



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1012 OF 2013.**

**MULWA MSANIFU KOMBO ..... CLAIMANT**

**VERSUS**

**KENYA AIRWAYS ..... RESPONDENT**

**RULING**

1. The claimant/applicant filed a Notice of Motion dated 4<sup>th</sup> July 2013 under section 3, 4, and 12 of the Industrial Court Act, section 17, 18, 25, 35, 51 and 87 of the Employment Act, Rule 16 and 17 of the Industrial Court (Procedure) Rules seeking for others that a temporary injunction do issue restraining the respondent from terminating his employment, causing him to hand over any property of the respondent, payment of his salaries pending the hearing and determination of the application. Also seeking to compel the respondent to give an explanation as to why his staff pass has been confiscated by Kenya Airports Authority (KAA) and to authorise KAA to release his staff pass to enable him access his place of work.
2. The respondent filed a Replying Affidavit sworn by Kennedy Mulunda and dated 24<sup>th</sup> July 2013.
3. The application is supported by the annexed affidavit of the claimant and based on the grounds that he is the employee of the respondent and required to have a staff pass to access and exit his work station. This pass is the property of KAA but was confiscated by them on 23<sup>rd</sup> May 2013 whith the knowledge of the respondent. Following this, the respondent gave the clamant an intention to terminate his employment dated 12<sup>th</sup> June 2013 where a decision was to be made on 17<sup>th</sup> June 2013 in the event that he does not get his pass, which termination being eminent he called to meet his manager who was aware of the circumstances of the confiscation of the pass. That 2 other employees of the respondent have been dismissed from service on similar grounds and circumstances as facing the claimant despite the intervention of Aviation and Airport Services Workers Union (AASWU), their Union. That a termination will cause serious financial consequences on the claimant and if not stopped, the claimant will suffer irreparable damage as he sorely depends on this job for his livelihood and to maintain his family.
4. The claimant further states that being an employee of the respondent he was stationed at the Jomo Kenyatta International Airport (JKIA) since 13<sup>th</sup> November 2006 as a Loading Agent, was promoted in 2009 and became Supervisor and in 2011 became a Turnaround coordinator. He requires a staff pass to access/exit JKIA the property of KAA and without this pass he cannot access his place of work as this was obtained pursuant to an agreement between the respondent and KAA.
5. On 17<sup>th</sup> May 2013 the claimant was intercepted at an exit by KAA officers while at his place of work where he was searched and asked to explain why he had 2 mobile phones and to prove their ownership. The claimant had one phone with his SIM card and that the other was from someone

- he was testing the WIFI overnight with the intention of buying it. After his shift ended he returned to the KAA officers and offered to bring the owner of the other phone and was asked to record a statement and the matter was handed over to the KAA private investigator. The owner of the other phone a Mr. Vicky was not available then to record his statement.
6. On 23<sup>rd</sup> May 2013 the respondent duty controller called the claimant not see the security officer but was withheld by KAA security from accessing his place of work as his pass had been withdrawn. He was to resume duty on 25<sup>th</sup> May 2013 but could not as he had no pass. On 27<sup>th</sup> May 2013 he went to KAA to enquire about his pass accompanied by the owner of the other phone, the said Mr. Vicky who was not heard and KAA officers referred him back to the respondent.
  7. On 30<sup>th</sup> May 2013, he received a notice to show cause letter noting that he was absent from work from 25<sup>th</sup> May to 28<sup>th</sup> May 2013 without informing the manager and the duty controller and without permission. A hearing was scheduled but the same did not proceed as he was informed the case had been closed but that the case was to be reviewed which created the apprehension causing him to come to court for interim orders.
  8. In submissions the claimant stated that the claimant's case has a high chance of success and thus restraining orders should be confirmed as laid down in the case of ***Giella versus Cassman Brown and Company (1973) EA 358*** as the balance of convenience tilts to his favour and the payment of costs will not be adequate in the circumstances of this case. That the respondent being aware of the circumstances surrounding the withdrawal of the claimant's pass they have an obligation to the issuance of the pass to enable the claimant access his place of work. The respondent approval is needed to get the pass from KAA.
  9. In reply, the respondent in the Replying Affidavit of Kennedy Mulunda the Manager Employee Relations-Operations stated that the respondent was aware of the claimant's case who was based at JKIA a restricted area requiring him to have KAA pass to perform his duties and that all employees based at JKIA must apply for a pass with KAA with the respondent duty being to confirm that the applicant individual is their employee who require access to restricted areas for official duties. That the discretion to issue the pass is on KAA and not with the respondent.
  10. That on 27<sup>th</sup> May 2013, the respondent was informed by KAA of the incident on 17<sup>th</sup> May 2013 involving the claimant where he had been intercepted by KAA security agents in possession of a Samsung Galaxy tablet that had not been declared nor proof of ownership of the item produced by the claimant contrary to operational regulations within his knowledge that all items in an individual's possession must be recorded before entering the airside. On this basis, KAA conducted investigations, they called the claimant to surrender his pass on 27<sup>th</sup> May 2013 and Mr. Martin Kampala the respondent security officer was summoned by KAA on the issue of ownership of the Samsung tablet found in the possession of the claimant and the withdrawal of his pass. The respondent thus came to learn that the issue was under investigation by KAA officers and hence the surrender of the pass was a requirement by KAA.
  11. That all passes are issued by KAA and they have the discretion to withdraw the same upon good grounds. As a result the claimant was out of work on 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> of May 2013 and only informed his manager about the withdrawal of his pass on 27<sup>th</sup> May 2013 via email correspondence with no prior formal communication. On 29<sup>th</sup> May 2013, the respondent commenced disciplinary action against the claimant as he was absent from duty without permission and a panel constituted for 18<sup>th</sup> June 2013. The claimant was also granted paid leave up to June 2013 to enable him obtain a security pass from KAA and after a reasonable period, on 28<sup>th</sup> June reviewed the case and granted unpaid leave up to 12<sup>th</sup> July 2013 to still pursue the issuance of a pass.
  12. That the claimant is still on unpaid leave in view of the withdrawal of his pass and his inability to carry out his duties for the respondent within the restricted area. This was to be reviewed on 15<sup>th</sup> July 2013, however the respondent got information from KAA that the pass had permanently been withdrawn following conclusion of their investigations where it was found the claimant had in his possession suspected stolen goods and he failed to verify and ascertain ownership resulting in the denial of access to restricted areas and withdrawal of the pass.
  13. That the claimant is unable to undertake his duties due to the withdrawal of his pas by KAA. That

