Nusu v National Assembly & 5 others; Law Society of Kenya (Interested Party) (Constitutional Petition E009 of 2023) [2024] KEHC 3949 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3949 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION E009 OF 2023

FROO OLEL, J

APRIL 22, 2024

IN THE MATTER OF ARTICLES 1,2,3,22,23,24,32,33,35,43,46,75,93,94,95,114,159,165,201,206, 209,213,214,225 AND 226 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONSTITUTION OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

IN THE MATTER OF THREAT TO SOVEREIGNITY, SUPREMACY OF THE KENYA CONSTITUTION 2010, CONTRAVENTION OF THE RIGHT TO JUDICIAL AUTHORITY, THREAT TO INDEPENDENCE OF THE ARMS OF THE GOVERNMENT, IN THE MATTER OF ILLEGAL PROCESS OR FAILING TO EXERCISE POWERS, RIGHT TO ECONOMIC & SOCIAL RIGHTS, ILEGAL DISTRIBUTION OF NATURAL RESOURCES

AND

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL INTERPRETATION, RIGHT TO INFORMATION, COMPANIES ACT CAP 480, BANKING ACT OF KENYA CAP 488, CONSUMER PROTECTION ACT, PUBLIC FINANCE MANAGEMENT ACT OF 2012, THE TREATY MAKING AND RATIFICATION ACT 2012, ILLEGAL ACTIONS, DILAPIDATION AND WASTAGE OF PUBLIC RESOURCES, CONSOLIDATED FUND, ABSENCE OF CHECKS, BALANCES AND ACCOUNTABILITY

AND

IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTIONOF KENYA 2010 VISAVIS REGIONAL, TRIPATRITE LEGISLATIONS AND TREATIES AND INTERPRETATION OF LAWS

BETWEEN

BETWEEN

PAUL LIHANDA NUSU ..... PETITIONER

AND

NATIONAL ASSEMBLY ..... 1ST RESPONDENT

SENATE ..... 2ND RESPONDENT

CABINET SECRETARY IN CHARGE OF FINANCE ..... 3RD RESPONDENT

CABINET SECRETARY IN CHARGE OF FOREIGN AFFAIRS .... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

AUDITOR GENERAL ..... 6TH RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

A. Introduction

1. Vide a Notice of Motion filed in court on 24th May,2023, brought under various Articles of *the constitution* of Kenya, section 72 of the Interpretation of General Provisions Act and Rule 3 (1) of the High Court [practice and procedure] Rules of the *Judicature Act* and all the enabling provisions of the law the Petitioner herein, sought for the following orders that:

    a. Spent.

    b. Spent.

    c. That pending the final hearing and determination of this petition this court be hereby pleased to issue and do issue an order directed to the cabinet secretary of finance, the 3rd Respondent herein, prohibiting the said from disbursing, issuing, charging the consolidated funds pursuant to section 2(i) of the EADB Act rev. 2014 in the new financial year 2023-2024 immediately after reading of the budget 2023-2024.

    d. Spent.

    e. That pending the final hearing and determination of this petition the Auditor General, the 6th Respondent herein be directed to produce the true records of the status of accounts of funds disbursed, issued pursuant to section 2(i) of the EADB Act rev 2014 directly from the consolidated fund as from the year 2014-2023.

    f. Spent.

    g. That pending the final hearing and determination of this petition the Auditor General, the 6th Respondent herein be directed to produce the true records of status of accounts the public

charge, debt, liability pursuant to section 2(i) of the EADB Act, Rev 2014 directly from the consolidated fund as from the year 2014-2023.

h. Spent.

i. That pending the final hearing and determination of this petition the 1st and 2nd respondent respectively be hereby directed to supply the petitioner/this court with minutes, memorandums, public participation (records), minutes having said, that precipitated the ratification of the EADB Act Rev 2014 as from the year 2014.

2. This Application is supported by the grounds on the face of the said application and the supporting affidavit of the petitioner, Paul Lihanda Nusu dated 23rd May 2023. In response to this application and petition, the 1st respondent did file their grounds of opposition dated 30th June 2023 and replying affidavit sworn by one Samuel Njoroge -clerk to the National Assembly, dated 14th December 2023. The 3rd to 5th respondents did file their grounds of oppositions dated 26th June 2023 in opposition to this application. The 2nd respondent in response to this application and petition file a notice of preliminary objection dated 26th June 2023, which preliminary objection was prioritized, heard and determined vide this courts ruling dated 30th October 2023. After the said ruling, the 2nd respondent did not file any grounds of opposition or replying affidavit in opposition to this application and their counsel stated in court on 29.01.2023, that they would not participate in these proceedings.

