REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 684 of 2006

WORLD DUTY FREE COMPANY LIMITED

T/A KENYA DUTY FREE COMPLEX……...…...…….PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY……..…..……1ST DEFENDANT

OGILVY EAST AFRICA LIMITED…….…..……2ND DEFENDANT

MEDIA INITIATIVE EAST AFRICA LTD.…...….3RD DEFENDANT

RULING

The Plaintiff herein in its plaint dated 27th June 2006 and filed the same date filed suit against the defendants whose salient features for purposes of this ruling are that there exists an agreement dated 27th April, 1989 as amended by the 11th May 1990 between the plaintiff and the Government of Kenya

spect of the Duty Free complex at Jomo Kenyatta International Airport Nairobi and Moi Airport Mombasa which has allegedly been breached in terms of the averments in the plaint. As a result of this breach the plaintiff has suffered substantial loss and damage for which it seeks relief.

Upon receipts of the demand notice the 1st defendant vide their advocates letter dated 8th March 2006 addressed to the Plaintiffs advocates offered to refer the dispute to arbitration in accordance with Section 33(1) of the Kenya Airports Authority Act Cap.395 Laws of Kenya, which request was acceded to by the plaintiff which plaintiff provided a list of arbitrators for selection in accordance with Section 12(2) of the Arbitration Act. But the first defendant failed and/or ignored to select any among the proposed arbitrators or at all and completely failed to respond to the plaintiffs said letter thus necessitating the filing of the suit.

In consequence of the aforesaid matters the plaintiff seeks the reliefs set out in paragraph 21 of the plaint.

The plaint is accompanied by a chamber summons under Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act Cap.21 Laws of Kenya seeking among others a temporary mandatory injunction to issue directing the 1st Respondent to permit the applicant and/or its

agents, nominees or customers to a advertise and put up advertisement light boxes within all Airport Terminals at Jomo Kenyatta International Airport and Moi international Airport till further orders of this Honourable court, a temporary injunction to issue restraining the 1st Respondent from granting any or any further advertising concessions whatsoever in contravention of the Applicants' said rights, any other, Relief that this Honourable court may deem just and fit to grant and costs.

The first defendant's counsel filed a notice of appointment dated 30th day of June filed the same date followed by a notice of preliminary objection dated 12th July 2006 and filed the same date.

It has 6 grounds.

1. Clause a of the Agreement dated 27th April 1989 (annexture A.H.1) relied upon by the Plaintiff provides for all disputes arising out of the said agreement to be referred to Arbitration.

2. The provisions of Section 12 and 13 of the Kenya Airports Authority Act (Chapter 395) Laws of Kenya which govern actions by or against the 1st defendant/respondent provide for mandatory recourse to arbitration with regard to any disputes.

3. The Plaintiff has, prior to the filing of this application and suit through its letter dated 10th March 2006 marked as annexture *"A.H 9"* invoked the provisions of Section 33 (1) of the Kenya Airports Authority Act Chapter (395) Laws of Kenya and agreed to make reference of the dispute for arbitration and provided a list of possible Arbitrators and therefore this application and suit are an abuse of the process of the Honourable Court. Thus the application and suit are wholly in competent.

4. The defendant's application has no merit whatsoever and raises no triable issues as the Agreement dated 27th April 1989 (annexture "AH.1") granting the alleged sole and exclusive advertising rights relied upon by the plaintiff is between the Plaintiff and the Government of Kenya which is not a party to this suit.

5. The current lease between the Plaintiffs and first defendant exhibited as annexture "AH 2" do not give the alleged sole and exclusive advertising rights in the suit premises. Clause (x) page 38 of annexture "AH 2" and clause (t) page 78 of the annexture, the current leases between the plaintiff and the first defendant specifically prohibit the plaintiff from carrying out any advertisement without the written consent of the first defendant, no such consent has been exhibited in the application or plaint.

6. The defendant seeks general damages for alleged breach of contract in its suit and has not established sufficient grounds for the granting of either a prohibitory or mandatory injunctions.

The Second defendant on the other hand also filed a notice of appointment of advocate dated 11th day of July 2006 and filed the same date, simultaneously with a preliminary objection comprising three grounds: namely-

(1) The suit is brought against the principal defendant Kenya Airports Authority in breach of mandatory provision of the law and in particular in breach of the provisions of the Kenya Airports Authority Act Chapter 395 of the Laws of Kenya.

