**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 372 of 2012**

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

**VERSUS**

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

**RULING**

**1.** On 17th October, 2012, this court allowed the Plaintiff's application for injunction dated 8th June, 2012 in terms of prayer Nos. 4 (c ) and (d). the prayers granted were as follows:-

***"1. THAT a Temporary Conservatory Prohibitory Injunction be and is hereby granted against the Respondent restraining the Respondent whether by itself, its servants, agents or otherwise from repossessing or attempting to repossess the premises demised to the Applicant under the leases dated 29th January, 2003.***

***2. THAT a Temporary Conservatory Prohibitory Injunction be and is hereby granted against the Respondent restraining the Respondent whether by itself, its servants, agents or otherwise from granting or attempting to grant leases to any third party or in any manner otherwise utilize the premises demised to the Applicant under the leases dated 29th January, 2003.***

***3. THAT the Defendant be and is hereby restrained from dealing with and/or in any way whatsoever and howsoever interfering with the premise occupied by the Plaintiff, its operations and business carried out therein until this suit is heard and determined.***

***4. THAT the costs of this application is awarded to the Plaintiff."***

**2.** On the 25th October, 2012 the Defendant took out a Motion on Notice for the court to clarify the said ruling to the effect that the orders only apply to the area/space which the Plaintiff has not surrendered amounting to 61.3 square metres and not the original area or space provided for under the leases dated 29th January, 2003. The application was expressed to be brought under Sections 3, 3A, 34 and 99 of the Civil Procedure Act and was supported by the Affidavits of Joy Nyaga sworn on 19th June, 2012 and 25th October, 2012.

**3.** The Defendant contended that there was no dispute that the Plaintiff had surrendered 1,985.96 square metres leaving only 61.3 square metres unsurrendered, that the orders of 17th October, 2012 had restrained the Defendant from repossessing or interfering with the Plaintiff's demised premises under the leases of 29th January, 2003, that the said premises was for 2047.23 square meters and was no longer available to the Plaintiff, that the court had already found in the ruling that the Plaintiff's rights were only restricted to the unsurrendered space or area, that for the interests of justice it was fair to make the

clarification so that the Defendant is not cited for contempt of court in respect of that order. Ms Joy Nyaga swore that the court had made a firm finding in the ruling that the rights of the Plaintiff extended only to the unsurrendered area but that order Nos. 1 and 2 in respect of prayer Nos. 4(c) and (d) of the Motion that was allowed referred to the entire demised area. She indicated that once the order is extracted as prayed, the Defendant would be cited for contempt of court yet the entire demised area was not available to the Plaintiff. Mr. Mutua, learned Counsel for the Defendant submitted that it was clear from the order that was subsequently extracted by the Plaintiff that the Defendant may be cited for contempt as the orders covered the area already surrendered by the Plaintiff. Counsel urged that the application be allowed.

**4.** The Plaintiff strenuously opposed the application through the Replying Affidavit of Arif Hafiz a director of the Plaintiff sworn on 12th November, 2012. The Plaintiff contended that although the Plaintiff surrendered various spaces to the Respondent the same was as a result of pressure exerted on it by the Defendant who had insisted that it required the spaces for expansion of the airports, that the Defendant had leased the same to 3rd parties, that the Plaintiff has the exclusive right to operate duty free shops, that the order of 17th October, 2012 was not ambiguous. The Plaintiff further contended that the only space that had been surrendered willingly by the Plaintiff was the space surrendered to one M/s Diplomatic Duty Free who were ready to surrender the space back for allocation to the Plaintiff.

**5.** Mr. Kalove, learned Counsel appearing for the Plaintiff submitted that the provisions of law relied on by the Defendant do not apply, that Section 99 of the Civil Procedure Act that had been invoked did not apply in this case as it applied to clerical errors or mistakes. That there was no ambiguity in the order of 17th October, 2012, that there was already an extracted order and there was no formal application to review the same, that if the application is allowed there would be two orders from the same ruling which will be untenable. Counsel therefore urged that the application be dismissed.

**6.** I have considered the Affidavits on record and the submissions of Counsel. The first challenge to the application is that the same has been brought under the wrong provisions of the law and that the jurisdiction of this court has not been properly invoked. I do agree with this submission. It is trite law that Section 3A, that invokes the inherent jurisdiction of the court, can only be invoked where there is no clear provision of the law. In this case, there is a clear provision of law for making the application. Section 99, of the Civil Procedure Act deals with the power of the court to recall a decision for purposes of rectifying mistakes and errors. I do agree with Counsel for the Plaintiff that the issue before court is not that of mistake or error.

