



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 185 OF 2018

**IN THE MATTER OF: ALLOEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA'S FREEDOM OF
MOVEMENT ARTICLE 39**

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF THE SOCIAL ECONOMIC RIGHT TO WORK

AND

**IN THE MATTER OF: THE ALLEGED INFRINGEMENT OF THE FREEDOM FROM DISCRIMINATION UNDER ARTICLE
27**

BETWEEN

MAXWELL MWAILONGO MWANDAWIRO.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

The Petition

1. By a petition dated 29th June, 2018 and filed herein on 28th September, 2018 the Petitioner prays for the following orders:

(i) A declaration be and is hereby issued declaring that the Petitioners' rights under Articles 24, 27, 39 and 50 (2) (a) have been infringed upon by the Respondent.

(ii) The Respondent be compelled to issue the Applicant with a Port-Pass upon submissions of the requisite application forms.

(iii) That the costs of this petition be borne by the Respondent.

(iv) Any other relief that the court may deem fit to grant.

2. The Petitioner's case is that he has been working at the Port of Mombasa for approximately over 20 years and currently he is working at Active Forwarders Limited, Mombasa County as a Documentation Officer. Due to the nature of his work, the Petitioner is required to access various offices located inside the Port including but not limited to KRA Port Operation, Kenya Bureau of Standards (KEBS), and Port Health amongst other offices, and it is therefore vital for him to have access to a Port-Pass also known as a Gate Pass (hereinafter referred to as a pass) and that despite having made several applications to the Respondent's offices for issuance of a pass, the Respondent has willingly knowingly and arbitrarily declined to grant the Petitioner with the pass without a valid reason and against the rules of natural justice and the Constitution of Kenya which guarantees right to a fair hearing, freedom of movement and access and right to equality and fair treatment.

The Response

3. The petition is opposed by the Respondent. The Respondent filed a response to the petition on 23rd October, 2018 and a Replying affidavit by **Safari Abongo**. The Respondent denies that the Petitioner has been working at the Port of Mombasa since 1993 and states that

it is not privy to the current occupation of the Petitioner at the alleged Active Forwarders Limited as stated in paragraphs 3 of the Petition and therefore makes no admission in respect thereof. In response to Paragraphs 4 of the Petition the Respondent states that it is a stranger to the allegations and puts the Petitioner to strict proof. The Respondent denies arbitrarily declining to grant the Petitioner the port pass. However, the Respondent avers that the same was denied on the basis of a routine vetting exercise that revealed the Petitioner has been the subject of several investigations of a criminal nature. The Respondent further avers that the Petitioner's right to movement and work is fettered by the Respondent's statutory mandate to protect the Port of Mombasa and the cargo therein from theft. The Respondent's case is that as a statutory body it has the power to prohibit, control or regulate access to the Port by the Petitioner and any other person vide the Kenya Port Authority Act Section 12 (2) (j). The Respondent avers that the security measure undertaken by the Respondent entails adherence to the various statutory provisions such as the East African Community Customs Management Act (EACCMA) and the Kenya Ports Authority Act as well as the International Regulations in particular the International Ship and Port Facility Security (ISPS) Code which outlines the entire Port area as a restricted area that requires controlled access. That the Respondent in upholding its security obligations issues port passes to all port employees and port users who carry out operations in the Port. Production and issuance of the port passes is controlled by the Respondent's Integrated Security System that captures particulars of all persons being issued with port passes. Accordingly, the Respondent reserves the right to decline applications for port passes in instances where the information generated by the Security System reveals a threat to the security of Port Operations by the Applicant. The Respondent avers that the Petitioner has previously made application to the Respondent for port pass on temporal and permanent basis which were declined on the basis of the Petitioner's past misconduct within the Port Premises key of which include;

(a) Theft and recovery of Container Number INKU 2612970 recovered at a private yard in Port Reitz Area.

(b) Complaint by Faima Ventures Limited for theft of the Container Number WFHU5078280.

4. Contrary to the Petitioner's allegations under Paragraph 7 and 8 of the Petition, the Respondent denies having acted arbitrary in denying the Petitioner access to the Port of Mombasa. The Respondent states that its decision was informed by factual acts of misconduct by the Petitioner that are well within the knowledge of the Petitioner. In reference to the Petition paragraph 9 the Respondent avers that there have been no discrimination against the Petitioner on the issue of port pass, stating that the criteria used in denying applications for access to the Port of Mombasa is objectively aimed at protecting the Port from all insecurities and is governed by the existing regulatory frameworks of the Port.

