



Millia & another v Agricultural Finance Corporation & another (Petition 13 of 2019) [2024] KEHC 5456 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
PETITION 13 OF 2019
SN MUTUKU, J
APRIL 23, 2024**

BETWEEN

TOM PARSALOI MILLIA 1ST PETITIONER

REHEMA CHEBITOK SHABAN 2ND PETITIONER

AND

AGRICULTURAL FINANCE CORPORATION 1ST RESPONDENT

BK SILA T/A LEGACY AUCTIONEERING SERVICES 2ND RESPONDENT

RULING

1. This Ruling relates to Notice of Motion (the Application) dated 26th October 2020. The Application is brought under various provisions of the law as specifically shown on the face of it. The Application seeks the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the Honourable Court be pleased to stay execution of the orders issued by the Hon. Justice Chacha Mwita in his judgment delivered on 9th October 2020 pending the hearing and determination of this application.
 - iv. That the Honourable Court be pleased to set aside/or review orders issued by Hon. Justice Chacha Mwita in his judgment delivered on 9th October 2020.
 - v. That costs of this application be provided for.



2. The grounds in support of the application are found on the face of it and in the Supporting Affidavit sworn by Mr. Bonano Badia, who has described himself as the General Manager Operations of the 1st Respondent.
3. I have read the Application and the Supporting Affidavit. I have understood the grounds in support of the application. In summary form and simply phrased, the Applicants are saying that the orders of Hon. Justice Mwita in his judgment delivered on 9th October 2020 are difficult to comply with for the reasons that the Applicant has a duty of care and responsibility over information held relating to its clients who are not parties to these proceedings and that by implementing the orders of the court in that judgment, the Applicant will be offending the rules of confidentiality between the Applicant and its clients; that dissemination of the information as ordered without necessary measures may be open to abuse.
4. The Applicant further states that they are apprehensive that supplying such information flouts the client's rights to privacy.

Replying Affidavit

5. Through a Replying Affidavit sworn by the 1st Petitioner/Respondent on 25th June 2021, the Application is opposed. It is the averments of the Respondents that the orders of the Court required the Applicant to supply the Respondents with information of the beneficiaries of the presidential directive of 10th July 2017 on the waiver of outstanding loans, the counties from which these beneficiaries come from, the criteria used to identify the beneficiaries and the amount of loans waived.
6. That after the judgment was delivered, the Respondents' advocate, through a letter dated 15th October 2020, requested the information from the Applicants and served them with the Court Order dated 7th December 2020 but they did not comply with the court order.
7. The Respondents have stated that the funds received by the Applicants for the waiver are public funds and the Respondents are entitled to full disclosure of how the funds were applied and who the beneficiaries were; that during the hearing of the Petition, the Applicant did not demonstrate any reasons why the information should not be released; that the Applicants have not demonstrated that there is a mistake or error apparent on the face of the record and/or sufficient reason to form the basis of review. They have urged that this application be dismissed with costs.
8. The Application was canvassed through written submissions.

1st Respondent's/Applicant's Submissions

9. The 1st Respondent/Applicant filed submissions dated 1st August 2022 in which two issues have been identified for determination, namely:
 - i. Whether the 1st Respondent has met the conditions for review?
 - ii. Whether the release of information on counties and the list of all the beneficiaries will offend the rules of confidentiality between the 1st Respondent and its clients while executing the orders?
10. On the 1st issue it was submitted that the 1st Respondent has met the conditions for review. They relied on section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. They cited Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR and Francis Origo & another v Jacob Kumali Mungala [2005] eKLR to support their submissions that this court retains



inherent discretionary powers which it can invoke whenever it is necessary to do so in the interest of justice and fairness as provided under Section 3A of the *Civil procedure Act*.

11. They urged this court to exercise that inherent discretion in interpreting what sufficient reason in the circumstances of this case is. They also relied on *The Registered Trustees of the Archdiocese of Dar es Salaam v Banjo Village Government & others*, Civil Appeal No. 47 of 2006 where it was stated that:

“It is difficult to attempt to define the meaning of the words “sufficient cause”. It is generally accepted however that the words should receive a liberal construction in order to advance substantial justice, when no negligence or inaction or want of bona fides is imputed to the Applicant.”
12. It is further submitted that this court should find that there exists sufficient reason to warrant a review in this case and argued that the duty of confidentiality that the 1st Respondent/Applicant owes to the clients is crucial and amounts to strong ground which can lead to review. They relied on *Evan Bwire v Andrew Nginda* [2000] eKLR to support that argument.
13. On the 2nd issue, it is submitted that the 1st Respondent/Applicant has a duty of care and responsibility over information relating to third parties and cited, inter alia, *Jean Njeri Kamau v Association of Action Aid International & 2 others* [2020] eKLR and *Tournier v National Provincial and Union Bank of England* [1923] All ER on the issue of confidentiality.
14. It was submitted that this Honourable Court through Order (b) (i) of the judgment directed the 1st Respondent to provided confidential information about its clients to the Petitioners/Respondents thereby exposing it to unwarranted and unnecessary litigation for breach of fiduciary duty. They invited the court to find that there exists a duty of confidentiality to its clients which should be considered as constituting a sufficient reason for review.

