



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.93 OF 2010**

**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27,40,48,50 AND/OR AS READ TOGETHER WITH ARTICLES 19,20,21,22,23 and 24 AND OF THE CONSTITUTION OF KENYA**

**MAYA DUTY FREE LIMITED.....PETITIONER**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**AND**

**KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Petition**

1. The petitioner filed the petition herein dated 8<sup>th</sup> October 2010 supported by supporting affidavit and subsequently amended petition filed on 11<sup>th</sup> July 2017 supported by supplementary affidavit dated 11<sup>th</sup> July 2017. The facts in support of the petition are found in the supporting affidavits and the annexures thereto.

2. The petition seeks *inter-alia*; a declaration section 33(1) of Kenya Airports Authority Act (Cap 395) of Laws of Kenya is inconsistent with Article 48 of the Constitution of the Republic of Kenya in, that it unreasonably and without lawful cause or justification undermines, restricts or otherwise limits the petitioner's fundamental right to access to justice and is therefore void, invalid and/or inapplicable to the circumstances hereof as against the petitioner to the extent of the said inconsistency.

3. The petitioner further seeks other prayers if per chance prayer (a) in the petition is unavailable, under Article 23(3) of the Constitution, grant prayers (b), (c), (d), (e), (g) and (h) but to refer prayers (ff), (ffff) and (ffff) to chief Justice to appoint a single arbitrator for determination under section 33(1) of the Kenya Airports Authority Act (*Chapter 395*) of Laws of Kenya.

**2<sup>nd</sup> Respondent's Response**

4. In opposition to the petition the 2<sup>nd</sup> Respondent filed preliminary objection dated 19<sup>th</sup> January 2011 setting out several grounds of objection and a Replying affidavit sworn by Joy Nyaga sworn on 7<sup>th</sup> February 2011 both of which were filed on 20<sup>th</sup> January 2011 and 7<sup>th</sup> February 2011 respectively.

**Analysis and Determination**

5. I have considered the petition, preliminary objection, response thereto, submissions by counsel for the respective parties and authorities relied upon by both parties. The following issues have arisen for consideration:-

a) Whether the petition is incompetent for failure to comply with mandatory redress mechanism as provided for in section 33 and 34 of the Kenya Airport Authority Act and whether statutory provision in section 33 of Kenya Airport Authority Act is unconstitutional and amounts to denial of access to justice to the petitioner?

b) Whether the petition raises reasonable constitutional issue against the 2<sup>nd</sup> Respondent?

c) Whether granting the orders sought would be against the interest of justice and under public?

d) Whether the petitioner has been paying that for repossessed Gates 6 and 7 premises at Moi International Airport and Jomo Kenyatta International Airport respectively?

A) Whether the petition is incompetent for failure to comply with mandatory redress mechanism as provided for in section 33 and 34 of the Kenya Airport Authority Act and whether statutory provision in section 33 of Kenya Airport Authority Act is unconstitutional and amounts to denial of access to justice to the petitioner?

6. Section 33(1) of the Kenya Airports Authority Act provides as follows:-

"33. Compensation

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

Section 34(a) provides:-

"Where any action or other legal proceedings is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provision shall have effect:-

a) The action or legal proceedings shall not be commenced against Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent...."

7. The Petitioner submits the above-mentioned sections are grossly unconstitutional and egregiously violate the petitioner's fundamental right to access justice, guaranteed under Article 48 of the Constitution whereas the Respondent contends the present petition is incompetent for its failure to comply with the mandatory redress under the aforesaid section.

8. It is contended by the petitioner the said sections purports to oust the jurisdiction of the courts to hear civil disputes for compensation against the 2<sup>nd</sup> Respondent, and to issue appropriate relief under Article 23(3) of the Constitution, should it be determined, that the 2<sup>nd</sup> Respondent has violated fundamental rights to property.

