



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 140 OF 2019

IN THE MATTER OF ARTICLE 35 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF SECTION 23 OF ACCESS TO INFORMATION ACT NO. 31 OF 2016

IN THE MATTER OF THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT NO. 23 OF 2011

IN THE MATTER OF ENFORCEMENT OF THE ORDER ISSUED BY THE COMMISSION

ON ADMINISTRATIVE JUSTICE ON 30TH JULY 2019 AS A DECREE OF THE HONOURABLE COURT

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT 2011

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES

BETWEEN

THE REPUBLIC

AND

ISAIAH KUBAI.....1ST RESPONDENT

BANKING INSURANCE AND FINANCE UNION.....2ND RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

VERSUS

DUNCAN MUTHUSI.....EX-PARTE APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)

JUDGMENT

The ex-parte applicant is a member of the 2nd respondent trade union. The 1st respondent is the General Secretary of the trade union. The applicant says he is also the Chief Shop Steward of the trade union at the Barclays Bank of Kenya and also the Chairman of the Joint Negotiating Council of the trade union.

On 28.09.2018 the applicant wrote to the 1st respondent requesting for the 2nd respondent's audited accounts for the years 2017, 2016, 2015 and 2014; and an Annual General Meeting of the 2nd respondent's members and the 2nd respondent's union officials on or before 27.10.2018. The applicant wrote that he hoped to hear from the 1st respondent by Wednesday 02.10.2018.

The 1st respondent replied by the email of 01.10.2018 referring to the 2 items as requested for and stated as follows:

a) The union constitution at section 3P mandates the applicant as a member to inspect the audited accounts of the union at the union head office during working hours and the applicant was authorised to pick a date and communicate to the General Secretary in writing so that he could carry out the exercise at a nominal fee stipulated in the same section of the constitution.

b) On the second request, the union officials were ready and more than willing to address a workers meeting (and not an Annual General Meeting as there was no such provision in the union constitution) and further the applicant was to make sure that he forwards to the 1st respondent items to be discussed and the union officials shall also include their issues to be addressed.

c) As a matter of course the applicant was to reciprocate by urgently forwarding to the respondents a full accountability and usage of all the monies that had been forwarded to the applicant's team as the Barclays Bank of Kenya Central Staff Committee under the applicant's leadership from 29.07.2016 to 31.08.2018 as was listed in the email by setting out the date, cheque number and the amount of money.

The applicant replied by his email of 05.10.2018 stating that he would wish to inspect the trade union's membership register on 15.10.2018 from 10.00am onwards and requested the respondents to confirm if it was convenient to them. By a further email on 05.10.2018 the applicant requested for a soft copy of the union constitution. The applicant further stated that on the accountability since his team took over office as the Barclays Bank of Kenya Central Staff Committee, the 1st respondent could get in touch with the Committee's Treasurer who was more than willing to comply but the 1st respondent had to quote to the Treasurer the provisions of the union constitution that empowered the 1st respondent to seek such accountability as the respondents had not made similar demands to the similar Committees for other banks. Further the 1st respondent was asked to provide full accountability report by the Barclays Bank of Kenya Central Staff Committee that the applicant's team had replaced because the membership had demanded for it. The applicant further asked the 1st respondent to share the part of the union constitution that stopped the secretariat from calling for an Annual General Meeting.

The applicant says that he visited the respondents' office on 04.12.2018 to inspect the books of accounts in company of other members namely Gabriel Okomo and Alphonse Were and the 1st respondent accused them of creating disturbance. They were consequently falsely charged in Criminal Case No. 2298 of 2018.

The applicant's advocates addressed to the 1st respondent the letter dated 04.06.2019 as follows:

“NOTICE: ACCESS TO INFORMATION PURSUANT TO ARTICLE 35 OF THE CONSTITUTION OF KENYA AND ACCESS TO INFORMATION ACT NO.31 OF 2016 – BANKING INSURANCE AND FINANCE UNION (BIFU)

We act on behalf of Duncan Muthusi, one of the members and elected Shopsteward of Banking Insurance and Finance Union (BIFU) who has instructed us to address you as hereunder.

Rule 3P, 21A and 22B of the BIFU Constitution and Rules require BIFU to display a copy of the Auditor's report conspicuously at the registered office of the Union for inspection by members. However the union has not adhered to these requirements.

Our instructions is to request as we hereby do, that pursuant to Article 35 of the Constitution of Kenya and Access to Information Act No.31 of 2016, information, details and supporting documents for the following:

- 1. Copies of the audited accounts of BIFU for the last five (5) years.**
- 2. The Register of Members for both National and Branches.**
- 3. The list of Branch Officials.**
- 4. The Minutes of the Annual Delegates Conference for the last five (5) years and notices convening those conferences.**
- 5. The details of the physical branch offices.**

In the information, details, supporting documents, response and explanations requested above is for the purposes of realising and enforcing Article 10 of the Constitution of Kenya on National Values and principles of Governance, Article 41 on Labour Relations and Chapter 6 on Leadership and Integrity.

We would appreciate to receive the information requested within the statutory period provided pursuant to Access to Information Act No.31 of 2016 from the date of receipt of this letter.

TAKE NOTICE that in default, we shall institute the necessary legal action without any further reference to you whatsoever at your detriment as to cost and attendant consequences.

Yours faithfully

Apollo & Co. Advocates

Signed

APOLLO MBOYA, HSC

The letter was copied to the applicant and to Lucy Ndung'u, Commissioner – Access to Information, Commission on Administrative Justice. The respondents replied by the letter dated 07.06.2019 that the 1st respondent was out of Kenya until 23.06.2019 and a response would not be made until thereafter.

By the letter dated 11.06.2018 the interested party wrote to the 1st respondent that the Commission was the enforcement agency of the right of access to information as provided by section 14 and Part V of the Access to Information Act, 2016. Further the Commission had received the applicant's Advocates' letter of 04.06.2019 and the respondents were therefore requested to respond to the request for information in line with section 9 (1) of the Act bearing in mind the legal timelines and that a similar request had been made to the 1st respondent's office by the email dated 28.09.2018 and whose copy was attached.

The 1st respondent addressed to the interested party and the Advocates for the applicant the letter dated 01.07.2019 referring to the correspondence between himself and the applicant on the subject (referred to earlier in this judgment) and that the applicant was free to inspect the 2nd respondent's books without assistance of the interested party or the Advocates. The 1st respondent stated that the applicant was engaged in wild maligning of the 1st respondent's reputation and a defamation suit was pending at the High Court. The 1st respondent further stated that in the circumstances the interested party should not entertain the applicant's request and concluded, **"He should come out clean and admit to yourselves that his intention is not about inspection but about manipulating the union to assist him overthrow the leadership of this union members as he attempted in an abortive coup attempt of 23/03/2019 using doubtful signatures of bankers who are bona fide delegates of this union."**

The interested party addressed to the 1st respondent the letter dated 08.07.2019 referring to the 1st respondent's letter of 08.07.2019 and stating that the claimant had misdirected himself on provisions of the Access to Information Act because inspection is a form of providing access to information but section 11(3) of the Act provides that if a request is made for another form, then disclosure should be in the form contemplated by the requester. Further, the requester had made a request for provision of the information in the form stated in his Advocates' letter of 04.06.2019 so that the 1st respondent's response ought to have been in line with sections 9(4) and 11(1) of the Act where applicable. Further the request was not limited to books of accounts but also included other documents as listed in the request letter. The letter concluded that the 1st respondent complies within 7 days or the Commission, the interested party, would invoke section 23 and other necessary provisions of the Act.

By the letter dated 30.07.2019, the interested party referred to the request as listed in the Advocates' letter of 04.06.2019, stated that it had considered the request and proceeded to further state as follows:

"The Commission opines that the information requested is public information/records held by your Office. Under the Access to Information Act, the right of access to information is absolute unless limited by section 6 of the same Act.