- the respondent has no control over the issuance of the pass.
14. That the disciplinary action taken against 2 other officers is not related to the claimant's case and they are distinct. That the application in court is therefore unwarranted and should be struck out.
  15. The respondent also submitted that the application before court is premature and an abuse of the court process meant to undermine the disciplinary process of the respondent as an employer who has a right to undertake disciplinary action against any employee pursuant to the Employment Act provisions and their rules.
  16. That the claimant as an employee of the respondent based at JKIA operates in a restricted area where all personnel are required under the mandate set out in KAA Act section 39 to control the entry and exit of personnel in these areas. This control is done by the issuance of a pass called the *restricted area personnel pass* and the pass issued to the claimant was subject to KAA rules and regulations and not a pass of the respondent but as the property of the KAA.
  17. That the respondent has employees who have to apply for the pass and the same used subject to the KAA rules and it is under the mandate of KAA that these passes are issued, renewed or withdrawn. That KAA pass requirements are set out in an application *form for restricted areas personnel security pass* and further the KAA has issued a memo on *briefing for security passes/permit applicants* and that the respondent has no mandate to provide clearance for their staff to obtain their pass beyond a confirmation that the particular applicant is an employee with them and are required to work within the restricted area. That only in 4 circumstances can the respondent return to passes to KAA where;

A person ceases to be their employee;

The pass expires;

There is a duty change; or

Called to do so by KAA.

18. That in this case, there was an incident on 17<sup>th</sup> May 2013 and the claimant was stopped at the place of exit by KAA security officers and found to be in the possession of an item suspected to be stolen. The incident was only reported to the respondent on 27<sup>th</sup> May 2013 and the claimant was aware that such information should have been formally brought to the attention of the employer. As a result the claimant was unable to attend to his duties at the call centre, he was absent from duty and he was given 15 days to sought out the issue and a further unpaid leave but has failed to get his pass back.
19. That under section 44(4) of the Employment Act, the respondent was justified in taking disciplinary action against the claimant for gross misconduct as a right due to the respondent and that section 41 of the Act protects both an employee and an employer to undertake a fair labour practice and that to allow this application, it will prevent the employer from taking disciplinary action on how to deal with their employees and the application should be dismissed.
20. The conditions precedent to the grant of interim injunction are that a party must satisfy the court at the first instance that there is a good prima facie case with a probability of success, there is danger to suffer irreparable injury which cannot adequately be compensated by an award of damages and where the court is in doubt as regard the these two conditions, then apply the convenience rule. In cases of labour relations, the Court is also invited to ensure the rule of fair labour standards are applied to both parties in pursuance to the provisions of Article 41 of the Constitution as not bringing the fair labour practices into play in cases of labour relations, even where the traditional rules for granting interim injunctions apply, the point in labour peace and harmony will be lost. The court here must therefore look at the provisions of the Employment Act as well as the administrative disciplinary procedures at play in this case.
21. Questions relating to disputes of administrative disciplinary proceedings or actions pending before employers properly fall within the boundaries of this court as established in accordance with the provisions of the Constitution. The disputes relating to pending administrative disciplinary actions by employers fall within the jurisdiction of the court as provided for under section 12 of the