9. Section 33 and 34 of the Kenya Airports Authority lays down the process to be followed by an aggrieved party in seeking compensation. It gives notice and opportunity to comply with section 33 and 34 of the Kenya Airports Authority Act. In the instant petition, the petitioner had adequate notice and opportunity to follow the process set down before filing the petition but chose to file the petition before complying with the mandatory provision of the Act. The petitioner was on 8<sup>th</sup> September 2010 issued to the with notice requiring it to vacate the suit premises and re-organization exercise by 2<sup>nd</sup> Respondent carried out on 3<sup>rd</sup> December 2010, this was 3 months after notice was issued to the petitioner. The petitioner had time to comply with the provisions of section 33 and 34 of the Kenya Airport Authority Act. I find that the issue of infringement of the petitioner's right of access to justice does not hold any water, as there was a clear statutory and contractual mechanism of redress for the issues before this constitutional court and, that notwithstanding, as provided, the petitioner neglected, failed and/or refused to activate the clearly spelled out process, that would have led to a legitimate remedy. The issue complained of, in view of the above, do not lie with the formulation of section 33 and 34 of Kenya Airport Authority Act or the lease but on part of the indolence and failure of the petitioner to adhere to the law.

10. The petitioner suggest that the constitution under Article 159(1) and 165(3) and the right of access of justice by all parties under Article 48 (3) and 22(1) of the Constitution, stated above cannot be ousted by a statute. I have perused the aforesaid Articles and section 33(1) of Kenya Airports Authority Act I find, that the same do not contravene Articles 48, 3A, 22(1), 23(3) and 40 of the constitution. The said section 33(1) do not purport to oust court's jurisdiction to hear claims for compensation and issue appropriate reliefs as it merely sets the process to be followed and the period from which a relief for compensation can be commenced. This is not in my view an act, that can be said to oust the court's jurisdiction to hear claims for compensation. I find no inconsistency of section 33(1) of the Kenya Airports Authority with the constitution.

11. The petitioner further submit section 34(a) of Kenya Airports Authority Act, is equally unconstitutional. The petitioner referred to the case of **World Duty Free Company Limited vs Kenya Airports Authority** where it was held:-

"The first challenge by the Defendant on the application is that the court lacks jurisdiction by virtue of section 33 of the Act and that there was no notice of intention to sue contrary to Section 34(a) of the Act. ....In addition to what this Court said in that ruling, I doubt whether those Sections of the Act are any longer enforceable in view of the present constitutional dispensation. They seek to give the Defendant special, preferential treatment and privileged position in as far as the

protection of the law is concerned. Can they stand the constitutional stipulation as to equality before the law? I doubt. If Section 13A of the Government Proceedings Act has been declared unconstitutional in the case of **Kenya Bus Services Ltd & Another vs Minister for Transport & 2 others Hccc No. 504 of 2008...** wherein Majanja J held that preferential treatment of the Government under Section 13 of that Act was in breach of Article 48 of the Constitution, I doubt if these two provisions can withstand constitutional scrutiny....."

12. It is urged by the petitioner, that the position of serving 30 days mandatory notice on the Government and Parastatal in Kenya, is no longer law in Kenya, by virtue of High Court in **Kenya Bus Services Ltd & another vs Minister for Transport & 2 others Hccc 504 of 2008** having declared section 13 A of the Government proceedings Act (*chapter 50 of Laws of Kenya*) to be unconstitutional, and in contravention to Article 48 of the Constitution of Kenya. It is the petitioners position therefore that section 33(1) and 34(a) of Kenya Airports Authority Act are unconstitutional and in contravention of Article 48 of the Constitution.

13. The petitioner suggestion is, that section 33 and 34 of Kenya Airports Authority Act, are unconstitutional by virtue of the holding in **Hccc No. 372 of 2012 World Duty Free Company Limited vs Kenya Airport Authority and Kenya Bus Services Limited & another vs Minister for Transport & 2 others (2012) eKLR**. I have perused the two judgments, and it is clear, that the aforesaid decisions did not declare the impugned section unconstitutional. The former decision is on the other hand, distinguishable in, that the requisite notice to institute legal proceeding, was issued by the plaintiff in that case, whereas in the instant case, no notice was ever issued as required. Secondly, section 33 of Kenya Airports Authority Act did not apply in that case, because damage had not been caused by the defendant against the plaintiff. In that case, the plaintiff exercised its option to renew the leases issued to it by the defendant but defendant failed to respond to the notices. Accordingly the plaintiff issued notice to sue to enforce the renewal. The plaintiff sought injunction reliefs to prevent them from being evicted from the leased premises. Indeed damage had not yet been occasioned upon them and therefore section 33 of Kenya Airports Authority Act could not apply in that case. Section 13A of the Government proceedings Act that was declared to be a violation of the constitution is from a different and distinct Act of parliament and not from Kenya Airports Authority.

14. I note, that subsequently several later decisions of the High Court and Court of Appeal have departed from the decision of by brother Hon. Justice Majaja in the **Kenya Bus Services Limited case (supra)** and have upheld the validity and constitutionality of section 13A of Government Proceedings Act. In **Miriam Njeri Njau vs Attorney General (2016) eKLR** Hon. Justice Ngaah Jairus in striking out the Appeal held as follows:-

**"My conclusion is that the appellant's suit did not lie and without evidence that the respondent had been served with the mandatory statutory notice, it was misconceived and fatally defective. Rather than dismiss it as the learned magistrate did I would order that it be struck out with costs to the respondent."**

15. Additionally, Hon. Justice Mbogo C.G. in **Michael Mwanzia Kitavi vs Lukenya University Trust Registered Trustees & 3 others [2017] eKLR** after analyzing the reasoning in **Kenya Bus Services Limited case (supra)**, held as follows:-

**"I will associate myself with the position that was held by the High Court in the case of Miriam Njeru Njau vs Attorney General [2016] eKLR and the Court of Appeal in the case of Joseph Nyamamba & 4 others vs Kenya Railways Corporation. As such, I hold that the plaintiff ought to have complied with the requirement of giving notice to the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants before filing this suit correctly....The upshot of the foregoing is that the notice of preliminary objection has merits and in the circumstances I hereby proceed to strike out the entire suit as it is fatally defective with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants."**

16. Once more in a more recent decision of Hon. Justice Nzioki wa Makau in **Joseph Gitonga Wachira & 41 others vs Nyeri County Government & 2 others [2018] eKLR**, it was held as follows:-

**"The subject of the suit is the employment of the Claimant and it is asserted that the 3<sup>rd</sup> Respondent was their employer before the contracts lapsed in June 2015. The 3<sup>rd</sup> Respondent is a state organ to which the provisions of Section 13A of the Government Proceedings Act would apply. The Claimants were required to give mandatory 30 days' notice prior to suing the 3<sup>rd</sup> Respondent. This suit against the 3<sup>rd</sup> Respondent is thus incompetent for want of the requisite notice."**

17. I find upon considering Kenya Airports Authority Act, the parliament in its wisdom must have had good reason to enact Kenya Airports Authority Act, as a separate and distinct Act from Government Proceedings Act. The parliament in realizing the sensitive nature of the operations at the airport in Kenya established Kenya Airports Authority through the Kenya Airports Authority Act with special mandate to carry out various primary functions as provided under section 8 of the Act. It was with, that in mind the parliament enacted a statute, that would ensure smooth running of the aerodromes with a view to achieving passenger satisfaction and security. It is its primary function to protect and promote the public interest of the Airports, which interest overrides, the commercial desire of the petitioner to make profit at the airports. Infact if anyone was to be allowed to bring actions or other legal processes without following laid down procedures, against the 2<sup>nd</sup> Respondent, the sensitive statutory functions of the 2<sup>nd</sup> Respondent would be at a high risk of being paralyzed to the detriment of the larger public interest.

