.

Respondents Case

- 3. The Application is opposed vide the Replying Affidavit of Peter Mwangi sworn on the March 28, 2022, wherein it is stated that:-
 - a. On various dates and instances in the year 2012, the Respondent did enter into an agreement with the Applicant herein for purposes of the Applicant providing ground handling services within the Jomo Kenyatta International Airport, Moi International Airport and the Eldoret International Airport.
 - b. The contractual agreement was governed by a concession agreement dated September 21, 2012 for a period of five years, which period was subsequently extended on various occasions with the latest extension being for a period of six months from August 1, 2018 to January 31, 2019.
 - c. The contractual relationship between them obligated the Applicant to pay all the rent and concession as they fell due together with the interest amongst other obligations.
 - d. The Respondent states that the Applicant has a long history with them dating back to the 1990s but has a poor record of servicing its debts with the Respondent.
 - e. As at January 24, 2022, the Applicant had an outstanding debt of Kshs 63,370,772.405 and USD 32,580.12 arising out of various bills invoiced to them by the Respondent which include the revenue and recoveries bills for Land and building rent, concession, water, telephone and electricity bills and fuel and oil & spillage.
 - f. Any adverse action taken by them with regard to the matter herein was occasioned by the Applicant's own actions of breaching the terms and conditions of the agreement entered into by the parties, when the Applicant failed to settle the outstanding amounts due to the Respondent for a continuous number of years despite numerous requests.
 - g. On 31st September, 2018, a meeting was held between the Respondent's officers and the Applicant's representative with the aim of the Applicants indicating how they intended to settle the outstanding amounts due to the Respondent.



- h. Through its representatives, the Applicants made a proposal to pay a sum of Kshs 5,000,000.00 being a top up to a previous payment of Kshs 4,000,000.00 that had initially been made on 1st September, 2018. A further proposal of payment by a monthly instalment of Kshs 1.5M until payment in full was made.
 - i. The Respondent was not amenable to this offer and made a counter offer through its Managing Director vide a Letter dated 3rd September, 2018 for immediate payment of Kshs 5,000,000.00 with an additional Kshs 5,000,000.00 to be paid not later than Friday, September 7, 2018 and thereafter, the Applicant to make a payment of Kshs 5,000,000.00 by third (3rd) of every month,
 - j. Which proposal was reviewed at the request of the Applicant to read that the third instalment of Kshs 5,000,000.00 to be payable by September 14, 2018 and monthly instalments of Kshs 5,000,000.00 payable by fifteenth (15th) of every month.
 - k. On various occasions the Respondent made a request to the Applicant to regularize the debts but in vain.
 - l. Later the Applicant sought injunctive orders which were granted against the Respondent in Milimani CMCC No 8513 of 2018 which orders the Applicant has been enjoying since September 24, 2018 to January 21, 2022, when the Applicants Application was dismissed, to the detriment of the Respondent.
 - m. The Applicant is obligated by the Concession Agreement to pay the Respondent and as such it is estopped from claiming that the amounts due are statute barred since payment of rent arrears and concession have been ongoing and were subject to extension of the contract on various occasions.
 - n. No Memorandum of Appeal has been filed to prove that an appeal has been preferred and issuing injunctive orders in favor of the Applicant is not a viable solution as the debt owed by them continues to accrue at the Respondent's expense.
 - o. The Applicant has not demonstrated any prejudice it will suffer in the event the injunctive orders are not issued and in seeking the equitable remedy of injunction, it has not come to court with clean hands.
4. On March 8, 2022, the court directed the parties to dispose of the application dated February 11, 2022 by way of written submissions and they complied. The Applicant's submissions are dated May 26, 2022 while the Respondents are dated June 10, 2022.
5. To determine the application dated February 11, 2022, I have read through the grounds upon which the same is premised both on its face and Supporting Affidavit, the Replying Affidavit filed in response thereof by the Respondent alongside the written submissions and authorities cited by the respective parties herein. I find the main issue for determination being whether the Applicant has met the threshold for grant of an injunction.



6. The application for an injunction has been brought under Order 40 Rules 1, 2 and 3 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#). Order 40 of the [Civil Procedure Rules](#) provides for temporary and interlocutory injunctions:-

Rule (1) Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

Rule (2) Injunction to restrain breach of contract or other injury

1. In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after Judgment, apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after Judgment, apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

7. The necessary ingredients that must be established in an application for injunction orders were laid down in the locus classicus case of [Giella v Cassman Brown](#) [1973] EA 358 and reiterated in the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) (CA) No 71 of 2012 [2014] eKLR, where the Court of Appeal set them as follows:-

- a. The Applicant has a prima-facie case with a probability of success.
- b. The Applicant will suffer irreparable injury which cannot be adequately compensated in damages. And if in doubt over the two requirements;
- c. The court to determine the matter in a balance of convenience.



