



IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.326 OF 2013

BETWEEN

CHAMANLAL KAMANI.....1ST PETITIONER/APPLICANT

DEEPAK KAMANI.....2ND PETITIONER/APPLICANT

RASHMI KAMANI.....3RD PETITIONER/APPLICANT

AND

THE HON. ATTORNEY GENERAL..... RESPONDENT

RULING

Introduction

1. The Application before me is dated 14th July 2014 and seeks the following orders,

“(i) This Application be certified as urgent and heard ex parte and service of the same upon the Respondent be dispensed with in the first instance.

(ii) This Honourable Court do restrain the Respondent by way of a conservatory order, either by himself or by any person acting under his authority from releasing any information, documents and reports requested for by the Swiss Federal Attorney’s Office, in a Request For Legal Assistance in Criminal Matters dated June 3rd, 2014 and addressed to the Respondent, Reference No. P.P.CH-3003 Bern, MPC, LAUS pending the hearing and determination of this Application.

(iii) This Honourable Court do restrain the Respondent by way of a conservatory order, either by himself or by any person acting under his authority from releasing any information, documents and reports requested for by the Swiss Federal Attorney’s office, in a Request For Legal Assistance in Criminal Matters dated June 3rd, 2014 and addressed to the Respondent, Reference No. P.P.CH-3003 Bern, MPC, LAUS pending the hearing and determination of the Petition.

(iv) The Respondent do furnish the Petitioners with the following documents:-

- a. *An agreement dated the 8th of June 1998 between the Government of Kenya and Sound Day Corporation.*
- b. *An agreement dated the 8th of June 1998 between the Government of Kenya and Apex Finance Corporation together with the promissory notes issued by the Government of Kenya in respect of this agreement and the legal opinion of the Respondent validating the promissory notes.*
- c. *An agreement dated 12th July 2002 between the Government of Kenya and Apex Finance Corporation together with the promissory notes issued by the Government of Kenya in respect of this agreement and the legal opinion of the Respondent validating the promissory notes.*
- d. *An agreement dated 19th May 1997 between the Government of Kenya and Sound Day Corporation together with an addendum to the said agreement dated 10th June 1998 and the promissory notes issued by the Government of Kenya in respect of the said agreements and the legal opinion of the Respondent validating the promissory notes.*
- e. *An agreement dated 19th May 1997 between the Government of Kenya and Sound Day Corporation together with addendums to the said agreement dated 10th June 1998 and 14th June 2002 and the promissory notes issued by the Government of Kenya in respect of this agreement and the addendums thereto and the legal opinion of the Respondent validating the promissory notes.*
- f. *An agreement between the Government of Kenya and Sound Day Corporation dated 17th December 2003 together with the promissory notes issued by the Government of Kenya in respect of this agreement and the legal opinion of the Respondent validating the promissory notes.*
- g. *An agreement dated 4th December 2003 between the Government of Kenya and Anglo Leasing and Finance Limited together with the promissory notes issued by the Government of Kenya in respect of this agreement and the legal opinion of the Respondent validating the promissory notes.*
- h. *An agreement dated 19th November 2003 between the Government of Kenya and Infotalent Limited together with the promissory notes issued by the Government of Kenya in respect of this agreement and the legal opinion of the Respondent validating the promissory notes.*
- i. *An agreement dated 29th may 2003 between the Government of Kenya and Globetel Incorporated.*
- j. *An agreement dated 29th May 2003 between the Government of Kenya and Midland Finance and Securities Limited together with the promissory notes issued by the Government of Kenya in respect of this agreement and the legal opinion of the Respondent validating the promissory notes.*

(v) *The costs of this application be provided for; and*

(vi) This Honourable Court do grant any other order that it may deem fit in the circumstances of this matter.”

2. The Application is premised on the grounds *inter alia* that the request for mutual legal assistance by the Swiss Confederation, wherein the Petitioners/Applicants are named as accused persons, violates the provisions of **Article 156(4)(c)** of the **Constitution** and also violates the provisions of the Mutual Legal Assistance Act in the following ways;

