



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 193 OF 2005**

**GIANT HOLDINGS LIMITED .....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY.....RESPONDENT**

**CONSOLIDATED WITH**

**CIVIL APPLICATION NO. NAI. 139 OF 2007 (UR. 90/2007)**

**BETWEEN**

**GIANT HOLDINGS LIMITED .....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY .....RESPONDENT**

*(Being an application for stay and injunction pending the hearing and determination of the appeal from the ruling and order of the High Court of Kenya at Nairobi (Ojwang, J.) dated 3<sup>rd</sup> June, 2005*

in

H.C.C.C. No. 694 of 2003)

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**RULING OF THE COURT**

This ruling relates to two applications which were heard together.

The first and the main application viz **Civil Application No. Nai. 193 of 2005** was filed on 12<sup>th</sup> July, 2005. It seeks two main reliefs under **rule 5(2)(b)** of the Court of Appeal Rules pending appeal from the decision of the superior court (*Ojwang, J.*) dated 3<sup>rd</sup> June, 2005 namely, a stay of execution of orders of the superior court; and an order of injunction to restrain the respondent from granting an advertising concession agreement to any other party or doing anything that would terminate or breach the applicant’s rights and interest under an Advertising Concession Agreement dated 23<sup>rd</sup> December, 1999 and from dealing directly with the applicant’s agents. While that application was pending for hearing the parties reached an agreement that an interim injunction be granted pending the hearing of the application and the court on 2<sup>nd</sup> August, 2005 recorded the consent order granting an interim injunction restraining

the respondent, its officers, servants or agents from:

**“entering into any further advertising concession agreement (other than the two agreements already extended and exhibited ...) until the hearing and determination of the applicant’s notice of motion dated 8<sup>th</sup> July, 2005 and filed on 12<sup>th</sup> July, 2005.”**

By the 2<sup>nd</sup> application dated 14<sup>th</sup> March, 2007 and filed on 18<sup>th</sup> June, 2007 viz: **Civil Application No. Nai. 139 of 2007**, the applicant claims that the respondent has breached the interim injunction and seeks leave to apply for an order of committal for contempt of court against three officers of the respondent.

The dispute between the applicant, **Giant Holdings Limited (GHL)** and the respondent, **Kenya Airports Authority (KAA)** relates to an Advertising Concession Agreement dated 23<sup>rd</sup> December, 1999 by which KAA granted advertising services to GHL at KAA airports for a term of 10 years from 1<sup>st</sup> March, 2000 in consideration of GHL paying KAA 50% of the gross receipts from advertisements payable as stipulated in the Agreement. **Clause 9** of the agreement prohibited GHL assigning, sub-contracting or sub-letting the contract without prior consent of KAA. That clause was amended by a further agreement dated 11<sup>th</sup> December, 2002 to provide that the consent of KAA should not be unreasonably withheld.

By **Clause 13** of the Agreement KAA was entitled to terminate the agreement upon 90 days notice in writing if among other things GHL is in breach of any covenants terms or conditions stipulated under the agreement.

By a notice dated 15<sup>th</sup> April, 2003 the Managing Director of KAA gave a notice of termination of the Concession Agreement alleging breach of the agreement by:

- (i) *Failure to submit contracts with advertisers prior to the installation of advertising display.*
- (ii) *erection of advertising displays without prior approval.*
- (iii) *sub-contracting and assigning the contract without approval and*
- (iv) *failing to pay concession fees due in respect of the advertisement displays.*

GHL by a letter dated 13<sup>th</sup> May, 2003 denied any breach and by a letter dated 27<sup>th</sup> June, 2003 demanded a notice of rescission of the notice to terminate the agreement.

The respondent failed to rescind the notice and on 9<sup>th</sup> July, 2003 GHL filed a suit against KAA claiming that KAA had no valid grounds for terminating the agreement and sought various orders of injunction, accounts for concession fees, general and aggravated damages for breach of contract.

