



**Kazuri 2000 Limited v Kenya Commercial Bank (Miscellaneous Application E170 of 2023)
[2024] KEHC 6971 (KLR) (Constitutional and Human Rights) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E170 OF 2023
LN MUGAMBI, J
JUNE 13, 2024**

BETWEEN

KAZURI 2000 LIMITED APPLICANT

AND

KENYA COMMERCIAL BANK RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 24th May 2023 the applicant seeks the following orders:
 - i. Spent.
 - ii. This court be pleased to compel the respondents to supply data related to bank transactions done by one of their customers with the account name Beads International Limited and Account number 1117300048 in Kenya Commercial Bank from the year 2010 to 2014.
 - iii. Costs.

The Applicant's Case

2. John Newman, the applicant's director filed his affidavit in support of even date and a further supplementary affidavit dated 18th July 2023. He informs that the company produces and sells ceramic beads jewelry.
3. He deposes that on 17th November 2020 one of its directors came across a file for a company known as Beads International Limited. The file disclosed its date of incorporation as 3rd December 2009, the list of Directors and its bank account at Kenya Commercial Bank. He asserts that this was a fraudulent



company incorporated for the sole reason of embezzling funds from the applicant. This occurred from 2010 to 2014.

4. He contends that the fraudulent Company was created when the applicant's Managing Director was ailing. The directors of this Company exploited the situation by selling the applicant's products and further directing the clients to make their payments to their bank account at Kenya Commercial Bank.
5. He contends that the fraudulent company did not have its own products neither a physical address. Obviously therefore, their actions were intent on deceiving the applicant's clients to believe that the two are one company. Moreover, it is noted that one of its directors, Celestino Goes was also one of the applicant's director. The applicant subsequently lodged its complaint with the police at Karen Police Station vide OB No.28/27/11/2020.
6. The applicant for this reason seeks information on the fraudulent company under Article 35 of the Constitution, so that the same can be used as evidence in the intended civil and criminal proceedings against it.

Respondent's Case

7. In response, the respondent's filed grounds of opposition dated 30th June 2023 on the basis that:
 - i. The application offends the provisions of Article 24 of the Constitution.
 - ii. The application is contrary to the provisions of Section 6 (1) of the Access of Information Act No. 31 of 2016.
 - iii. The respondent's customer is not party to these proceedings.
8. Furthermore, through their replying affidavit sworn on 3rd July 2023 by Adriannah Mule, it deposes that its client, Beads International Limited is not a party to these proceedings. For this reason, this application is deemed to be in breach of Beads International Limited's rights and its contractual relationship with the Company.
9. On the other hand, she asserts that as per the Central Bank of Kenya Prudential Guidelines No. 5. 17, it is obligated to maintain records of all transactions for a minimum period of 7 years from the date the relevant transaction was completed or following termination of an account or business relation.

Applicants' Submission

10. Onyango Rimita Advocates LLP for the applicant filed submissions and a list of authorities dated 18th July 2023.
11. Counsel on whether the applicant can access the information from the respondent answers in the affirmative. This is because the information sought, directly affects the applicant's company as seen from its affidavit. Counsel further added that Section 4 of the Access to Information Act, entitles every citizen to information held by the State or another person and this is not affected by any reason issued by the person seeking the information.
12. Reliance is placed Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (2013) eKLR where it was held that:

“The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited



circumstances; that anyone, not just citizens, should be able to request and obtain “information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

13. Counsel further asserts that the burden of justifying the limitation on this right has not been discharged by the respondent as espoused in Article 24(3) of the *Constitution*. It is argued that the respondents have the burden and duty to demonstrate that the information sought falls within the exceptions of Section 6 of the Access to Information Act. Reliance is placed in *President of the Republic of South Africa and Others v M & G Media Ltd* (CCT 03/11) [2011] ZACC 32 where it was observed that:

“The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of the *Constitution*.”

14. Akin dependence is placed in *Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission* (2019) eKLR and *Legal Advice Centre t/a Kituo Cha Sberia & 33 others v Cabinet Secretary, Ministry of Education & 7 others* (Petition 104 of 2019) [2021] KEHC 390 (KLR) (Constitutional and Human Rights) (26 November 2021).

