



**Mungai & others v Kenya Airports Authority & others (Civil Case
2543 of 1996) [2011] KEHC 2861 (KLR) (Civ) (22 March 2011) (Ruling)**

PAUL NJOGU MUNGAI & OTHERS v KENYA AIRPORTS AUTHORITY & OTHERS [2011] eKLR

Neutral citation: [2011] KEHC 2861 (KLR)

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

CIVIL

CIVIL CASE 2543 OF 1996

JW MWERA, J

MARCH 22, 2011

BETWEEN

PAUL NJOGU MUNGAI PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY & OTHERS DEFENDANT

RULING

1. On 9.12.10 the court was told that a point of preliminary objection dated 23.8.10 had been filed and it ought to be heard first. It was not stated at this point as to what that objection referred to in this otherwise very old case or at what point in the whole proceedings it had been brought. It was filed by the 1st defendant, Kenya Airports Authority. When the objection was perused, it transpired that the 1st defendant desired the court to strike out the suit and the entire proceedings on the grounds that:
 - i) the plaintiffs' suit and proceedings have been filed in contravention of the provisions of section 33, 34 (a) of the *Kenya Airports Authority Act* (Cap. 395);
 - ii) by virtue of those provisions of law, the entire suit plus proceedings were premature, misconceived, incompetent and a nullity; and
 - iii) further by reason of the same provisions, the court had no jurisdiction to entertain the suit and so it must be struck out with costs.
2. The file is fat with pleadings, correspondences, interlocutory applications, rulings, documents and all. And asked to submit the 1st defendant filed an 8 – page script arguing why the preliminary objection should be sustained and referring to many authorities to that effect. The plaintiff on the other hand responded with a 19-page script containing 92 points and also referring to a myriad of authorities to



persuade the court that the objection was unmerited. So the court is obliged to glean from all these and perusing the pleadings and past proceedings, determine the objection one way or the other.

3. To begin with the basis and essence of a preliminary objection is as stated in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. The facts of this case are not relevant here but the principle enunciated there regarding a preliminary objection, is this:

“ So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration “ (Law J.A pp. 700, And further but to the same point:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

4. (Sir Charles Newbold, P pp. 701, B).

By the above, the principle of a preliminary objection is firmly set in all legal minds and all that remains is the application. To do so here the court elected to peruse the plaint and the defence simply to acquaint itself with the nature of the claim and the application thereto. Otherwise the decision to issue will be mainly on the submissions filed on a point of pure law, which if successfully argued, may dispose of the suit herein.

5. By the plaint filed here on 14.10.96, shorn of all the unnecessary, if not irrelevant material in it plus the constitutional “arguments” thrown in here and there, the plaintiffs ‘basically prayed that the 1st defendant should not have expelled them from the grounds of Jomo Kenyatta International Airport (JKIA) where they were operating taxis under lease/ licence. A permanent injunction should issue against the 1st defendant not to repeat that act and it should be compelled to readmit the plaintiffs to the airport. It should also pay damages, costs and interest. On 28/1/97 Hayanga J as he then was, granted interim orders, inter alia, readmitting the plaintiffs to JKIA. The judge added:

3. That this suit be heard immediately.....”

6. It does appear that a trial is still pending todate with the injunction, orders having been set aside by the Court of Appeal as it will appear presently.

7. On 28/1/09 the 1st defendant filed a defence denying that the 3rd plaintiff, New Jambo Taxis was/were an entity capable in law, to sue. It was also denied that it was wrong to expel the plaintiffs from the airport. That theirs were personal licences and, to cut the long story short:

29. Further the KAA avers that the plaintiffs have not before instituting this suit served upon the KAA a statutory notice as required by section 34 (a) of the *Kenya Airports Authority* (Cap 395) and that consequently this suit is incurably defective and invalid.”

8. This reference to paragraph 29 of the defence is for the fact that section 34 (a) of Cap 365 features in the preliminary objection as well as section 33 thereof. The 1st defendant denied these provisions were inconsistent with the old constitution, now repealed.

9. The 1st defendant opened its submission by invoking the powers it enjoys by virtue of section 33 of the *Kenya Airports Authority Act*, (Cap) 395, The Act which reads



33.

- (1) In the exercise of the 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 agreement, as may be determined by a single arbitrator appointed by the Chief Justice
- (2) Nothing in this section shall be construed as entitling any person to compensation –
(a) for any damages suffered unless he would have been entitled thereto otherwise that under this section; or (b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence of such user.”

10. With emphasis on section 12. (3) (j) of the Act which appeared to be pertinent here the 1st defendant maintained that:

- (1) (a)(c)
- (2)
- (3) Without prejudice to the generality of subsections (1) and (2) the Authority shall have power to-
 - (a)
 - (i)
 - (j) enter into agreements with any person, agency, or Ministry –
 - (i)
 - (ii) for the performance or provision by that person, agency or Ministry of any of the services performed or provided by the Authority; or

11. By citing sections 33, 12 (3), (j), the 1st defendant was telling the court that it had power to enter into agreements with the named parties to perform some of its functions. In the event the other party suffered damage, it could not bring a law suit but could only get remedy by compromising with the 1st defendant OR by the issue being determined by an arbitrator appointed by the Chief Justice.

12. The court heard that the plaintiffs had pleaded that they had leases/ contracts with the 1st defendant to operate at JKIA (Paras 8, 10, 12, 13 of the plaint) On the other hand those contracts were accepted by the plaintiff's from the 1st defendant, in accordance with clause 9 thereof which in its pertinent parts read:

AND the lessee hereby accepts this lease subject to the conditions, restrictions and covenant agreements set forth in this lease.

PROVIDED ALWAYS the provisions of section 33(1) of the Kenya Airports Authority Act (Cap 395 Laws of Kenya) shall apply in the event of breach of the covenant and/or dispute in the interpretation of the lease agreement.”Accordingly, while exercising the powers under section 12 of the Act to enter agreements, the defendant informed the lessee/plaintiffs that in the event of disputes, section 31 (1) could come into play ie. to compromise on what to be paid in the event damage occurred, in default to go to an arbitrator appointed by the Chief Justice. So the plaintiff lessees should not run away from the conditions on which they got contracts to operate at JKIA, by instituting suits as this one. That the plaintiff should go



by and exhaust the statutory course before coming to court and that was mandatory. The plaintiffs were praying for damages for breach of contract plus declarations and mandatory injunctions. Accordingly, this suit was premature in the sense that the avenues provided to resolve disputes leading to suits had not been exhausted in the first place. Several cases were then cited in support.

- 13, Coming to section 34, and may it be observed that the court was referring to the 1992 edition, it was argued that the plaintiffs were required to serve a written notice on the 1st defendant before bringing the suit.
 34. Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of 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 provisions shall have effect –
 - (a) the action or legal proceedings shall not be commenced against the Authority until at least one month after a 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;
 - (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of continuing injury of damage, within six months next after the cessation thereof.”
14. And with the foregoing, the court was urged to find that the suit herein was premature or at worst a nullity, having been brought without first serving the said written notice on the 1st defendant. That both sections 33, 34 of the Act were couched in mandatory terms and so ought to be complied with or applied. That all the foregoing went to the jurisdiction of the court and with that some more cases were cited in support whereupon the preliminary objection should be upheld.
15. On the part of the plaintiffs the court heard that in its grounds dated 24.10.96 opposing the plaintiffs’ injunction application, the same sections 33, 34 of the Act being raised in this preliminary objection were put forth by the 1st defendant. The injunction was granted in the ruling of 24.1.97, thereby dismissing the grounds based on those provisions of law. The status now is one of res judicata and further that the appeal that followed did not set aside the objection based on sections 33, 34 by the 1st defendant. Then the plaintiffs appeared to submit that Civil Appeal No 282/01 wherein the injunction orders were set aside, was only interlocutory, based on whether Hayanga J correctly considered the principles for granting injunctions. And so it was concluded:
 7. That being the case, the 1st defendant herein is bringing the same issues to the same court for a second time. That must be stopped.
16. It should be confessed that it is not clear to the court if the plaintiffs are saying that Hayanga J considered and determined the ground(s) of opposition based on sections 33, 34 of the Act and when his ruling was appealed against in CA 282/0, the injunction orders were set aside while the grounds based on those provisions of law were dismissed. But that may become clearer as the court proceeds to appreciate the Court of Appeal ruling said to be contained in the 1st defendant’s bundle of authorities, as well as the Hayanga J ruling.
17. Not to lose sight of this aspect the court decided to peruse the Hayanga J ruling of 24/1/97 together with that of the Court of Appeal delivered on 22.11.09 on the issue of sections 33, 34, before going further.



