



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO 68 OF 2014

PAUL ALALA OKOTHPETITIONER

VERSUS

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

KENYA AIRWAY LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner, an employee of Kenya Airways Limited, the Interested Party (hereafter ‘**Kenya Airways**’), has filed this matter alleging violation of his rights under Articles 27, 47 and 50 of the Constitution by the 1st respondent, the Kenya Airports Authority, (‘**KAA**’) in that KAA has withdrawn his security pass issued to him as an employee of Kenya Airways.
2. The petitioner works as a Customer Service Agent at the Airport. He was charged in January 2014 with the criminal offence of conspiracy to commit forgery. Upon his release on bail, his security pass, which had been issued by KAA, was ordered to be released to him. However, KAA officers confiscated the pass and declined to return it to him, hence this petition.
3. Upon the application of Counsel for the 1st respondent, the Interested Party was, on the 21st of February 2014, enjoined as a party to these proceedings. The petition was argued before me on 20th March 2014.
4. After the hearing, and considering that, in the circumstances in which the petitioner had been placed in by the withdrawal of the pass, it would be contrary to justice and defeat the purpose of this petition if Kenya Airways were to take steps to replace the petitioner, I directed that Kenya Airways takes no steps to terminate the petitioner’s employment or to replace him pending the judgment of this Court.

The Facts

5. By its letter dated 3rd December 2013, Kenya Airways applied for the issue of security passes for its staff, including the petitioner, from KAA, and the passes were duly issued. It is this pass that

the petitioner used in the course of his employment by Kenya Airways as a customer service agent, working at the ground operation, since his employment on 12th January 2009.

6. The petitioner was charged with the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code. The date on the charge sheet, which was annexed to the affidavit sworn **Mr. Naphtali Oseko** on behalf of the 1st respondent and marked **NO3**, indicates that the charges were laid on 30th January 2014. The petitioner had been arrested, with two others, on the 29th of January 2014. The offence was alleged to have been committed at the Jomo Kenyatta International Airport, and the case was scheduled for hearing on the 1st day of April 2014.
7. On 5th February 2014, KAA took away the pass that is a requisite to enable one access the airport buildings and, according to the petitioner, insisted that the pass would not be returned to him until the criminal case is resolved.
8. The petitioner contends that if he does not get the pass back, he was likely to lose his employment with Kenya Airways and in the likely event that he was found not guilty, he would be unable to get his employment back as his employer would have terminated his employment and replaced him.

The Petitioner's Case

9. In his petition dated 10th February 2014, the petitioner alleges that he was barred from accessing his place of work by the 1st respondent and his security pass confiscated without any justification thereby violating his rights. He claims that as an employee of Kenya Airways, he is entitled to access his workplace, and that his security pass was taken away on the basis of charges before the Kibera Court brought through the National Police Service. He contends that the charges had nothing to do with the security of the airport as they are conspiracy to commit a forgery, and that forgery of what document has not been disclosed.
10. In his submissions on behalf of the petitioner, Mr. Onguto argued that there are two conditions contained in the KAA guidelines for issuance of security pass on the basis of which the pass can be withdrawn, namely that the user has used the pass to gain access for illegal purposes, or for irregular activities within the airport. He submitted that no reason had been given for barring the petitioner from accessing his work place; that his employer has no complaint with regard to the work of the petitioner; that there must be a good reason for the denial of the pass, and being charged with a criminal offence does not deny one the right to work and access the airport.
11. Counsel argued further that KAA had admitted that there was no reason for taking away the pass, and there was therefore no reason for the petitioner to undergo a second vetting in order to be issued with a security pass.
12. The petitioner therefore seeks the following orders from the Court:
 - a. ***A declaration that the respondent's decision to withhold the petitioner's pass is a violation of the petitioner's constitutional rights.***
 - b. ***An order compelling the respondent to grant the petitioner the requisite pass to enable him discharge his employment duties.***
 - c. ***An injunctive order restraining the respondent from unnecessary and unfairly preventing the petitioner from accessing his work station.***
 - d. ***Costs of this petition be borne by the respondent.***

The 1st Respondent's Case

13. Mr. Marete for KAA relied on an affidavit sworn by **Mr. Naphtali Oseko** sworn on 26th February 2014 and written submissions dated 11th March 2014. In the said affidavit, Mr. Oseko, who is employed as an Aviation Security Supervisor by KAA, deposes that the issuance of security passes is the duty of KAA pursuant to the provisions of the **Kenya Airports Authority Act** as read with The **Civil Aviation Act No 21 of 2013**. He avers that there are specific guidelines for the issuance of security passes known as the “**Security Permit Issuance Police Guidelines**” on the basis of which KAA issues permits for access to the airport. He deposes further that the 1st respondent has no objection to the issuance of a security pass to any person, including the petitioner, but that such passes are issued in strict accordance with the security guidelines; and that in issuing the said passes, the 1st respondent is guided by the requirements of Article 238 with regard to national security.
14. According to KAA, the petitioner was arrested on 29th January 2014 and charged on 30th January 2014 with the offence of forgery suspected to have been committed at the Jomo Kenyatta International Airport. Accordingly, it was the KAA’s case that its regulation 7.8.2 allows it to subject the petitioner to vetting afresh on suspicion of involvement in criminal activities; that there must be an application by the employer for the pass, and that the employer must vouch for the employee; and a regular background check conducted to ensure that each individual still meets the criteria for issuance with the pass.
15. Mr. Marete submitted that regulation 8.1.2 requires the holder to surrender the pass if he is required to; that under regulation 8.6, which contains the condition for withdrawal of a permit, the permit will be withdrawn if the permit holder is involved in illegal, irregular or unethical conduct. Counsel submitted that while KAA recognizes the constitutional right to presumption of innocence, the fact that another agent has deemed it fit to charge the petitioner with an offence is prima facie sufficient to warrant the withdrawal of the permit; that this was justified on the basis that a question may arise whether the employer continues to vouch for the employee, in light of the continued background check, and whether the holder still continues to warrant the pass.
16. He contended therefore that the right and legal duty of KAA to the public must be weighed against the rights of the petitioner, and it would be dereliction of duty in the face of the charges against the petitioner not to conduct the background check again or to allow him unchecked unhindered use of the security pass. According to Mr. Marete, there is no process for re-issuance of a pass, and that the only way a pass can be re-issued is for the employer to re-apply afresh, and no effort had yet been made by the petitioner’s employer to apply afresh for the pass; that the responsibility for the application for the pass lies with the interested party; and that there is no other way for the petitioner to obtain the pass other than through an application to KAA by Kenya Airways.

The 2nd Respondent’s Case

17. The Attorney General did not file any response to the petition but relied on the affidavit and submissions filed by KAA. Mr. Awino submitted on behalf of the Attorney General that security passes within the security area of the airport are issued by the KAA and it has the discretion to withdraw it. He submitted further that the Court has jurisdiction to determine any dispute brought before it but should not usurp the powers of the 1st respondent, placing reliance on the decision of the Court in **Miguna Miguna vs Permanent Secretary Office of the Prime Minister [2011]eKLR**. He contended further that it was the duty of KAA to conduct its investigations on whether the petitioner should be issued with the pass or not.
18. Counsel submitted that the petitioner was required, in accordance with sections 107 and 109 of the Evidence Act, to prove the allegations against KAA; that if the evidence before the Court is that the petitioner has been out of employment because he is being vetted for allegations of involvement in criminal activities, the 1st respondent has the mandate to vet him afresh, and the orders sought should therefore not issue.

The Interested Party's Case

19. Kenya Airways filed an affidavit in reply sworn by **Lucy Muhiu**, the Head of Employee Relations, on 17th March 2014. Ms. Muhiu confirms that the petitioner's pass was confiscated by KAA, and that he needs it to gain access into the airport within which his work station is situated.
20. She avers further that Kenya Airways had no part to play in the withdrawal of the pass; that it had already played its part in signing the petitioner's form in which he applied for the issuance of the pass, and should not therefore have been enjoined in these proceedings at all.
21. Ms. Munyaka submitted on its behalf that the 1st respondent's guidelines on application for security passes at 4.1.3 and 4.1.4 do require the employer to initiate the process; that Kenya Airways had applied for a pass on behalf of the petitioner, and a pass had actually been issued. Ms. Munyaka posed the question whether the pass had been validly withdrawn, and what happens after such withdrawal. Counsel contended that the 1st respondent has admitted that there is no procedure in the guidelines on whether the pass is to be applied for afresh, withdrawn or returned; that it had proceeded on the assumption that there is a duty on the Interested Party to initiate the process of issuing a pass; and that there was no provision in the guidelines on the procedure to be followed when the pass has been taken away.
22. Counsel submitted that as the 1st respondent's argument was that it had no objection to re-issue of the security pass provided due process is followed, due process had indeed been followed and a pass issued to the petitioner. It was her submission therefore that Kenya Airways had fully discharged its duty under the guidelines. She submitted that if the 1st respondent has the mandate to withdraw passes, it also has the prerogative to advise the petitioner and the Interested Party on the action to be taken for the petitioner to get the pass back; that the interested party cannot act on its own volition to start a fresh application as it had not been advised on the withdrawal of the pass and there had been no communication whatsoever by the 1st respondent that it had withdrawn the petitioner's pass.
23. Ms. Munyaka submitted further that Kenya Airways was bound by the decision of KAA; that if KAA withdraws the petitioner's pass, then the interested party must take action to comply with such decision of the 1st respondent; and that any action that it takes in light of the withdrawn pass that may occasion loss to the petitioner is solely the responsibility of the 1st respondent. It was its view, further, that the 1st respondent had two options, to return the pass or show good reason why the pass cannot be returned and completely withdraw it, but as matters stood, it was non-committal on what it intended to do.
24. Counsel informed the Court that the petitioner had been given annual leave pro-rated for 2014 which had expired; that he was also given compassionate leave in terms of the Collective Bargaining Agreement which had also expired, and the petitioner's contract of employment was currently frustrated due to impossibility to perform on the part of the petitioner. Kenya Airways was therefore likely to take steps to fill the petitioner's position due to the current situation caused by the withdrawal of the petitioner's security pass.

Determination

25. It is the view of the Court that the determination of this matter turns on whether or not the 1st respondent was entitled to confiscate and withhold the petitioner's security pass that allows him access to the Jomo Kenyatta International Airport where he works for Kenya Airways. From the averments by the Interested Party and the submissions on its behalf, it appears to have been very accommodating of the petitioner in a bid to ensure that he sorts out his legal troubles and retains his job. It gave him leave for 2014 and then unpaid leave. It had applied for renewal of his security pass as is evident from annexure **NO2** in the affidavit of Mr. Naphtali Oseko.

26. The contention of the 1st respondent, which is supported by the Attorney General, is that as the petitioner was charged with a criminal offence, it was entitled to withdraw the security pass. Mr. Marete argued on its behalf that despite the constitutional provision that one is presumed innocent until proven guilty, KAA's duty to the public and the need to ensure security override such constitutional protections for the petitioner. The petitioner's position is that he will lose his employment with the Interested Party if his pass is not returned to him, a position confirmed by the Interested Party.
27. The basic contention by the KAA is that the pass was withdrawn as the petitioner poses a security threat. It has referred the Court to the **Kenya Airports Authority Guidelines Security Permit Issuance Policy Guidelines, 2nd Edition-January 2013**. The Guidelines are expressed to have been issued by the Managing Director, Kenya Airports Authority, with an effective date of November 2012.
28. There is no dispute that KAA has the mandate to issue permits allowing access to various parts of the Airport. The Court observes, however, that the issuance of permits or withdrawal thereof must be done in conformity with the Constitution. If anything done under the guidelines or indeed any law is inconsistent with the constitution, then, under the provisions of Article 2 of the Constitution, that act is null and void. Needless to say, no guidelines can be held up as permitting violation of a person's constitutional rights.
29. The respondents laid great emphasis on the issue of security, and the need to ensure that in these days, when there are serious security threats from terrorism, no chances can be taken with the security of the public. The Court agrees fully with these sentiments.
30. The point of disagreement with the submissions of Counsel for the 1st respondent, however, is when he argues that the petitioner's rights, particularly his right to be presumed innocent, must, on the determination of the 1st respondent, be subordinated to the duty of the 1st respondent to the public, critical though that duty is.
31. What is the situation that we are confronted with here? The petitioner has been charged with the offence of conspiracy to commit a felony and was released, according to his Counsel, on a cash bail of Kshs 50,000. This has not been disputed.
32. Section 393 of the Penal Code provides as follows;
- “Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment”.***
33. Admittedly, therefore, the petitioner is charged with a serious offence, the particulars of which were not before the Court. However, even if they were, the provisions of Article 50 with regard to a fair trial are clear:
- (2) Every accused person has the right to a fair trial, which includes the right—***
- (a) to be presumed innocent until the contrary is proved;***
34. Under Article 25, one of the rights from which no derogation is permissible is the right to fair trial. Article 25 provides that:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a)...

(b)...

(c) the right to a fair trial; ...

