IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & VISRAM, JJ.A.)

CIVIL APPLICATION NO. NAI. 26 OF 2011 (UR. 19/2011)

BETWEEN

THE MUNICIPAL COUNCIL OF MOMBASA.....1ST APPLICANT

SUMMIT COVE LINES COMPANY LIMITED.....2ND APPLICANT

AND

KENYA TRANSPORT ASSOCIATION (acting in the interests of its members to the exclusion of those who may have sought reliefs on own right).....RESPONDENT

(Application for stay of execution of the orders of the High Court of Kenya at Mombasa (Ojwang, J.) dated 4th February, 2011

in

CONSTITUTIONAL PETITION NO. 6 OF 2011)

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RULING OF THE COURT

This is an application under **Section 3 (2), 3A, 3B** of *Appellate Jurisdiction Act* (Act) and **Rule 5 (2) (b)** of the Court of Appeal Rules (Rules) seeking three main orders, namely, stay of execution of orders of 4th February, 2011; stay of execution of the exparte orders granted by the superior court (Ojwang J) on 31st January, 2011 and confirmed on 4th February, 2011 and stay of further proceedings in *Constitutional Petition No. 6 of 2011* pending the hearing and determination of the intended appeal.

On 31st January, 2011, the **Kenya Transport Association** (KTA), (Respondent) a registered association whose members are the owners and operators of lorries, trailers, fuel tankers and trucks filed a *Constitutional Petition No. 6 of 2011* under various Articles of the Constitution in the High Court, Mombasa seeking a declaration that the Public, Private Partnership agreement between Municipal Council of Mombasa (council) and Summit Covelines Company Limited (Summit) (Applicants) regulating collection of parking fees and charges and clamping of vehicles was unlawful, null and void for contravening the Public Procurement and Disposal Act, among other laws, and an order prohibiting the respondents from collecting parking charges and fees.

The respondent contemporaneously filed an application seeking two main orders, firstly, an injunction restraining the applicants from compelling members of KTA to pay to Summit parking charges and from compelling members of KTA to park their vehicles at privately owned yards managed and operated by Summit and, secondly, an injunction/conservatory order restraining the applicants from forcing/compelling members of KTA, to pay the Summit parking charges/fees and from parking their vehicles at the privately owned yards managed and operated by the Summit at designated areas of Kibarani, Changamwe, Magongo and Miritini within Mombasa County. The application was supported by the affidavit of Paul Maiyo, the Chairman of KTA. It is apparent from the supporting affidavit that the heart of the dispute is the Public, Private Partnership agreement between the Council and Summit permitting Summit to collect parking levies and fees from members of KTA and also permitting Summit to provide private parking bays for the members of KTA. The respondent (KTA) alleged in the petition that the Council had failed to disclose the contents of the public, private partnership agreement and that the said Partnership agreement was procured in breach of the Public Procurement and Disposal Act.

The application was brought under certificate of urgency and during the High Court vacation. It was at the first instance heard exparte by Ojwang J. on 31st January, 2011 who granted the second order sought in the application exparte saying:

"Upon seeing the application and attendant documents and upon considering the merits of the points raised by counsel I have come to the prima facie perception that the actions of the 1st respondent cannot directly be reconciled with the constitution and the Public Procurement and Disposal Act.

The final position will, of course be determined after hearing this matter, inter partes, but on first state application I will hereby make a conservatory order, in terms of prayer No. 2".

The learned Judge ordered the application to be served and listed it for hearing, inter partes, on 16th February, 2011.

Two days later on 2nd February, 2011, the respondents filed an application seeking discharge or setting aside the exparte order given on 31st January, 2011 or alternatively an order that KTA provide security for the loss of revenue of Shs.850,000/= daily until the determination of the petition.

The application was supported by the affidavit of Tubman Otieno, the Town Clerk of the council and Joseph Kirema, a director of Summit. The Town Clerk explained in detail all matters relating to the dispute and annexed thereon the relevant documents. In particular, he asserted that the parking charges were imposed and gazetted with the approval of the Minister for Local Government and that the Public Private Partnership agreement was entered into after the approval by the Minister for Local Government.

Although the application was heard inter partes, the superior court (Ojwang, J.) in a terse ruling disallowed the application without considering its merits, confirmed the orders given on 31st January, 2011 and ordered that the earlier application dated 31st January, 2011 should be heard inter partes on 16th February, 2011 as scheduled.

The applicants lodged a Notice of Appeal on 7th February, 2011 and filed the present application on 14th February, 2011.

When the respective counsel appeared before the superior court on 16th February, 2011 for inter partes hearing, Mr. Asige for applicants applied for adjournement and stay of the application pending the determination of the present application. Mr. Mogaka, learned counsel for KTA on his part had no objection but asked the court to give a hearing date of the petition on priority basis whereupon the superior court ordered that the petition be heard on 21st March, 2011.

