REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 43 OF 2018

MOI UNIVERSITY.....PLAINTIFF

-VERSUS-

PRO AVIATION SYSTEMS LIMITED.....RESPONDENT

RULING

[1] The brief background of this matter is that the Defendant was contracted by the Plaintiff to carry out maintenance of its aircraft **CESSNA T182RG (5Y-RKM)** (hereinafter, "the aircraft") vide a contract dated **3 June 2016**; and that during the currency of the said contract the Plaintiff issued a cancellation notice to the Defendant dated **20 March 2018**, effectively terminating the contract. The Defendant then proceeded to claim an amount of **Kshs. 5,312,739/=** from the Plaintiff through its advocates, **One & Associates, Advocates**. In spite of attempts to amicably settle the dispute between the parties, the Plaintiff felt constrained to file this suit, specifically for the purpose of seeking an order to compel the Defendant to hand over the aircraft to it in an assembled state; as well as an Airworthiness Certificate for the aircraft.

[2] Contemporaneously with the Plaint, the Plaintiff filed a Notice of Motion dated **17 September 2018** seeking a mandatory injunction in terms of the prayers set out in the Plaint; and in particular that:

> **[a]** Pending the hearing of the suit, the Court do issue orders compelling the Respondent to release and hand over aircraft **CESSNA 182 Registration No. 5Y RKM** to the Applicant, **Moi University;**
>
> **[b]** Pending the hearing and determination of the suit, the Court do issue orders to restrain the Respondent, **Pro Aviation Systems Ltd**, from handling the said aircraft.

[3] The interlocutory application was allowed on **2 October 2018** and an order issued directing the Defendant to release and hand over the aircraft to the Plaintiff in the condition in which it was as at **16 March 2018.** Being unhappy with the order of **2 October 2018,** the Defendant took a decision to challenge it by way of appeal and consequently filed a Notice of Appeal dated **5 October 2018.** A request was, likewise, made by the Defendant for certified copies of the proceedings and the ruling dated **2 October 2018.** The Defendant also filed a Notice of Motion dated **9 October 2018** through the law firm of **One & Associates,** seeking stay of execution of the order dated **2 October 2018** pending the hearing and determination of the intended appeal. There is, however, no indication on the record that any interim orders were issued in respect of that application.

[4] Thereafter, the Plaintiff filed an application, under a Certificate of Urgency, dated **23 October 2018** seeking that the Defendant's directors be cited for contempt. Apparently, this is the application that gave rise to the impugned ruling dated **29 July 2018,** which, according to the court record, was delivered by **Hon. Omondi, J.** on **29 July 2019.** The application was allowed in the following terms:

> **"Consequently, I hold and find that the two named individuals, OSCAR SAMMY IMBUYE and DOMINIC GITONGA KARUNA KAMAI have knowingly and wilfully disobeyed the court orders made on 2nd October 2018. They are thus in contempt of court. In the event that the two afore-named directors are not present in the court room at the reading of this decision, I order that a warrant do issue for their arrest and committal to civil jail for a period of 6 months. Costs follow the event and the same be and are hereby awarded to the applicant."**

[5] Again, the Defendant promptly filed the Notice of Motion dated **30 July 2019** to stay the orders issued on **29 July 2019**. Other than those two applications, the Defendant also filed an application dated **20 February 2019** seeking an order of stay of proceedings pending reference of the dispute to arbitration in accordance with Clause 1.20 of the Contract dated **3 June 2016.** Thus, in effect, there were 3 applications pending as at **8 October 2019** when the file was placed before me for hearing. However, the Defendant proceeded to withdraw the application dated **20 February 2019** and gave sufficient cause therefor at paragraph 21 of the Defendant's written submissions dated **12 September 2019;** thus the only pending applications are the twin applications for stay pending appeal dated **9 October 2018** and **30 July**

2019 as the application dated **20 February 2019** is hereby deemed as having been withdrawn on **8 October 2019.**

[6] Moreover, there being no indication, one year later that the Defendant's intention to appeal the decision of **2 October 2018** was actualized, I take it that the application dated **9 October 2018** has been overtaken by events and therefore confine myself, in this ruling, to the determination of the application dated **30 July 2019**. The said application was filed by the Defendant, **Pro Aviation Systems Ltd**, under **Section 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 42 Rule 6** of the **Civil Procedure Rules, 2010,** for orders that the Court be pleased to issue an order of stay of execution of the decision of the court (Hon. Omondi, J.) delivered on **29 July 2019** pending the hearing and determination of the intended appeal. The Defendant also prayed for the costs of the application.

