REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 331 OF 2014

KENYA AIRPORTS

PARKING SERVICES LIMITED.....1ST PLAINTIFF/RESPONDENT

KAPS MUNICIPAL

PARKING SERVICES LIMITED.....2ND PLAINTIFF/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF MOMBASA....1ST DEFENDANT/RESPONDENT

HAMIS M. MWAGUYA.....2ND DEFENDANT/APPLICANT

NAHMEED MUSA..... 3RD DEFENDANT/RESPONDENT

SALIM MWAMULEVI.....4TH DEFENDANT/RESPONDENT

MOHAMMED ABBAS.....5TH DEFENDANT/RESPONDENT

RULING

1. The application before me seeks the stay of Contempt Proceedings against **HAMISI M. MWAGUYA**, the Applicant.

2. On 2nd October 2017 the Court delivered a Ruling in which it found the Applicant to be in contempt of Court.

3. The Court directed the Applicant to appear before it on 6th November 2017 for the purposes of mitigation and sentencing.

4. The Applicant felt aggrieved by the Ruling and lodged a Notice of Appeal. In his considered view, the appeal has high chances of success.

5. Whilst awaiting the hearing and determination of his appeal, the Applicant brought this application, with an intention of halting the proceedings at which mitigation and sentencing should be undertaken.

6. It is the view of the Applicant that mitigation and sentencing have extreme and highly prejudicial consequences that would render his intended appeal nugatory. If the said steps were allowed to proceed, the Applicant contends that that would subvert the ends of justice.

7. Therefore, in his considered opinion, the Applicant feels that the only way to serve the interest of justice and fairness, would be by staying the contempt proceedings.

8. In the meantime, the Applicant swore an affidavit in which he gave his undertaking to prosecute the appeal expeditiously.

9. By his said affidavit, the Applicant also informed the Court that he was willing to abide by any conditions which the Court would set, for the grant of the relief sought.

10. In response to the application, the Plaintiff first asserted that the application was incompetent because it had been made in the wrong case.

11. The application was brought in **HCCC NO. 331 OF 2014**.

12. But the Plaintiff insists that the Ruling in respect to which the Applicant had lodged a Notice of Appeal was made in **HCCC NO. 434 OF 2009**.

13. It is common ground that there are various cases which were filed at the High Court, arising from disputes between the **KENYA AIRPORTS PARKING SERVICES LIMITED** and **KAPS MUNICIPAL PARKING SERVICES LIMITED** (on the one hand) and the **COUNTY GOVERNMENT OF MOMBASA** (on the other hand).

14. The Applicant's position was that the three cases, (being **HCCC NO. 252 OF 2015; HCCC NO. 331 OF 2014;** and **HCCC NO. 251 OF 2015)** were transferred from Mombasa to the **Commercial & Tax Division of the High Court, Milimani Nairobi,** where they were consolidated with **NAIROBI HCCC NO. 434 OF 2009.**

15. But the Plaintiffs insist that the cases were never consolidated. The Plaintiffs contend that each of the cases continued to exist separately and distinctly, although they were to be heard together, by the court.

16. A perusal of the Court records reveals that on 13th May 2014, the Hon. Lady Justice M. Kasango ordered that **Mombasa HCCC No. 37 of 2014** be transferred to the **Commercial & Tax Division of the High Court**, at **Milimani, Nairobi.**

17. The Learned Judge did not order that the case be consolidated with the case, **HCCC NO. 434 OF 2009.** Instead, the Judge directed that it would be for the Presiding Judge at the **Commercial & Tax Division,** to determine whether or not to order for the consolidation of the two cases.

18. On 13th November 2014, when the cases were before me, Mr. Buti, the Learned Advocate for some of the Defendants, said that the cases could not be consolidated, but that they could be heard together. Mr. Amuga Advocate and Mr. Ogunde Advocate also concurred with that view.

