



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 40 of 2012

NATIONAL ASSOCIATION FOR THE FINANCIAL INCLUSION OF THE INFORMAL SECTOR.....PETITIONER

AND

THE MINISTER OF FINANCE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, the National Association for Financial Inclusion of the Informal Sector (“NAFIIS”), is a society duly registered under the *Societies Act (Chapter 108 of the Laws of Kenya)*. It is an association of people involved in the informal, micro and small scale business sector and its purpose as its name suggests is to advocate for financial inclusion in the informal sector.

2. This case concerns the participation of NAFIIS in the formation and implementation of the Medium Small and Micro Enterprises Fund (“the Fund”) which was launched by the Minister of Finance (“the Minister”) on 14th March 2011. The purpose of the Fund is to provide loans to medium, small and micro enterprises. The government appropriated a sum of KShs. 3.8 billion to establish this revolving fund.

Petitioner’s Case

3. The petitioner seeks the following reliefs from the court in its petition dated 8th February 2012;

(a) *A declaration that the fundamental right to participation and the right to information of the person as protected and envisaged by Articles 10(2)(a), 33, 46 of the Constitution is being violated against the informal.*

(b) *A mandatory injunction directing the 1st respondent to withhold the release of any further money for the informal sector until a meeting comprising the Petitioner (NAFIIS), the three banks ie Equity, K-Rep and Co-operative Bank and the Treasury Small and Medium Enterprise Fund Managers is held.*

(c) *A mandatory injunction directing the Treasury to reconstitute a permanent liaison office that coordinates the affairs of the informal sector with the Ministry of Finance as initially constituted.*

(d) *Any further orders, directions, declarations and remedies as this Honourable Court deems fit and just in the circumstances.*

4. The petition is supported by the affidavit of Nelson Ng’ang’a, its national secretary, sworn on 8th February 2012 and a further affidavit sworn on 28th September 2012. Counsel for the petitioner, Mr Mwendwa, relied on the written submissions dated 6th June 2012 and 26th September 2012.

5. The petitioner’s case is that it was involved in activities leading to the setting up of the Fund and that the Minister together with other stakeholders proposed a structural framework for engagement with stakeholders. By a letter dated 4th April 2011, the Informal Sector Co-ordinator at the Ministry of Finance (“the Treasury”) wrote to the Registrar of Societies recommending the registration of NAFIIS following a National Financial Inclusion Workshop held in November 2010. NAFIIS was duly registered on 5th April 2011.

6. Thereafter, it is alleged, various meetings were held between NAFIIS and the Treasury to chart the way forward and it was agreed that there be a tri-partite relationship to devolve these funds. This relationship was to comprise NAFIIS as representatives of the informal sector, the Treasury and commercial banks engaged in disbursement of the funds, that is, Equity Bank, Cooperative Bank and K-rep Bank.

7. According to NAFIIS, it was agreed that the money was to be distributed by the three banks to groups which the representatives of the informal sector being represented by the petitioner herein would approve. The petitioner alleges that the Minister directed that the money would be lent at an interest rate of 8 percent per annum and that the interest charged would be for the balance that remains unpaid for and not the amount loaned.

8. The petitioner avers that upon the disbursement of a total of Kshs.900,000,000/00 of the Funds, the banks have failed to distinguish this kind of funds from their ordinary commercial loan products. The money is loaned at the normal interest rates and the repayment period has been flouted together with other stipulations in the disbursement of funds.

9. NAFIIS states that a liaison office, managed by the Co-ordinator of the Informal Sector, was created within the Treasury to be a link between the three banks, informal sector represented by the petitioner and the Treasury. The office was subsequently abolished and as such NAFIIS also complains that its right to participate in national activities enshrined

in **Article 10(2)** of the Constitution has been violated by the closure of its liaison office within the Treasury.

10. The petitioner also claims that the respondents' failure to act on their mandate and responsibilities as enumerated in this petition and in other legislation led to chaos in the manner the Fund is being utilised by the three banks. The petitioners complain that there is embezzlement of funds, chaos and confusion in the informal sector and unjust enrichment of banks which has resulted in the stagnation economic growth due to lack of participation of the informal sector and poverty.

Respondents' Case

11. The respondents oppose the petition and have filed a replying affidavit sworn on 20th April 2012 by George Omino, the Deputy Director in the Economic Affairs Department in the Ministry of Finance. In support of their case their counsel, Mr Wamosta, relied on the written submissions dated 9th October 2012. The Ministry denies the allegation made by NAFIIS.

12. Mr George Omino deposes that the Treasury developed implementation structures for the Fund as well as the criteria for bank selection. The Treasury invited bids from banks which met the criteria developed to partner in disbursing the funds to the informal sector.

13. After evaluation of bids from several banks; Cooperative Bank of Kenya Ltd, Equity Bank Limited and K-Rep Bank Limited were selected to aid the government in disbursing the funds out of the Fund to the informal sector. Thereafter the banks entered into credit facility agreements with the Treasury to provide how they would receive the funds and subsequently disburse them to the informal sector.

14. It is the position of the Treasury that it has not made any representation to NAFIIS or any other party to the effect that informal sector would access the funds through associations other than qualified institutions as the said funds were to be disbursed in accordance with implementation structures arrived at by the Treasury. The Treasury also denies that it directed the formation of any association to monitor the disbursements of the funds nor identify and approve enterprises to benefit from the Fund and that any communication to that effect was unauthorised.

15. The Treasury confirms that it organised various workshops with a view to involving the public in developing the implementation structures of the Fund but it denies that it invited any opinion leaders and no tri-partite relationship was developed at the meetings as alleged by the petitioners.

16. Mr Omino deposes that concerns were raised by the Provincial Administration and members of the public concerning the formation of county steering committees as a result of communication emanating from one of its officers. This communication was unauthorised and the said officer called upon to withdraw all unauthorised communication.

17. Mr Omino further states that sometime in the year 2011, the Provincial Administration and the Treasury received complaints from members of the public in relation to the Fund that certain persons were soliciting money under the guise of registration for the said Fund to enable them access it. The Treasury clarified the position in letters to the Provincial Administration on the issue and an advertisement was placed in the newspapers to explain the Fund.

18. Mr Wamosta, submitted that the petition does not disclose any violation of the petitioner's fundamental rights as protected under the Constitution. That the petitioner's right to information has not been breached as they have not provided any evidence to prove that it has requested for information relating to the Fund from the Treasury and the same has been denied.

19. As regards the right to participate, counsel submitted that the petitioners' right to public participation has not been denied as the Ministry involved the public extensively in developing the implementation structures of the Fund.

Analysis and determination

20. This is a matter that concerns the enforcement of fundamental rights and freedoms, protected by the bill of rights and it is therefore the obligation of the petitioner to plead with specificity the nature of the breach in relation to him. (See *Anarita Karimi Njeru v Attorney General* [1979] KLR 54 and *Matiba v Attorney General* [1990] KLR 666). In *Trusted Society of Human Rights Alliance v Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported)* the court went further and noted that it was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself and enable the court adjudicate the violation.

21. In this case the rights alleged to be violated are contained in prayer (a) of the petition. The issue for consideration is whether the petitioner's right of public participation, the right to information and consumer rights protected under **Articles 10(2)(a), 35 and 46** respectively were violated.

The right to public participation

22. According to Mr Mwendwa, counsel for the petitioner, NAFIIS is the duly registered umbrella body formed purposively to monitor implementation of funds meant for the informal sector have not been accorded the opportunity to participate in the running of the Fund. This was aggravated by the closure of the liaison office in the Treasury.

23. **Article 10(2)(a)** and **(c)** is relied upon by the petitioners. **Article 10** provides;

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

Article 201 also provides that for public participation in all aspects of public finance. It provides as follows;

(a) There shall be openness and accountability, including public participation in financial matters;

(d) Public money shall be used in a prudent responsible way.