**7.** The Plaintiff contended that the Defendant should have applied to review the ruling. I do not think so. The orders of 17th October, 2012 having been of an injunctive nature made under Order 40 of the Civil Procedure Rules, the correct provision under which the application should have been made is Order 40 Rule 7. That rule allows a party who is aggrieved with an injunction to go back to court and ask for the discharge or variation of the same. Since the Defendant is seeking to vary order Nos. 1 and 2 of the order of 17th October, 2012, it should have invoked the court's jurisdiction under Order 40 Rule 7 of the Civil Procedure Rules and not as it did.

**8.** The question therefore that arises is whether the application is incurably defective. If we were still in the era of technical jurisprudence, I would have held so. However, Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya enjoins the courts to be guided by the principle of substantive justice rather than technicalities. I hold that the issue of wrong provision of law is a technicality in that it did not lead to any prejudice to the Plaintiff. The Plaintiff fully knew what the application was all about and effectively opposed it. I hold that the error is immaterial and the application is properly before me for consideration on merit.

**9.** During the hearing of the application that resulted in the order of 17th October, 2012, it became quite clear that the area occupied by the Plaintiff had considerably reduced. This was captured in the ruling as follows:-

***"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."***

**10.** From the foregoing, it is clear that the court was alive to the fact of the reduced area demised by the lease of 29th January, 2003. Indeed the Plaintiff does not deny that fact. Its contention is that the parts were surrendered through coercion or deceit on the part of the Defendant who leased them to 3rd parties. The Plaintiff further contended that the third parties were willing to surrender back those parts if they are subsequently leased to the Plaintiff. That may be so. If the parts of the demised premises were surrendered through coercion or deceit, the court was not told of this fact when it heard the Plaintiff's injunction application. Further, that is an issue that should be sorted out in another fora not in this injunction application. The prayers in the Plaint do not point to that end. As regards the willingness of the 3rd parties to surrender the spaces back for leasing to the Plaintiff, that is a completely different transaction that is tripartite in nature, i.e. between the Plaintiff, the Defendant and the said 3rd parties. Since the court was not involved in the creation of the leases as between the 3rd parties and the Defendant, the court cannot in any way whatsoever make an order affecting the 3rd parties in the absence of the said parties in these proceedings or a substantive application to that effect.

**11.** The Plaintiff contended that allowing the application will result in the existence of two (2) separate orders from the same ruling having different effects. That may be so, but when the Plaintiff was extracting the order of 17th October, 2012, it was aware of the existence of this application. I believe the court has the power under Sections 1A and 3A of the Civil Procedure Act to rectify such an anomaly if it arises.

**12.** From the portion of the ruling of 17th October, 2012, that I have set above, it is quite clear that whilst the court was very much alive to the fact that portions of the demised premises had been surrendered, when it came to give the orders, the court allowed the prayers in the motion as prayed for. Those prayers referred to the entire area contained in the leases of 29th January, 2003. Reading the ruling of 17th October, 2012, was it in the contemplation of the court that the injunctive order would cover the entire area contained in the leases of 29th January, 2003? I do not think so. The court was categorical that:-

***"The option to renew <u>shall and can</u> only apply to the unsurrendered <u>area and no more</u>."***

**13.** That is very clear from the ruling. It does not require any explanation as to what the court intended to restrain. Accordingly, I am of the view that the application is merited. I will allow the same as follows:-

**(1)** The order issued herein on 15th November, 2012 is hereby set aside.

**(2)** The order of 17th October, 2012 is hereby varied to read;

**a)** THAT a Temporary Conservatory Prohibitory Injunction be and is hereby granted against the Respondent restraining the Respondent whether by itself, its servants, agents or otherwise from repossessing or attempting to repossess the portion of the premises currently in occupation of the plaintiff in the premises demised to the Applicant under the leases dated 29th January, 2003.

**b)**THAT a Temporary Conservatory Prohibitory Injunction be and is hereby granted against the Respondent restraining the Respondent whether by itself, its servants, agents or otherwise from granting or attempting to grant leases to any third party or in any manner otherwise utilize the premises currently under occupation of the Plaintiff in the premises demised to the Applicant under the leases dated 29th January, 2003.

**(3)** Prayer No. 3 of the order of 17th October, 2012 remains intact.

**(4)** Costs are awarded to the Defendant in any event.

Orders accordingly.

**DATED** and **DELIVERED** at Nairobi this 3rd day of December, 2012

**.....**

**A. MABEYA**

**JUDGE**