19. On 28th November 2014, the Court was informed by Mr. Buti Advocate that all the parties had agreed that the cases could not be consolidated.

20. Having carefully perused the record of the court proceedings I found no order for the consolidation of the cases. Therefore, the Applicant was not right when he said that the cases had been consolidated.

21. If the alleged consolidation was the only basis upon which the Applicant chose to bring his application in **HCCC NO. 331 OF 2014**, I would tell him that he erred.

22. It would be an act of futility to order the stay of contempt proceedings in a case in which no such proceedings were ongoing.

23. In this set of cases, the parties agreed that the matters in issue were all very inter-twined. It was for that reason that it became prudent to have the cases heard together, by one Judge.

24. Nonetheless, I reiterate that the cases were not consolidated, which implies that the application ought to have been struck out, because it had been lodged in the wrong case.

25. But I will not take that route in this case. Instead, I will go on to give due consideration to the merits of the application.

26. First, I will consider the contention that the application was filed after an inordinate delay.

27. The Respondent reasoned that a delay of 31 days was inordinate. But the Applicant pointed out that pursuant to **Section 33(4)(b)** of the **Contempt of Court Act No. 46 of 2016**, he was allowed up to sixty **(60)** days within which to file his appeal. Therefore, when he brought the application after 31 days, the Applicant argued that there had been no delay on his part.

28. The period of **60** days was for lodging an appeal. In my view, it is not the yardstick to be used in determining whether or not an application for stay of proceedings pending an appeal had been brought timeously.

29. The fact that the Applicant was not in hurry to bring his application immediately after the court had held him to be in contempt, is indicative of the absence of imminent danger of any execution of the orders made thus far.

30. If there was a real probability that the Ruling would be executed against the Applicant, I doubt that he would have waited for over one month before seeking stay of these proceedings.

31. As the danger was not lurking in the shadows, close to the Applicant, he cannot be said to have been guilty of inordinate delay. He did not need to have acted sooner than he did, because nothing untoward could have happened to him sooner.

32. That leads me to the question concerning the action, if any, that could be taken against the Applicant if these proceedings were not stayed.

33. The Applicant is supposed to present himself before the court, where he would be accorded an opportunity for mitigation. Thereafter, the court would determine the appropriate sentence to hand down.

34. Surely, the process through which the Applicant would put forward his mitigation cannot be prejudicial to him.

35. And before the court hands down a sentence against him, the Applicant cannot state, with any degree of certainty, that he would be prejudiced by a sentence whose nature and severity he knew nothing about.

36. In the event, I find that the Applicant has failed to establish a sufficient cause to warrant the grant of an order for stay of these proceedings.

37. He has not shown that he would suffer substantial loss if the proceedings were not stayed. Indeed, the Applicant has not shown that would suffer any loss if the proceedings were allowed to proceed further.

38. In the absence of proof of the substantial loss which the Applicant would suffer unless proceedings were stayed, it cannot be said that his appeal would be rendered nugatory if the case were permitted to carry on.

39. As the court had not handed down any sentence against the Applicant, it would be speculative to set a figure in respect to such security as the Applicant should provide, as a pre-condition for the grant of an order for stay.

40. The Respondent has suggested that the Applicant could have offered, as security, the deposit of a sum equivalent to the maximum fine payable under the **Contempt of Court Act.**

41. At this moment, it is not known whether or not the court could impose a fine, as punishment for the Applicant's contempt. Therefore, an offer to deposit the maximum fine provided for by law may not actually constitute a security for the due performance of such order as the court would otherwise cause to be executed against the Applicant.

42. In this case, the Applicant failed to offer any security; and that constitutes a demonstration of lack of good faith on his part.

43. In the final analysis, I find that the application lacks merit. It is therefore dismissed with costs to the Plaintiff.

DATED,SIGNED and DELIVERED at NAIROBI this 4TH day of June 2018.

FRED A. OCHIENG

JUDGE