



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO.135 OF 2019**

**MASON SERVICES LIMITED .....APPLICANT**

**VERSUS**

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

**RULING**

1. Through the application dated 25<sup>th</sup> February 2019, the applicant seeks the following orders:-

**1. Spent**

**2. Spent**

**3. Spent**

**4. That pending the hearing and determination of the intended arbitration, the Honourable court do issue an interim injunction restraining the respondent, its servants, employees and/or agents from evicting, blocking, preventing, taking over operations, management and/or interfering in any manner whatsoever with the Applicant's Revenue Collection Management and operations of car parking at Moi International Airport Mombasa and Kisumu International Airport.**

**5. That the Honourable court be pleased to refer the dispute arising from the issuance of notices of lapse of concession terms dated 30<sup>th</sup> January 2019 in respect of the applicant's concessionary and management of car parking and Revenue Management System at Moi International Airport Mombasa and Kisumu International Airport to arbitration for hearing and determination.**

**6. That the Honourable court be pleased to issue such orders as it may deem fit in the circumstances.**

**7. That the costs of the application be provided for.**

2. The application is brought under Order 40 Rules 2(1), (2), 3(3) and 4 of the Civil Procedure Rules, Section 7 of the Arbitration Act and Article 159(2) of the Constitution.

3. The application is further supported by the affidavit of the applicant's director, Mr. Stephen Njoroge and is premised on the grounds that the licenses and concessionary agreements made between the applicant and the respondent provide for arbitration in the event that a dispute arises during the performance of the contracts.

4. A summary of the applicant's is that on 19<sup>th</sup> March 2013 and 15<sup>th</sup> July 2011 the respondent granted the applicant license to install and manage an automated Car Park and Revenue Management System at Moi International Airport and Kisumu International Airport respectively for 5 years. On 6<sup>th</sup> April 2014, the applicant entered into a concessional agreement with the respondent in respect to Mombasa International Airport which agreement required the applicant to use its own capital in installing the equipment required and employing personnel in managing the equipment after which it was expected to recover its investment from the revenue collected at an agreed percentage within the contractual period.

5. The applicant concedes that the concession terms in respect to Moi International Airport Mombasa lapsed in October 2018 and that it has been offering service while awaiting the floating of public bids, and that in respect of Kisumu Airport, the terms were extended from time to time with the last extension being in February 2018 for a period of five (5) months.

6. The applicant contends that the extension of the contracts created a legitimate legal and economic expectation on the applicant and that any purported notice ought to be reasonable in the circumstances. It contends that the respondent's notices of lapse of concession terms dated 30<sup>th</sup> January 2019 are improper, irregular, discriminatory and are issued in bad faith as the respondent has not issued similar notices to other players in similar circumstances whose concession agreements lapsed in June 2017.

7. It is averred that the respondent has not identified any new successor for the applicant or floated public bids for the same in line with the provision of the Public Procurement and Asset Disposal Act so as to warrant the issuance of the said notices.

8. The applicant states that it has already entered into contracts with third parties on seasonal car parking tickets and that it stands to be sued for breach of contracts unless interim orders sought are granted.

9. It further contends that the concessionary contracts are also for security in nature and that the respondent does not have ready personnel to operate and manage the automated systems a scenario that is likely to expose the security of the local and international users of the two international airports to risk.

10. At the hearing of the application, **Mr. Oyugi**, learned counsel for the applicant submitted that the applicant wrote letters to the respondent after the lapse of the concession agreements asking the respondent to refer the dispute to the arbitration since the said licences and agreements contained an arbitration clause.

11. It was submitted that the issues raised by the applicant show that a dispute has arisen which ought to be solved through arbitration. It was further submitted that even though the relationship between the applicant and the respondent had lapsed, it still continued on terms of concessionary agreements.

12. The respondent opposed the application through the replying affidavit of its General Manager – Procurement and Logistics, **Mr. Patrick Wanjuki**, who confirms that the respondent granted the applicant a licence to install and manage the automated car parking services at Moi International Airport (MIA) and Kisumu International Airport (KIA). He avers that the legitimate need for extension of the said licences, upon expiry, were in tandem with the respondent's discretionary power under the Public Procurement and Assets Disposal Act ( hereinafter "**the Act**") which governs procurement processes.