18. It is this court's understanding of Hayanga Judge's ruling that only section 33 (1) of the Act fell to be determined – not section 34. Reference to this section 33 (1) was made thus:

The first defendant as a statutory body objects to the right of the plaintiffs to bring an action without going first for statutory arbitration as provided for under section 33 (1) of Cap 395

19. Later in the ruling section 33 (1) was reproduced and the learned judge remarked:

“ Again it was argued that section 33 of the Kenya Airports Authority Act cap 395 is a bar to any injunction because the matter ought to go first to arbitration whether this arbitral clause can stop a claim for injunction is not settled. I had the occasion to rule in HCCC 12/9/1996 that an injunction application is not a suit analogous to or in generis with compensation to be conditioned to that section. “And:

So if there is a particular compensation like here compensation is provided, that in law should NOT and does not oust the court's jurisdiction to grant an injunction.

20. And with all the above, the mandatory injunction orders sought were granted. The matter went on appeal – Civil Appeal No 282/01. That court set out the prayers that were before Hayanga J, also went over the history of the dispute and three broad grounds of appeal were set down for determination:

- i) A failure by the learned Judge to appreciate and give effect to sections 33 and 34 of the Kenya Airports Authority Act;
- ii) A failure to appreciate and apply principles governing the grant of a mandatory injunction
- iii) A failure to appreciate that the respondent's suit was not brought under section 84 of the Constitution.

21. This was an interlocutory appeal limited to the mandatory injunction order – not the whole suit which was still pending. The Court of Appeal found that Hayanga J had not issued the mandatory injunction orders as per principles governing that nature of remedies. There were no special circumstances to warrant the orders, and they were set aside.

22. When perusing the judgement in the above appeal, it was instructive to note that the Court of Appeal only made reference to section 33 of the Act and nothing about section 34 which had been part of ground (i) (above) of the 3 grounds of appeal. The court commented that section 33 of the Act provided for a reference of dispute to arbitration. It quoted clause 19 (above) of the leases the 1st defendant gave to the plaintiffs, particularly that they were subject to the conditions, restrictions stipulations provided for in section 33. Then their lordships delivered themselves:

“Mr. Njuguna submitted that this section is unconstitutional as in his view it limits free access to the courts. In our view we find nothing unconstitutional or ultra vires the Constitution in the section the respondents voluntarily entered into the lease agreements. Prima facie, they are held to have chosen the manner of dealing with disputes between them.” That court then declined to say no more about the issues in the case since the appeal by the 1st defendant was allowed.

23. So limiting ourselves to sections 33, 34 of the Act, it can be said that while the High court granted the injunctions because they did not constitute action for compensation envisaged by sections 33, the Court of Appeal did not agree. To that court, parties herein were bound by section 33 (1) of the Act, either to settle a dispute for compensation in the event of damage by agreement or refer the dispute to



an arbitrator appointed by the Chief Justice. They could not run away from that manner of dealing with disputes between them at all. And because the suit itself was still pending the Court of Appeal left this issue of section 33 to be dealt with as it has come now in this suit. And both courts did not touch on section 34 of the Act regarding issuance of notice to the 1st defendant by a party desirous of suing it. But before determining this preliminary objection in the light of these 2 sections recourse is had to the plaintiffs other part of the submission.

