

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 539 OF 2016

EDWIN HAROLD DAYAN DANDE.....1ST PETITIONER

ELIZABETH NAILANTEI NKUKUU.....2ND PETITIONER

PATRICIA NJERI WANJAMA.....3RD PETITIONER

SHIV ANOOP ARORA.....4TH PETITIONER

VERSUS

BRITISH AMERICAN INVESTMENTS CO. (K) LTD....1ST RESPONDENT

BRITISH AMERICAN ASSETS MANAGERS LTD.....2ND RESPONDENT

JUDGMENT

1. **Edwin Harold Dayan Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama and Shiv Anoop Arora**, the 1st, 2nd, 3rd and 4th Petitioners respectively, were at one time employees of British American Assets Management Ltd the 2nd respondent, an associate of British American Investments Company (K) Limited, the 1st respondent herein. The 1st petitioner was the Chief Executive officer, the 2nd petitioner the senior potfolio manager, the 3rd petitioner assistant company secretary and the 4th petitioner the investment analyst at the 2nd respondent.
2. The petitioners resigned from the 2nd respondent after issues of their impropriety arose and the 2nd respondent with other affiliate companies filed

suits in the High Court accusing the petitioners of fraud in respect to investment funds transferred from the 2nd respondent.

3. The petitioners aver that the suits were later settled between **Acorn Group Limited**, Acorn properties limited, Acorn Investment and the respondents. At the same time, the 2nd respondent lodged a complaint with the police against the petitioners over fraud and acts of conflict of interest.
4. The petitioners further aver that following the respondents' actions, they instituted Judicial Review proceedings in **JR No 435 of 2014** but the court declined to grant immediate stay of criminal investigations initiated against them and later the proceedings in **Criminal case No 1735 of 2016**. The decline to grant stay forced the petitioner to lodge an appeal to the Court of Appeal.
5. The petitioners state that the respondents conducted legal investigations and forensic audit which did not find them culpable in the alleged fraudulent acts. They further state that they sought information from the respondents relating to matters over which they had been systematically harassed before various courts and tribunals, including being labeled as fraudsters in various media outlets without success. It is the petitioner's case that they have the right of access to information on the settled civil suits and the investigations, a right guaranteed by Article 35(1) of the Constitution.
6. It is the petitioners' case that the respondents hold information which they consider relevant and valuable for purposes of exercising and protecting their rights and fundamental freedoms in terms of Article 35(1)(b) of the Constitution as read with section 4(1)(b) of the Access to Information Act.

According to the petitioners, information they seek is on the settlement agreement entered into between the 2nd respondent and Acorn Group Ltd in the Civil suits, the legal investigations and forensic audit done by Messrs **Coulson Harney** and **KPMG** respectively on the 2nd respondent's activities and books of account

7. The petitioners aver that although they have requested for these documents, their request has not been acceded to. They, therefore, filed this petition and sought the following reliefs.

- i. A declaration that the Respondents have violated the rights of the petitioners under Article 35(1)(b) of the Constitution and section 4(1)(b) of the Access to information Act No 31 of 2016.*
- ii. An order compelling the respondents to provide the petitioners with;*
 - a. The settlement Agreement entered into between BAAM and Acorn Group Limited in HCCC No 352, 353, 354, 361 and 362 of 2014 which form the basis of the court orders given on 22nd October, 2015 by Honourable Nbogholi-Msagha*
 - b. The forensic audit performed by KPMG on the books of BAAM as mentioned in paragraph 5 of Ms Carol Akinyi Ouko-Misiko's witness statement sworn on 27th October 2014 and filed in HCCC No 354 of 2014;*
 - c. The legal audit performed by Messrs Coulson Harney of all transactions handled by the petitioners as referred to in paragraph 17 of Mr Jude Anyiko's affidavit sworn on 27th October 2016 and filed in HCCC No. 354 of 2014.*

iii. Such other and/or further relief as this Honourable Court may deem fit and just to grant.

iv. The costs of and occasioned by this petition be provided for.

