REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 253 OF 2012

WORLD DUTY FREE COMPANY LIMITED……...…….. PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY ……..…… DEFENDANT

R U L I N G

On 2nd May, 2012, the Plaintiff brought this suit praying for various declarations and injunctive orders. Together with the Plaint, the Plaintiff filed a Notice of Motion seeking various injunctive orders and for an order that the matter be referred to arbitration. Before the motion could be heard, the Defendant filed a Preliminary Objection on Notice dated 14th May, 2012. The Defendant's objections were that :

"1. Section 33 of the Kenya Airports Authority Act, Cap 395 Laws of Kenya prescribe the remedy available to the plaintiff, to wit, arbitration proceedings. Accordingly the entire suit should be dismissed in limine.

2. The provisions of the Arbitration Act, 1995 do not apply in suits brought under Section 33 of the Kenya Airports Authority Act, and hence no preservative or injunctive orders may issue pending the arbitration.

3. This Honourable Court lacks jurisdiction in matters brought under Section 33 of the Kenya Airports Authority Act.

4. No notice has been given (before action) as prescribed under Section 34(a) of the Kenya Airports Authority Act."

The objection was argued on the basis of written submissions filed on 18th and 24th May, 2012, respectively. Counsels hi-lighted their respective written submissions on 28th May, 2012. This ruling is in respect of the said Preliminary Objection.

The Defendant contended that Section 33 (1) makes reference to Sections 12, 14, 15 and 16 of the Act, that the relevant provision to the Preliminary Objection was Section 12(1) (a) of the Act which provides, inter alia, that the Authority has powers to construct, operate and maintain aerodromes and other related facilities as well as to provide other amenities for passengers, that the particular provisions of Section 12 were, Section 12(1) (a) & (c), 12(2), 12(3) (a), 12(3) (1) (ii), 12(3) (g), 12 (3) (j) and 12 (3) (j) (ii). That

since the suit related to an International Tender Notice for the Development and Management of Duty Free Retail Concessionaire at Jomo Kenyatta International Airport ("JKIA"), the action lied under Section 12 of the Act. The Defendant further contended that since the Plaintiff had claimed that it had suffered injury and damage as a result of the advertisement of the International tender and that the Plaint sought damages for the breach of the lease dated 29th January, 2003, the Plaintiff's suit fell under Section 33 of the Act.

Mr. Mutua, learned Counsel for the Defendant submitted that under Section 33 of the Act, it was mandatory that the Chief Justice appoint an arbitrator to deal with the issues raised in this suit, that there was no notice to commence this suit which is mandatory under Section 34 of the Act. Counsel further submitted that in **HCCC No. 684 of 2006 World Duty Free Company Ltd –vs- KAA and 2 others**, the court held that it lacked jurisdiction in a case like the present one. Mr. Mutua further submitted that the letter dated 20th March, 2012 exhibited in the Further Affidavit of Arif Hafiz indicating that the Plaintiff had served the Defendant's Managing Director with the Notice of Intention to Sue was a fabrication because it was registered at the City Square Post Office yet the parties operate within JKIA and there was no reason why it was not hand delivered to the Defendant's offices at JKIA. Counsel also relied on the cases of **Narok County Council –vs- Transmara County Council (2000) 1 EA 161, Taxtar Investment Ltd –vs- Kenya Airports Authority HCCC No. 1238 of 1999, Giant Holdings –vs- Kenya Airports Authority HCCC 694 of 2003, and Parapet Ltd –vs- Kenya Airports Authority HCCC No. 4 of 1999** in support of his submission that this court has no jurisdiction to entertain this case under Section 33 of the Act. Counsel therefore urged that the Preliminary Objection be upheld.

