



Trv Towers Limited v Bank of Baroda (Kenya) Limited (Commercial Miscellaneous Application E818 of 2023) [2024] KEHC 8595 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E818 OF 2023**

MN MWANGI, J

JULY 11, 2024

BETWEEN

TRV TOWERS LIMITED APPLICANT

AND

BANK OF BARODA (KENYA) LIMITED RESPONDENT

RULING

1. In a Notice of Motion application dated 18th September, 2023, brought under the provisions of Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#), the [Banking Act](#), and Article 35 of the [Constitution](#) of Kenya, 2010, and any other enabling provisions of the law, the applicant seeks the following orders-
 - i. Spent;
 - ii. That the Court issues an order compelling the respondent to produce the documents listed below that are in their custody for auditing:
 - a. Bank account operating mandate forms.
 - b. Bank statements.
 - c. Full titles of all bank accounts including deposit accounts, retention accounts and foreign exchange accounts together with their account numbers and balances.
 - d. Copies of account opening forms for all bank accounts.
 - e. Particulars of all authorized signatories of all the bank accounts.
 - f. Copies of the resolutions provided to open bank accounts.



- g. Details of loans, overdrafts, guarantees and any associated indemnities.
 - h. Securities held by the bank.
- iii. That the costs of the application be provided for; and
- iv. That this Honourable Court be pleased to make any other order or further orders as the circumstances and the interest of justice herein may require.
2. The application is anchored on the grounds on the face of it and the supporting affidavit of Virji Meghji Patel, a Director and Shareholder of the applicant, sworn on 18th September, 2023. In the said affidavit, he deposed that the applicant is a limited liability company duly registered under the *Companies Act*, 2015 and issued with certificate No.163843.
3. He also deposed that the applicant is a holder of bank account No. 95860200002201 with Bank of Baroda Kenya Limited, the respondent herein, and that the applicant has received a statutory notice from NCBA Bank Kenya Limited as being in default of its financial obligations and is apprehensive that its properties are in imminent danger of being sold off, and that the applicant and its directors have launched investigations into the financial operations of the company.
4. The deponent contended that the applicant has reason to believe that there might have been mismanagement of company resources which action has necessitated the applicant to conduct a forensic audit for purposes of immediately stemming any mismanagement and to take such actions as may be required to urgently promote the wellbeing and success of the company.
5. That Directors passed a resolution on 12th July, 2023 to conduct a forensic audit in respect to the applicant's financial records but on approaching the respondent and requesting to be allowed to access bank statements, resolutions on operating the accounts, bank accounts mandate forms, securities held, among others, it refused and/or neglected to grant the applicant access to the same, yet it is necessary for the applicant to conduct an urgent forensic audit to establish the status of its financial affairs but the respondent's action has made that impossible.
6. The deponent stated that he has been advised by his Advocates on record, advise which he believes to be true, that the respondent owes the applicant a legal and contractual duty and as such, the respondent should not illegally withhold information from the applicant, whereas the applicant's Directors have a duty to promote the success of the company, which duty requires them to conduct audits so as to ensure that the company's financial matters, among others, are in order. The applicant averred that no prejudice will befall the respondent if the application is allowed as prayed.
7. In opposing the application, the respondent filed a replying affidavit sworn on 2nd October, 2023 by Martin Karanu, the Legal Manager of the Bank of Baroda (Kenya) Limited, the respondent herein, sworn on 2nd October, 2023. He admitted that the respondent is in custody of the documents in relation to the suit herein.
8. The respondent deposed that the account No. 95860200002201 in the name of TRV Developers Ltd was opened on 16th October, 2019 with Mr. Tribhovan Lalji Chavda and Jayesh Tribhovan Chavda, the Chief Executive Officer and Director, respectively, indicated as the signatories to the said account.
9. The respondent averred that at the time of opening the account, the applicant was provided with a resolution of the company to open a bank account, certificate of incorporation of the company together with a certificate of its PIN certificate and a CR-12, and account opening instructions as contained in a letter dated 16th October, 2019.