(2) The plaintiff/applicant in this suit seeks relief from parties who are strangers to the agreement upon which the plaintiffs alleged claim is predicated.

(3) With regard to the said application the suit prayers cannot sustain the Application sought to be made.

This ruling is in respect of the preliminary objections filed

herein. Counsel for the first defendant/respondent stressed the following points.

1.All matters complained of in the Plaint fall under Section 12 of Cap.395 Laws of Kenya in respect of which Section 33 (1) of the same Act ousts the jurisdiction of the court as it lays down the procedure to be followed in the event there is a dispute namely firstly through amicable settlement in the absence of which the same to be determined by a single arbitrator.

For the foregoing reasons Counsel for the first defendant urged this court to strike out the suit as well as the application with costs.

Counsel for the second defendant concurred with the submissions of Counsel for the 1st defendant to the effect that Arbitration is mandatory. That the plaintiff should have moved the Honourable the Chief Justice to appoint an arbitrator under Section 33(1) of the Act.

(2) That in all instances of cases in which litigation had been taken first before arbitration have ended up with being struck out due to non-compliance with the arbitration clause.

(3) They content that a wrong party has been sued as the contract is with the Kenya Government which is not a party to the current proceedings. This is confirmed by the averments in paragraph 6 –8 of the plaint.

Counsel for the 3rd defendant adopted submission of Counsels for the 1st and 2nd defendant.

Counsel for the plaintiff raised the following points.

1. The contract was signed by the Aerodromes department on behalf of the Kenya Government and the KAA Act came into force on 31.5.91 after the signing of the agreement. When the Act become operational the KAA was given full responsibilities formerly performed by Aerodromes. On this basis they contend that the proper party is before court.

2. It is their submissions that the Act operates retrospectively and no penal consequences are given and section 3(2) gives Authority to sue and be sued.

3. As regards the jurisdiction of the court it is the Counsels submissions that the court has jurisdiction to hear the suit on the first instance.

4. If the respondents want to avail themselves of the arbitration clause then they have to come within the ambit of the arbitration clause by seeking stay of the proceedings, through a chamber summons application, which application has to be made when a party enters appearance or takes any other step in the matter. The Respondents have lost the right to object to the proceedings herein because the first defendant entered appearance and filed the Preliminary objection.

The second defendant entered appearance and filed a replying affidavit, while the 3rd defendant entered appearance and filed a defence. In view of the foregoing the right to object either on account of an arbitral clause or on account of Section 33 (1) has been lost.

5. In order to succeed in their objections, the objectors have to show that they have not taken any steps in the proceedings.

6. The objectors are further disentitled to the relief sought because they have not shown that they were willing to go for arbitration. It is the plaintiff's stand that the Respondents were not willing to go for arbitration because they declined the plaintiffs' offer to do so and so they are estopped from asserting otherwise.

They maintain that all the parties served are the proper parties to the suit in terms of order 1 rule 1,3 and 7 of the Civil Procedure Rules and it is in their interests that they stay in the proceedings. In response to the plaintiffs' counsel submission, counsel for the 1st defendant submitted that Section 6(1) of the arbitration

Act No.54 of 1995 deals with arbitration agreements where as the proceedings herein deal with statutory arbitration where there is no election.

(6) Counsel for the 3rd defendant submitted that the contract in contest herein is between the Plaintiff and the 2nd defendant and not 3rd defendant.

On the Courts assessment of the facts herein it is clear that there are a number of preliminary issues to be disposed off before going into the merits of the objection. The first of these are whether the preliminary objection satisfies the ingredients for a preliminary objection. These are two namely that the objection must specifically be dealing with points of law, and secondly those points of law must be capable of disposing off and terminating the proceedings finally. The test to be applied to the points raised is that which is found in the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS [1963] E.A. 676.** At page 700 paragraph D-E Law J.A. as he then was had this to say "*so far as I am aware a Preliminary Objection consists of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."* Sir Charles Newbold President as the there was in the same authority at page 701 paragraph A-B laid down the following principle". "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued as the assumption that all the 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."

