



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 47 OF 2020

MIGUNA MIGUNA.....PETITIONER

-VERSUS-

THE LUFTHANSA Group Operating as

LUFTHANSA GERMAN AIRLINES.....1ST RESPONDENT

AIR FRANCE.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RAYCHELLE OMAMO, THE CABINET SECRETARY,

MINISTRY OF FOREIGN AFFAIRS.....4TH RESPONDENT

CAPTAIN GILBERT M. KIBE, DIRECTOR GENERAL, KENYA CIVIL

AVIATION AUTHORITY (KCAA).....5TH RESPONDENT

ALEX GITARI, ACTING MANAGING DIRECTOR,

KENYA AIRPORTS AUTHORITY.....6TH RESPONDENT

FRED MATIANG'I CABINET SECRETARY, MINISTRY OF INTERIOR

AND COORDINATION OF NATIONAL GOVERNMENT...7TH RESPONDENT

-AND-

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....1ST INTERESTED PARTY

THE LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

RULING

1. The Petitioner, Miguna Miguna, filed a petition dated 14th February, 2020 asserting that his right to citizenship; his right to identity documents including a passport; and his right to movement, to enter, and reside anywhere in Kenya as provided for in Articles 12, 14 and 39(3) of the Constitution have been violated by 1st Respondent, Lufthansa Group operating as Lufthansa German Airlines; 2nd Respondent, Air France; 3rd Respondent, Attorney General; 4th Respondent, Raychelle Omamo, the Cabinet Secretary, Ministry of Foreign Affairs; 5th

Respondent, Captain Gilbert M. Kibe, Director General, Kenya Civil Aviation Authority (KCAA); 6th Respondent, Alex Gitari, Acting Managing Director, Kenya Airports Authority; and 7th Respondent, Fred Matiang'i Cabinet Secretary, Ministry of Interior and Co-ordination of National Government. The Kenya National Commission on Human Rights is the 1st Interested Party and the Law Society of Kenya is the 2nd Interested Party.

2. The Petitioner also complains that his right to due process of the law under Articles 47, 48 and 51(1) of the Constitution were violated. The Petitioner further avers that his right to freedom and security of the person under Article 29; right to dignity under Article 28; right to property under Article 40; socio-economic rights under Article 43; right to family under Article 45; and the rights of detained and arrested persons held in custody under Article 51 have been violated by the respondents.

3. The Petitioner prays for the following orders:

a. THAT a declaration be and is hereby issued that the action of the Respondents purporting via “red alert” to bar the entry of the Petitioner as a Kenyan citizen, revocation and confiscation of his passport and other identity documents and the declaration that he was a member of a prohibited class and a prohibited immigrant were made in violation of Articles 12, 14 (1) & (2) and 16 of the Constitution and a violation of the Petitioner’s right to citizenship including those specified in Article 39(3) of the Constitution and hence the actions are illegal and invalid.

b. THAT a declaration be and is hereby issued that the action of the Respondents purporting [to] bar the Petitioner from travelling to Kenya and any other African country, revocation and confiscation of his passport and other identity documents and the declaration that he was a member of a prohibited class and a prohibited immigrant and removal from Kenya were made in violation of Articles 47, 48 and 51(1) because they were done without due regard to the requirement of fair administrative action, access to justice and denied the Petitioner a fair hearing before a court or, another independent and impartial tribunal or body and hence invalid and therefore an abuse of office.

c. THAT an Order be and is hereby issued against the 1st and 2nd Respondents suspending their operation and landing rights in Kenya, pending their compliance with Kenya Court Orders, International Law and Fair Administrative Action law.

d. THAT a declaration be and is hereby issued that restraining the Petitioner from entering Kenya without justification and without informing him of the reasons of the “Red Alerts”, was deplorable and inhumane, and was a violation of the Petitioner’s constitutional rights, and that the purported “Red Alerts” are thus unenforceable.

e. THAT a declaration be and is hereby issued that the action of the Respondents infringe on the Petitioner’s right to dignity (Art. 28), property (Art. 40), family (Art. 45), rights of a detained person, arrested and persons held in custody (Art. 51) and all other rights that flow with the right to citizenship.

f. THAT an Order be and is hereby issued declaring and or quashing the action of the 1st and 2nd Respondents, in concert with the other Respondents, purporting to cancel the permission to enter Kenya of the Petitioner, and designation as a “Red Alert” prohibited class and a prohibited immigrant and removal from Kenya are invalid *ab initio*.

g. THAT an Order be and is hereby issued requiring the Respondents to facilitate the unconditional re-entry of the Petitioner to Kenya at a date, time, airline or other method of transportation of his appointing including by issuing him with necessary travel documents if need be.

h. THAT an Order for punitive damages for an amount to be fixed by this Court.

i. THAT the Respondents bear the costs of this Petition.

j. THAT this Honourable Court be pleased to grant such further Order or Orders as may just and appropriate.

4. The petition is supported by the affidavit sworn on the date of the petition by the Petitioner’s counsel Dr. John M. Khaminwa.

5. In response to the petition, the 3rd Respondent filed a notice of preliminary objection dated 24th February, 2020 in which it is asserted that this Court has no jurisdiction to adjudicate over disputes outside the territory of Kenya. It is further contended that the petition should be dismissed as it is premised on hearsay statements by a party other than the Petitioner and that the supporting affidavit does not set out any factual basis upon which any of the orders sought may be granted.

6. The 3rd Respondent further states that this Court does not have jurisdiction to issue prerogative orders against private parties and that the matters in issue are *res judicata* or in the alternative *sub-judice* as they were the subject of the proceedings in **Nairobi High Court Constitutional Petition No. 51 of 2018, Miguna Miguna v Dr. Fred Matiang’i & 6 others**.

7. The 3rd Respondent through submissions dated 26th October, 2020 urge that Kenyan courts cannot exercise extraterritorial jurisdiction on the basis of municipal prescriptive law. The 3rd Respondent asserts that exercise of jurisdiction over matters in foreign jurisdictions on the basis of Kenyan law would amount to infringement of the sovereignty of foreign states. This assertion is supported by reference to the decision in **Thuita Mwangi & 2 others v Republic [2015] eKLR**.

8. It is submitted that the matter is *res judicata* as the facts set out in paragraphs 10 to 14 in support of the petition were subjected to judicial

determination by the High Court. Moreover, that the Petitioner has admitted that the High Court determined the violations alleged in paragraphs 31-34 of the petition in **Nairobi High Court Constitutional Petition No. 51 of 2018, Miguna Miguna v Dr. Fred Matiang'i & 6 others**. The 3rd Respondent relies on the decisions in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** and **Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party)** in support of the assertion that the doctrine of *res judicata* bars this Court from entertaining this petition.

9. The 3rd Respondent therefore urge this Court to sustain the preliminary objection and strike out the petition with costs.

10. The 1st and 2nd respondents filed joint submissions dated 21st October, 2020 in support of the 3rd Respondent's preliminary objection. They submit that the Petitioner is in effect urging an extraterritorial application of the Constitution and the Bill of Rights as the actions complained of took place outside Kenya. Reliance is placed on the decision of the Constitutional Court of South Africa in **Kaunda v President of the Republic of South Africa 2005 (4) SA 234 (CC)** in support of the argument that the Constitution and the Bill of Rights cannot be applied extraterritorially.

11. The 1st and 2nd respondents urge this Court to find that it has no jurisdiction to adjudicate over their refusal to allow the Petitioner to board their planes in Berlin, Germany.

12. The Petitioner filed submissions dated 20th October, 2020 in opposition to the preliminary objection. On the matter of the Court's jurisdiction, the Petitioner submits that the Court has jurisdiction to hear the petition by dint of Articles 165 (d)(i) & (ii) and 259(1) of the Constitution.

13. The Petitioner submits that the substantive arguments on the form, evidence, merits, demerits and procedure underlying the petition can only be resolved through an actual trial. This argument is supported by reference to the decision in **Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR**.

14. In response to the Attorney General's claim that this petition violates the principle of *locus standi*, the Petitioner contends that the issues raised do not concern the extraterritorial application of the Constitution. It is asserted that the jurisdiction and *locus standi* of all parties and juristic corporate personalities are well-founded in the petition. The Petitioner relies on the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (K) Ltd [1989] KLR 1**.

16. It is finally submitted that the Court is only invited to determine whether it has jurisdiction to hear the claim, and any issues of fact cannot be addressed at the preliminary stage. The Petitioner therefore prays for the dismissal of the preliminary objection. Reliance is placed on the decisions in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** and **Five Forty Aviation Ltd v Lonzim Air (BVI) Ltd [2013] eKLR** in support of the assertion that there is no proper preliminary objection before this Court.

16. Upon perusal of the preliminary objection and submissions, I find that the issue raised is whether this Court has jurisdiction to determine this petition. The starting point is to observe that the High Court, in accordance with Article 165 of the Constitution, has jurisdiction under Article 23(1) to hear and determine an application for redress of, a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

17. The respondents have posed a question as to whether the rights and freedoms under the Constitution can be applied beyond the borders of Kenya and against corporate entities which are incorporated in other states. There is indeed persuasive dictum in the South African Constitutional Court case of **Kaunda & Others v President of the Republic of South Africa (CCT 23/04) [2004] ZACC 5** that the Constitution is territorially bound and has no application beyond the borders of a country. That jurisprudential position is, with respect to the respondents' counsel, not applicable to the circumstances of this case.

18. The question is whether the violations complained of by the Petitioner were indeed committed outside the jurisdiction of this Court as claimed by the Attorney General. The Petitioner's case is that the 1st and 2nd respondents did not allow him to board their flights because of "red alerts" issued by the Kenyan State. The violation of the Petitioner's rights happened as a result of the issuance of the "red alerts". Any activities that occurred outside the Kenyan jurisdiction were in compliance and furtherance of violations that had been committed in Kenya.

19. I also do not think that a Kenyan whose rights are violated in a foreign jurisdiction by the Kenyan State can be turned away from our courts on the premise that there is no constitutional remedy for such violations.

20. In the circumstances of this case I am inclined to agree with the Petitioner that there is no proper preliminary objection before this Court. In **Attorney General of the United Republic of Tanzania v African Network for Animal Welfare (ANAW) [2012] eKLR** the Appellate Division of the East African Court of Justice observed that:

"All the other so-called Preliminary Points were not at all Preliminary Points of law. Each and everyone of them involved the clash of facts, the production of evidence, and the assessment of testimony. Any such issue (depicting those features) cannot and should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on its merits – with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined; and a finding of fact then made by the Court."

21. I do not think that the 1st and 2nd respondents can escape liability if the Petitioner can establish the alleged violations and the nexus between the State of Kenya and the two respondents in the commission of the violations. The 1st and 2nd respondents can only exonerate themselves after their defences are considered alongside the Petitioner's case.

22. Another ground upon which the respondents seek to terminate the petition at this stage is that the petition is *res judicata* as the issues raised were determined by a court of competent jurisdiction in **Nairobi High Court Constitutional Petition No. 51 of 2018, Miguna Miguna v Dr. Fred Matiang'i & 6 others**.

23. The *res judicata* doctrine finds its footing in Section 7 of the Civil Procedure Act, Cap. 21 which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. The principles of the doctrine of *res judicata* have been distilled in several decided cases including **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** where the Court of Appeal held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

25. The subject of the dispute before the court is the first element to consider when determining whether a matter is *res judicata*. The question to be answered in that respect is whether the issue was directly or substantially in issue in the former suit.

26. There is no doubt that this petition discusses the same sequence of events as **Nairobi High Court Constitutional Petition No. 51 of 2018, Miguna Miguna v Dr. Fred Matiang'i & 6 others**. However, the current petition is primarily premised on the events which followed the Court's judgement in the previous petition. Therefore, the issues in the two petitions are not the same.

27. Having found that the cause of action is not the same in the two petitions, I need not consider the other elements of the doctrine of *res judicata* in order to reach the inevitable conclusion that this petition is not *res judicata*.

28. The Petitioner's case is that the Kenyan State has violated and continue to violate his constitutional rights and fundamental freedoms. That being the case, he is entitled to sue as many times as the number of the incidents of the violations. He can only stop suing the violators of his constitutional rights and fundamental freedoms when the violations cease. The doctrine of *res judicata* is not applicable in such circumstances. In stating so, I am guided by the holding of the Court of Appeal in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** that the doctrine of *res judicata* **“should only be invoked in constitutional litigation in the clearest of the cases”** and it **“must be sparingly invoked and the reasons are obvious as rights keep evolving, mutating, and assuming multifaceted dimensions.”**

29. The two issues I have determined in favour of the Petitioner are sufficient to dispose of the respondents' challenge to the jurisdiction of this Court. I consider all the other issues raised by the respondents as defences to the petition.

30. The costs for the preliminary objection will abide the outcome of the petition.

Dated, signed and delivered virtually at Nairobi this 25th day of February, 2021.

W. Korir,

Judge of the High Court