The Plaintiff filed written submissions on 24th May, 2012. In those submissions, the Plaintiff contended that it's claim was that, by virtue of the Government of Kenya Agreement made on 27th April, 1989 and the decree of this court made on 10th July, 2002, a lease dated 29th January, 2003 was entered into, that lease had given the Plaintiff certain exclusive rights which the Defendant had breached by advertising an International Tender No. KAA/776/2011-2012 and that as a result of the said breach the Plaintiff **will suffer grave loss and damage.**

Mr. Kalove, learned Counsel for the Plaintiff submitted that Section 33 of the Act does not stipulate that in all disputes between potential Plaintiffs and the Defendant, they must be referred to arbitration, that Section 33 of the Act only applied where there was little damage caused by the Defendant and the only issue was to fix compensation, that the Section does not apply to multibillion shilling cases which is a preserve of this Court, that the Section presupposes where liability is not in dispute, that where liability is in dispute, a litigant has direct recourse to court, that the suit was not as a result of the direct exercise of power by the Defendant under Sections 12, 14, 15 and 16 of the Act, that the same arises out of the breaches to the covenants in the Government of Kenya Agreement, the Decree of 10th July, 2002 and the lease dated 29th January, 2003. It was further submitted that the damage that the Plaintiff will suffer as a consequence of the breach is huge and the only way to prevent the said damage is by the Defendant being restrained from continuing with the said breached.

Counsel further submitted that as regards Section 34 of the Act, the Plaintiff had exhibited a letter dated 20th March, 2012 to the Further Affidavit and since it was disputed, the Preliminary Objection cannot stand, that an application had been filed by the Plaintiff to cross-examine the deponent of the Affidavit denying the notice of 20th March, 2012. Counsel relied on the cases of **Crispus Njogu –vs- The Attorney General Cr. Appl. Case No. 39 of 2000** and **Ndyanabo –vs- Attorney General (2001) 2 EA 485** to buttress his proposition that Section 33 of the Act should be interpreted liberally and broadly and not in a restrictive way. Finally, that Section 33 of the Act does not oust the jurisdiction of this court to entertain this suit. Counsel urged that the Preliminary Objection be dismissed with costs.

In rejoinder, Mr. Mutua submitted that the issues raised by the Defendant were of a substantive nature and not mere technical, that Section 7 of the Arbitration had been held to be inapplicable where Section 33 of the Act applied in the case of **HCCC 684 of 2006** between these same parties, that Article 159(2) (c) of the Constitution emphasizes alternative modes of dispute resolution and that this court should also promote the provisions of any statute that tend to promote alternative modes of dispute resolution e.g.

Section 33 of the Act. Mr. Mutua therefore urged the court to sustain the Preliminary Objection.

I have carefully, considered the written submissions, the oral highlights by Counsel and the authorities relied on by the parties.

A preliminary Objection was defined in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors (1963) EA 676** wherein at page 701 the Court of Appeal for East Africa held that:-

"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 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." (Emphasis supplied)

The Defendant's objection to the motion and the entire suit generally is on the grounds that Section33 of the Act prescribe a remedy to the Plaintiff's claim, that is arbitration, and therefore this court lacks jurisdiction, that the provisions of the Arbitration Act do not apply and that there having been no notice of intention to sue under Section 34 of the Act, before the suit was filed the suit is incompetent.

Since Section 33 of the Act is not new to judicial interpretation, it would be worthwhile to consider how the courts in this country have dealt with, interpreted and applied this Section. Assistance was given by the Defendant who cited no less than six (6) cases on this point. I propose to analyse and consider those cases to be able to come up with a conclusion that will give light to the matter before hand.

1)World Duty Free Company Ltd T/A Kenya Duty Free Complex –vs- Kenya Airports Authority & 2 others NBI HCCC No. 684 of 2006.

In this case, the Plaintiff alleged that an agreement dated 27th April, 1989 between the Plaintiff and the Government of Kenya which gave the Plaintiff exclusive advertising rights had been breached. As a result of the breach, ***the Plaintiff had suffered loss and damage for which it sought relief***. The Court found that what was alleged to have been infringed was the sole and exclusive right to advertise or arrange for other persons to advertise sales products within the Airport Terminal. Hon. Nambuye J (as she then was) found that since that was a power that had been exercised by the Defendant under Section 12(3) (c) of the Act, the same was susceptible to Section 33 of the Act. She also found that the Plaintiff in that case had submitted itself to Section 33 of the Act before filing that suit. The suit was held to be incompetent as the court lacked jurisdiction. The most important thing here was that the Plaintiff pleaded that it had suffered damage as a result of the exercise of the Defendant's powers under the Act.

2)James S. G. Mukinya –vs- Kenya Airports Authority NBI HCCC No. 2958 of 1996.

This was a suit for unlawful termination of employment. Hon. Waweru J held that ***the contract of employment between the Plaintiff and the Defendant was not entered into in the Defendant's exercise of powers conferred by Sections 12, 14, 15 and 16 of the Act. He held that Section 33 of the Act was therefore not applicable to that dispute***. He however dismissed the suit for falling foul of Section 34 of the Act. The important aspect here was that the court was convinced that there are other cases against the Defendant that fell out of Section 33 and which it was competent to bring action against the Defendant in a Court of law.

3)Kenya Association of Air Operators –vs- Kenya Airports Authority NBI HCCC No. 974 of 2002.

The Court found that from what was pleaded in paragraphs 14 to 39 of the Plaint, the Plaintiff's suit was based on allegations that the Defendant was in breach of its statutory duties under Section 12 of the Act ***which had resulted in the Plaintiff suffering and continuing to suffer loss and damage***. Hon. Waweru J found that since the Plaintiff's claim was basically for compensation, the process set out under Section 33 of the Act had to be exhausted first before the suit could be filed. He struck out the suit.

4)Parapet Ltd –vs- Kenya Airports Authority NBI HCCC No. 4 of 1999

This suit concerned ***an action for damages for wrongful termination*** of the cleaning services contract by the authority. Hon. Njagi J found that the contract that had been terminated was subject to Section 33 of the Act and held that the Court lacked jurisdiction to entertain the suit and struck the same accordingly.

5)Kenya Airport Authority – vs - Paul Njogu Mungai & 2 others CA No. 282 of 2001.

In this matter, the Court of Appeal held that it found nothing unconstitutional with Section 33 of the Act. That the Section had only given arbitration as the first course in dispute resolution whereby the courts are only secondary in the process of dispute resolution.

6)Stephen Wanyee Roki –vs- Kenya Airports Authority NBI HCCC No. 1626 of 2001.

The Plaintiff brought a suit claiming Kshs.1,520,000/- against the Defendant for services rendered. Hon. Njagi J held that Section 33 of the Act was applicable in that what was being claimed was compensation and the suit was therefore struck out.

The conclusion to be drawn from the above cases is that the Kenyan courts are united in one thing, that once it is proved that a dispute between a litigant and the Defendant is properly under Section 33(1) of the Act, Courts have no jurisdiction to entertain such a matter. It is also clear that the Courts are unanimous that the said Section 33 of the Act applies to both tortious as well as contractual claims.

However, from the decisions of Hon. Waweru J and Njagi J in **James S.G Mukinya –vs- KAA (Supra) and Parapet Ltd –vs- KAA (Supra)** case Nos. 2 and 4 above, respectively, the application of Section 33 is limited. In those cases, the courts held that Section 33 of the Act did not apply to a contract of employment between a litigant and the Defendant and that Section 33 only provides for compensation in respect of damages suffered as a result of the Defendant's exercise of the powers under Section 12, 14, 15 and 16 of the Act. Indeed Hon. Njagi J. held in **Parapet Ltd –vs- KAA (Supra)** that:-

"Section 33(1) of the Act provides for compensation in respect of damages which may be suffered pursuant to the exercise of the Authority's powers under the above Sections."

I had the opportunity of considering Section 33 of the Act in the case of **World Duty Free Company Ltd –vs- Kenya Airports Authority NBI HCCC No. 372 of 2012 (UR).** In that case, in order to ascertain the real meaning and tenure of Section 33 of the Act, I decided first to examine the rules of construction of Acts of Parliament before delving into ascertaining the meaning and application of that Section. After such consideration, I delivered myself thus:-

"One needs to consider the Section carefully to be able to know what the intention of Parliament was. The rules of constructing Acts of Parliament are well known that in construing a Section in an Act of Parliament, the plain meaning of words used in the Section must be considered.

In CRAIES ON STATUTE LAW (6TH EDITION) at page 66 it is observed that:-

"The cardinal principle of the construction of Acts of Parliament is that they should <u>be construed according to the intention as expressed in the Acts themselves</u>. The tribunal that was to construe an Act of legislature or indeed any other document has to determine the intention as expressed by the words used. In order to understand these words, it is natural to inquire what is the subject matter to which they are used and the object in view."

In BARNES –VS- JARVIS (1953) 1 W.L.R. 649 Lord Goddard C.J said:-

"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered". If the words of the statute are themselves precise and unambiguous, <u>then no more can be necessary than to expound those words in their ordinary meaning and natural sense</u>. The

words themselves alone do in such a case best declare the intention of the law giver."

In WARBURTON –VS- LOVELAND (1832)5 E.R. Tindal C.J said:-

"Where language of an Act is clear and explicit, we must give effect to it whatsoever the consequences, for in that case, the words of the statute speak the intention."

Now turning to Section 33 (1) of the Act, the same in my view is very clear. That where the Defendant is exercising any of its powers under Sections 12, 14, 15 and 16 of the Act and in the process or after exercising those powers, a person suffers damage, no suit shall be entertained in respect thereof for compensation. That the quantum of compensation shall be agreed upon or in default the same shall be fixed by an arbitrator appointed by the Chief Justice. This in my view is obtained by the use of the words:-

"In exercise of the powers conferred ……. 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 ….."

My view is that, Parliament knew that the Defendant, in exercising the powers under the referred to Sections, would cause damage and that whenever such damage is caused the persons suffering such damage would be entitled to compensation. Parliament intended that courts should not be resorted to in the first instance in assessing the quantum of loss, but that such quantum be fixed by agreement or in default, arbitration by a sole arbitrator appointed by the Chief Justice.

In my view therefore, Section 33 does not apply to all or every dispute under Section 12, 14, 15 and 16 of the Act. In order for that Section to apply, such a dispute must arise as a result of the following:-

(i) the Authority exercising its powers under Sections 12, 14, 15 and 16 of the Act,

(ii) a person suffers damage as a result of such exercise of power, and

(iii) that dispute be for compensation.

Indeed if this Court were to seek further assistance in trying to decipher the intention of Parliament, it may look at the marginal notes. A close look at the Section would reveal that the marginal notes reads "compensation". It is not in dispute in my view, that a court can use the marginal notes if necessary in construing a section of a statute.

Therefore, if help would be sought from the marginal notes to Section 33 of the Act, it is clear that that section deals with "compensation".

Accordingly, my view is and I so hold that if a dispute between a party and the Defendant is about compensation for a wrong done pursuant to the Defendant's exercise of its powers under Sections 12, 14, 15 and 16 of the Act such a party is unsuited as the proper forum is not this court but as set out by Section 33 of the Act."

The Preliminary objection in that case was argued while this ruling was pending. I still fully subscribe to the reasoning and the said conclusions as set out above. In the said case, I proceeded to examine the Plaint to ascertain what the Plaintiff's suit therein was all about in order to discern whether Section 33 of the Act was applicable. I also propose to do likewise in this case.

I have carefully perused the Plaint. Paragraphs 4, 5, 6, 7 and 8 of the Plaint in this case give the historical background to the suit, i.e. the existence of the Government of Kenya Agreement and the leases to the Plaintiff by the Defendant. They also give the basis of the Plaintiff's claim to the exclusive right to operate a facility of duty free shops at the Defendant's premises. Paragraphs 10, 11 and 12 of the Plaint sets out the breach committed by the Defendant of advertising the international tender.

Then in paragraphs 20, 12 and 22 of the Plaint, the Plaintiff gave the history of the Defendant's actions that had violated contracts between themselves and the action taken in those instances.

The paragraphs that allude to loss and damage are paragraphs 13, 15, 17 and 18 of the Plaint. The said paragraphs alleged that:-

"13. Relying upon the sole and exclusive rights given to the Plaintiff by the Defendant the Plaintiff has over time invested Millions of Dollars in its duty free shop and other facilities at the Jomo Kenyatta International airport which are now in grave risk by the award of the concession for the "Development, and Management of Duty Free Retail Master Concessionaire at JKIA by the Defendant as a consequence of which the Plaintiff stands to suffer irreparable loss and damage which cannot be compensated by damages alone.

15. As a consequence of the said breach by the Defendant and its contravention of the Plaintiff's rights, the Plaintiff stands to suffer irreparable loss and damage it its business operations in the event that a Master Concessionaire concession is awarded which loss cannot be reversed.

17. There is a real and present danger that unless the Defendant is urgently restrained by injunction for continuing with is unlawful conduct aforesaid the Plaintiff will suffer irreparable loss and damage which cannot be compensated by damages alone.