18. In view of the above I find section 33(1) and 34(a) of the Kenya Airports Authority Act are valid and constitutional.

19. The mechanism for redress of complaints against the 2<sup>nd</sup> Respondent in private arrangements are governed by section 33 and 34 of Kenya Airports Authority Act. The petition herein w filed without complying with section 33 and 34 of the Kenya Airports Authority Act, that require the serving of notice on the 2<sup>nd</sup> Respondent at least one month before commencement of the actions. The statutory notices which are mandatory, were ignored by the petitioner in filing the petition, which I find is statute barred. In **Joel Kiprono Langat vs Kenya Posts & Telecommunication Corporation Civil Appeal No, 144/1999 (unreported)**. The plaintiff therein filed a suit against the defendant (KPTC) citing grounds of wrongful dismissal. When the matter came up for hearing, counsel for the defendant raised a preliminary

objection on the ground, that the suit was incompetent for failure on the part of the Plaintiff to comply with the mandatory provisions of **Section 109 (a) & (b) of the KPTC Act, Cap 411**. The learned Judge upheld the preliminary objection on that ground.

20. In addition to the above in a case of **Julius Kariuki Mungai vs Baliga Limited & Another (Civil Case No. 124 of 2004) (unreported)** the counsel for the defendant therein raised a preliminary objection on the ground, that the suit was statute-barred by virtue of section 136 (1) of the Government Land Act Cap 280 of the Kenya as read together with Section 4 thereof, Hon. Justice Emukule stated as follows;

**"If the plaintiff had any claim against the conveyance it ought to have brought its action within the tenets of section 136 (1) and (2) above cited. Firstly, it should have brought its action within the 12 months from the date of the conveyance to the first defendant and as such after appraising the first defendant and no doubt the second defendant of its intention to do so in terms of section 136 (2). The plaintiff failed to do so, and on this ground alone, I will find that the plaintiff's action is statute-barred and is consequently incompetent."**

21. In view of the above I am satisfied, that the petitioner overloaded the provisions of section 33 and 34 of the Kenya Airports Authority Act by commencing proceedings against the 2<sup>nd</sup> Respondent contrary to mandatory provision of section 33(a) of the Kenya Airports Authority Act. The petition is therefore incompetent and defective.

#### **B) Whether the petition raises reasonable constitutional issue against the 2<sup>nd</sup> Respondent?**

22. The issues raised in the Amended petition on its perusal clearly turn out to be contractual rather than constitutional matters. The petition is expressed under the ambit of Article 40 of the constitution. The concept of property rights under **Article 40 of the constitution** are not absolute as there are some limitations. **Article 66 of the Constitution of Kenya** gives state the constitutional power to regulate land or any interest or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning.

23. In case of **Murang'a Bar Operator & Another vs Minister for State For Provincial Administration and Internal Security & 2 others [2011] eKLR**, a similar issue arose and the learned Judge held;

**"As regards the provisions of Article 40 of the Constitution which guaranteed protection of the right to property, I did not find any merit in the petitioner's argument that the impugned Act or any section thereof is an infringement to their right to acquire and own property. Any applicant whose establishment complies with the licensing regulations will continue to be licensed as there before. As earlier stated, the control mechanisms set out in the Act are necessary."**

24. In the instant petition I find nothing in Kenya Airports Authority Act, that violates the right of the petitioner to own property; secondly the control mechanism (re-organization of the Airports) are absolutely necessary for the interest of public safety, passenger comfort, immigration, national security and international competitiveness of the Jomo Kenyatta International Airport of the regional sub-Saharan International transport lab. The petitioner's right to property emanate from three sources.