Applying these two principles to the objections herein it is clear from the submissions of both sides is that the real issue is whether the suit is maintainable in law on the basis of jurisdiction of this court over the said suit in view of clear statutory provision of arbitration to precede any action in Court. It is this courts finding that issues of jurisdiction are matters of law and not evidence. As to whether all objections answer this is the affirmative will be dealt with at the merit consideration stage. That is when the court will determine which objection has merit and which does not. For now it is enough to say that some of the preliminary objection have passed raised the test of being purely on points of law.

The second test is whether if successful they can dispose off the case. The answer to this is in the affirmative because if the jurisdiction of the court is found to be non existent issues of lack of locus standi before the court arises and upon such issues arising then issue of nullity of the proceedings come into play to dispose off the case finally as being unlawfully filed.

The 3rd test is whether the same has been raised at the right moment or stage of the proceedings. In the case of Registered Trustees of CATHOLIC ARCH DIOCIES OF NYERI AND ANOTHER VERSUS STANDARD LTD AND OTHERS (2003)1 E.A. 257 Juma J. held *inter alia* that preliminary points are to be raised at the beginning of the hearing and not at the end of the hearing. In the case of **OMONDI VERSUS NATIONAL BANK OF KENYA LTD AND OTHERS [2001] 1 E.A. 177** Ringer J as he then was held that issues of *locus stand* and *Res Judicata* are pure points of law that can properly be raised as objection". What we are concerned with herein is the issue of *locus standi* to present this case to the court which is objected to as a wrong forum. If ruled that it is in the wrong form then there is no locus standi to appear before this court.

As for the timing of presentation it is clear that the proceedings are at their infancy stage. In fact only the 3rd defendant has filed a defence. The prime movers of the objection who are the first and 2nd defendants, one has filed only the notice of appointment and a replying affidavit while the other one the first defendant has filed a notice of appointment, entered appearance but he has not filed a defence. But both have filed these preliminary objections. In view of the scenario presented above the preliminary object have been presented at the right point in time namely at the beginning of the proceedings.

The next preliminary issue to be dealt with is locus standi of both objectors to attack both the application and the plaint. The second defendant has filed notice of appointment, replying affidavit and a preliminary objection. The locus standi acquired by the 2nd defendant is that which is provided for by order 50 rule 16(1) which states "*Any Respondent who wishes to oppose any motion or other application shall file and*

serve on the applicant a replying affidavit or a statement of grounds of opposition if any not less than three clear days before the date of hearing."

The locus standi gained by the second defendant is to be limited to the attack on the interim application only I think this issue escaped everybody's attention and that is why Counsel for the second defendant did not demonstrate how he could use is locus standi for attacking the application to attack the plaint. In the absence of that he has no alternative but to lean on the submissions of the 1st and 3rd defendant. The 1st defendant has a memo of appearance in addition to the notice of appointment and replying affidavit. Entry of appearance gives *locus standi* to attack the plaint. The same thing applies to the 3rd defendant whose Counsel associated herself with the submission of the other two Counsels. The association is sufficient to fault the plaint if the points associated with are sufficient to fault the said plaint.

After disposing off preliminaries the court comes to deal with the merits of the objections. The first point to be considered is whether the correct procedure has been followed in presenting the objections. This arises from the plaintiff's counsels submissions that they should have come by way of a chamber summon instead of objections. The Plaintiffs counsel had in mind section 6 of the Arbitration Act (Act nO.4 of 1995). It states 6 (1) "*A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings stay the proceedings and refer the parties to arbitration unless it finds (a) that the arbitration agreement is null and void in operative or is incapable of being performed or*

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the Court arbitral proceedings may be commenced or continued and an arbitral award may be made"

This court has considered the provisions of section 6(1) of the arbitration Act in the light of the arguments herein and finds that this Section is applicable to a proceeding where the jurisdiction of the court is not ousted by any law governing that proceedings. The main argument under Section 6 of the Arbitration Act would be a plea that the arbitration proceedings should be resorted to as opposed to a fully flagged trial in Court. In this instance the jurisdiction of the Court does not come under attack as being void *abinitio.* In other words the jurisdiction of the High Court is not completely ousted as shown by Section 7 of the same Act where interim reliefs can be granted by the High Court. The High Court is called upon to take cognizance of the presence of the arbitration clause affecting the proceedings and give effect to that arbitration clause priority over court proceedings.

