



**Rinascimento Global Limited & 12 others v Kenya Deposit Insurance Corporation & another;
Chase Bank Kenya Limited (in Liquidation) (Interested Party) (Petition E529 of 2021)
[2022] KEHC 11493 (KLR) (Constitutional and Human Rights) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11493 (KLR)

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

PETITION E529 OF 2021

HI ONG'UDI, J

MAY 17, 2022

BETWEEN

RINASCIMENTO GLOBAL LIMITED 1ST PETITIONER
ONE RINA LIMITED 2ND PETITIONER
**TRUSTEES OF THE EMPLOYEE STOCK OWNERSHIP PROGRAMME
(ESOP)(GEROGE WANGARURO MBIRA, EUNICE NYAWIRA KIMERIA,
SEVASTONE MAKANDA AND SIDNEY LOUIS SHILAKO AS
TRUSTEES) 3RD PETITIONER**
CARLO VAN WAGENINGEN 4TH PETITIONER
NAMAJA INVESTMENTS LIMITED 5TH PETITIONER
SIMON WOODS 6TH PETITIONER
LANDSBURY LIMITED 7TH PETITIONER
REALCAP INVESTMENT LIMITED 8TH PETITIONER
FRANGIE INVESTMENT LIMITED 9TH PETITIONER
DAWOOD SHAH 10TH PETITIONER
FRANK MWONGERA 11TH PETITIONER
ANTHONY GROSS 12TH PETITIONER
ROWENA GROSS 13TH PETITIONER

AND

KENYA DEPOSIT INSURANCE CORPORATION 1ST RESPONDENT



CENTRAL BANK OF KENYA 2ND RESPONDENT

AND

CHASE BANK KENYA LIMITED (IN LIQUIDATION) INTERESTED PARTY

JUDGMENT

1. The petition dated December 7, 2021 was filed under articles 2(1), 19, 20, 21, 22, 23, 35 and 258 of the Constitution and seeks the following orders:-
 - a. An order of *mandamus* compelling the 1st and 2nd respondents to forthwith provide the petitioners with the information sought in their letters to the respondents dated October 26, 2021 and November 11, 2021 to wit:
 - i. The terms of the sale of Chase Bank Kenya Limited's assets to SBM Bank;
 - ii. The agreements executed to effect this sale;
 - iii. The process of procuring the aforesaid sale, including but not limited to the bids submitted by the various participants, if any;
 - iv. Valuation of Chase Bank Kenya Limited for purposes of structuring and negotiating the sale; and
 - v. Minutes of the meeting of the Board of Directors of the respondents authorizing the sale of the 75% carved out assets of Chase Bank to SBM Holdings Mauritius.
 - b. A declaration that the failure by the 1st and 2nd respondents to provide information sought under article 35(1) is a violation of the petitioners' right to access information.
 - c. A declaration that the failure by the 1st and 2nd respondents to provide information sought under article 35(1)(a) is a violation of article 10 of the Constitution specifically the values of the role of law, participations of the people, human rights, good governance transparency and accountability.
 - d. General, exemplary and aggravated damages under article 23(3) of the Constitution of Kenya, 2010 for the unconstitutional conduct of the respondents.
 - e. Costs of the petition.
 - f. Any other order that this honourable court may deem just and fit in the circumstances.
 - g. Interest.

The Petitioners Case

2. The petitioners' case is premised on the assertion that the respondents as public bodies have infringed on their right to information as enshrined in article 35 of the Constitution. As a consequence, the petitioners contend that since this violation is without any justification the respondents' actions are discriminatory, disproportionate and malicious.
3. The petitioners' case is supported by their supporting affidavit of even date as sworn by the Zafrullah Khan, the 1st petitioner's director. He makes known that the petitioners are shareholders of the



- interested party. He states that the interested party was placed under receivership on April 7, 2016 and subsequently liquidated on April 16, 2021 by the 2nd respondent. He avers this was done *vide* Gazette Notice No 3651 following recommendation of the same by the 1st respondent.
4. He avers that the petitioners were not involved or informed of the processes and pertinent information leading up to the decision to liquidate the interested party. It is his contention that the respondents since April 2016 have not engaged them regarding the affairs of the interested party. This was until April 17, 2018 when the respondents publicly announced the signing of an agreement between SBM Bank (Kenya) Limited, and the 2nd respondent for the acquisition of the interested party.
 5. According to the financial statements of SBM Holdings Mauritius that were disclosed on December 31, 2018 it was noted that the sale constituted 75% of the carved out assets and specific liabilities of the interested party. He deposes that as shareholders they were never consulted or informed of the terms leading up to the 75% sale of the interested party which is their right to know. He additionally deposes that this act not only affected their right under article 35 but also their right to property under article 40 of the Constitution.
 6. He avers that through their advocates, in a letter dated October 26, 2021 the petitioners sought from the 2nd respondent information regarding the sale of the interested party's assets to SBM Mauritius. The petitioners specifically sought information on the terms of the sale of the interested party's assets; the agreements executed to effect the sale; the process of procuring the sale as aforesaid, including but not limited to the bids submitted by the various participants, if any; and valuation of Chase Bank Kenya Limited for purposes of structuring and negotiating the sale.
 7. In response, the 2nd respondent vide a letter dated November 10, 2021 informed the petitioners that it had not been a participant in the transaction and as such could not divulge the requested information. The letter proceeded to inform them that this information ought to be sought from the 1st respondent. He argues that this response was misleading as the interested party's assets could not have been held and sold without the knowledge and approval of the 2nd respondent.
 8. He avers that the petitioners nevertheless proceeded to write to the 1st respondent vide a letter dated November 11, 2021 seeking the same information. He divulges that this letter did not receive any response. He deposes that the petitioners on December 3, 2021 wrote a second letter to the 1st respondent informing them of their need for the information sought. This information was never granted as per the petitioners.
 9. He in conclusion deposes that the petitioners are apprehensive that the reason the information is being withheld by the respondents is that this information will demonstrate the fraudulent and criminal enterprise of high-ranking officials of the 1st and 2nd respondents while disposing off the interested party to SBM Holdings which was shrouded in secrecy, mystery and misinformation. The information he avers will prove the 1st and 2nd respondents' malicious act in quickly selling the interested party's assets without the petitioners' knowledge and to their detriment.

The Respondents' Case

The 1st Respondent's case

10. The 1st respondent in response filed its grounds of opposition in conjunction with the interested party dated January 24, 2022. The following are the grounds:-



- i. The petitioners have not sought leave of this honourable court to institute the present proceedings as against the 1st Respondent, contrary to the provisions of section 56(2) of the [Kenya Deposit Insurance Act, 2015](#) ("the [KDI Act](#)").
 - ii. The 1st respondent is not subject to the direction or supervision of any other person or entity in the exercise of its rights, powers and privileges. The instant petition is an attempt by the petitioners to interfere with this independence afforded to the 1st respondent to manage the affairs of the interested party in an orderly and efficient manner, and the same are therefore in contravention of section 51 and section 61 of the [KDI Act](#).
 - iii. Pursuant to section 50(1)(a) of the KDI Act, the 1st respondent is not required to notify or obtain the approval of the shareholders or creditors of the 1st interested party when effecting a transaction under section 50 of the [KDI Act](#), including a transaction of the kind between the interested party and SBM Bank (Kenya) Limited ("SBM").
 - iv. The request for information as made by the petitioners is contrary to the express provisions of the [KDI Act](#), insulating the transfer of assets and liabilities at section 50(8) thereof. The said protection is granted to facilitate a resolution by insulating a transaction intended for the benefit of depositors. This limitation is justifiable in an open and democratic society and is protected by article 24(1) of the [Constitution of Kenya, 2010](#) ("the [Constitution](#)").
 - v. The agreement between the interested party and SBM ("the agreement") was based on the express provisions of section 50(6), section 50(8) and section 50(9) of the [KDI Act](#) and provided for confidentiality in those circumstances. The disclosure as sought by the petitioners would expose the 1st respondent to liability and otherwise contravene the [KDI Act](#) as well as the terms of the agreement.
 - vi. The agreement was based on the transfer of assets and liabilities, which comprise the transfer of information with regard to third party account holders whose fundamental rights are protected by article 31 of the [Constitution](#), and in the event, by section 31 (1) of the [Banking Act](#), cap 488 of the laws of Kenya ("the [Banking Act](#)") which debar the 1st respondent from disclosing the financial affairs of any person without their consent in writing.
 - vii. The information sought by the petitioners contravenes section 6(1)(d) and section 6(1)(e) of the [Access to Information Act, 2016](#) ("the ATIA").
 - viii. The instant petition is an abuse of the process of this honourable court in so far as they amount to a fishing expedition by the petitioners, and an attempt by the petitioners to contrive a cause of action as against the respondents.
 - ix. Section 15 of the [KDI Act](#) prohibits the 1st respondent or any of its officers and agents from disclosing any and all records, documents, material or information relating to the business and affairs of the 1st respondent or the interested party, which such person has acquired in the performance of their duties or the exercise of their functions.
11. The 1st respondent and the interested party in addition filed their replying affidavit dated February 1, 2022 sworn by David Irungu, the 1st respondent's General Manager. He deposes that by Gazette Notice No. 2320 dated April 7, 2016, the 2nd respondent appointed the 1st respondent as a receiver for the bank pursuant to the provisions of sections 43(1), 43(2) and 53(1) of the [Kenya Deposit Insurance Act, 2015](#). Soon after pursuant to Gazette Notice No 3651 dated April 16, 2021 the 1st respondent was appointed as the interested party's liquidator.