13. He further states that the licence and concessional agreements have since expired as the extensions granted were for a specific period after which the applicant is obliged to stop its operations even without any notice.

14. It is the respondent's position that upon the expiry of the licence and concessional agreements, the applicant has no cause of action against the respondent and that the application is therefore extremely wanting.

15. He states that the extension letters and notice of lapse of concession were issued to the applicant in good faith. It is averred that in view of the lapse of the concessional contracts, the applicants follow up for arbitration process has been overtaken by events and that the application does not meet the threshold set for issuance of interlocutory injunctions.

16. At the hearing of the application, **Mr. Abdihakim**, learned counsel for the respondent, submitted that the prayers sought should not be granted because the application is based on an expired contract and does not meet the conditions for granting orders of injunction.

17. Counsel submitted that the order for interim protection is not available in the applicant in light of the fact that the subject contract does not exist as the applicant continues to provide services to the respondent on the basis of this court's orders and against the respondent's wishes.

### **Analysis and determination**

18. I have carefully considered the pleadings filed herein, the parties' submissions together with the authorities that they cited. The main issues for determination are, firstly; whether the applicant has made out a case for the granting of interim orders of protection pending hearing and determination of the intended arbitration and, secondly; whether the dispute arising from issuance of notices of lapse of concession terms dated 30<sup>th</sup> January 2018 should be referred to arbitration.

19. Before I embark on the main substance of this ruling, I wish to point out that on 27<sup>th</sup> February 2019 this court, differently constituted, issued orders that the status quo obtaining between the parties herein be maintained pending the hearing and determination of the instant application. One can therefore say that the effect of the said orders of 27<sup>th</sup> February 2019 were to put hold or stay the notices of lapse of concession terms dated 30<sup>th</sup> January 2019 pending the hearing and determination of this application.

20. Interim measure of protection pending arbitral proceedings are provided for under Section 7 of the Arbitration Act as follows:

***(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.***

***(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."***

1. The purpose of an order of interim protection is to preserve the assets or in some way maintain the status quo as the parties await the

outcome of the arbitral proceedings. In *CMC Holdings Ltd & Another v Jaguar Land Rover Exports Ltd.* [2013]eKLR it was held that:

***“The measures are intended to preserve assets or evidence which is likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitration. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”***

21. In *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others* [2010] eKLR the factors to be considered before the granting the interim measure of protection were outlined as follows:

***i. The existence of an arbitration agreement.***

***ii. Whether the subject matter of arbitration is under threat.***

***iii. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?***

***iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision –making power as intended by the parties?***

22. In the instant case, the applicant contends that it had a concession agreement that contains an arbitration clause which stipulates as follows:

***“14. The parties hereto will endeavour to settle amicable disputes arising out of this concession agreement. If any dispute or difference shall arise between the parties hereto as to the meaning of construction of this concession agreement of anything herein contained or as to the rights or obligations of either party hereunder or otherwise in connection with this agreement anything to follow hereon which cannot be settled amicably, then in all such cases the same be offered for decision to a single arbitrator to be appointed by agreement between the parties or failing such agreement within 30 (days) after the date on which one of the parties hereto first serves on the other a notice giving the name, address and a summary of the qualifications of a suggested Arbitrator, to be appointed by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom, Nairobi Chapter and any arbitration proceedings hereunder shall be conducted in Nairobi aforesaid PROVIDED THAT the provisions of Section 33(1) of the Act shall apply if any such dispute or difference concerns or includes a claim by the licensee against the licensor for damages or other compensation as a result of any alleged breach by the licensor for this agreement.”***

23. I have perused Clause 14 of the licence to Install and Manage Automated Carpark and Revenue Management System dated 19<sup>th</sup> March 2012 signed by the applicant and the respondent together with Clause X of the Concession Agreement dated 6<sup>th</sup> April 2014 which were attached to the applicants supporting affidavit and marked “SN1” and “SN2” respectively and I note that in both documents, the parties agreed that all disputes arising out of their agreement as to their rights and obligations shall be referred to an arbitrator in the event that an amicable settlement is not reached upon by the parties.

