



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 45 OF 2015

WORLD DUTY FREE COMPANY LILIMITED
t/a KENYA DUTY FREE COMPLEX.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORIOTY.....1ST DEFENDANT

DUFRY INTERNATIONAL AG.....2ND DEFENDANT

RULING

1. The application dated 5th June 2015 was brought by the plaintiff, **WORLD DUTY FREE COMPANY LIMITED** Trading As **KENYA DUTY FREE COMPLEX**. It is an application against the 2 defendants, **KENYA AIRPORTS AUTHORITY** and **DUFRY INTERNATIONAL AG**.

The application sought the following reliefs;

“1. **THAT this application be certified as urgent.**

2. **THAT service of this application be dispensed with in the first instance and be heard ex-parte.**

3. **THAT pending the inter-partes hearing of this application:-**

i. **A temporary injunction do issue against the 2nd Defendant/Respondent restraining them whether by themselves, their servants, agents or otherwise from commencing and/or continuing to perform the concession agreement dated 15th October 2014 (Ref. No. KAA/193/2013-2014) between the 1st Defendant/Respondent and the 2nd Defendant/Respondent for development and management of Duty Free Retail services under the single master licence at the Jomo Kenyatta International Airport or any other airport or at all.**

ii. **A TEMPORARY INJUNCTION do issue against the 2nd Defendant/Respondent whether by themselves, their servants and/or agents from executing and/or operating, managing or in any other way dealing with duty free retail services under the single master licence under the concession agreement dated 15th October 2014 (Ref No. KAA/193/2013-2014) or at all the**

Jomo Kenyatta International Airport or any other airport or at all.

iii. A TEMPORARY INJUNCTION do issue against the Defendants/Respondents whether by themselves, their servants or agents restraining the said Defendants/Respondents from interfering with the plaintiff's/Applicant's sole and exclusive rights granted by the 1st Defendant/Respondent to operate Duty Free shops at all Airports in Kenya.

iv. A temporary injunction do issue against the 1st Defendant/Respondent restraining the 1st Respondent whether by itself, its servants, agents or otherwise from in any manner whatsoever advertising, continuing to advertise any Tender or Requests for Proposals of whatever nature relating to Duty Free shops or Duty Free operations.

4. THAT pending reference of this suit to Arbitration and determination thereof provided for under the Kenya Airports Authority Act, CAP 395 Laws of Kenya:-

i. A temporary injunction do issue against the 2nd Defendant/Respondent restraining them whether by themselves, their servants, agents or otherwise from and or continue to perform the concession agreement dated 15th October 2014 (Ref No.KAA/193/2013-2014) between the 1st Defendant/Respondent and the 2nd Defendant/Respondent for development and management of Duty Free Retail services under the single master licence at the Jomo Kenyatta International Airport or any other airport or at all.

ii. A TEMPORARY INJUNCTION do issue against the 2nd Defendant/Respondent whether by themselves, their servants and/or agents from executing and/or operating, managing or in any way dealing with duty free retail services under the single master licence under the concession agreement dated 15th October 2014 (Ref No. KAA/193/2013-2014) or at all at the Jomo Kenyatta International Airport or at any other Airport or at all.

iii. A TEMPORARY INJUNCTION do issue against the Defendants/Respondents whether by themselves, their servants or agents restraining the said Defendants/Respondents from interfering with the Plaintiff's/Applicant's sole and exclusive rights granted by the 1st Defendant/Respondent to operate Duty Free shops at all the airports in Kenya.

iv. A TEMPORARY INJUNCTION do issue against the 1st Defendant/Respondent whether by itself, its servants, agents or otherwise from in any manner whatsoever advertising, continuing to advertise any Tender or Requests for Proposals of whatever nature relating to Duty Free shops or Duty Free operations

v. Any other relief that this Honourable Court may deem just and fit to grant.

vi. THAT the costs of this application be provided for”.

2. The application was supported by the affidavit of **SANJAY KISHO KUMAR MASHRU**, who is the General Manager of the plaintiff.

3. In a nutshell, the plaintiff lay claim to the sole and exclusive rights to construct, manage and control the commercial operations of Duty Free shops at both the Jomo Kenyatta International Airport Nairobi and the Moi International Airport Mombasa.