By a notice of motion filed together with the suit on the same day (*i.e. 9<sup>th</sup> July, 2003*) GHL sought various interim injunctions pending the hearing of the suit. On the same day GHL obtained *exparte* orders of injunction for a duration of 14 days pending the hearing of the application *interpartes*. It is clear from the replying affidavit sworn by **John Joseph Tito** on behalf of KAA that the *exparte* orders were extended from time to time but when application was adjourned on 20<sup>th</sup> January, 2004 the *exparte* order was not extended whereupon KAA by a letter of 30<sup>th</sup> January, 2004 acted upon the termination notice and terminated the agreement. Thereafter on 2<sup>nd</sup> March, 2004 the superior court reinstated the *exparte* injunction on the application of GHL.

At the hearing of the application in the superior court, counsel for KAA raised a preliminary objection to the suit and the application based on jurisdictional issue in accordance with the notice of preliminary objection filed on 22<sup>nd</sup> July, 2003 in addition to raising other grounds in opposition to the application.

It was contended by KAA’s counsel that in view of provisions of **section 33(1)** of the Kenya Airports

Authority (*Cap. 395 Laws of Kenya*) (Act) the court had no jurisdiction to entertain the suit and the proceeding and thus the suit and the application were premature, misconceived, incompetent and complete nullity.

By **section 12(3)(e)** of the Act the KAA has power to;

**“Determine, impose and levy rates, charges, dues or fees for any services performed by the Authority or for use by any person of the facilities provided by the Authority, or for the grant to any person of a licence, permit certificate, subject to the approval of the Minister.**

And by **section 12(3)(j)** KAA is authorized to enter into the specified agreements.

**Section 33(1)** of the Act, the basis of the preliminary objection, provides:

**”In the exercise of powers conferred by sections 12, 14, 15 and 16 the Authority shall do as little damage as possible, and, where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Authority or, in default of an agreement, as may be determined by a single arbitrator appointed by the Chief Justice”.**

The superior court in a lengthy ruling considered the issues raised in the application exhaustively and made findings, *inter alia*, that, **section 33(1)** of the Act mandatorily requires disputes to be resolved by arbitration as the first forum since arbitration had not been pursued the court lacked jurisdiction to hear and determine the disputes; that the court entertained doubts as to whether GHL had a *prima facie* case with a real possibility of success, and, lastly, that, refusal to grant an interlocutory injunction would not cause GHL irreparable harm as it could be compensated by award for damages.

GHL being aggrieved by the decision filed a notice of appeal and promptly filed **Civil Appeal No. 130 of 2005**.

In a normal application under **rule 5(2)(b)**, an applicant is required to satisfy the court that the intended appeal or appeal is arguable and that unless the order sought is granted the appeal if ultimately successful would be rendered nugatory before the court can exercise its discretion in his favour. In this application however, it is contended by the KAA, among other things, that, there is nothing to stay as the superior court merely dismissed the application for interlocutory injunction; that the application for injunction pending appeal has been overtaken by events as KAA awarded advertising contracts to two other companies after the superior court dismissed the application for interlocutory injunction, and, that, if injunction is granted, it will have the effect of reviving a contract which has already been lawfully terminated. GHL, on the other hand, contends, *inter alia*, that the purported contracts with two companies are a sham meant to hoodwink the applicant and the court that the substratum of the application has been overtaken by events; that the contracts given to the two companies are in the nature of management or agency agreements and cannot be equated or substituted with exclusive Concession Agreement; that the two advertising contracts were scheduled to expire on 30<sup>th</sup> June, 2006 but were unlawfully extended, lastly that, KAA has indicated in writing that it would directly conduct advertising business itself.

It is convenient to deal with the stay and injunction application first.

We respectfully agree with submissions of KAA’s counsel that the application for stay of execution is misconceived. The superior court merely dismissed the GHL’s application for interlocutory injunction with costs. The superior court did not grant any positive relief to KAA nor order any party to do anything or refrain from doing anything. The appellant has not specifically sought stay of execution regarding costs (see ***Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63***).

The application for injunction is also fraught with problems.

