



REPUBLIC OF KENYA



**Marchet Auctioneers (K) Ltd v Deposit Protection Fund Board As liquidator
of Post Bank Credit Ltd (In Liquidation) (Commercial Case 82 of 2004)
[2024] KEHC 907 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 82 OF 2004
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

MARCHET AUCTIONEERS (K) LTD PLAINTIFF

AND

**DEPOSIT PROTECTION FUND BOARD AS LIQUIDATOR OF POST BANK
CREDIT LTD (IN LIQUIDATION) DEFENDANT**

RULING

1. Before this Court is the plaintiff's application dated 1st July, 2022 brought under Sections 1A, 1B & 3A *Civil Procedure Act*, Cap.21, Order 51 Rule 1 of the *Civil Procedure Rules, 2010* and Sections 6(4) & 6(6) of the *Access to Information Act*, No 31 of 2016.
2. The plaintiff seeks the following orders-
 - (i) Spent;
 - (ii) That an order do issue to the current Chief Executive Officer of the respondent, Mr. Mohamed A. Mohamudto attend Court on 7/07/2022 to testify with respect to the internal memo dated 17/03/2003;
 - (iii) That in default of compliance, warrants for the arrest of the said Officer to issue to compel his attendance in Court; and
 - (iv) That the costs of this application be in the cause.



3. The application is based on the grounds that during the hearing of the above matter on 23rd June, 2022, an issue as to the authenticity and admissibility of the defendant's internal memo dated 17th March, 2003 arose.
4. The plaintiff averred that the admissibility of the said internal memo as evidence will not occasion any harm to the defendant, since it is a matter of public record and that Kenya Deposit Insurance Corporation (KDIC) formerly the Deposit Protection Fund Board is a public entity and is thus required to disclose any information necessary to promote public interest in the administration of justice.
5. The plaintiff asserted that Mr. Mohamud. A. Mohamud, being the CEO of the defendant, is best placed to provide an accurate testimony and produce the said internal memo dated 17th March, 2003.
6. In opposition, the defendant relied on its grounds of opposition dated 6th July, 2022 and a replying affidavit sworn on 7th July, 2022 by the Resolutions Officer, Postbank Credit Limited.
7. It was contended that the reliefs sought in the present application are intended to undermine the defendant's defence which violates Article 50(1) of the Constitution of Kenya and to intimidate the defendant to abandon its defence.
8. It was contended that the said application is misconceived as the plaintiff seeks access to information but a public institution cannot be compelled to disclose information that would undermine its commercial interests or to give evidence to support the plaintiff's case.
9. The plaintiff also contended that the documents marked "MC1" were illegally obtained and consist of 'without prejudice' communication undertaken well after the suit herein was filed, whereby no agreement or consent was reached and therefore cannot be admitted as evidence.
10. Vide a supplementary affidavit dated 15th July, 2022, a Director of the plaintiff responded to the grounds of opposition and replying affidavit of the defendant.
11. The plaintiff in the said averred that the internal memo dated 17th March, 2003 has formed part of the Court record since 30th April, 2004 and no objection was ever raised by the defendant and that the defendant's objection is only meant to suppress evidence and ensure that this Court does not unearth the truth in these proceedings.
12. The plaintiff stated that the defendant has not demonstrated how the production of an internal memo authored by the latter would compromise its right to a fair trial. The plaintiff asserted that the said memo ought to be admitted in evidence. That contrary to the averments in the defendant's replying affidavit, the plaintiff has been pursuing the earliest conclusion of this matter and that the application was necessitated by the defendant's objection to production of its own document.

Analysis And Determination.

13. Both parties herein filed rival submissions which this Court has considered. On 23rd June, 2023, during examination of the plaintiff's witness, Counsel for the defendant objected to the production of an internal memo dated 17th March, 2003, which was authored and executed by the then liquidation agent of the defendant. The internal memo acknowledged the existence of unpaid fee notes raised by the plaintiff. The defendant questioned the authenticity and admissibility of the said memo stating that it was obtained irregularly. This led the plaintiff to file the instant application seeking inter alia, to have the current CEO of the defendant to attend Court to testify and produce the said internal memo.