24. I agree that public participation as a national value is rooted in the fact that Kenya is a democratic state and that public participation fulfils and complements the other values of good governance, transparency and accountability. The Constitution does not prescribe how public participation is to be effected and in every case where a violation is alleged, it is a matter of fact whether there is a breach or not.

25. In the case of **Consumer Federation of Kenya (COFEK) v Attorney General and Others Nairobi Petition No. 11 of 2012 (Unreported)** the court noted, at para. 52, that, “The values outlined in **Article 10** of the Constitution are not defined nor are they cast in stone. I would agree with Mr Gatonye, that they are applied in a particular context and the court in examining whether particular values are fulfilled must look at the legislative architecture of the statute and the facts and circumstances of the case bearing in mind that every statute rule, regulation or policy must be read in a manner that is intended to fulfill these values.”

26. The court further quoted with the approval the sentiments of the Constitutional Court of South Africa in **Minister of Health and Another v New Click (Pty) Limited and Others CCT 59/2004, [2005] ZACC 14** that, “The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say.”

27. Looking at this case holistically, I do not think the petitioners have been denied public participation as alleged or at all. First, the petitioner concedes that during the formation of the Fund it was engaged in workshops and stakeholders were sent information through circulars on the formation of the fund. Second, I do not think that NAFIIS is the exclusive means of public participation by members of the informal and small business sector. It is a purely voluntary society and the public has other avenues and organisations through which they may engage the Fund. Third, the office of liaison referred, is not the exclusive means of communication and engagement with matters concerning the Fund. The Treasury and the banks which are engaged in administering the Fund have avenues for addressing any issues that may arise.

28. I find and hold that the petitioner has not made out a case for violation of the right to public participation in the circumstances of this case.

Right of Access to Information

29. The petitioners also complain that the right to access to information protected under **Article 35** has been violated. **Article 35** provides 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 the 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.

30. A reading of **Article 35** shows that the right of access contains three key elements. The first is the entitlement to information from the state or to information held by another person required for exercise or protection of a fundamental right and freedom. A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of **Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported)**, the court stated, at para. 43, that, “I am not inclined to grant the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.”

31. The petitioner has not set out what information it requires or what was information was sought and not given. The petitioner’s depositions refer to the allegation that the Treasury has refused to engage with the petitioner. There are no letters attached which show specific requests for information. The demand letter written to the Attorney General dated 26th October 2011 does not seek specific information that would form the basis of a cause of action under **Article 35**.

32. The second element contained in **Article 35(2)** is the right to correction or deletion of untrue or misleading information that affects a person. There is no allegation that this aspect of the right to information has been violated.

33. **Article 35(3)** is the third element which imposes on the State the obligation on the State to publish and publicise important information. In this respect, I note that the Treasury published in the media titled, “Statement on the MSE Fund (Fund for inclusion of the informal sector)” dated 12th April 2011 in the Daily Nation and the Standard Newspaper and the information was also part of a Ministerial Statement in the National Assembly on 4th May 2011. This dissemination was part of the state obligation under **Article 35(3)**.

34. I therefore find and hold that the petitioner has not made out a case to support the violation of **Article 35**.

Consumer Rights

35. The petitioner has also alleged breach of **Article 46** of the Constitution which protects consumer rights. **Article 46** provides as follows;

46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2)Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

36. Mr Mwendwa, submitted that the basis of this claim was the banks were charging commercial interest rates on loans disbursed from the Fund. This allegation is not supported by the petition or the depositions. The terms of the loans, the agreements and the facts relating to the lending are not before the court nor are other facts that are necessary for the court to consider whether any rights of the consumers are affected.

37. I conclude that the no case has been made to support a violationof **Article 46**.

Disposition

38. Since the petitioner has failed to demonstrate any violation of its rights, it follows that no relief or remedy can be granted under **Article 23**. The only relief that can be granted is to the respondents and this to dismiss the petition.

39. The petition is dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 18th day of October 2012.

D.S. MAJANJA

JUDGE

Mr H. Mwendwa, instructed by Kituo Cha Sheria, for the petitioner.

Mr S. Wamotsa, Litigation Counsel, instructed by the State Law Office for the respondents.