



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. APP. NO. 561 OF 2014

IN THE MATTER OF: APPOINTMENT OF A SINGLE ARBITRATOR

AND

**IN THE MATTER OF: SECTION 33 OF THE KENYA AIRPORTS AUTHORITY ACT,
CHAPTER 395 LAWS OF KENYA**

GIANT FOREX BUREAU DE CHANGE LIMITED.....APPLICANT

V E R S U S

KENYA AIRPORTS AUTHORITY.....RESPONDENT

RULING

The Respondent has raised a preliminary objection to the Plaintiff’s Notice of Motion dated 5th August, 2014. The point of law, appearing in the notice of preliminary objection dated 26th August, 2014 is that the application is grossly misconceived in law, frivolous and mala fides for the reason that the cited law does not support the application as the cause of action is tortuous in nature.

I have considered the submissions of the learned counsels appearing, including the authorities cited.

The Plaintiff filed this application on 8th August 2014. It is made on the following grounds:-

- “1. THAT the Applicant intends to pursue recovery proceedings against the Respondent for a sum of Kshs. 27,764,506/- being the loss they suffered as a result of an inferno that gutted down their offices at the Respondent’s premises at Jomo Kenyatta International Airport on 7th August 2013**
- 2. THAT the law provides that for a dispute of this nature under Section 33 of the Kenya Airports Authority Act, Cap 395 Laws of Kenya, the same should be determined by a single Arbitrator appointed by the Chief Justice.**
- 3. THAT the Arbitrator to be appointed is the sole prerogative of the Honourable Chief Justice and he has to be moved by the Applicant to exercise the statutory powers conferred to his office.**
- 4.....**

5.....

6. THAT the Applicant stands to suffer irreparable loss if this application is not heard and determined expeditiously.

7. THAT the Respondent shall not suffer any prejudice if the orders sought are granted.”

It is apparent from what is pleaded that the Applicant’s claim is based on allegations that the Defendant is in breach of, or has failed to perform, its statutory duties under **sections 12, 14, 15 and 16** of the Act, as a result of which the Applicant suffered, and continues to suffer loss and damage.

Section 33(1) of the Act provides as follows:-

“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.”

The Applicant alleges that the loss suffered as a result of the inferno that occurred at the Respondent’s premises is a claim falling under Section 12 of the Act and therefore it is well within the law for the Chief Justice to appoint an Arbitrator to make a decision on the amount of compensation payable.

Section 12(3) (f) and (g) of the Act (Kenya Airports Authority Act) states:-

“12. (3) Without prejudice to the generality of subsections (1) and (2), the Authority shall have power to:-

(f) prohibit, control or regulate –

(i) the use by any person of the services performed or the facilities provided by the Authority; or

(ii) the presence of any person, aircraft or goods within any prescribed aerodrome or any premises controlled or occupied by the Authority;

(g) sell, let or otherwise dispose of any property, movable or immovable, which in the opinion of the Board is not necessary for the purposes of the Authority:

Provided that the Authority shall not sell, let or otherwise dispose of any building or land vested in it by virtue of Section 4 except with the consent of and subject to any conditions imposed by the Government”

Such facilities include aerodromes. The term “aerodrome”, of course, includes airports, going by the definition to be found in section 2 of the Act.

There cannot be any dispute that the fire that occurred which led to the Applicant incurring loss and damage could not have resulted from the exercise of the Respondent’s exercise of its powers as provided for under section 12 of the Act. Section 33(1) of the Act (quoted above) cannot therefore come into play. The issues emanating from the claim are such that liability would have to be determined first before the issue of compensation can be addressed. The Applicant will then be entitled to such compensation as may be determined by the Court after a full trial. Section 33 does not apply to all or every dispute under Sections 12, 14, 15 and 16 of the Act and if the intention of Parliament was that all disputes relating to the exercise of the powers conferred by the sections above by the Respondent should be referred to arbitration under section 33, nothing would have been easier than to state so.

A number of High Court judges have similarly held. See for instance the cases quoted by the Respondent – **Milimani HCCC No. 253 of 2012 World Duty Free Company Limited vs Kenya Airports Authority [2012]eKLR.**

The Court shall hear the parties on the issue of liability before compensation can be determined. The preliminary objection is well taken. The notice of motion Application dated 5th August 2014 is therefore misconceived. It is hereby struck out with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 5th Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE