



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI & SHAH, J.J.A.)
CIVIL APPLICATION NO. NAI 29 OF 1997 (12/97 UR)

BETWEEN

KENYA AIRPORTS AUTHORITY.....APPLICANT

AND

1. PAUL NJOGU MUNGAI

2. JAMES KIMANI

3. NEW JAMBO TAXIS.....RESPONDENTS

**(An application for stay of Execution in an intended
appeal from a ruling and order of the High Court of
Kenya at Nairobi (Mr. Justice Hayanga) dated 24th
January, 1997**

in

H.C.C.C. NO. 2534 OF 1996

RULING OF THE COURT

On 29th January, 1997, the superior court (Hayanga J.) issued a temporary mandatory injunction ordering the applicant (KAA) to re-admit the respondents' 120 taxis to Jomo Kenyatta International Airport (JKIA) to enable the respondents to carry on their business of providing taxi services to persons who may be looking for transport from JKIA to Nairobi city or its environs. The learned judge also made a further mandatory order the effect of which was to order second, third and fourth defendants in the suit in the superior court to remove themselves and all their property and belongings from the office of the respondent. This further order is not the subject of arguments before us.

The superior court declined to grant orders for stay of execution of the first of the aforesaid orders pending filing and determination of the appeal intended to be filed by KAA against the said orders. KAA is therefore now before us invoking the aid of rule 5(2)(b) of the Rules of this court and seeks orders to stay the execution of the aforesaid order of Hayanga J pending the hearing and determination of the intended appeal.

Mr. Tobiko who appeared for KAA in the superior court as well as before us urged that the learned judge was wrong in applying the test of a prima facie case with probability of success in granting the temporary mandatory order sought. We would point out that the principles governing grant of mandatory

as well as prohibitory (restrictive) orders pending hearing and determination of a suit in the High Court are the self-same ones enunciated in the celebrated case of Giella v. Cassman Brown & Co. Ltd. [1973] E.A. 358 save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases. This test was laid down in the case of Kamau Mucuha vs The Ripples Limited, Civil Application No. NAI 186 of 1992, unreported, by this court wherein it approved and applied the distinction between a prohibitory and a mandatory injunction drawn by Megary J. (as he then was) in the case of Shepherd Homes vs Sandham [1979] 3 W.L.R. 348. Megary J. there said:

"Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already effected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately, established that the defendant was entitled to retain the erection.

The above passage shows that an order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage. Again referring to the principle in the Shepherd Homes case (*supra*) as adopted in the case of Locaball International Finance Ltd. v. Agroexport [1986] 1 ALL E.R. 901 Mustill LJ said at page 906:

"The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case. I feel bound to say that, to my way of thinking, this was not the approach adopted by the judge because, as I understand the position, specific argument was not directed at the hearing before him to the level of conviction which required to be conveyed to the court before a mandatory injunction could properly be granted."

So that in the final analysis, as regards principles governing the grant of a temporary mandatory injunction the passage in Halsbury's Laws of England volume 24 paragraph 948 is germane to the issues before us and it would bear setting it out.

It reads:

"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

Having considered the principles governing the grant of a temporary mandatory injunction we come to the principles governing the grant of orders for a stay of execution of the decrees or orders of the superior court, by this court, under Rule 5 (2)(b) of the rules of this court. These principles are of course well established that is to say that we have to apply our minds *de novo* on the suitability or otherwise of the relief sought; that first the intended appeal should not be frivolous, or that it is an arguable appeal, and if successful, should not be rendered nugatory.

Dealing with the first of these principles what emerged from the pleadings, affidavits and arguments before us is that some time in 1993 and 1994 KAA informed the respondents that it would allow only roadworthy vehicles (taxis) to operate from JKIA. KAA through its general manager referred to such taxis as those which were "of good and sound state and condition both mechanically and aesthetically." The minutes of the meetings held at JKIA between KAA and Taxi/Tour Operators on 29th September, 1993 and 4th October, 1994 point out KAA's concern about peace, reputation, security etc. of

and concerning the airport areas in relation to the manner of operating the taxis, conduct of drivers, discipline etc. The question of inspection of taxis was also mooted. The respondents and other taxi owners agreed to submit to such inspection. It was agreed that owners of dented, old and mechanically unsound vehicles should remove such taxis from the airport areas.

Subsequently older taxis were barred from operating from the airport area and some of the owners of these taxis are members of the third respondent. They were excluded from operating their taxis as from 23rd August, 1996. Mr. M'Inoti for these respondents complains that his clients were discriminated against as only seven digit number taxis, as opposed to older six digit number taxis were allowed to operate from the airport area. He invoked the provision of section 75 of the Constitution of Kenya to urge that his clients property rights were being infringed. The long, verbose and inelegantly drafted plaint brings in the alleged factor of tribalism being practised by a Masaai general manager of KAA against members of Kikuyu community. This is obviously irrelevant and constitutes a red herring to detract attention from the real issue in dispute which is simply: was there a breach (if any) of the contract (such as may have been on the part of KAA, the contract being one which allowed the members of the third respondent to operate their taxis from the airport)?

It is at least arguable that the Airports Authority can regulate the manner and method of controlling the use of airport premises by taxi operators. It is also arguable, at least, that the Authority can keep out unroadworthy vehicles from operating as taxis, from the airport.

The other arguable issue is whether or not the learned judge, whilst appreciating the principles governing the grant of temporary mandatory injunction, properly applied the same to the case before him. We need not say any more in this regard at this stage. Another issue, arguable, is: ought the respondents have first invoked in their aid the provisions of sections 33 (1) and 34 of the Kenya Airports Authority Act, Cap 395, Laws of Kenya before going to High Court? From all this we are able to ascertain that the intended appeal is an arguable one. It is not frivolous.

The next matter we have to consider is whether the appeal, if successful would be rendered nugatory. The respondents' taxis were ousted from using the airport area on 23rd August, 1996. They did not file suit until 14th October, 1996 as they (as the respondents say) were trying to acquire new vehicles or rather seven digit number vehicles. In the meanwhile and whilst the hearing of the injunction application was pending in the High Court other taxi owners have been allowed to operate from the airport area. It would be difficult if not impossible to return the parties to the status quo existing before 23rd August, 1996 and there is evidence that parties who use the airport taxi facilities are satisfied with the present system. Clearly it would not be an ideal situation to stop present taxi operators (who incidentally are all Kikuyus despite the respondents' allegations of Tribalism) from using the airport area.

We allow this application and grant a stay of execution as sought pending the hearing and final determination of the intended appeal, or until further order or orders. Costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 28th day of February, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR