



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 370 OF 2016

**IN THE MATTER OF: ARTICLE 22(1), 23, 165(3)(D) AND 268 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF FAILURE TO COMPLY WITH THE RULE OF LAW PRINCIPLE AND
OF DENIAL OF RIGHT TO FAIR ADMINISTRATIVE ACTION, INFORMATION, AND
FREEDOM OF EXPRESSION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20(1)-(4), 25(C), 33(1)(A), 35(1), 47, 48, 49
(1), (9), 232(1)(C)(F)**

AND

**IN THE MATTER OF RULES 3, 4, 10, 11 AND 13 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

BETWEEN

MIKUL N. SHAH.....1ST PETITIONER

KENAFRIC INDUSTRIES LIMITED.....2ND PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES.....RESPONDENT

JUDGMENT

Background

The Petitioners filed this Petition on 11th October 2016. This was together with a Notice of Motion under a Certificate of Urgency brought under Articles 22(1), 23, 165(3)(d), 258; Articles 19, 20(1)-(4); 25(c), 33(1), 47, 48, 49(1), (9); 232 (1) (c), (f); Rules 3, 4, 9, 10, 11 and 13 of 2013 Rules. Both the pleadings

are supported by the Affidavit of Mikul Shah, the 1st Petitioner, sworn on 11th October 2016, on his and the 2nd Petitioner's behalf.

The 1st Petitioner is the executive director of Kenafric Industries Limited, the 2nd Petitioner which is a limited liability company, operating within Nairobi.

They application sought mainly a stay of proceedings in Criminal Case 1441 of 2015 (Republic v. Kenafric Industries Limited and Mikul Shah) pending the hearing of the Petition. The Petition sought declarations & orders to aimed at compelling the Respondent to produce all original documents lodged by one Paul Ramara pursuant to a work permit/ residence permit application that allowed the said Paul Ramara's presence in the country on 13th, 14th and 15th August 2015. They further sought from the court an order for the supply of the information sought by their letter to them dated 9th September 2015. They concluded by praying for the cost of the application.

At the commencement of the hearing, the court directed that both the Petition and the Notice of Motion be heard contemporaneously since the issues canvassed in both were similar. The direction was conceded to by both counsel for the Petitioners/Applicants and counsel for the Respondent. I must add however that amongst other prayers sought in the Petition was that this court assesses the quantum of damages awardable to the Petitioners for the failure of the Respondent to access information to them.

Submissions

The Applicant submitted that they sought the orders; firstly, on the ground that the information was necessary for the preparation of their defence in Criminal Case 1441 of 2015 and that the said information was solely in the Respondent's custody and also given the fact that the right to information was 'the touchstone of all freedoms' available to all citizens they should access it. Secondly, that the information sought comprised of public documents and as such the Respondent was holding it merely as a custodian for the public's good and given that the public service is required to abide by the values of transparency and to provide the public with the information in a timely and accurate manner they should be privy to it. They further submitted that the information sought would not undermine the national security of Kenya or impede the process of the law and was therefore not inconsistent with the tenets of Section 6 of the Access to Information Act and that they had approached the Respondent on numerous times in a bid to access the information to no avail. Counsel for the Petitioner concluded by submitting that the Petitioners had recourse before the court for the denial of their constitutional right.

The Petition was opposed by the DPP on behalf of the Respondent. The Respondent's case is supported by the Replying Affidavit of Stanslous Kyengo, the Chief Immigration Officer in the Investigations and Prosecutions Section of the Department of Immigration, on 3rd November, 2016 and filed on 4th November, 2016. In it he deponed, *inter alia*, that the Applicant had sent a letter to the department on 5th August, 2016 seeking the information sought in this application and that this letter amounted to a 'fishing escapade' since the Petitioners did not offer cogent particulars that could identify the person whose information was sought with certainty. He further deponed that the Respondent was willing to grant them the information sought but that the opaque nature of the request made it impossible to do so. He concluded by submitting that given the aforementioned the application was baseless, misconceived and devoid of merit and therefore the orders sought should not be granted since the granting of the orders would prejudice the functions, operations and independence of the Respondents.

Analysis and Determination

It appears prudent to first clarify the matter of whether the Petitioners have the *locus standi* to make an application for access to information under Article 35 of the Constitution. In this endeavor this court finds guidance in **Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & others**[2013] eKLR where it was held that; “... *a body corporate or a company is not a citizen for the purposes of Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article.*”

It would appear from this decision that the 2nd Applicant has no *locus standi* to make an application under Article 35(1) as a limited liability company. However, it must be noted that the Access to Information Act was enacted to give effect to Article 35 of the Constitution and in it a person is defined as falling within the definition set out under Article 260 of the Constitution which includes a company, association or other body of persons whether incorporated or unincorporated. It follows then that both Applicants have the relevant *locus standi* to bring an application of this kind.

That being said the Petitioners are challenging the failure by the Respondent to provide information in respect to one Paul Ramara, which they require in order to prepare the defence in the criminal proceedings in the lower court. In particular, the Petitioners were seeking details of the said Paul Ramara's residency or work permit status. The Petitioners contend that this information is necessary for preparation of their defence in the lower court proceedings, and thus, critical to the ensuring fairness in their trial. The Respondent however replied that they did not refuse to grant the Applicant the information sought and they were ready to do so if granted more detailed particulars of the said Paul Ramara.

The Petitioners' case is anchored on the right to information under the Constitution and the Access to Information Act No. 31 of 2016. The Petitioners aver that the said Paul Ramara was behind the search of their premises and seizure of goods.

The right to information is guaranteed under **Article 35** of the **Constitution of Kenya, 2010** in the following terms:

(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 publicize any important information affecting the nation.

Section 4 of the **Access to Information Act** elaborates on this rights as follows:

(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

The main issue for determination is whether the Petitioners are entitled to access the information being sought. The information being sought is in respect of one Paul Ramara, described as a South African national and a local representative of a company called *PUMA*. It was alleged that the said Paul Ramara acting as an agent for the said company accompanied inspectors from the Anti-Counterfeit Agency to raid the Petitioners' premises. The Petitioners have set out their previous attempts to access the information being sought, in the letters dated 9th September, 2015 and 29th July, 2016 written to the Director of Investigations by counsel for the Petitioners.

A response was made following the subsequent letter of 29th July 2016 in its letter dated 16th August, 2016 to the Petitioners' advocate. The Respondent stated that the release of the information requested for would require a court order due to confidentiality concerns. In the Replying Affidavit relied upon to oppose the Petition, it is deponed that the request for information was declined on the grounds that it was

not specific particularly in terms of the passport number, date of birth and other personal particulars.

This position was challenged by the Petitioners on the ground that the information being sought does not fall under the limitations cited under **Section 6** of the **Access to Information Act**. It is observable that several reasons have been cited for the failure to provide the requested for information. In response to the formal request, the Respondent cited confidentiality concerns. In the Replying Affidavit, the Respondent cited the need for a court order since the information requested was confidential, and further that the Petitioners ought to have supplied specific particulars. During the hearing of the Petition, counsel for the Respondent, asserted that the Petitioners were on a fishing expedition as they were not certain of the identity of the person being sought. Notably, counsel added that the Department did not have records of the person stated ever being granted a special pass or work permit, adding that granting of the orders would prejudice the functions, operations and independence of the Respondents.

The right to information is secured by the Constitution. This right is not classified as one of the non-derogable rights, thus, it can be subjected to certain limitations, which must be done in accordance with the law, in particular in line with **Article 24 (1)** which provides that a right or fundamental freedom can only be limited '*by law and only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*'

Section 6(1) of the **Access to Information Act** in particular sets out the limitations on the right to access to information as follows:

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) cause substantial harm to the ability of the Government to manage the economy of Kenya;*
- (f) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained*
- (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*

It is incumbent upon the party restricting access to demonstrate that the limitation is justified by the law and within the constitutional dictates. The Petitioners maintained that the information is necessary to conduct its defence. The right to a fair trial is one of the non-derogable rights set out under **Article 24(2)**

of the Constitution. **Article 50 (2)(c)** grants an accused person the right to have adequate time and facilities to prepare the defence. It is trite that access to information is interlinked to the enjoyment of other rights set out in the Constitution, as was set out by Mumbi J. in **Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 others**[2013] eKLR,

“ 31. ...,the right to information is critical to and closely interlinked with the freedom of expression ...,and indeed with the enjoyment of all other rights guaranteed under the Constitution.”

The Petitioners have demonstrated attempts to access the information being sought using letters cited in this Petition which the Respondent did not contest. I observe that the initial communication did not elicit a response from the Respondent, leading to a further request about a year later, to which the Respondent sought a court order in order to comply with the request. That said, the Respondent has shifted goalposts in respect of reasons for non-provision of the requested information, from need for a court order due to confidentiality concerns, to lack of specific particulars by the Petitioners, and even a reference to lack of records in respect of the person cited. The Respondent did not demonstrate that the information requested falls under any of the categories limited by Section 6.

Section 4 of the Act recognizes that the right to 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. It further dictates that non-disclosure is only permitted in the circumstances set out under Section 6. None of these reasons were cited by the Respondent. On the contrary, the Petitioners are entitled to the unlimited right to a fair trial.

While this court does not concern itself with the merits or otherwise of the charges against the Petitioners, it is emphasized that the state should in no way prohibit the Petitioners' right to prepare for their defence in the lower court if the realization of that right is dependent on the access to the information being requested. The Respondent is under an obligation to facilitate that right unless there is a justifiable reason within the law. The Respondent has not demonstrated any such justification. In fact, the Respondent demonstrated dishonesty, in stating lack of particulars on the one hand and citing lack of records of work permit or special pass in respect of Paul Ramara. This reason is not persuasive for the reasons that, the Respondent is the sole custodian of the records pertaining to the information being sought. It would be impractical to expect the Petitioners to be in possession of some of the particulars cited in the Replying Affidavit such as the date of birth, and passport number of the said Paul Ramara. Their request could not be deemed a fishing expedition as the Respondent contends since the Petitioners availed some information which in this court's view, could provide a sufficient basis to make further inquiries and provide information if at all available.

I am persuaded that the failure by the Respondent to facilitate the Applicant's access to the information sought would likely violate his right to a fair trial and therefore the proceedings in *Criminal Case 1441 of 2015*. This threatened violation has not crystallized as to justify the award of compensation sought by the Petitioners.

Now to the orders being sought, this court observes that in the first letter of request for information dated 9th September, 2015, counsel for the Petitioners sought an investigation as to whether the Paul Ramara had the necessary visa to practice or engage in employments as advocate, lawyer or agent, and further sought for information on the status under which he entered the country. In the subsequent letter, Mr. Mogeni referred to the earlier letter and sought to have information sought within seven days to facilitate the conduct of proceedings facing his client (the 1st Petitioner). The application filed together with the Petition however, seeks a wider range of prayers over and above what was sought in the letter.

Taking all the above in consideration this court, therefore declares:

- a) That the Petitioners have a right to access the information sought, as pleaded in the letters of 9th September, 2015 and 29th July 2016.

b) Failure to provide the information sought would violate the Petitioners' right to a fair hearing.

The court orders the Respondent to avail the information sought in the letters of 9th September, 2015 and 29th July, 2016 within 14 days. I shall make no orders on the prayer for quantum of damages because the same was not canvassed in the submissions by the Petitioners. In any case, save for the correspondence exchanged between the Petitioners and the Department of Immigration it was not demonstrated in any other way how the Petitioners suffered damages. Having made that observation, I make my final orders that the Respondent does avail the information sought in the Petitioners' letter dated 9th September, 2015 and 29th July, 2016 within 14 days. Each party shall bear its own costs of both the Petition and the Notice of Motion. It is so ordered.

Dated and Delivered at Nairobi this 7th day of December, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Omolo h/b for Mogeni for the Petitioners.

2. M/s Atina for the Respondent.