12. He avers that the 1st and 2nd respondent on March 30, 2017 invited investors to present an initial expression of interest ("EOI") to take an equity interest in the interested party, in a bid to ensure a speedy and optimal recovery for depositors and creditors. By May 2, 2017, the respondents had received a total of twelve responses to the process. Out of this list, a shortlist of the qualifying investors was identified. The public was informed that the shortlisted investors would be granted access to confidential data that would enable them to develop a formal proposal for taking an equity interest in the interested party.
13. Upon an evaluation of the proposals from the shortlisted investors, the respondents on or around October 9, 2017, received a non-binding offer from SBM. He says of essence to note is that the announcement by SBM preceded a meeting held between the respondents, depositors and shareholders of the interested party on October 5, 2017, where the non-binding offer was discussed. Support for the same was expressed.
14. On this basis he avers that the respondents on January 4, 2018, accepted a binding offer from SBM. At this point the respondents informed the public that the binding offer included *inter alia* the transfer of 75% of the value of deposits under moratorium at the interested party. Once the respondents were satisfied the offer was viable they announced the signing of an agreement between SBM and the 1st respondent for the acquisition by SBM of certain assets and assumption of certain deposits ("the agreement").
15. Soon after on June 13, 2018, the 2nd respondent provided its approval to the agreement pursuant to section 9 of the [Banking Act](#), cap 488 of the laws of Kenya. Subsequently, the Cabinet Secretary to the National Treasury provided approval to the agreement on June 28, 2018. In view of the foregoing he denies the petitioners assumption that the process was done in secrecy. This is since the depositors, shareholders and public at large were at all material times kept abreast with the various developments on the SBM Transaction and were provided with such information as was necessary.
16. Turning to the law, he deposes that the petitioners did not seek leave of this Court before instituting the present proceedings against the 1st respondent, contrary to the provisions of section 56(2) of the [Kenya Deposit Insurance Act, 2015](#). Furthermore, he avers that the reliefs sought are not feasible in law. This is because the petitioners seek an order of mandamus compelling the 1st and 2nd respondents to provide the petitioners with the information that belongs to and is in possession of the interested party. All the same he avers that information regarding the interested party's sale was shared publicly.
17. He deposes that the assertion that the petitioners as shareholders were never informed of and consulted on the terms of the SBM Transaction and resultant agreement has no basis in law. This is because section 50(1)(a) of the [KDI Act](#), does not require the 1st respondent to notify or obtain the approval of the shareholders or creditors of the bank when effecting a transaction under section 50. secondly that section 50(8) of the [KDI Act](#) allows the 1st respondent to enter into a transaction of the nature such as the SBM Transaction without the need to obtain approval from debtors, creditors, or other security holders of a bank. This is meant to facilitate a speedy resolution of a bank by insulating a transaction intended for the benefit of depositors from the requirements of third-party endorsement, and as such is a justified limitation of the petitioners' rights under article 24 of the [Constitution](#).
18. He further deposes that the impugned agreement was based on the transfer of assets and liabilities, which comprised the transfer of information regarding third-party account holders who are not presently before this court. Taking this into consideration he asserts that such information is protected by article 31 of the [Constitution](#) as well as section 31(1) of the [Banking Act](#), which precludes the 1st respondent from disclosing the financial affairs of any person without their consent in writing. The



restriction is echoed under section 6(1)(d) & (e) of the [Access to Information Act, 2016](#). Similarly, restriction of such disclosure is also recapped under section 15 of the [KDI Act](#) which prohibits the 1st respondent, its officers, and its agents from disclosing any records, documents, material, or information relating to the business and affairs of the 1st respondent or the interested party submitted in procuring the transaction, or the agreement executed to that effect.

19. Considering the case made out, he avers accordingly that the petition is an abuse of the court process and amounts to a fishing expedition, aimed at frustrating the respondents in the conduct of their statutory functions. As such it ought to be dismissed with costs.

2nd Respondent's Case

20. The 2nd respondent filed a replying affidavit dated February 1, 2022 sworn by Kennedy Kaunda Abuga, the 2nd respondent's general counsel. He avers that the [Central Bank of Kenya Act](#) cap 91 mandates the 2nd respondent to formulate monetary policy and foster the liquidity, solvency and proper functioning of a stable market based financial system. Considering this the [Banking Act](#) cap 488 empowers the 2nd respondent to regulate and license financial institutions, intervene in management where necessary and to liquidate institutions by appointing Kenya Deposit Insurance Corporation as liquidator as provided by section 54 of the [Kenya Deposit Insurance Act](#).
21. He deposes that upon appointment of the 1st respondent as a receiver pursuant to [KDI Act](#), it is not subject to the direction or supervision of any other entity in exercise of its rights, powers and privileges.
22. He avers that the agreement for sale and assumption of certain assets and liabilities of the interested party by SBM Bank Kenya Limited was a contract between them. As such the 2nd respondent was not a party to the agreement. He avers therefore that the 2nd respondent is under no legal obligation or duty to release the information as sought by the petitioners. This is because neither SBM Bank Kenya Limited nor the interested party are respondents in the petition and releasing any information obtained by the 2nd respondent in the exercise of its regulatory function as prayed would be in contravention of section 6 (1) (d) of [Access to Information Act, 2016](#). He deposes in any event that the 2nd respondent is prohibited by the provisions of section 17 of the [Central Bank of Kenya Act](#) from disclosing any information which is acquired in the performance of its duties.

The Parties Submissions

The Petitioners' Submissions

23. The petitioners through the firm of AhmedNasir Abdullahi Advocates LLP filed written submissions dated February 10, 2022.
24. Counsel begun by stating that the first issue for determination was the 1st respondent's contention that section 56(2) of the [KDI Act](#) prohibits the institution of any proceedings against the 1st respondent without seeking leave of the court first. Counsel states that section 2 of the [KDI Act](#) defines an institution as 'a bank, financial institution or mortgage finance company' and so excludes the 1st respondent from this definition. He submits therefore that the provision refers to the interested party as it is the institution in contention and not the 1st respondent who is the receiver.
25. Counsel submits further that the courts have held that the provisions of section 56(2) of the [KDI Act](#) do not apply to institutions placed under receivership. This position was held in the case of [Thomas and Piron Grands lacs Limited v lighthouse Property Company Limited: Chase bank Limited \(In Receivership\) and another](#) [2019] eKLR which was cited in support.



26. Similarly counsel submits that the leave of the court is not required when it comes to constitutional rights suits. In addition he submits that the impugned section refers to and is only relevant where the litigation is in respect of assets of the institution under receivership. As such, he states that the petition does not relate to the assets of the interested party but the rights of the petitioners as shareholders to have the information on the agreements in selling their business availed to them and be informed as to how the process was conducted and concluded.
27. Counsel proceeds to submit that the 1st respondent had misconstrued the provisions of the *KDI Act*. First, section 15 to mean it's a bar to any disclosure of the documents relating to the transactions under consideration. However counsel submits that a clear reading of section 15 shows that this bar as advanced by the 1st respondent is baseless. This is because the provision allows for the disclosure that is permitted in law and expressly places the authority under the jurisdiction of the court.
28. Secondly, sections 51 and 61 provide for the autonomous status of the 1st respondent to mean that the court does not have the powers to order it to supply the information sought. On this point counsel cited the case of *Evans Ladtema Muswabili v Vibiga Public Service Board & 2 others, Marley Ezekiel Ayiego (Interested Party)* [2021] eKLR where speaking to the supremacy of the *Constitution* the Court observed that it would be strange for laws enacted by bodies created by the *Constitution* to be superior to the legal position stated by the *Constitution* itself.
29. It is submitted that sections 6(1)(d) and (e) of the Act are not applicable in the circumstances of this case. This is because the defense is raised by the 1st respondent on behalf of the third parties who participated in the bid process. He adds that no defense was raised as to why it could not disclose the information sought. According to counsel there was an open public bidding where both foreign and local banks participated. As such he states that an open public bidding process cannot lead to an invasion of privacy. He submits therefore that the disclosure of the documents that the petitioners seek will not amount to unwarranted invasion of the bidders' privacy.
30. Furthermore, counsel submits that article 31 of the *Constitution* protects the right to privacy only in the four contexts which is privacy relating to a person their home or property searched; their possessions seized; information relating to family or private affairs unnecessarily required or revealed; and privacy of their communications infringed. It is his argument that the genre of privacy that is raised by the 1st respondent is not protected under this article.
31. Counsel submits in light of this that the constitutional rights of the citizens to access information held by the state and its organs is fundamental in any constitutional democracy. This view was upheld in the South African case of *Brummer v Minister for Social Development and others* [2009] ZACC 21; 2009(6) SA 324 (CC); 2009 (11) BCLR 1075 (CC).
32. Additional dependence was placed on local and international cases that emphasize the importance of the right to access information. The cases are *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR; *President of South Africa & 2 others v M & G Media Limited* [2011] ZACC 32, *State of Uttar Pradesh v Raj Narain* (1975) 4 SCC 428; *Michael A Dagg v The Minister of Finance* [1997] 2 RC; *Dinesh Trivedi v Union of India* (1997) 4 SCC 306 among others.
33. On the issue of the challenged remedies counsel submits that the constitutional architecture set out in the bill of rights is designed in a manner that the court has the power to give any remedy it deems fit. In emphasizing the unique powers of the high court to give a remedy whenever a right is infringed, counsel cited the case of *Kenya Hotel Properties Limited v Attorney General & 5 others* [2018] eKLR in support. In this case the court observed that there is no remedy that the High Court is unable to



grant under the Constitution. Counsel in view of the foregoing submits that the petitioners are entitled to the information sought.

The 1st Respondent and Interested Party's Submissions

34. The firm of Oraro and Company Advocates on behalf of the 1st respondent and interested party filed written submissions dated February 28, 2022.
35. Counsel on the first issue submits that the right to information under article 35 of the Constitution is not absolute and cannot operate in isolation as held in the case of Jack Mukhongo & 12 others v Attorney General & 2 others, Petition No 182 of 2017. It follows therefore that the right of access to information must be read harmoniously with other articles of the Constitution while realizing that it may be limited by the provisions of article 24 of the Constitution as read with section 6 of the Access to Information Act.
36. In view of this he submits that the court in the case of Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission [2019] eKLR observed that a reading of section 6 of the Access to Information Act makes it clear that there are reasonable and justifiable limitations on the right of access to information. Additional reliance was placed on the case of Mercy Nyawade v. Banking Fraud Investigations Department & 2 others [2017] eKLR.
37. Counsel submits considering this that the agreement preceding the SBM transaction was based on the transfer of assets and liabilities of the interested party to SBM. This transfer comprised the transfer of information regarding among others third-party account holders who are not part of this suit. Counsel submits that disclosure of this information is protected by various provisions. These are section 6(1) (d) of the Access to Information Act which states that the right of access to information is limited in respect of information whose disclosure is likely to involve the unwarranted invasion of privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made; section 31 (1) of the Banking Act, cap 488 which precludes the 2nd respondent from publishing any information which would disclose the financial affairs of any person, unless the consent in writing of that person has first been given and article 31 of the Constitution, which states that every person has the right to privacy, which includes inter alia the right not to have information relating to their family or private affairs unnecessarily required or revealed. Considering this, disclosure of this information would be in breach of the third parties right to privacy.
38. To buttress this argument counsel cited the case of Timothy Njoya v Attorney General & another [2014] eKLR where the court noted its mindfulness of the fact that it must protect the rights of every person including those who are not parties to the petition who may be adversely affected by the orders sought. Further support was placed on Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004] eKLR.
39. Counsel further submits that disclosure of information on the bids submitted by the various participants (including SBM itself) involves release of commercially sensitive documents that were modelled on individual strategies and pricing models adopted by the various bidders. In essence, allowing access to these bids would not only breach these individual bidders right to privacy but also runs the risk of prejudicing their commercial interests as protected under section 6(1)(e) of the Access to Information Act. This section provides that the right to access information is limited in respect to disclosure that is likely to substantially prejudice the commercial interests including intellectual property rights of that entity or third party from whom the information was obtained.
40. Counsel submits that the issue of disclosure of the agreement as well as details surrounding the SBM Transaction was determined in the case of Chase Bank (Kenya) Limited Employee Share Ownership Plan & another v Kenya Deposit Insurance Corporation & 4 others [2020] eKLR, where the court



