



**Ndung'u v Equity Bank Kenya Limited & another (Petition E107 of 2022)
[2024] KEHC 4507 (KLR) (Constitutional and Human Rights) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E107 OF 2022

LN MUGAMBI, J

APRIL 12, 2024

BETWEEN

LUCY NJERI NDUNG'U PETITIONER

AND

EQUITY BANK KENYA LIMITED 1ST RESPONDENT

SAFARICOM PLC 2ND RESPONDENT

JUDGMENT

Introduction

1. The petition is dated 17th March 2022 and supported by the petitioner's affidavit of even date and the further affidavit sworn on 22nd June 2022.
2. The gravamen of this Petition is the Petitioner's claim that the respondents violated her Constitutional rights to privacy and dignity for divulging her personal information to her former employer. The petitioner prayed for the following reliefs against the respondents:
 - a. A declaration that the respondents' actions of divulging the petitioner's personal bank account statements and Mpesa statements to the petitioner's employer without the petitioner's authority and/or consent, which action subjected the petitioner to humiliation, ridicule, embarrassment and odium was a violation of the petitioner's right against being treated in a degrading manner.
 - b. A declaration that the respondents' actions of divulging the petitioner's personal bank account statements and Mpesa statements to the petitioner's employer without the petitioner's authority and/or consent, which actions subjected the petitioner to humiliation, ridicule,



embarrassment and even dismissal from work violated the petitioner's right to human dignity under Article 28 of *the Constitution*.

- c. A declaration that the respondents' actions of divulging the petitioner's personal bank account statement and Mpesa statements to the petitioner's employer without the petitioner's authority and/or consent, which action subjected the petitioner to humiliation, ridicule, embarrassment and even dismissal from work violated the petitioner's right to privacy under Article 31 of *the Constitution*.
- d. An order for compensation for the contravention of the fundamental rights and freedoms of the petitioner.
- e. An order for compensation for the mental anguish and psychological torture the petitioner suffered after her personal bank account statements and Mpesa statements were divulged to her employer without her consent.
- f. This Court do find that the petitioner is entitled to damages for violation of her constitutional rights under Articles 28 and 31 of *the Constitution* and order the respondents to pay the same in the sum of Kenya Shillings Five Million (Kshs. 5,000,000/ =).
- g. Costs of this petition; and
- h. Any other or further relief as this Court may deem fit to grant.

petitioner's Case

3. In September 2017, the petitioner's employer, New Wide Garments Kenya EPZ Limited took her through a disciplinary hearing. In the course of the hearing her personal bank statements for Account No.0700192001700 which she maintains with the 1st respondent and Mpesa statement for her mobile number 0720295330 which she has registered with the 2nd respondent featured. Eventually, her employment was terminated following disclosure of the information that by the respondents.
4. The petitioner asserted that she neither authorized nor consented to the disclosure of the information to the former employer by the respondents. She contends that her attempts to engage the respondents over the issue bore no fruit. Her demand letters to the respondents were ignored.
5. She maintains that the respondents' actions violated her constitutional rights. Further, that the ordeal caused her psychological torture and led to loss of her job.
6. In the further affidavit, the petitioner questions the legitimacy of Court Order that the respondents alleged had authorized them to disclose her personal information. She contended that the order did not state the names of the parties, the issuing magistrate and the case number. Furthermore, that the order directed the 1st respondent to issue Mpesa statements, which are generally in custody of the 2nd respondent. In her view, the Court Order was a forgery and ought not to be admitted in evidence.

1st Respondent's Case

7. In response, the 1st respondent filed an answer to the petition dated 4th May 2022 and a replying affidavit by Roy Akubu, the 1st respondent's Legal Services Senior Manager, sworn on 18th August 2022.
8. He depones that on 29th July 2016, CPL Jackson Mbitu (No. 46864) vide Miscellaneous Criminal Application No. 74 of 2016 sought a court order before the Principal Magistrate's Court at Mavoko. The purpose was to be granted a search warrant to investigate the 1st respondent's Bank Account No. 0700192991700. This investigation was in pursuit of a criminal suit brought against the petitioner, for



breach of Section 268(1) as read together with Section 278 of the Penal Code. Accordingly, the Court granted the order which the 1st respondent complied with by issuance of the documents sought.

