REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 372 of 2012

WORLD DUTY FREE COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT

RULING

By a Notice of Motion dated 8th June, 2012 brought, inter alia, under Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Plaintiff sought various temporary, prohibitory and mandatory orders of a conservatory nature. When the said motion came up for hearing, the Defendant raised a Preliminary Objection on Notice dated 18th June, 2012. The Defendant objected to the Plaintiff's Motion on 4 grounds, that:-

"1. Section 33 of the Kenya Airports Authority Act, Cap 395 of the 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 parties filed written submissions in respect thereof which were ably argued by the respective counsels.

The Defendant's contention is that the suit relates to the renewal of leases dated 29th January, 2003

relating to spaces within Jomo Kenyatta International Airport, Nairobi and Moi International Airport, Mombasa, that the Plaintiff's case was that it had suffered injury and damage for the Defendants failure to renew the leases, that the claim therefore is brought under Section 33 of the Kenya Airports Authority Act Chapter 395 of the Laws of Kenya (hereinafter "the Act"). That the Plaintiff had previously litigated over the question of the duty free shops at the JKIA and the courts have addressed the issue of Sections 33 and 34 of the Act in a conclusive manner.

The Defendant relied on the cases of **World Duty Free Company Ltd T/A Keya Duty Free Complex –vs- KAA & 20 others HCCC No. 684 of 2006 (UR), Narok County Council –vs- Transmara County Council (2000) 1 EA 161, Taxtar Investment Ltd –vs- KAA HCCC No.1238 of 1999 (UR), Giant Holdings Ltd –vs- KAA HCCC No. 694 of 2003 (UR), Parapet Ltd –vs- KAA HCCC No. 4 of 1999 (UR)** and **KAA –vs- Paul Njogu Mungai & 2 Others CA No. 282 of 2001 (UR).**

The Defendant further contended that the Plaintiff had not given notice before instituting the suit in breach of Section 34(a) of the Act.

Mr. Mutua, learned Counsel for the Defendant submitted that the entire suit was misplaced and should be struck out for being in breach of Section 33 of the Act, that Clause 5 of the lease stipulated that Section 33 of the Act shall apply for any breach or dispute in interpretation of the leases, that the subject matter is renewal of the leases, that the nature of the dispute squarely lies under Section 12 (3) (a) of the Act that relate to selling and letting of premises, that the deponent of the Affidavit in support of the application had swore elsewhere that any dispute under Section 33 be referred to arbitration. Mr. Mutua further submitted that Article 159 (2) of the Constitution of Kenya enjoins courts to encourage other modes of dispute resolution and therefore the court should enforce the provisions of Section 33 which encourages arbitration, that the Plaintiff having not appealed against the decision of Hon. Nambuye J (as she then was) in HCCC No. 684 of 2006 between the parties that decision is binding on the Plaintiff, that the Arbitration Act was not applicable and no conservatory orders can be granted. Counsel urged that the objection be upheld and the application and the entire suit dismissed with costs.

In opposition, the Plaintiff filed a Notice of Preliminary Objection dated 18th June, 2012 and written submissions dated 20th June, 2012. The Plaintiff contended that its suit is founded on the Defendant's refusal to allow the Plaintiff an extention of the leases dated 29th January, 2003 expiring on 10th July, 2012, that the Plaintiff had exercised its right to the option to renew the leases by a letter dated 1st March, 2012 which was never responded to, that the Plaintiff had properly given the Defendant notice of intention to sue on 19th April, 2012.

Mr. Adala, learned Counsel for the Plaintiff submitted that Section 33 of the Act did not provide that for every dispute between the authority and any potential Plaintiff arbitration is the remedy, that that Section applies where only a little damage has been caused by the Defendant, that the arbitrator has no jurisdiction to award general, punitive or special damages in a multibillion shilling case, that it was not the intention of the legislature to shut out every person suffering damage in the exercise of the Defendant's powers under Sections 12, 14, 15 and 16 of the Act from seeking redress in Court at first instance, that Section 33 of the Act is only applicable where the Defendant admits liability and the only issue is to agree on quantum for compensation, that where there is no admission of liability by the Defendant direct recourse to Court is not barred, that the damage to be suffered by the refusal to renew the lease are not within the control of the Authority to ensure as little damage as possible in terms of that Section.