B. The Application

3. The Petitioner, deposed that East African Development Bank, was created as a result of the East African Cooperation treaty of 1967, which was re-enacted through the 1980 charter ratified by all the three East African countries of Kenya, Uganda and Tanzania. After enactment of the new Kenya constitution in 2010, the 1st and 2nd respondent's while exercising their constitutional mandate did ratify the *East African Development Bank Act*,(CAP 493A) Revised in 2014 (hereinafter referred to as EADB, Act), to align it to the said constitution, but in doing so, failed to appreciate the import/ dictates of the said constitution especially as regards conducting public participation before passing the said EADB Act. The 1st and 2nd respondents were further faulted in allowing certain provisions of the said EADB Act, to undermine, threaten, infringe and abuse the petitioner's fundamental rights as guaranteed under *the Constitution* of Kenya, 2010 and to that extent the said EADB Act was unconstitutional.

4. The petitioner further deposed that the 1st and 2nd respondents had further failed in their duty to ensure that they protected taxpayers' money by placing competent, transparent verifiable systems to provide safeguards, through which checks and balances for accountability and transparency could be enforced as an integral factor in ensuing that monies advanced to the bank from consolidated funds were prudently used and audited as provided for under *the constitution* of Kenya 2010 & *Public Finance management Act*. It was therefore apparent that the *East African Development Bank Act* (Rev 2014) itself from inception propagates prejudice, opaque financial management systems, while at the same time evaded checks and balances. As a public spirited individual, he had petitioned, the 1st and 2nd respondents to provide him with necessary information regarding the process undertaken in reviewing and enacting the said law, but they had failed to do so, leaving him with no option but to seek redress of the Court.

5. It was therefore urgent that the orders sought be granted to safeguard, and protect public coffers from a money heist, that was silent cancer eating into tax payer's money without systems being put in place to check, on how it was being utilized. In short, there was no accountability and transparency in utilization of funds sent to EADB, hence this justified the issuance of the interim order and the prayers sought in the petition.

C. 1st Respondents Grounds of Opposition.

6. The 1st Respondent filed their grounds of opposition dated 30th June 2023 and replying affidavit dated 14th December 2023, wherein it was averred that the EADB, was established by the treaty amending and re -enacting the charter of EADB, which was ratified in 1980 by all the governments of Kenya, Uganda & Tanzania and by virtue of Article 2 thereof, the said treaty therefore formed part of the laws in Kenya. Further the *East African Development Bank Act*, (Cap 493A) was amended in 2014 to align it with the new constitution and also to provide for the obligation Kenya as a constituent member of the Bank, had to undertake as provided for under the said EADB Act.

7. The said EADB Act, domesticated the charter, and provided that, the said Bank, was an international organization which enjoys immunity and received same privileges, immunities and exemptions as foreign governments. Further pursuant to Article 45 of the Charter, monetary contributions received by EADB from the member states, formed parts of its assets and therefore the said bank, enjoyed complete immunity from any interference even by the member states that established it. The court was thus urged not to issue any orders that would affect the objectives and functionality of the said EADB as envisaged by the charter.

8. The 1st respondent further did file their replying Affidavit dated 14th December 2023, sworn by one Samuel Njoroge C.B.S, who is the clerk to the National Assembly. He deponed that the petitioner was actively challenging the constitutionality of various section of the EADB Act and its ratification by the National Assembly and Senate, which the petitioner contended was unlawful and carried out in a manner that was inconsistent with *the constitution* of Kenya, 2010.

9. Article 2(5) and (6) of *the constitution* of Kenya provided the legal framework and positioning of International law as part of laws recognized in Kenya. The said provisions expressly provided that general rules of International law would form part of laws in Kenya and any treaty or convention ratified by Kenya would also form part of law of Kenya under *the constitution*. EADB Act, was ratified in the year 1980 and it came into force on 18th May 1984. In 2014 the said Act was amended through section 30 of the Finance Act, No 38 of 2013 in a bid to streamline the said Act and make it compliant with *the constitution* of Kenya 2010.

10. As regards the Amendment to the EADB Act 438A, the same was undertaken through the Finance bill 2013, which was read for the first time and referred to the Departmental committee on Finance, Planning & Trade of the national assembly, pursuant to provisions of standing Order No 127 of the National Assembly. The said committee facilitated public participation by engaging various stakeholders, who included Kenya Bankers Association, Price water house coopers (an independent auditing firm) and Institute of certified Public Accounts of Kenya (ICPAK) and the said firms did make presentations and submitted memoranda for consideration. The committee presented its report to the house, which report was debated and subsequently passed by the house procedurally. Thereafter the EADB Act, was assented to on 21st October 2013 with section 30 introducing the amendments approved.

11. The 1st respondent further averred that the nation assembly approved and authorized the withdrawal of funds from the consolidated fund in accordance with Article 206(2) of *the constitution* of Kenya and would exercise oversight role over national revenue and its expenditure pursuant to Articles 95(4), (c) of *the constitution*. In doing so the National Assembly ensures that there is a system of checks and balances between the legislative arm of the government and executive arm of the government. Further standing Order 207 of the National Assembly, established a committee of public debt and privatization, and they had the mandate under Standing order 207(2),(c) to oversight the consolidated

fund services excluding audited accounts. The national assembly had also enacted regulations through the Public Finance Management (National Government) regulations, 2015 specifically Part IV of the said regulations to provide guidance on donations and grants. These regulations had operationalized section 47 and 48 of the *Public Finance management Act*, 2012.