9. He asserts that contrary to the petitioner's allegation, the 1st respondent never issued her bank information to her former employer but to the investigating officer as directed by the Court Order. As such, the information was issued in compliance with the law. He for this reason contends that the petition is devoid of merit, frivolous, vexatious and unfounded in law and so ought to be dismissed.

2nd Respondents' Case

10. The 2nd respondents in reply filed grounds of opposition dated 6th April 2022 on the premises that:
- i. The suit discloses no cause of action against the 2nd respondent as the Mpesa Statements were released by the 2nd respondent to the Directorate of Criminal Investigations, through Athi River Police Station and not to the petitioner's former employer.
 - ii. In the petitioner's case against her former employer: Nairobi ELC Case Number 2481 of 2017: Lucy Ndunga vs New Wide Garments Kenya EPZ Ltd (2021) eKLR, her employer confirms that the Mpesa Statements were retrieved from Directorate of Criminal Investigations, through Athi River Police Station.
 - iii. The 2nd respondent has a duty to co-operate with law enforcement under the provisions of Section 144 of the Criminal Procedure Code.
 - iv. The 2nd respondent was informed by Directorate Criminal investigations that the petitioner was under investigation and so required access to her Mpesa Statements.
 - v. The 2nd respondent is not a proper or necessary party to this suit and its inclusion in these proceedings is a waste of judicial time and an abuse of the court process.
 - vi. The petition should be dismissed with costs to the 2nd respondent.
11. Further in the replying affidavit by Weldon Siongok sworn on 27th May 2022, he states that the petitioner agreed to the 2nd respondent's Mpesa Terms and Conditions at the onset of their engagement. Under Clause 4.6, he notes that the petitioner agreed that the 2nd respondent may be compelled by law to issue her personal information hence under Clause 16.1 agreed for this information to be disclosed in such circumstances.
12. He depones that on 7th August 2015, the 2nd respondent was issued with a search warrant from the Senior Principal Magistrate at Mavoko Law Courts authorizing Jackson Mbitu, an investigating officer from the DCI- Athi River Division to investigate the petitioner account. The 2nd respondent was thus required to release the petitioner's Mpesa statements pursuant to the court order.
13. Considering this, he asserts that the 2nd respondent discharged its obligation by releasing the petitioner's information in accordance with the law. As a result, it is not liable as alleged by the petitioner.

Petitioner's Submissions

14. Sitati and Mwangi Advocates for the petitioner filed submissions and a list of authorities dated 12th May 2022. They also filed further supplementary submissions dated 19th September 2022. Counsel staunchly submitted that the petitioner's right to dignity and right to privacy under Article 28 and 31 of *the Constitution* were violated by the respondents.



15. On the petitioner’s right to privacy, counsel submitted that the 1st respondent violated its duty of confidentiality by divulging the petitioner’s information. Counsel specifically stressed that as per the adduced evidence, this information was issued to the petitioner’s former employer by the 1st respondent. Counsel noted that this was evident from the disciplinary Committee’s meeting minutes.
16. On this premise Counsel asserted that this does not fall within the confines of the legal exceptions in law and so the burden falls on the 1st respondent to prove that it did. Reliance was placed in *Standard Chartered Bank of Kenya vs Intercom Services Ltd & 4 others (2004) eKLR* where the Court of Appeal stated that:

“The Bank’s duty to secrecy regarding a customers’ account and matters relating to it is never in dispute. The banks, whether collecting banks or paying banks, have a duty to ensure that customers’ account and matters relating to it are kept secret or are made confidential.”
17. Similar dependence was placed in *Irene Donna Shamala v NIC Bank Limited (2021)eKLR*.
18. Furthermore, Counsel argued that this disclosure violated the petitioner’s rights to privacy and dignity. Reliance was placed in *Coalition for Reform and Democracy (CORD) & 2 others vs Republic of Kenya & 10 Others (2015) eKLR* where it was held that:

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part.”
19. Like dependence was also placed in *Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR*.
20. Counsel equally argued that the 1st respondent in view of Article 24 of *the Constitution*, any limitation to a constitutional right must satisfy the criteria that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Counsel argued that the 1st respondent did not adduce any evidence to justify limitation of the petitioner’s right to privacy and neither discharged its burden of proof.
21. Reliance was placed in *Mutuku Ndambuki Matingi vs Rafiki Microfinance Bank Limited (2021)eKLR* where it was held that:

“The burden was on the Appellants to prove that the State or somebody else under the authority of any law has violated their rights and freedoms guaranteed under *the constitution*. Once that has been established, the burden shifts to the State or the person whose acts are being complained of to justify the restrictions being imposed or the continued existence of the impugned legislation.”
22. Turning to the 2nd respondent, Counsel submitted that it had also violated the petitioner’s right to privacy by disclosing the petitioner’s Mpesa statements to her former employer. It is noted that as per Regulation 15 Kenya Information and Communications (Consumer Protection) Regulations, 2010, the 2nd respondent has a duty of confidentiality to its clients. According to Counsel, while the



respondents averred that the disclosure was in compliance with the law, the same was not proved as no evidence was adduced to support the claim.

23. Counsel as well challenged the authenticity of the adduced Court Order that is relied upon by the respondents. Reliance was placed in Francis Njau Njoroge & another t/a Francrom General Merchants vs Insurance Regulatory Authority & 5 others [2018] eKLR where it was held that:

“Admittedly, a search warrant may constitute a serious encroachment on the rights of the individual, thus a careful scrutiny by the courts is necessary at the point the court is approached for one. In Minister of Safety and Security v Van der Merwe & others[1] [2011] (5) 61 (CC), (par 55-56) the Constitutional Court of South Africa dealt with what constitutes a search warrants stating;”...a valid warrant is one that, in a reasonably intelligible manner:-

- (a) states the statutory provision in terms of which it is issued;
- (b) identifies the searcher;
- (c) clearly mentions the authority it confers upon the searcher;
- (d) identifies the person, container or premises to be searched;
- (e) describes the article to be searched for and seized, with sufficient particularity; and
- (f) specifies the offence which triggered the criminal investigation and names the suspected offender”.

24. Counsel was thus emphatic that the petitioner’s rights were violated by the respondents and is thus entitled to the reliefs sought. Relying on Article 23(3) (e) of *the Constitution*, Counsel submitted that the petitioner should be awarded a compensation of Ksh. 5,000,000 which she justified on the basis that the petitioner’s employment was terminated and had undergone mental distress, loss of her friends and colleagues, humiliation and her lost her means of survival.

25. Reliance was placed in M W K vs another v Attorney General & 3 others (2017) eKLR where it was held that:

“Additional damages are also awarded in situations where a plaintiff is subjected to distress, embarrassment, or humiliation. Aggravated damages are basically compensatory in nature and they are awarded for the aggravated damage that is caused to a plaintiff.”

26. Comparable dependence was also placed in Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (Civ) (17 December 2021), Harun Thungu Wakaba vs The Attorney General (2004) eKLR and Standard Newspapers Limited & another vs Attorney General & 4 others (2013) eKLR.

1st Respondent’s Submissions

27. On 26th August 2022, Igeria and Ngugi Advocates filed submissions and a list of authorities for the 1st respondent. Counsel highlighted the issues for determination as whether the 1st respondent had disclosed the petitioner’s bank account statements to her former employer as alleged and whether the 1st respondent had infringed upon her fundamental rights and freedoms by disclosing the information to the DCI - Athi River.