Therefore, the Commission pursuant to Powers granted by section 23(2)(a) of the Access to Information Act, 2016 determines:

- 1. That the National General Secretary, Banking Insurance and Finance Union do facilitate access to information and records held relating to the request made by Apollo & Co. Advocates through letter referenced ACA/GEN/2019 dated 4th June 2019.**
- 2. That compliance with No.1 be within seven (7) days from the date hereof.**

TAKE NOTICE THAT section 23(3) of the Access to Information Act, 2016 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."

By the letter dated 02.08.2019 the 1st respondent addressed the applicant in view of the interested party's letter dated 30.07.2019 thus,

"RE: ACCESS TO INFORMATION PURSUANT TO THE LETTER FROM THE OFFICE OF THE OMBUDSMAN DATED 30TH JULY (received by us on 2nd August 2019) AND COPIED TO YOUR ADVOCATE APOLLO MBOYA AND OUR ADVOCATE GUSERWA

We are in receipt of a letter under reference CAJ/ATI/FIN/000/9/19 – SNK dated 30th July 2019 from the office of the Ombudsman directing us to accord you access to information as regards the union's books of accounts as enumerated in your advocate's earlier request to us dated 4th June 2019 (Ref. ACA/GEN/2019).

This is to invite you to our offices any working day from 6th August 2019 provided you notify us in writing a day earlier specifying the date and time you intend to access the said information.

Yours faithfully,

Signed

ISIAH KUBAI, MBS

GENERAL SECRETARY”

On 05.08.2019 the applicant’s advocate replied the 1st respondent’s letter dated 02.08.2019 that the letter of 04.06.2019 by the Advocates was that pursuant to Article 35 of the Constitution of Kenya and Access to Information Act No.13 of 2016, the 1st respondent was to furnish the Advocates on behalf of the applicant the details and supporting documents as listed in the letter of 03.12.2018. Further when the applicant visited the union offices on 04.08.2018 to inspect the books of accounts in the company of two other union members they were falsely accused and charged in Criminal Case No. 2298 of 2018 for allegedly creating disturbance. Thus to obviate similar experience the applicant had issued the notice to access information by the Advocates’ letter of 04.06.2019. Further, the 1st interested party had been required by the interested party to provide the information requested within 7 days as per interested party’s letter dated 30.07.2019. The letter concluded, **“In view of the above, if we do not receive the information requested within three (3) days of receipt of this letter, we shall commence the necessary legal action to challenge your defiance without any further reference to you whatsoever.”**

The applicant has moved the Court and filed an application on 14.10.2019 through Apollo Mboya & Company Advocates. The application is under section 23(2) (3) of the Access to Information Act, 2016, Rule 10 and 31 of the Employment and Labour Relations Court (Procedure) Rules, Article 162 (2) (a) of the Constitution of Kenya and all other enabling provisions of the law. The applicant prayed for orders:

1. That the application be certified as urgent and be heard ex parte.
2. That the Applicant be granted leave to enforce the order issued by the Commission on Administrative Justice on 30.07.2019.
3. That the grant of leave do operate as a stay against the 1st respondent from accessing or operating any bank account Nos. 0102074144800 and 0152074144800 of the 2nd respondent held at with the Standard Chartered Bank Ltd, Harambee Avenue Branch and any other bank account of the 2nd respondent.
4. That the Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.
5. That the costs of the application be provided for.