rejecting the call for disclosure noted that that section 6 was relevant to the facts of the case because the agreement's disclosure which the petitioners sought had a confidential clause forbidding disclosure of its content to third parties. Its disclosure as sought by the petitioners would no doubt be an invasion of SBM's privacy and would be prejudicial to the commercial interests of the Bank.

41. Additional reliance was placed on the case of *Department for Works and Pensions v The Information Commissioner* - Appeal No EA/2009/0073, *Christopher Martin Hogan & Oxford City Council v The Information Commissioner* - Appeal Numbers EA/2005/0026 and EA/2005/0030. It is counsel's submission for that matter that both the agreement and particulars of the various bids submitted by the participants to the EOI process, fall within the exceptions to the right of access to information as envisioned under article 35 of the *Constitution*.
42. Moving on to the second issue, Counsel submits that the 1st respondent is an independent statutory entity and so not subject to the direction, control or supervision of any person or entity in the discharge of its functions. Counsel submits that this is provided under sections 51 and 61 of the Act. These sections grant the 1st respondent autonomy in the exercise of its receivership and liquidation powers and functions.
43. Considering this, counsel contends that the Act's intention was to permit the 1st respondent carry out its functions without interference, unless there was violation of statute or the *Constitution* as recognized in the case of *Republic v Kenya Revenue Authority, ex parte Interactive Gaming & Lotteries Limited* [2016] eKLR. Similar support was placed in the case of *Kenya Deposit Insurance Corporation v Richardson & David Limited & another* [2017] eKLR. It is submitted thus that granting the orders to access the information will encroach on the 1st respondent's independence and undermine the statutory provisions protecting them.
44. The third issue regards the petitioners request for details of the bidding process of procuring the SBM transaction, counsel submits that to the extent that the information concerning the bidding process, the SBM Transaction and the agreement executed as a result thereof was not prejudicial to any third-party's rights or interests since confidentiality over this information was waived by the respondents as well as SBM. As a result, this information was made public. Accordingly, counsel submits that the petitioners were kept in the know at all times during the bidding process. Furthermore, that they were even invited to participate in the public meetings and consultations conducted by the respondents to discuss the offer made by SBM.
45. Counsel submits therefore that since this information is publicly available, it is governed by section 6(5) of the *Access to Information Act*. This section provides that a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means. This was acknowledged in the case cited in support of *Chase Bank (Kenya) Limited Employee Ownership Plan & another (supra)*. Additional reliance was placed on the case of *Burmah Oil Company Limited v Governor and Company of The Bank of England* [1979] 1 WLR 473.

The 2nd Respondent's Submissions

46. The 2nd respondent through the firm of Amolo & Gacoka Advocates filed written submissions dated March 2, 2022. Counsel identifies the issues for determination as:
 - i. Whether the petitioners' right to access information under article 35 of the *Constitution* is subject to limitations under the law;
 - ii. Whether the petitioners' right to access information under article 35 of the *Constitution* has been violated by the respondents;