28. On the first issue, Counsel refuted the petitioner's allegation stating affirmatively that the 1st respondent never disclosed the petitioner's information to her former employer. According to Counsel the petitioner did not furnish any evidence to prove this allegation. Reliance was placed in *Evans Otieno Nyakwana V Cleophas Bwana Ongaro (2015)eKLR* where it was held that:

“... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya).”

29. Counsel further asserted relying on pages 12 to 18 of the judgment in the petitioner's case, ELRC Cause No. 2481 of 2017 *Lucy Ndungu Njeri vs New Wide Garments EPZ Limited* and her exhibit herein marked 'LN6' that her former employer indicated that the bank and Mpesa statements were obtained from the DCI.

30. Moving to the next issue, Counsel submitted that the right to privacy is not absolute under Article 25 of *the Constitution* and so information can be disclosed in pursuit of a legitimate legal claim even without the person's consent. Relying on the averments in the 1st respondent's affidavit, it is argued that disclosure of the petitioner's information was legitimate.

31. In support reliance is placed in *Francis Njau Njoroge & Another T/A Francrom General Merchants Vs Insurance Regulatory Authority & 5 Others [2018] eKLR* where it was held that:

“In the present petition, the search warrant was issued for purposes enabling the police investigate possible fraud The petitioner has not alleged that the court that issued the impugned search warrants did not follow the law, or that the procedure for issuing the warrants was not followed There is also no allegation that the court that issued the search warrants did not have jurisdiction to do so. The magistrate had authority by virtue of section 118 of the CPC, and was satisfied based on the affidavit placed before court that it was necessary to issue the warrants to enable proper investigations. There is no allegation either that the effect that the warrants were vague or overbroad to make them invalid. It would be difficult therefore to impugn the warrants that were issued in accordance with the law.”

32. Comparable reliance was also placed in *Irene Donna Shamala (supra)*. Counsel in a nutshell submitted that the petitioner had not proved her case against the 1st respondent.

2nd Respondent's Submissions

33. In the submissions dated 5th August 2022 and supported by a list of authorities of even date, Gikera & Vadgama Advocates submitted that the issues for determination are whether the 2nd respondent violated the petitioner's right to dignity and privacy and if so whether the petitioner is entitled to the relief sought.

34. Counsel relying on the averments in the 2nd respondent's replying affidavit submitted that the petitioner's rights are not absolute. Further that it is required under Section 27A (2) and (3) of *Kenya Information and Communications Act* to disclose information of a subscriber in connection with an



investigation. Reliance was placed in *Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 others* [2016] eKLR that:

“Disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest, and provided the disclosure is not greater than is reasonably necessary.”

35. They further relied in *Anthony Mwangi Ngigge t/a Tiindah Online Shop v Safaricom Limited* [2021] eKLR, *M. W. K & another (supra)*, *David Lawrence Kigera Gichuki v Aga Khan University Hospital* [2014] eKLR, *Francis Njau Njoroge & another t/a Francrom General Merchants v Insurance Regulatory Authority & 5 others* [2018] eKLR and *Joshua Kiprop Kisorio v Safaricom Plc & 4 others; Abdinajib Adan Muhumed (Interested Party)* [2021] eKLR.

36. Counsel further submitted that Section 144 of the Criminal Procedure Code requires persons to cooperate with law enforcement as they carry out their duty and so the 2nd respondent was under an obligation to comply with the issued court orders. Dependence was placed in *Caroline Mutuku vs Amos Kones Mabele & 2 others* (2021) eKLR where it was noted that:

“.. a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy.”

37. Reliance was also placed on *Francis Njau Njoroge & another t/a(supra)*, *Shimmers Plaza Limited vs National Bank of Kenya Limited* (2015) eKLR, *Alken Connections Limited vs Safaricom Limited & 2 others* (2013) eKLR and *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* (2017) eKLR.

38. On the petitioner’s claim that the Court Order is invalid, Counsel pointed out that the Athi River Police were responsible for processing, if not the 2nd respondent. In any event, it was submitted that the Court in *Leah Nyambura Kamore vs Republic* (2021) eKLR affirmed that the omission of the magistrate’s name in a court order is not fatal and does not affect the validity of the warrant as the name of the magistrate is disclosed on the primary file.

39. Counsel further contended that there was no evidence adduced to the effect that the 2nd respondent had subjected the petitioner to inhuman, cruel treatment or violated her dignity. Reliance is placed in *Christian Juma Wabwire vs Attorney General* [2019] eKLR where it was held that:

“I am alive to the fact, that the petitioner in his petition alluded to various constitutional violation, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violation of his rights and freedoms. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof.”

40. Comparable reliance was also placed in *Joshua Kiprop Kisorio vs Safaricom Plc & 4 others; Abdinajib Adan Muhumed (Interested Party)* (2021) eKLR. To that end, Counsel asserted that since the petitioner had failed to prove her case she was not entitled to the relief sought.



Analysis and Determination

41. There are two main issues for determination, namely:
- i. Whether the petitioner's rights under Articles 28 and 31 of *the Constitution* were violated by the respondents.
 - ii. Whether the petitioner is entitled to the reliefs sought.

Whether the Respondents violated the petitioner's rights under Articles 28 and 31 of *the Constitution*.

42. The petitioner's claim is hinged on what she claims is unauthorized disclosure of her personal/private information held by the respondents to a third party (her employer) without her consent thereby violating her right to privacy and dignity which is protected by *the Constitution*.
43. This allegation was vehemently opposed by the respondents who asserted that the disclosure was done within the limits authorized by the law, not to her employer as alleged, but to Government Investigative Agency.
44. It is thus necessary to explore the legal principles applicable and ascertain whether the constitutional rights to privacy and dignity of the petitioner were violated.
45. Article 28 of *the Constitution* underscores the intrinsic worth of every human being which means that every individual must be valued, be treated justly and be respected. It states thus:

28. Every person has inherent dignity and the right to have that dignity respected and protected.

46. Article 31 which the Petitioner contends was violated protects the right to privacy. It provides:

31. Every person has a right to privacy, which includes the right not to have-
- a. their person, home or property searched
 - b. their possession seized
 - c. information relating to their family or private affairs unnecessarily required or revealed;
or
 - d. the privacy of their communications infringed.

47. Confidentiality of information between the Bank and a customer is founded on the contract between the Bank and the customer, the relevant banking practices, common law principles and legislation. The leading case on the nature of this relationship is the case of *Tournier vs. National Provisional and Union Bank of England (1924)1KB 461* where the court held as follows:

“It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.”



48. In the South African case of *Stevens vs Investec Bank (Pty) Ltd* (2012) ZAGPJHC 226 the Court held:

“There is no doubt that a banker-client relationship requires the highest uberrimae fides and that confidentiality is one of the essential aspects of such relationship of trust as between banker and client. Privacy in financial and banking affairs is often an important aspect of successful business enterprise in a competitive economy.”

49. In *Attorney-General vs. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 the Court explained what gives rise to the duty of confidence as follows:

“a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others... in the vast majority of cases...the duty of confidence will arise from a transaction or relationship between the parties...But it is well settled that a duty of confidence may arise in equity independently of such cases.”

50. As far as the petitioner’s relationship with the 2nd respondent is concerned, it is contractual in nature as is governed by the 2nd respondent’s Terms and Conditions Agreement. Accordingly, any question on the contractual terms and the manner to in which to deal with it such as the purported disclosure of information is governed by the Agreement. In this regard the Court in *Mark Otanga Otiende vs Dennis Oduor Aduol* [2021] eKLR observed as follows:

“27. Firstly, the position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2001] eKLR, the Court of Appeal stated that:

“It was clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

28. More recently, the Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject reiterated they that it was “alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

51. As already discussed in the foregoing, the right to privacy under Article 31 of *the Constitution* is conjoined with the right to dignity under Article 28 of *the Constitution*. The High Court in *Kenya Human Rights Commission vs Communications Authority of Kenya & 4 others* [2018] eKLR recognized twin-like relationship when it explained:

“63. A persons' right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions. Information protection is an aspect of safeguarding a person’s right to privacy. It provides



for the legal protection of a person in instances where such a person's personal particulars are being processed by another person or institution. Processing of information generally refers to the collecting, storing, using and communicating of information.

64. 'Privacy,' 'dignity,' 'identity' and 'reputation' are facets of personality. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being."

52. The Court however noted that there may be justification for limitations to the right but subject to certain conditions. It stated:

"72. A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right."

53. It is clear from the authorities above that disclosure of private or confidential information can happen by operation of the law or consent of the person whose information is to be disclosed. If disclosure required by law, the threshold set out in Article 24 of [the Constitution](#) must be met.

54. In the instant Petition, the Respondents contention was that the petitioner bank and mobile data (Mpesa) information was disclosed in compliance with a Court Order that had been issued by Mavoko Principal Magistrate Court and brought to the attention of the respondent by the Investigating Officer.

55. Courts have recognized that confidentiality obligation is not absolute and is subject to a number of exceptions. The Court in Tournier Case (Supra) expressed itself as follows:

Scrutton J.

"I have no doubt that it is an implied term of bankers contract with this customer that the bank shall not disclose his account or the transaction relating thereto except in certain circumstances. The circumstances in which disclosure is allowed are sometimes difficult to state. I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection (as when a bank is collecting or suing for an overdraft. Or to the extent reasonable and proper for carrying on the business of the account as in giving a reason for declining to honour cheques when there are insufficient assets or when ordered to answer questions in the law courts or to prevent frauds or crimes."

Banks L.J

"In my opinion it is necessary in a case like the present to direct the jury what are the limits and what the qualifications of the contractual



duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads:

- a. Where disclosure is under compulsion by law;
- b. Where there is a duty to the public to disclose;
- c. Where the interests of the Bank require disclosure;
- d. Where the disclosure is made by the express or implied consent of the customer.”

56. Equally, in a matter that involved the 2nd respondent, the Court in Joshua Kiprop Kisorio vs Safaricom Plc & 4 others; Abdinajib Adan Muhumed (Interested Party) [2021] eKLR held as follows:

“26. On its part, the 1st Respondent through submissions dated 28th April, 2020 contends that there are circumstances in which information may be divulged to a third party since the right to privacy is not absolute as specified in Article 24(1)(d) of *the Constitution*. It is further submitted that Section 27A(3)(b) of the *Kenya Information and Communications Act* allows telecommunication operators to disclose the registration particulars of a subscriber in connection with the investigation of any criminal offence or for the purpose of any criminal proceedings. According to the 1st Respondent, it was compelled under a court order to provide the investigating officer with the sought information. The argument is supported by reference to the decisions in *MWK v another v Attorney General & 3 others* [2017] eKLR; *Clarke & others v Chadburn & others* [1985] 1All ER (PC), as cited in *Kenya Tea Growers Association v Francis Atwoli and 5 others* [2012] eKLR; and *Migori Chadwick Kerama Mathius v Kenya School of Law & 3 others* [2018] eKLR.

27. The right to privacy as envisaged under Article 31 of *the Constitution* can be subject to limitation under Article 24. In this case, the right to privacy was limited under a court order dated 21st August, 2011 and the 1st respondent was compelled to provide the information requested under the order. This is in line with the provisions of the Kenya Information and Communication Act which permits a telecommunications operator to disclose the registration particulars of a subscriber in connection with the investigation of any criminal offence or for the purpose of any criminal proceedings.

