



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 12 OF 2014 (JR)

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF: ARTICLES 19, 20, 23, 27, 28, 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE KENYA CIVIL AVIATION REGULATIONS 2013

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE

EXPARTE

1. JARED ODIMO ODHIAMBO

2. GRACE NASONGO.....APPLICANTS

VERSUS

1. THE GENERAL MANAGER MOI INTERNATIONAL AIRPORT

**2. CHIEF MAGISTRATE'S COURT
MOMBASA.....RESPONDENTS**

RULING

1. In a Notice of Motion dated 30th April, 2015 and filed on the same day, the ex parte Applicant sought –
2. An order for certiorari to remove to this court and quash the decision by the First Respondent dated 12th and 13th day of March, 2014 preventing the applicants from entering Moi International Airport Mombasa, and
3. An order of prohibition do issue prohibiting the Respondents or any person acting on their behalf or behest from prosecuting criminal cases Number 213 of 2014 and 214 of 2014 enforcing the decision by

the First Respondent made on the 12th and 13th day of March, 2014.

4. Costs of the application

5. The application was premised upon the grounds on the face thereof, and the Affidavit Verifying the Facts sworn by the First Applicant.

6. The Applicants' case is that they were employees of Automated Parking Systems, and were assigned to the Moi International Airport Mombasa as Toll Operators. In the course of their employment, they had altercations with some members of the political class from the Coast Region who in turn laid complaints with the management of the First Respondent. According to the First Applicant's Affidavit Verifying the Facts, the Applicants were barred from entering the First Respondent's premises at the pain of being arrested if they resisted. The First Applicant was arrested and detained at the Airport Police Station and was charged at Mombasa Chief Magistrate's Court Criminal Cases No. 209 and 214 of 2014 for disobeying an order barring him from entering the First Respondent's premises. The Second Applicant was likewise arrested and charged for the same offence in Mombasa Chief Magistrate's Court Criminal Case No. 213 of 2014 for the same offence.

7. The Applicants' say that they were not notified of their ban from entering the First Respondent's premises, and that their prosecution is ill-motivated arising from differences between the management of their employer (**Automated Parking Systems**), and that of the First Respondent; and that the court should quash their prosecution by orders of certiorari and prohibit the Respondents from prosecuting them.

8. The application was however opposed by the Attorney-General on behalf of the Respondents, that the Application is misconceived, frivolous, vexatious and an abuse of the process of the court, and that the orders sought are untenable and a nullity, and that the Applicants are authors of their own misfortunes.

DETERMINATION

9. I have considered the respective arguments for and against the Application. The Applicants are charged with the offence of **"refusing to follow a lawful instruction by an Airport operator on behalf of the authority contrary to Regulation 51(1)(b) of the Kenya Civil Aviation Regulations 2013."**

10. The origin of the Applicants' misfortune is to be found in an agreement described as a **"Licence to Install and Manage an Automated Carpark and Revenue Management System at M.I.A. (Moi International Airport) Mombasa"** between Kenya Airports Authority (the First Respondent's employer), and the Mason Services Limited (the ex parte Applicants' employer). Under the agreement as it is clear from its title, the Licensee was **inter alia** –

I. "to install, maintain and manage modern car parking facilities at the Airport with payment kiosks at the parking zones or terminal building"

II. "provide on-going customer service training for all employees working in the car parking bays."

11. It is quite apparent from the Replying Affidavit of Mr. Yatich Kangugo, the Manger Moi International Airport Mombasa that the Kenya Airports Authority (the Authority) was not satisfied with the Licencee's management under the Licence Agreement. To register its disapproval, it had sent two letters both dated 10th March, 2014 entitled – **"UNBECOMING CONDUCT OF YOUR STAFF"** and notifying the Licencee's Director/Chief Executive to remove and redeploy the Applicants away from the Airport with immediate effect, (that is 10th march, 2014), and inviting the Licencee's Director/Chief Executive for a meeting on 14th March, 2014, on the same subject.

12. Though the Licencee's Director/Chief Executive replied to the Respondent's letter and regretted the

particular incident regarding one coastal potentate and his bodyguard, the licensee declined the invitation to have a meeting with the First Respondent. The Director/Chief Executive called for independent witness statements involving the potentate and his bodyguard and expressed concern that the Licensee had lost revenue due to the First Respondent's own actions by opening a barrier for over 1 ½ hours, and allowed motor vehicles to enter and exit without paying the prerequisite parking charges. He called the First Respondent's action illegal, uncalled for, embarrassing and incomprehensible.