[7] The application was predicated on the grounds that the Court delivered a ruling on **29 July 2019** allowing the Plaintiff's Notice of Motion application for orders to commit the directors of the Defendant to civil jail; and the Defendant, being aggrieved by the said ruling, intends to appeal against the whole of the said decision and has consequently lodged a Notice of Appeal. It was further averred that, unless the decision aforementioned is stayed, the Defendant shall suffer substantial loss which is irreparable as they shall be incarcerated in civil jail; and that serving a civil jail term would be irredeemable should the Defendant's intended appeal succeed. The Defendant averred that it is willing to comply with such terms as the Court shall impose.

[8] The Defendant further averred that, whereas the Court has issued orders for committal to civil jail of the directors of the Defendant for non-compliance with court orders, the orders were complied with to the best ability of the Defendant and as directed by the Court; and therefore that, in arriving at the impugned decision, the Court misdirected itself. It was further contended by the Defendant that the decision of the Court is contrary to established precedent by condemning the directors of the Defendant to imprisonment without an option of a fine; and therefore, that the intended appeal is arguable, meritorious, raises substances issues of law and has high chances of success. Hence, the Defendant is apprehensive that unless the orders sought herein are granted, it shall suffer substantial loss and the intended appeal will be rendered nugatory; the flipside being that the Plaintiff stands to suffer no prejudice should the application be allowed.

[9] In support of the application, the Defendant relied on the affidavit of one of its directors, **Oscar Imbuye,** sworn on **29 July 2019**. **Mr. Imbuye** averred therein that they are aggrieved by the ruling delivered herein dated **29 July 2019** and proceeded to lodge a Notice of Appeal, a copy of which was annexed to the Supporting Affidavit and marked **Annexure "OI 1".** Hence, he deposed that, unless the decision is stayed, the directors of the Defendant shall irreparable suffer substantial loss should they be incarcerated as ordered, as the decision affects their liberty. According to **Mr. Imbuye**, serving a civil jail term is irredeemable and unwarranted, for the reason that the orders of the court were indeed complied with to the Defendant's best ability and as directed by the Court.

[10] The application was resisted by the Plaintiff, **Moi University**, vide the Replying Affidavit sworn by **Petrolina Chepkwony** on **6 August 2019**. The Plaintiff's contention is that the application is fatally defective, bad in law, incompetent and ought to be struck out with costs as it is nothing but an afterthought intended to waste precious judicial time. It asserted that the Defendant must first purge its contempt for it to be granted audience by the Court; and that, having challenged the jurisdiction of the Court, the Defendant cannot turn round and come before the very court to seek orders of stay. The Plaintiff further averred that the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** having not been satisfied, the Defendant is not deserving of the orders sought.

[11] The application was urged by way of written submissions, which were highlighted on **8 October 2019**. Counsel for the Defendant proffered the argument that the appeal is arguable and raises several triable issues, namely:

> **[a]** whether or not it was proper for the Court to issue a mandatory injunction at an interlocutory stage;
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> **[b]** The exhaustion principle;
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> **[c]** The question about service of the order and the effect of the Court's misgivings at paragraph 1 of the ruling dated **29 July 2018** (see page 89 of the Defendant's Bundle filed on **17 September 2019**) as to whether the signature in question was the Defendant's;
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> **[d]** Whether indeed it was the duty to obtain the Certificate of Airworthiness was reposed in the Defendant; and therefore whether the Defendant was well poised and suited for compliance with the order.
>
> **[e]** The question of the reasonableness of the penalty of 6 months' imprisonment imposed on the Defendants' directors without the option of fine.