This is distinguishable from a situation in the case under consideration where the courts jurisdiction is completely ousted in the first instance. This takes the Court to examine the provision of Section 33 (1) of the Kenya Airports Authority Cap.395 Rev – 1992 which states:-

33(1) "*In the exercise of the powers conferred by Section 12,14, 15 and 16, the authorities 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 therefore 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"*

The Section is explicit that it applies to the exercise of the powers under section 12,14,15 and 16 of the Act. Section 12 is what applies to this case. What is alleged to have been infringed is the sole and exclusive rights to advertise or to arrange for other persons to advertise sales products within the Airport Terminal. Powers under Section 12 (3) (c) are on all fours with what the plaintiff contracted for namely "*carry on any business that may be necessary or desirable for the purposes of the Authority and act as agent for the government in the provisions of any agreed functions"*

Advertising any sales products within the Airport terminals is a business in term of Section 12 (3) (c).

Contracting out that service to any other 3rd party is an exercise of powers under Section 12. Claims arising from the powers exercised under Section 12 are affected by the Provisions of Section 33(1) of the Act. It would appear that the plaintiff was obligated to exhaust the procedure laid down in this Section before proceedings to court. To resolve this one has to look at some of the decisions on the subject both by the high court and Court of Appeal.

Beginning with those cited by the objectors the first one is the case of **NAROK COUNTY COUNCIL VERSUS TRANSMARA COUNTY COUNCIL AND KENYA ASSOCIATION OF TOUR OPERATORS (KISUMU) CIVIL APPEAL NO.25 OF 2000.** The brief facts are that the first respondent **TRANSMARA COUNTY COUNCIL** had been curved out of the appellant. In the process of curving out just like in the case of other similar curving out of County Councils from original one country wide, the Minister exercising his powers conferred on him under Section 270 of the Act set up commissions which were to oversee the distribution of assets between the original councils is and newly created councils. A dispute arose between the appellant and the first respondent as regards the distribution of assets and liabilities. As a result of this dispute County Council of Transmara (plaintiff) sued County Council of Narok as 1st defendant and Kenya Association of Tour Operations (2nd defendant).

The argument before the Court of Appeal as presented by Counsels of both sides are found at pages 4-5. Last line on page 4 up to 1st paragraph 1 on page 5. It is observed that Mr. Njagi for the appellant argued zthat the High Court had no jurisdiction to entertain this dispute. In view of the provisions of Section 270 of the Act. In his view the plaintiff should have referred the matter to the Minister for arbitration. On this ground Counsel urged the Court to strike out the cross appeal and award costs. In paragraph 2 on page 5 Mr. Otachi for the first defendant was of the view that Section 270 of the Act did not oust the unlimited jurisdiction of the court and he relied on Section 60 (1) of the Constitution of Kenya.

For purposes of comparison with Section 33(1) of the KAA Act Section 270 of the Local Government Act as set out and page 6 of the judgment reads "*with respect to the matters mentioned in paragraphs (c) to (h) of Section 269 (1), those paragraph shall apply and have effect so far as is reasonable and practicable only as respects the appointment part of the area of the first mentioned local authority, and any appointment of rights, liabilities, property, assets or any other of the matters or things mentioned in those paragraphs shall be made between the several local authorities concerned on a fair and equitable basis, either as agreed between them or in default of agreement as directed by the Minister*"

Upon consideration Okubasu J.A. made observations at page 6 of the judgment to the effect that "*From the above it would appear that the legal position where we have two local authorities (as in the instant appeal) the distribution of assets and liabilities between the two authorities would be determined on a fair and equitable basis either as agreed between the local authorities or in case of disagreement then as directed by the Minister for local Authority."* The holding is at page 8 of the judgment line seven from the bottom up to page 9 and it states "*As the law (Local Government Act) provides for procedure to be followed in distribution of assets and liabilities then the parties are bound to follow that procedure provided by the law. This had to be done before the parties could resort to a court of law. Hence the preliminary objection raised on the question of jurisdiction should have been upheld by the superior Court.*

In view of the foregoing stand that the superior court had no jurisdiction to entertain this dispute in view of the provisions of Section 270 of the Act (Cap.265). I would therefore allow the appeal and award costs to the appellant both in this court and in the superior Court.:

In the case of **AMIRA (K) LTD VERSUS NATIONAL IRRIGATION BOARD [2001] E.A.LR 33.** issue arose for determination whether a state corporation falls within the definition ion of Government, whether it was possible to sue the corporation in its own name as opposed to the Name of the Government and whether the defendant as an instrument of the Government the reliefs sought against it by the plaintiff could be granted. At page 335 paragraph, f – h Mwera J. had this to say "The argument persuasively as it was put, does not command itself to this Court. In its view the defendant a body corporate and as it

discharges public Functions of Government it is not the Government in the larger context (rather vague) that give definition or description of government. It is a specific entity clearly set out and able to sue or be sued. It can enter into contracts and hold property etc. It was sued in accordance with the law and again properly so. Accordingly the plaintiff is entitled to seek the relief it purports to pursue in the application dated 6th November 2000" On the basis of the foregoing discussion it was held inter alia that "The defendant was a body corporate set up by statute which could sue and be sued and enter into contracts, and though it discharged public function was not" The Government" in the larger sense, and therefore did not fall within the provisions of the Government Proceedings Act (Chapter 40). It had been sued in accordance with the law and the plaintiff was not precluded from seeking the relief prayed.

In the case of **PARAPET LIMITED VERSUS KENYA AIRPORTS AUTHORITY. MILIMANI COMMERCIAL COURTS NAIROBI HCCC NO.4 OF 1999.** The defendant had contracted the Plaintiffs' cleaning services at Jomo Kenyatta International Airport which was terminated. The Plaintiff was aggrieved by that action and filed suit against the defendants. The defence raised a preliminary objection to the effect that the Plaintiffs suit is misconceived, incompetent and is un maintainable in law as the same contravenes the mandatory provisions of Section 33 (1) of the Kenya Airports Authority Act Cap.395 Laws of Kenya and that the same is an absolute nullity having been filed in blatant contravention of the mandatory provisions of Section 34 (a) of the said Act. The argument put on behalf of the objectors at page 3 of the ruling was to the effect that where by law a matter is to be submitted to arbitration, the High Court lacks the requisite jurisdiction to entertain a matter before it is referred to arbitration. If in such circumstances the matter is filed in Court for determination then the court should strike it out.

For the defence it was argued that section 33 (1) of Cap.395 Laws of Kenya dealt with tortuous actions and not those falling under contract and further that the contract in dispute therein did not fall under the KAA Act.

At page 7 of the ruling paragraph 2 the court identified the issue for determination as to whether the court had jurisdiction to hear the case. At page 13 of the ruling Njagi J. quoting **ONYANGO J.** as he then was (now J.A.) in the case of **TAXTAR INVESTMENTS LTD VERSUS KENYA AIRPORTS AUTHORITY CIVIL CASE NO. 1238 OF 1999** observed *"….all the Act says is in that in case any person who suffers damage as a result of the activities of the authority in exercise of its powers under Sections 12,14,15 and 16 then such a person would have to first seek arbitration proceedings to determine such a matter. It does not state that such determination by a single arbitrator shall be final. I do feel after such determination, if any party including the original complainant is aggrieved, he would still have a recourse to the court. In short Section 33(1) merely provides a first step in such a situation but does not provide a final step"* Njagi J.in adopting the reasoning in **TAXTAR INVESTMENT VERSUS KAA** supra made findings that the Court has jurisdiction provided that all the avenues charted in the Act have been fully exhausted. The case was struck out because it offended Section 34(a) of the Act. In the case of **TAXTAR INVESTMENTS LTD VERSUS KENYA AIRPORTS AUTHORITY NAIROBI MILIMANI COMMERCIAL COURTS** civil case No. 1238 of 1999 at page 7 of the judgment line six from the bottom Onyango J as he then was (now J.A.) made the following observations. *"the plaintiff says that under the Constitution of Kenya, the courts jurisdiction cannot be ousted and further that event the defendant had taken part in the case having filed defence and having cross-examined the witness and made submission". In respect to this argument the learned judge made findings at page 8 at the top thus "In my humble opinion, Section 33(1) of the Kenya Airports Authority Act does not seek to oust the powers of the Court, although I do agree that if it were to seek to oust the powers of the Court then the provisions of the Constitution which bestows the High Court with unlimited jurisdiction to enquire and determine all civil and criminal matters in the courts would prevail over the provisions of Section 33(1) of the Act. However, here all that the Act says is that in case of any person who suffers damage a result of the Authority in exercise of its powers under Section 12,14,15 and 16 then such a person would have to first seek arbitration proceedings to determine such a matter. It does not state that such determination by a single arbitrator shall be final. I do feel after such a determination if any party including the original complaint is aggrieved he would still have a recourse to court".*