12. It was therefore the 1st respondent's contention, that the petitioner had failed the specificity test established in the case of Anarita Karimi Njeru Vs Republic (1979) eKLR, which binds a person seeking redress to set out with reasonable degree of precision the provisions said to be infringed and the manner in which the infringement has been occasioned. The petitioner had also failed to demonstrate how the impugned provisions of the EADB Act had violated his fundamental rights and freedom or how the purpose and effect of the EADB Act had infringed on any of his rights as guaranteed by *the constitution*. In the circumstance and for the interest of justice, fairness and proportionality the 1st respondent prayed that this application be dismissed.

13. The 2nd respondent did not file any replying affidavit or grounds of opposition to the Application under consideration.

D. 3rd, 4th and 5th Respondents' grounds of opposition to the

Application

14. The 3rd to 5th respondents too, did file grounds of opposition dated 26th June 2023, wherein herein averred that the application under consideration was bad in law, incompetent and incurably defective. The petition had been prematurely filed and it was unjustifiable for the petitioner to seek to prohibit the 3rd respondent from executing his statutory mandate as provided for under section 2(1) of the *East African Development Bank Act*, more so when considering that the said Act was passed into law and ratified by the 1st and 2nd respondent over a decade ago.

15. Under, Treasury (Incorporation) Act Cap 101 of 1982 Revised 2012, the National Treasury on behalf of the Government exercised oversight and ownership through shareholding, equity participation or state membership subscriptions in all Government investments and unless the court made a determination that the 3rd respondent's action are not within the law and constitution, his action to remit Kenya's contribution to EADB, could not be halted based on mere allegations and suspicion by the petitioner. Further Kenya like all East African community members had obligations to discharge under the treaty and it would be detrimental, unconstitutional and unlawful to halt the discharge of these duties without a full trial and involving all the Arms of Government and the people of Kenya.

16. Finally, the said 3rd to 5th respondents, did also state that the applicant had also failed to satisfy the threshold of legal principles governing the applications for interlocutory injunction as set out in the case of Giella vs Cassman Brown &Co Ltd (1973) EA 358 and that section 16 of the *Government Proceedings Act*, which provided for the nature of relief against the government and expressly forbids the court from issuing injunctive orders against the government. The 3rd to 5th respondent therefore urged the court to find that the application under consideration lacks merit and proceed to dismiss the same.

A. Submissions

(i) The Applicant's Submissions

17. The petitioner/applicant did file his submissions dated 24th January ,2024 and filed in court on 26th January 2024, counsel for the petitioner did raised the following issues for determination:

a. Does the Petition and application in itself meet the threshold of being heard.

b. Has the test to grant conservatory orders been adduced passed or demonstrated.

c. What are the conditions to be met before a right or fundamental freedom could be limited?

18. Reliance was placed in the case of Hassan Ali Joho and Another v Suleiman Said Shahbal and 2 Others, where it was held that where a petition was founded on cogent issues of constitutional controversy, the court would not shy away from determining the said issues that arose and properly fell within its discretion to determine. Further in Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others, Civil application No 5 of 2014 [2014] eKLR, it had been held that conservatory orders bear a more decidedly public law connotation and would be issued on inherent merit of the case, bearing in mind the public interest, the constitutional values, proportionate magnitudes, and priority levels attributable to the relevant causes. Further Conservatory orders would be issued in situations where the protection of specific fundamental right of an individual was in jeopardy or where there is a threat to public order, the rule of law, or public interest. Conservatory orders could therefore be issued where, it was deemed necessary and when immediate intervention through interim interlocutory orders was the only effective remedy in the given circumstance.

19. It was the position of the petitioner/applicant that there was an urgent need for conservatory orders to be issued as prayed for in the application under consideration, as there was a live threat that irreparable harm, infringement *the constitution*, and continuous misuse of public funds would occur in blatant disregard of clear provisions of Article 206 as read with Article 209(1) of *the constitution* of Kenya 2010. Before filing this suit, the petitioner/applicant did aver that pursuant to Article 35(1) of *the constitution* 2010 and section 6 of *Access to Information Act*, 2016 he had sought for relevant information from the 1st and 2nd respondents with regard to the process undertaken to enact the EADB Act,Rev 2014 and audits conducted by the 6th respondent to verify that the sums advanced to EADB from the consolidated accounts, to enable him verify if the said funds are properly utilized and accounted for, but so far no response had been given and/or good/plausible reason proffered to explain why such information should be denied.