24. The plaintiffs claimed that this preliminary objection was made in bad faith coming some 15 years since the suit was filed. It ought to have been raised at the earliest opportunity, ie in the grounds of objection to the injunction application. This court has amply considered that position in the proceedings before Hayanga J and the Court of Appeal.
25. The plaintiffs added that taking in regard the concept of overriding objective in civil litigation, this court should facilitate a just and expeditious trial of the suit – i.e. not to throw it out at this point. No points of law had been raised in the objection. That going to arbitration was a fact to be proved by evidence.
26. Moving to section 34 – the required written notice to the 1st defendant’s managing director before suing, the plaintiffs claimed that that was a matter of evidence whether it was given or not. The suit contained claims of breaches of the constitution and that the plaintiffs were right to move by way of plaint because in 1996, there were no rules of procedure made under section 84 of the old constitution to enforce fundamental rights. In any event section 34 of the Act was a limiting condition. It was not stated why with the “Chunga” followed by the “Gicheru” Rules of 2001, 2006 the plaintiffs did not move to use the proper procedure to enforce their fundamental rights if they really felt strongly about it. It can be observed these rights are not enforced by way of plaint and it cannot be said that Kenyans were not litigating about such before the “Chunga” and “Gicheru” rules. But be that as it may so far. The plaintiffs then moved to analyse the authorities put forth by the 1st defendant, claiming that they were distinguishable and most came from single High Court judges anyway. Then many more arguments were gone into leaving the court with a view that it had so far had adequate material placed before it to determine the present preliminary objection.
27. Going back to that objection and beginning with ground (iii) that this court lacks jurisdiction to entertain the suit herein, it does not agree. Other than the unlimited jurisdiction in matter civil and criminal proffered on this court by the Constitution, there are very few cases especially where specific statutes exist giving specified adjudicatory bodies jurisdiction to handle specific matters in dispute. As regards section 33 it mandated that if a dispute regarding damage occasioned by the 1st defendant when it is undertaking its duties, a suit shall not lie except that the parties ought to agree on what compensation to be paid or they go before an arbitrator appointed by the Chief Justice. No suit shall lie. But if one is filed the court will not send them away empty - handed. It will instead direct that since they chose the manner to resolve their dispute, like here when the plaintiffs accepted the leases from the 1st defendant to operate taxis at JKIA, and clause 19 of those leases stipulated that section 33 (1) of the Act would apply, the court will in its duty to do justice tell the parties that they should proceed to compromise the matter or go to an arbitrator as provided under section 33. Such a course is still adjudication by a court, and not that such suit finding its way before a court is a nullity. It is only misdirected as to the forum chosen by the parties.
28. As regards ground (i) – sections 33, 34 of the Act, it has been noted (above) that when the High Court gave the plaintiffs the injunction orders by arguing that section 33 did not apply to such proceedings, except for actions/suits filed to claim compensation for any damage occasioned, the Court of Appeal did not agree and instead termed it as one of the issues to be determined when the suit itself was under review. It is now under review and this court’s position is that it was filed prematurely. The parties



bound themselves to settle damage disputes mutually or go for arbitration. And because an aggrieved party should never be left without a forum to ventilate its complains and/or expect a remedy, this court is prepared to rule and it rules that parties proceeding under section 33 of the Act who cannot agree on the compensation or get an arbitrator to resolve their dispute, should come to court as a last result. Here the plaintiffs want to evade the machinery provided for their grievance under section 33 and approach the court in the first instance. It cannot be.

29. Regarding section 34 the 1st defendant argued that the plaintiff did not serve a requisite notice before filing this suit against it. It is a legal requirement – not a matter of fact. The plaintiffs did not tell this court that that legal requirement was complied with. Accordingly the court was left with the view that the plaintiff filed this suit in contravention of section 34 aforesaid and it cannot stand. The legislature did not pass section 34 in vain or merely to decorate the statute books. It is no inhibition or claw to the aggrieved party to comply with that provision before filing a suit against the defendant. And it was not done here.
30. Lastly the plaintiffs argued that issues about sections 33, 34 of the Act were res judicata. From the foregoing this court does not agree. It has been set out regarding how Hayanga J's appreciation of section 33 was overturned by the Court of Appeal and the same left to be determined now and how neither court dealt with the merits of section 34 ending with a final determination.
31. In sum the preliminary objection is upheld. The suit herein is struck out with costs.

DELIVERED ON 22.3.11.

J. W. MWERA

JUDGE

