



**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 37 OF 2014**

**KENYA AIRPORTS PARKING SERVICES LTD ..... 1<sup>ST</sup> PLAINTIFF**

**KAPS MUNICIPAL PARKING SERVICES LTD ..... 2<sup>ND</sup> PLAINTIFF**

**V E R S U S**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**HAMIS M. MWAGUYA ..... 2<sup>ND</sup> DEFENDANT**

**NAHEED MUSA ..... 3<sup>RD</sup> DEFENDANT**

**SALIM MWAMULEVI ..... 4<sup>TH</sup> DEFENDANT**

**MOHAMMED ABBAS ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Plaintiff filed this case on 19<sup>th</sup> March 2014. Plaintiff on that day also filed a Notice of Motion dated 18<sup>th</sup> March 2014. The Court on hearing that application on 19<sup>th</sup> March 2014 certified it as urgent but declined to grant ex parte orders. Plaintiff was directed to obtain an inter partes hearing date on priority basis. On subsequent inter partes hearing dates the Notice of Motion was adjourned for various reasons, one reason being that one of the Counsels appearing for some of the Defendants was hospitalized and another because the Court was involved in a part heard matter where the witnesses were from Kampala. During those adjournments the Court declined to grant Plaintiff injunction orders sought preferring to grant such orders after inter partes hearing. It was during the periods of those adjournments that 1<sup>st</sup> Defendant filed a Notice of Motion dated 8<sup>th</sup> April 2014. Principal prayer in that Notice of Motion was for the Court to stay **Milimani HCCC No. 434 of 2009** pending the hearing of Plaintiff's Notice of Motion dated 18<sup>th</sup> March 2014. The Court on 8<sup>th</sup> April 2014 granted ex parte interim stay of that suit **HCCC No. 434 of 2009**. Inter partes hearing of that Notice of Motion was fixed on 13<sup>th</sup> May 2014.
2. It is important to state that the Plaintiff herein by this action seeks an injunction to restrain the Defendants from interfering with Plaintiff's right to collect parking fees within the city of Mombasa pending the arbitral proceedings between the Plaintiff and 1<sup>st</sup> Defendant.

3. Plaintiffs plead in their plaint that it had an agreement with 1<sup>st</sup> Defendant, dated 28<sup>th</sup> June 2006, by which Plaintiffs were to provide parking management of cars, matatus and other related services. A dispute arose on that agreement between Plaintiffs and 1<sup>st</sup> Defendant in 2009, when the 1<sup>st</sup> Defendant was called Municipal Council of Mombasa. Following that dispute Plaintiffs sued Municipal Council of Mombasa in **Milimani HCCC No. 434 of 2009**. Plaintiffs obtained injunction to stop Municipal Council of Mombasa from interfering in Plaintiffs rendering of the services as per that agreement. The injunction was granted pending arbitration process which is till on going.
4. The Plaintiffs further pleaded that the order of injunction issued against Municipal Council of Mombasa was brought to the attention of the 1<sup>st</sup> Defendant but 1<sup>st</sup> Defendant had acted contrary to that order of injunction hence this case being filed.
5. The contract of 28<sup>th</sup> June 2009 is the subject of this suit and also of **Milimani HCCC No. 434 of 2009**. That point became poignantly clear to me when 1<sup>st</sup> Defendant by its Notice of Motion dated 8<sup>th</sup> April 2014 sought stay of **Milimani HCCC No. 434 of 2009**.
6. It is with that in mind that when parties appeared before me on 13<sup>th</sup> May 2014 I asked them to address me on the similarity of the two suits. All parties were given opportunity to address me on that issue and the record clearly bears it out, that all Counsels addressed me. After hearing the parties I made the following orders-
  1. **This suit be and is hereby transferred to Nairobi.**
  2. **The Presiding Judge of Nairobi, Milimani Commercial Court determine whether this matter should either be considered or be consolidated with Milimani Commercial Court Civil Case No. 434 of 2009.**
  3. **Mention before that Presiding Judge on 12<sup>th</sup> June 2014.**
  4. **Until further orders of the Court, Nairobi HCCC No. 434 of**

**2009 shall be stayed.**

The Defendants sought stay of the order of transfer and the Court on that day granted stay of the order for seven (7) days and ordered that if there was no application for review of the order filed by any party

within seven (7) days the file be transferred as ordered.