Mr. Adala sought to distinguish the cases relied on by the Defendant. He submitted that in **HCCC 684 of 2006 World Duty Free Co. Ltd –vs- KAA** the interpretation given to Section 33 was too wide, that in the **Narok County Council –vs- Transmara County Council** the Court was considering Section 270 of the Local Government Act and not Section 33 as in this case, that in **Parapet Ltd –vs- KAA HCCC No. 4 of 1999** the Hon. Njagi J had held that the Court has jurisdiction once there has been arbitral proceedings, that this Court therefore has jurisdiction because the parties herein are already in arbitration before Hon. (Rtd) Justice Torgbor, that **Giant Holdings Ltd –vs- KAA HCCC No. 694 of 2002** was

wrongly decided. Mr. Adala further submitted that clause 5 of the lease that had made reference to Section 33 of the Act as being applicable was meaningless and unenforceable. On Section 34 (a) of the Act, Mr. Adala submitted that a notice of intention to commence proceedings had been given vide a letter dated 19th April, 2012. Finally, Mr. Adala urged that the Court should be guided by Article 159 (2) (d) and (e) of the constitution with a view to doing justice without due regard to procedural technicalities. Counsel referred to the cases of **Crispus Karanja Njogu –vs- A.G Cr. Case No. 39 of 2000** and **Ndyanabo –vs- A.G (2001) 2 EA 485** in support of that contention. Counsel therefore urged that the objection by the Defendant be dismissed with costs.

I have carefully considered the pleadings, the written submissions, the able oral hi-lights of Counsel and the authorities referred to.

A preliminary Objection is an objection based on a pure point of law which if successful may dispose of the application or the suit as the case may be. The principles applicable were set out in the celebrated case of **MUKISA Biscuit Manufacturing Co. Ltd –vs- West End Distributors (1963) EA 676** wherein at pages 700 – 701 the Eastern Court of Appeal stated:-

"…….. 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….."

And,

"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."

The facts upon which the objection is raised as set out in the Plaint are that the Plaintiff is a lessee of the Defendant pursuant to two (2) leases dated 29th January, 2003, respectively, they are due to expire on 10th July, 2012, that the said leases contain a clause with an option to renew the same, that the Plaintiff had exercised that option vide letters dated 1st March, 2012 in terms of the leases but the said letters have not been responded to by the Defendant, that the Plaintiff gave the Defendant Notices dated 19th April, 2012 of intention to sue unless the leases were renewed within 14 days , that there was danger that unless the Defendant was restrained from refusing to renew the leases on expiry, the Defendant may repossess the premises and that the substratum of HCCC No. 413 of 2008 and arbitral proceedings before Mr. Justice (Rtd) Torgbor will be rendered nugatory. On those facts the Plaintiff had sought a declaration and varius injunctive orders.

The provisions of Section 33 and 34(a) of the Act have been variously considered. I propose to consider in extensor all the decisions that have dealt with these provisions and which were cited to me in order to understand how the courts have interpreted and dealt with these provisions.

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 that Section before filing that suit. The suit was held to be incompetent as the court lacked jurisdiction.

2) Narok County Council –vs- TransMara County Council (2000) 1 EA 161.

This was a dispute as to the distribution of the assets of the two warring county councils. The Court of Appeal firmly held that Section 270 of the Local Government Act was categorical as to the mode of sharing assets between the county councils. The Court had no jurisdiction since the Act was categorical that it was the Minister for Local Government who had the power to deal with the dispute. The importance of the decision is that once a statute has clearly set out the procedure of pursuing a remedy, the court lacks jurisdiction in such a matter. The suit was dismissed.

3) 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 Section34 of the Act.

4) 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.

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

The suit herein concerned an action for damages for wrongful termination of the cleaning services contract by the authority. Hon. Njagi J found that he 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.

6) 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 cause in dispute resolution whereby the courts are only secondary in dispute resolution.

7)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 and the suit was struck out.