10. The respondent's deponent averred that he had been advised by the respondent's Advocate that a relationship between a bank its customer is that of a principal and agent and as such, a fiduciary duty that is based on trust arises where a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within the said contract.
11. The respondent admitted having received a letter dated 21st June, 2023 from one Mr. Virji Meghji Patel requesting for inter alia bank statements since inception to date in respect to the suit account.
12. The respondent contended that on the basis of the fiduciary duty, it was unable to honour the request by Virji Meghji Patel as contained in the letter dated 21st June, 2023 as he was not a signatory to the said suit account, and the respondent has not received instructions from its signatories authorizing the release of the said information.

Analysis And Determination.

The issue for determination is whether the applicant is entitled to the documents it seeks from the respondent.

13. In written submissions dated 29th November, 2023, filed by the law firm of Tito & Associates, Ms Bakari, learned Counsel for the applicant cited the provisions of Article 35(1) of the Constitution of Kenya, 2010 which provides that every citizen has the right to access to information held by another person and required for the protection of any right or fundamental freedom. Counsel also cited the case of Eunice Wairimu Muturi & another v James Maina Thuku & another [2018] eKLR, and stated that the applicant is requesting for records of its account to which it has a right of access. She relied on the case of Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR, where the Court adopted the case of Cape Metropolitan Council v Metro Inspection Services Western Cape CC & others (10/99) [2001] ZASCA 56, where the Court held that an applicant has to state the right that he wishes to exercise or protect, the information which is required and how the information would assist him in exercising or protecting that right.
14. It was submitted that the applicant herein has advanced its reasons for requesting for the said information in the application and in its affidavit, and that the information is intended to promote the wellbeing and the success of the applicant, more so now that it is at the risk of execution by one of its financiers.
15. Ms Bakari urged this Court to take note that a signatory is only but an agent of the main customer/ account holder, which in this case is the applicant herein, which means that the role of the said individual does not override that of the applicant herein, as such information should not be unreasonably withheld from the applicant herein for reasons that it is not a signatory to the said account held by the respondent institution.
16. It was submitted that the documents sought solely concern the applicant herein and not any other party, which means that releasing the said documents could not reasonably be expected to harm or disadvantage any of the parties in any way. Counsel contended that the respondent's continued action of unnecessarily withholding the said documents is a violation of the right to information as enshrined in the Constitution of Kenya, 2010.
17. The applicant also prayed for costs under Section 27 of the Civil Procedure Act and relied on the Case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR, to support its prayer for costs.



18. On 14th December, 2023, this Court gave the Advocates representing the applicant 7 days to file and serve their written submissions. However, as at the time of writing this ruling, no submissions had been uploaded on the CTS portal by the said Advocates.

19. The application herein is mainly anchored on Article 35(1) of the Constitution of Kenya, 2010, which provides for access to information. The said provisions state as follows-

- “ 1. Every person has the right of access to-
- a. information held by the State;
 - b. information held by another person and required for the exercise or protection of any right or fundamental freedom;
2.
3.”

20. To bring into effect the above provisions, Parliament enacted the Access to Information Act. The object and purpose of the said Act is to—

- “ a) give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;
- (b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the Constitutional principles;
- (c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;
- (d) promote routine and systematic information disclosure by public entities and private bodies on Constitutional principles relating to accountability, transparency and public participation and access to information;
- (e) provide for the protection of persons who disclose information of public interest in good faith; and
- (f) provide a framework to facilitate public education on the right to access information under this Act.”

22. It was not controverted that the applicant’s deponent is a Director of the applicant. Although in his letter to the respondent dated 21st June, 2023 he claims not to have been aware that the applicant had a bank account at the respondent bank, that is far from being factual because as per annexure MK1 attached to his affidavit in support of the instant application, the Board resolution derived from the meeting of 16th October, 2019, shows that the decision to open a bank account with the respondent was approved by Tribhovan Lalji Chavda, Jayesh Tribhovan Chavda, and the applicant’s deponent, Virji Meghji Patel, who were present at the said meeting. In the absence of any evidence to show that the said Board Resolution was a forgery, I am satisfied that the Virji Meghji Patel, being one of the applicant’s Director was aware that a bank account was to be opened at the respondent bank and that Tribhovan Lalji Chavda, the applicant’s CEO and Jayesh Tribhovan Chavda were to be the signatories of the said account and they signed the bank mandate forms for the applicant.



23. The CR-12 dated 21st June, 2023 attached to the instant application shows that the Directors of the Company as at that time were Virji Meghji Patel, with 49 ordinary shares and Tribhovan Lalji Chavda, with 51 ordinary shares. It is thus evident that the latter is the majority shareholder of the company. Although the said Director has not been made a party to these proceedings, in the extract of the meeting held on 12th July, 2023, it is shown that he was absent from the meeting with apology. There is however no evidence to show that a Notice was sent to him inviting him to attend the meeting. There is also no evidence to show that 1 Director can constitute a quorum. The applicant's Articles and Memorandum of Association were not availed to this Court for this Court to satisfy itself that indeed the meeting of 12th July, 2023 was quorate. As I have earlier stated, allegations have been made against Tribhovan Lalji Chavda but he was not made a party to the application herein so that he could support the averments made by Virji Meghji Patel in his affidavit, or controvert them.
24. The observations in the preceding paragraph aside, I note that in the replying affidavit filed by the respondent, it exhibited some of the documents that are being sought by the applicant, such as a duly executed account opening form for the applicant, and a Board Resolution dated 16th October, 2019.
25. 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.”
26. In Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission [2019] eKLR, Makau J., stated that the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access, a position that was clearly expressed by



the Constitutional Court of South African in President of the Republic of South Africa & others vs M & G Media Limited where it was held 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. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions.....Hence.....the evidentiary burden rests with the holder of information and not with the requester.”

27. The respondent opted not to file written submissions to support its refusal to supply the information being sought by the applicant. The respondent had a burden and a duty to demonstrate that the information being sought by the applicant falls within the exceptions under Section 6 of the Access to Information Act. The respondent has however failed to discharge the evidential burden of proof to the required standard. The right of access to information is provided for under Section 4 of the Access to Information Act as read with Article 35(1) of the Constitution of Kenya, 2010.
28. It is evident from the provisions of Article 35(1) of the Constitution of Kenya, 2010 that the right of access to information is only available to citizens. Section 2 of the Access to Information Act defines a citizen as any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens. This means that a company whose director(s) is/are Kenyan citizen(s) is/are considered citizen(s) for purposes of enforcing the right of access to information under Section 4 of the Access to Information Act as read with Article 35(1) of the Constitution of Kenya, 2010.
29. That being the case, and bearing in mind the fact that Virji Meghji Patel is a Director and Shareholder of the applicant company, though he is not a signatory to the bank account in issue, and taking into account that the orders being sought are aimed at establishing accountability in the manner a loan advanced to the applicant by NCBA and channeled through the applicant’s bank account domiciled in the respondent was expended, it is my finding that the applicant company is entitled to the information it seeks.
30. I hereby make the following orders-
 - i. The respondent is hereby compelled to provide the applicant herein through its Director Virji Meghji Patel with the following documents-
 - a. Bank account operating mandate forms for account No. No. 95860200002201 domiciled at the respondent.
 - b. Bank statements from the date the account(s) was(were) opened to date.
 - c. Full titles of all bank accounts including deposit accounts, retention accounts and foreign exchange accounts together with their account numbers and balances.
 - d. Copies of account opening forms for all bank accounts.
 - e. Particulars of all authorized signatories of all the bank accounts.
 - f. Copies of the resolutions provided to open bank accounts.
 - g. Details of loans, overdrafts, guarantees and any associated indemnities.



- h. Securities held by the bank.
- (ii) I decline to condemn the respondent to pay the costs of the present application as the same has been precipitated by Virji Meghji Patel's desire to establish if there was mismanagement of a loan facility advanced to the applicant company by NCBA Kenya Plc. Each party shall bear its own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ogendo for the applicant

Mr. Nyachio for the respondent

Ms B. Wokabi – Court Assistant.