Response

8. The respondents filed a replying affidavit by **Judy Anyiko**, the Chief investments officer of the 2nd respondent, sworn on 15th February 2017. She deposed that the petitioners, who had been employees of the 2nd respondent, resigned from employment in 2014; that on various dates in the course of their employment, they engaged in fraudulent and irregular activities inconsistent with their duties including withdrawal of funds held by the 2nd respondent through **Acorn Properties Ltd, Acorn Investment Ltd and Acorn Group Ltd**.
9. According to **Ms Anyiko**, this led to the respondents filing several civil suits in the High Court over the illegal transfer of funds at the instance of the petitioners; that the companies to which the funds had been transferred namely; **Acorn Properties Ltd, Acorn Investments Ltd and Acorn Group Ltd**, entered into out of court settlement agreeing to retransfer back those funds leading to settlement to the suits.
10. **Ms Anyiko** further deposed that the petitioners' acts were also the subject of criminal investigations eventually leading to the petitioners being charged in **Criminal Case No 1735 of 2016**; that the petitioners filed Judicial Review proceedings in **JR No 435 of 2014 Edwin Harold Dayan Dande & 3 Others v Inspector General of Police & 3 others**, seeking to prohibit their investigations and or prosecutions but the application was declined

leading to filing of an appeal being **Civil Appeal No 146 of 2016**. It is deposed that the application for stay in the Court of Appeal was however withdrawn on grounds that the High Court had stayed their criminal prosecution.

11. **Ms Anyako** denied the petitioners' contention that their right of access to justice has been compromised by the failure to give them the documents. It is her further contention that the petitioners have demonstrated that they have sufficient information to defend themselves as demonstrated by their replying affidavit filed in the civil suits.
12. According to **Ms Anyako**, the settlement agreements were entered into between the respondents and other parties to transfer back the funds illegally transferred to them, and that the petitioners not being party to those settlement agreements, are not entitled to them. She stated that although Article 35(1) provides for access to information, the present petition is a fishing expedition in that the information sought is not for purposes of protecting the right of access to justice.

Petitioners' submissions

13. **Mr Amoko** appearing with **Ms Rachier** for the petitioners, submitted highlighted their written submissions dated 4th April 2017, and supplementary submissions dated 6th November 2017, that the petitioners seek to access information in exercise of their right under Article 35(1) of the constitution. According to learned counsel, although the request for information was made to the respondents' counsel by letter dated 28th November 2016 there was no response to that request.

14. Mr Amoko submitted that the petitioners were once employees of the 2nd respondent but resigned from their employment after their employee-employer relationship became strained. Learned counsel further submitted that before resignation, the petitioners had participated in a forensic audit that had been commissioned by the respondents and are aware that no adverse finding were made against them with regard to the allegations previously raised against them.
15. Counsel pointed out that although civil suits had been filed against the petitioners and other third parties, those suits were compromised between the respondents and those other parties without involving the petitioners. He submitted that it is the settlement agreements and the investigations conducted regarding the claims made against the petitioners that they seek to access. Counsel further argues that the documents are not only sought for purposes of trial but also for the civil suits. According to Mr. Amoko, the right of access to information cannot be limited if it is intended to aid a party enforce his right to fair trial which cannot itself be limited. He contends that the respondents have not shown that the information sought falls within the exceptions in Article 35(1) save only to state that the information sought will prejudice commercial interests without showing how.
16. Counsel relied on the case of *Mercy Nyawande v Banking Frauds investigations Department* [2017]eKLR among other decisions arguing that the respondents have not come anywhere near the standard set by the law and jurisprudence.

Respondents' submissions

17. Mr Nyaga, learned counsel for the respondents, submitted also highlighting their written submissions dated 9th October 2017, that after the petitioners resignation, civil suits were filed against them and other parties, and that investigations conducted established that the petitioners had committed some fraudulent acts by transferring funds from the 2nd respondents to third parties.
18. Counsel submits that negotiations were held between the respondents and the companies which had been involved in the fraudulent transfer of funds leading to consent being entered into between those companies and the respondents to have the funds transferred back to the 2nd respondent. It is further submitted that a complaint was also lodged with the police and investigations conducted resulted into the petitioner later charged in court.
19. Regarding the petitioners' quest for information, Mr Nyaga argues that the petitioners were not party to the negotiations and resulting settlement hence they are not entitled to those documents. In so far as Article 35(1) is concerned, counsel contends that the petitioners ought to show why they need the documents and how this will aid them in the protection of rights and fundamental freedom which they have not shown. He relies on the decision of Nairobi Law Monthly v KenGen & 2 others [2012] eKLR for the submission that information should be for the protection of another right. Counsel further argues that the petitioners' letter of 28th November 2016 did not show protection of rights to be the reason for seeking the information.

20. Mr. Nyaga contends with regard to the settlement documents that they are confidential between the parties thereto and should not be disclosed to third parties. He also contends that the legal investigation and forensic audit are similarly confidential documents; that the respondents are bound by confidentiality clauses and that disclosure would be prejudicial to the respondents' commercial interests.
21. He also argues that section 6 of the Access to Information Act provides instances when the right of access can be limited. In counsel's view, section 6(e) protects privileged commercial information. He also relies on section 6(f) of the Act and several authorities in support of their position.

