



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC NO. 530 OF 2017**

**AMS PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....DEFENDANT**

**RULING**

**Background**

1. The Plaintiff is the registered owner of LR No. 209/12221 at South C area of Nairobi. The Plaintiff designed a residential estate to be known as Five Star Estate Phase II comprising of 228 units. As the estate was to be put up within the vicinity of Wilson Airport, the Plaintiff notified the Defendant of its intention to build the estate.
2. The Defendant approved construction of 168 units but declined to approve 60 units on the ground that if the 60 units were built they would fall on take-off funnel of Runway 25/07 which is supposed to be obstacle free.
3. Following the Defendant's refusal to permit construction of 60 units, there were attempts to negotiate a settlement which included an offer of an alternative plot to the Plaintiff or compensation.

The negotiations however did not bear fruit forcing the Plaintiff to file a suit against the Defendant in which the Plaintiff seeks an order to compel the Defendant to compensate the Plaintiff for the unused parcel of land comprised in title LR NO. 209/12221 where the Defendant would have put up 60 units and for determination of compensation payable by the Defendant to the Plaintiff.

**Preliminary Objection**

4. On 21<sup>st</sup> November 2018, the Defendant filed a Notice of Preliminary Objection in which it raised the following grounds:-
  1. That this suit is premature and in violation of the provisions of Section 34 (a) of the Kenya Airports Authority Act Cap 3 of 1991;
  2. That this suit is statute barred by virtue of the provisions of Section 34 (b) of the Kenya Airports Authority Act Cap 3 of 1991;
  3. That the jurisdiction of this Honourable Court has not been properly invoked in view of the provisions of Section 33 of the Kenya Airports Authority Act Cap 3 of 1991;
  4. That in view of the foregoing, this suit is incompetent, bad in law and an abuse of the Court process.
5. The parties filed skeletal submissions and their advocates presented their respective positions on the issues during the hearing.

**Defendant's arguments**

6. The Defendant's Counsel argued that the Plaintiff's suit was filed contrary to Section 34 (a) of the Kenya Airports Authority Act Cap 3 of 1991 (KAA Act). Section 34 (a) of the KAA Act provides as follows:-

“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—

*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.*

7. The Defendant's Counsel argued that as there was no notice issued pursuant to the provisions of Section 34 (a) of the KAA Act, the suit is premature.

8. The Defendant's Counsel also argued that the Plaintiff's suit is statute barred by virtue of the provisions of Section 34 (b) of the KAA Act. Section 34 (b) of the KAA Act provides as follows:-

*“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.”*

9. Lastly, the Defendant's Counsel argued that the Plaintiff did not properly invoke the jurisdiction of the Court. The Defendant argued that the Plaintiff did not comply with the provisions of Section 33 of the KAA Act. Section 33 (1) of the KAA 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 therefore 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.”*

10. The Defendant contends that the Plaintiff's claim as filed is for compensation and as per the provisions of Section 33 (1) of the KAA Act, the Plaintiff should not have filed this suit. The Plaintiff should have pursued compensation and if there would have been no agreement, then the matter would have been determined by a single arbitrator appointed by the Chief Justice.

### **Plaintiff's argument**

11. The Plaintiff's Counsel argued that the Preliminary Objection raised by the Defendant does not meet the threshold set out in the case of ***Mukisa Biscuit Manufacturing Limited Vs West End Distributors Limited [1968] EA 697***. The Plaintiff further argued that it issued a notice which met all the requirement of Section 34 of the KAA Act.

12. On the issue of limitation, the Plaintiff argued that its suit is not statute barred in that refusal by the Defendant to allow it to construct 60 units is a continuing act and that the filing of this suit is therefore not statute barred and further that the suit as filed is not for compensation *per se* as it is also seeking for a declaration.

### **Analysis**

13. I have considered the arguments raised by the Defendant as well as the arguments raised by the Plaintiff in both their submissions and during the hearing of the Preliminary Objection. The issues which emerge for determination are firstly whether the Preliminary Objection is properly raised. In the case of ***Mukisa Biscuit Manufacturing Limited*** (supra) a Preliminary Objection was defined as follows:-

*“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 facts pleaded by the other side are correct. If cannot be raised, if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

14. In the instant case, the issue of limitation and jurisdiction have been raised. These are pure points of law which strictly fall under issues which can be raised as preliminary points. What may not amount to a Preliminary Objection in the strict sense is whether a notice was issued to the managing director before the suit was filed as this will inevitably require ascertainment of facts. I therefore find that the Preliminary Objection has grounds upon which the same can be entertained.

15. Secondly, this Court has to determine whether the jurisdiction of this Court has been properly invoked. It is clear from the suit filed by the Plaintiff that its contention is that as it was not allowed to construct 60 units comprised in the land held by it, and as a result it has suffered loss for which it is seeking compensation. Section 33 (1) of the KAA Act provides that where any person suffers damage as a result of an action by the Kenya Airports Authority no suit shall be filed but the person who has suffered damage shall be entitled to compensation as may be agreed between him and the Kenya Airports Authority or in case of failure to agree, the matter will be determined by a single arbitrator to be appointed by the Chief Justice.

16. I have seen correspondence in the file showing that there were attempts by the Defendant and the Plaintiff to agree on compensation. These attempts did not mature. By virtue of Section 33 (1) of the KAA Act, the issue of compensation having not been agreed upon, then the dispute was to be determined by a single arbitrator appointed by the Chief Justice.

It is therefore clear that this Court lacks jurisdiction to entertain a claim for compensation.

17. In the case of ***E. Torgbor Vs Ladislaus Odongo Ojuok (2015)eKLR*** the Court of Appeal quoted the holding of the Supreme Court of Kenya in ***Re The matter of the Interim Independent Electoral Commission S.C Constitutional Application No. 2 of 2011 [2011]eKLR*** and ***Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR*** where the Supreme Court held as follows:-

***“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft or interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”***

18. The KAA Act under Section 33 (1) clearly provides for a mechanism through which any dispute as to compensation is to be addressed. It was therefore not open to the Plaintiff to file this suit when there are clear ways of handling the dispute. In ***World Duty Free Company Ltd – VS- Kenya Airports Authority [2012]eKLR*** Justice Mabeya had this to say:-

***“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 Section 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.”***

***“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.”***

19. Courts have stated time and again that where a statute provides for a mechanism of resolving disputes, that procedure should be followed and if a party does not follow the procedure but instead files a suit as in the present case, the suit is clearly for striking out. See ***Wilson Mutegi Nyaga & 2 Others VS County Public Service Board, Kitui County & 2 Others [2016]eKLR***.

20. The third issue to be determined is whether this suit is statute barred. Section 34 (b) of the KAA Act provides that no action shall lie or be instituted against the Kenya Airports Authority unless the action is commenced within twelve (12) months next after the act complained of and in case of a continuing injury or damage, within six (6) months after the cessation thereof. In the instant case, the Defendant communicated its rejection of approval to construct vide its letter of 23<sup>rd</sup> November, 2004.

The rejection was reiterated vide its letter of 7<sup>th</sup> January, 2005. The Plaintiff ought to have instituted its suit latest by 7<sup>th</sup> January, 2005. There are correspondence in the file which show that there were attempts to negotiate a settlement. As the Defendant submits, even if it were assumed that the negotiations stopped time from running, the last correspondence from the Plaintiff was on 18<sup>th</sup> February, 2015. The Plaintiff was expected to have filed the suit by February, 2016. This suit was filed on 18<sup>th</sup> August, 2017. This was clearly out of the twelve (12) months provided.

21. The Plaintiff argued that the denial of approval to construct 60 units on its land is still going on and that therefore the injury or damage caused to it, is a continuing one. In support of its arguments, the Plaintiff cited my decision in ***Kulwant Singh Chadha Vs Kenya Airports Authority & 2 Others***. In the decision cited, Kenya Airports Authority was constructing an extension of a runway through the land owned by the Plaintiff. In dismissing the contention by Kenya Airports Authority that the Plaintiff’s suit was statute barred, I found that the trespass to the Plaintiff’s land was continuing as the construction of the runway was still going on. This is not the case in the instant case where the Plaintiff was denied approval for construction in 2004. If the Plaintiff was keen on filing a suit which did not fall under Section 33 (1) of the KAA Act then the suit should have been filed a year after 2004 or a year after 2005 when the Defendant reiterated its rejection of approval to construct 60 units which would have been on the take off funnel of Runway 25/07. Whichever way one looks at the dispute, the fact remains that this suit is statute barred.

22. The last issue for determination is whether notice was given as per the provisions of Section 34 (a) of the KAA Act. The Defendant argued that no notice was issued. The Plaintiff on the other hand argued that there was notice issued on 23<sup>rd</sup> February, 2016. I have looked at the replying affidavit sworn on 10<sup>th</sup> December, 2018 by Janakan Murugesan, a director of the Plaintiff Company. Annexed to this affidavit is a notice pursuant to Section 34 (a) of the KAA Act which was forwarded vide letter dated 23<sup>rd</sup> February, 2016. The forwarding letter was duly stamped by Defendant on 25<sup>th</sup> February, 2016.

The notice captured all what is expected to be contained in the notice issued pursuant to Section 34 (a) of the KAA Act. I therefore do not find any merit in this ground.

### **Conclusion**

23. In conclusion therefore, I find that the Preliminary Objection by the Defendant is well founded on lack of jurisdiction and limitation. I uphold the Preliminary Objection on those two grounds and proceed to strike out the Plaintiff’s suit with costs to the Defendant.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this 27<sup>th</sup> day of **June, 2019**.

**E.O.OBAGA**

**JUDGE**

In the presence of Mr. Migere for Mr. Nyaburi for the Defendant.

Court Clerk Hilda.