15. Opposing the allegation that Beads International Limited should be party in these proceedings, Counsel submits that it is not a necessary party. To support this argument reliance is placed in *Kingori v. Chege & 3 Others* [2002] 2 KLR 243 where it was held that:

“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the *Constitution* of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met:

- (1) There must be a right to some relief against him in respect of the matter involved in the suit.
- (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings.”

Respondent’s Submission

16. On 31st July 2023, Amolo and Gacoka Advocates filed submissions and a list of authorities for the respondent. Counsel on whether the applicant has demonstrated its case for the orders sought, asserts that the applicant’s right under Article 35 of the *Constitution* is not automatic but subject to the limitation envisaged under Article 24 of the *Constitution* and Section 6(1) of the *Access to Information Act*.



17. Reliance is placed in *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* (2015) eKLR where it was held that:

“A part from what we have already said regarding raising such a contentious and complex question in an originating summons, we do not see how this Article is relevant to the type of information sought from the 1st respondent but more significantly the 1st respondent is protected, indeed prohibited by section 31(2) of the *Banking Act* from disclosing or publishing any information in its possession except as provided by the Act. With respect, it appears to us that the appellant was on a fishing expedition when he invoked Articles 35 of the *Constitution* to get information relating to other clients of the 1st respondent on the interest rates that they had secured for themselves. The applicant had no legitimate interest in being availed other clients' information held by the 1st respondent. In appropriate cases, however by an order of the court, relevant information may be disclosed. In this case the omnibus information regarding details of accounts of strangers was not only unreasonable but also unrealistic and the learned Judge properly dismissed the prayer.”

18. Counsel further submitted that the applicant failed to comply with the dictates of Section 8(1) of the *Access to Information Act* which requires a formal application to the official where the information is sought. This was not done by the applicant. The application for this reason is said to lack merit and so ought to be dismissed.

Analysis and Determinatio

19. Following a perusal of the pleadings and submissions of the parties, the Court finds that only a singular issue arises for determination, namely:

Whether or not this Court should allow the applicant's prayer to access bank information of Beads International Limited

20. The right to access information is a universal right that is also upheld in various international instruments. Nationally, this right finds its roots in the *Constitution* under Article 35 of the *Constitution*. This Article provides as follows:

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.

21. This Article is given effect by the Access to Information Act No.31 of 2016. Section 4 of the Act expounds on this right as follows:

Right to information

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.
- (2) Subject to this Act, every citizen's right to access information is not affected by—
- c. any reason the person gives for seeking access; or
 - d. the public entity's belief as to what are the person's reasons for seeking access.
22. The Supreme Court in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR expounding on the right to information held as follows:

“(13) Article 35(1)(a) and (b) of the *Constitution*, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the Court in Petition No. 479 of 2013 *Rev. Timothy Njoya v. Attorney General & Another*; [2014] eKLR, it was held;

“A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In *Nairobi Law Monthly v. Kengen* (supra) the Court dealt with the applicability of the right to information as follows;

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the *Constitution* of Kenya which imposes an obligation on the state to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the state”.

(14) This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically, procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.”

23. The right of access to information is a constitutional guarantee but is subject to certain permissible limitations. It is not unbidden. Section 6(1) of the *Access to Information Act* outlines these limitations as follows:

Limitation of right of access to information

1. 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.
24. The essence of this application is the applicant's prayer that it be allowed to access Beads International Limited's bank information from the respondent. The applicant argues that its request is justified and supported under Article 35 of the *Constitution*. The respondent on the other hand finds this prayer problematic for a number of reasons. First that the party who this accusation is primarily against is not party to this proceeding. Secondly that its relationship with Beads International Limited is contractual and hence cannot divulge the information sought. The respondent further points out that the applicant failed to request the information as provided in the Access to Information Act.
25. Following discovery of the alleged fraudulent dealings of Beads International Limited, the applicant lodged a complaint with the police at Karen Police Station. The applicant says that this information will be used in prosecution of the criminal and civil suit against this company.
26. As a starting point, it is axiomatic that applicant is seeking to have the respondent compelled to release information belonging to a 3rd Party. The Respondent is a bank and the relationship between a bank and its client is contractual in nature and is guided by the principle of confidentiality. This principle was accentuated by the Court of Appeal in the case of *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* (2004) eKLR in which the Court stated:

“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. There is no doubt about that for it is on that understanding that anybody either as individual or as a corporate body would ever think of putting his money in a bank.