In the case of **GIANT HOLDINGS LTD VERSUS KENYA AIRPORTS AUTHORITY NAIROBI**

HCCC 694 OF 2003 J.B. Ojwang J. was faced with a jurisdictional issue where by the plaintiff sought to take refuge in the doctrine of estoppel to stop the defence from raising a preliminary objection under Section 33(1) of the Act because they had come to the hearing of the application and they would prejudice the plaintiff if the objection was raised at that point in time. At page 75 of the ruling line 5 from the bottom the judge ruled "*A point of law can be raised at any time during the hearing of a matter and there need indeed be no special notice given of the same – even if practice has called for notice in certain situations"* At page 77 line 6 from the top on statutory arbitration the judge stated "There is no statutory linkage shown between the scheme of arbitration in the Kenya Airports Authority Act and in the Arbitration Act….. the plaintiff ought to have familiarized itself with the applicable arbitral procedures and should have been the first to seek recourse thereto."

At page 84 of the ruling, the learned judge considered the question as to whether section 33 (1) of the Kenya Airports Authority Act Cap.395 Laws of Kenya an independent procedure of conflict resolution, or is it subject to the scheme of Arbitration Act 1995 as Counsel for the Plaintiff urges? The learned judge's response to that question is on the same page at line 4 from the top and it says "*the position. In my considered opinion is that Section 33(1) of the Kenya Airports Authority Act provides an independent special procedure of dispute resolution by arbitration. It cannot be subject to the provision of the arbitration Act, as no canon of statutory interpretation will support the preposition made by Counsel for the plaintiff. Whereas the Arbitration Act is certainly a basis for consensual arrangements between the parties and also does provide for the rule of the court at the very beginning, Section 33 (1) of the Kenya Airports Authority Act is more mandatory in its statement of the first forum of dispute resolution; that forum is the arbitrator and not the court"*

This is by no means a point of first impression, as several decision of this court have taken the clear position that section 33(1) of the Kenya Airports Authority is binding on those who have entered into a contract with the Kenya Airports Authority"

After quoting with approval the findings of Njagi J. In the case of **PARAPET LTD VERSUS KENYA AIRPORTS AUTHORITY HCCCNO.4 OF 1999(**supra) and Onyango Otieno J. as he then was (now J.A.) in **TAXTAR INVESTMENTS LTD VERSUS KENYA AIRPORTS AUTHORITY HCCC 1238 OF 1999** the learned judge made findings at page 85 of the ruling last paragraph to the effect that "*In my construction of Section 33 of the Kenya Airports Authority act, and particularly in the light of the persuasive authority which I have set out I would hold that the disputes in the plaintiffs suit and its application, fall to be determined in the first place through arbitration and that the first initiative in the invocation of the arbitral process falls at the door of the plaintiff rather than of the defendant. So long as the arbitration process, has not been pursued, I would hold that this court at the moment lacks jurisdiction to hear and determine the disputes"*

Turning to the plaintiff's legal authority for consideration, it is to be noted that the court was referred to order 1 rule 1,3 and 7 Civil Procedure Rules. The central theme in those provisions is that the plaintiff is entitled to sue a defendant, from whom he has a cause of action entitling him to a relief and even where there is doubt he may join more than one to the proceedings so that the issue of liability may be determined by the Court, especially in instances where if separate suits were brought common questions of law and reliefs would be determined by the Court.

Section 33(1) of the Kenya Airports Authority is the Section which has given rise to the raising of the preliminary objection, herein and extensively is the main focal point for discussion herein. The Arbitration Act No.4 of 1995 came into the limelight because an issue arise as to whether the provisions of this Act operate to affect Section 33(1) of the Act. Further if the provisions of the said l995 arbitration Act operate to oust the objections herein, in view of the fact that the objection have taken steps in the matter and have failed to apply for the stay of proceedings and on that account they have become, disentitled to the plea of the right to have recourse to arbitration proceedings first.