[12] Thus, it was the submission of **Mr. Wasilwa**, learned counsel for the Defendant, that the sub-stratum of the intended appeal may be rendered nugatory should the orders sought not be granted. The Defendant, likewise, urged the Court to note that the Plaintiff's own equivocation and prevarication was an impediment to the hand-over of possession of the aircraft. Counsel pointed out that while the Plaintiff was intent on a handover of the aircraft, it, in the same vein, obtained orders barring the Defendant from further handling the aircraft. He added that the Plaintiff also dispossessed the Defendant of important and necessary documents while fully aware that the works could not be carried out without the said documents. Thus, Counsel accordingly urged the Court to find that the application for stay pending appeal is merited. Counsel relied on various authorities, including **A.A. Esmail vs. Equip Agencies & 4 Other [2014] eKLR,** and **Lucy Wangui Gachara vs. Minudi Okemba Lore, Civil Appeal No. 4 of 2015 (Malindi),** among others, to support his submissions.

[13] On his part, **Mr. Mukabane,** learned counsel for the Plaintiff, emphasized the fact that the Defendant brazenly disobeyed the order of **2 October 2019** and has continued in that course of disobedience to date, even as it seeks the discretion of the Court for an order of stay of execution of the committal order of **29 July 2019**. It was therefore the submission of the Plaintiff that the Defendant's application dated **30 July 2019** is an abuse of the process of the court and ought not to be countenanced; more so because the Defendant has all along disputed the jurisdiction of the court. In addition to the foregoing, the Plaintiff submitted that the Defendant ought not to be granted audience until it purges its contempt. Counsel relied on **Hadkinson vs**. **Hadkinson** [1952] AllER 657 and **P N K vs. J K M** [2018] eKLR as to the "plain and unqualified obligation" of persons against whom court orders are issued to obey unless and until the same is set aside.

[14] The Plaintiff further submitted that no attempt whatsoever was made by the Defendant to satisfy the conditions for stay as set out in **Order 42 Rule 6** of the **Civil Procedure Rules.** He relied on **Machira T/A Machira & Co. Advocates vs. East African Standard** (No. 2) [2002] eKLR and **Gladys Momanyi vs. Dr. George Omondi Oyoo & 4 Others** [2003] eKLR for the proposition that, in this kind of application, it is not enough for the applicant to merely state that substantial loss will result; and that specific details and particulars ought to be supplied to prove either pecuniary or tangible loss; which, in his view has not been proved. Hence, Counsel concluded his submissions by stating that to grant the orders of stay would be prejudicial to the Plaintiff; and therefore that the application ought to be dismissed with costs.

[15] I have given due consideration to the application dated **19 February 2018,** the grounds set out therein and in the Supporting Affidavit as well as the averments in the Replying Affidavit filed in response thereto and the written and oral submissions made herein. Having done so, it is plain that, central to the application dated **30 July 2019** is the question posed by Counsel for the Plaintiff as to whether the Defendant, being in contempt as it is, is entitled to audience before purging its contempt; and in this respect I would reiterate the holding in **Hadkinson vs. Hadkinson [1952] AllER 567** that**:**

> **"It is the plain and unqualified obligation of every person, against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.**
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> **For, a person who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed."**

[16] In similar vein, the rationale behind the obligation to obey was well explicated in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828,** thus:

> **"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors."**

[17] Accordingly, there is no question that the contemnors herein deserve to be punished in terms of the pronouncement of the court dated **29 July 2019.** Nevertheless, the rule of law also envisages that an aggrieved party be afforded an opportunity to appeal; and for good measure, **Order 42 Rule 6** of the **Civil Procedure Rules** provides for stay to facilitate such an appeal before the decision can be implemented. Where therefore, the contemnor comes to court in pursuit of such an appeal, the court ought not to shut its doors to such a litigant. I find succor in this regard in the decision of the Court of Appeal in **A.A. Esmail vs. Equip Agencies & 4 Others** (supra) that:

> **"…we think that in the circumstances of this case, they were entitled to be heard for the purposes of showing cause why they should not be committed for contempt, as the learned Judge had ordered. As we have noted, when the learned judge found them guilty of contempt of court, on 22nd September 2004, the appellant and the 4th respondents, who were not parties to the suit or the contempt application were not in court …When the learned judge ordered them to appear on 30th September 2004, it was to be expected that they would be heard, otherwise how were they to show cause? Unfortunately, that never happened.**
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> **The authorities show that for purposes of showing cause why he should not be committed, a contemnor is entitled to be heard. It is noteworthy that in Hadkinson vs. Hadkinson (supra) Lord Denning was very clear enough that it is unusual for a court to refuse to hear a party to a suit and that such cause should be taken only when justified by grave considerations of public policy. The fact that a party to a suit has disobeyed an order of the court is not itself a bar to his being heard; a court could exercise its discretion to refuse to hear him if the disobedience continued to impede the cause of justice."**

