



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT

Civil Case 384 of 2012

KENYA AIRPORTS AUTHORITY.....PLAINTIFF

-VERSUS-

CITY COUNCIL OF NAIROBI.....DEFENDANT

R U L I N G

1. Before the Court is a Notice of Motion dated **11th June 2012**. It is filed under **Section 1A** and **1B** of the **Civil Procedure Act, Order 40 Rule 1 (2), 2 (1), (2), 4(1) and (2)**, and **Order 51 Rule 1** of the **Civil Procedure Rules**. The application seeks one main substantive prayer that is:-

a) That pending the hearing and determination of this suit, the defendant, its agents and/or servants be hereby restrained by this Court from conducting a census of businesses, issuing demand notices, acting on issued demand notices and/or collecting payments of advertisement fees, single business permits levy, licence fees or other charges from the plaintiff, the plaintiff's tenants, concessionaires and other service providers and/or otherwise howsoever from interrupting, approaching, and/or interfering with the plaintiff's operations at **Jomo Kenyatta International Airport (JKIA)** and **Wilson Airport**.

2. The application is supported by the annexed affidavit of **JOY NYAGA** sworn on **11th June 2012** together with its annexures. The application is based on the several grounds stated therein. The deponent in her affidavit begins by describing the establishment and mandate of the applicant in an elaborate manner. The applicant deposes that, in the past years they have exclusively provided various services to the aerodrome users and exclusively charged fees from the concessionaires, tenants and licensees in accordance with the Kenya Airports Authority Act, Cap 395 Laws of Kenya. The applicant alleges that since July 2010, the respondent, purporting to be acting under its statutory powers started issuing demand notices to the applicant and to the applicant's tenants, concessionaires and other service providers operating within the aerodromes of the Jomo Kenyatta International Airport and Wilson Airport ('the two airports') in Nairobi.

3. It is the applicant's claim that the harassment and intimidation antics by the respondent have progressively gotten more serious culminating into a Notice received on 7th June, 2012 where the respondent has threatened to unlawfully enter into the airport to purportedly carry out a census of all businesses at JKIA. The applicant also claims that the respondent has issued notices stating that it has statutory powers to prohibit and control the use and development of land and building within the two airports.

4. The applicant submits that the respondent is already issuing demand notices to the applicant,

applicant's staff, tenants and concessionaires, and other service providers for payment of alleged licence fees, advertisement fees and single business permits levy, threatening to arrest and prosecute them in default of paying the demand charges. It is submitted that due to the foregoing, a state of anxiety, uncertainty and insecurity has been created at the two airports. It is the applicant's contention that the operations at the two airports may be disrupted at any time unless the respondent and its agents or employees are restrained by the orders of this Court. The applicant also contends that JKIA, in particular, is a highly sensitive point of entry, immigration, communication, national security and international aviation in the Republic of Kenya while Wilson Airport remains the busiest airport in the region and therefore, a disruption of the activities in the two airports will definitely have far reaching repercussions to the entire country.

5. It is the applicant's case that the mandate of constructing, operating and maintaining public aerodromes is the domain of the aviation authorities namely, the Kenya Airports Authority and the Kenya Civil Aviation Authority.

6. The application is opposed vide a Replying affidavit of **ADUMA J OWUOR** dated **9th July 2012** with its annexures. In the affidavit, the deponent has stated the powers and functions of the Defendant pursuant to the provisions of the Local Government Act, Cap 265 and the Physical Planning Act, Cap 286 Laws of Kenya. The Defendant avers that the Plaintiff has in the past been cognizant of the Defendant's aforesaid powers and functions and that in the past the plaintiff has been making payments to the Defendant being payment for advertisement done within the airport.

7. The Defendant's case is that, nowhere in the Kenya Airports Authority Act, Cap 395 Laws of Kenya or any other law is the Plaintiff mandated to carry out regulatory functions in the nature of business licensing, physical development and planning or charging of advertising or business permit fees. The Defendant notes that Section 12 of Cap 395 only permits the Plaintiff to charge fees for services it renders which fees have to be approved by the Minister. The Defendant further submits that, nowhere under Cap 395 is ousted the jurisdiction of the City Council or any other local authority to issue demand notices, collect fees/charges/levies or enforce such charges and notices against the Plaintiff or persons operating within the airports neither does it preclude such local authorities from entering and inspecting their premises for the purposes of ascertaining compliance and enforcing charges and notices.

8. The Defendant avers that the Plaintiff's application is an abuse of the process of court and ought not to be entertained. In view of the foregoing, the Defendant avers that the Plaintiff has failed to demonstrate that it has a *prima facie* case with any probability of success. The Defendant finally urges the court to dismiss the Plaintiff's application with costs.

9. At the hearing of the application, Mr. Moya appeared for the Plaintiff while Mr. Ataka appeared for the Defendant. Counsel for the Plaintiff relied on their Skeleton submissions filed in court on the hearing date together with the attached authorities. In the submissions, Counsel for the Plaintiff reiterated the contents of their application as well as the supporting affidavit. In addition, Counsel for the Plaintiff submitted on the issue of statutory interpretation. It was his submission that the provisions of the most recent Statute prevail over any inconsistent provisions in earlier Statutes. He stated that the later Act, which is the KAA Act in its provisions relating to collection of levies and rates at the aerodrome impliedly repealed similar provisions obtainable in the Local Government Act. He relied on the case of **NZIOKA & 2 OTHERS – VS- TIOMIN KENYA LTD [2001] KLR (E&L) 423**.

10. Mr. Ataka for the Defendant contended that, under the Physical Planning Act and the Local Government Act, the Defendant had the mandate to exercise its powers and functions within the airport land. He submitted that the Plaintiff had not shown a *prima facie* case as they had not shown how the Defendant lacked the aforesaid powers. He further submitted that, under the KAA Act, the mandate to levy fees and exercise regulatory controls was in respect of the services and facilities provided by the Plaintiff. It was his contention that the said services did not include the Plaintiff allowing people to carry out business within the airport and that those people were subject to the Nairobi City Council.

11. I have considered the application herein in light of the rival arguments by both parties. The main issue

in dispute is whether the Defendant has the mandate to levy charges and collect fees from the plaintiff's tenants and concessionaires within the aerodrome. However, at this point, it is not for me to determine who has the proper mandate to levy charges and fees for services provided at the aerodrome. That is a matter to be determined at full trial. Therefore, the main issue for determination at this point is whether the applicant is entitled to the orders sought.

12. The principles for granting a temporary injunction are well settled as enunciated in the celebrated case of **Giella vs. Cassman Brown**.

13. Firstly, the applicant must establish a prima facie case. The Plaintiff has stated its powers and functions as provided for under the Kenya Airports Authority Act. **Section 12 (3) (e)** of the **Kenya Airports Authority Act** states as follows:-

“(3)the authority shall have power to.....

.....

(e) determine, impose and levy rates, charges, dues or fees for any services performed by the Authority, or for use by any person of the facilities provided by the Authority, or for the grant to any person of a licence, permit or certificate, subject to the approval of the minister;”

The above section clearly indicates that, the Plaintiff has the powers to levy charges on its concessionaires as well as to grant them licences for use of their facilities. However, the said powers are subject to the minister's approval. The Plaintiff did not adduce any evidence, whether in form of a gazette notice or otherwise, to indicate that the said powers have been approved by the minister.

However, it is the Plaintiff's claim that in the past years they have been exclusively levying charges and collecting fees from the concessionaires, tenants and licensees in accordance with the Kenya Airports Authority Act. The said claim has not been disputed by the Defendant. The Plaintiff claims that the Defendant started demanding for payment of advertisement fees, single business permits levy and licence fees for all tenants and concessionaires within the aerodromes of the two airports as from July 2010. This raises an eyebrow as to why the Defendant did not perform the aforesaid regulatory functions in the past years. In the circumstances, I am inclined to find that the Plaintiff has established a prima facie case.

14. Secondly, the applicant must demonstrate that it will suffer irreparable loss that cannot be compensated for by way of damages. The Plaintiff has stated that due to the threatened arrests, intimidations, harassments and demand notices issued by the Defendant, a state of anxiety, uncertainty and insecurity has been created at the airport. Indeed, from the records, it is clear that the concessionaires have been agitated by the state of affairs arising from the Defendant's demand notices and demand of payments for licences. The said state of affairs, if not contained, will obviously lead to a disorderly conduct of business within the aerodromes. The same cannot be compensated for by way of damages.

15. Finally, if I was in doubt, the balance of convenience would tilt in favour of the applicant as a result of the foregoing.

16. In the upshot, the Notice of Motion dated **11th June 2012** is hereby allowed with costs to the Plaintiff/Applicant.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 8TH DAY OF OCTOBER 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Moya for the Plaintiff/Applicant

Okoth for the Defendant/Respondent

Teresia – Court Clerk