



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

PETITION NO. 13 OF 2019

TOM PARSALOI MILLIA.....1ST PETITIONER

REHEMA CHEBITOK SHABAN.....2ND PETITIONER

-VERSUS-

AGRICULTURAL FINANCE CORPORATION.....1ST RESPONDENT

B. K. SILA T/A LEGACY

AUCTIONEERING SERVICES.....RESPONDENT

JUDGMENT

a) The petitioners obtained a financial facility from the 1st respondent, a financial institution, amounting to Kshs. 7,000,000/= with interest at 10% to enable them purchase steers. They were to repay the loan within 36 months at Kshs. 230,200/=. They were also to execute legal charges in favour of the 1st respondent over parcel Nos. **Kwale/Diani Beach Block/1585** and **Loitokitok/Ngama/297**.

b) The petitioners aver and depose that they invested the money into livestock farming and paid Kshs. 750,000/=. They were willing to continue paying the loan but unfortunately a substantial number of their livestock died. Production was also adversely affected by harsh weather conditions between 2017 and 2018. This made it impossible to continue servicing the loan and they fell into arrears as a result.

c) The petitioners state that on 10th July 2017, the President directed the 1st respondent to waive loans advanced farmers in Kajiado, Narok and Baringo counties amounting to Kshs. 1, 500,000,000 (1.5 Billion). The 1st respondent was to hand back title deeds to the concerned farmers.

d) It is the petitioners' case that being farmers in Kajiado County, they were entitled to a waiver of their loan and had legitimate expectation that the 1st respondent would take steps to waive the full amount they owed or part thereof as directed by the President.

e) The petitioners further aver that by letter dated 6th March 2018, the 1st respondent recalled their loan amount together with interest amounting to Kshs. 7,404,149. On 22nd May 2019, the 2nd respondent notified them that **Kwale/Diani Beach Block/1585** would be auctioned on 2nd August 2019. They state that their attempt to get information from the 1st respondent why their loan was not considered has not yielded any result and the 1st respondent has not supplied the information sought in violation of Article 35 of the Constitution.

f) The petitioners claim that they have been discriminated against as only a select group was considered and their loans waived. They therefore filed a petition dated 10th July 2019 and sought the following reliefs:

(a) A declaration that they had a legitimate expectation that the loan advanced to them by the 1st respondent would be waived in terms of the President's directive,

(b) A permanent injunction restraining the 1st and 2nd respondents either themselves, their agents and or servants from advertising, selling, transferring, leasing or in any way dealing with properties known as Kwale /Diani Beach Block/1585 and Loitokitok/Ngama/297.

(c) A declaration that the 1st respondent is in breach of the provisions of Article 35 of the Constitution by failing to publish information relating to the beneficiaries of the Presidential directive on waiving of loans.

(d) An order compelling the 1st respondent to release to the petitioners within 7 days of making the order; the following information:

(i) A list of all beneficiaries of the Presidential directive of 10th July 2017 on waiving of loans;

(ii) Counties the beneficiaries come from

(iii) Criteria used to identify the beneficiaries

(iv) Amount of loans waived

Respondents' response

g) The respondents filed a reply to the petition on 4th October 2019 dated 2nd October 2019, and a replying affidavit by Mainga Evans, the legal officer of the 1st respondent, sworn on 2nd October 2019 and filed on 4th October 2019. He deposed that on or about 5th October 2016, the petitioners applied for agricultural development loan from the 1st respondent for Kshs. 7,000,000. The loan was approved and was to be repaid within three (3) years with interest at 10%.

h) The loan was to be disbursed only after the petitioners executed legal charges over **Kwale/Diani Beach Block/1585** and **Loitokitok/Ngama/297**. Legal charges were registered in favour of the 1st respondent on 19th and 22nd December 2016 respectively to secure the loan amount.

i) He further deposed that the petitioners were to issue a monthly standing order for Kshs. 230,200/= with effect from 25th January 2017 in favour of the 1st respondent. The petitioners later defaulted in loan repayment which they admitted in their letter dated 13th June 2018.