20. A purposive interpretation of *the constitution* and *Access to information Act*, 2016 demonstrated that their dominant objective leaned towards a conclusion that their objective was to promote access to and disclosure of information by state and state agencies, unless there were exceptional circumstances to deny access to the same, and the burden of justifying such limitation rested on the person resisting disclosure. Principle 4 of the Global principle's on National security and right to information (The Tshane principles) stated that though right to information was not absolute, the respondents had to show that the limitation imposed on this constitutional right was fair, reasonable, necessary and justifiable in a democratic society. Reliance was placed in the cases of Reliance bank Ltd vs Norlake Investments Ltd (2002)-1 EA, Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, Civil Appeal No. 224 of 2017 [2017] eklr, Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others [2014]eKLR.

21. Further, reliance was made on the case of Legal Advice Centre & 2 Others v County Government of Mombasa & 4 others [2018] eKLR, Matatiele Municipality and others Vs President of the Republic of south Africa and others (2) (CCT73/05A),(2006)ZACC12;2007(1)BCLR47(CC), Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (formerly Nairobi constitutional petition No 43 of 2014 Mui coal basin local community & 15 others Vrs Permanent secretary Ministry of Energy & 17 others (2015) eKLR, where the courts stress on the importance of stakeholder engagement, where those most affected by the policy ought to have a bigger say in that policy. Facilitation of public

involvement in legislative process, therefore, means taking steps to ensure that the public effectively participated in the legislative process.

22. The petitioner/applicant concluded by stating that he had proved that indeed his application had raised a strong prima facie/ arguable case, which based on the material presented to court, and the said court properly directing its mind on the issues raise would conclude that there exists a right which apparently had been infringed by the opposite party so as to call for an explanation or rebuttal from the latter. The application raised serious constitutional questions that merited a determination by this court and the circumstances herein justify the grant of conservatory orders as sought. See Mrao Vs First American Bank of Kenya ltd & 2 others (2003) eKLR,

(ii) The 3rd to 5th Respondents Submissions

23. The 1st and 2nd Respondents did not file any submission in opposition to this Application. The 3rd, 4th and 5th Respondents did file their submissions on 29th January 2024, wherein they submitted that the issues for determination as condensed in their grounds of opposition was whether the applicant was justified in seeking the orders sought and also whether the applicant had met the threshold for grant of conservatory orders.

24. It was submitted that this application was unjustified and was a waste of this Honorable courts time for the simple reason that the petitioner sought to challenge the process of ratification of the East African Community treaty and the subsequent provisions of the EADB Act, Cap 493A. In the interim, the petitioner sought to prohibit the 3rd respondent from disbursing, issuing, charging the consolidated funds pursuant to section 2(1) of the EADB Act, Rev 2104. This prayer had been overtaken by events since the budget for this financial year had already been read and some activities listed had already taken place. It was also unclear, why the petitioner had waited for 39 years since the enactment of the EADB Act, Cap 493A to urgently seek to stop its execution and the statutory mandate of the 3rd respondent as provided for under the said Act.

25. EADB was an international organization established jointly by sovereign states of (Kenya, Uganda, & Tanzania) and the said countries had jointly determined the legal status, capacities, privileges and immunities of EADB. The petitioner by this petition had sought to change the sovereign will of the three states as expressed in the charter, which position could not be entertained by this Honourable court. Reliance was placed in the case of Walter Osapiri Barasa vs the Cabinet Secretary of Interior and National Co- ordination & 6 others (2014) eKLR, where it was held that "Once a treaty becomes part of its law, a state party is obligated to perform the treaty regardless of conflicts with its internal laws. Suffice to say, internal law includes states constitution".

26. Further, the petition as filed also breached the doctrine of political question, which focus on limitation upon adjudication by courts of matters mostly dealing with foreign relations and national security. This doctrine was underpinned by the concept of separation of powers, where such issues were handed over to other arms of government to handle. The petitioner was therefore in the wrong forum as negotiation, signing, approval and ratification of treaties were all within the purview of the executive and legislative arm of government and his dissatisfaction with the treaty of East African cooperation of 1967, Treaty Amending and Re-enacting the charter of EADB and consequently the passing of EADB Act, Cap 493A, Rev 2014 were matters concluded and constituted a waste of courts judicious time.

27. It was submitted that the principles applicable for granting of conservatory orders have been the subject of discussion by various courts as enumerated in Gitarau Peter Munya vs Dickson Mwenda Kithinji(2014), Kathambi Ruchiami & 2 others vs Head of the Public Service & 3 others(2021) and

Board of Management of Uhuru Secondary School vs City County Director of Education and 2 others. Where the following principles were laid out namely;

a. The applicant needs to demonstrate an arguable prima facie case with a likelihood of success and to show that in the absence of the conservatory orders he's likely to suffer prejudice.

b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objectives of specific right or freedom in the bill of rights.

c. If an interim conservatory order is not granted the petition to its substrum will be rendered nugatory.

d. Whether the public interest will be served or prejudiced by decision to exercise discretion to grant or deny a conservatory order.