28. The Petitioner’s subscriber information was provided to one P.C. Abdi Mohamed for purposes of criminal investigations on the strength of a court order. The release of the information by the 1st respondent to the investigating officer was therefore permitted under the law and cannot amount to a violation of the Petitioner’s privacy. The 1st Respondent was under a legal duty to comply with the court order.”

57. In light of the above, it is now the cardinal duty of this court to find out if the petitioner’s information was disclosed in the manner allowed by the law or not.

58. While the Petitioner claimed that her confidential information was unlawfully disclosed to her employer, the Respondents categorically denied they disclosed the information to the Petitioner’s



employer. Instead, they stated that they duly acted as per the requirements of the court order served upon them by an Officer of the Directorate of Criminal Investigation Officer and gave the information to Cpl. Jackson Mbilu as directed by the order issued in Principal Magistrate's Court at Mavoko Miscellaneous case No. 74 of 2016 a copy of which they attached.

59. The petitioner steadfastly protested the validity of the said court order. In refuting its validity, the Petitioner swore an affidavit dated 22nd July, 2022 in which she deposed as follows:

“ 3. That the copy of the search warrant and court order both dated 29th July, 2016 which the 2nd Respondent has attached in its list and bundle of documents are unauthenticated and as such should not be admitted in evidence for the following reasons:

- i. The said order and warrant do not have the names of the parties in that case in which the order and warrant was issued
- ii. The said warrant and order do not have the name of the magistrate who issued them
- iii. The order indicates the manager of Equity Bank (the 1st Respondent herein) should provide Mpesa Statements yet Mpesa Statements are normally in custody of the 2nd Respondent herein not the 1st Respondent.” The said order was attached as LLN 1 and LLN2.”

4. That upon service of the said documents, I instructed my advocates on record to follow up with Mavoko Law Courts for purposes of authentication of the aforesaid court order and warrant which Court confirmed vide letter dated 20th June, 2022 that it was difficult to authenticate the said orders as the same do not bear the case numbers and/or the name of the Magistrate who signed them

7. That from the foregoing and also based on the 2nd Respondent's conduct is clear indication that the said documents are forgery and as such I pray that the Honourable Court do not admit them in evidence”

60. An allegation of forgery of a Court order such as the one made by the Petitioner is a serious accusation that imputes a criminal motive. The assertion that the court order served upon the 1st and 2nd Respondent was a forgery appears to come from the Petitioner because of a letter the petitioner received from Mavoko Law Courts dated 20th June, 2022 where the Court in response to her earlier inquiry seeking authentication of a court order the court replied:

“I refer to the above matter and your letter dated 3rd May, 2022. Kindly note that it is difficult for me to authenticate the said orders as the same do not bear the case numbers and the name of magistrate who signed them”

61. With due respect to the Petitioner, the above statement only alludes to the difficulty of providing the required information due certain missing details in the copy of the order attached in seeking the information. It does not state or allude to forgery or fraud.



62. The Petitioner's assertion is in fact subsequently displaced by the information contained in the replying affidavit of Roy Akubu on behalf of the 1st Respondent sworn on 18th August, 2022 who stated thus:

“ 4. That in response to the entire Petition, I wish to state as follows:

- i) On or about 29th July, 2016, the Principal Magistrate's Court at Mavoko heard Miscellaneous Criminal Application No. 74 of 2016 filed by No. 46864 CPL Jackson Mbitu, who was attached to DCI Athi River, seeking inter alia for an order that the Court issues him with a search warrant to investigate the Bank Account No. 0700192991700 held with Equity Bank Kenya Ltd under the provisions of Section 118 and 121 (1) of the Criminal Procedure Code (Annexed hereto and marked as Exhibit DM1 is a copy of the Notice of Motion Application dated 29th July, 2016 accompanied by the Supporting affidavit of No. 46864 Cpl. Jackson Mbitu sworn on even date.
- ii) The main basis for filing the said application for issuance of a search warrant was that the Petitioner herein was subject to criminal investigation for contravening Section 268(1) as read with Section 278 of the Penal Code.
- iii) Consequently, the Court granted the orders as set out hereunder:
 1. That the Manager EquityBank, provides the Officer with:
 - a. The account statements from 1st January, 2015 to date
 - b. Certified account opening documents including the names of the account holders, its physical address and telephone numbers of the account holders
 - c. Certified copy of identity card (s) in the opening of the said account
 - d. Any other documents and information that may be relevant to assist the officer with investigation (annexed hereto and marked exhibit DM2 is a certified copy of the original court order issued at the Principal Magistrate's Mavoko Law Courts on 29th July, 2016.”

