**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 372 of 2012**

**WORLD DUTY FREE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....DEFENDANT**

## RULING

**1.** Before me is a Notice of Motion dated 8th June, 2012 brought under Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking various injunctive orders against the Defendant. The grounds for the application were set out on the face of the motion and the Supporting, Further and Supplementary Affidavit of ARIF HAFIZ the Plaintiff's General manager sworn on various days. The Plaintiff contended that pursuant to an Agreement between the Government of Kenya and an entity known as House of Perfume executed on 27th April, 1989 and amended on 11th May, 1990 (hereinafter "the said Agreement"), the Defendant was to Lease to the Plaintiff certain premises (hereinafter **"the demised premises"**) at the Jomo Kenyatta International Airport and Moi International Airport Mombasa **("JKIA"** and **"MIA"),** respectively for the exclusive right to the Plaintiff to manage, control and commercially operate Duty Free shops thereon.

**2.** That pursuant to the said Agreement, the Defendant granted to the Plaintiff two (2) Leases dated 29th January, 2003 for LR Nos. 24937 and MV/VI/3888, for JKIA and MIA respectively, from 10th July, 2002, (hereinafter **"the said leases"**), that Clause 4(e) (iv) of the said Leases provided for an option to renew at the instance of the Plaintiff, that such option was exercisable three (3) months before such expiry, that the Plaintiff has faithfully performed the covenants in the leases. That by letters dated 1st March, 2002, the Plaintiff exercised its option to renew the leases, that the Defendant refused to respond and by a letter dated 19th April, 2012 the Plaintiff gave a notice to sue, to which there was no response. That by an Affidavit sworn by one Joy Nyaga, the Defendant's corporation secretary on 14th May, 2012, the Defendant had indicated that it was not obliged to renew the said leases, that the refusal to grant the renewal had affected the Plaintiff's operations due to uncertainty and budgetary allocations, that the Defendant may grant Leases of the demised premises to third parties thereby cause the Plaintiff to suffer irreparable loss and damage, that the Plaintiff's valuable assets such as bonded and other warehouses, Motor vehicles and trucks, computers and other moveable assets would be rendered redundant as well as loss of employment if the orders sought are not granted. That there were also arbitral proceedings going on before the Hon. Justice (RTD) Togbor which may also be rendered nugatory.

**3.** Mr. Kalove, learned Counsel for the Plaintiff submitted that since the said Leases were drawn by the Defendants Advocates any mis-descriptious therein as to land references cannot be relied on by the Defendant to defeat the Plaintiff's claim, that the Award by the International Centre for Settlement of

Investment Disputes ("the said Tribunal") was not binding on this court, that the same was never registered in this country, that the proceedings before the said Tribunal were never authorized by the Plaintiff, that notwithstanding the irregularities disclosed in those proceedings as to the agreement of 1989, the said Leases were nevertheless executed in 2003, that the said Leases were pursuant to the order of Mbaluto J in **HCCC No. 192 of 1999 and 464 of 2000**, that the surrender of various parts of the demised premises does not affect the Plaintiff's right to the option to renew, that the right to exclusive right is not against public policy, that the Public Procurement and Disposal Act, 2005 cannot apply retrospectively. He further submitted that Section 33 of the Kenya Airports Authority Act was applicable where what was in dispute is the quantum of compensation and not a case such as the present one, that it is unconstitutional to hold that every dispute between the Defendant and any party should be referred to Arbitration. Counsel urged that the application be allowed.