Determination

22. I have considered the petition and the response. I have also considered submissions by counsel for parties and the authorities relied on. The issue raised in the petition is whether this court should order access under Article 35(1)(b) of the Constitution as read with the Access to Information Act.
23. The facts of this petition are not in dispute. The petitioners were once employees of the 2nd respondent. They resigned when they thought their employment was no longer tenable. This was after issues of impropriety regarding transfer of some funds from the 2nd respondent's accounts to third parties. The respondents instituted recovery suits on account of that fraud and the petitioners were named as co-defendants in those suits.
24. Later on, the respondents as plaintiffs, entered into a settlement with the other parties without involving the petitioners so that the money that had

allegedly been transferred to the third parties was to be transferred back to the respondents herein. Similarly legal investigation and forensic audit were conducted at the instance of the respondents. A complaint was also lodged with the police leading to investigations being commenced against the petitioners which resulted into criminal proceedings.

25. The petitioners took out Judicial Review proceedings to stop their investigation and prosecution. At the time of the hearing, there were proceedings both in Judicial Review and the Court of Appeal regarding investigations and criminal prosecution. It is these settlement agreements, the legal investigation and the forensic audit reports that the petitioners seek to access.
26. In the petition, the petitioners argue that they are entitled to access that information for purposes of enforcing their rights. The respondents have on their part contended that the petitioners are not entitled to the information and have cited confidentiality and prejudice to commercial interests as the basis for resisting the request to access.
27. Access to information is a fundamental right. Article 35(1) grants every citizen the right of access to information held by the state and by another person and which may be required for the exercise or protection of a right or fundamental freedom. In that regard, the right to access is given to an individual for purposes of accessing information held by public bodies acting on behalf of the state or held by private persons. It is an important right for the proper and democratic conduct of government affairs for it enables citizens participate in the governance of their affairs.

28. The right to access information is a foundational human right upon which other rights flow, and for citizens to protect their other rights, the right to access is critical for any meaningful and effective participation in the democratic governance of their country. (see *Katiba Institute v President's Delivery Unit & 3 others* [2017] eKLR. it is in that regard, that Article 35(1) makes the right of access to information attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access.
29. Further, the right to access information is inviolable as a constitutional right because it is granted by the Constitution and not by the state. The state's and everyone's duty is to respect and uphold this right. In the case of *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* [2016]eKLR, the Court stated that;

"[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public's Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2, that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not

require individuals to demonstrate a specific interest in the information”.

30. The Constitutional Court of South Africa also appreciated the importance of this right as a founding value in a constitutional democracy in the case of *President of Republic of South Africa v M & G Media* CCT 03/11, when it stated that:-

“[10]The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right... also depends on the right of access to information. For without access to information, the ability of citizens to make responsible...decisions and participate meaningfully in public life is undermined.”

31. The fact that the right to access information is a basis for accountability, responsiveness and openness was stated in *Brummer v Minister for Social Development & others* CCT 25/09 2009 ZACC 21 thus;

“[62] The importance of this right...in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency...[The]Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”

32. The information sought by the petitioner is not held by the state but by a private entity. That does not, however, mean the right of access does not bind private persons or entities at least from the spirit of both Article 35(1) and section 4 of the Access to Information Act. The petitioners say they want information for the exercise or protection of a right. In that case all they are to show is that they seek information from the respondents the purposes of exercising or protecting a right or fundamental freedom.
33. In this respect, the petitioners have pleaded that they were investigated and criminal proceedings initiated against them. Those proceedings relate to some fraudulent acts alleged to have been committed by the petitioners. They have also pleaded and it is admitted by the respondents, that civil suits were also filed in the High Court in which they were among those named as defendants. Just like the criminal proceedings, the civil suits were on the basis of the petitioners' alleged fraudulent conduct. Further still, legal and forensic audits were conducted on the 2nd respondent's books of account to ascertain whether there had been any fraudulent activities committed by the petitioners leading to transfer of funds from the 2nd respondent's accounts to others entities named in those civil suits. It is on the basis of the legal forensic audit and criminal investigations by the police that led to arraigning of the petitioners.
34. According to the petitioners, the legal and forensic audits did not find them in any way culpable. The petitioners, therefore, wrote a letter dated 28th November 2016 to the respondents' advocates seeking to access

information, on those investigations and settlement of the civil suits but no response was received or information given.

35. In furtherance of the objectives of Article 35, the National Assembly enacted the Access to Information Act. Section 4 of the Act provides for the procedure to access information. The section echoes Article 35(1) of the Constitution providing that subject to the Act and any other written law, every citizen has the right of access to information held by the State and another person and where that information is required for the exercise or protection of any right or fundamental freedom.
36. The section further provides that every citizen's right to access information is not to be affected by any reason the person gives for seeking access; or what the public entity believes to be the person's reasons for seeking access. Subsection (3) is also clear that access to information held by a public entity or "a private body" shall be provided expeditiously and at a reasonable cost.
37. Section 5 provides that a public entity should facilitate access to information held by it, while under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand the information sought. Section 9 is to the effect that that a decision on the request to access should be made and communicated within 21 days. The communication should include whether or not the entity has the information and will allow access.
38. Although the provisions' emphasis seems to be on the information held by the state, there is mention of private body or entity. That means a private person or entity has as much an obligation to allow access where the

information sought is for purposes of exercising or protecting a right or fundamental freedom.

39. As already pointed out, the petitioners were at the centre of the investigations, civil suits and criminal prosecutions. They were respondents in the civil suits because they were said to have committed fraudulent acts. The same thing relates to the legal and forensic audits as well as the criminal investigations and they have in fact been charged in court. That being the case, they would be entitled to know the outcome of the legal and forensic audits which formed the basis of the civil suits. In my respectful view, the petitioners would also be entitled to know the basis of the settlement of the civil suits in which they were co-defendants.
40. From the legal perspective, the petitioners were to seek information from the respondents. However, they sent the letter of request to the respondents' advocates. The respondents have not raised any objection to this. They have neither contended that they did not receive the request to access, nor that they do not have the information sought. All they have said, is that they will not give that information because, one; that the information is privileged and, two; that disclosure will be prejudicial to their commercial interests.
41. As I have already pointed above, the petitioners were at the centre of the investigations under taken by the respondents, leading to the filing of the civil suits and the initiation of criminal prosecutions. The legal and forensic audits were also with regard to the petitioners' activities and whatever the outcome, the petitioners have a right to know and therefore, protect their rights, if need be.

42. Moreover, the civil suits were instituted against, among others, the petitioners, and if there were settlements reached between the respondents and the petitioners' co-defendants, the petitioners would, in my respectful view, be entitled to know the terms of the settlement. The respondents have not identified the prejudice to be suffered if information regarding outcomes of the legal and forensic audits as well as details of the settlement entered into between the respondents and petitioners' co-defendants in the civil suit is disclosed. How the respondents' commercial interests would suffer if details are disclosed has also not been made clear to the court. For my part, I am unable to discern any prejudice or how the respondents' commercial interests would suffer, given that the dispute is already in the public domain since the civil dispute and investigations leading to criminal prosecutions which are not a secret.
43. The court further appreciates that whether or not there should be disclosure is not determined by the reason given by the part seeking to access or what the party asked to allow access perceives to be the reason for seeking to access. The right to access information is a fundamental right and can only be limited in terms of the Constitution and the law. Where a party cites commercial interest as a reason for declining to allow access, it must be clear but not a mere conjecture.
44. In that regard I agree with the court's view in *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* (supra), that where a public authority, (including a private entity), seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. And as the **European Court of Human Rights** observed

in Youth Initiative for Human Rights v Serbia (Application No 48135/06)
thus:-

“The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions...The access to information law should, to the extent of any inconsistency, prevail over other legislation...National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who willfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law.”

45. Taking the above pronouncements into account, I find the respondents' contention that allowing access will be prejudicial to their commercial interests unpersuasive given the nature of the information sought. This is because the Constitution and the law place a positive obligation on the state and other persons to give information in their possession for purposes of exercising or protecting rights or fundamental freedoms.
46. Having carefully considered this petition, the responses, submissions and the law, I am persuaded that the petition is meritorious and should be allowed.

Consequently, the petition dated 21st December 2016 is allowed and I make the following orders;

- i. *A declaration is hereby issued that the Respondents have violated the petitioners' right under Article 35(1)(b) of the Constitution as read with section 4(1)(b) of the Access to information Act No 31 of 2016.*
- ii. *An order is hereby issued compelling the respondents to provide the petitioners with;*
 - a. *The settlement Agreement entered into between British American Asset Management Limited and Acorn Group Limited in HCCC No 352, 353, 354, 361 and 362 of 2014 which form the basis of the court orders given on 22nd October, 2015.*
 - b. *The forensic audit conducted by KPMG on the books of BAAM as mentioned in paragraph 5 of Ms Carol Akinyi Ouko-Misiko's witness statement sworn on 27th October 2014 and filed in HCCC No 354 of 2014;*
 - c. *The legal audit performed by Messrs Coulson Harney of all transactions handled by the petitioners as referred to in paragraph 17 of Mr Jude Anyiko's affidavit sworn on 27th October 2016 and filed in HCCC No. 354 of 2014.*
 - d. *The respondents do bear costs of the petition.*

Dated, Signed and Delivered at Nairobi this 22nd Day of February 2019


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JUDGE