- (i) *The allegations set out in the Request are spurious and the alleged particulars of the offence do not constitute an offence in Kenya. That the requirement of dual criminality as stipulated by Section 40 of the Mutual Legal Assistance Act, Article 46 Paragraph 21(c) of the United Nations Convention Against Corruption and Article 6 Paragraph 2(c) of the United Nations Convention Against Transnational Organised Crime and the Protocols thereto, to which Kenya is a State Party, is missing. The Request is also contrary to the provisions of Section 11(a) of the Mutual Legal Assistance Act which provides that such a request should be refused by the Respondent.*
- ii. *The Request undermines the sovereignty of the Republic of Kenya by questioning the contractual capability of the Government of Kenya. Moreover, the suggestion in the Request that the Government was an accessory to money laundering and/or complicit in contract is in complete and absolute disregard to the sovereignty of the Republic of Kenya under Article 1 of the Constitution. The Request is therefore contrary to the provisions of Section 11(f) of the Mutual Legal Assistance Act.*
- iii. *Investigations are ongoing in respect of the contracts that are the subject matter of the Request and should the Respondent act on the Request, he may interfere with the said investigation in a manner contrary to the provisions of Section 10 of the Mutual Legal Assistance Act.*
- iv. *The Request does not disclose any legal basis for it being made and is generally contrary to Section 9 of the Mutual Legal Assistance Act and Article 50 of the Constitution.*
3. The Applicants further add that the request violates the Petitioners'/ Applicants' rights to fair administrative action contrary to **Article 47** and right to fair hearing under **Article 50** of the **Constitution**.

Factual Background

4. Sometimes back, the Kenya Anti-Corruption Commission (as it was then known) requested for legal assistance from the Swiss Federal Attorney's Office in regard to payments made in Switzerland for eight security related contracts between the Government of Kenya and various corporations. Upon receipt of the request, the Swiss Federal Attorney's Office opened a criminal inquiry against the Petitioners/Applicants. On 3rd June 2014, the Swiss Federal Attorney's Office requested for mutual legal assistance in the conduct of the said criminal inquiry from Kenya's Attorney General. In that request, the Petitioners/Applicants were named as suspects in the offence of money laundering contrary to **Article 305** of the **Swiss Criminal Code**, which request the Respondent has allegedly announced, publicly, that he intends to act upon.
5. In the request, the Swiss Federal Attorney's Office specifically, and for avoidance of doubt, requested the Respondent to;
- a. Sort out all exhibits contained in the files assembled by the Attorney General or by any other prosecuting authority that will show the payment of amounts or the attribution of advantages to Kenyan public officials in the context of the conclusion of the agreements in issue, particularly the appropriate bank documentation as well as any deed of transfer of property.
- b. Transmit a copy of the minutes of any auditions carried out with any potential suspects or witnesses.
- c. Transmit a copy of all reports established by the Kenya Police Service or by any other criminal authority, which may have evidenced corrupt payments related to the agreements in issue.
- (d) Transmit a copy of any other documents likely to confirm the existence of money laundering.

It is the above requests that triggered both the Petition herein and the Application under consideration.

The Applicants' Case

6. The Applicants, in addition to the issues raised above, now contend that the request for mutual Legal assistance is defective and Mr. Mwenesi acting for them submits that the request was in violation of the requesting State's law and it was specifically not in tandem with **Article 96** of the **Swiss Statute** on limitation of time for commencement of proceedings and also that it violates the provisions of **Article 50** of the **Constitution 2010**. He claims that where certain information is required by a citizen, then the Court ought to acquiesce and grant favourable orders in that regard. He relies on the case of **George Okungu vs Chief Magistrate's Court (2014) e KLR** to support that proposition.
7. He further claims that even if the subject matter of the present Petition had attracted substantive public interest and comments, the Court must grant justice to the Applicants according to the law only and not be swayed by public opinion. In that regard, he quoted international instruments including the **UN General Assembly Resolution No. 55/25** and the **Universal Declaration of Human Rights** to argue that investigations into an offence must follow the specific laws of the State Party concerned. That in the instant case, there being an alleged breach of the laws of Swiss Confederation, then the present Application ought to be granted as prayed.

The Respondent's Case

8. The Respondent, the Attorney General, opposes the Application. He filed Grounds of Opposition 30th July 2014 where he basically states that a request for mutual legal assistance does not and cannot constitute an infringement of the Petitioner's constitutional rights as alleged in the Petition nor is it a violation of the Constitution generally or the doctrine of international judicial cooperation. He therefore claims that the Application is misconceived. He has also filed a Replying Affidavit sworn on 2nd August 2014 by Muthoni Kimani, the Senior Deputy Solicitor General in the Office of the Respondent.
9. Ms. Kimani deponed in her Affidavit that upon the request for mutual legal assistance being received by the Respondent, he executed the request and released the documents, the subjects of the Application, on 17th July 2014. She thus claims that all the prayers sought in the Application have been overtaken by events since all the documents named in it have already been released to the Government of Switzerland by the Respondent. In any event, she deposed that the Petitioners are not entitled to the documents sought because a request for mutual legal assistance is a matter between Sovereign States under public international law and individuals have no role to play at all in the entire process.
10. She further states that the Application has sought to pre-empt the criminal investigation that is being conducted by the Swiss Government and that the Applicants' rights under **Articles 47** and **50** of the **Constitution** have not been violated as alleged or at all. That compliance with a request made under the Mutual Legal Assistance Act cannot in any way amount to a violation of the Constitution since the Respondent is under an obligation to comply with the request made by the Swiss Government as a matter of legal obligation.
11. In addition, in her Submissions, Ms. Kimani stated that in order to qualify to gain access to information, the Applicants must demonstrate that they have requested for the information, given a basis for it and that the Respondent has refused to comply with that request. On the contrary, she added that the Applicants are seeking the information selfishly and improperly, in order to enable them prosecute the Petition and therefore that the right to information cannot be addressed at this stage of the proceedings since it is a live matter in the Petition. She relies on the case of **Kahindi Lekalhaile & 4 Others vs Inspector General of National Police Service & 30 Others Petition No.25 of 2013** in that regard.