- iii. Whether the 2nd respondent bears an obligation to maintain confidence to Chase Bank Limited (In Liquidation) and SBM Bank (K) Limited who are the parties to the Agreement for sale and assumption of certain assets and liabilities of Chase Bank Limited (IL) by SBM Bank (K) Limited, to whom the information relates;
 - iv. Whether the petition is scandalous, frivolous and vexatious;
 - v. Whether the petitioners are entitled to the reliefs sought; and
 - vi. Who is entitled to costs.
47. On the first issue, counsel submits that the petitioners' right under article 35 of the Constitution is not an absolute right and not among those cited under article 25 of the Constitution. Moreover article 24 of the Constitution allows limitation of fundamental rights as long as it is reasonable and justifiable in an open and democratic society. In support reliance was placed on the Supreme Court case of Karen Njeri Kandie v Alassane Ba & another [2017] eKLR, where the court held that
- "the test to be applied in order to determine whether a right can be limited under article 24 of the Constitution, is the 'reasonable and justifiable test', that must not be conducted mechanically. Instead the court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society."
48. In view of the petitioners request for information, counsel submits that the 2nd respondent was established under article 231 of the Constitution and its functions are clearly spelt out under section 9(5) and (6) of the Banking Act, cap 488. In essence he argues that the information sought by the petitioner is not covered by these sections as the 2nd respondent was not a party to the contract. It is argued that in the matter, its role was only limited to its regulatory and supervisory function.
49. It is accordingly submitted that the 2nd respondent is not obliged by law to provide the information sought by the petitioners since such information can be accessed from the parties to the Agreement for sale and assumption of certain assets and liabilities of chase Bank Limited (IL) by SBM Bank (K) Limited who are the interested party and SBM Bank (K) Limited. In a nutshell counsel submits that the inability by the 2nd respondent to provide the information sought is reasonable, justifiable and in line with the acceptable constitutional and statutory limitations to the right of access to information.
50. Owing to the foregoing counsel on the second issue submits that the 2nd respondent has not violated the petitioners' right to access information under article 35 of the Constitution. He states that by virtue of article 24 of the Constitution, all rights that do not fall under article 25 are enjoyed and guaranteed subject to strict terms of limitations as held by the Court of Appeal in the case of Haki Na Sheria Initiative v Inspector General of Police & 3 others [2020] eKLR.
51. Additionally counsel notes that the Access to Information Act under section 6(1) (d),(e), (f) and 6(5) lays down the limitations to the right to access information under article 35 of the Constitution. Considering this, counsel asserts that the petitioners have failed to discharge their burden of demonstrating how their right under article 35 of the Constitution has been violated by the 2nd respondent. This is since some evidence would have to be adduced to support the contention as held by the Court of Appeal in the case of Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR.
52. On the third issue, Counsel submits that that the 2nd respondent bears an obligation of confidence to the parties to the Agreement for sale and assumption of certain assets and liabilities of chase Bank



Limited (IL) by SBM Bank (K) Limited, being SBM Bank Kenya Limited and Chase Bank (K) Limited. It is added that this information came to its possession by virtue of its regulatory role under the provisions of the [Banking Act](#), cap 488 and the [Central Bank of Kenya Act](#) cap 491.

53. It is therefore submitted that since neither SBM Bank Kenya Limited nor the interested party are respondents to this petition, releasing any information obtained by it in the exercise of its regulatory function as prayed would be in contravention of the limitations to the right of access to information under sections 6(1) (d) and (e) of the [Access to Information Act](#). In addition, the 2nd respondent by dint of section 17(1) of the [Central Bank of Kenya Act](#) is not allowed to divulge information that is acquired during the performance of its duties through its governor, deputy governor or any director or any other officer or employee of the bank.
54. In support reliance was placed on the Court of Appeal case of [National Bank of Kenya Limited v Leonard Gethoi Kamweti](#) [2019] eKLR where it was held that where a defendant is proved to have used confidential information, directly or indirectly and obtained from a plaintiff without his consent express or implied he will be guilty of an infringement of the plaintiff's rights. Additional reliance was placed on the case of [Hoswell Mbugua Njuguna t/a Fischer and Fischer Marketing Concepts v Equity Bank Limited & another](#) [2017] eKLR. As such counsel submits that the 2nd respondent would be breach of its obligation of confidence if its releases the information as sought by the petitioners.
55. On the fourth issue, counsel submits that the petition is scandalous, frivolous and vexatious. He notes that a pleading is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense as held in the case of [Trust Bank Limited v HS Amin & Company Limited & another](#) [2000] eKLR. Additional reliance was placed on the case of [Mpaka Road Development Co Ltd v Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House](#) [2001] eKLR.
56. Counsel submits that the petition is scandalous because the petitioners have failed to demonstrate the alleged infringement of their right to access to information under article 35 (1) of the [Constitution](#) by the 2nd respondent. In addition, that the petitioners have not suffered any loss, provided particulars of the alleged loss, adduced evidence of the alleged loss/damage because of its negative response to provide the sought information. Lastly, that the petitioners baselessly enjoined it as a party to this petition yet it was never a party to the agreement for sale and assumption of certain assets and liabilities of Chase Bank Limited (IL) by SBM Bank (K) Limited, which was signed between SBM Bank Kenya Limited and Chase Bank Kenya (IL), from whom the petitioners ought to have sought the required information.
57. On the fifth issue, counsel submits that the petitioners are not entitled to the reliefs as sought in their petition since they have failed to discharge their burden in proving that the 2nd respondent violated their right of access to information under article 35 of the [Constitution](#). Further that the petitioners have not proved any losses or damages suffered by the 2nd respondent's alleged violation of their right to access information, so as to warrant the award of damages as sought. In view of that Counsel submits in the final issue that ordinarily, costs follow the event and as such the 2nd respondent is entitled to the costs.



Analysis and Determination

58. On a preliminary note, the 1st respondent contends that the petitioners did not seek leave of this court before instituting this suit in accordance with section 56(2) of the [Kenya Deposit Insurance Act](#). This section provides that:

No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

59. An institution is defined as under section 2 of the [Act](#) as:

“institution” means a bank, financial institution or mortgage finance company as defined in the [Banking Act](#) or a deposit taking microfinance institution as defined under the [Microfinance Act, 2006](#), No 19 of 2006 or any other deposit taking entity licensed by the Central Bank.

60. My interpretation of the above is that the civil suit referred to is the one brought against a financial institution under the Act not the 1st respondent. It is clear from the pleadings that the suit is not brought against the institution which is the interested party but the 1st respondent. Taking this into consideration I perceive that these provisions are not applicable in the context of this case.