8. A “*prima facie*” case was defined in the case of *Mrao Limited v First American Bank Limited & 2 others* [2003] KLR 125 to mean:-

“....a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

9. I have through the affidavits and written submissions by the parties herein. It is clear that there exists a concession agreement between the Applicant and the Respondent which is not in issue. However, in its submissions, the Applicant claims that the said agreements have provided for mechanics through which either party can terminate the lease but not eviction. It is also submitted that the Respondent has annexed statements of Accounts on their Replying Affidavit predated to 1998 which it says are time barred and cannot be relied upon by the court.
10. The Respondent on the other hand submitted that the Appellant had failed to establish a *prima facie* case with chances of success since it had not annexed a Memorandum of Appeal to demonstrate the grounds it intends to rely on in its intended appeal or demonstrated any reasons they believe they have on appeal with high chances of success. It is the Respondent’s submission that the Applicant obtained interim orders in this matter which allowed them to proceed with operations at their detriment and have since defaulted in payment of the necessary bills hence the outstanding debt has risen to a substantial amount. The Respondent went on to submit that the Applicant is seeking to obtain interim orders from this Court when it has failed to comply with the terms and obligations of the agreement between them, which the court cannot alter or amend since the same was entered into voluntarily by the parties. He further submits that by its conduct of failing to perform its obligations and breaching the terms of the agreement entered voluntarily by the parties, the Applicant has come to court with unclean hands, hence cannot benefit from the equitable remedy of injunction.
11. Having gone through the grounds upon which the application is based, this Court has come across a Memorandum of Appeal dated January 28, 2022 filed on February 2, 2022. On perusal thereof, the issue of whether the amounts claimed by the Respondent are statute barred is one of the grounds upon which the intended appeal is premised. In its reply, the Respondent has found issue with the Applicant on the same issue. This Court finds this issue, together with terms of the concession and such agreements pertinent as they form the substratum of the appeal, as a matters of facts and law that cannot be resolved on affidavit evidence. On this basis, this Court is convinced that the Applicant has established a prima-facie case worth of deliberation/interrogation of arguments and considerations at trial.
12. On whether the Applicant has established likelihood of suffering substantial loss, this Court is guided by the definition of substantial loss in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012]eKLR, where it was observed that:-

“No doubt, in law, the fact that the process of execution has put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial



loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

Further, in the case of *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Limited (In Liquidation)* (2004) E.A. LR 331, the Court defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

13. The applicant has argued that it was served with a Notice to Vacate all the Airport premises by the Respondent was inadequate and if executed within the period specified therein, would automatically lead to loss of hundreds of jobs for its employees and breach of various agreements it has with different airlines to provide ground handling services, which loss it has submitted to be enormous to even contemplate.
14. On the other hand, it is the Respondent’s submission that the Applicant has not demonstrated the kind of injury or loss it is likely to suffer in the event an injunction as sought for is denied. That in any event, the Applicant is the author of its own misfortune as it failed to honour the agreement and settle the outstanding debt owed to the Respondent by virtue of the agreement entered into by the parties voluntarily. The Respondent confirms that the damages likely to be occasioned to the Applicant can adequately be compensated by way of damages by virtue of it being a State Corporation. On the flipside, it is the Respondent’s submission that if the court is inclined to grant the Applicant’s prayer of injunction, then it is their request that they pay half the outstanding amount of rent arrears due to them and deposit the remaining half in a joint interest-earning account in the names of both counsel for the parties herein.
15. Having considered the arguments by both parties in regard to the likely loss the Applicant may suffer, it is this Court’s contention that the Applicant’s apprehension is genuine in view of the material loss it will suffer and by extension, its employees, if the prayer for injunction is denied and the imminent eviction proceeds to take place. The financial accrual as expressed by the Respondents can be compensated by way of damages and costs in the event the appeal fails.
16. The Applicant having demonstrated a prima-facie case and the risks it is likely to suffer if an injunction is granted herein, the court takes the liberty of finding that the balance of convenience lies with the grant of the injunction as sought.
17. In view of the foregoing findings by this Court, the application dated February 11, 2022 be and is hereby allowed in the following terms:-
 - a. Pending the *inter partes* hearing and determination of this Appeal, this Honorable Court be pleased to grant a temporary order of injunction restraining the Respondent whether by their employees, servants, agents or anyone acting under their instructions whatsoever from in any manner whatsoever from evicting the Applicant/Appellant from all the premises/airports it operates from, within different airports in the Republic of Kenya that have been granted to it by the Respondent, denying access of the Applicants/Appellants employees to their respective work stations, grounding of any of the Applicants/Appellants equipment, disconnecting any of the utilities used by the Applicants/Appellants in the performance of its obligations to its clients and used by the Applicants/Appellants carrying out its core business to its various clients as contained at Clause 6 of the Concession Agreement dated September 21, 2012.



b. Costs to be in the cause of the appeal.

18 It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF
FEBRUARY , 2023.**

D. O. CHEPKWONY

JUDGE