12. For the above reasons, the Respondent prays that the Court should dismiss the Application with costs.

Determination

13. It is not in dispute that prayers (ii) and (iii) of the Motion before me have been spent because it is a fact that and it is uncontested that the Respondent has already acted on the request for mutual legal assistance by the Swiss Government. That being the case, there is nothing to injunct and to even attempt to address the issue would be akin to chasing the wind. I will therefore not belabor that point at all. That being so, I am left with one substantive prayer to determine, being prayer (iv). For purposes of clarity, this prayer seeks an order for the Respondent to furnish the Petitioner with certain documents. Sadly, in making that prayer, the Petitioners have failed to invoke any law which allows them access to the information sought nor have they laid any basis in the Application or in oral arguments made in Court to guide the Court in that respect.

14. Having so said, I have seen the Application before me and it is said to be premised on **Articles 21, 22, 35, 165 and 258** of the **Constitution**. For that reason, I will proceed and determine that aspect of the Application under those provisions for the reason that this Court has been enjoined by **Article 159(2) (d)** of the **Constitution** to administer justice without regard to technicalities and also because clearly, the Application seeks access to certain information held by the Respondent.

15. The right of access to information is found under the provisions of **Article 35** of the **Constitution** which states as follows;

“35(1) Every citizen has the right of access to—

a. Information held by the state: and

b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to correction or deletion of untrue or misleading information that affects the person.

(3) The state shall publish and publicise any important information affecting the nation.”

16. The importance of the right to access to information cannot be overemphasized and as the Court stated in ***Famy Care Limited vs Public Procurement Administrative Review Board & Another Petition No. 43 of 2012***;

“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”

The Court went on to state that;

“The right of access to information is also recognized in international instruments to which Kenya is party. The Declaration of Principles of Freedom of Expression in Africa adopted by the African Commission on Human and Peoples’ Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples’ Rights which provides, “Every individual shall have the right to receive information.” The Commission noted that right

of access to information held by public bodies and companies will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”

17. Similarly in *Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company & Others Petition No.278 of 2011* Mumbi Ngugi J. held thus;

“The right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution.”

Access to information is therefore fundamental to the realization of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.

18. It is also true that the High Court has held in the past that for one to enforce the right of access to information, he must establish that he has sought the information and access to such information has been denied. This principle was expressed as follows in *Nairobi Law Monthly vs Kengen (supra)*;

“Finally, in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

However, this petition succeeds to the extent that I have found that the 1st respondent (Kenya Electricity Generating Company) has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a Constitutional obligation to provide the information sought” (Emphasis added).”

19. The above, in my view, is a correct exposition of the law and in the instant case, *prima facie* it is unclear why the Petitioners failed to show that they had in fact requested for the information they now seek and the same was deliberately denied and with no reasons for such an action being given so that their right to come to Court under **Article 35** can be said to have crystallized - See also *Kahindi Lekalhaile (supra)* in that regard. That being the case, I am constrained to find that the Petitioners have jumped the gun in filing the instant Application because how then can it be said that the Respondent denied the Petitioners access to information which information they have never sought?

20. At this stage of the proceedings and having considered the matter at a *prima facie* level, I do not think that this Court, with the facts as they are, can grant the orders sought and I say so without making a determinate finding as I am yet to hear the Petition on its merits.

21. In the circumstances, it is obvious that I do not see any merit in the Application and the same is hereby dismissed with an order that costs should abide the determination of the Petition.

22. In the meantime, let the Petition be fixed for hearing on a priority basis.

23. Orders Accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 30TH DAY OF OCTOBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Mwenesi for Petitioners

Mr. Mohamed for Respondents

Order

Ruling duly delivered.

Mention on 9/12/2014 for directions.

ISAAC LENAOLA

JUDGE