It is expedient to deal with the issue of jurisdiction raised by Mr. Mogaka first. Mr. Mogaka,

submitted that the orders granted by the superior court both on 31st January, 2011 and on 4th February, 2011 were injunctive orders and that the Court has no jurisdiction to stay injunctive orders under **Rule 5 (2) (b)**. He cited two authorities in support of that proposition, namely, **Avind Velji Shah vs. Zaverchand Solpal Jetha Holdings Ltd. & 5 Others** – *Nairobi Civil Application No. Nai. 96 of 2009* (20009) e KLR) and **Consolidated Bank of Kenya & 2 Others vs. Usafi Limited** – *Nairobi Civil Application No. Nai. 195 of 2005* (2006 eKLR).

Mr. Asige on his part contended that according to the ruling of 31st January, 2011 the superior court granted conservatory orders and not injunctive orders which conservatory orders could have been given under **Rule 20** of the Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court practice and procedure Rules, 2006*, of the repealed Constitution.

The superior court in the ruling dated 31st January, 2011 stated:

"….. I will hereby make a conservatory order in terms of prayer No. 2 pending hearing and final determination of the application the respondents shall be restrained from forcing compelling members of the petitioner to pay to 2nd respondent parking charges/fees or parking their vehicles at privately owned yards which are managed controlled and operated by 2nd respondent at designated areas in Kibarani, Magongo, Changamwe and Miritini within Mombasa County".

The constitutional petition and the application dated 29th January, 2011 were made under various Articles of the 2010 Constitution including Articles 22 and 23. Article 22 deals with enforcement of the Bill of Rights and Article 23 gives jurisdiction to courts to grant redress and reliefs for infringement of the Bill of Rights. By Article 23 (2) the reliefs which the court can grant include an injunction and a conservatory order.

Thus, it is clear that the superior court granted the impugned order under the current Constitution and not under the practice and procedures rules applicable to the repealed Constitution.

It is true that the learned judge referred to the order which he was about to make as a *"conservatory order"*. Nevertheless, the order granted was in terms of prayer 2 of the application which was by its terms and in effect a restraining order – an order of injunction – intended to conserve or preserve the *status quo ante*.

In the two authorities cited by Mr. Mogaka, this Court has held that it has no jurisdiction under **Rule 5 (2) (b)** to stay execution of an order of injunction and that stay of the execution of an order of injunction would have the effect of nullifying the injunction before the appeal against its grant is heard. Indeed an order of injunction, like a judgment, remains in force until it is either set aside on appeal or set aside or varied by the court issuing it.

The order of 4th February, 2011 dismissing the application to stay or discharge the order of 31st January, 2011 was a negative order which is not capable of being stayed. Secondly, on the basis of the authorities cited, the Court has no jurisdiction to grant the application for stay of execution of the exparte order of 31st January, 2011 being an order of injunction.

The Court has of course jurisdiction under **Rule 5 (2) (b)** to grant a stay of proceedings pending appeal in terms of prayer No. 4 of the application.

However the general principle is that a stay of proceedings is made very sparingly and only in exceptional circumstances as it has the effect of driving the claimant from the *"judgment seat"* (see Halsbury's Laws of England 4th Ed. Re-issue paragraph 926 page 290). The case of **Silvestein v. Chesoni** [2002] I KLR 867 illustrates the Court's reluctance to stay proceedings.

In this case the intended appeal is against the order of 4th February, 2011 dismissing an application to set aside the exprte orders granted on 31st January, 2011. It is clear from the proceedings of the superior court that the order of 16th January, 2011 was an exparte order pending the hearing and determination of the application inter partes on 6th February, 2011. It has been contended that the learned Judge confirmed the exparte order on 4th February, 2011. The word *"confirmed"* may have created some confusion but the intention of the learned Judge is clear from the ruling of that day. He appreciated that the application had not been heard inter partes and reiterated the earlier order that it be heard inter partes on 16th February, 2011. The word *"confirmed"* in the context in which it was used meant logically that the order would remain in force until the hearing of the application inter partes the application to set aside having been dismissed.

However the hearing of the application inter partes aborted on 16th February, 2011 when Mr. Asige applied for adjournment and stay of the application pending the determination of the present application. The learned Judge allowed that application and in the meantime ordered that the petition be heard on 21st March, 2011 – that is, in three days time from the date of this Ruling. It follows that the application was not heard inter partes and that the exparte orders are still in force until the hearing of the petition or the decision of this Court, if favourable to the applicants, whichever is earlier.
It is clear that the intended appeal is indeed an interlocutory appeal. At the hearing of the petition the applicants will have an opportunity to canvass all the matters intended to be raised in the interlocutory appeal including the competence of the constitutional petition and the legality of the Public Private Partnership and the disputes would be effectively and conclusively determined. This would not only be beneficial to the parties but also in furtherance of the overriding objective, as stipulated in **Sections 3A** and **3B** of the Act and the Rules, *inter alia*, of achieving a just, timely and less costly determination of the dispute as well as ensuring effective use of judicial resources. Thus, it would not be just in the circumstances to stay the hearing of the petition.

In light of the foregoing, it is not necessary to inquire whether or not the intended appeal is arguable.

In the result the application is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 18th day of March, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR