



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 195 OF 2018

PATRICK KABUNDU.....1ST PETITIONER

MUTUMA CALEB MWITL.....2ND PETITIONER

CHICHI KIMANI.....3RD PETITIONER

VERSUS

MOMBASA COUNTY GOVERNMENT.....1ST RESPONDENT

THE GOVERNOR MOMBASA COUNTY.....2ND RESPONDENT

MOMBASA COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

THE CLERK OF MOMBASA COUNTY ASSEMBLY.....4TH RESPONDENT

THE MOMBASA COUNTY ASSEMBLY COMMITTEE ON SECURITY AND

ADMINISTRATION THROUGH CHAIRPERSON.....5TH RESPONDENT

THE MOMBASA COUNTY ASSEMBLY COMMITTEE ON JUSTICE AND LEGAL

AFFAIRS THROUGH CHAIRPERSON.....6TH RESPONDENT

MOHAMED AMIR MOMBASA INSPECTORATE DIRECTOR.....7TH RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION.....1ST INTERESTED PARTY

THE ATTORNEY GENERAL.....2ND INTERESTED PARTY

THE CHIEF MAGISTRATE MOMBASA.....3RD INTERESTED PARTY

THE INSPECTOR GENERAL NATIONAL POLICE SERVICE...4TH INTERESTED PARTY

THE MOMBASA LAW SOCIETY.....5TH INTERESTED PARTY

RULING

The Application

1. The application before the court dated 3/6/2019 is, as submitted by the 1st Petitioner/Applicant Mr. Kabundu, largely premised on the Ruling of this court delivered on 9/5/2019 on an application, dated 11/7/2018 also filed by the same parties.

2. Apparently because the Applicants did not succeed in the Ruling delivered on 9/5/2019, the Applicants thought the best way forward is to make the current application in order to access the evidence they would require to prosecute their petition herein.

3. This application prays for the following orders:

(a) An order directing the County Government of Mombasa to produce for perusal by this Honourable Court and the Petitioners the receipt book which record out payment made by the public in the County Court since 1st June, 2015 up to date and also bank statements for KCB Account No. 1162415967 from 1st June, 2015 up to date and Pay Bill No. 8563555 account GENERAL 1 M-Pesa statements from its registration up to date and other accounts known to them collecting fines and bill arising from violation of the county by laws to ascertain what amount of money has been received on behalf of the national government and submitted to the consolidated fund.

(b) Without prejudice an order directing Safaricom to produce M-Pesa statement for Pay Bill No. 856355 from its date of registration up to date to this Honourable court and the Petitioners to enable the court to ascertain what amount of money has been collected through the Pay Bill and if the money collected has been transmitted to the necessary bank accounts for transfer to the consolidated fund.

(c) Without prejudice that an order directing information on who's mobile phone numbers or account is the M-Pesa Pay Bill No. 856355, Account GENERAL 1 linked to and how withdrawals are made on the subject account.

(d) Without prejudice an order allowing the Petitioner to place notice and/or advertisement in the print and other media calling on any and all persons who have ever been fined and/or paid any money to the Mombasa County Court in form of fines and cash bonds from 1st June to date and issued with a County Government receipt to forward it to the Petitioners and court for accounting purposes.

(e) That the cost of this application be granted.

4. The application is premised on the grounds set out thereon and is supported by affidavit of Patrick Kabundu, the 1st Petitioner herein, sworn on 3/6/2019.

5. The Petitioner's case is that the Kenya Constitution 2010 at Article 35 allows access to public information as public right; that Parliament of Kenya has promulgated a law that allow citizens to access information as a public right; that the Petitioner's petition prayer No. 6 depends on the information on effect of accounts assessment to help the court reach the right figures; that the law vested in Article 262 (22) on the transnational and consequential provision give the Chief Justice and Chief Registrar of the Judiciary jurisdiction and how to operate after 2010 constitution; that on 25/11/2014 in a consultative meeting between the then Chief Justice Mr. Willy Mutunga and Council of Governors, the then Chief Justice is quoted in a statement that the Local Government Act Cap 265 which established the former Municipal Courts is now repealed by the County Government Act 2012 and by the authority vested in him under Article 262 (22) on the transitional and consequential provisions. The Chief Justice asked the Chief Registrar of Judiciary to give direction; that an administrative Memo dated 26/5/2015 as CRJ 3 issued by the Chief Registrar of Judiciary directed all Chief Magistrates and Presiding Judges that no revenue or part of revenue should be remitted to the County Government. There was a further directive on how Judiciary was to take over from the Municipal/City Court under the old constitution and Cap 265 Local Government Act which was repealed; that on 25/9/2018 the 1st Petitioner wrote a letter to the Chief Registrar of Judiciary Reference subject STATUS OF COUNTY COURTS AND CONSOLIDATED FUND under Article 206 of constitutional being fines and bonds; that on 16/11/2018 the Chief Registrar of the Judiciary wrote to the 1st Petitioner Mr. Patrick Kabundu and gave the position of Judiciary by supporting the memo dated 26/5/2015 and stated that the Hon. Attorney General is handling the subject matter for Judiciary and directed Petitioner to deal with the Attorney General on court matter; that the Mombasa County Government has agreed that it collects the fines and bonds from Mombasa Public through the Municipal Court in the County Secretary Replying Affidavit dated 30/7/2018; that it is the interest of justice and fairness that the application herein should be allowed and that Mombasa County Government should not be allowed to collect funds which belong to the Judiciary.

The Responses

6. The 1st, 2nd, 3rd and 4th Respondents opposed the application through grounds of opposition filed herein on 14/8/2019. The 1st to 4th Respondents' case is that the provisions of law cited by the Applicant, both in the constitution as well as in the Access to Information Act of 2016 do not in any manner either operate or enure for the benefit/advantage of the Applicant. The same do not assist the Applicant in his rather convoluted, voluble and unclear requests contained in his Motion; prayer No. 1 in that motion is incapable of properly being understood, to enable the above Respondents to adequately respond thereto. For example, it is not clear which payment is made out by the public in the County Court that the Applicant makes reference to in that prayer; it is hard to envisage what exactly the Applicant means by the phrase "...other accounts known to them collecting fines and bill arising from violation of County by law..." The Respondents aver that none of the Respondents admits such violation of "County By laws" to entitle them give any accounts relating to such alleged violations as intimated by the Applicant. The Respondents further aver that they shall not make any comments regarding orders sought against Safaricom, a stranger in these proceedings. Further, they aver that prayer 3 in the said motion is devoid of any particularity as to the party against whom it is sought.

7. The Respondents aver that in the circumstances, it is not possible to adequately respond to the same. They further aver that prayer 4 is in the realm of the perceived prerogative of the Applicant. No order of this court is necessary or required for him to do what is a perception of his case. They further aver that the gist of the grounds upon which the subject motion of 3/6/2019 is predicated are those that have already been the subject of the Ruling of this Court delivered on the 9/5/2019.

8. The 5th, 6th and 7th Respondents also oppose the application. They filed grounds of opposition on 24/9/2019. Their case is that the orders being sought are subject of the main petition hence allowing the application shall be akin to determining the matter prematurely; that the Applicant is seeking to unjustly steal a match from the Respondent which is against the principle of fair hearing; that the issue at hand is whether the County Government of Mombasa should oversee the operations at the Municipal Court and therefore, the application has no bearing on the main petition; that the Applicant has not tendered sufficient justification to warrant being granted the orders being sought; that no miscarriage of justice will arise if the application is disallowed considering that whether or not the Applicant is entitled to the information sought is an issue that shall be determined upon the case being heard and determined on merit; that the application is an attempt to unnecessarily delay proceedings in the main petition and should thus be dismissed to save on time; that the application seeks for orders against a party that is not a party to this application and the application is misconceived, fatally defective and an utter abuse of the court process and should thus be dismissed with costs to the Respondents.

9. The 1st to 4th Interested Parties also oppose the application. They filed grounds of opposition on 3/10/2019. Their case is that the orders being sought are the subject of the main petition hence allowing the application is akin to determining the matter prematurely; that if the application is allowed it would go against the principal of natural justice as the other parties will have been condemned unheard in light of the main petition; that the application has no bearing on the main suit as the issue of the County Court being overseen by the County Government of Mombasa is the main issue in this suit; that the application is an abuse of court process and should thus be disallowed as it is a mockery of justice; that the Petitioner has not tendered sufficient evidence to entitle him to such privy information considering Safaricom is not a party to the suit; that the application is meant to delay hearing of the main petition, and should be dismissed in the interest of justice and that the application is misconceived, fatally defective and an utter abuse of the court process and should be dismissed with costs to the Respondents and Interested Parties.

Submissions and Determination

10. With the leave of court parties filed submissions to the motion. Those submissions were briefly highlighted in court on 4/11/2019.

11. I have carefully considered the application and submissions. In my view the following issues arise for determination:

- (i) Whether the prayers in the motion are res judicata as regards the Ruling of 9/5/2019 and/or are pre-judicial to the petition herein.
- (ii) Whether this court can grant the prayer sought herein for access to information in the custody of Safaricom, a stranger to these proceedings.

12. As regards the first issue herein, the Applicant expressly submitted that the foundation of his application is paragraphs 26 to 30 of the Ruling herein delivered on 9/5/2019. Those paragraphs read as follows:

26. The Petitioners have made very serious allegations that for the last three years public funds have been directed to Mombasa County accounts, the same has not been remitted to the Consolidated Fund and that public funds are now being channeled to some people's pockets in breach of the law.

27. The Petitioners also submit that the government will lose millions in revenue if the collections by the 1st Respondent in relation to court fines, fees and bail continues.

28. It is this Court's view that the allegations raised by the Petitioners herein are very serious allegations that can be equated to fraud if proved. For the Petitioners to raise a *prima facie* case with a probability of success, they need at least to demonstrate that the monies collected by the 1st Respondent did not end up in the Consolidated Fund but ended up in some people's pockets as alleged for the Petitioners to qualify for the orders of temporary injunction against the 1st Respondent.

29. All that the Petitioners demonstrated was that the monies for Court fees, fines and bail were paid into a revenue account in the 1st Respondent's name and not the Judiciary revenue account like in Machakos County, where court fees, fines and bail were deposited in the Judiciary's revenue account instead of the Machakos County's account as per the directive by the Chief Registrar of the Judiciary. That alone in this Court's view is not enough to warrant the issue of a temporary Injunction in the absence of any evidence of diversion of funds.

30. It is this Court's finding that the Petitioners have not established a *prima facie* case with a probability of success. Further, the Petitioners have not demonstrated how the continued collection of court fees, fines and bail by the 1st Respondent will occasion injury or loss to them. The Petitioners never rebutted the 1st Respondent's response in which it averred that the money collected in form of court fees, fines and bail by them is remitted to the Consolidated Fund. It is this Court's finding that the Petitioners have failed to demonstrate the injury or loss that will be occasioned if the temporary injunction against the 1st Respondent is not granted.

13. Clearly these paragraphs raised hypothetical questions which were reserved to be heard and determined in the petition herein. However, instead of waiting for the petition to be heard the Applicant has decided to have those issues determined in this application. If that is allowed, this would amount to having the issues raised in the petition being determined prematurely in this application with the consequence that the Applicant would be stealing a match from the Respondent against the principles of fair hearing.

14. It would also amount to the Applicant being given a second pick at the cherry, having missed in the first pick. This would amount to unfair proceedings against the Respondents. It is the finding hereof that this motion cannot be allowed for the reason that the same would amount firstly, to re-hearing the Notice of Motion dated 11/7/2018 which led to the Ruling of 9/5/2019 and, secondly the grant of the motion would compromise the petition herein.

15. On the second issue, the Applicant prays for an order of access to information against Safaricom Kenya Limited, which is not a party to these proceedings. Before that however, there is a clear procedure to be followed by anybody who seeks information under Article 35 of the constitution. The relevant provisions are as follows:

“35(1) Every Citizen has a 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.”

16. Pursuant to this Article, there was enacted the Access to Information Act, No. 31 of 2016 whose preamble is in these terms:

An Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

17. Clearly this Act was enacted for the purpose of conferring upon the “*Commission on Administrative Justice*” the oversight authority and responsibility in the enforcement and eventual fulfillment of those matters envisaged as falling within the purview of Article 35 of the Constitution. This, and no less, is the purpose and responsibility of that body. By reason of the above enactment, PART III of that Act makes provision for ACCESS TO INFORMATION, and then, at Section 7(1) thereof provides as follows:

“(1) A chief executive officer of a public entity shall be an information access officer for purposes of this Act.”

Then, sub-section (2) provides:

“(2) A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.”

18. In this respect, there is established in every Public body, a designation of an Information Access Officer. Such an office as stated in Paragraph 4 above having been established, Section 8 makes provision for the Application for Access to such information as follows:

“(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.”

19. For the avoidance of doubt, and to buttress the necessity of the framing and making of an application in the manner prescribed, sub-section (4) thereof provides as follows:

“(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.”

20. Once such an application has been made, provision is made at Section 9 of the manner in which this information is to be processed. That Section 9 provides as follows:

“(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application.

(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.

(3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—

(a) the request is for a large amount of information or requires a search through a large amount of information and

meeting the stipulated time would unreasonably interfere with the activities of the information holder; or

(b) Consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—

(a) whether or not the public entity or private body holds the information sought;

(b) whether the request for information is approved:

(c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

(d) if the request is declined, a statement about how the requester may appeal to the Commission"; (Emphasis given)

(5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance."

21. Of great significance in this enactment is sub-section (6) which provides as follows:

"(6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected."

22. It is therefore the view of this Court that this Act has provided a full mechanism of the manner in which a citizen should apply for and obtain information from the state or other public body. Where any such information is denied, then the public body is duty bound, by the provisions of Section 9 (d) to provide the applicant, in that Section called "the requester" with a comprehensive Statement on how such "requester" will make an appeal "to the Commission".

23. Section 2 of the Act interprets the term Commission to mean:

"the Commission on Administrative Justice established by Section 3 of the Commission on Administrative Justice Act, No. 23 of 2011."

24. Apart from complaints to the Commission, which are provided for in Part III of the Act, Part IV of that Act provides for REVIEW of Decisions by the Commission. By Section 14 of that Part, provision is made as follows:

(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

Again to underscore the necessity of meticulously following this enactment, sub-section (4) of that Section provides as follow:

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

25. In the light of the foregoing, it is clear that this Act has a comprehensive procedure to be followed by any citizen in need of any information from a public body. The mode of applying for such information has been set out. The manner of complaining against any unfavourable decision of the Commission has been given. The manner of applying for Review of a decision of the Commission has also been provided for. These procedural requirements have all been flouted, if not forgotten by the Applicant in the Notice of Motion dated 3/6/2019, and filed in Court on 4/6/2019.

26. Again there is no evidence on record that the Petitioners have ever written to the 1st Respondent seeking for the information that they now seek that this Court makes Orders thereon. The Petitioners have in the instant case ignored all the procedural steps set out in the Act, and came to this Court prematurely. There is therefore no jurisdiction conferred on this Court to grant orders sought in the present application dated 3/6/2019. The Petitioners have cited the case of **Nairobi Law Monthly Ltd vs. Kenya Electricity Generating Company Ltd 2013 eKLR** as authority in support of their quest for the Orders that are sought. However, that case is distinguishable. The said decision was correctly decided, on the basis of the law as it was in the year 2013, before the Enactment of the Access to Information Act. This Act came into operation on the 31/8/2016. After that date, the procedures therein set out have to be followed; and the Petitioners were therefore duty bound to follow the same.

27. Just to note for record. Assuming that the Applicant herein had followed the above procedure, the information requested cannot issue against Safaricom Kenya Limited who is not a party in these proceedings.

28. From the foregoing the upshot is that the motion before the court dated 3/6/2019 does not have merit. It is dismissed. Parties to bear own costs.

Dated, Signed & Delivered at Mombasa this 6th day of May, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Makori holding brief Mr. Buti for 1st – 4th Respondents

No appearance for Petitioner

No appearance for Respondents

No appearance for Attorney General

Mr. Kaunda Court Assistant