18. There is a real and present danger that unless the Defendant is urgently restrained by Injunction from continuing with its unlawful conduct aforesaid the Defendant will flout and continue to flout with impunity as it has done before both the GOK agreement dated 27th April 1989 and lease dated 29th January, 2003 to the detriment loss and damage to the plaintiff and to the detriment of the inviolability of contracts and the administration of justice in the country." (Emphasis supplied)

A careful examination of the said paragraphs will reveal that the Plaintiff has not pleaded anywhere that it has suffered damage as a result of the actions of the Defendant contrary to the submissions of Mr. Mutua, the Defendants learned Counsel. From the Plaint, it is clear that the Plaintiff has only pleaded that ***in view of the allegations it has made, if relief was not granted, it would suffer loss and damage that cannot be compensated by an award of damages***. That loss is futuristic. It has not yet attached. Indeed a look and examination of the prayers in the Plaint in particular prayer Nos. V. VI. VII and VIII would show that, what the Plaintiff had come to seek in court ***was to prevent the damage from taking place. Those prayers are of an injunctive nature meant to support the allegations made in the Plaint to prevent the Defendant from committing a breach which would lead to a damage*.** Nowhere in the Plaint has the Plaintiff pleaded that it has suffered loss and damage as contended by the Defendant.

As I held in **HCCC No. 372 of 2012** aforesaid, ***Section 33 of the Act applies in situations where damage has already been caused to a person by the actions of the Defendant and the issue for determination is compensation.*** In the case before me, the dispute is about preventing the Defendant from causing damage. I am of the view therefore that damage having not attached, the Plaintiff having not pleaded that **it has suffered** any damage as a result of the Defendant's actions, and the suit being not one for compensation for any loss suffered but to prevent the Defendant from acting in a manner that will lead the Plaintiff to suffer loss and damage, Section 33 of the Act does not apply to this suit.

My conclusion is informed by the understanding that, courts are supposed to interpret the provisions of a Statute strictly in terms of the clear meaning flowing from the words used in the Section under consideration. My reading of Section 33 is that, that Section will apply only where the action of the Defendant in the exercise of its powers under Sections 12, 14, 15 and 16 of the Act results in a person suffering damage. This is supported by the use of the words ***"……. and where any person suffers damage ……."*** in that section.

The Plaintiff has come to court before it has suffered loss and damage. Can this court hold that Section 33 of the Act extends to future damage? I do not think so. From the Plaint, I am convinced that the Plaintiff's damage is in the future for the reason that it will only attach upon the opening of the bids and a 3rd party

being awarded the tender. The Plaintiff rushed to the seat of justice and was able to stop that eventuality by an injunction of this court. My considered view is that, the objection by the Defendant is to the effect that the court should let the damage attach and/or occur, then let the Plaintiff pursue its remedies in terms of Section 33 of the Act.

Without expressing any conclusive view on that scenario, my view is that Section 33 of the Act does not apply. The Plaintiff's suit is in the nature of a quia timet injunction. The Plaintiff is apprehensive that the actions of the Defendant, if not restrained, will lead to the breach of an agreement of April, 1989, a Court order of 2002 and a lease that is still valid between the parties which will in effect lead to loss and damage that no award of damages can effectively compensate.

Before departing from this point, can it be said that in enacting Section 33, Parliament contemplated a scenario such as the one before me. I would state no for the following reasons:-

a) parliament envisaged a situation where the actions of the Defendant lead to a person suffering damage whereby the issue of compensation for such damage is referred to an arbitrator,

b) an arbitrator cannot and has no jurisdiction whatsoever to grant an injunction. I do not know of any law that gives arbitral tribunals such power. In our jurisdiction, injunctions can and are only granted under Order 40 of the Civil Procedure Rules and Rule 5 of the Court of Appeal Rules which state that a court may grant an injunction in certain circumstances. A "court" is defined in the Civil Procedure Act as the High Court or Subordinate Court and under the Court of Appeal Rules as the Court of Appeal or a division thereof. Accordingly, no tribunal of whatever nature, in my view, may have that jurisdiction. If there is, I know of none and none was referred to me, and

c) further, even if an arbitral tribunal had jurisdiction to grant an injunction, the process of appointing the arbitrator is winded whereby by the time the arbitrator is seized of the matter, the injury which a party may have wanted to prevent by way of an injunction may have by then attached. Can it then be said that our Parliament intended that at all times the citizens of this country should be left exposed to the actions of the Defendant, wait until they suffer damage, then leisurely advise the Honourable the Chief Justice to appoint an arbitrator to assess the damage and order compensation. The answer is a resounding no! If that were the intention of Parliament, it would have said so expressly. In any event that would be bad law.

d) Finally, I have always known it to be the principle of law that, that which the law has not expressly prohibited, is impliedly permitted. Since Section 33 only prohibits cases for compensation, the court cannot read into that Sections other cases as being prohibited.