[18] The Court went further in its discussion to make the following distinction:

> **"…the general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applied to proceedings voluntarily instituted by himself in which he has made some claim and not a case where all he seeks is to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction…"**

[19] In this instance, the Defendant has not sought to bring some new cause of action or claim. It seeks stay of execution to enable it appeal the decision on the contempt application. I therefore take the view that the Defendant and its directors, who are the cited contemnors, are entitled to a hearing. That said, I would agree with the Plaintiff that Counsel for the Defendant misdirected his efforts in dwelling on the merits of the appeal. This Court, being a court of concurrent jurisdiction as the court that delivered the ruling of **29 July 2019,** is in no position to consider the merits of the intended appeal. Hence, the application is one that squarely falls for consideration under **Order 42 Rule 6** of the **Civil Procedure Rules**; which provides that:

> **"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such**

application and to make such order thereof as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."

(2) No order for stay of execution shall be made under subrule (1) unless--

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

[20] Accordingly, it was imperative for the Defendant to demonstrate on a balance of probabilities that:

[a] it will suffer substantial loss unless the order is made;

[b] the application has been made without unreasonable delay, and

[c] that such security as the court orders for the due performance of such decree has been given.

[21] The rationale for these requirements was well explicated in the case of **Machira T/A Machira & Co. Advocates vs East African Standard (supra) thus:**

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[22] The Applicant has expressed its desire to appeal that decision by promptly filing a Notice of Appeal dated **29 July 2019**. That Notice was therefore filed well within the 14-day window provided for in **Rule 75(2) of the Court of Appeal Rules, 2010.** Similarly, the instant application for stay was filed on **30 July 2019,** the day following the date of the impugned ruling. Clearly, there was no delay whatsoever in bringing the instant application.

[23] As to whether the Defendant has demonstrated to the requisite standard that it risks to suffer **substantial loss** unless the order of stay is made, what is in issue is not the execution of a money decree but the incarceration of the directors of the Defendant. I would agree with the submission that once incarcerated, the damage cannot be undone should the intended appeal succeed. A similar view was taken in **Republic vs. Director of Lands and Urban Planning, Government of Makueni County, Exparte Edward Mutinda & 15 Others** [2015] eKLR thus:

"In matters where the liberty of the applicant is at risk or jeopardy, the Court normally grants stay of execution since to decline to do so may lead to the applicant being imprisoned, a fact which cannot be undone if the appeal succeeds. As was appreciated by the Court of Appeal in United Insurance Co. Ltd vs. Stephen Ngare Nyamboki Civil Application No. Nair 295 of 2001, in a matter involving the threat of imprisonment, if the order of imprisonment were to be enforced, even for a few days and the intended appeal were to succeed, that success will obviously be rendered nugatory and therefore stay granted." (see also **Rev. Jackson Kipkemboi Koskey & 7 Others vs. Rev. Samuel Muriithi Njogu & 4 Others, Civil Application No. Nai 311 of 2006)**.

[24] Likewise, in **Dr. Christopher Ndarathi H. Murungaru vs. Kenya Anti Corruption Commission & Another** [2006] eKLR, the Court of Appeal held, in an application for stay pending appeal under Rule 5(2)(b) of the Court of Appeal Rules, that:

"…matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for one week. The appeal would have been rendered nugatory…"

[25] In the premises, I am satisfied that this is a fit and proper case in which an order of stay would serve the ends of justice. Should the intended appeal fail, the contemnors would then be under obligation to serve their respective terms as ordered herein. Thus, I find merit in the Defendant's application dated **30 July 2019**, which is hereby allowed and orders prayed for therein granted as hereunder:

[a] That an order of stay of execution of the decision of the court delivered on **29 July 2019** be and is hereby issued pending the hearing and determination of the Defendant's intended appeal.

[b] That costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE