

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(COMMERCIAL AND TAX DIVISION) (MILIMANI LAW COURTS)**

**PETITION NO. E025 OF 2024**

**IN THE MATTER OF: ARTICLES  
2,10,22,23,27,35,40,46,50,79,201,227,232,258 & CHAPTER 6 OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE KENYA AIRPORTS AUTHORITY ACT, CAP 395  
OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 176(1) (J) OF THE PUBLIC  
PROCUREMENT AND ASSET DISPOSAL ACT, 2015.**

**AND**

**IN THE MATTER OF: SECTION 45(2)(B) OF THE ANTI-CORRUPTION  
AND ECONOMIC CRIMES ACT AS READ WITH SECTION 48 THEREOF**

**BETWEEN**

**CAPITAL INTERNATIONAL CONCIERGE SERVICE LIMITED.....  
..... PETITIONER**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup>**

**RESPONDENT**

**CABINET SECRETARY, ROADS AND TRANSPORT.....2<sup>ND</sup>**

**RESPONDENT**

**HON ATTORNEY GENERAL.....3<sup>RD</sup>**

**RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED  
PARTY**

**RULING**

1. Before me is the Petitioner's Notice of Motion dated 22nd April 2025 seeking, in substance, a mandatory interlocutory injunction compelling the 1st Respondent, Kenya Airports Authority (KAA), to issue new and valid airport passes to the Petitioner's employees and agents within three days to facilitate performance of the concession contract.
2. The application is opposed by the 1st Respondent through Grounds of Opposition dated 9th May 2025 and Replying Affidavit sworn on 22nd May 2025. The 2nd and 3rd Respondents have also filed Grounds of Opposition, raising a jurisdictional objection, contending that the matter is contractual and ought to have been filed in the Commercial Division rather than as a constitutional petition.
3. The facts giving rise to the present application are that the Petitioner, Capital International Concierge Services Ltd, was awarded Tender No. KAA/OT/JKIA/MBD/022/2020-2021 by the 1st Respondent, Kenya Airports Authority, for provision of "Meet and Assist" services at Jomo Kenyatta International Airport. A Licence Agreement was executed on 13<sup>th</sup> July 2021 for five years, requiring the Petitioner to pay a minimum annual guarantee of Kshs.6,000,000/= a security deposit of Kshs.1,500,000/= and concession fees.
4. The Petitioner contends that despite compliance, the 1st Respondent failed to provide lounges, permitted other service providers to operate

unlawfully, and later declined to renew staff passes upon their expiry on 31<sup>st</sup> March 2025. It argues that denial of passes amounts to constructive termination and violates its constitutional rights.

5. The 1st Respondent disputes these claims, citing arrears exceeding Kshs.9.8 million, the non-exclusive nature of the licence, and its discretion under Clause 5.1(iii) to deny access for security reasons. Demand notices have been issued, including one dated 23<sup>rd</sup> April 2025, threatening distress.
6. The matter was first filed in the Constitutional and Human Rights Division in June 2024 as Petition No. E295 of 2024, before being transferred to this Division and assigned the present case number in November 2024. The Petitioner has filed several applications seeking conservatory relief; However, on 19<sup>th</sup> June 2025, the Petitioner abandoned all the other applications except the present Notice of Motion dated 22<sup>nd</sup> April 2025.
7. The Application proceeded by way of written submissions. The Petitioner filed submissions dated 20<sup>th</sup> June 2025 and a supplementary submission dated 3<sup>rd</sup> July 2025, whilst the 1<sup>st</sup> Respondent's submissions in opposition to the Petitioner's application are dated 23<sup>rd</sup> June 2025.
8. In considering the present application, the Court will also take into account the submissions dated 23<sup>rd</sup> September 2024, by the Attorney General in support of its Preliminary Objection dated 3<sup>rd</sup> July 2024.

### **Determination and Analysis**

9. I have carefully considered the Notice of Motion dated 22<sup>nd</sup> April 2025, the affidavits filed in support and in opposition, the Grounds of Opposition, and the rival submissions of counsel. I have also borne in

mind the constitutional and statutory provisions cited, as well as the authorities relied upon by both parties. Based on the submissions, I find the following issues to be arising for determination: -

- (i) whether the application introduces matters outside the scope of the petition;
- (ii) whether the Petitioner has satisfied the threshold for grant of a mandatory injunction;

**Whether the application introduces matters outside the scope of the petition;**

10. The application before Court is the one dated 22<sup>nd</sup> April 2025 and seeks interlocutory relief in the nature of a mandatory injunction directing the 1<sup>st</sup> Respondent to issue airport passes to the Petitioner's employees pending the hearing and determination of the Petition.
11. The 1<sup>st</sup> Respondent contends that the prayer for the issuance of airport passes sought on the application is new and was not pleaded in the petition, and therefore not properly anchored. According to the 1<sup>st</sup> Respondent, the instant application is a veiled attempt by the Applicant to amend the petition through means not recognized in law. Citing, among others, the decision in the case of **Institute for Social Accountability v Parliament of Kenya [2014] eKLR**, the 1<sup>st</sup> Respondent asserted that attempts to smuggle substantive claims not pleaded in the primary suit through interlocutory applications ought not to be permitted.
12. The Petitioner, on its part, argued that the question of issuance of "airport passes" to its staff is integral to the performance of the concession contract and their withdrawal amounts to constructive termination.

13. Having considered the two rival submissions, I note that evidence on record demonstrates that the 1<sup>st</sup> Respondent had issued passes to the Petitioner's agents and/or employees until 31<sup>st</sup> March 2025 and were thereafter withheld. In my view, while the specific prayer for passes may not have been expressly pleaded in the petition, I find that it is sufficiently connected to the substratum of the petition, that is, the alleged frustration of the concession contract, as to warrant consideration.
14. Accordingly, I find and hold that contrary to the 1<sup>st</sup> Respondent's submissions, the instant application does not introduce matters outside the scope of the petition.

**Whether the Petitioner has satisfied the threshold for grant of a mandatory injunction**

15. The law on interlocutory injunctions is settled. In **Giella v Cassman Brown [1973] EA 358**, the Court set out the tripartite test: an applicant must establish a prima facie case with a probability of success; demonstrate irreparable harm that cannot be compensated by damages; and show that the balance of convenience tilts in its favour.
16. The above principles were restated in **Nguruman Ltd v Jan Bonde Nielsen [2014] eKLR**, where the Court of Appeal emphasized that the three requirements are sequential hurdles, each to be surmounted before the next is considered. The Court in part stated as follows: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied

as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

17. In the present application, the Petitioner seeks a mandatory temporary injunction, which is a distinct and more stringent remedy. It is settled law that such relief, by its very character, is exceptional and is not granted lightly. The Court of Appeal in **Kenya Breweries Ltd v Washington Okeyo (2002) EA 109**, adopting *Halsbury's Laws of England*, held that a mandatory injunction may be granted at the interlocutory stage only in clear cases, or where special circumstances exist, and where the Court feels a high degree of assurance that the

injunction will ultimately be justified at trial. The Court stated as follows: -

“A mandatory injunction can be granted on interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court think it ought to be decided at once, or if the act done is simple and a summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

18. Similarly, in **Lucy Wangui Gachara v Minudi Okemba Lore** [2015] eKLR, the Court of Appeal reiterated that mandatory injunctions are drastic in effect and should be approached with circumspection. The Court stated as follows: -

“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.

If authority were required for the above proposition, they are countless. In ***SHEPHERD HOMES LTD V. SANDAHM [1971] 1 CH. 34, Megarry, J.*** stated:

***“[I]t is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”***

19. From the above, it is clear that before granting a mandatory injunction at the interlocutory stage, the Court must first interrogate whether the circumstances disclosed meet the higher threshold established in law, and whether the orders sought are necessary to preserve the substratum of the petition.
20. The rationale is that a mandatory injunction compels performance of an act which, if wrongly granted, may irreversibly alter the parties’ positions before trial. Courts must therefore exercise caution, ensuring that the case is unusually strong and that the risk of injustice in withholding relief outweighs the risk of granting it prematurely. As Megarry J observed in *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 34, “the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought to enforce a contractual obligation.”
21. On prima facie case, the Petitioner contends that it was the successful bidder in Tender No. KAA/OT/JKIA/MBD/022/2020-2021 executed a five-year concession contract dated 13th July 2021, and was issued passes until 31st March 2025. It argues that refusal to

renew passes amounts to constructive termination of the contract and undermines rights under Articles 27 (equality), 47 (fair administrative action), and 227 (fair procurement). It asserted that the Review Board and High Court have previously affirmed the validity of its contract.

22. The Respondent, on the other hand, argued that the licence was non-exclusive, the Petitioner delayed commencement of operations until December 2023, and arrears exceeding Kshs. 9.8Million remain unpaid. Clause 5.1(iii) expressly reserves discretion to deny access for security reasons.
23. Upon weighing of the parties' respective positions, I find that the Petitioner has shown an arguable right arising from a valid contract and prior issuance of passes. The Respondents' allegations of breach, while serious, remain contested matters for trial. Accordingly, the Court finds that the Petitioner has disclosed the existence of a prima facie case at this stage.
24. Regarding irreparable harm, I agree with the Petitioner's submissions that without passes, it cannot access JKIA to perform its contractual obligations. Its business is paralysed, employees are locked out, and reputation and clientele are lost. Monetary damages cannot adequately compensate for the disruption of operations and erosion of goodwill.
25. While financial loss is quantifiable, the inability to perform a subsisting public contract and the loss of market presence constitute harm beyond mere monetary compensation. The prejudice to reputation, continuity, and constitutional rights is, in my considered view, irreparable in nature.

26. Further, I find merit in the Petitioner's submissions that the refusal to renew passes effectively terminates the contract before trial, thereby undermining the substratum of the Petition. On the other hand, the act sought—renewal of passes—is administratively simple and reversible. This presents the kind of special circumstance envisaged in *Kenya Breweries v Okeyo* (supra).
27. Finally, the balance of convenience favours preserving the contract until trial. Public interest lies in upholding procurement integrity and preventing constructive termination of a valid concession. Security concerns raised by the 1<sup>st</sup> Respondent can, in my view, be addressed through compliance with the International Civil Aviation Organization (ICAO) clearance procedures, which remain within the 1<sup>st</sup> Respondent's mandate.
28. The upshot of the foregoing is that the Court is convinced that the Petitioner has satisfied the higher threshold for interim mandatory injunctions. Accordingly:
- i. The Notice of Motion dated 22<sup>nd</sup> April 2025 is hereby allowed.
  - ii. The 1<sup>st</sup> Respondent, Kenya Airports Authority, is hereby directed to forthwith issue new and valid airport passes to the Petitioner's employees and agents within three (3) days of this order, subject to compliance with applicable security clearance procedures.
  - iii. Costs of the application shall be in the cause.
29. It is so ordered.

**SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS  
19<sup>TH</sup> JANUARY 2026**



**ADO MOSES**  
**JUDGE**

**In the presence of: -**

*C/A - Moses*

Ombwayo.....for the Applicant

Mulili..... for the Respondent

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