4. The claim for the sole and exclusive rights was said to be founded upon an Agreement dated 27th April 1989, which was amended on 11th May 1990. The said Agreement was said to have been executed between the Government of Kenya and the Plaintiff.

5. It was the plaintiff's case that pursuant to clause 3 (b) of the leases between the plaintiff and the 1st

defendant, the plaintiff was granted the sole and exclusive rights within the area presently designated or which may in future be designated as an airport, to carry on Duty Free operations.

6. As far as the plaintiff was concerned the original agreement together with the Leases in relation thereto, were still subsisting.

7. However, the 1st Defendant is said to have breached the terms of the Agreement and the Lease by granting another exclusive concession agreement to the 2nd Defendant on 15th October 2014. It was the plaintiff's understanding that the defendants ought not to have entered into that agreement because it had the effect to dislodging the plaintiff's sole and exclusive rights in respect to the Duty Free services at the airports in Kenya.

8. Secondly, the agreement between the defendants was said to constitute a contravention of the Court Order made in **Hccc No. 413 of 2008**, on 24th September 2008.

9. In so far as the agreement in issue contravened the orders of the court, the plaintiff submitted that the agreement was therefore illegal, null and void.

10. The defendants' take was that the agreement between the defendants was entered into after due process. The history behind the said agreement was spelt out in great depth.

11. The process started by the invitation to tender, which was advertised on 4th and on 7th of October 2013. The first tender was closed on 25th October 2013. By that time, the plaintiff had put in their joint bid, together with **SUSAN GENERAL TRADING JLT**.

12. After evaluation of the bids, the Evaluation Committee recommended that the contract at Terminal 4 of the Jomo Kenyatta International Airport be awarded to **M/s NUANCE GROUP Ag**.

13. However, the award of the tender was successfully challenged before the Public Procurement Administrative Review Board. The said Board directed the 1st defendant to re-tender.

14. It is noteworthy that the process of re-tendering commenced by advertisements in local daily newspapers on 24th June 2014 and 1st July 2014.

15. Whilst the first process had attracted 10 firms, the re-tendering process attracted 5 firms.

16. After the evaluation of the bids, the 2nd defendant was, on 15th August 2014, notified that its tender had been accepted. The award was challenged before the Review Board in Application No. 34 of 2014 and Application No. 35 of 2014, which were lodged by **FLEMINGO INTERNATIONAL (BVI) LIMITED and ATU TURIZIM ISTELEMECILIGI**, respectively.

17. On 17th September 2014 the Review Board dismissed the 2 applications for review. It is after being given the green light to proceed with the process that the 1st Defendant signed an agreement with the 2nd defendant.

18. On a *prima facie* basis, it appears that the 1st defendant complied with the legal requirements and procedures before it signed the contract with the 2nd defendant.

19. Secondly, on a *prima facie* basis, I find that by taking an active role in the initial tender, the plaintiff must be deemed to have acknowledged, by that very conduct, that at the time it put forth its bid, it did not have in its hands the very thing that it was tendering for.

20. Thirdly, on the face of it, the tendering process appears to have been conducted in a manner which was in compliance with the law. Therefore, I find, on a *prima facie* basis, that the product of that process,

which is the agreement between the 1st and the 2nd defendants was not illegal or null and void, as suggested by the plaintiff.

21. As regards the alleged contravention of the Court orders issued in **Hccc No. 413 of 2008**, I find that it would be most inappropriate for this court to delve into the substance of the alleged contravention. The reason why I deem it to be inappropriate is that when a court issues orders and the said orders are allegedly contravened, the person asserting that there had been a contravention is expected to return to the court which had given the orders in issue. He would demonstrate to that very court how its order had been violated. If the court is satisfied with the evidence tendered, the court would take appropriate action, such as committal of the contemnor, to civil jail.

22. A party does not file a separate suit to urge its case of alleged contraventions of orders made in an earlier case.

23. In my considered view, that same reasoning would apply to a situation in which there was an arbitral award. When the party against whom the award was made flouted, disobeyed, disregarded or violated the award, he should be cited for contempt; But such proceedings should be pursued before a court or tribunal which was handling matters developing from the arbitral award.

24. The defendants have shown, on a *prima facie* basis, that the 2nd defendant was not granted sole and exclusive control over the Duty Free operations at the Jomo Kenyatta International Airport. There were other companies which were already carrying out separate and distinct duty free operations within the said airport.