Further, if the same confidentiality was not assured, many crimes would be committed as a consequence of knowing what one has in his or its account, and further, commercial transactions would not flourish.

In the case of *Tournier v National Provincial and Union Bank of England Ltd* [1923] All ER 550, Banker LJ stated as follows:

“The case of the Banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence.”



27. In the celebrated English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 the Court was emphatic that in the relationship between a bank and a client, there is implied contract term not to disclose the client's information subject to legal exceptions only, as per Bankes L.J stated thus:

“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.”

28. The question is whether the applicant has established a proper basis for compelling this Court to issue the Order sought.

29. In this case, the account in question does not belong to the Applicant, it instead belongs to Beads International Limited, a 3rd Party who is not even part of these proceedings. The consent of the 3rd Party has not been obtained or even sought.

30. Further, the Applicant alleges that Beads International Limited used fraudulent means to defraud it. That is a complaint of criminal nature that must be subjected to an investigation. The process of obtaining banker's information for purpose of investigating a criminal complaint is comprehensively provided for under the *Evidence Act*. It does not require one to file a Constitutional Application under Article 35 to obtain. In other words, it is not a matter that compels the Court to apply the *Constitution* in order to resolve, in other words, it does not raise a constitutional issue. To attempt to deal with it using the *Constitution* is to trivialize the *Constitution* as Section 180 of the *Evidence Act*, Cap 80 is explicit. it states:

“ 180. Warrant to investigate

1. Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's 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 other person named therein to investigate the account of any specified person in any bankers book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or the person named in the warrant, and the officer or person may take copies of any relevant entry or matter in such bankers book.
2. Any person who fails to produce any such book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book



or to 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 fine not exceeding two thousand shillings or to both such imprisonment and fine.”

31. In addition, once a complaint has been reported and O.B. entry is made signifying the complaint has been formally received, the responsibility of investigating including gathering of the necessary information shifts to the investigator. It does not to give the complainant the leeway to resort to the Constitution as a means of obtaining the information which can conveniently be obtained by the investigator using the already available statutory mechanism.
32. In any case, at this stage, I consider the Applicant’s allegation to be a mere allegation. This Court will be taking a sheer gamble that could have serious ramifications on both commercial or privacy rights of the 3rd Party by releasing its bank information into the hands of another private entity which might turn out to be a competitor. That is why it would more reasonable to leave gathering of such information into the hands of an impartial public investigative entity.
33. Additionally, the Applicant did not demonstrate full compliance with the provisions of Access to Information Act before approaching this Court. First, Section 8(1) required that he should have made a written application in English or Kiswahili to the Respondent requesting for the access information to the Respondent providing sufficient particulars of the information requested. In the event of refusal, under Section 12, he should have applied for review to the Commission on Administrative Justice. No evidence was adduced to ascertain compliance with these provisions. I am guided by the case of Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties) (2021) eKLR in which the Court stated:

“29. Under section 23 of the Access to Information Act No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another* [2020] eKLR, Korir J observed correctly in my view, as follows:

“...The preamble of the Access to Information Act, 2016 clearly states that it is an “Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”

“It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-

“The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-

- a. the release of any information withheld unlawfully;
- b. a recommendation for the payment of compensation; or
- c. any other lawful remedy or redress.”



Section 23(3) of the *Act* provides that:

“A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.”

“I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the *Act* actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice.

34. The inescapable conclusion that is that the application dated 24th May 2023 lacks merit and is accordingly dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JUNE, 2024

.....

L. N. MUGAMBI

JUDGE