The application was based on the annexed supporting affidavit by the applicant and upon the following grounds:

1. The applicant has requested the 1st respondent to provide information, details and supporting documents as per his advocate’s letter dated 04.06.2019 and pursuant to Article 35 of the Constitution of Kenya and the Access to Information Act No. 31 of 2016.
3. The interested party has on 30.07.2019 per powers in section 23(2) (a) of the Access to Information Act, 2016 ordered thus **“1.That the National General Secretary, Banking Insurance and Finance Union do facilitate access to information and records held relating to the request made by Apollo & Co. Advocates through letter referenced ACA/GEN/2019 dated 4th June 2019. 2. That compliance with No.1 be within seven (7) days from the date hereof.”**
4. That section 23(3) of the Access to Information Act states that a person who is not satisfied with an order made by the Commission on Administrative Justice may appeal to the High Court within twenty-one days from the date the order was made and there has been no appeal.
5. That section 23(4) of Access to information Act states that an order of the Commission on Administrative Justice may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of filing the order.
2. That section 23(5) of Access to Information Act states that if no appeal is filed, the party in favour of whom the order is made by the Commission on Administrative Justice may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.
3. The Employment and Labour Relations Court is established pursuant to Article 162(2) (a) of the Constitution of Kenya as a superior court of record with the status of the High Court that exercises jurisdiction throughout Kenya for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.
4. The decree is required for purposes of realising and enforcing Article 10 of the Constitution of Kenya on National Values and Principles of Governance, Article 41 on Labour Relations and Chapter 6 on Leadership and Integrity.
5. The 2nd respondent’s Treasurer has resigned by the letter dated 20.11.2018 both as Treasurer and as signatory to the 2nd respondent’s bank accounts. As such, the applicant is concerned that the 1st respondent is singly running the accounts of the 2nd respondent hence the stay orders as prayed for.

The 1st and 2nd respondents filed the replying affidavit of the 1st respondent on 16.10.2019 and opposed the application upon the following grounds:

1. The ex-parte applicant is not the Chief Shop Steward or Shop Steward of the trade union at the Barclays Bank of Kenya and also is not the Chairman of the Joint Negotiating Council of the trade union as per the 1st respondent’s letter dated 07.03.2019 by which Boniface Lugadilu was appointed Chairman of the Joint Negotiating Council until elections are held.

2. The opportunity was availed to the applicant to access the information by the 1st respondent's letter dated 02.08.2019 but he refused to avail and instead joined NGO groups to demonstrate against the 2nd respondent's leadership.
3. The applicant was invited to fix a date to inspect the trade union's books but he failed to avail but instead resorted to public demonstration against the union on 04.12.2018 culminating in his arrest and charge.
4. The 2nd respondent's bank accounts are operated in accordance with the Trade Unions Accounts Regulations and the 2nd respondent's constitution under supervision of the Registrar of Trade Unions.
5. There is no order by the interested party and which does not make orders against private entities. In any case the respondents invited the applicant after the interested party's letter of 30.07.2019 which he failed to honour.
6. The applicant is dragging the respondents to Court endlessly and there are pending rulings in HCCC No. 281 of 2018.
7. No order by the interested party has been filed in Court for adoption.
8. Thus the application is baseless, lacks merit, is frivolous and vexatious.

The applicant filed his further affidavit on 24.10.2019 and stated as follows:

1. The interested has indeed made an order by the letter dated 30.07.2019.
2. Section 23(2) of the Access to Information Act, 2016 states that the Commission may, if satisfied that there has been an infringement of the provisions of the 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.
3. The Access to Information Act, 2016 is enacted by Parliament to give effect to Article 35 of the Constitution and to confer the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. Article 35 provides that every citizen has a right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.
4. Section 3 of the Access to Information Act provides the object and purpose of the Act to include inter alia, giving effect to the right of access to information by citizens as provided under Article 35 of the Constitution; providing 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; providing a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; promoting 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.
5. Section 2 of the Act defines "private body" and "public entity".
6. The applicant seeks to access information as requested to enforce Articles 10 and 41 and Chapter 6 of the Constitution of Kenya and he has stated as much in the letter by his Advocates dated 04.06.2019.
7. The respondents have not appealed the interested party's decision of 30.07.2019 as provided for in section 23(4) of the Act. In absence of the appeal, the applicant is entitled under section 23(5) of the Act to apply ex-parte like in the instant proceedings by summons for leave to enforce such order as a decree and the order may be executed in the same manner as an order of the High Court to the like effect. The respondents having not appealed they have waived such right accordingly.

The Court has considered the pleadings, the affidavits and exhibits, and the submissions made for parties. The Court makes findings as follows.

First, the parties are in agreement that the Court enjoys the necessary jurisdiction to entertain, hear and determine the application. Indeed the dispute is between a union and its officials on the one hand and a member of the Union. That clearly falls within the jurisdiction of the Court as conferred in the Employment and Labour Relations Court Act, 2011 as read with Articles 162(2) (a) and Article 165 (5) of the Constitution. The Court returns accordingly.

Second, it is clear that the interested party made an order by the letter dated 30.07.2019 pursuant to section 23(2) (a) of the Access to Information Act, 2016 and the letter clearly states the determination by the interested party. The Court does not find any reason to doubt that the interested party made a determination and therefore an order as envisaged in the Act.

Third, the Court returns that the applicant has satisfied all the requirements under the Access to Information Act, 2016 to justify an order for leave as envisaged in section 23(5) of the Act. The claimant has shown that the interested party made the order, the order has not been

complied with as per his Advocates' letter of 05.08.2019, no appeal against the order was preferred on the part of the respondents, and the time prescribed to appeal has lapsed.

Forth, the Court returns that the interested party has jurisdiction under the Access to Information Act, 2016 to make such orders as appropriate under section 23(2) against both public entities and private bodies and with respect of access to information held by such entities and bodies. It is also true that Articles 35, 10 and 41 as invoked for the applicant apply to both public entities and private bodies. The sections of the Access to Information Act, 2016 as invoked and cited for the applicant are clear on that wide jurisdiction of the interested party over the public entities and private bodies. The Court has re-examined the interested party's letter of 30.07.2019 and returns that the interested party found that the information requested for was public information or records held by the respondents. The interested party did not find that the respondents were public entities. The Court finds that while the 2nd respondent is a private body, it was found by the interested party to hold public information or records. If the respondents were dissatisfied by that finding, the Court holds that the proper action was to appeal against the finding by the interested party as prescribed in the Act but which was not done. The Court further holds that the present proceedings are purely for leave in terms of or as envisaged in section 23(5) of the Act and the proceedings are not about challenging the decision by the interested party one way or the other. In that regard, the Court returns that submissions made for the respondents challenging the merits of the interested party's decision conveyed by the letter dated 30.07.2019 will not fall for investigation and determination in the present application. Thus whether the interested party may have usurped the powers of the Registrar of Trade Unions under sections 31, 43 and 44 of the Labour Relations Act, 2007 and therefore the order by the interested party was invalid; whether the interested party went outside its statutory jurisdiction, or other challenges in that regard are all matters beyond the scope of the present proceedings.

Fifth, the Court has found that the present application is purely about leave under section 23(5) of the Act so that all other reliefs as prayed for will fail as going beyond the scope of the proceedings under the section. The prayers other than leave will collapse. In particular the Court returns that the prayers for leave to operate as a stay of the operation of the 2nd respondent's accounts were outside the scope and purpose of the application and will be declined. The Court has considered all circumstances of the proceedings and the purpose of the proceedings and returns that each party shall bear own costs of the proceedings. While making that finding the Court returns that whether the respondents had complied with the order by the interested party or not, the applicant would still be entitled to file the order by the interested party for leave as envisaged under section 23(5) of the Act. Further the Act in section 23(4) sets a regime that required the respondents to be notified of the application in any event.

In conclusion judgment is hereby entered on the application filed and dated 14.10.2019 with orders:

1. The Applicant is hereby granted leave to enforce the order issued by the Commission on Administrative Justice conveyed to the respondents by the letter Ref. No. CAJ/ATI/FIN/000/9/19 – SNK dated 30.07.2019 and to enforce the order as a decree of the Honourable Court to the like effect of a decree of the Court.
2. Each party to bear own costs of the application.

Signed, dated and delivered in court at Nairobi this Friday, 29th November, 2019.

BYRAM ONGAYA

JUDGE