*a) The 2<sup>nd</sup> tenure at the airport and therefore the specific statutes under which airport land falls; namely The Registrar of Titles Act (Cap 287); Transfer of Property Act, 1882 and*

*b) The mandate and property rights vested on the landlord pursuant to The Kenya Airports Authority Act (Cap 395)*

*c) The Contract/Tenancy lease that was entered into between the petitioner and the 2<sup>nd</sup> Respondent.*

I therefore find and hold contrary to the petitioner's assertion, the formulation of Article 40 does not grant unlimited rights and private control of property as submitted by the petitioner. This is simply because the constitution makes provisions, modification and limitations of private property right in public interest. In the instant case, the re-organization exercise at Jomo Kenya International Airport had many purposes including preventing nuisance. It is of great interest to note, that the use of property is governed by general public utility and anything that threatens to become a nuisance or danger is excluded.

#### **C) Whether granting the orders sought would be against the interest of justice and under public.**

25. The petitioner contends that it was virtuously and necessary evicted from the leased premises Gate 7 at Jomo Kenyatta International Airport and trolley space at Moi International Airport. The Leases in respect of the premises were express on periods and what steps the 2<sup>nd</sup> Respondent was supposed to take before the surrender of the acquisition by the 2<sup>nd</sup> Respondent. That notwithstanding express provision, the 2<sup>nd</sup> Respondent issued notice requiring the petitioner to surrender its leased spaces to which the petitioner wrote back asking for alternative space, before surrender or requisition by 2<sup>nd</sup> Respondent, to which the 2<sup>nd</sup> Respondent did not comply but instead instructed its agents to forcefully and virtuously evict the petitioner.

26. The 2<sup>nd</sup> Respondent urges, it is abundantly clear, that reinstating the petitioner back to the shops in dispute would be a case of continued congestion and confusion on gate 6 and 7 thereby causing serious security hazard for passengers termination or boarding their flights through those gates. It is further urged, that it would be great discomfort to the passengers waiting to board Planes through the said gates. That moreover, the threat to the Jomo Kenyatta International Airport remaining as the region hub in the aviation industry cannot be overemphasized in that the discomfort and hazard posed by the shop would cause players in the aviation industry to prefer other airports especially the Bole International Airport in Addis Ababa.

27. I have considered and balanced the petitioner's interest against the interest of justice and the wider public interest, and I am of the view, that the petitioner ought not to be allowed to continue operating in the affected areas at the expense of the comfort and security of passengers

and members of public. The petitioner's presence in the affected areas would continue interfering with the security of the general public and the passengers, a situation generally frowned by the law and Kenya Courts. The courts have consistently held, that where public interest outweighs the individual private interest, the private rights have to bow out to public interest. (See in **Republic vs Kenya National Commission on Human Rights ex-parte Uhuru Muigai Kenyatta [2010] eKLR**). Similar positions have been upheld in the decisions of **East African Cables Limited vs Public Procurement Complaints Review and Appeals Board & Another [2007] eKLR**, and **Kenya Power & Lighting Co. Ltd vs NGM Co. Ltd & 2 other (Nairobi, CA No. 74 of 2010) (unreported)**.

28. Having considered the parties rival submissions, and the law, I find, that if the petitioner is granted the space sought, the order to, that effect would harm the greater number of people and in exercise of the discretion, based on the parties submissions and evidence, I would decline the orders sought for benefit of the wider public interest.

**D) Whether the petitioner has been paying rent for repossessed Gates 6 and 7 premises at Moi International Airport and Jomo Kenyatta International Airport respectively?**

29. The petitioner contends that it has paid rent for unavailable space at shop Gate 7 at Jomo Kenyatta International Airport for 4.7.47 square metres over **L.R. No. 21919** of United States Dollars (*USD*) 170,393.14, as itemized at paragraph 27 A (1) of the Amended petition. The payments were exhibited jointly as annexure (**KMS-1**) of the Supplementary Affidavit of Kuldip Sapra sworn on 7<sup>th</sup> July 2017. It is also urged the petitioner paid rent for unavailable space six (6) square meters Trolley at Moi International Airport Mombasa of United States Dollars 17593079 as itemized at paragraph 27A(ii) of the Amended petition, which payments were exhibited jointly as annexure (**KMS-1**) of supplementary affidavit of Kuldip Sapra sworn on 7<sup>th</sup> July 2017.