Firstly, the KAA gave a notice of termination of the Advertising Concession Agreement in accordance with **Clause 13** of the Agreement which authorized KAA to terminate the contract on grounds of breach

of any covenants terms or condition upon giving 90 days notice in writing. The notice of termination dated 15<sup>th</sup> April, 2003 should have taken effect from about 15<sup>th</sup> July, 2003 but an interim exparte injunction was granted by the superior court on 9<sup>th</sup> July, 2003 restraining KAA from terminating the Agreement. The interim injunction was subsisting during the pendency of the application save for a short interval, until 3<sup>rd</sup> June, 2005 when the superior court dismissed the application. The plaint on which the application for interlocutory injunction was pegged seeks as a first prayer an injunction restraining KAA from terminating or breaching the Advertising Concession Agreement. The first prayer in the interlocutory application (**Chamber Summons**) dated 9<sup>th</sup> July, 2003 similarly sought an injunction restraining KAA from terminating or breaching the Advertising Concession Agreement. In the instant application, GHJ does not seek to restrain KAA from terminating the advertising concession agreement. Since the relationship of the parties was contractual in nature, it follows that the contract was terminated in the accordance with the notice of termination from the date the superior court dismissed the application for interlocutory injunction and implicitly discharging the subsisting interim orders. The contract remains terminated in law until a court declares otherwise. It means therefore that there is no impediment to entering into a similar agreement with any other party. Thus an order of injunction to restrain KAA from granting an advertising concession to any other party would not only have no foundation but also it would have the effect of reviving a contractual relationship which does not now exist.

Secondly, KAA maintains that after the superior court dismissed the application for interlocutory injunction it entered into two advertising agreements

with two other companies which agreements are annexed to the replying affidavit.

The first agreement dated 23<sup>rd</sup> June, 2005 granted Media Initiative East Limited (*Media*) a licence in the form of a concession to advertise at six airports for a period of twelve months.

The second agreement dated 28<sup>th</sup> June, 2005 grants Ogilvy East Africa Limited (*Ogilvy*) a licence – in form of a concession to advertise at Jomo Kenyatta International Airport for a period of twelve months. KAA further states that the concessionaires took over the concession areas covered by the terminated contract and entered into advertising agreements with various advertisers.

The applicant admits that the two agreements cover the locations upon which it had been granted advertising concession but asserts that the contracts were of a different nature and further that the contracts have been unlawfully extended beyond the contractual period of one year.

The two agreements with Media and Ogilvy speak for themselves. The agreements refer to each as an advertising concession. The two companies are not parties in this dispute. Furthermore the two agreements are not the subject of this dispute. It would be inappropriate and highly irregular if this Court were to scrutinize the two agreements in this dispute and to make a finding whether or they have been lawfully extended. Suffice to say that the KAA has demonstrated that what GHJ seeks to restrain has already happened and that the application has been overtaken by events.

Thirdly, as conceded by the GHJ's counsel the 10-year Advertising Concession Agreement which commenced on 1<sup>st</sup> March, 2000 has already expired by effluxion of time. Although the GHJ's counsel intimates that the applicant has given a notice of continuance he had not demonstrated that the agreement has provision for extension or that KAA has agreed to extend the agreement. The reality which GHJ has to face is that the contract which was the basis of the suit and the application in the superior court and also the basis of the present application has run its full course and has been terminated by effluxion of time. The result is that GHJ has no contractual rights which can be protected by an order for injunction pending appeal.

The second application is brought on the basis that the consent interim injunction granted on 2<sup>nd</sup> august, 2005 by consent exempted only the existing contracts given to Media and Ogilvy respectively entered into in June 2005 and which were to expire in June 2006 and did not exempt the extension of the two

contracts. The correspondence shows that KAA contended that the two contracts had an in built holding over clause. The issue of whether or not the two contracts could be extended is therefore contentious as between GHL and KAA. As we have already observed above it would be wrong if the Court were to determine the contractual rights of parties who are not before the Court and when there is no dispute between the parties to the contract. Moreover it would be futile to allow GHL to litigate any further when the underlying ten-year contract has been terminated by both a contractual notice of termination and by effluxion of time. Indeed, we doubt whether GHL would have *locus standi* to prosecute the intended application.

For the foregoing reasons we dismiss both the first application for stay and injunction and the second application for leave to apply for order of committal for contempt with costs to the respondent.

***Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2010***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**