From the foregoing, it is quite clear that the courts in this country are united that where it is shown that a matter in dispute between any party and the Defendant is properly under Section 33(1) of the Act, the Court lacks jurisdiction to entertain such a dispute and such a suit has to be struck out. Further, it is clear that the courts have held that the said Section 33 of the Act applies to both tortious as well as contractual claims.

The foregoing being the case, I reject Mr. Adala's submissions that Section 33 of the Act deals with matters concerning little damage and that it does not apply to multibillion claims and punitive damages. Further, Mr. Adala's submissions that Section 33(1) is a technicality and that the Constitution enjoins this Court to pursue and do substantive justice cannot hold. To my mind, applying the law as enacted by Parliament cannot be and will never be a technicality. Enforcing the law, in my view, is doing substantive justice as the intention of the Constitution is that the courts of this country do apply the law as enacted by Parliament. That is the rule of law which this Court is enjoined to uphold. If a law is bad then the best forum to seek its rectification is Parliament. This Court can only enforce the law as enacted by parliament since Parliament is assumed to make good laws for the welfare of the citizens of this country.

Indeed the Court of Appeal has in the case of **KAA –vs- Paul Njogu Mungai & 2 others (Supra**) found nothing unconstitutional in Section 33 of the Act. In this regard, I reject Mr. Adala's contention.

Accordingly, this Court will apply the letter and spirit of that section without any reservation whatsoever.

What does Section 33(1) of the Act provide?

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

"33. (1) In 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." (Emphasis supplied)

The courts in the cases that I have hitherto referred to tended to make sweeping holdings that once a dispute is under Sections 12, 14, 15 and 16 of the Act, Section 33 of the Act applies. With due respect, I do not think so. 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 be construed according to the intention as expressed in the Acts themselves. 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, then no more can be necessary than to expound those words in their ordinary meaning and natural sense. 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.

That is the only time that Section 33 of the Act would apply. Indeed Hon. Njagi J held in the case of **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 fully subscribe to that statement of the law.

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

In **Visram Karsan –vs- Bhatt (1965) EA 789**, the East African Court of Appeal whilst considering the issue of interpreting an Act of Parliament held at page 790:-

"***While in Britain the courts will not normally have regard to marginal notes for assistance in construing the terms of a Section, this is due to the historical reason that prior to 1850 marginal notes did not form part of the bill as presented to Parliament and they were only added after legislation had been passed. It could not, therefore, at least as regards the earlier legislation, be said that the marginal note played any part in disclosing the intention of the legislature. The position in Kenya is very different. Marginal notes always form part of the bill as presented to Parliament for enactment." (Emphasis supplied).***

In that case, the Court proceeded to use the marginal notes to construe Section 99 of the Evidence Act.

In a later case of **Ramadhani –vs- Republic (1969) EA 269,** Platt J (as he then was) observed at page 271:-

"But I think the marginal note may afford some guide.

……. I have on previous occasions considered the validity of using marginal notes in the interpretation of the meaning of the corresponding Section of the legislation concerned. Suffice it therefore to say that in my opinion the modern view is that marginal notes may be used in assisting the interpretation of the relevant provision of the law."

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 question that should be answered therefore is, is the Plaintiff's suit herein for compensation? A brief look at the Plaint will disclose as follows:-

(a) paragraphs 4 to 8, then 15 and 16 of the Plaint only establish the existence of the leases which have a renewal clause.

(b) Paragraphs 9 and 10 buttress the fact that the Plaintiff had exercised its right to the option to renew the leases and the Defendant had not renewed the leases.

(c) Paragraphs 10, 14, 18 and 19 of the Plaint allude to the likelihood of the Defendant not renewing the lease and the need for an order restraining the Defendant from repossessing the premises and an order compelling the Defendant to renew the lease. All those paragraphs do not state that the Plaintiff has suffered any damage.

In the whole Plaint, the only paragraphs that allude to damage are paragraphs 11 and 16. They state:-

"11. There is real danger that unless the Defendant is urgently compelled by mandatory injunction to grant a new lease to the Plaintiff the Defendant will violate its covenant to grant a new lease to the Plaintiff as a consequence of which the Plaintiff will suffer irreparable loss and damage which cannot be compensated by damages alone.

