



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 318 OF 2019

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF ARTICLES 2, 10, 19, 20,24,25,27,28,47 &259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE KENYA AIRPORTS AUTHORITY ACT NO 3 OF 1991, LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2005, LAWS OF KENYA

BETWEEN

IRENE ELIZABETH WANJIKU KISANGI.....APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

ABEL GOGO.....1ST INTERESTED PARTY

NIXON RONO.....2ND INTERESTED PARTY

RULING

Introduction

1. Irene Elizabeth Wanjiku Kisangi, the *ex parte* Applicant herein (hereinafter referred to as “the Applicant”), is a Kenyan citizen, and states that she is the station manager for Fast Track Kenya Limited, the authorized general sales agent for Mozambique Airlines. She commenced the proceedings herein by way of a Chamber Summons application dated 25th October 2019 in which she was seeking for leave for the following judicial review orders:

- a) An order of Certiorari to bring to the High Court for purposes of quashing the decision of the 1st Respondent through its officers the 1st and 2nd Interested Parties made on 25th July 2019 that the Airport Movement Pass of the Applicant be confiscated without any justifiable explanation.
- b) An order of Prohibition prohibiting the 1st Respondent through its officers the 1st and 2nd Interested Parties from unilaterally making administrative decisions materially affecting its employees, to wit, the Applicant without their/her participation and involvement.
- c) An order of Mandamus compelling the 1st Respondent through its officers the 1st and 2nd Interested Parties to forthwith

release the Airport Movement Pass belonging to the Applicant unconditionally with immediate effect.

d) THAT the leave so granted do act as a stay of the 1st Respondent's actions through its officers the 1st and 2nd Interested Parties of the 25th July 2019 which led to the confiscation of the Airport Movement Pass of the Applicant.

e) The costs of this application be provided for.

2. The 1st Respondent is the Kenya Airports Authority, which is a body corporate established under section 3 of the Kenya Airports Authority Act, and whose mandate is to *inter alia* administer and manage aerodromes. The Attorney General is sued as the 2nd Respondent in his capacity as the principal legal advisor of the Government of Kenya. Abel Gogo and Nixon Gogo, 1st and 2nd Interested Parties, are joined as the relevant employees of the 1st Respondent, with the Applicant stating that the 1st Interested Party serves as the Airport Manager, and the 2nd Interested Party as a Security Officer.

3. This Court on 29th October 2019 granted leave to the Applicant to apply for the judicial review orders, and directed that the prayer in the application that such leave do act as a stay of the 1st Respondent's actions be canvassed *inter partes*, and that the Respondents and Interested Parties file their response on the said prayer. The hearing of the prayer was subsequently held on 20th December 2019, when the counsel for the parties made oral submissions. The respective cases of the parties are set out in the following sections.

The Applicant's Case.

4. The Applicant's application was supported by a Statutory Statement dated 25th October 2019, a verifying affidavit sworn by the Applicant on even date, and a further affidavit she swore on 19th December 2019. It is the Applicant's case that on 25th July 2019, the 1st Respondent through the actions of the 1st and 2nd Interested Parties confiscated her Airport Movement Pass without any justifiable reason, and she is consequently unable to access her work premises and is on the verge of losing her employment. Further, that as she was unable to attend duty, her employer being Fast Track Kenya Limited, eventually lost its agency with Mozambique Airlines.

5. The Applicant averred that the reasons given by the 1st Respondent through its officers, were that passengers on board a Mozambique Airline were deported to their point of origin being Ethiopia, on the grounds of not having proper travel documentation. Further, that the blame was levelled on the Applicant as the station manager, despite that she was on sick leave on the material day. The Applicant contended that the action was discriminatory, and the findings of the investigations conducted on the incident have not been disclosed to her, neither was she given an opportunity to be heard, nor charged with any criminal offence.

6. Therefore, that the actions of the 1st Respondent through its officers are unconstitutional and not based on any statutory instrument, *ultra vires* and unreasonable. In addition, that the Guidelines relied upon by the 1st Respondent do not supersede the Constitution and the Fair Administrative Action Act. The Applicant averred that she stands to suffer irreparable prejudice as she might be blacklisted, and will not hold a job in any airport in the country. Lastly, the Applicant sought the return of the Airport movement pass so that she could hand it over officially to the authorities.

7. The above averments were reiterated during the hearing by Ms. Kalili, the counsel for the Applicant. The counsel submitted that the 1st Respondent's actions did not meet the constitutional threshold, and that the 1st Respondent unlike the Applicant, would not suffer any prejudice if stay is granted.

The 1st Respondent's Case

8. In response, the 1st Respondent filed a Replying Affidavit sworn on 18th December 2019 by the 1st Interested Party, its Airport Manager at the Jomo Kenyatta International Airport. The Applicant's counsel sought to have this affidavit expunged on the ground that the 1st Interested Party had not brought evidence of his employment with the 1st Respondent, which application was withdrawn upon the Court pointing out to the counsel that it was the Applicant who joined the 1st Interested Party in this suit, and who has described him as the Airport Manager of the 1st Respondent. The Applicant cannot therefore approbate and reprobate in this regard.

9. The 1st Respondent's case is that the Applicant was issued with a one year security permit applied for and obtained under Mozambique Airlines, and in line with the 1st Respondent's Security Permit Issuance Policy Guidelines. Further, that Mozambique Airlines terminated the agency relationship with the Applicant's employer, Fast Track Kenya Limited owing to security incidents detailed by the Applicant, and that Fast Track Kenya consequently ceased all operations at the airport, and has no space where it can operate from as it operated from space allocated to Mozambique Airlines. The 1st Respondent further averred that the Applicant's permit was withdrawn in line with its Security Permit Issuance Policy Guidelines, a copy of which were attached. Also attached were copies of the confiscated permit issued to the Applicant and of a letter on the appointment of a new General Sales Agent by Mozambique Airlines dated 1st November 2019.

10. Mr. Njoroge, the counsel for the 1st Respondent and Interested Parties, relied on the above averments to submit that the Applicant has not demonstrated the threshold and criteria for stay for this Court to exercise its discretion in her favour, as the 1st Respondent's decision has been implemented to conclusion. This is for reasons that the permit was taken from the Applicant and the agency of her employer with Mozambique Airlines has been terminated. Therefore, that the Applicant no longer has any basis for access to restricted areas of the airport. In addition, that the Applicant had failed to disclose that her permit was only for one year and is due to expire on 31st December 2019, after which she is required to undergo fresh vetting under the 1st Respondent's Security Permit Issuance Policy Guidelines.

11. On the legal basis of the 1st Respondent's Security Permit Issuance Policy Guidelines, the counsel submitted that section 12 of the Kenya Airport Authority Act gives power to the 1st Respondent to regulate the use of its facilities and presence of airports. On the prejudice the 1st Respondent may suffer, the counsel referred the Court to the security risks identified in the said Security Permit Issuance Policy Guidelines, if there is unauthorized access to restricted areas of the airport. Reliance was in this regard placed on the decision by this Court in **Republic vs National Hospital Insurance Fund Management Fund Board ex parte Patanisho Maternity and Nursing Home (2019) eKLR.**

The Determination

12. The applicable law on whether the leave so granted should operate as a stay is Order 53 Rule 1(4) of the Civil Procedure Rules, which provides as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

The decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

13. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision and in various decisions by Kenyan Courts.

14. The main factor that is relevant is whether or not the decision or action sought to be stayed has been fully implemented, on which there are differing opinions. In **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega (2005) e KLR**, it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. A similar decision was also made in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR**. According to these decisions, it is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.

15. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

16. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.

I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. ..It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay”

17. Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**, similarly held that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be

stayed is a continuing process, the same may be stayed at any stage of the proceedings.

18. I am persuaded by the foregoing authorities, whose import is that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.

19. In the present application, the 1st Respondent has brought evidence of, and the Applicant has also admitted, that her Airport Movement Pass was confiscated by the 1st Respondent's employees, and that the agency between the Applicant's employer and Mozambique Airlines, which was the basis of the said Airport Movement Pass or permit, has also been terminated. In addition, the 1st Respondent brought evidence that the Applicant's permit is just days short of expiry. Therefore, not only is the implementation of the decision sought to be stayed complete, the stratum of the Applicant's Airport Movement Pass or permit is also non-existent, as the agency with Mozambique Airlines was the basis of the Applicant's access to the 1st Respondent's facilities under the said Airport Movement Pass. A stay in the circumstances will be in vain and will not serve any useful or lawful purpose.

20. On the prejudice that may be suffered by the Applicant, it is noted that she did not bring any evidence of action or proceedings taken by the 1st Respondent to blacklist her as alleged. It is also notable in this regard that her Airport Movement Pass or permit was only with respect to access to the apron and lounges of the airport, which are restricted areas for public security purposes. In this regard, the public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra)**, where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders. There is thus need to preserve the current *status quo* until the legality or otherwise of the 1st Respondent's proceedings and decision is established.

21. In the premises, the prayer for stay in the Applicant's Chamber Summons dated 25th October 2019 is declined. The costs of the said Chamber Summons shall be in the cause.

22. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF DECEMBER 2019

P. NYAMWEYA

JUDGE