- Employment Act, 2007. The Act under subsection 12(3) (i) empower the court to make interim preservation orders including injunctions in cases of urgency. The possible interim orders would include the preservation of a status quo or rights and obligations in the employment relationship as may emerge in an administrative disciplinary procedure. Where the court decides to make preservative orders, the court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the court thereby become part of the administrative disciplinary process.
22. The court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly discipline or terminate the employment relationship. In ***Miguna Miguna – versus- Permanent Secretary, Office of the Prime Minister and the Attorney General (2011) eKLR*** the Court held that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. The court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective *ab initio*. In ***Muthusi and 2 others -versus- Gathogo and 2 others (1990) KLR 90*** the Court held that it would be futile for the court to involve itself in the day to day running of a union which had its own governing rules. Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly.
23. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court's intervention and, the employee has not exhausted such internal mechanisms.
24. The issue for determination is whether in the present case the applicant has met the threshold set out above to justify the court's intervention through issuance of an interim order stopping disciplinary process by the respondent against the claimant pending the hearing and determination of this cause. The claimant's case is that the procedure invoked by the respondent is unfair because the respondent has constituted a disciplinary panel that closed his case before he could be heard and, noting that the respondent should explain as to why his staff pass has been confiscated by KAA and should have it released to him to enable him access his place of work. On the other hand, The respondent's case is that the claimant's pass was issued by KAA and they are not in control of its issuance, withdrawal or cancellation their role is only to confirm that the claimant is their employee whose duty station is a restricted area and that the claimant has failed to report to work or show cause as to why he should not be disciplined for failing to be at work.
25. Even though a court will not go into the internal procedures of what the employers take their employees through in disciplinary proceedings, where this is challenged to be unfair, this becomes an invitation to court to delve into the same. I note the matter in issue here being the restricted Areas Pass issued to the claimant by a third party KAA has been withdrawn and that the claimant is now unable to access his air wing area within JKIA to attend to his duties. As a result, the respondent gave him 15 day of leave to sought out the issues as against him and KAA, this was found not to be enough and a further period was given with unpaid leave to resolve the same. I also note that annexure KM-2 in the respondent affidavit is the *application form for the restricted area personnel pass* which require an individual applicant to give information with details as to the name of employer and the duration the pass is required, upon which there is a part that is left for KAA at Part III to give final clearance and authority. At Part II, the employer is also required to give their authorisation which then as a prerequisite indicates that the first parts must be done by the applicant seeking to have the pass, details provided and the employer being required to give

- approval, authorisation or recommendations. The process must therefore start with the applicant. In this case the claimant must do his part before KAA or the employer can give their approvals.
26. In this regard, the claimant already had his Pass issued to him; this pass was withdrawn by KAA, a third party herein, they not being part of the proceedings herein. The respondent is not the one in need of the pass; rather it is the claimant who requires this pass that was taken away from him by KAA and not the respondent. This pass is needed by the claimant to access his place of work which he is unable to do. Therefore, he must resolve this issue with KAA and not the respondent.
27. The court finds that the submission of the applicant that the disciplinary process should be stopped in the interim and to compel the respondent to give him an explanation as to why his staff pass has been confiscated by KAA and or to authorise the KAA to release his staff pass to enable him go to work is a ground that does not meet the threshold set out earlier in this ruling. The other grounds advanced by the claimant for intervention by the court is that the respondent should pay his salary from July 2013 without any deductions and that he should not hand over any property belonging to the respondent being grounds and arguments that can be properly advanced and decided in the disciplinary process.
28. The disciplinary panel in which the claimant as a Unionised employee can be represented will be in a good capacity to hear and make a proper determination. The applicant has therefore failed to establish the necessary threshold for the court to order the temporary orders as prayed for. While making this finding, the court notes that throughout the pendency of the application for interim orders before the court and administrative disciplinary proceedings before the respondent, the claimant was on paid leave for 15 days, he is now on unpaid leave but still in the employment of the respondent. He has not been terminated.
29. The court draws the respondent's attention to the provisions of section 46(h) of the Employment Act, 2007;

***(h) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation***

30. Therefore an employee's initiation or proposed initiation of a responsible and founded complaint or other legal proceedings against his employer shall not constitute a fair reason for dismissal or for imposition of a penalty or adverse decision. The court finds that in view of the complex legal issues raised in this cause, the complaint leading to this cause was responsible and with good foundation. The claimant was apprehensive of what action was to be taken against him.

**Accordingly, the court makes the following orders:**

- 1. The claimant shall remain in the employment and duty of the respondent until the conclusion of the disciplinary process occasioning the commencement of this cause unless otherwise lawfully disciplined on account of substantially different and proven misconduct.**
- 2. Each party to bear their own costs of the application.**

**Ruling delivered this 23<sup>rd</sup> day of August 2013.**

**M. Mbaru**

**Judge**

**In the presence of**

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