25. In the circumstances, unless those other parties were enjoined to this case, so that they were accorded an opportunity to be heard, it would, on a *prima facie* basis, be imprudent and extremely prejudicial to them, if the plaintiff was said to have sole and exclusive rights over all the duty free operations at the Jomo Kenyatta International Airport.

26. The plaintiff concedes that its sole and exclusive rights were reduced. However, it emphasizes that the said reduction was as a result hooliganism, force and duress which the 1st Defendant exerted on the plaintiff.

27. Assuming for a moment that the plaintiff's said contention was factually correct, that would imply that in reality, the plaintiff did not have the sole or exclusive rights over the duty free operations at the Jomo Kenyatta International Airport.

28. Of course, as the plaintiff has said, there was a Preliminary Committee which was conducting investigations into the complaints lodged by the plaintiff. That would mean that there is yet no decision on the question as to whether or not the 1st defendant was culpable, in relation to the complaints against it.

29. The 1st defendant has asserted that there had been a settlement of the disputes pitting it against the plaintiff, in relation to the subject matter of the suit.

30. The plaintiff categorically denied the existence of any settlement.

31. To that end, the plaintiff pointed out that the participation of one, Kamlesh Patni, in the negotiations with the 1st defendant, and a settlement, if any, derived from such negotiations, could not be construed to be a settlement involving the plaintiff.

32. The plaintiff is quite right to point out that a company was a body corporate, which was independent of its shareholders. The plaintiff could therefore only act through its board of directors.

33. Whereas, there is no doubt in law, that a limited liability company cannot be equated to any one of its

directors, I did not understand the 1st defendant to have advanced a contrary opinion.

34. Companies function through natural persons, who express the views of such companies. My understanding of the 1st defendant's contention was that Kamlesh Patni was the face of the plaintiff at the negotiations with the 1st defendant.

35. However, it is common ground that the alleged settlement had not crystallized into any signed agreement. Therefore, whether or not Kamlesh Patni represented the plaintiff at the negotiations, the position, on a *prima facie* basis, is that the parties have not signed any settlement.

36. Indeed, the 1st defendant appears to confirm that the process of attaining a settlement was still ongoing. I say so because at paragraph 13 of its submissions, the 1st defendant said;

“Even though the process of settling all the claims as agreed is underway, it has been delayed by the Plaintiff's and its agents' prevarication”.

37. Of course, I have taken note of the fact that the 1st defendant also said that it had already performed its part of the bargain. That may imply that, as far as the 1st defendant was concerned, there was already an agreement and that all that remained was for the plaintiff to do its part.

38. Nonetheless, there is clearly no meeting of the minds between the plaintiff and the 1st defendant on the question of the alleged settlement.

39. In the final analysis I find that the plaintiff has not demonstrated a *prima facie* case with a probability of success.

40. Secondly, I find that the defendants had already executed an Agreement after the 1st defendant had undertaken due process.

41. Thirdly, the 2nd defendant has taken up the space which was given to it under its agreement with the 1st defendant.

42. Other parts of the Jomo Kenyatta International Airport, where duty free operations and other businesses were being conducted, had also been taken up by various other entities. In the circumstances, it would, at this stage, be ill-advised to grant any interim relief which could place the plaintiff in the position of a party who has the sole and exclusive rights over the subject matter of the application.

43. Having held, on a *prima facie* basis, that the 2nd defendant and other persons are in occupation of the subject matter of the application, it would follow that the only way to give to the plaintiff any rights over the said subject matter would be by ordering those in occupation to vacate their respective premises.

44. In effect, the plaintiff would have had to seek and obtain a mandatory injunction to compel those in occupation to vacate. However, the plaintiff did not seek any mandatory injunctions.

45. Finally, as the 2nd defendant and other persons are in occupation, I find that the balance of convenience tilts in their favour.

46. For all those reasons, I find no merit in the plaintiff's application. It is therefore dismissed.

47. I order the plaintiff to pay to the defendants the costs of the application dated 5th June 2015.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of November 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Awinja for the Plaintiff/Applicant

Angwenyi for Imende for the 1st Defendant

Okoth for the 2nd Defendant

Collins Odhiambo – Court clerk.