5. The Respondent further states that the rationale of denying the Petitioner access to the Port of Mombasa has previously been addressed by the Commission on Administration of Justice after the Petitioner made a complaint in 2014. The complaint was adjudicated upon and the Respondent availed to the commission two complaints against the Petitioner that had previously led to criminal investigations in 2008 and 2009. That previous complaints against the Petitioner emanated from both the Respondent and port users whose cargo were stolen from the Port of Mombasa.

6. The Respondent further states that the Petitioner has failed to set out his complaint on infringement of his fundamental rights with reasonable degree of precision and has failed to outline the manner in which his rights have allegedly been infringed. The petition does not define the issues in controversy before the Court. It is averred that the Pleadings do not provide facts on the existence of rights infringed by the Respondent which is contrary to Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya.

7. Submissions and Determination

Parties filed submissions which I have considered. In my view the following issues are to be determined to reach a finding herein.

(i) Whether the port pass is a private right to be granted by the Respondent at whim.

(ii) Whether the Petitioner was granted the right under Article 47.

8. The issue before the court is whether or not the port pass can be given to anybody who has a business to do in port. The Respondent operates the Kenya Ports Authority where the business of import and export of goods take place. Clearing and forwarding agents work in port round the clock. The port is the major source of livelihood for most residents of Mombasa. Those whose business have anything to do with the port depend on access thereto for livelihood.

9. It is not disputed that the Petitioner has been working in the port since 1993. He has done that through the company called Active Forwarders Limited, as a Documentation Officer. The general nature of his work therefore requires him to access various offices located inside the port including the Kenya Revenue Authority (KRA) port operations, Kenya Bureau of Standards (KEBS), Port Health amongst many other offices. Despite having made several applications to the Respondent's offices for issuance with a port movement/access card also known as a Port-Pass, the Respondent has refused to do that. The Respondent's refusal is informed by a fact of suspicion, that the Petitioner may have been engaged in theft activities within the port. The Respondent cited two particular instances involving alleged theft and recovery of container number INKU2612970 in 2008 and WFHU5078280 in 2009 in both of which the Respondent suspects that the Petitioner was involved. This Court has no way of knowing the involvement of the Petitioner in the alleged thefts, suffice to note that those are mere allegations. There is no evidence or record that the Petitioner was involved in the alleged theft. There is no evidence of a criminal prosecution involving the Petitioner in those alleged thefts. The Petitioner earns a living through his work in port. To deny him a port pas would amount to denial of a right to earn a living and hence would make him a destitute. This Court appreciates that the Kenya Ports Authority is a restricted security facility to which not every person would be granted access. However, denial of access must be based on some tangible possible breach of security. The alleged theft instance took place in 2008 and 2009. That it is more than 10 years ago. A proper investigation should have concluded the guilt or otherwise of the Petitioner regarding those allegations. To deny the Petitioner a right to earn a living 10 years after allegations of theft which were neither prosecuted nor proved would be contrary to the provisions of the constitution and would amount to violations including discrimination.

10. In any event, the Petitioner is entitled to Fair Administrative Action and should have been given written reasons as to why his application

for port pass was denied. Article 47 states that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

11. Article 47 has been effected through the enactment of Fair Administrative Action Act. It is noteworthy that for over ten (10) years the Respondent has denied the Petitioner a fair chance to earn a living thereby breaching his fundamental right under Article 47. It is the finding of this Court that the Respondent has breached and violated the Petitioner's rights under the constitution.

12. Arising from the foregoing, it is the finding of this Court that the Petitioner has proved the said violations of his rights and is entitled to the prayers sought in the petition as follows:

(i) A declaration be and is hereby issued declaring that the Petitioners' rights under Articles 24, 27, 39 and 50 (2) (a) have been infringed upon by the Respondent.

(ii) The Respondent be and is hereby compelled to issue the Applicant with a Port-Pass upon submission of the requisite application forms, and payments, if any.

(iii) That the costs of this petition be borne by the Respondent.

Dated, Signed and Delivered at Mombasa this 1st day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Kamau for Respondent

Ms. Njau for Petitioner

Mr. Kaunda Court Assistant