35. In the face of such clear constitutional provisions, it becomes difficult to see how the arguments of the 1st respondent can be sustainable. As I understand Mr. Marete, until the petitioner is proved innocent, he is not entitled to a security pass that will entitle him to access his place of work. His argument is premised on Guideline No. 7.8.1 and 7.8.2 of the KAA Guidelines which are in the following terms:

7.8.1 To make appropriate decisions KAA will cooperate and establish suitable coordination mechanisms with law enforcement agencies (CID, NIS, Military, KRA and Immigration) to ensure that undesirable persons are not issued with permits.

7.8.2 These agencies shall be fully involved in the vetting process and shall have the authority to disqualify or object, on reasonable grounds, any application for a permit on security grounds by virtue of the applicant being considered to be a threat to security or having any involvement with groups suspected of criminal activities, or other reason to indicate that the candidate is an undesirable to be allowed access to restricted areas.

36. The petitioner is charged with a criminal offence. He has not been tried yet. Though the facts of the alleged offence are not before the Court, there is no suggestion that it is such an offence as would amount to a threat to security nor is there anything to suggest that it is related to terrorism. His employer, Kenya Airways, is categorical that it has done what it was required to do for him to obtain the security pass, and has accommodated him to the extent of giving him unpaid leave in order to secure his employment.

37. The consequences of doing what the 1st respondent suggests, in effect ‘presuming the petitioner guilty’ until he is absolved of the charges by the Court, would fly in the face of our constitutional guarantees. It would have the effect of leading to a loss of employment for the petitioner, violating his right to employment and a livelihood, and thereby materially affecting his socio-economic rights under Article 43. It also clearly violates his rights under Article 25 and 50 of the Constitution. It is not in the interests of justice that the 1st respondent should be allowed to do this.

38. As this Court observed in the case of **Salim Awadh Salim v The Commissioner of Police High Court Petition No. 822 of 2008**, the threat posed by terrorism is beyond dispute, but it cannot be used as an excuse for weakening fundamental human rights enshrined in international law and in domestic Constitutions such as ours. Further, security considerations are not permissible limitations to fundamental rights and freedoms under Article 24 of the Constitution. It would be a travesty of justice and a mockery of our Constitution to allow the 1st respondent to deny the petitioner access to his place of work because it presumes him guilty of an offence for which he has been charged and is facing prosecution before a Court of law, and which nothing indicates has any connection with terrorism or poses any threat to security.

Reliefs

39. The final issue to consider is what relief to grant the petitioner in light of my findings above. **Article 23** gives this Court the jurisdiction to grant appropriate relief in redressing violations

under Article 22. These reliefs include a declaration of rights, injunctions, conservatory orders, or an order of judicial review.

40. The Court observes that the Guidelines permit, at Guideline No. 4.0.3, the issue of permits for specific zones. No evidence was presented with regard to the kind of permit that had been issued to the petitioner as an employee of the Interested Party, or the zones he has access to. It is however within the discretion of the respondent, in accordance with its Guidelines, to return the petitioner's security pass and impose such conditions as would enable the petitioner access his workplace.

41. I therefore issue the following orders:

- i. *I declare that the 1st respondent's decision to withhold the petitioner's security pass is a violation of the petitioner's constitutional rights under Articles 25, 43 and 50, of the Constitution.*
- ii. *I direct that the 1st respondent does, within the next seven (7) days from the date hereof, return or re-issue to the petitioner the requisite security pass to enable him access his place of work at the Kenya Airways offices, Jomo Kenyatta International Airport, Nairobi, to discharge his employment duties.*
- iii. *In default, the respondent to pay to the petitioner the equivalent of his salary prorated for every day during which he is not able to access his place of employment as a result of the respondent's failure to return or re-issue the security pass.*
- iv. *I order that the 1st respondent do pay to the petitioner damages equivalent to his salary for the period that the Interested Party was compelled to send the petitioner on unpaid leave.*
- v. *The 1st respondent shall bear the petitioner's costs in respect of this petition.*
- vi. *The Interested Party shall bear its own costs of the petition.*

Dated, Delivered and Signed at Nairobi this 7th day of May 2014

Mumbi Ngugi

Judge

Mr Ongoto instructed by the firm of Ongot & Co. Advocates for the petitioner

Mr. Marete instructed by the firm of Robson Harris & Co. Advocates for the 1st respondent

Mr Awino instructed by the State Law Office for the 2nd respondent

Ms Munyaka instructed by the firm of Gikera & Vadgama Advocates for interested party