For the foregoing reasons and for the special nature of the Plaintiff's suit, ie. applying for injunctive reliefs to forestall a wrong that will cause damage which it has sworn cannot be compensated by any awrd of damages, I am of the view and so hold that Section 33 of the Act does not apply to this suit.

I so hold although, I am alive to the fact that the Plaintiff did in Prayer No. IX of the Plaint pray for:-

"General and Aggravated Damages against the Defendant for its gross breaches of its contractual obligations and covenants under the lease dated 29th January, 2003."

I do not think that it can be said that this prayer can bring this suit to the ambit of Section 33 of the Act for the following reasons:-

(1) Firstly, the Prayer is not supported by any pleading in the body of the Plaint. It is a mere appendage.

(2) Secondly, it is not the main prayer in the Plaint. The cardinal and principal prayers are prayer Nos. I to VIII of the Plaint.

(3) Thirdly, if assessment of damages alone is what is prohibited by the Section, the other remedies sought which are the majority should prevail and remove the suit from the ambit of Section 33 of the Act.

Accordingly, to that extent, I am of the view that the cases relied on by the Defendant are not applicable. They are distinguishable on their own facts. The cases also relied on by the Plaintiff are inapplicable. They dealt with issues of interpretation of the Constitution while Section 33 of the Act is a mere statute. I have interpreted Section 33 in its strict and restrictive sense not so broadly as to limit the citizens' rights under the law for it is a cardinal principle of interpretation of statutes that a court should not interpret a law such as to limit the rights of the citizens but rather to enlarge them. Interpreting Section 33 other than as I have done in my view, would be to limit the citizen's rights to approach the court in other disputes with the Defendant other than for compensation as intended by Parliament.

On the application of Section 7 of the Arbitration Act 1995 I have noted what Hon. Nambuye J (as she then was) held in HCCC No. 684 of 2004. That decision is of persuasive force. My view would be that even if Section 7 of the Arbitration Act does not apply, if a litigant properly approached the court and convinced the court that before proceeding to arbitration under Section 33 of the Act, it was necessary to grant an injunction, the court will be perfectly entitled to grant an injunction and refer the matter to the Honourable the Chief Justice to appoint a sole Arbitrator who will consider the issue of compensation in an appropriate case. I say so on the ground that I have always known that the cardinal principle of interpretation of the law is that ***"that which the law has not expressly prohibited, is impliedly permitted."*** The question which this court is to ask is that, if the law has not specifically barred the issuance of an injunction to restrain the Defendant from acting in a disastrous manner in Section 33, why would a court of law bar a party from seeking a temporary relief along those lines? Will a court of law fold its hands and tell a litigant before it **"sorry you have to wait for the astronomical damage to occur, then go to a sole arbitrator to determine the quantum of compensation."** I do not believe so.

As regard Section 34 of the Act, the case **of Mukisa Biscuits** have set the standard upon which a Preliminary point have to be taken. A preliminary objection is to be taken on the assumption that the facts pleaded by the other side are correct. It cannot be raised if the facts are disputed. The Plaintiff states that it served a notice under Section 34 of the Act on 20th March, 2012, the Defendant has denied that fact. How can this court resolve that issue on a preliminary point. I believe it cannot. On that basis, I do not think that the objection under that Section is merited. Indeed the Plaintiff has made a formal application which was filed on 24th May, 2012 seeking to cross-examine JOY NYAGA on that very issue.

On the foregoing reasons, I am persuaded to make a finding that the Defendant's Preliminary Objection is unmeritorious and I dismiss the same with costs to the Plaintiff. This now paves the way for the Plaintiffs main Notice of Motion to be heard on merit.

It is so ordered.

DATED and delivered at Nairobi this 10th day of July, 2012.

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A. MABEYA
JUDGE