**4.** Opposing the application, the Defendant relied on the Replying Affidavit of Joy Nyaga sworn on 19th June, 2012. The Defendant contended that the court lacked jurisdiction to entertain the suit by virtue of the provisions of the Kenya Airports Authority Act, Chapter 395 Laws of Kenya (hereinafter **"the Act"**), that the suit was therefore an abuse of the process, that the Plaintiff had acknowledged this in the Arbitral proceedings before Justice (RTD) Torgbor, that the Plaintiff had not given one month notice before instating this suit contrary to Section 34(a) of the Act, that the Plaintiff had failed to disclose material facts at the ex parte stage, that the agreement of 27th April, 1998 had been held to be voidable and unenforceable by the International Centre for Settlement of Investment Disputes Tribunal in ICSID case No. ARB/00/7, that in the said proceedings one Mr. Ali acted as the Director of World Duty Free Company Ltd, that in so far as the Leases dated 29th January, 2003 made reference to a decree in **HCCC Nos. 192 of 1999 and 464 of 2000** the said decrees were made before the decision of the tribunal, that the Defendant's property wherein the demised premises is erected at JKIA is known as **LR No. 21919 Grant I.R 70118/1** whilst the Lease dated 29th January, 2003 is registered against LR NO. 24937 Grant No. I.R 91642/1, that in the premises, the Leases were voidable.

**5.** The Defendant further contended that the Plaintiff had misrepresented that it occupies all the Duty free space area at JKIA and MIA at the respective passenger terminals yet it occupied a negligible area and space thereof, that out of the original 2,047.23 $m^2$ of space leased the Plaintiff only remains with an area of 61.3 square metres having surrendered the rest of the area which has since been leased to Diplomatic Duty Free Ltd, that there had been breaches of the Leases by the Plaintiff disentitling it from any renewal of the Leases, that such breaches have led to litigations in the past, that the Leases as was the said Agreement were against public policy for restricting competitive bidding and tendering process, that the Lease offended the mandatory provisions of the Public Procurement and Disposal Act, 2005 and that the Defendant could not award the Plaintiff exclusive rights to all airports as that would be unconstitutional.

**6.** Mr. Mutua, learned Counsel for the Defendant submitted that by virtue of Article 2(5) of the Constitution, the Award in ICSID case **No. Arb/00/7** is applicable as a law in our courts, he cited the text of **Chitty on Contracts Volume 1 at paragraph 17-008** on the proposition that the courts cannot enforce an illegal contract. Counsel also cited **Article 227(1)** of the Constitution which promotes competitive bidding for public services, he referred to the Defence and Counterclaim for particulars of breach which the Defendant contends the Plaintiff is in breach of. Counsel therefore urged that the application be dismissed with costs.

**7.** I have considered the Affidavits on record, the written submissions, Counsel's oral hi-lights and the authorities relied on. This is an injunction application and the principles governing such applications are well known under the **Giella –vs- Cassman Brown case** that the Applicant must establish a prima facie case with a probability of success, that damages would not be an adequate remedy, and in the event the court is in doubt, it will determine the matter on a balance of convenience. Prima facie case was defined by the Court of Appeal in the case of **MRAO –VS- FIRST AMERICAN BANK (K) LTD (2003) KLR** as a case where on the material presented, a tribunal properly directing itself will see that there is right of the Applicant that has been breached by a Respondent requiring a rebuttal by the latter.

**8.** The Plaintiff's case is that by virtue of Clause 4(e) (iv) of the Leases dated 29th January, 2003 it had

given in writing its intention to renew the Leases for a further 10 years. That since it had reasonably performed and observed the covenants of the Leases the Defendant had wrongfully refused to renew the Leases. In **Halsburys laws of England fourth Edition 2006 Re-issue Vol. 27 (1) paragraph 139** the learned writers have observed:-

"***A Lease which creates a tenancy for a term of years may confer on the tenant an option to take a Lease for a further time. Such an option constitute an offer which the landlord is contractually precluded from withdrawing so long as the option remains exercisable and maybe possible to exercise the option by conduct. If the tenant purports to exercise the option by a notice given before such a stated time, he must do so at a reasonable time before that stated time.***

**……..**

***If the option does not state the terms of renewal, the new Lease will be for the same period and on the same terms as the original Lease, so far as those terms arise out of the relationship of landlord and tenant ……***

***The absence of any specified machinery for settling the new rent is not fatal if there is a formulae to determine the new rent which the court can apply." (Emphasis supplied)***

**9.** 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. This court had in its ruling dated 3rd July, 2012 disposed off these two issues and found that the court has jurisdiction to entertain the matter and further that there was proper notice given by the Plaintiff to the Defendant. 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 & Anor –vs- Minister for Transport & 2 others HCCC No. 504 of 2008 (UR)** wherein Majanja J held that the 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. However, since the issue had been settled in the ruling of 3rd July, 2012, this issue does not fall for further consideration here.