7. 1<sup>st</sup> Defendant accordingly filed Notice of Motion dated 19<sup>th</sup> May 2014 for review of the order of transfer. It is that Notice of Motion that is the subject of this Ruling.
8. By that Notice of Motion 1<sup>st</sup> Defendant seeks review on the following grounds-
  - a. **there is sufficient reason for the said order made on the 13<sup>th</sup> May 2014 to be reviewed and/or set aside;**
  - b. **it does not lie in the mouth of the Plaintiff to say that the Defendants are ‘forum shopping’ when the Plaintiff’s are the ones who filed these proceedings before this Honourable Court;**
  - c. **the First Defendant did not have and had no opportunity to address the question of a transfer of the suit as the only question raised, at the instance of the Court, was on the similarity or otherwise of this matter with Nairobi Milimani High Court Commercial Case**

**No. 434 of 2009 Kenya Airports Parking Services Limited and Kaps Municipal Parking Services Limited –Vs- Municipal Council of Mombasa.**

- d. **The transfer of the matter to Nairobi is prejudicial to the First Defendant and will result in losses to the First Defendant in terms of costs which will likely result in loss of taxpayers funds; and**
- e. **The Plaintiffs have and continue to abuse the process of this Honourable Court.**
9. On ground (b) above it is important to note, as was submitted by Learned Counsel Mr. Amuga, that the statement attributed to him that Defendants were forum shopping hence why they were objecting to the transfer of this matter, did not influence the decision of this Court of 13<sup>th</sup> May 2014. This is because the Court was more concerned with whether this suit was similar to **HCCC No. 434 of 2009** when it asked parties to address it. I will therefore disregard that ground since I find it is not a valid ground.
10. As stated before and the record bear it out all Advocates, 1<sup>st</sup>

Defendant's Advocate included, were given opportunity to address the Court on the similarity or otherwise of the suits. As rightly submitted by Plaintiff the Court can on its own Motion or on application of any party order a High Court file to be tried in a particular place. The power to do so is donated by Order 47 Rule 6(2) Rule 6 of that order provides as follows-

**“6.(1) Every suit whether instituted in the Central Office or in a**

**District Registry of the High Court shall be tried in such place as the Court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.**

**(2) The Court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the Court:**

**Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.”**

Having in mind the above provisions ground No. (c) of the Notice of Motion is rejected. This Court has the power to order a High Court to be heard at any particular place.

11.1<sup>st</sup> Defendants objection on the ground of transfer of this case would

cause it prejudice because being Mombasa based it would incur costs in traveling to Nairobi cannot be a ground that can lead to review of the order of transfer. This is because parties are already litigating in Nairobi Milimani Court and if the Milimani Court does consolidate the suits, there will be no extra costs of travel.

12. I am of the view that this matter should go to Milimani Court for the

Presiding Judge of the Commercial Division to decide whether this case should be consolidated or heard together with the earlier suit, that is, **Milimani HCCC No. 434 of 2009**. 1<sup>st</sup> Defendant obviously held the view that the suits are similar because in seeking by Notice of Motion dated 8<sup>th</sup> April, 2014 to stay **HCCC No. 434 of 2009**, the deponent of the affidavit in support of the stay

application faulted the Plaintiff for filing this suit, whereas there was in existence a prior suit, that is HCCC No. 434 of 2009, touching on the same contract. The deponent had this to say on that-

**“THAT on the 20<sup>th</sup> March 2014, the Plaintiffs in Milimani Commercial Courts High Court Civil Case No. 434 of 2009 (KENYA AIRPORTS PARKING SERVICES LIMITED & KAPS MUNICIPAL PARKING SERVICES LIMITED –vrs- MUNICIPAL COUNCIL OF MOMBASA) filed an application seeking my committal to civil jail for alleged Contempt of a Court Order. The Plaintiffs in that application failed to make a full and complete disclosure of the fact that they had filed this suit on the 19<sup>th</sup> March 2014 seeking exactly identical orders as had been granted against the Municipal Council of Mombasa in the above suit. In this respect, I annex hereto and mark as Exhibit “HM-1”, a true Photostat copy of the Plaintiffs’ said application and Affidavit for Contempt.”**

The fact that there are similarities in both suits in view of the above deposition cannot be doubted.

13. I am indebted to the Plaintiff for providing an authority, case of

**HANGZHOU AGROCHEMICAL INDUSTRIES LTD –Vs- PANDA FLOWERS LIMITED (2012)eKLR** where the Court discussed a similar issue as this before me. I rely on the following passage of that case, where the Learned Judge was quoting from the case **RAPID KATE SERVICES LTD –Vs- FREIGHT FORWARDERS KENYA LTD & 2 OTHERS (2005)IKLR 292** as follows-

**“The Court’s power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power of the Court under Sections 3A of the Civil Procedure Act .... Although there is only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to Subordinate Courts established under various laws) it is not forbidden for a Kenyan High Court sitting in one location to order a transmission or allocation of a case file before him to another Judge sitting in another location. It must be a matter of discretion for the Judge and it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under Section 3A of the Civil Procedure Act ....”**

14. There is no basis presented by 1<sup>st</sup> Defendant to lead this Court to

review or set aside its order of 13<sup>th</sup> May 2014. It is for that reason that the application dated 19<sup>th</sup> May 2014 is dismissed with costs to the Plaintiff.

15. An order is hereby issued for the Deputy Registrar of this Court to

have this file taken to **Milimani Court** as ordered on 13<sup>th</sup> May 2014.

**DATED and DELIVERED at MOMBASA this 17<sup>th</sup> day of JULY, 2014.**

**MARY KASANGO**

**JUDGE**