28. On whether the applicant had demonstrated and met the above requirements, reliance was placed in the case of David Ndii and others vs AG (2023) & Naftali Ruthi Kinyua vs Patrick Thuita Gachure and another (2015)eKLR. Where the court held that a prima facie issue includes but is not limited to a "genuine or arguable case". The court had to consider the material presented, properly direct its mind to conclude that there existed a right which has apparently been infringed by the opposite party as a result calls for an explanation or rebuttal. Further in determining if the petitioner had raised a prima facie case, the court must be guided by Article 22(1) and 258(1) of *the constitution* to ensure that indeed there was a right or fundamental freedom which had been denied, violated, infringed or is threatened to enable the court intervene. It was the 3rd to 5th respondents' position that these parameters had not been met and the court should not grant conservatory orders at this stage.

29. The 2nd to 5th respondent further faulted the petitioner for failing to juxtapose the provisions of the EADB Act, which he alleges are unconstitutional or flawed when squared as against *the constitution*. The petitioner in general terms expressed his fear, that the said EADB Act was unconstitutional and that in absence of the conservatory orders he is likely to suffer prejudice or that the substrum of the petition will be rendered nugatory. Reliance was placed on U.S Vs Butler, 297 U.S 1 (1936) to buttress this point. The court was urged not to issue any conservatory orders to stop the 3rd respondent from executing his duties under section 2(1) of the EADB Act, as that would be in blatant breach of the charter and treaty establishing East African community, and would not augur well for the country and its relationship with the partner states. Further reliance was placed on Kizito Mark Ngaywa Vs The Minister of state for internal security & provisional Administration & Another (2011) eKLR & Mombasa Bishop Joseph Kimani & others Vs Attorney General, committee of experts & another (2010) eKLR to buttress this point.

30. The 3rd to 5th Respondents therefore urged this court to find that this application is not merited and proceed to dismiss the same with costs.

(iii) 6th Respondent's Submissions

31. The 6th Respondent did file their submissions dated 15th December 2023, wherein they denied that they have failed to exercise their mandate as pronounced under Article 229 of *the constitution* of Kenya 2010, and operationalized by the *Public Audit Act*, 2015, which provided that in carrying out its functions, the office of the Auditor General and any person to whom the Act applies, shall be guided by the values, principles espoused in Article 10,27, 73,75, 201 and 232 of *the constitution* of Kenya 2010.

32. Article 35 of the treaty amending and re-enacting the charter of the EADB, provided that the books of account of the said Bank would be Audited every financial year by auditors of high repute selected by the Banks Board of Directors. On that score, the mandate of the office of the Auditor General, by

law therefore did not extend to audit of EADB books of Accounts. This too was confirmed by Article 229(4)(b),(5) and (6) of *the constitution* of Kenya 2010 as read with section 7 of the *Public Audit Act* 2015 which empowered the 6th respondent to only audit accounts of national and county governments. EADB was an international institution whose mode of Audit had been prescribed under Article 35 of the Treaty Amending and Re- enacting the charter of the EADB and as such the failure to audit the Bank could not amount to dereliction of duty.

B. Analysis &Determination

33. Having carefully considered this Application by the petitioner, the grounds of opposition filed by the 1st, 3rd to 6th Respondents, the replying affidavit filed by the 1st respondent, and rival submissions filed by the said parties I do find that only two issues arise for determination.

    a. whether pursuant to provisions of Article 35 of *the constitution* of Kenya 2010 the 1st and 2nd respondent should supply the petitioner with minutes, memorandum, public participation records/minutes that precipitated the ratification of EADB Act, Rev 2014 and also whether the 6th respondent too should supply the petitioner with true records of the status of account of funds disbursed, issued pursuant to section 2(1) of the EADB Act directly from the consolidated fund as from the year 2014 to 2023.

    b. Whether this court should issue conservatory orders directed to the cabinet secretary of Finance, the 3rd respondent herein prohibiting him from disbursing, issuing charging the consolidated funds pursuant to section 2(1) of the EADB Act, Rev 2014 in the new financial year 2023 -2024 immediately after reading the budget 2023 -2024.

(I) Applicability of Article 35 of *the constitution* of Kenya 2010.

34. Article 35 of *the Constitution* of Kenya provided as follows:

    " Access to information".

35.

    (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 publicize any important information affecting the nation."

36. Article 35 of *the Constitution* has been operationalized by the *Access to Information Act*, 2016 which gives effect and operationalizes the said Article 35 of *the constitution* and also provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on requested for and in line with the constitutional principles. Section 4 of the Act which is material, to this petition provides for the procedure to access information. The said section provides that ;

    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.

3. Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4. This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

5. Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (emphasis)

37. It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information. Public entities should therefore facilitate access to information held by it unless they are limited to do so by provision of section 6 of the said Act, which provides for exceptions when information may not be granted.

38. Finally, 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 what information is being requested. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding why the citizen wants to access information. Section 9 states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.

39. The importance of the right to access to information cannot be overemphasized and has been the subject to numerous litigations. As the court observed in the case of Famy Care Limited v Public Procurement Administrative Review Board & another Petition No. 43 of 2012 [2012] eKLR,

> "(16) The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of *the Constitution*. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to *the Constitution* and Article 10 cannot be achieved unless the citizen has access to information.
>
> (17) The right of access to information is also recognised in international instruments to which Kenya is party. The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples' Rights which provides, "Every individual shall have the right to receive information." The Commission noted

that right of access to information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy."

40. In the case of Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (supra) the Court stated of what the state should bear in mind when considering the request to access information.;

> " 34. The...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...
>
> 36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

41. The Court then went on to state at paragraph 56;

> " [56] ... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a).... they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens."

42. In the case of Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016]eKLR, the Court reaffirmed the position that *the Constitution* does not limit the right to access information when it stated;

> " [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".

43. The importance of the right to access information as a founding value of constitutional democracy was also dealt with by the Constitutional Court of South African in the case of President of Republic of South Africa v M & G Media (supra) where the Court 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 to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

44. The right to access information as a basis for accountability, responsiveness and openness was also discussed and emphasized in the case of Brummer v Minister for Social Development & Others (supra) where the Court stated;

> "(62) The importance of this right too, 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. And *the Constitution* demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."
>
> (63) Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas."

45. The above principles regarding the right to access information are also founded on International instruments. Article 19 of the Universal Declaration of Human Rights is clear that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". Article 19(2) of International Convention on Civil and Political Rights also makes the right to information imperative when it states that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." And finally, Article 9(1) of Africa Charter on Human and Peoples Rights states that "every individual has the right to receive information."

46. These international instruments were ratified by Kenya and by virtue of Article 2(5) of *the Constitution*, general rules of international law and any treaties or conventions ratified by Kenya form part of the law of this country. Arising from the jurisprudence above and the law, the state has constitutional obligation, without qualification, to allow citizens access information and they cannot be denied that right by the state. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by *the Constitution* and is protected by the same Constitution.

47. The petitioner seeks for orders that the 1st and 2nd respondents provide him minutes, memorandums, public participation (records) minutes that precipitated the ratification of the EADB Act, Rev 2014 and also further sought to be supplied with true records of status of accounts the public charge debt, liability, pursuant to Section 2(1) of the EADB Act, Rev 2014 directly sourced from the consolidated fund from the year 2014 to 2023. The 1st petitioner did not directly respond to this request in their response and only gave a chronology as to how the EADB Act, Rev 2014 was amended. The 2nd respondent on the other hand did not oppose this application.

48. The 3rd to 5th respondents on their part in their grounds of opposition and submissions opposed this application/petition on the basis of various legal propositions, more specifically geared at their opposition to the court granting conservatory orders, but did not submit on the issue of right to information as sought. The 6th respondent on the other hand stated that section 3 of the *Public Audit Act*, 2015, provided guiding values and principles that guided the discharge of its functions and the office of the Auditor – General and any person to whom the Act applied, were to be guided by the values, principles and requirements of Article's 10,27,73,75, 201 and 232 of *the constitution* 2010.

49. The role, powers and functions of the Auditor General as prescribed under Article 229(4), (b),(5) and (6) of *the constitution* of Kenya 2010 as read with section 7 of the *Public Audit Act* 2015 allowed the 6th respondent to audit and report on the accounts of national and county governments only. EAOB was an international institution whose mode of auditing had been prescribed under Article 35 of the treaty Amending and Re- enacting the charter of the East African Development Bank and a such failure to audit the bank could not amount to dereliction of duty.

50. Arising from the jurisprudence analyzed above and the law, the state has constitutional obligation, without qualification, to allow citizens access information and they cannot be denied that right by the state. The petitioner had indeed sought for information which is within the control of the 1st, 2nd and 6th respondent and none has been supplied. Even after filing of this petition and allowing the parties to file their documents the said respondents have not deemed it fit to allow the petitioner to access the said documents, which without doubt infringes on his right of information as guaranteed under Article 35 of *the Constitution* of Kenya 2010.

51. The 6th respondent has a valid point when they raise the fact that they do not audit the book of account of EADB and are restricted to Auditing accounts of the National, County Government and other state agencies. Article 35 of the treaty amending and re enacting the charter of the EADB provides that the banks accounts will be audited by auditors of high repute selected by the banks board. That may be so but the petitioner is not seeking audited books of account of EADB, but prima facie he seeking to known the amounts, public charge, debt and liability owned by the government of Kenya to EADB, which sums are charged on the consolidated accounts- a national government account audited yearly by the 6th Respondent by dint of the provisions of Article 229 (4), (a) of *the constitution* of Kenya. There is no valid reason advanced under the sun, why the 6th respondent cannot furnish such information especially in light of provisions of Article 201 of *the constitution* which promotes financial openness, accountability and public participation in financial matters

52. The petitioner's prayers for access to information are therefore merited and ought to be granted.

> II. Whether this court should issue conservatory orders directed to the cabinet secretary of Finance, the 3rd respondent herein prohibiting him from disbursing, issuing charging the consolidated funds pursuant to section 2(1) of the EADB Act, Rev 2014 in the new financial year 2023 -2024 immediately after reading the budget 2023 -2024.

53. The applicant urged the court to grant the above orders on the basis that public interest dictated that there had to be a high level of financial probity in the use and disbursement of public funds as set out under Article 201 of *the constitution* of Kenya. By his pleadings, he had proved that, there was blatant infringement of public right in enacting the EADB, Act, 2014 and there was need for transparency in disbursement of public funds to the said institution to avoid abuse and lack of probity. This constituted a continuous fundamental right abuse and therefore it was imperative and necessary to protect public interest, order and rule of law. He urged this court to issue a conservatory order to protect against this continuous blatant breach from being occasioned.

54. The 1st respondent on the other hand did submit that pursuant to Article 45 of the charter establishing EADB, monetary contributions received by the EABD formed part of its Assets. Consequently, the same was immune from any interference even by member states that establish it. Furthermore, the EADB has immunity from all and any judicial proceedings, as such this court could not issue any orders that would affect the objectivity and functionality of the EADB. Further the 1st respondent urged this court to take judicial notice of the fact that EADB legal status, capacities, privileges and immunities was jointly established and determined by three sovereign states of Kenya, Uganda and Tanzania and it was not within the province of the court to prevent or alter the sovereign will of the said states as expressed in the charter.

55. The 1st respondent further stated that it exercised oversight role over national revenue and its expenditure by dint of provision of Article 95(4), (c) of *the constitution* and in doing so, the National assembly had ensured that there was in place a system of checks and balances between the legislative and executive arms of government. Standing order 207 of the National Assembly standing orders, created, the committee on Public debt and privatization which had oversight over, consolidated funds services excluding audited account. It was this committee that exercised oversight over the consolidated fund services and expenditure as defined under Article 206(2), (c) of *the constitution*.

56. Further they had operationalized the regulations to guide donations and grants by the national government or its entities as provided for under section 47 and 48 of the *Public Finance Management Act*, 2012. These regulations were the Public Finance Management (National Government) Regulations, 2015. Specifically, Part IV of the said regulations provided for guidance on donations and grants. The petitioner's fears of lack of accountability were therefore unfounded.

57. The 3rd to 5th petitioners on their part submitted that the prayers sought to be prohibit the 3rd respondent from disbursing, issuing, charging the consolidated fund pursuant to section 2(1) of the EADB Act, Rev 2014 in the financial year 2023- 2024 immediately after reading of the budget had already been overtaken by event since the said budget had been read and some of the activities sought to be stopped had already taken place. The said EADB Act had been in force for 39 years since its enactment and as such there was no need to preliminarily stop execution of the statutory mandate of the 3rd respondent as provided for under the said Act. The said respondents also relied on the doctrine of political question, which provided that it was unjustifiable for courts to adjudicate on matters dealing with foreign relations and national security.

58. The 3rd to 5th respondents further urged this court not to grant the said conservatory orders on the basis that the petitioner/applicant had not demonstrated an arguable prima facie case with any likelihood of success nor will denial of the said order render this petition or its susbstrum to be rendered nugatory. The orders sought would also not serve public interest as the EADB Act found recognition and legitimacy from an international treaty to which Kenya was a party and had validation in Article 2(6) of *the constitution* of Kenya. Therefore, to grant the conservatory order would be in blatant breach of the terms of the charter and the treaty establishing East African community and would not auger well

from the country in its relationship with the partner states and international community. Finally, there was no prejudice which the petitioner would also suffer if the orders sought are not granted.

59. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

    a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

    b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

    c. The public interest must be considered before grant of a conservatory order.

60. In the case of Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi Petition No. 16 of 2011 Musinga, J (As he was then) stated that:

> "...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*."

61. Further in a majority decision in the case of The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012, it was held as follows:

> "In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

62. The question that follows therefore is whether the Applicant has satisfied the conditions for the grant of conservatory orders. The first condition is the need to establish a prima facie case. In Mrao Ltd v First American Bank Ltd & 2 others [2003] KLR 125 what constitutes a prima facie case in civil cases was defined as follows:

> "So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of

success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

63. This petition raises two clear constitutional issues for determination; whether the EADB Act, Rev 2014, was properly and constitutionally enacted as envisaged in law and secondly, whether there is in place transparent and accountable systems to account for public money advanced to EADB. This was expected in line of Article 201(a),(d) & (e) of *the constitution* of Kenya. The 1st respondent alleged that there was adequate public participation which took place before the said EADB Act, was revised in 2014, but is yet to place that evidence before court. Further they argue that, the committee on Public debt and privatization had oversight of consolidated funds services excluding audited account and that they had operationalized the regulations to guide donations and grants by the national government or its entities as provided for under section 47 and 48 of the *Public Finance Management Act*, 2012. These regulations were the Public Finance Management (National Government) regulations, 2015. Specifically, Part IV of the said regulations provided for guidance on donations and grants. At this point the court cannot make a conclusive determination on these issues but clearly, they form a proper legal basis for which it can be clearly said that the petitioner has made out a prima facie case which is ripe for determination.