j) Mr. Mainga admitted that indeed there was a Presidential directive on waiving loans in Kajiado, Narok, Baringo, Tana River, Kericho and Busia Counties of distressed unsecured group loans and bad and doubtful loans. The government first released Kshs. 500,000,000 and later Kshs. 407,078,335/= to cater for waived loans in those counties.

k) The deponent stated that the 1st respondent's Board was to formulate criteria for distributing the limited sums of money in the affected counties; that it was decided to waive balances outstanding on loans for livestock and seasonal crops advance to small scale farmers and ranchers in Kajiado and Narok counties for the period covering 2003-2016; and waivers on loans within the same period with negotiation on partial payment where possible; and waiver of entire outstanding balances on loans for livestock granted to small scale farmers in Baringo county for the same period.

l) It is the 1st respondent's case that the petitioners did not meet the above threshold for the reason that they are not small-scale farmers or ranchers; that their loan was advanced on 8th February 2017 outside the period 2003-2016; that their loan had not been distressed given that it was only three (3) months old at the time the directive was issued and that the money released by the government could not cover everyone. In their view, the petitioners are willful defaulters.

m) The deponent further stated that on 13th June 2018, the petitioners gave a proposal to repay the loan but failed to honour it. The 1st respondent maintained that the petitioners cannot rely on Article 35, the right not being absolute, to defeat their contractual obligation.

Petitioners' submissions

n) The petitioners relied on their written submissions dated 6th November 2019 and filed on 11th November 2019. They submitted that they fall within the category that was intended to benefit from the Presidential directive for waiver of loans.

o) According to the petitioners, the President's directive was for waiver of loans within the named counties and the President directed the 1st respondent to hand back title deeds following harsh drought experienced in those regions. The petitioners argued that they took a loan to purchase steers for rearing on the two parcels of land but due to harsh conditions, a substantial number of the steers died. As a result, they did not make profits to enable them repay the loan.

p) The petitioners further argued that the 1st respondent's contention that they are not small scale farmers is not supported by evidence; that the 1st respondent's further contention that their loan had not been distressed is also not without foundation since they did not have any other means of repaying the loan as their steers had succumbed due to bad weather conditions and drought.

q) On whether they had a legitimate expectation, the petitioners argued in the affirmative. They submitted, relying on **Kenya Revenue Authority & 2 Others v Darasa Investments Limited** [2018] eKLR, that if a public authority leads a person or body to expect that the public authority will in future continue to act in a way either in which it has regularly or always acted in the past or on the basis of a past promise or statement which presents how it proposes to act, then, prima facie, the public authority should not without an overriding reason in the public interest, renege from the representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue.

r) The petitioners submitted that the directive was made on 10th July 2017 and therefore it intended to cover any loan made before that period.

s) On whether they were discriminated against, they again thought so and argued that being farmers within Kajiado County, and having taken a loan, the 1st respondent's act of not considering them for the waiver denied them the opportunity that was given to a select group of individuals without any justification, and thus discriminated against them.

t) They relied on *Barclays Bank of Kenya Limited & Another v Gladys Muthoni & 20 Others* [2018] eKLR for the submission that discrimination as defined in *Rose Wangui Mambo & 2 others v Limuru County Club & 15 others* [2014] eKLR means affording different treatment to different persons attributable wholly or mainly to their description by among other things sex whereby persons of one such description are subjected to restriction which persons of another description are not subjected to.

u) The petitioners argued that the 1st respondent's decision not to waive their loan despite being farmers was discriminatory and there was no basis for such discrimination.

v) They also argued that failure by the 1st respondent to give information violated their right guaranteed under Article 35 of the Constitution. They stated that although they requested for information through their advocates, it was released to them. They relied on *Katiba Institute v President's Delivery Unit & 3 Others* [2017] eKLR; for the argument that once a citizen seeks information it should be given.

Respondents' submissions

w) The respondents submitted that the principal of legitimate expectation did not apply to the petitioners. According to the respondents, the doctrine was well stated in *Republic v Kenya Revenue Authority Ex parte Shake Distributors Limited* (Misc. Application. No. 359 of 2012), as a promise made to a party by a public body that it will act or not act in a particular manner. They also relied on *Royal Media services Limited & 2 Others V Attorney General & 8 Others* [2014] eKLR for the same argument.

x) The respondents submitted that the petitioners' claim of legitimate expectation offends the loan agreement which placed legal obligations on them to repay the loan. They argued that since the doctrine of legitimate expectation is based on the principle of fairness, the petitioners cannot invoke it, and in any case, the petitioners have not shown that they fall within the requirements of the doctrine.

y) The respondents again relied on *R (Bibi) v Newham London Borough Council* [2001] EWCA CIV 607 [2002] 1WLR 237 at (19), for the submission that in all legitimate expectation cases, whether substantive or procedural, three practical questions arise; to what has the public authority, whether by practice or promise committed itself; whether the authority has acted or proposes to act unlawfully in relation to its commitment and what the court should do.

z) They contended that the petitioners cannot benefit from the doctrine of legitimate expectation on the loan waiver. They relied on *Republic v Devon County Council Ex parte P. Baker* [1955] 1 ALL ER, for the proposition that expectation arises not because the claimant asserts any specific right to a benefit, but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness.

aa) The respondents further contended that the petitioners are relying on a political statement and that a court of law cannot interpret a political statement in favour of the petitioners. According to the respondents, the Presidential directive was that distressed loans be waived in the named counties and the government only released Kshs. 907,073,335/= to cater for all counties.

bb) They argued that it was incumbent upon the 1st respondent's Board to come up with criteria of achieving that directive. In their view, the petitioners did not fall within the criteria set First, not being a small scale farmer or ranchers in Kajiado County and second, their loan had not been distressed. They urged the court not to accept to write the agreement/contract for the parties.

cc) Regarding the allegation of breach of Article 35. The respondents argued that the petitioners did not demonstrate how the information sought was required for the protection or exercise any right or fundamental freedoms. They urged the court to dismiss the petition with costs.

Determination

dd) I have considered the petition, the response and submissions by parties. I have also considered the authorities relied on. In my view, two issues arise for determination. First, whether the 1st respondent has violated the petitioners' legitimate expectation, and second, whether the 1st respondent has violated the petitioners' right to information. Before determining the two issues, a review of the undisputed facts is necessary.

ee) The petitioners applied for and obtained a loan of Kshs. 7,000,000 from the 1st respondent. The loan was to attract interest at 10%. They were to repay the loan in three years at a monthly installment of Kshs. 230, 200/=. They also charged two properties to secure that loan. Although they applied for the loan in December 2016 and the legal charges over the properties were registered on 19th and 22nd December 2016, the loan amount was dispersed in February 2017.

ff) The petitioners state that they paid Kshs. 750,000/= but defaulted due to harsh climatic conditions. The 1st respondent initiated the process of realizing securities and relevant notices were served on the petitioners which prompted the filing of this petition.

gg) Meanwhile, in July 2017, the President issued a directive that loans to farmers in named counties be waived. The petitioners assert that they had a legitimate expectation that their loan would also be waived but this did not happen.

hh) The 1st respondent, the principal party in the petition contended that the petitioners did not fall in the criteria used to waive loans, that

the amount received from the government could not cover every borrower and that the petitioners were willful defaulters. It was also contended that the petitioners had no legitimate expectation.

Whether legitimate expectation was violated

ii) The 1st respondent admitted that the President issued a directive on waiver over loans. It however stated that it only received over 907,000, 0000/= shillings which could not cover all the loanees. Its Board of management came up with criteria for determining who was to be considered for the waiver. It stated that the petitioners did not fall within the criteria it adopted and, therefore, they did not violate the petitioners' legitimate expectation. In their view, the doctrine of legitimate expectation did not apply in the petitioners' case.

jj) The petitioners have also contended that their legitimate expectation was violated. The respondents on their part argued that there was no such expectation. They further contended that there cannot be legitimate expectation against a binding agreement between the parties.

kk) Legitimate expectation is founded on legitimate representation made by an authority which has power to make such representation, that certain actions will be taken in a particular way or not taken without any qualification. Representation must also be clear and unambiguous and gives rise to legitimate expectation and the authority or body making the representation will thus be bound by that representation. In other words, the doctrine of legitimate expectation requires that there be a promise by a public body which has authority to make such representation, to act or not to act in a particular manner. The public body concerned must have acted contrary to that promise or representation for legitimate expectation to arise.

ll) The principle was well stated by the Supreme Court of Canada in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, thus;

“[68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite”

mm) The court went on to state that generally speaking, the representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

nn) In *National Director of Public Prosecutions v Phillips and Others*, [2002] (4) SA 60 (W) para 28, *Hehe J*, stated;

“The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';

(ii) The expectation must be reasonable:

(iii) The representation must have been induced by the decision-maker;

(See also President of the Republic of South Africa and Others v South African Rugby Football Union and Others [2000] (1) SA 1 (CC) para 216, and Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others [2014] e KLR)

oo) In the petitioners' case, was there a representation by the 1st respondent that it reneged on or failed to follow? In my respectful view, the answer must be in the negative. Parties have not attached the Presidential directive itself. What is attached to the petitioners' affidavit is a statement dated 10th July 2017 and signed by Manoah Espisu, State House Spokesperson. It states in part:

His Excellency the President, Uhuru Kenyatta, has waived up to Sh. 1.5 billion in loans owed to the Agricultural Finance Corporation (AFC) by distressed farmers in Kajiado, Narok and Baringo counties...”

pp) The statement went on to make reference to other counties where the President had made similar waivers on different dates. The court has not, therefore, seen the actual statement or terms of that directive. Both the petitioners and the 1st respondent agree that the President made a directive that was to see loans waiver affect several counties.

qq) According to the 1st respondent, the government followed up the directive and provided about 900 million Kenya shillings so that the 1st respondent could comply with that directive. The 1st respondent contended that due to the amount released, it had to come up with modalities for actualizing the President's directive. It decided that the directive should cover the loans disbursed to small scale farmers and ranchers between 2003 and 2016, as well as those who had been distressed. They argued that the petitioners did not fall within the categories identified by the 1st respondent because their loan had just been advanced and were not distressed.

rr) I have considered the arguments by both sides. What is clear is that it was the government that promised to waive loans and not the 1st respondent. Second, although the government promised a waiver of up to Kshs. 1.5 billion shillings, according to the 1st respondent, the government gave only Kenya Shillings 907,073,335/= which was not enough to waive all outstanding loans. The 1st respondent was left with

no alternative but to come up with modalities of complying with the directive. It therefore decided on those who were to be eligible for the waiver.

ss) The petitioners have not denied that their loan was advanced in February 2017 as the 1st respondent stated. They had just begun repaying the loan by the time the directive was issued. Their loan did not also fall in the category identified by the 1st respondent, that is, 2003 to 2016. They were not distressed at the time. In that regard, I have not seen any promise made by the 1st respondent to the petitioners conferring on them legitimate expectation capable of enforcement by in court of law.

tt) If there was any promise or representation, it was by the government but not the 1st respondent. It is inconceivable that the petitioners could raise a claim of legitimate expectation against the 1st respondent when it is clear that it made no promise or representation to the petitioners that it was waiving their loan. A promise or representation must also clear unambiguous and unqualified.

uu) Moreover, the government gave money to the 1st respondent to enable it meet the presidential directive. That meant the promise for waiver of loans was subject to the availability of Kshs. 1.5 billion the President promised. The 1st respondent received less than the amount the Spokesperson mentioned in the statement and the petitioners did not allege that the 1st respondent received the 1.5 billion shillings as promised.

vv) On the basis of the above, I am unable to agree with the petitioners that they had a legitimate expectation from the 1st respondent which it failed to accord them. No promise or representation and it would in the circumstances, be difficult to hold the 1st respondent culpable.

Whether the right to information was violated

ww) The petitioners have also argued that the 1st respondent violated their right of access to information guaranteed under Article 35(1) of the Constitution. They submitted that they sought information regarding people whose loans had been waived and the criteria used but that information was not disclosed.

xx) The 1st respondent on its part argued that it did not violate the petitioners' right of access to information. It contended that the right to information under Article 35 is not absolute and that the petitioners did not show that they required the information for enforcement of a right or fundamental freedom.

yy) The right of access to information is one of the rights in the Bill of Rights. Article 35(1) provides that every citizen has the right of access to information held by the State and information held by another person and which is required for the exercise or protection of a right or fundamental freedom.

zz) There is no doubt that the right to access information is constitutionally guaranteed to every citizen where the information is held by the state. A citizen is also entitled to information held by another person if it is required for purposes of enforcing a right or fundamental freedom.

aaa) The petitioners contended that they sought information from the 1st respondent but the information was not provided. In *Katiba Institute v President's Delivery Unit & 3 others* (supra) this court stated:

“[28] The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.” (Emphasis)

bbb) Access to Information Act, 2016 provides for the procedure for seeking information. Section 4 (2) provides that subject to the Act, every citizen's right to access information is not affected by any reason the person gives for seeking access; or the public entity's belief as to what are the person's reasons for seeking access. Subsection (3) further states that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

ccc) Section 5 also provides that a public entity should facilitate access to information held by it. However, section 8, states that a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. On the other hand, section 9 provides that a decision on the request to access information should be made and communicated within 21 days. Such communication should include whether the public entity has the information sought and whether or not it will provide access to that information.

ddd) The petitioners argued that their advocates sought information from the 1st respondent on their behalf. I have perused the record and noted that the petitioners' advocates wrote a letter dated 19th June 2019 to the 1st respondent seeking information on the criteria used to waive loans and a list of all beneficiaries of the waiver. The letter was delivered to the 1st respondent and received the following day 20th June 2019.

eee) There is no doubt that the petitioners indeed sought to access information from the 1st respondent. The request was delivered and

received. The letter was also clear on the information sought. According to section 9 of the Act, the 1st respondent had 21 day upon receiving the request, within which to respond to the petitioners' request, indicating whether it had the information sought and whether or not it was allowing access.

fff) In its response, the 1st respondent did not deny receiving the request. It did not also state that it did not have the request or that it allowed access or was not to allow access. In short the 1st respondent remained mum about the issue.

ggg) The law gave the 1st respondent twenty one (21) days within which to respond to the request for access. According to the record, the letter was written on 19th June 2019 and delivered on 20th June 2019. They were to respond twenty one days later by 11th July 2019. The petition was drawn and signed on 10th July 2019 but was filed on 12th July 2019.

hhh) Although the petition was drawn and signed just before the period set by statute to respond expired, it was filed after the period within which the 1st respondent was required to respond. Even then, the 1st respondent did not respond and has not responded to date. I have no doubt in my mind that the 1st respondent violated statute when it failed to respond to the petitioners' request for information.

iii) The constitution and the law are not in vain when they enjoin the state and anybody holding information to allow access as a matter of right. The 1st respondent has argued that the right under Article 35(1) is not absolute. That is not the point here. The fact of the matter is that it had a constitutional and legal obligation to respond to the petitioners' request to access information in its possession. My understanding of the law is that the request to access should be granted regardless of the reason for seeking information or what the body, in this case the 1st respondent, thinks to be the reason for seeking such information.

jjj) That being the position I find with regard to this limb, I am satisfied that the 1st respondent violated the constitution and the law when it refused to respond to the petitioners' request for access.

kkk) In the end, the petition partially succeeds. The petitioner failed to prove that the 1st respondent violated their legitimate expectation. They have however proved that the 1st respondent violated their right of access to information guaranteed under Article 35(1) of the Constitution. I therefore make the following orders which I find appropriate in the circumstances of this case.

a) A declaration that the 1st respondent is in breach of the provisions of Article 35 of the Constitution by failing to publish information relating to the beneficiaries of the Presidential directive on waiving of loans.

b) An order is hereby issued compelling the 1st respondent to release to the petitioners within twenty one (21) days from the date hereof the following information:

i. A list of all beneficiaries of the Presidential directive of 10th July 2017 on waiving of loans;

ii. Counties the beneficiaries come from

iii. Criteria used to identify the beneficiaries

iv. Amount of loans waived

(c). This being a constitutional petition the appropriate order to make regarding costs is that each party do bear own costs.

Dated, Signed and Delivered at Kajiado this 9th day of October, 2020.

E. C. MWITA

JUDGE