



Republic v Citibank NA; Suntra Investments Limited (Exparte Applicant); Commission on Administrative Justice (Interested Party) (Miscellaneous Application E025 of 2022) [2024] KEHC 372 (KLR) (Constitutional and Human Rights) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E025 OF 2022**

**M THANDE, J
JANUARY 26, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CITIBANK NA RESPONDENT

AND

SUNTRA INVESTMENTS LIMITED EXPARTE APPLICANT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

RULING

1. This Court is tasked to determine the Application dated 26.5.22 in which the Exparte Applicant (Suntra) seeks the following orders:
 1. Spent.
 2. That the applicant be granted leave to enforce the order issued by the Commission on Administrative Justice on 24th January 2022 as a decree of this Honorable Court.
 3. That the grant of leave do operate as a decree of this Honorable Court in place for the order issued by the commission on Administrative Justice on 24th January 2022.



4. That the Honorable Court be pleased to grant such other or further orders as it may deem fit and necessary in the circumstances.
 5. That the costs of the application be provided for.
2. Suntra's case is set out in the affidavit and further affidavit sworn on even date and on 15.7.22 by David Kinyua Waweru, its Chairman and Director. He deposed that in 2008, the Government of Kenya offered for sale its 10 billion shares in Safaricom Limited, by way of IPO. Suntra participated in the IPO as an authorized selling agent while the Respondent (Citibank) was the lead receiving bank on behalf of the Government. Suntra further entered into an agreement with Kenya Commercial Bank (KCB) which had no direct role in the IPO, to have all its clients' applications for the IPO processed through Suntra and the two would share the commission earned. Prospective investors were required to complete a detailed application form for the shares, submit the same to an authorised selling agent for onward transmission to Citibank. To this end, all completed forms and payments received from KCB were forwarded by Suntra to Citibank in numbered control batches which would include details of the name of applicants, the number and value of shares applied for, the total number of shares for the batch and the total value of the shares on the batch. Upon receipt, Citibank would verify the batch schedules against the applications received and would then renumber the batches with its own numbers. Thereafter upload the data onto its accounting system tagging each batch to a unique trail reference number. The details of the uploaded data would then be imprinted on every received batch as evidence of the data captured from every such batch. Citibank maintained a Global Payments System (GPS) in line with the agreement between the authorized selling agents and the Government and an account for each authorized selling agent by the Respondent. This account would be debited with the batch total of all applications received and credited with the payments made by the agents.
3. Suntra claims that it sought information and documents from Citibank relating to a customer Ruparelia Sudhir who had paid Kshs. 116,500,000/= but was never allocated any shares. However, Cibank failed to supply Suntra with a complete statement of accounts relating to all its transactions showing debits for batch values and credits for payments received, images of 90 specific application forms which could not be traced, relating to KCB Bank applications through Suntra and documents regarding Batch 6065 indicating the total amount debited into Suntra's account for the batch relating to the said amount of Kshs. 116,500,000/=. This provoked Suntra to lodge a complaint against Citibank with the Interested Party (CAJ) on 9.7.21, pursuant to the provisions of the [Access to Information Act](#) (ATIA). CAJ rendered its decision on 24.1.22 requiring Citibank to furnish Suntra with the information sought within 7 days. Citibank however refused to comply with the order. Suntra has now moved to this Court seeking enforcement of the said order.
4. The Application is opposed by the Respondent (Citibank), *vide* a replying affidavit sworn on 20.6.22 by Edmond Obundo Okullo, its Cash Product Manager. He averred that Citibank carried out a Reconciliation of Applications and Payments in respect of the transaction with Suntra and obtained a discharge by Suntra way back on on 29.8.08. It was not until 9.5.19 that Suntra re-opened the issue. He then gave a history of the correspondence between Citibank and Suntra over the matter. He deposed that Suntra made an application to CAJ for review of the Bank's response of 19.12.19, which application Citibank says was incurably defective. Citibank further alleges violation of its right to a fair hearing as CAJ engaged in covert correspondence with Suntra without involving it.
5. It is Citibank's case that CAJ did not have jurisdiction to consider, investigate and determine Suntra's application for review as Citibank is neither a state or a private body within the ambits of section 4 and 2 of [ATIA](#). Additionally, that the instant Application is defective having been brought under section 23(3) of [ATIA](#) which concerns appeal and not the orders sought herein. Citibank further urged that it



is practically impossible to comply with the request for information concerning Sudhir's application and payments (which application was neither received by the Bank nor payment processed). As such, the leave sought wherein for enforcement of CAJ's decision should be denied as this Court cannot issue an order in vain.

6. The CAJ supported the Application vide an affidavit sworn on 12.10.22 by, Mercy K. Wambua, its Commission Secretary. In a nutshell CAJ's position is that there being no appeal against its decision, the same may be enforced as a decree of this Court.
7. The right of access to information is guaranteed under article 35 of the *Constitution*. To give effect to the provisions of article 35, Parliament enacted the ATIA and conferred on CAJ, the oversight and enforcement of the *ATIA*.
8. The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the *Constitution*. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the *Constitution* and article 10 cannot be achieved unless the citizen has access to information. These are the words of Majanja, J in the case of *Famy Care Limited v Public Procurement Administrative Review Board & another* Petition No. 43 of 2012 [2012] eKLR.
9. An entity, whether public or private, from which information is sought, has both a constitutional and statutory obligation to disclose. Section 8 of the *ATIA* stipulates the procedure for an application for access to information, while Section 9 makes provision for the processing of such application. In the event an application for access to information is rejected, section 14 of the *ATIA* has provided a remedy, namely, applying to the CAJ for the review of the decision to reject.
10. It is common ground that Suntra did apply to CAJ requesting a review of the decision of Citibank in respect of the information sought from it. CAJ considered the application and response by Citibank, CAJ. Thereafter in exercise of the powers granted under Section 23(2) of the *ATIA*, CAJ made a determination contained in a letter dated 24.1.22, addressed to Citibank. Suntra now seeks to leave to enforce the order issued by the Commission on Administrative Justice on 24.1.22 as a decree of this Court.
11. The determination is produced hereunder:
 1. That the Chief Executive Officer, Citi Bank N. A. Kenya & East Africa Cluster do facilitate access to information and records held relating to the request for information made by Suntra Investment through their letters dated 29.10.19 and 6.12.19.
 2. That compliance with No. 1 be within seven (7) days from date hereof.
Take notice that section 23(3) of *ATIA, 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."
12. To begin with, Citibank contends that the Application is defective, having been brought under incorrect provisions of the law. Suntra countered this by submitting that this is a typographical error and that the body of the Application is clear on the orders sought.



13. I have noted that the Application is expressed to be brought under Section 23(3) of the ATIA which makes provision for appeals from the decisions of CAJ. The correct provision relating to enforcement of orders by CAJ is Section 23(5). Is this error fatal? I think not. It is a mere technicality that does not go into the substance of the matter before me. Courts are called to administer substantive justice and not sacrifice the same at the altar of procedural technicalities. In this regard I am duly guided by the principle in article 159(2)(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities. Accordingly, I find the error excusable and that it does not render the Application defective.
14. I now turn to Citibank's contention that CAJ lacked the jurisdiction to hear and determine the complaint by Suntra. Citibank contends that Suntra's complaint concerned the right to information pursuant to Section 4(1) of the ATIA. Further that in its letters to the CAJ, Suntra failed to satisfy the requirement in Section 4(1)(b), namely to state the rights it sought to protect, the information required and how the information would assist in exercising and protecting those rights. Without fulfilling the requirements, the jurisdiction of the CAJ cannot be invoked. It was further submitted that the CAJ did not consider Section 30 of the Act in the context of any of the amounts that had not been claimed, having been deposited with the Unclaimed Assets Authority.
15. On its part, Suntra submitted that CAJ had the requisite jurisdiction to deal with its complaint and further that under Section 23(3) of the ATIA allows a person aggrieved by the decision of CAJ to appeal to the High Court.
16. The powers of CAJ are stipulated in Section 23 of the ATIA. Under subsection (2), CAJ has the power to order the release of information as follows:

The Commission may, if satisfied that there has been an infringement of the provisions of this 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.
17. In its decision in question, CAJ stated that it was made pursuant to powers granted under Section 23(2)(a) of the ATIA.
18. It is quite evident to the Court that Citibank is aggrieved by the decision of CAJ. Section 23(3) of the ATIA provides a remedy for a person dissatisfied with an order by CAJ as follows:

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.
19. I have perused the correspondence on record. In the letter dated to CAJ dated 9.8.21 and subsequent letters before the decision was made, Citibank did not raise the issue of jurisdiction. This has only been raised now, in opposition to Suntra's application for enforcement of CAJ's decision. The correct procedure would of course have been for Citibank to raise the issue of jurisdiction with the CAJ in the first instance. Thereafter, if dissatisfied, invoke the appellate jurisdiction of this Court under Section 23(3), to challenge the decision of CAJ on grounds of want of jurisdiction.
20. Our courts have repeatedly stated that where a clear, sufficient and adequate legal avenue and procedure for redress has been provided by law, such procedure must be followed to the letter. In the case of



Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

21. Similarly, in the case of *Secretary, County Public Service Board & another v Hulbbhai Gedi Abdille* [2017] eKLR the Court of Appeal expressed itself thus:

Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, this Court emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

22. It is not clear why Citibank did not avail to itself the clear procedure set out in Section 23(3) to appeal to this Court against the decision of CAJ. This is in spite of the said decision containing a notice of the parties’ right of appeal under the said provision. The issues now raised that the application before CAJ was defective, that CAJ lacked jurisdiction to consider the same and that it is practically impossible to comply with the order, ought to have been raised in the appeal contemplated under Section 23(3) of the ATIA. Flowing from the cited authorities, it is evident that Citibank cannot now challenge the validity of the decision of CAJ, having failed to follow the procedure of appeal provided in the *ATIA*.

23. I now turn to the prayer for enforcement of the decision by CAJ. The ATIA has made provision for an enforcement mechanism. Section 23(5) of the ATIA provides as follows:

If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission 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.

24. The orders given by CAJ are not in vain and are enforceable as orders of this Court on application. Where an order by CAJ has not been appealed against, a party in whose favour the order is made may apply ex-parte for leave to enforce such order as a decree. The law further provides that such order may then be executed just like any order of this Court. There being no appeal against the decision of the CAJ made on 24.1.22, Citibank was obligated to comply with the said decision and orders. Having failed to do so, Citibank is in violation of the provisions of the ATIA and of Suntra’s right of access to information. Accordingly, the Court would be justified to grant the leave sought herein.

25. In the end and for the reasons set out herein, I do find that the Application dated 26.5.22 is merited. The following orders therefore issue:

1. Leave is hereby granted to the *ex parte* Applicant to enforce the order issued by the Commission on Administrative Justice on 24th January 2022 as a decree of this Honorable Court.



2. The Exparte Applicant shall have costs.

DATED AND DELIVERED VIA MS TEAMS THIS 26TH DAY OF JANUARY 2024

M. THANDE

JUDGE