16. Relying upon the certainty of its option to renew its leases contained in the said GOK agreement and leases the Plaintiff has overtime invested millions of Dollars in its duty free shop and other facilities at the Jomo Kenyatta International airport and Moi International airport which are now in grave risk by the Defendant's object failure and/or refusal to renew the said leases in accordance with investment and suffer irreparable loss and damage which cannot be compensated by damages alone." (Emphasis supplied)

In the said paragraphs, the Plaintiff did not plead that it had suffered any loss and damage, it only alluded to the fact that in view of the matters pleaded in the other parts of the Plaint if no appropriate relief was granted, the Plaintiff would suffer loss and damage that cannot be compensated by any award of damages.

The loss alluded to herein is in the future. The same has not yet attached. A look at the prayers to the Plaint will reveal that , prayer Nos. I, II, III, IV and V are geared towards forestalling and/or preventing that damage from attaching these read:-

"I. A DECLARATION that the Plaintiff is entitled to the renewal of its leases dated 29th January, 2003 upon the expiration of the term on 10th July, 2012.

II. A MANDATORY INJUNCTION do issue against the Defendant compelling the Defendant to renew the leases dated 19th January, 2003 in respect of the premises demised to the Plaintiff under the said leases at Jomo Kenyatta International Airport and Moi International Airport.

III. AN ORDER that the leases dated 29th January, 2003 in respect of the premises demised under the said leases to the Plaintiff at Jomo Kenyatta International Airport and Moi International Airport respectively be deemed to be renewed for a further term of 10 years each 10th July, 2012 upon the same terms and conditions as set out in the leases dated 29th January 2003.

IV. A PROHIBITORY INJUNCTION do issue against the Defendant whether by itself, its servants agents or otherwise from repossessing or attempting to repossess the premises demised to the Plaintiff under the leases dated 19th January, 2003.

V. A PROHIBITORY INJUNCTION do issue against the Defendant restraining the Defendant whether by itself, its servants agent or otherwise from granting or attempting to grant leases to any third party or in any manner otherwise utilize the premises demised to the Plaintiff under the leases

dated 29th January, 2003."

All these prayers are supported by the paragraphs I have set out above.

As I have already held, Section 33 of the Act applies where a person has already suffered damage by the use of the words, **" ….. and, where any person suffers damage…."** in that Section thereby presupposing that the damage is already suffered and is past. Not futuristic. It is only the compensation that can be gone to.

In its Plaint, nowhere did the Plaintiff state that it had suffered any damage for which it could claim compensation. The Plaintiff expressed the fear of the Defendant breaching the terms of the leases with itself. For this reason, the Prayer No. VI in the Plaint is, in my view, a mere supplasage that does not have any support in the main body by way of allegations or otherwise. It has not been pleaded that the Defendant has committed any breaches that will warrant any damages to be claimed.

The conclusion arrived at is that, Section 33(1) of the Act applies to situations where a person has suffered damage and claims compensation. The Plaintiff is very clear that it has not yet suffered damage, its suit is to prevent the Defendant from acting in a manner that will lead to the plaintiff suffering damage.

Considering the nature of the suit, the apprehensions the Plaintiff has pleaded in the body of the plaint and the attendant prayers thereto, the arbitrator under Section 33 cannot grant Prayer Nos. II, III, IV and V of the Plaint. To my mind only this court can give those reliefs. This, in my view is the reason why Section 33 of the Act was not courched in an omnibus way. If the intention of the Parliament was that all disputes relating to the exercise of the Powers conferred by Sections 12, 14, 15 and 16 of the Act by the Defendant should be referred to arbitration under Section 33, nothing would have been easier than to state so. But Parliament in its very wisdom, decided to limit those issues to only **compensation**for **damage suffered**.

In view of the foregoing, I am of the view and so hold that Section 33 of the Act, is not applicable to the suit before court.

Mr. Mutua, learned Counsel for the Defendant referred the Court to Clause 5 of the leases. The same provides:-

"5. AND THE LESSEE hereby accepts this lease subject to the condition restrictions stipulations and covenants set for the herein PROVIDED ALWAYS that the provisions of Section 33 (1) of the Kenya Airports Authority (Act CAP 395 Laws of Kenya) shall apply in the event of breach of the covenants terms and/or dispute in the interpretation of this lease."

In Mr. Mutua's view, Section 33 of the Act applies to all disputes relating to the interpretation of the lease. Mr. Adala was of the view that that clause was meaningless and unenforceable, that Section 33 was only applicable to small damage.

I do not agree with Mr. Adala that that part of the lease is meaningless. I agree with Mr. Mutua for the Defendant that it was in the contemplation of the parties that Section 33 of the Act would apply to disputes relating to the leases. However, the application of that section would only apply in strict compliance with the interpretation that I have rendered above, i.e. where any breach of the leases or interpretation leads to damage and the dispute is for compensation. Since I have found that there is no damage has been suffered by the Plaintiff and that the dispute relating to the leases herein is not for compensation, I hold the view that Section 33(1) of the Act is not applicable, notwithstanding Clause 5 of the leases.

Mr. Mutua referred the court to an Affidavit sworn by one Mr. Arif Haviz sworn on 15th June 2012 in some Arbitral Proceedings wherein he stated that any dispute under Section 33 of the Act between a party and the Kenya Airports Authority, must be referred to Arbitration, that having so admitted in those proceedings, the Plaintiff is estopped from denying in this matter that Section 33 does not require arbitration to be resorted into under the said Section before the filing of this suit. The answer to that is

simple. Once the Defendant shows that a dispute is squarely under Section 33 of the Act, there is no escape for a party in such a dispute from the application of that Section. The Defendant has not shown that Section 33 of the Act applies to the circumstances of this suit as I have set out above. In my view, therefore, the estoppel sought to be raised against the Plaintiff does not apply in this matter.

Accordingly, I reject the Objection under Section 33 of the Act.

As regards the application of the Arbitration Act in suits under Section 33 of the Act, I agree with the Defendant that once it is shown that the dispute is in respect of the exercise by the Defendant of the Powers under Sections 12, 14, 15 and 16 of the Act, that damage has been suffered as a result thereof and that the claim is for compensation, then clearly there can be no Arbitral proceedings under the Arbitration Act, 1995. The arbitration has to be as set by Section 33 of the Act. As I have already found, Section 33 does not apply to this suit and the objection on this ground therefore fails.

The other objection was that the suit fell foul of Section 34 of the

Act. ***That Section provides:-***

"34. Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect: -

a) The action or legal proceedings shall not be commenced against the Authority until at least one month after 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 or his agent;

b) The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of continuing injury or damage, within six months next after the cessation thereof."

That Section requires that before any action is instituted against the Defendant, notice of intention to commence such proceedings be given to the Defendants Managing Director at least one month before such proceedings are instituted.

The Defendant contends that there was no notice of intention given to its Managing Director and relied on the case of **Langat -Vs- Kenya Ports and Telecommunication Corporation (2001) IEA 147**. The Plaintiff's submitted otherwise.

I have seen the document appearing at page 90 of the exhibit "**A.H.4**". It is a letter by the Plaintiff dated 19th April, 2012. It is addressed to the Managing Director of the Defendant. It is referenced; **NOTICE OF INTENTION TO SUE**. The second last paragraph of that letter notifies the recipient that unless the Plaintiff hears from the Authority within 14 days of the date of the letter or receives a draft lease for 10 years, the Plaintiff shall institute proceedings against the Authority. That letter is stamped as received by the Defendant on 19th April, 2012. That letter was not specifically denied by Joy Nyaga in her Replying Affidavit filed on 19th June, 2012. Further, the stamp of the Defendant appended to that letter was also not denied, disputed nor challenged. Applying the best evidence rule, I am satisfied that the notice was given on the 19th of April, 2012 whilst the suit was commenced on 8th June, 2012 well outside the 30 days period provided for in Section 34 of the Act. I reject the Defendant's objection on the basis that Section 34 of the Act was breached by the Plaintiff. That Section was not breached.

Accordingly, I find that the Defendant's Preliminary Objection is without merit and it is dismissed with costs to the Plaintiff.

DATED and DELIVERED at Nairobi this 3rd day of July, 2012.

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A. MABEYA
JUDGE