REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

<u>PETITION NO.47 OF 2020</u>

IN THE MATTER OF ARTICLES 2, 3, 10, 12, 14 (1)-(3);

16, 19, 20(1)- (4), 21, 22, 23, 24, 28, 29, 47, 159(3), 238, 244,

245, 258 & 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF IMMINENT THREATENED CONTRAVENTION OF

FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE COSTITUTION

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO CITIZENSHIP AND ALL OTHER

ATTENDANT RIGHTS UNDER THE CONSTITUTION AND INTERNATIONAL LAW

AND

IN THE MATTER OF THE KENYA CIVIL AVIATION ACT, 2013

AND

IN THE MATTER OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION 1944

AND

IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN & PEOPLES' RIGHTS 1981

AND

IN THE MATTER OF AIR TRAVEL RED ALERTS & TRAVEL ADVISORIES

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

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,

MNISTRY OF FOREIGN AFFAIRS...4TH RESPONDENT

CAPTAIN GILBERT M. KIBE, DIRECTOR GENERAL,

KENYA CIVIL AVIATION AUTHORITY (KCCA)...................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 NATION COMMISSION

ON HUMAN RIGHTS..1ST INTERESTED PARTY

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

RULING

1. The petitioner Miguna Miguna filed the Notice of Motion dated 4th November, 2021 seeking the following orders:

> **1………spent**
>
> **2. An order be and is hereby made and directed to all the respondents herein, lifting the red alerts given by the Government of the Republic of Kenya acting through the 3rd, 4th, 5th, 6th and 7th Respondents to the 1st and 2nd respondents and/or to any other airline, preventing the said airlines from allowing the petitioner to board their aeroplanes for purposes of travelling to and entering Kenya on 16th November, 2021 or any other day.**
>
> **3. The costs of this application be provided for.**

2. The application is premised on the grounds on its face plus the supporting affidavit by Dr. John M. Khaminwa. A summary of the grounds is to the effect that the petitioner/applicant has on three (3) occasions namely 2nd February, 2018, 6th February, 2018 and 26th March, 2018 been denied entry into Kenya on instructions of the 3rd, 6th and 7th respondents. That in furtherance of this denial the said respondents issued "red alerts" making it impossible for the 1st and 2nd respondents to allow the petitioner to board their flights.

3. That the petitioner's entry into Kenya is an exercise of his right coupled with several orders and decree issued by the courts, in various mentioned cases. It is also his case that he has made arrangements to travel to Kenya arriving on 16th November, 2021.

4. In the supporting affidavit Dr. Khaminwa has reiterated the grounds in support of the application. He avers that the applicant is a Kenyan citizen by birth and is entitled to live, enter, remain and reside anywhere in Kenya by virtue of Articles 12 to 18 and 39 of the Constitution of Kenya. He depones that the action by the 3rd, 6th and 7th respondents in denying the petitioner his rights of entry into Kenya through the "red alerts" is a violation of those rights.

5. He further depones that the petition has booked an air ticket to travel from Canada via Germany and France to land in Kenya on 16th

November, 2021. He annexed a letter from the petitioner to Chief Justice (Emeritus) Dr. Willy Mutunga, Nelson Havi the President Law Society of Kenya and himself "JMK – 2". He adds that the other two will be accompanying the petitioner on his flight to Kenya. He therefore prays that the "red alerts" be lifted forthwith to enable the petitioner travel and return to Kenya on 16th November, 2021.

6. The 1st and 2nd respondents through the firm of Hamilton Harrison & Mathews filed the following grounds of opposition dated 8th November, 2021:

> 1. The High Court of Kenya does not have jurisdiction to compel the 1st and 2nd respondents to accept the petitioner as a passenger in Germany or France which are outside the territory of the Republic of Kenya and the jurisdiction of the court.
>
> 2. The petitioner has admitted that the red alerts that form the basis of the petitioner's complaint were issued by the 3rd, 4th, 5th, 6th and 7th respondents. Any order to lift the red alerts should be directed to the 3rd , 4th, 5th, 6th and 7th respondents only.

7. A replying affidavit dated 10th November, 2021 was sworn by Alexander Muteshi the Director in charge of citizenship and immigration under the Ministry of interior and co-ordination of the National Government. He avers that the allegations attributed to Lufthansa Airlines constitute hearsay statements that are inadmissible in law. He deposes that neither of the offices of the 3rd, 4th and 7th respondents had issued any so called "red alerts" to either of the 1st or 2nd respondents.

8. He further depones that pursuant to the provisions of Article 18 of the Constitution of Kenya, Parliament enacted legislation governing *inter alia* entry into and residence in Kenya prescribing the duties and rights of citizens and generally giving effect to the provisions of chapter three of the constitution of Kenya. He depones that the respondents have not denied nor do they intend to deny the petitioner/applicant entry into Kenya but intend to enforce the requirements of the law as regards re-entry into Kenya by citizens as applied to any other Kenyan citizen. The respondents have denied there being any "red alerts" as claimed by the petitioner/applicant.

9. The application was argued orally. Dr. Khaminwa for the petitioner/applicant submitted that the applicant is a Kenyan citizen living in Canada against his will. He urged that despite several orders being issued by the court the Executive has failed to comply with them and the Attorney General is not assisting them.

10. It is his submission that arrangements have been made for the petitioner to return to Kenya on 16th November, 2011. He therefore prayed for prayers Nos.1, 2 and 3 of the present application to be granted. He referred to the several decided cases on this matter.

11. Mr. Nelson Havi also appearing for the petitioner/applicant while supporting Dr. Khaminwa's submissions reiterated that several orders had been made in respect to the petitioner/applicant's rights. That the court found the actions of the 3rd, 4th and 7th respondents to the unconstitutional. Counsel referred to the decree by Justice Mwita dated 14th December, 2018 which was not complied with since the petitioner/applicant was not able to board a flight from Germany on 6th February, 2020 because or red alerts issued by the Kenya government.

12. He further submitted that the petitioner/applicant has already left Toronto for Germany where he will be joined by Dr. Mutunga Chief Justice (*Emeritus*) and Mr. Havi as he flies to Kenya. Its counsel's contention that since the Kenya government has in the replying affidavit denied issuing the red alerts it should not be opposed to the application. Relying on the case of **Tononoka Steels Limited v The Eastern and Southern African Trade & Development Bank (1999) eKLR** he submitted that the High Court has unlimited Jurisdiction on matters where foreign bodies operate in Kenya. It is his argument that the red alerts are the problem here and it's also evident that the 1st and 2nd respondents operate their aircrafts in Kenya.

13. It is his further argument that the red alerts are the problem here and it is also evident that the 1st and 2nd respondents operate their aircrafts in Kenya. He confirmed that copies of the petitioner/applicant's air tickets had been annexed and found at page 68-71 of the annextures to the supporting affidavit.

14. Dr. Khaminwa further submitted that what was being done to the petitioner/applicant was a violation of his constitutional rights and is therefore a human rights issue. That he is suffering for no fault of his.

15. Mr. Ondieki for the 1st and 2nd respondents submitted that the said respondents are not part of the dispute between the petitioner and the 3rd, 4th and 7th respondents on status and travels. He contends that if any order is to be made in respect to the petitioner's travel the same should be directed at the 3rd – 7th respondents. It is his argument that since the 3rd respondent has indicated that there are no red alerts he should make an undertaking to that effect. It is his submission that the only parties in control of the petitioner's entry to Kenya are the 3rd – 7th respondents.

16. While agreeing with the decision in the case of **Tononoka Steels Limited** (*supra*) cited by Mr. Havi on the issue of jurisdiction. Counsel submitted that the issue to board or not is not taking place in Kenya. Further, those to oversee the boarding are not in Kenya. Therefore to avoid the issue of such an order being disobeyed the said order should target the 3rd – 7th respondents.

17. Mr. Marwa for the 3rd, 4th and 7th respondents said that he was relying on the replying affidavit sworn on 10th November, 2021. He submitted that the claim is against specific individuals who are the 3rd, 4th and 7th respondents and they have denied issuing any "red alerts". He questioned the law under which the red alerts had been issued.

18. Responding to the submission that the 3rd respondent should give an undertaking on obedience of court orders counsel submitted that it is

the petitioner/applicant who should abide by the laws of the country. That if he abides they will have no problem. He therefore opposed the motion.

19. Mr. Abdikadir Osman for the 1st interested party associated himself with the submissions by his seniors. He submitted that the import of the "red alerts" has never been given to the petitioner/applicant. No reason has been given to the petitioner/applicant for their issuance. He added that no stay of execution has been issued in the appeal before the Court of Appeal.

Analysis and determination.

20. I have duly considered the Notice of Motion, the affidavits, grounds of opposition, annextures, the oral submissions cited case plus case law and find two issues falling for determination. These are:

(i) Whether this Court has jurisdiction as against the 1st and 2nd respondents.

(ii) Whether the order sought should be granted.

Whether this court has jurisdiction as against the 1st and 2nd respondents.

21. The 1st and 2nd respondents have challenged the jurisdiction of this court. They assert that by virtue of being foreign companies this court cannot compel them to accept a passenger situated in their jurisdiction in their flight.

22. The 1st and 2nd respondents' operations touch on aviation laws operating both in Kenya and their jurisdictions. Owing to the international character of aviation, the laws dealing with the issue are largely international laws. The applicable laws in this matter include the Constitution of Kenya, local and international laws dealing with carriage of passengers. In so far as international law is concerned, it need hardly be mentioned that an international agreement is binding on states that are parties to it.

23. The Kenya Constitution under Article 2(5) and (6) permits international laws and conventions ratified by Kenya to form part of Kenyan law. This Articles provides as follows:

Article 2(5) *The general rules of international law shall form part of the law of Kenya.*

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

24. Kenya with reference to the matter at hand has ratified the *Convention for the Unification of Certain Rules relating to International Carriage by Air as amended by the Hague Protocol of 1955* which bears application under Kenyan law pursuant to the cited provisions above. The 1st and 2nd respondents are also parties to this convention. Article 1 of the Convention defines the purpose of the Convention as follows:

1) This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2) For the purposes of this Convention, the expression "international carriage" means any Carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another state, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another state is not international carriage for the purposes of this Convention.

3) Carriage to be performed by several successive air earners is deemed, for the purposes of this Convention to be one undivided carriage if it has been regarded by the parties as a single operation. Whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

25. Further, Article 3 of the Convention divulges what constitutes a passenger airline relationship as follows:

1) In respect of the carriage of passengers, a ticket shall be delivered containing—

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

(2) The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage The

absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, nonetheless, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph (1)(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

26. This Convention is effected by the Carriage by Air Act No. 2 of 1993 which in its preamble states that *'An Act of Parliament to give effect to the Convention concerning international carriage by air, known as "the Warsaw Convention as amended by the Hague Protocol, 1955," to enable the rules contained in that Convention to be applied, with or without modifications, in other cases and, in particular, to non-international carriage by air; and for connected purposes.'*

27. The carriage by Air Act under Section 3 on the Convention's force of law provides that:

The provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, carriers servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in Kenya in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.

28. A reading of the above provisions makes it abundantly clear that the Convention forms part of international and Kenya law and accordingly binds all parties that ascribe to it. Accordingly it applies in this case and hence the 1st and 2nd respondents' otherwise arguments are not sustainable. Moreover a look at the documents presented in court by the petitioner is an annexed boarding ticket which is deemed as evidence of a contractual relationship between the airline and its passengers under Article 3(2) of the Convention.

29. Turning over to the commercial feature of this matter, the aspect of dealing with foreign companies operational in Kenya is not a novel issue in our court's jurisdiction. The Court of Appeal in the case of **Tononoka Steels Limited v Eastern And Southern Africa Trade And Development Bank[1999] eKLR** as relied upon by the parties on the issue of jurisdiction expressed itself as follows:

"Kenya is an important member of the international community and is therefore bound by the rules of international law. It is inconceivable that the Government of Kenya could knowingly disregard such an important rule of international law and grant PTA Bank absolute immunity from every form of legal process extending to even its commercial activities. I am entitled to assume that the Minister did not intend to break the law and that he issued the Legal Notice in complete ignorance of the law and without the benefit of competent legal advice.

In my judgment, even if PTA Bank is an international organisation entitled to immunities and privileges including immunity from suits and legal process, it is not immune from suit in respect of the subject matter of this case. In coming to this conclusion I have taken into account the intrinsic nature of the transaction as the material consideration in determining whether entering into that transaction is a commercial activity or an exercise in sovereign authority. I entertain no doubt at all that the transaction under consideration here was purely commercial and was not covered by the absolute immunity granted by the Minister under the Legal Notice."(Emphasis underlined).

30. In light of the above analysis it is plausible to come to the conclusion that this court is vested with the necessary jurisdiction contrary to the 1st and 2nd respondents' assertions.

Whether the order sought should be granted

31. The petitioner asserts that there exists a "red alert" advisory as regards his travel into the territory of Kenya. He as a result seeks to have this Court issue an order to lift the "red alert" to permit his travel into the country. The 3rd, 4th and 7th respondents on the other hand contend that the petitioner's allegations are merely hearsay. This is because the Government has not issued any red alert advisory to bar the petitioner from entering the country. The respondents have however averred that the petitioner is at liberty to enter the country as long as he complies with the laws as required of every Kenyan citizen.

32. The threshold of proving one's case as set out in the Evidence Act Cap 80 under Chapter 4 is as follows:

107. Burden of proof

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

33. The Supreme Court discussing the burden of proof in the case of **Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** opined as follows:

> ***"[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***
>
> ***[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:***
>
> ***"…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."***

34. Likewise in the case of **Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh [2021] eKLR** I noted as follows:

> ***"22. I also refer to The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:***
>
> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."***
>
> ***[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"***

35. A perusal of the petitioner's annexed documentation divulges that whereas the existence of a red alert advisory is claimed there is no evidence adduced to support this claim. The 3rd, 4th and 7th respondents in their replying affidavit have averred that the purported advisory does not exist. They have deponed that they have no intention of denying the petitioner/applicant entry into Kenya. With this averment at paragraph 9 of the replying affidavit this court being a court of law would have expected the petitioner/applicant to adduce evidence to confirm the existence of the "red alerts" or the intentions to issue such an alert by the respondents.

36. The petitioner's case is founded on the apprehension that history will repeat itself without evidence being adduced in support. The court cannot rely on speculations to grant the sought orders.

37. It is my humble finding that the matter at this stage is merely speculative. It is reasonable in a nutshell to state that the petitioner has not discharged his burden of proof as required by the law. It would consequently be arbitrary to issue the order as sought, at this stage.

38. Be that as it may, it is necessary to highlight that the 3rd, 4th and 7th respondents in exercise of their functions as state officers are bound by the national values and principles as underscored under Article 10 of the Constitution. They are in consequence mandated by the law to adhere to the set principles in the Constitution with regards to the petitioner. I do appreciate the anxiety exhibited by the petitioner following what happened to him previously. The respondents should however note that all are watching to see if they will act as per the averment at paragraph 9 of the replying affidavit as the petitioner/applicant observes the law as regards re-entry into Kenya.

39. The upshot is that the Notice of Motion was filed prematurely and without the support of the necessary evidence. It is hereby dismissed. There shall be no order as to costs.

DELIVERED ONLINE, SIGNED AND DATED THIS 12TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

Judge of The High Court