The court was referred to the case of **EAST AFRICAN POWER AND LIGHTING COMPANY LTD VERSUS KILIMANJARO CONSTRUCTION COMPANY LTD [1983] KLR 392.** In this case the appellant contracted the respondent to erect transmission lines. All of a sudden the appellant

terminated the contract and ordered the respondent to stop. The respondent sued for breach of contract and the appellant having entered appearance applied for a stay of proceedings pending arbitration. It was held *inter alia (1)* "If a party is asked to refer a dispute to arbitration pursuant to an arbitration agreement whether warned or not of the consequences of default and such a party replies that it does not the arbitration provisions but does not take any other action to initiate or proceed with such arbitration then such party is not entitled to a stay of proceedings upon filing of a suit.

(2) In order to be entitled to a stay of proceedings the steps necessary for a reference to arbitration must be put in motion by the party on its initiative or in response to an invitation by the other party.

(3) The court can say that there was a readiness and willingness to do all things necessary for the proper conduct of an arbitration if and when either way, some positive step is taken which would lead to a reference to arbitration and whether the arbitration itself takes off or not is immaterial. Such positive actions are of the pre-requisites do or order of stay of proceedings."

The principles set by the **MUKISA BISCUIT MANUFACUTIRING CO. LTD VERSUS WEST END (supra)** have already been set out earlier in this ruling. These principles specify what qualifies to be an objection and what does not qualify to be a preliminary objection. Reference was also made to the case of KISUMU WALLA OIL INDUSTRIES LTD VERSUS PAN ASIATIC COMMODITIES PTE LTD AND EAST AFRICAN STORAGE COMPANY LTD MSA CA 100 OF 1995. In this case what was discussed was the arbitration clause falling under Section 6 of the Arbitration Act. The holding by Bosire J.A. is that in the light of the clear provisions of Section 6 of or our Arbitration Act unless a defendant waives his right to rely on such a clause, he would be obliged to apply for a stay of proceedings.

This court has taken the totality of the argument for all Counsels, the totality of the preliminary points raised and has considered them in the light of all the principles of the cases cited herein and in that regard makes the following findings.

(1) Objection 1 and 2 of the first defendants/respondents preliminary objections as well as ground 1 and 2 of the 2nd defendant respondents preliminary objections have been considered and found to be based purely points of law and are sustainable. Secondly they are also sustainable because they have been raised at the earliest opportunity in the courses of the proceedings thus satisfying the pre-requisite that such objections be raised at the beginning of the proceedings and not at the end of the proceedings not withstanding the accepted principle that being points of law they can be raised at any stage of the proceedings. Further thirdly that they have satisfied the third ingredient which is to the effect that if upheld it will dispose off the proceedings by terminating the proceedings ground 3 of the second defendants grounds of objections and ground 3, 5 and 6 of the 1st defendants grounds of objection do not qualify to be preliminary objections as they deal with matters of evidence. For example ground 3 of the 2nd defendant/respondent requires the court to examine the evidence to be adduced through the affidavits and annextures or otherwise in order for the court to determine whether the reliefs sought are maintainable or not. Ground 5 and 6 of the first defendants' preliminary objection requires the court to scrutinize annextures AH1 and AH 2 to determine whether the objection is to be upheld or not. This examination is not examination of legal points but documents with evidential value. Ground 6 of the first defendant's objection requires the court to call for factual evidence to determine whether sufficient evidence has been put forward to warrant the granting of a prohibitory or mandatory injunction. Ground three of the first defendants objection also deals with evidence as in order to establish the existence of the arbitration clause in the contract and confirm that an offer to go for arbitration was made by the plaintiff and turned down by 1st defendant the court has to scrutinize the said letter. In doing so the court would be dealing with matters of evidence. As for ground 4 of the first defendants objection it deals with matters of both mixed law and facts. Law arises as regards parties to a contract whereas, to who signed the said contract are matters of fact.

(2) The faulting of ground 39 of the 2nd Defendants preliminary objection and grounds 3,5 and 6 of the 1st Defendants grounds as well as ground 4 partially has not affected the value of the remaining grounds and they are sufficient to serve the purposes for which they were meant to serve.

(3) As explained earlier on in this ruling Counsel for the 2nd defendant has locus standi to attack the application only where as counsel for the first and 3rd defendants have locus standi to attack the plaint as well.