30. It is petitioner's submissions the claimed rebate for the overpaid rental sums, has been conceded to by the 2<sup>nd</sup> Respondent in an affidavit by M/s Katherine Kisila, in an affidavit sworn at Nairobi on 12<sup>th</sup> April 2017 in Nairobi Hcc Constitutional **petition No. 45 of 2017 Maya Duty Free Limited vs Kenya Airport Authority & others** at paragraph 8 in the following terms;

**"....While it is correct that the Petitioner has been paying full rent in respect of the parts of the demised premises under the Lease....the payment is not as a consequence of any demand by KAA. KAA is in the process of processing a refund to the Petitioner as is appropriate."**

The same was produced as KSM-3) of the supplementary Affidavit of Kuldip Sapra sworn at Nairobi on 17<sup>th</sup> July 2017.

31. The 2<sup>nd</sup> Respondent objects to the claim stating the invoices and receipts do not indicate, that they relate to Gate 6 and 7 and therefore cannot be rightly attributed to the said gates. The 2<sup>nd</sup> Respondent states the petitioner is still a tenant. The payments are for slip at Gate 5 for which 2<sup>nd</sup> Respondent continually issues invoice for space occupied by petitioner but not for space 6 and 7. The 2<sup>nd</sup> Respondent's affidavit by Katherine N. Kisila attached to the supplementary affidavit in the amended petition as **KMS-3** has been controverted. I find the petitioner has failed to demonstrate that the contents contained in the aforesaid affidavit are related to the two spaces in this petition but to any other space, as the petitioner has rented other space from the 2<sup>nd</sup> Respondent. The petitioners cannot therefore rely on the controverted affidavit to support its claim. Other independent evidence was not produced. The petitioner was supposed to strictly prove its claim but has failed to do so. I find the petitioner is not entitled to the sum claimed.

32. Having considered the petition I proceed to make the following orders:-

**a) A declaration be and is hereby made to the effect that section 33 (1) of the Kenya Airports Authority Act, (Chapter 395) of the Laws of Kenya is not inconsistent with Article 48 of the Constitution of Republic of Kenya. It is not unreasonable and without lawful cause or justifiable nor does it undermine, restrict or otherwise limit the petitioner's fundamental right to access to justice. It is therefore not void, invalid, and/or inapplicable to the circumstances hereof as against the petitioner to the extent of any inconsistency.**

**b) The amended petition is further incompetent for failing to comply with the mandatory redress mechanism as provided for in section 33 and 34 of the Kenya Airports Authority Act.**

**c) The amended petition does not raise any reasonable constitutional issue against the 2<sup>nd</sup> Respondent as the matters raised thereon are contractual in nature and not constitutional matters.**

**d) There has been absolutely no violation of any constitutional right of the petitioner as the issues between the parties are in the nature of private contractual rights to be regulated by the agreements entered into between the parties and the applicable law thereto.**

**e) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have constitutional power to regulate any interest or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning as stipulated by Article 66 of the constitution.**

**f) The statutory provision under section 33 of Kenya Airports Authority Act does not amount to a denial of access to justice to the petitioner.**

**g) The petitioner had more than adequate notice and opportunity to comply with section 33 and 34 of Kenya Airports Authority Act but chose to file the present petition without compliance.**

**h) The Honourable court does not have power to waive the mandatory requirement of section 33 and 34 of Kenya Airports Authority Act.**

**i) Petition is dismissed with costs.**

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of May, 2019.**

.....

**J .A. MAKAU**

**JUDGE**