



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 110 OF 2010

KENYA PORTS AUTHORITY APPELLANT

V E R S U S

EDWARD KATUU & 30 OTHERS RESPONDENTS

RULING

1. The Appellant Kenya Ports Authority is established under Cap 391 as a Public Authority in charge of the Port of Mombasa.
2. The Respondents are Taxi operators at the Port of Mombasa where they offer taxi services to passengers, crew, tourists and other Port users.
3. The Appellant by a Notice dated 4th March 2009 invited members of the public to apply/renewal for licenses to operate taxi business at the Port of Mombasa.
4. The Respondent sued the Appellant in **Mbsa CMCC No. 902 of 2009**. In their plaint the Respondents pleaded that they applied for licenses to operate taxi business at the Mombasa Port. Appellant by its letter dated 11th March 2009 informed the Respondents who it collectively called Mombasa Port Taxi Operators that their licenses to operate taxi business at the Port would not be renewed. The Respondents in their plaint said that the decision communicated by that letter was punitive and oppressive. They termed it as a nullity. The Respondents in their plaint prayed for declaration that the Notice in that letter was unlawful, null and void and for an injunction to restrain the Appellant from denying the Respondents entry licenses into Mombasa Port for punity damages.
5. The Respondents filed in the Chief Magistrate's Court an interlocutory application seeking to restrain the Appellant from denying them a license. The Magistrate's Court by orders dated 18th January 2010, 3rd February 2010 and 20th May 2010 issued injunction restraining the Appellant from denying the Respondents access to the Mombasa Port and in particular the order of 20th May 2010 ordered the Appellant to renew the Respondents licenses to operate taxi business in the Mombasa Port.
6. It is not clear to the Court what has aggrieved the Appellant to lead it to file this present appeal. The Appeal it seems from the Memorandum filed herein directs the Appellants grievance to the order made by the Magistrate's Court dated 6th May 2010, yet the Appellant has filed an application dated 28th May 2013 seeking to stay the order of the Magistrate's Court issued on 13th

May 2013.

7. It is important to note that the order that the Appellant seeks to stay by that application is not an order which is the subject of this present Appeal. A party cannot use an appeal to litigate other orders or rulings which are delivered by the lower Court. The order which the Appellant ought to have sought a stay over ought to have order which is the subject of this appeal.
8. But I think the Appellants greatest blunder is its failure to provide coherent documents pertinent to its application for stay. The application or applications that resulted in the orders of the Magistrates court of 18th January 2010, 3rd February 2010, 20th May 2010 and 13th May 2013 are not before Court. Indeed the Court faced an uphill task in deciphering what was before the lower Court. The Court also found it difficult to find out what transpired before the lower Court. Even the Appellants written submissions in support of its application did not assist the Court. The only assistance the Court obtained was from the Respondents written submissions which gave a chronological table of events before the Magistrates Court.
9. It seems from those written submissions that the Respondents obtained an injunction against the Appellant and this is obvious from the order of the Magistrate's Court dated 20th May 2010. The Appellant filed this appeal. That however whilst the order of 20th May 2010 was still subsistence the Respondents stated in its submissions that the Appellant breached the order by denying the Respondents entry to the Mombasa Port. The only issue I wish to point out in respect of that chronology is that the order which is the subject of this appeal is the one made by the Magistrates Court on 6th May 2010. The Respondents in its written submissions stated that in view of the Appellants breach of the Court order they filed another application which resulted in the order of 16th May 2013. That order was to effect that the Appellants were to allow the Respondents to carry out their business within the terms of the order of 20th May 2010.

10. The Appellant's application dated 20th May 2013 must in my view

additionally fail because to grant it would be tantamount to granting the Appeal. This appeal is against the injunction order of the Magistrates' Court. The application of 28th May 2013 seeks to stay orders of the Magistrates Court of 13th May 2013 and 16th May 2013. All the orders seem to relate to the injunction either restraining or requiring the Appellant to continue giving the Respondents access to the Mombasa Port. The lower court matter has its main prayer as an injunction against the Appellant. To therefore entertain the Appellants application would conclude this appeal and also the lower court's case.

11. The Appellant has in my view directed its energy in the wrong

direction. It has to that extent itself to blame for the prolonged subsistence of the injunction. There is no evidence of what attempts the Appellant has taken to try to set the lower courts case down for hearing. It is probably at the conclusion of such full hearing that any party who is aggrieved can file an appeal.

12. Before completing this Ruling I will address an argument advanced by

the Respondents Counsel in his written submissions. He submitted that this appeal should be struck out for having not been filed with the leave of the Court. Order 43 rule 1(1)(u) provides that an appeal shall lie as of right from the order made under Order 40 rule 1 of the Civil Procedure Rules 2010. Although the parties did not avail the applications from which the various orders were made I am guided by the extracted orders from the Magistrates Court and in particular the one dated 20th May 2010 shows that the application was made under Order XXXIX of the CPR (now deleted). Order XXXIX is para materia to Order 40 of the Civil Procedure Rules 2010. It follows therefore that the Respondents were wrong in their submissions and the Appellant did not require leave of the Court to file the present appeal.

12. For the reasons stated above the Appellants application dated 28th May 2013 is dismissed with Costs to the Respondents.

Dated and delivered at Mombasa this 29th day of August, 2013.

MARY KASANGO

JUDGE