



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 2 OF 2020

IN THE MATTER OF ARTICLE 21, 22 (1), 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOM

UNDER ARTICLE 3, 20, 23, 27 (2), (3), 35 (1) (b) and 40 (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4 (1) (b) and 4 (3) OF ACCESS TO

INFORMATION ACT NO. 31 OF 2016 LAWS OF KENYA

BETWEEN

MARGARET BASHFORTH.....PETITIONER

VERSUS

WOBURN ESTATE LIMITED.....1ST RESPONDENT

WOBURN MANAGEMENT LIMITED.....2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Gicharu Kimani Advocates for the Petitioner

Richard O Advocate for the Respondents

J U D G M E N T

The petitioner filed a request for information held by the respondent based on the following facts:

1. The petitioner is a lessee of an apartment known as apartment number 2E in Block 2, of the said “Woburn Residence Club” (hereinafter referred to as the suit property) having acquired it in May 2005.

2. The subject Lease Agreement dated 5th September, 2005 between 1st respondent and the petitioner, pertaining to the suit property herein, provides under the terms of Clause 2.2 (a) of Part B Fourth Schedule – Service Charge.

“[a] the company shall within 3 months after each computing date prepare an account showing the periodical expenditure (distinguishing between actual expenditure) for the financial period ending on that computing date and containing a fair summary of the expenditure referred to in it and upon such account being certified by the

Accountant it shall be conclusive evidence for the purpose of this Lease of all matters of fact referred to in the account and shall be binding on the company and owner except in the case of material manifest error.”

3. The petitioner who is an owner as per the above clause, avers that from 2013 to date, the respondents colluded in violation/infringement and or denied her access to information in their custody pertaining to certified accounts of service charges in total contravention of her fundamental rights enshrined under Article 27 (2) (3), 35 (b) and 40 (2) of the Constitution of Kenya, 2010.

4. The petitioner avers that the required information is to enable her make a vital decision with regard to the status of the accounts of the property.

5. The respondents have continued to refuse/or withhold the financial statement of Woburn Residence Club by denying the petitioner access to the certified accounts for service charges for the last seven (7) years, without any justifiable reason, despite the petitioner having continuously and incessantly requested for the same.

6. That the actions of the respondents are purely intended at interfering with among others her right to property and quite enjoyment thereof as the same is malicious, extraneous and in breach of her constitutional rights as outlined.

That by withholding such necessary information, the respondent is in violation of Articles 3, 20, 27, 35, 40 of the Constitution and Section 4 (1) (b) of Access to Information Act No. 31 of 2016. According to the petitioner the overarching purpose of access to information held by the respondent is to facilitate making informed decisions required in the textual of the Lease Agreement.

At the hearing of the petition, there was consensus between both counsels that the petition be disposed of by way of written submissions.

The case for the petitioner

Mr. Gicharu appearing for the petitioner submitted that the continuum withholding information on the financial accounts and statements in regard to service charge by the respondent is a violation under Article 35 of the Constitution. It is vehemently submitted that the petitioner as a lessee of an apartment known as No. 2 E in Block 2 under the respondents management herein has undisputed right to access information held by the respondent which fall within the scope of the Lease Agreement. It is further submitted that the parties have signed the Lease Agreement and the terms are familiar and any denial of information affecting the Constitutional rights of the petitioner by the respondent is not maintainable. It is submitted that therefore all other subsequent demands for service charge without executing the right to access to information infringes the fundamental rights and freedoms of the petitioner by the respondents.

In interpreting the provisions of Article 35 of the Constitution and Section 4 (1) of Access of Information Act of 2016, **Mr. Gicharu** cited and relied on the principles in **Coalition for Reforms and Democracy v Attorney General Petition No. 630 of 2014**. In **Minister of Health & Others v Treatment Action Campaign & Others {2002} 5 LRC 216**; **Tinyefuze v A. G. {1997} UGCC 3**. The principle which **Mr. Gicharu** emphasizes through these citations is that the petitioner has a right to access of information held by the respondent, hence a declaration so prayed for ought to be issued in her favour.

The respondent case

Mr. Otara appearing for the respondents submitted and took the view that all those facts and relief applied for by the petitioner are res judicata in terms of Section 7 of the Civil Procedure Act. **Mr. Otara** further submitted, on the difficulty he has with the petition, in view of the identical issues raised in **HCCC NO. 1 OF 2017** as joined and suited between the petitioner and the respondent. It is submitted further, that nothing stopped the petitioner in first making inroads on subject matter of accounts and other relevant information *insitu* the proceedings in **HCCC NO. 1 OF 2017**.

In accordance with the arguments and submissions by **Mr. Otara**, under the present Law, the general management right on contractual relationship is extractable from the obligations and terms set out in the instrument. That freedom of contract provides legal compulsion and source of relevance on enforcement. **Mr. Otara** further submitted and took issue with the motive of the petition in a matter basically construed and interpreted in lieu of the signed Lease Agreement. Largely, **Mr. Otara**, submitted and urged this Court to dismiss the petition.

Resolution

The crux of the matter in this petition is whether, there has been an infringement of the Constitutional rights of the petitioner by virtue of the respondent withholding access to information on accounts/financial statements as they relate to service charge. As a general rule while Access to Information Act recognizes a broad right of access to any information under the control of the state, or private citizen, the overarching purpose of the Act must be considered in determining, whether an exemption to that general right exist for the Court to decline the grant of that right to information. In Article 35 of the Constitution, every citizen has the right to access information held by the state and held by another person and required for the exercise or protection of another's right. The need for information is essential for a thriving young democracy like the Republic of Kenya. For the democratic process requires that the state and all its actors readily makes available true and complete information on policies and regulatory framework which have a direct impact on the fundamental rights and freedoms of the citizens.

As **James Madison** once remarked:

“a popular government without popular information or the means of acquiring it is but a prologue to a force or a tragedy or perhaps both knowledge will forever govern ignorance, and the people who mean to be their own governors, must arm

themselves with the power which knowledge gives.”

It is thus no coincidence that the demand for access to information in Kenya is also linked to that held by any other individual. The information requested in the present case is information about the nature of operations of the service charge account. It is intended argues the petitioner to give her a fair, overall picture of patterns on specifics, and accuracy which is Lease related as signed with respondent. As much as the petitioner has set out the tenor of the petition within the constitution, information relating to the position of the petitioner is thus not personal, if the language in the petition serves me right.

Incidentally, the respondents manages apartments, owned by other leaseholder besides the petitioner. There is something about some identifiable, named individual with registrable and beneficial interest rights to the apartments leased out by the 1st respondent and managed by the 2nd respondent.

Generally, speaking information relating to the service charge will consist of the kind of information disclosed in the Lease Agreement/or contract such as the terms and conditions associated with that particular leasing interest it may include quantifications, on service charge, duties and responsibilities of the lessor and lessee of the properties so occupied by each individual or entity. There is no indication that the Lease Agreement lacks the details of the information or an addendum upon which the protocols or service charge payment was to be effected between the parties to the governing agreement. It would be most unjust if every breach, infringement, error, mistake, grievance or need for a repudiation to a contract term by a party privy to such conditions, obligations and warranties was to escalate them as a constitutional petition.

There remain two additional commentaries, which I would like to mention in connection with this petition. First, there might be another acceptable manner of resolving the dispute on accounts/or financial statements on service charge which would go further in protecting the freedom and sanctity of individual contracts entered into voluntarily by legal entities and persons. Perhaps this could be achieved by setting out the unconscionable clauses in the impugned contract or agreement as a covenant signed to bind the parties to such a relationship.

In the instant petition, the petitioner, must have been a member of the bargaining party to the questionable Lease Agreement. Yet in the absence whether a commercial Court has failed to adjudicate on the issues and satisfy the parties concerned, it would be unfair, and improper to consider the grievance under the scheme in Article 35 of the Constitution and Section 4 of Access to Information Act 2016.

Second, in light of this I am not sure that the information sought to be accessed has not been a subject of litigation in **HCCC NO. 1 OF 2017** at Malindi High Court. Perhaps on the hind sight I tend to agree with the respondent Learned Counsel that the cause of action though framed as a constitutional petition is indeed res judicata within the express provisions of Section 7 of the Civil Procedure Act. It will suffice to observe that in the face of a commercial litigation on service charge dispute the demand for disclosure of accounts or other crucial financial statements would be a matter under consideration; if a party refuses or neglects to do so, the constitutional Court can decline jurisdiction to entertain the subject matter on the basis of res judicata and multiplicity of suits on the same cause of action.

Third, this petition from the onset involves a clash between competing parties to a legal contract. For obvious reasons, the petitioner and the respondents have opposing views as to which of the terms/conditions on service charge should prevail. It should also come as no surprise that the parties have markedly different conceptions of the clauses on service charge that embody that Lease Agreement. Recognizing the conflicting nature of the dispute, **HCCC NO. 1 OF 2017** was filed as an attempt to adjudicate the claim by weaving the access to information of the accounts and the terms into the Lease Agreement. This type of problem necessitated appointment of an expert within the context of the Lease Agreement.

In juxtaposition of **HCCC NO. 1 OF 2017** and the current petition, it's apparent that they are being prosecuted as separate or distinct causes of action between the petitioner and the respondents, but coincidentally the Lease Agreement which featured prominently in **HCCC NO. 1 OF 2017** set out a coherent and principled mechanism on dispute resolution arising out of any of the terms in the aforesaid agreement which clause was to be given paramountcy by each party in a given case. In effect if there was any ambiguity as to enforcement of the service charge, and as to whether, the payment is pegged to the right to disclosure on certain crucial information, the scope of that Lease Agreement becomes the reference point to unmask the rights of the parties.

As I have indicated, however this petition flies in the fact of abuse of the Court process, structured and litigated with a firm believe that a parallel interpretation model by the Court would produce a completely different result from the decision in **HCCC NO. 1 OF 2017**. It is my conceded view that if this Constitutional Court exercises jurisdiction over the petition, the closed specified reliefs in **HCCC NO. 1 OF 2017** are likely to emerge as new issues and that model considered inherently contradictory or necessary leads to inconsistent decisions on the same cause of action. Simply because, it might be easier to apply a clear, bright line rule on infringement of an Article in the Constitution, that favors one interest over another, perfectly persuades me not to agree with the petitioner.

The determination of what constitutes a right to access information under Article 35 of the Constitution and Section 4 of the Access to Information Act 2016 is an interpretive exercise, an exercise that inevitably requires a consideration of the competing values of access on personal information, its privacy and or public and or purpose usage within the meaning of the Act.

Analogously, in the present petition, the freedom to contract serves a number of specific functions, the broad and open negotiations which is finally reduced into writing is protected by Law. That freedom to enter into contracts informs and improves on the quality of commercial transactions on the sectors of society. It is fundamental that any inequitable or unconscionability clauses be governed and rooted on the scope and import of civil Law adjudication. On this last point, its expressed that the onus vested in the petitioner to discharge the burden of proof that the question on access and disclosure of information held by the respondents is inconsistent with or an infringement of her right to Article 35 of the Constitution falls below the set threshold in respect of interpretation of this same Constitution. The changing character of litigation as a Constitutional petition was to ensure the petitioner has a second bite at the cherry. The penalty rule in football to signify that a player has fouled and misconducted himself a demand is on referee to show a red card as a command that the player must leave the field immediately and must take no farther part in the game. Giving effect to this rule, in the game of football in the context of the petition there is a probable cause to issue a red card to the petitioner to stop her from abusing the Court system to free up the justice system to other needy

cases. Perhaps, time has come to deal with vexatious litigation under the guise of Access to Justice. Whether it is a right to be enforced in a legal system strangled with resources? Now all such how much is too much? A move to tighten controls by Courts on vexatious litigation. The question then arises whether the right of access to information on private contracts should be subject to exactly the same focus such as public bodies. The same may be true in other areas like financial transparency and accountability, crime statistics to epidemiological data – one of the most interesting challenges for the right of access to information in the private entities relates to the efficiency and effectiveness of those bodies and what information is at their disposal, when decisions are taken and quality of those decisions.

In the midst of all these, I find the spirit of Article 35 on Access to Information Act is critical for enabling citizens to exercise their voice, to effectively monitor and hold their government to account about decisions that affect their lives.

To that extent, I find no Constitutional substance in the petition. As a consequence, it stands dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE

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