64. The next step is to find out if the Applicant has demonstrated that failure to grant the orders sought would render his petition to be rendered nugatory. In the case of Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others [2011] eKLR, the Court while considering the circumstances under which conservatory orders should be granted observed that:

> "What is clear to me from the authorities is that strictly a "Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to "give such directions as it may consider appropriate for the purpose of securing of ... the provisions of *the Constitution* (see – BANSRAJ above)". A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise."

65. I resonate with the submissions of the 3rd to 5th respondents, who aver that, the prayers for conservatory orders as sought have been overtaken by events as most of the act's sought to be restrained have already been effected under the past budget and to issue the said orders at this interlocutory stage would be acting in vain/a vacuum. Secondly, if the Court were to grant conservatory orders to halt Kenya's budgetary allocation to EADB, and upon hearing the substantive petition, the court finds that the the EADB Act, Rev 2014 was properly enacted and indeed there are checks and balances in place to account for funds disbursed to the said bank,it would mean that the court would have destabilized the bank and such an order would have a detrimental effect on its operations and Kenya's obligation to its East African neighbors. In my view, this risk far outweighs the risk of upsetting the apple cart at this stage without the benefit of full arguments by the respective parties. It is trite that the public interest lies in the uninhibited operation of the law and if this Court needlessly suspends the operation of the law the consequences will be far-reaching and detrimental to the smooth running of EADB.

66. In Susan Wambui Kaguru & 4 others v Attorney General & another [2012] eKLR it was determined that:

> " The question for the court is to consider whether these laws are within the four corners of *the Constitution*. No doubt serious and weighty arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."

67. Notwithstanding what I have stated above, I remain alive to the fact that laws that are detrimental to the rights and fundamental freedoms in the Bill of Rights can indeed be suspended at the interlocutory stage. However, such suspension can only occur where it is demonstrated that the suspension will not hamper the State in the delivery of its mandate. In Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR; Civil Application Nai 2 of 2015 (UR 2/2015), the Court of Appeal, in declining to set aside conservatory orders issued by the High Court suspending operation of some laws, held that:

> " It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by *the Constitution*. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this...
>
> While the Court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate *the Constitution* and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of *the Constitution* has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.
>
> We do not think that the applicant has made out such a case. The Court was not told that the grant of the conservatory orders has brought about a vacuum in our laws which makes it impossible or difficult to investigate and prosecute terror suspects or such other persons who may be targeted by the SLAA. Apart from the eight (8) sections of the SLAA whose operationalisation has been temporary suspended, all other laws of Kenya are still in full operation. We entertain no doubt that as we await either the hearing of the appeal before this Court, or, the finalization of the petitions before the High Court, the country's security agents and law enforcement organs can still make full use of the existing laws to keep the country and its people safe."

68. Finally the law that the Applicant claims to be unconstitutional has been in place from the time and may indeed be facilitating non transparent expropriation of funds from the consolidated funds in contravention of express provisions of *the constitution*. That if proved will warranted appropriate court

intervention. However, it has not been demonstrated that the law is a danger to life and limb to warrant its suspension at the interlocutory stage.

69. In conclusion, I determine that although the Applicant has established a prima facie case but has not met the other requirements for the grant of conservatory orders. Most importantly, the public interest lies in having this petition heard and determined expeditiously and on merit.

Disposition

70. The upshot is that the applicant partially succeeds and the orders that commend themselves at this stage are as follows; Prayers (5), (7) and (9) of the notice of motion Application dated 23rd May 2023 are granted on the following terms:

    a. The 1st and 2nd respondents, respectively are directed to provide and supply the Petitioner/ Applicant and this court with minutes, memorandum's, public participation (records) minutes, that precipitated the ratification of EADB, Rev 2014. The said set of documents are to be supplied, without fail, within the next 30 days from the date hereof.

    b. The 6th respondent is directed to produce true records of status of accounts of funds disbursed, issued pursuant to section 2(i) of the EADB Act directly from the consolidated fund as from the year 2014 to 2023.The said documents are to be supplied to the Applicant without fail within the next 30 days from the date hereof.

    c. The 6th respondent too is hereby directed to produce the true records of the status of accounts the public charge, debt liability, pursuant to section 2(1) of the EADB Act, Rev 2014, directly from the consolidated fund from the year 2014 to 2023. The said set of documents too are to be supplied to the Applicant without fail, within the next 30 days from the date hereof.

71. The other prayers as sought for under the said Application are dismissed.

72. The costs of this Application will Abide the petition.

73. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 22ND DAY OF APRIL, 2024.

In the presence of;

No appearance for Petitioner

Mr Atingu for 1st Respondent

Ma Mutua for 2nd Respondent

No appearance for 3rd to 5th Respondent

Sam Court Assistant