**10.** It would seem from the text I have cited of **Halsburys Laws of England,** that once a Lease has an option to renew, that option is exercisable at the instance of the tenant. The landlord may not escape from it once a tenant has exercised that option so long as the tenant has observed the covenants of the original Lease. In this case, there was an option to renew the Leases dated 29th January 2003 for a further period of 10 years after the expiry of the original term. By a letter dated 1st March, 2012, the Plaintiff seems to have written to the Defendant exercising that option to renew. The letters were received on 1st March 2012 with the Defendant's official stamp. Although the Defendant states in its Replying Affidavit that no notice of intention to renew the Lease had been given by the Plaintiff, the deponent of the Replying Affidavit did not specifically refer to and/or deny receipt of the said letters. Further, it was not denied that the stamps of receipt on the said letters were not those of the Defendant. Accordingly, there is prima facie evidence that the Plaintiff did exercise its option to renew the said Leases under Clause 4(e) (iv).

**11.** The Defendant contended that the Plaintiff was guilty on material non-disclosure, that the Plaintiff failed to disclose that there was an award by the International Centre for Settlement of Investment Disputes which in October, 2006 had made a finding that the Government of Kenya Agreement of April, 1989 was voidable and had been legally avoided by the Government of Kenya in April, 2003. The Defendant urged that that agreement should not be enforced as it is against public policy. On its part, the Plaintiff contended that that decision was of a lower tribunal than this court, that the Award was never registered in Kenya, that the proceedings before the said tribunal was litigated by an unauthorized person and that there was a consent order made in HCCC No. 192 of 1999 and 464 of 2000.

**12.** I agree with the Defendant's Counsel that under Article 2 of the Constitution of Kenya, 2010, International Treaties and any decision made pursuant to such treaties must be given consideration by our courts. Be that as it may, my view is that firstly, once the Leases, the subject of these proceedings were entered into, they created a complete different and distinct contract between the parties to this suit. It should be remembered that neither the Plaintiff nor the Defendant was a party to the Agreement of April, 1989. The rights and obligations emanating from the Leases were independent of that Agreement. Secondly, the Option to renew the Leases is also independent of that agreement. I believe that to be so, because even after the alleged Award was made in 2006 the Leases were never avoided. Neither the Government of Kenya nor the Defendant sought to avoid or terminate the Leases. They left the Leases to run their full course. I believe this was because the Defendant may have recognized the independence of the rights and obligations emanating from the Leases that is why it never sought to terminate or avoid those Leases. My view therefore is, even if there was an award nullifying the 1989 Agreement, the same has no effect on the rights and obligations of the parties under the Leases.

**13.** Even if I am wrong in the foregoing, it has not been shown that the Plaintiff participated in the proceedings before that tribunal or that the alleged award was brought to the attention of the Plaintiff. I say so because, the Plaintiff has contended that at the material time, it was being run by a court appointed receiver, a Mr. Charles Kariuki Githongo who neither participated nor authorized the institution of the said proceedings. Can the Plaintiff be said to have withheld material which has not been shown to have been in its possession? I do not think so. There is also the issue as to whether, having not been registered in Kenya, whether that award can be still recognized. How are foreign judgments recognized in this country? I believe by registration. This is an issue that can only be settled at the trial and not through Affidavit evidence. I therefore find that the issue of the alleged award cannot impede the Plaintiff's right to exercise its right to opt for the renewal of the Leases.