13. There is no reference that the Director/Chief Executive brought the incident and contents of the First Respondent's letter asking for the redeployment of the Applicants away from the Airport, or whether the Applicants were the Licensees employees who were involved with the potentate. The Applicants say in the Statutory Statement and paragraph 23 of the Affidavit of the First Applicant that he is a **“victim of the circumstances occasioned by the bad blood between the Airport Manager and their employer, and consequently their arrest and arraignment before court for the same offence was a demonstration of gross vendetta and abuse of power.”**

14. Whether or not the First Applicant in particular or the Applicants jointly refused to obey a lawful order not to enter the Moi International Airport Mombasa is a question of fact. The First Respondent's own letter of 10th March, 2014 asking for the redeployment of the Applicants was addressed, not to the Applicants but to the Applicants' employer. Even the Applicants' employer's letter of 11th March, 2014 to the First Respondent did not address the issue of removal or redeployment of the Applicants away from the Moi International Airport. The Director/Chief Executive of the Applicants employer reiterated that **“our staff are well trained in customer care and service and were at a loss how this happened given that the potentate who has and as many a time in the past used this facility and enjoyed our services.”**

15. It is thus clear that unknowing that there was **personae non grata** at the Mombasa International Airport, the Applicants walked into the hands of waiting Police Agents on instructions of the First Respondent who bundled them into the Airport Police Station, and had them charged in Mombasa Chief Magistrate's Court Criminal Cases No. 209 of 2014 and 213 of 2014 for the offence of allegedly disobeying lawful instructions given by the Airport operator on behalf of the Authority contrary to Regulation 51(1)(b) of the Kenya Civil Aviation Regulations 2013.

16. The Applicants therefore cries foul that they, in the circumstances leading to their arrest and arraignment in court, cannot receive a fair trial and pray for orders of certiorari to quash the charge sheet and prohibit their prosecution.

17. The Judicial Review order of certiorari will issue to quash a decision of a subordinate court, tribunal or body exercising quasi-judicial function, on the grounds of being **ultra vires**, lack or excess jurisdiction or for breach of the rules of natural justice.

18. There is no plea of **ultra vires**, lack or excess of jurisdiction. The plea here is that the Applicants' rights to fair hearing as guaranteed by the Constitution was breached by the First Respondent. The Constitution of Kenya 2010 is both clear and unambiguous as to what constitutes a fair trial. The attributes of a fair trial under Article 50 are a right –

- a. **to be presumed innocent until the contrary is proved;**
- b. **to be informed of the charge in sufficient detail in order to answer it.**

19. Though the First Respondent had drawn the attention of the Applicant's Director/Chief Executive, the perceived shortcomings of its staff and in particular the Applicants, there is no indication such shortcomings had been drawn or communicated to the Applicants either by their employer or the First Respondent save at the first encounter when the First Applicant was arrested, arraigned and bailed out by his employer and directed to go back and work at the same Station as the employer had found no fault on his part.

20. In the circumstances, the First Respondent had a legal duty to inform the Applicants that a

communication had been made to their employer that they should be redeployed away from the Moi International Airport Mombasa. To await for them and be bundled into court without prior knowledge of what they were charged of, was both malicious and oppressive. Malice in common acceptance means ill-will against a person, but in its legal sense, it means a wrongful act done intentionally without just cause or excuse.

21. In the circumstances, I find and hold that the Applicants were victims of a tug of war between their employer, Mason Services Limited (also referred to as Automated Parking Systems), and the First Respondent and being such pawns they deserved individual separate notices not to come to the Respondent's premises, and not to be ambushed and frog marched to court. That was a breach of the rules of natural justice enshrined both in Article 10 and 47 of the Constitution of Kenya 2010, relating to observance of the rule of law and fair administrative action.

22. In the circumstances, there shall issue an order to bring to this court, and quash by order of certiorari, the charge sheets dated 12th March, 2014 and 14th March, 2014 in Mombasa Chief Magistrate's Court Criminal Cases No. 209 and 214 of 2014 and 213 of 2014.

23. In addition, and for avoidance of doubt, there shall also issue an order of prohibition, prohibiting the First Respondent through the Kenya Police, or the Office of the Director of Public Prosecutions from prosecuting the Applicants or any of them in relation to the events described in this Ruling.

24. I also direct that any cash bail paid by the Applicants to secure their release pending trial be refunded to them forthwith.

25. In the circumstances the Notice of Motion dated 3rd April, 2014 wholly succeeds, and the Applicants shall have the costs of the application herein, if not agreed upon, to be taxed by the Taxing Officer of this court.

26. There shall be orders accordingly.

Dated, Delivered and Signed at Mombasa this 2nd day of November, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Thiongo for Applicant

No Appearance for Respondents

Mr. Silas Kaunda Court Assistant