61. Additional guidance and direction on the matter is offered in the case of [Thomas & Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited \(In Receivership\) & another \(Interest Parties\)](#) (*supra*) where the court opined as follows:

“28. Perhaps I need to add that while proceedings against an institution under receivership can be commenced or continued without the necessity of court sanction, a decree holder will not be able to reach the assets of the institution if it is shielded by a moratorium under the provisions of section 50(2).

29. I have to come to the conclusion that the provisions of section 56 of the [KDI Act](#) do not apply to institutions placed under receivership...”

62. That said and having gone through the parties pleadings and submissions, the issues that arise for determination are:

- i. Whether the petitioners right to access information under article 35 of the [Constitution](#) was violated by the respondents; and
- ii. Whether the petitioners are entitled to the reliefs sought.

Whether The Petitioners Right To Access Information Under Article 35 Of The [Constitution](#) Was Violated By The Respondents

63. The petitioners *vide* a letter dated October 26, 2021 sought information from the 2nd respondent. The 2nd respondent referred the petitioners to the 1st respondent in its letter dated November 10, 2021. The petitioners promptly wrote to the 1st respondent on November 11, 2021 and did a further follow up letter on December 3, 2021. The petitioners sought information on the following:

- i. The terms of the sale of Chase Bank Kenya Limited's assets to SBM Bank;
- ii. The agreements executed to effect this sale;



- iii. The process of procuring the aforesaid sale, including but not limited to the bids submitted by the various participants, if any;
 - iv. Valuation of Chase Bank Kenya Limited for purposes of structuring and negotiating the sale; and
 - v. Minutes of the meeting of the Board of Directors of the Respondents authorizing the sale of the 75% carved out assets of Chase Bank to SBM Holdings Mauritius.
64. The petitioners make known that the letters seeking the information were delivered but no response was received from the respondents. The follow up letter also went without a response. In the end the petitioners resolved to file this petition. This information has not been supplied this far. It is on this premise that the petitioners assert that their right to access information was violated.
65. The right to access information is a universal right that is upheld in various international instruments as cited by the petitioners. Nationally, this right finds its roots in the *Constitution of Kenya* under article 35 of the *Constitution*. This article provides as follows:
- (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.
66. Article 35 of the *Constitution* is effected by the *Access to Information Act* No 31 of 2016. Section 4 of the *Act* expounds this right as follows:
4. Right to information
- (1) Subject to this *Act* and any other written law, every citizen has the right of access to information held by—
 - (a) the State; and
 - (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - (2) Subject to this *Act*, every citizen's right to access information is not affected by—
 - (a) any reason the person gives for seeking access; or
 - (b) the public entity's belief as to what are the person's reasons for seeking access.
67. With reference to the right to access information, the petitioners rightly cited a plethora of cases that underscore the importance of this right. This court is in agreement with the authorities as cited. In addition to these authorities, I am guided by the Supreme Court decision in the case of *Njonjo Mue & Co*



another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR where the court opined as follows:

“(13) Article 35(1)(a) and (b) of the *Constitution*, read with section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the court in *Petition No 479 of 2013 Rev Timothy Njoya v Attorney General & another*; [2014] eKLR, it was held;

“A plain reading of section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd respondent. In *Nairobi Law Monthly v Kengen* (supra) the court dealt with the applicability of the right to information as follows;

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of article 35(3) of the *Constitution of Kenya* which imposes an obligation on the state to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the state”.

(14) This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.”

68. Accordingly, it is undeniable that the right to access information is one of the hallmarks of our democratic principles which binds all state organs and persons under article 10 of the *Constitution*. In this regard section 5(1) of the *Access to information Act* guides on what kind of information a party can seek disclosure in. This section provides as follows:

- (1) Subject to section 6, a public entity shall—
 - (a) facilitate access to information held by such entity and which information may include—
 - (i) the particulars of its organization, functions and duties;
 - (ii) the powers and duties of its officers and employees;
 - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
 - (iv) salary scales of its officers by grade;
 - (v) the norms set by it for the discharge of its functions;
 - (vi) guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records,



held by it or under its control or used by its employees for discharging its functions; and

- (vii) a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person.

69. Bearing this in mind it is observed that the petitioner sought to get this information from the respondents. The respondents opposed this request for several reasons. First, that the respondents are independent entities which cannot be directed by anyone. Secondly that the information sought is contained in an agreement between the interested party and the SBM bank who are not respondents in this matter. They argued that the agreement contained a confidentiality clause regarding the information therein. In addition that the information sought on the bidding process contained third party information that would prejudice the parties commercial interests due to the elaborate information that was shared in the bidding process.

70. To begin with, it is esteemed that all state organs are bound by the dictates of the Constitution first before the dictates of a Statute. This has been highlighted in our jurisprudence severally. It is clear accordingly that a public entity is supposed to disclose the information outlined under section 5(1) of the Access to Information Act. In addressing such a request, the Constitution demands that this administration action be fair. In respect of this article 47 of the Constitution provides that:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

71. In my understanding this means that a private or public entity is required irrespective of the decision that maybe made by it to give reasons to the requester for the decision taken out. In the context of this case, the respondents ought to have given reasons to the petitioner for their refusal to grant the information. This prerequisite in my opinion does not discharge any entity or person from this obligation. I am inclined to reject the respondents' argument that as independent entities they cannot be directed by anyone with reference to the requested information. I reiterate that all state organs are bound by the dictates of the Constitution.

72. Evidently at this juncture the right to access information was not granted by the respondents. The respondents however assert that the denial was justified in an open democratic society citing relevant authorities to support this argument. Additionally they pegged their case under section 6(1) of the Access to Information Act which provides exception to the right to access information. This section provides as follows:-

- (1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—
 - (a) undermine the national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;



- (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
- (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- (h) damage a public entity's position in any actual or contemplated legal proceedings; or
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

73. The question this court must answer is whether the case made out by the respondents holds water in the circumstances of this case. It is appreciated that the contest put forth in the cited provisions with reference to the respondents is not novel. This court in the case of *Chase Bank (Kenya) Limited Employee Ownership Plan & another* (*supra*) held as follows:

“25. The request for any further information, as sought by the petitioners, would also seem to be caught by the limitation to the right to access to information as set out in section 6 of the *Access to Information Act* No 31 of 2016. That section provides:

6. Limitation of right of access to information

- (1) Pursuant to article 24 of the *Constitution*, the right of access to information under article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to—
 - (a)
 - (b)
 - (c)
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - (g)
 - (h); or



(i)

26. That Section 6, reproduced above, is relevant to the facts of this case because the agreement whose details/disclosure the petitioners sought had a confidential clause forbidding disclosure of its content to third parties. Its disclosure as sought by the petitioners would no doubt be an invasion of SBM's privacy and would have prejudice the commercial interests of the Bank. The fact that SBM's agreement had a confidential clause protected it from public disclosure and which is in tandem with section 6(d), and (e) above."
74. The *Kenya Deposit Insurance Act, 2012* in its preamble makes known that the Parliament's purpose in enacting the statute was keen on providing a deposit insurance system for the receivership and liquidation of deposit taking institutions and to provide for the establishment of the Kenya Deposit Insurance Corporation and for connected purposes.
75. The Court of Appeal in the case of *Kenya Deposit Insurance Corporation v Richardson & David Limited & another (supra)* expounding on the 1st respondent's mandate as per the KDI Act noted as follows:
- "24. ...The law does not give the court the power to substitute itself in place of an institution where the latter is alleged to have erred in discharge of its duty. The role of the court is to sanction what is done in the right way or invalidate what is improperly done. The court is not entitled to discharge the duties of the institution it censures or whose decisions it invalidates. Parliament has not given the court the power to step into the shoes of such institution. It was not within the purview of the judge's jurisdiction to micromanage CBK and/or KDIC as institutions. A court of law is not an expert in the management of financial institutions. *The Constitution* has bestowed the mandate on Parliament to enact statutes to create bodies to manage and regulate such institutions. The KDI Act and the *Central Bank of Kenya Act* (CBK Act) are Acts of Parliament which have vested and entrusted CBK and KDIC with powers to regulate the financial sector. Pursuant to the provisions of the said Acts, KDIC carried out its mandate and recommended liquidation of DBK. It exercised its discretion. The orders issued by the court clearly show that the court took up the role of CBK and KDIC. That is not the province of a Judge. As correctly pointed out by Odunga J in Republic v KRA expert Interactive Gaming & Lotteries Ltd Misc Civil Application 251 of 2014, "specialized bodies created by statute ought to be given leeway to conduct their proceedings freely... where such bodies act within their jurisdiction the court ought only step in to ensure that the proceedings are conducted fairly.
25. The jurisprudence that has developed in this area of the law shows that when decisions of public bodies are impugned, the court is only entitled to investigate the action complained of with a view to seeing whether the public body "has taken into account any matters that ought not to be taken into account or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has



contravened the law by acting in excess of its power. “(see Associated Provincial Picture Houses, Limited versus Wednesbury Corporation [1948] 1 KB 223)”

76. I am in agreement with the opinion in the cited authorities and find no distinguishing circumstances in the case before this court. The right to access information is among those that can be limited by the operation of the law under article 24 of the Constitution. In our case the disclosure of the information is permissible if it does not fall under section 6(1) of the Access to Information Act. On the other hand the respondents are mandated to carry out their functions in accordance with the dictates of their enabling statutes to achieve the Parliament’s intended purposes. As guided by the Court of Appeal this court’s duty is only to investigate the action complained of to ascertain whether the respondents took into account any matters that ought not to be taken into account or disregarded matters that ought to be taken into account.
77. In this matter the respondents make known that their refusal to disclose the information was founded in the dictates of section 6(1) (d) and (e) of the Access to Information Act and the provisions of their enabling statutes as elaborated in their pleadings and submissions. The information sought as disclosed in the pleadings revolves around the agreement for sale between the interested party and SBM Bank and the bidding process documentation. Suffice to say this information is protected under section 6 of the Access to Information Act.
78. It is my humble view that the respondents in making the decision not to disclose the information considered the relevant issues as dictated by law. It is my considered opinion thus that their rejection to disclose the information was justified in line with the law. It is my deduction accordingly that the petitioners’ right under article 35 of the Constitution was not violated.
79. On the premise of this finding, I come to the conclusion that the petitioners are not entitled to the reliefs sought in this petition.
80. I find that the petition lacks merit and is dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 17TH DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

HI ONG’UDI

JUDGE OF THE HIGH COURT