24. In the instant case, while the applicant concedes that the concession agreement had lapsed, it also contends that there is a dispute arising from the issuance of notices of lapse of concession terms dated 30<sup>th</sup> January 2019 which it contends should be referred to arbitration.

25. My finding is that without going to the merits of the case to be filed before the arbitrator, it was not disputed that an arbitration clause exists in the concession agreements that the parties executed which arbitration clause binds the parties herein. I therefore find that this application fulfils the first condition on factors to be considered before granting an interim measure of protection.

26. Turning to the second condition regarding whether the subject matter of arbitration is under threat, I note that it was not disputed that the concession agreement has lapsed. Despite the lapse of the agreement, the applicant seeks orders of injunction to restrain the respondents from taking over or interfering with its operations and revenue collection at Mombasa International Airport and Kisumu International Airport. My understanding of the applicant’s prayer for injunction is that it seeks the orders of this court to allow it to continue with its operations at the respondents premises despite the lapse of their concession agreement.

27. The question which this court has to grapple with is whether this court can issue the injunctive orders sought in the face of the applicant’s admission that their concession agreement has lapsed. The answer to the above question is to the negative.

28. The principles governing the granting of orders of temporary injunction were well set out in the celebrated case of *Giella v Cassman Brown and Company Limited* (1973) E.A 385, at page 360 where Spry J. held that: -

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

29. Having regard to the above cited and well-known principles of injunction, and having noted that the concession agreement between the parties has already lapsed, I find that the applicant has not demonstrated that it has a prima facie case against the respondent or that it will

suffer damage that cannot be adequately compensated by an award of damages. I further find that issuing orders to allow the applicant to continue with its operations at the respondent's premises, in the face of an admission, by the applicant, that concession agreement that brought it to the said premises has already expired will be tantamount to rewriting the contract between the parties herein.

30. Needless to say, it is trite law that the court cannot rewrite the contract between the parties. This is the position that was adopted in ***National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another [2001] eKLR*** wherein it was held that a court of law cannot purport to rewrite a contract between the parties and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

31. The applicant argued that since the respondent had previously extended the terms of the concession agreement, it had a legitimate economic expectation capable of being enforced by the applicant against the respondent. My take is that the previous extension of the concessions notwithstanding, once the period of the concession lapsed, the applicant cannot seek the orders of this court to compel the respondent to extend the term of their agreement after the lapse of the period that had been agreed upon. This court is at a loss as to how and why the applicant perceives the notices of lapse of the concession terms to be illegal and unreasonable when the concession agreements were clear on the issue of their expiry dates. In ***Jiwaji v Jiwaji [1968] E.A. 547***, the Court held that:

***“where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties.”***

32. I respectfully agree with the above summation of the law and find that having established that the concession agreements had lapsed, and having found that this court cannot rewrite the agreement between the parties, this court is unable to find that the applicant will suffer prejudice unless the respondent is restrained by way of orders of injunction from taking over the car parking operations at the two airports.

33. My further finding is that the mere fact that the applicant has previously had its concession terms extended from time to time or that the respondent is yet to float public bids or has not issued similar notices to other service providers does not take away the fact that the term of the agreement between the parties has lapsed.

34. For the above reasons, I find that while the applicant is within its rights to refer any dispute it may have with the respondent to arbitration in line with the arbitration clause contained in the Concession Agreement, I am not satisfied that the applicant has made out a case for the granting of the interim measure of protection pending the arbitration.

35. Consequently and having regard to the findings that I have made in this ruling I find that the instant application is not merited and I therefore dismiss it with costs to the respondents.

**Dated, signed and delivered in open court at Nairobi this 22<sup>nd</sup> day of January 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Akatch for Munene for respondent

No appearance for applicant

Court Assistant – Sylvia