**14.** The Defendant has contended that the premises whereon the Plaintiff is operating from is different from the property wherein the Lease was registered. That whilst the Plaintiff is occupying LR No. 21919 Grant I.R. 70118/1, the Lease is registered against LR No. 24937 Grant I.R 91642/1. The Plaintiff contends that it does not matter since the Lease was drawn by the Defendant's own Advocates. I tend to agree with the Plaintiff. At the time of executing the Lease in January, 2003, the Defendant must have known which property it was leasing to the Plaintiff. That is why, it allowed the Plaintiff's occupation thereof and continued to collect rent for the rest of the term. Can the Defendant now turn around and say **"sorry we had made you execute a Lease on a different property from the one you have been occupying. We are not therefore bound by the covenants in that Lease."** This in my view won't do. The Defendant never raised this issue throughout the 10 year period the Lease was in force. It cannot rescile from the position it had led the Plaintiff to be in. Throughout the ten (10) year period, the Plaintiff have occupied the premises believing the same to be the one for which it executed the Lease dated 29th January, 2003. Estoppel in my view will apply and I reject the contention. In any event, Equity will treat as done that which ought to be done and therefore that the Lease executed was for the property occupied.

**15.** The Defendant has raised the issue that the area originally leased to the Plaintiff has considerably been reduced and that the option to renew cannot be exercised since the area remaining is only 61.3 $m^2$ out of the original 2,047.23 $m^2$. The Plaintiff contends that the rest of the area was surrendered to 3rd parties by consent of the parties. I have seen exhibit **"JN9"** to the Replying Affidavit of Joy Nyaga. These are letters showing the Plaintiff surrendering various areas of the demised premises to Diplomatic Duty Free Ltd. Those surrenders seem to have been effected by the concurrence of the Defendant. Indeed the Defendant has admitted having subsequently leased them to 3rd parties. Does the reduction in area affect the rights and obligations of the parties under the Lease? I do not think so. There is no law or authority that was cited for the proposition that the option to renew cannot be exercised because the area originally leased had reduced. I believe that once some parts were surrendered, the obligation and rights of the parties reduced under the Lease pro rata. The rights and obligations under the Lease remained applicable to the area that was left under occupation by the Plaintiff. Accordingly, my view is that the option to renew shall and can only apply to the unsurrendered area and no more. That does not affect the right to and obligation to the option to renew by the parties under the Lease.

**16.** The Defendant has contended that there has been breaches on the part of the Plaintiff therefore the

Defendant is not obligated to renew the Leases. The Defendant produced as **"JN10"** what it relies on as evidence of such breaches. On its part, the Plaintiff insisted that it has not been in breach and that it has reasonably observed its part of the bargain as far as the Leases were concerned. I have perused **"JN10".** I propose to examine that exhibit to establish on a prima facie basis, the breaches in question. There is a Plaint in **HCCC No. 1796 of 2002.** That is a suit by the Plaintiff against the Defendant alleging that the Defendant had breached the Leases by interfering with the Plaintiff's operations which had led to losses. The Plaintiff therein claimed that it had as a result closed several of its shops, warehouse, lounge and other business operations. It prayed that the losses it had suffered be offset against the rent arrears then due. This court was however not told the outcome of that suit. Without speculating, did the arrears of rent admitted in that suit have anything to do with the closures of the Plaintiff's business operations? The court cannot tell. My view is that a decision of the court in that suit lacking this court cannot at this stage make any finding on that issue. In any event, the arrears of rent admitted in that case were before the Leases the subject of these proceedings were executed on 29th January, 2003. Those rents therefore, may not be relevant.