(4) As regards capacity to sue and be sued of the first defendant on behalf of the Kenya Government paragraphs 6 and 9 of the plaint provide the link and reasons as to why the 1st defendant has been sued. If it is true that it is the first defendant which is responsible for executing the said contract on behalf of the Kenya Government then it is the right party to be sued. Section 3(2) of the creating Act states clearly that it was created as a body corporate with perpetual succession and a common seal and shall have capacity in its corporate name to sue and be sued and to acquire, hold and dispose off movable, immovable property for the purposes of this Act.

(5) The activities complained of in paragraph 6 of the plaint fall under the powers of the Authority exercisable under Section 12 of the Act. By virtue of this exercise Section 33 (1) is brought into play to regulate the conduct of the parties in the event of a dispute arising. The conduct of the parties to be regulated is for the would be disputants to take note of the mandatory command in the said section which is to be effect that "*no action or suit shall lie"*. This command seems to oust the jurisdiction of the court more so when it does not specify what action is to be taken after the arbitration fails to materialize or how the resultant agreement is to be given effect to. This command also appears to be an affront and a trespass to the unlimited jurisdiction of the High Court bestowed upon the High court by Section 60(1) of the Constitution of Kenya. Section 60 (1)which simply states "*There shall be a High Court which shall be a superior court of record and which shall have unlimited jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution, or any other law"*

This apparent trespass has been scrutinized in three High Court cases namely **PARAPET LIMITED VERSUS K.A.A. (unreported)** High Court Civil case No.4 of 1999, **TAXFAR INVESTMENTS LIMITED VERSUS KENYA AIRPORTS AUTHORITY (UNREPORTED) HCCC 1238 OF 1999 AND GIANT HOLDINGS LTD VERSUS KAA HCCC 694/2003,** and all the three decisions by three eminent judges are to the effect that the High Court un Limited jurisdiction is not taken away. It is merely delayed. All that parties are required to do is to have recourse to arbitration as a prerequisite it step failing which they come to court. As though these decisions are High Court decisions and therefore decisions of courts of concurrent jurisdiction, not binding on this court, they state the correct position in law and there is no need for this court to depart from them. These decisions have been indirectly confirmed by the Court of Appeal decision in the case of **NAROK COUNTY COUNCIL VERSUS TRANSMARA COUNTY COUNCIL CA.25 OF 2000(KISUMU)** which though not dealing with Section 33(1) of the KAA dealt with a similar legislation requiring parties to a dispute arising from that legislation to resort to a particular mode of procedure in resolving the matter before reaching the Courts. Applying that to the situation herein it is correctly submitted that arbitration should have been resorted to by the Plaintiff before coming to Court. If the defendants failed to respond to the request to nominate an arbitrator, that should not have deterred the Plaintiff from moving ahead in accordance with the Act. His request to the 1st defendant to nominate an arbitrator was wrong anyway as the Act requires the appointment of arbitrators to be done by the Honourable the Chief Justice. In two of the authorities cited failure to take this procedural step was found to be fatal to the suit and the action was struck out. The same applies to the action herein. As observed in the authorities cited legislative provisions are not for cosmetic value. They are meant to regulate conduct of those affected and should be obeyed. The business, of this court now is to give effect to the legislative provision in section 33(1) of the Act.

(6) Issue was raised about non compliance with the provision of the Kenya Arbitration Act No.4 of 1995. In response to this, this Court fully agrees with the reasoning of J.B. Ojwang J. in **GIANT HOLDINGS LTD VERSUS KAA NAIROBI HCCC 694 OF 2003 AT PAGE 84** of the ruling that the procedure provided for under Section 33(1) is a special and independent procedure and it has no linkage to the procedure under Act No.4 of 1995. This is so because Section 33(1) of the Act does not provide that link. This court however cannot go into inquires as to what rules the arbitrator appointed under that Section is to apply as that will be mere conjecture as it was not one of the issues raised.

The net result of the foregoing assessment is that objection 1 and 2 of the 1st defendants preliminary objection is upheld and it disposes off both the plaint and application. This compromises the 2nd defendants objection which could only lie as against the application only on grounds of lack of locus standi to attack the plaint. The plaintiff's suit dated 27.6.2006 and filed on 27.6.2006 be and is hereby ordered to be struck out for being premature with costs to the defendants.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH MAY 2007.

R. NAMBUYE

JUDGE