Petitioners’/Respondents’ Submissions

15. These are dated 7th December 2021. The following issues have been flagged out for determination:
 - i. Whether the 1st Respondent has met the grounds for review.
 - ii. Whether the 1st Respondent is justified in failing to supply the information required.
16. On the 1st issue, the Petitioners cited *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR which has also been cited by the 1st Respondent. In that case the court outlined the principles to be considered for review as follows:
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. While considering an application for review, the court must confine its adjudication with referent to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.
 - iii. Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section



80 of the Civil Procedure Act does not prescribe any limitations on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

- iv. The power of a civil court to review its judgment/decision is traceable in Section 80 CPA. The grounds on which review can be sought are enumerated in Order 45 Rule1.
17. It was submitted that the reasons given by the 1st Respondent that it is difficult to comply with the orders of the court due to the duty of care and responsibility over the information relating to third parties and that a breach of confidentiality agreement between itself and other clients do not meet the threshold for review; that during the hearing of the Petition, the 1st Respondent did not raise any grounds as to why the information sought by the Petitioners should not be released and that the reasons outlined by the 1st Respondent do not fall within the scope of the provisions of Section 80 of the Civil Procedure Act or Order 45 Rule 1 of the Civil Procedure Rules and therefore cannot be the basis for review.
18. On the 2nd issue, it was submitted that the 1st Respondent has deliberately failed to comply with orders of the Court and filed this application under the guise that the private information of the beneficiaries of the Presidential Directive of July 2017 ought to be protected and that there is a relationship of a confidential nature between itself and the beneficiaries that ought to be protected. It was submitted that it is trite that public interest overrides private rights; that the money used to pay the farmers is public funds and therefore the 1st Respondent cannot hide behind private rights in a bid to refuse to be held accountable.
19. The Petitioners cited *Katiba Institute v Presidents Deliver Unit & e others* [2013] eKLR where the Court held that:

“We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused”

“State organs or public entities....have a constitutional obligation to provided information to citizens as of right under the provisions of Article 35(1)(a) ...they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens.”
20. It was submitted that the actions of the 1st Respondent further contravene Article 201 of the Constitution and the peremptory principles of public finance which demand for openness accountability and public participation in financial matters; that the nature of the information being financial ought to be in the public domain for the purposes of openness and transparency. The Petitioners urged that the application be dismissed with costs.

Analysis and Determination

21. I understand the following issues to be central to the determination of this matter and to capture the dispute between the two parties:
 - a. Whether the 1st Respondent has met the grounds for review.
 - b. Whether the 1st Respondent is justified in failing to supply the information required.



22. The provisions of the *Civil Procedure Act* and the Rules thereunder that govern review are Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the Civil Procedure Rules. Section 80 provides that:

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

23. Order 45 Rule (1) provides that:

- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay

24. Clearly, a party moving the court for review must demonstrate the following:

- a. That there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or
- b. On account of some mistake or error apparent on the face of the record, or
- c. For any other sufficient reason, and
- d. The application for review must be made without unreasonable delay.

25. The orders of the court sought to be reviewed are contained in the judgment of the court (Mwita, J) delivered on 9th October 2020. The orders are reproduced in this Ruling as follows:

st 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.

- (a) a declaration that the 1
- (b) an order is hereby issued compelling the 1st Respondent to release to the Petitioners within 21 days (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.

26. In arriving at the above orders, the Court in paragraph (iii) of the judgment of the Court delivered on 9th October 2020, reasoned as follows:

“*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 Petitioner’s 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.”

27. I have read the application and the supporting affidavit as well as the submissions of the Applicants. I have not seen evidence by the Applicants demonstrating discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record.

28. Instead, the Applicants are asking this court to find that they had sufficient reason to not comply with the orders of the court. Their application is anchored on their claim that there is sufficient reason to warrant grant of the order of review for the reason that they owe a duty of confidentiality to their client not to release the information they were ordered to release to the Respondents. The Applicants are asking this court to invoke its inherent jurisdiction to find their failure to comply with the court order due to the duty of confidentiality they owe to their clients as sufficient reason.

29. Article 35 (1) of *the Constitution* provides that:

- (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.

30. The *Access to Information Act*, Act No. 31 of 2016, gives effect to Article 35 of *the Constitution*. Section 4 of the said Act is a replica of Article 35 (1) above. Section 8 of the Act provides elaborate manner in which applications for access to information are made. Section 9 provides how the said applications are processed. A public officer is required under the Act to make a decision on such an application as soon as possible, but in any event within twenty-one days of receipt of the application. Section 9 is specific that once the information access officer has made a decision as to whether to provide access to information, he shall immediately communicate the decision to the person requesting, indicating whether or not the public entity or private body holds the information sought; whether the request for information is approved; if the request is declined and the reasons for making that decision, including the basis for deciding that information sought is exempt.

31. I agree with the Respondents that the funds used to pay farmers is public funds and therefore the Applicants owe a duty of disclosure of information regarding how those funds were utilized. I agree



with the court in *Katiba Institute v Presidents Deliver Unit & e others* [2013] eKLR where it was held that:

“We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused”

“State organs or public entities....have a constitutional obligation to provided information to citizens as of right under the provisions of Article 35(1)(a) ...they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens.”

32. My careful analysis of this matter and the applicable law on review as well as relevant authorities leads me to the conclusion that the Applicants have not met the threshold for grant of the orders of review they are seeking. Their invitation to this court to invoke its inherent jurisdiction to find their alleged duty of confidentiality to the farmers as sufficient reason to grant the review is declined. They do not hold that duty of confidentiality to the farmers who benefitted from the payment.
33. The Applicants are bound by Article 10 of *the Constitution*, specifically the values and principles of good governance, integrity, transparency and accountability, to abide by the law and provide the information requested. As the situation stands, they did not comply with Article 35 of *the Constitution* and the provisions of the *Access to Information Act*, section 9.
34. I find this application without merit. It must fail for the reasons that it does not meet the requirements for the grant of review of the orders of this court. Consequently, the Notice of Motion dated 26th October 2020 is hereby dismissed with costs to the Respondents.
35. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF APRIL 2024.

In the presence of:

.....for the Applicant

.....for the Respondent

S. N. MUTUKU

JUDGE