**17.** The other documents in "JN10" are an order in HCCC No. 464 of 2000 dated 1st September, 2000 and letters by the Plaintiff to the Defendant dated 17th July, 2000, 16th May, 2000 and 4th May, 2000 respectively. All these in my view are not applicable as they pre-existed the Leases the subject of these proceedings. The other letters are dated 28th October, 2005, 9th July, 2007, 13th February, 2003 and 6th January, 2001 respectively. All these letters are by or are written on behalf of the Plaintiff and are addressed to the Defendant making various complaints against the latter. The response of the Defendant to those letters was produced. The court cannot form an opinion as to what the Defendant's response thereto was. Further, there is no evidence that has been produced to show that during the ten (10) year period after the Leases were executed, the Defendant did write or make any complaint as against the Plaintiff for any breaches. If such a complaint, letter or information exists, the same was never produced to this court. My view therefore is that, from paragraph 5.1 of the Replying Affidavit and the evidence before me, this court cannot on a prima facie basis say that the Defendant has established any breaches on the part of the Plaintiff that would run contra the Plaintiff's right to exercise the option to renew.

**18.** The Defendant also contended that the Lease was against public interest in that it forbade competitive bidding and tendering. The Plaintiff on its part urged that the Public Procurement and Disposal Act was enacted in 2005 and cannot apply retrospectively so as to affect the Leases executed in 2003. I agree with the Defendant that Article 227 of the Constitution of Kenya 2010 requires public entities to promote competition in any services they offer. The question that arises however is whether that Article affects already vested rights. A right to exercise an option to renew is a proprietary right. That right runs with the land. See **Halsburys Laws of England paragraph 139 (Supra).** The Defendant has produced evidence to show that by the acts and consent of all the parties themselves as regards the said leases, the issue of exclusivity of the running of the Duty Free shops may have been compromised. The Defendant has sworn that the Plaintiff is only occupying an area of 61.3 $m^2$ at JKIA. Can it therefore be said to be against public interest if the Plaintiff is allowed to exercise its right over such an area. I do not think so. The rest of the area, according to the Defendant, is in the hands of third parties.

**19.** In view of the foregoing, I am satisfied that the Plaintiff has established a prima facie case with a probability of success.

**20.** Are damages an adequate remedy? The Plaintiff has contended that pursuant to the Leases, it has invested heavily on its business operations which will be adversely affected if the Lease is not renewed. I am alive to the fact that such investment may have been undertaken with the length of Leases in mind. It should be noted that Duty Free Shops are unique type of businesses which are to be found only in airports. If the Plaintiff is removed from the JKIA and MIA Duty Free Shops, I am of the opinion that it will be difficult to get similar businesses having in mind that the Plaintiff must have by now acquired a substantial goodwill on its said businesses. I am therefore of the view that damages may not be an adequate remedy.

**21.** In the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** Ojwang Ag. J (as he then

was) at page 607 delivered himself as follows:-

***"Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella –vs- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover Internationale made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:-***

***" A fundamental principle of ….that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' ……"***

***Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –vs- Cassman Brown, the Court has had to consider the following questions before granting injunctive relief.'***

***i) is there a prima facie case ….***

***ii) does the applicant stand to suffer irreparable harm…..***

***iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…….***

***If granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the defendant than if I determined this application in favour of the applicant." (Emphasis supplied)***

**22.** In the above case, although the court did not find that any prima facie case had been established, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after the hearing of the case find that a greater injustice has been occasioned. In the present case, if the status quo is not maintained, the damage to be suffered will be massive as not only the operations and investments of the Plaintiff are to be lost, but there would be massive loss of jobs.

**23.** I am aware of the principles applicable in granting mandatory injunctions at the interlocutory stage as set out in **the Locabail case (Supra)**. A high degree of assurance is required. The suit should not be determined and/or terminated without a trial. I am therefore inclined to grant the application in terms of Prayer No. 4 (c) and (d) of the motion dated 8th June, 2012. Under prayer (e) thereof and in terms of the authority of **Captain J.N. Wafubwa –vs- HFCK HCCC No. 385 of 2011 (UR)** wherein ogola J granted substantive orders on a similar prayer, I order that the Defendant shall be restrained from dealing with, and/or in any way whatsoever and howsoever interfering with the premises occupied by the Plaintiff, its operations and businesses carried out therein until the suit is heard and determined. I will award the costs of the application to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi on this 17th day of October, 2012.

**A. MABEYA**

**JUDGE**