

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

(Coram: A. C. Mrima, J.)

MISCELLANEOUS CIVIL APPLICATION NO. E021 OF 2022

PARAGON ELECTRONICS LIMITED APPLICANT

-VERSUS-

NJERI KARIUKI (ARBITRATOR) RESPONDENT

-AND-

COMMISSION ON ADMINISTRATIVE

JUSTICE INTERESTED PARTY

RULING

Introduction:

1. This ruling is in respect of the application brought by way of an *Ex-parte* Chamber Summons dated 11th April, 2021. I will hereinafter refer to it as '***the application***'.
2. Paragon Electronics Limited, the Applicant herein, is a limited liability company duly incorporated in Kenya. It brought the application on the basis of Articles 22, 35 and 159(2)(d) of the Constitution and Section 23(2) and (5) of the Access to Information Act, 2016 (hereinafter referred to as '***the Information Act***').
3. The Respondent is Njeri Kariuki. She is an Advocate of the High Court of Kenya. She is also a Chartered Arbitrator, FCI Arb., Dip. CI Arb.
4. In this matter, the Respondent is sued in her capacity as the Sole Arbitrator in arbitral proceedings between the Applicant (as a Respondent) and Yusuf Sharafally Esufali and Amana Yusuf Sharafally Esufali (as Claimants).
5. The gist of this matter revolves around the Respondent's refusal to release some documents, which documents the Respondent holds in her capacity as the arbitrator, to the Applicant.



The Application:

6. The application was supported by the Affidavit sworn by one *Washiba Abdul* on 7th April, 2021. The deponent is a Director of the Applicant.
7. The application sought the following orders: -
 - i. *THAT, this Application be certified urgent and heard Ex-Parte and expeditiously.*
 - ii. *THAT, this Honourable Court be pleased to adopt the decision of the Commission on Administrative Justice contained in the letter dated 11th January 2022 to the Respondent as a decree of this Honourable Court thereby directing the Respondent to provide the Applicant with the documents and information requested in the Applicant's letter to the Respondent dated 11th November 2021.*
 - iii. *THAT, the Applicant be granted leave to enforce the decision of the Commission on Administrative Justice contained in the letter dated 11th January 2022 to the Respondent as a decree of this Honourable Court.*
 - iv. *THAT, the Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.*
 - v. *THAT, the costs of the application be borne by the Respondent on full indemnity basis*
8. In opposing the application, the Respondent filed Grounds of Opposition dated 11th May, 2022 which raised the following issues: -
 - i. *The Access to Information Act does not apply to arbitration proceedings.*
 - ii. *The subject matter sought under consideration is subject to proceedings in the High Court in **HCCC MISC/E006/2022 Paragon Electronics Limited V Njeri Kariuki and Yusuf Sharafally Esufali.***
 - iii. *There are express remedies provided for under the Arbitration Act, which the Applicant should have pursued with respect to the information sought.*
9. The hearing of the application was conducted on 12th May, 2022, by way of oral submissions, hence, this ruling.



The Applicant's case:

10. In advancing its case, the Applicant relied on Section 23 of the Information Act in buttressing that the application be allowed as prayed.
11. It also submitted that it was undisputed that there was a decision by the Commission on Administrative Justice (hereinafter referred to as '**the Interested Party**' or '**the Commission**') which it sought to enforce. The cases of *Republic v Sam Nthenya, Chief Executive Officer, Nairobi Women's Hospital & another Ex parte Christine Nzula; Commission on Administrative Justice (Interested Party) [2021] eKLR; Daniel Kibet Mutai & 9 Others V Attorney General (2019) eKLR; Paragon Electronics Limited V Njeri Kariuki Petition No. 412 of 2019 (2021) eKLR; and Martin Wanderi & 19 Others V Engineers Registration Board of Kenya & 5 Others (2014) eKLR* - were variously relied on in support.
12. Relying on *Republic vs. Sam Nthenya ex-parte Christine Nzula* case (supra), it was submitted that the Commission's letter directing the Respondent to release the documents in issue amounted to a decision capable of enforcement.
13. The Applicant posited that in determining the enforcement of the decision, the Court ought to apply a two-fold test. It is whether there is a decision by the Commission, and whether an appeal on the Commission's decision exists.
14. According to the Applicant, the twin-fold test informed the Commission and thus the Commission did not to oppose the application.
15. It was submitted that since the test answers in favour of the Applicant, the application ought to be allowed.
16. Responding to the Respondent's opposition, the Applicant averred that since the Respondent did not file any Replying Affidavit then her response should be limited to points of law since no factual matters can be raised through Grounds of opposition.
17. The Applicant disagreed with the Respondent on the argument that the role of the Commission does not apply to private persons. It referred to the *Sam Nthenya Ex parte Christine Nzula* case (supra) where the Court held that the Commission's role applies to both public bodies and private persons save as limited by the



law. As such, the Applicant posited that the Commission had jurisdiction over the matter.