63. Despite the petitioner claiming the Court order relied upon by the Respondents was a forgery, only because the copy she was served with and when she provided to the court for authorization missed certain details, the additional information by the Respondent which has full details of the Application used to get the order, the name of the officer who applied and the nature of the orders given by the



Court is irrefutable. This information confirms there was a valid Court order in place which was issued by the Court that was served upon the Respondents. I find. Allegations of forgery made by the Petitioner are mere fantasies that she could not prove.

64. Turning to whether the law permits searches or information relation to bankers books, the legal provision that stands out in this regard is Section 180 of the Evidence Act which provides thus:

Section 180 Evidence Act Cap 80 states:

1. where it is proved on oath to a Judge or Magistrate that in fact, or according to reasonable suspicion, the inspection of any bankers book is necessary or desirable for the purpose of any investigation into the commission of an offence, the Judge or Magistrate may by warrant authorize a police officer or any other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for any scrutiny by the officer or any person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.
- 2) Any person who fails to produce any such banker's books to the police officer or other person executing a warrant issued under this section to permit such officer or person to scrutinize the book or take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine."

65. Consequently, upon service of the Court order on the 1st Respondent, with orders that indicated that the Petitioner was under investigation on suspicion of committing an offence under Section 268 of the Penal Code in relation to the Bank Account in question, the 1st Respondent's hands were tied and had no room for any maneuver as failure to supply the information would have meant criminal liability on the part of 1st Respondent's.

66. Equally, the 2nd Respondent would have had no choice. The law requires any person that is holding information necessary to facilitate investigation of crime to turn that information upon being served with a Court order. Section 27 A (3) (b) of the Kenya Information and Telecommunication Act provides that: -

"A telecommunication operator may disclose the registration particulars of the subscriber in connection with investigation of any criminal offence or for the purpose of criminal proceedings"

67. Additionally, the Court has power under 118 of the Criminal procedure Code to issue a search warrant in that regard. Section 118 of the Criminal Procedure Code provides:

"When it proved on oath to a Court or Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be in any place, building, ship, aircraft, vehicle, box or receptacle, the Court or Magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described



in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law.”

68. Although Article 31 (c) of *the Constitution* protects an individual from having information relating to their family or private affairs unnecessarily required or revealed, it is important to acknowledge that this right can be limited where a clear, reasonable and valid justification exists as provided for in Article 24 which among others states that it is permissible if ‘the limitation is authorized by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’
69. Crime is a matter of public concern and information required for purposes of facilitating investigation into a criminal conduct is a reasonable and justifiable purpose as no true democratic society would condone crime in its midst.
70. Moreover, despite the Petitioner vehemently stating that it is the Respondents who provided the information to her employer which was thereby used in the employer’s disciplinary proceedings against her, she did not provide any iota evidence that demonstrated that it is the Respondents who gave the employer the said documents. On the contrary, the Respondents were able to show that they only surrendered the requisite information to the Investigating officer as required by the Court order.
71. The claim by the Petitioner against the Respondents giving information to her employer was thus not substantiated.
72. The Respondents merely performed a legitimate legal duty by providing the information relating to bank account and Mpesa statements to facilitate a criminal investigation. This Petition is founded on assumptions which the Petitioner could not prove.
73. The Petition is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

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L N MUGAMBI
JUDGE