14. The sole issue for determination is whether the current CEO of the defendant should be compelled to attend Court to testify in respect to an internal memo dated 17th March, 2003.
15. The plaintiff submitted that under Article 35(1) of the *Constitution* of Kenya, 2010 and Section 4 of the *Access to Information Act*, it has the right to access information required for it to prove its case and that the CEO of the defendant ought to be compelled to testify in Court and for the internal memo to be admitted in evidence.
16. On its part, the defendant submitted that if this Court was to grant the orders being sought, it would not only impede the due process of the law but would also substantially prejudice the defendant's interests and defence in the current proceedings.
17. The defendant maintained the position that the admissibility of the internal memo is limited. It contended that the said memo was obtained irregularly as it was not addressed to the plaintiff's Directors, which raises the question as to why or how the plaintiff has it in its possession for purposes of evidence in these proceedings.
18. Article 35(1) of the *Constitution* states as follows-
 - “ 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.” (emphasis added).
19. Section 4 of the *Access to Information Act* states thus:
 - “(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - (a) the State; and
 - (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.” (emphasis added).
20. Section 6 of the *Access to Information Act* highlights instances where the right of access to information may be limited in the following words-
 - “Pursuant to Article 24 of the *Constitution*, the right of access to information under Article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to—
 - (a) undermine the national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;



- (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
- (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- (h) damage a public entity's position in any actual or contemplated legal proceedings; or
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.”

21. The above provisions indicate that every person has the constitutional right of access to information held by the State or any other person for the exercise or protection of any right or fundamental freedom. This right is however derogable as stipulated under Section 6 of the [Access to Information Act](#).
22. The defendant submitted that if the orders sought in the instant application are granted, the due process of the law would be impeded and that its interests and defence would be substantially prejudiced.
23. The defendant has the onus of proving how the admission of the internal memo to this suit would impede the process of the law and how its defence would be prejudiced. The defendant has not shown any proof to that effect. It is not sufficient for the defendant to claim that the admission of the internal memo would damage its defence without giving credence to the said disputation.
24. This Court also notes that the defendant has alleged that the internal memo was obtained irregularly and/or illegally but has not provided evidence to support this assertion. The defendant has failed to meet the legal requirements of Sections 107 and 109 of the [Evidence Act](#).
25. In the Supreme Court case of [Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others](#) (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling) it was held as follows-

“The petitioners have further been unable to establish that the internal memos obtained from the 2nd respondent would be used in the protection of fundamental rights or freedoms, or that without such information, they would be unjustly prejudiced.

Thus in *Rev Timothy Njoya v Attorney General & another* (supra) at para 44, the court held as follows;

“In *Cape Metropolitan Council v Metro Inspection Services Western Cape & others* [2001] ZASCA 56 the court stated as follows;

“ Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that



information would assist him in exercising or protecting that right.”
(emphasis added).

26. The authority above explains that in order for a party to rely on particular evidence falling within the ambit of Article 35(1) of the *Constitution* of Kenya, 2021, such as the plaintiff herein has done, it needs to establish how its rights stand to be prejudiced by failure to adduce such evidence. The plaintiff submitted that the internal memo is key evidence and its admissibility will assist in the protection of its right to a fair hearing. The said memo acknowledged the existence of unpaid fee notes raised by it, and in this Court’s considered view, it is a fundamental piece of evidence for the plaintiff whose case would be greatly prejudiced if the internal memo is not admitted in evidence.
27. It is this Court’s finding that it is in the interest of justice and the fair administration of justice for the said memo to form part of the plaintiff’s evidence and for the defendant’s CEO to be examined on its contents.
28. In the end, prayer 2 of the instant application is granted with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Boke h/b for Mr. Kyalo for the plaintiff

Mr. Kimani h/b for Mr. Mwangi for the defendant

Ms B. Wokabi – Court Assistant.