18. In the end, the Applicant prayed that the application be allowed with costs.

The Respondent's case:

19. In opposing the application, the Respondent posited that the Commission had no jurisdiction since arbitration is a self-regulating process and has no room for other statutory processes.
20. It was also submitted that the Respondent, as an arbitrator, does not fall under the category of the persons described in Section 2 of the Information Act. It was further submitted that the Information Act does not apply to commercial transactions.
21. According to the Respondent, the Commission lacked jurisdiction to deal with the issues at hand and that the only recourse to any aggrieved party in arbitral proceedings is to the High Court.
22. The Respondent submitted that she did not appeal the Commission's decision over the jurisdictional issue, but nonetheless, that she challenged the Commission's decision, *vide* a letter date 20th January, 2022; whose content impugned the Commission's jurisdiction as well as pointed out that there existed another ongoing Court case on the same issues. The other matter was Nairobi High Court *Misc. ELC Case No. E006 of 2022*.
23. Expounding on the jurisdictional issue, the Respondent contended that Courts have been reluctant to interfere with statutory processes, especially those on alternative dispute resolutions. Reliance was placed on *Republic v Attorney General & Another ex parte Nyoro Construction Limited* (2019) eKLR; *Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & Another*; and, *Modern Holdings (EA) Limited v Kenya Ports Authority* (2020) eKLR.
24. The Court was urged to dismiss the application.

The Interested Party's case:

25. The Interested Party supported the application. It joined the Applicant in urging that the application be allowed in upholding Article 35 of the Constitution.



26. The Interested Party narrated that the Applicant had sought for time sheets and ETR receipts from the Respondent, but they were not provided; thus prompting the Applicant to approach the Commission. The Commission directed the Respondent to avail the said information to the Applicant.
27. It was submitted that Section 2 of the Information Act defines information to include documents which include the time-sheets and ETR receipts. As such, the Commission was clothed with jurisdiction to handle that issue.
28. Further, the Interested Party submitted that access to information is a right guaranteed by the Constitution. Further, it was submitted that the Applicant acted within the Constitution and the law.
29. The Interested Party noted that the Information Act has a comprehensive mechanism for redress that ought to be strictly followed and that the Respondent fell within the meaning of a private body in Section 2 of the Constitution, hence, the Respondent ought to comply with the Commission's directive to provide the time-sheets and ETR receipts.
30. The Interested Party prayed that the application be allowed.

Issues for Determination:

31. Upon considering the parties' cases and their submissions, the following issues are for determination:
 - i. *Whether the commission had jurisdiction to determine the complaint before it?*
 - ii. *If (a) above is in the affirmative, whether in the circumstances the Application be allowed.*

Analysis and Determination:

(a) Whether the Commission had jurisdiction to determine the complaint before it:

32. Preliminarily, all parties submitted to the jurisdiction of this Court. It is the jurisdiction of the Commission that was impugned by the Respondent.



33. To deal with the issue of the Commission's jurisdiction, or lack of it, I will generally look at the concept of jurisdiction which applies to both Courts, tribunals and all other entities.
34. *Jurisdiction* is defined in **Halsbury's Laws of England** (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."
35. **Black's Law Dictionary**, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.
36. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 **In the Matter of Interim Independent Electoral Commission** (2011) eKLR held that: -

29. *Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent*

38. Later, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others** (2012) eKLR the Supreme Court stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.



39. And, in **Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR**, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal craftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

40. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or a settled judicial precedent.

41. Next is a look at the nature of the Commission.

42. The Commission is established under Section 3 of the *Commission of Administrative Justice Act, No. 23 of 2011* (hereinafter referred to as '**the CAJ Act**').

43. The CAJ Act is *an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes.*

44. Pursuant to Section 4 of the CAJ Act, the Commission is a Commission within the meaning of Chapter Fifteen of the Constitution and has the status and powers of a Commission under that Chapter. Section 8 provides for the functions of the Commission whereas Section 26 provides for its powers.

45. Further powers of the Commission are provided for in the Information Act.

46. The Information Act is *an Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.*

47. **Article 35** of the Constitution which is at the heart of the Information Act states as follows: -



35. Access to information:

- (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 publicise any important information affecting the nation.*

48. Section 3(a) of the Information Act provides for one of the object and purpose of the Act as follows: -

The object and purpose of this Act is to—

- (a) ***give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;***

49. In discharging the above duty, the Commission is specifically conferred with the functions in Section 21 of the Information Act.

50. Section 21(1)(f) and (2) has it that: -

21. Functions of the Commission

- (1) *The functions of the Commission shall be to—*
 - (f) *hear and determine complaints and review decisions arising from violations of the right to access to information;*
- (2) *The Commission shall have all the powers as are provided for under this Act, its constitutive Act and the Constitution as are necessary for the performance of its functions under this Act.*

51. Where the Commission is satisfied that there has been an infringement of the provisions of the Constitution and the Information Act, it is permitted under Section 23(2) of Information Act to exercise the following powers: -

23. Powers of the Commission

- (2) *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.*

52. The Section continues to state as follows: -

- (3) *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.*
- (4) *An order of the Commission under subsection (2) 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 the filing of the order.*
- (5) *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.*

53. Returning to the issue as to whether the Commission had jurisdiction over the complaint before it, suffice to remind ourselves that the complaint by the Applicant was the refusal by the Respondent to avail time-sheets and ETR receipts which the Applicant wanted to use in defending a Bill of Costs filed by the Respondent.

54. The Applicant, therefore, required the time-sheets and ETR receipts held by the Respondent for purposes of exercising its right to fair trial under Article 50(1) of the Constitution and to defend its right to part with its money/property under Article 40 of the Constitution. As such, the Applicant's right under Article 35(1)(b) of the Constitution had crystallized.

55. It is provided that one of the functions of the Commission under Section 3 of the Information Act is to give effect to the right of access to information by citizens as provided under Article 35 of the Constitution. In doing so, the Commission may order the



release of information and in default its order may be executed as a decree of the Court.

56. On the basis of the foregoing, this Court is at a loss on the rationale behind the argument that the Commission lacks jurisdiction since arbitral proceedings are special proceedings and the arbitrator is a not a person contemplated under the Information Act.
57. The above argument can only result when one has a casual look at the Information Act and fails to acknowledge the fact that the Information Act is subordinate to the Constitution courtesy of Article 2(4) of the Constitution.
58. Where the Constitution has expressly provided that information held by another person which is required for the exercise or protection of any right or fundamental freedom must be availed, no legislation can suggest otherwise, and, even if so happens, any such provision of the legislation should not be accorded any positive application. The only exception to the right to access information should only where a limitation is permissible under the Constitution and the law. In this case, Section 6 of the Information Act provides for limitation of the right to access information.
59. Further, Article 260 of the Constitution defines a *person* to include a company, association or other body of persons whether incorporated or unincorporated. As such, an arbitrator is a person under the Constitution and is bound by the Constitution and the Information Act.
60. It is of importance as well to point out that the purpose of the application is not to, in anyway, to interfere with the arbitral process. The application is a simple request for information, which information the Applicant wishes to use in other proceedings involving the same parties.
61. Flowing from the foregoing, this Court finds and hold that the arbitral proceedings do not oust the jurisdiction of the Commission over the subject matter. Further, an Arbitrator is not excluded from complying with Article 35 of the Constitution and the Information Act unless within the limitations in law.



62. In the end, the Commission had jurisdiction to deal with the complaint laid before it by the Applicant against the Respondent.
63. Having answered the first issue in the affirmative, I will deal with the subsequent issue.

(b) Whether in the circumstances the application be allowed:

64. In dealing with this issue, I will adopt the two-fold test in determining whether the application ought to be allowed.
65. The test is simple and rest on two considerations. They are whether there is a decision by the Commission and, if so, whether an appeal against the decision was preferred.
66. On whether there is a decision by the Commission, I have perused the letter by the Commissioner dated 11th January, 2022. It is addressed to the Respondent.
67. The Commission reviewed the complaint and ordered the Respondent to avail the documents referred to therein. The Respondent was further reminded that the information requested was not limited under the Information Act.
68. **Section 2** of the *Fair Administrative Actions Act*, No. 4 of 2015 defines a 'decision' as follows: -
- "decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be.***
69. The Information Act imposes a duty on the Commission to decide on whether certain information ought to be released to a requesting party.
70. The law calls upon the Commission to make decisions. Therefore, the letter dated 11th January, 2022 was a decision of the Commission.
71. On whether the decision was appealed against, the answer thereto is outright no. I say so for two reasons. First, the Respondent's Counsel confirmed as much. Second, Section 23(3) of the Information Act accords any party dissatisfied with the decision by the Commission to lodge an appeal before the High Court. The Respondent did not do so, but instead wrote a seemingly objection

letter to the Commission. For all intents and purposes, the letter cannot be deemed as an appeal to the High Court.

72. In sum, the Applicant is entitled to the orders sought.

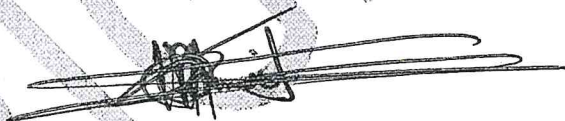
Disposition:

73. The following final orders of the Court do hereby issue: -

- a) **The decision by the Commission on Administrative Justice made *vide* a letter dated 11th January 2022, directing that the requested information be availed by the Respondent herein to the Applicant, be and is hereby recognized and adopted as a judgment of this Court. A Decree to issue forthwith.**
- b) **Costs of the application to be borne by the Respondent.**

Those are the orders of this Court.

DELIVERED, DATED and SIGNED at NAIROBI this 3rd day of June, 2022.



**A. C. MRIMA
JUDGE**

Ruling virtually delivered in the presence of:

Mr. Ataka, Learned Counsel Advocates for the Applicant.

Mr. Namachanja, Learned Counsel for the Respondent.

Miss. Musembi, Learned Counsel for the Interested Party.

Jared Otieno – Court Assistant