



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE 1119 OF 2005

PRESTIGE AIR EXPRESS LIMITED.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT

RULING

The applicant filed a suit against the respondent by way of a plaint dated 8th September 2005 and filed in court on 13th September 2005.

In that plaint he sought judgment for:-

- (a) A permanent injunction restraining the defendant by itself, its agents, its servants, and/or whomsoever acting on its instructions from evicting the plaintiff from the suit premises more specifically known as *HANGER NUMBER 22* at Nairobi save by the procedure established by law.
- (b) A declaration that the Hanger has been substandard since February 2002 when it was partially destroyed and that the parties herein agreed that the plaintiff shall not pay rent to the defendant till the year 2007 on condition that the former surrenders its passenger lounge to the later for 2 years.
- (c) Costs of the suit.
- (d) Any other relief that this Honourable Court deems fit and just to grant.

Together with the plaint he brought a Chamber Summons under Certificate of Urgency in which he sought the following orders:

- (a) That the defendant/respondent herein by itself, its agents and servants and/or

whomsoever acting on its instructions be restrained from evicting disturbing the applicant's goods, on in any other way interfering with the plaintiff's quiet possession and usage of the Hanger Number 22, situate at Wilson Airport Nairobi, until this suit is heard and determined.

- (b) That the defendant be ordered to repair the damaged Hanger Number 22 at Wilson Airport.
- (c) Costs of this application.

The application is based on the following grounds:

- (a) That the respondent has threatened to close down the premises.
- (b) That if the premises are closed the applicant will suffer irreparable loss.
- (c) That the applicant will not get access to the planes in Hanger Number 22 if the premises are locked up.
- (d) That the applicant has paid rent up to February 2005.
- (e) That the plaintiff has already performed its part of the contract by temporarily surrendering its passenger lounge to the defendant as per the agreement of 24th February 2005.

The application is also supported by a sworn affidavit of the application in which the applicant has deponed on the facts mainly as contained in the plaint. When the applicant appeared before Mohamed, J, he obtained ex parte injunction and the matter was fixed for 26th September 2005 for hearing inter partes. When the application came before me on 26th September 2005 Mr. Kamau counsel for the defendant raised a Preliminary Objection on grounds on a point of law.

First that this court has no jurisdiction to entertain the suit. Secondly, the suit is premature before the court as it offends the provisions of Section 34 of the Kenya Airports Authority Act Cap 395 which provides that no legal action shall 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 of his agent.

The plaintiff's action also contravenes Section 33 of the Act which provides that any dispute against the Authority be referred to Arbitration. The defendant contends that the plaintiff should not have

proceeded to file this suit in court as section 33(1) is applicable in this case.

To this Mr. Mariaria for plaintiff says that under the Constitution of Kenya the courts jurisdiction cannot be ousted.

Having considered the submissions by both counsel for the plaintiff and the defendant, it is my humble opinion that Section 33(1) of the Kenya Airports Authority Act does not seek to oust the powers of the court but if it did, then the provisions of the constitution which bestows the High Court with unlimited jurisdiction to enquire and determine all civil and criminal matters would prevail over the provisions of Section 33(1) of the Act. However, here all the Act does is to provide the mode and the procedure of settling disputes and it does not state that the decision of the arbitrator is final. It does not provide a final step.

Mr. Mariaria further submitted that he came to court for injunctive orders which the Arbitrator cannot issue. In the event of eminent threat it is quite in order for a party to come to the court for protection while awaiting for the matter to be arbitrated by the organ empowered to deal with the same. In these circumstances a party comes to court under Certificate of Urgency to seek ex parte injunctive orders. And if the court is satisfied that the reason put before it for the grant to ex parte injunctive which reason must be recorded, the court can issue the same. The court was certified and granted ex parte orders. Such ex parte orders can only be challenged if there is evidence of non disclosure of material facts.

Mr. Kamau addressed me at the close of the submissions to decline to extend the ex parte orders granted by Mohamed on 13th September 2005. As I have said earlier if the court is satisfied with the reasons given during the ex parte proceedings which must be recorded and grants orders, the court can only decline to extend them after it has perused the same and detected any non-disclosure of material facts and the same can only be considered not in isolation but in the main body of the application and if the defendant's applications succeeds the same lapses automatically.

The dispute in the instant case started way back in 2002. The plaintiff had sufficient time to refer the matter to arbitration as or issue notice as required by the Act. I agree with the counsel for the defendant that this suit is prematurely before the court. The suit is therefore dismissed with costs as well as the costs of this application.

Dated and delivered at Nairobi this 4th day of October, 2005.

J.L.A. OSIEMO

JUDGE