



REPUBLIC OF KENYA

THE SUPREME COURT OF KENYA
EDWIN HAROLD DAYAN DANDE & 3 OTHERS v. THE INSPECTOR
GENERAL, NATIONAL POLICE SERVICE & 5 OTHERS
(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

SC PETITION NO. 6 (E007) OF 2022
(CONSOLIDATED WITH PETITION NOs. 4 (E005) & 8 (E010) OF 2022

DATE OF JUDGMENT: 16TH JUNE, 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court dismissed the appeal with costs awarded to the 1st, 2nd, 3rd, 4th, and 6th respondents.

Background

At all material times, the 1st-3rd appellants were employed by British American Asset Managers Ltd (BAAM). During the appellants' employment, BAAM entered into a joint-venture project with Acorn Group Limited for the development of real estate and other business ventures. A dispute arose between the appellants and BRITAM over the real estate business leading to the resignation of the 1st -3rd appellants who then formed a rival company, Cytonn Investments Limited (4th appellant). As a consequence, BAAM instituted various civil suits against the appellants and Acorn seeking restitution of funds allegedly fraudulently transferred by the 1st - 3rd appellants to Acorn and its affiliates without BAAM's approval and criminal proceedings.

Aggrieved the appellants filed two judicial review suits and a constitutional petition at the High Court seeking orders *inter alia*, of ; prohibition directed at the 1st and 2nd respondents from arresting, harassing, and /or otherwise interfering with their liberty and property; *certiorari* to quash the decision of the 2nd respondent to institute criminal proceedings against them as well as the resultant proceedings in **Criminal Case No. 1735 of 2016 Republic vs Edwin Harold Dayan Dande & 3 Others**; prohibition barring the Chief Magistrate's court from hearing and determining the criminal case; a declaration that the respondents violated their right to access information under Article 35(1)(b) of the Constitution; and an order compelling the respondents to provide them with the settlement agreement entered into between BAAM and Acorn in several suits filed at the High Court.

The High Court in two separate judgments dismissed the judicial review suits on grounds *inter alia* that, it was pre-emptive and presumptuous to prohibit the 2nd respondent from prosecuting the appellants as no decision had been made at the time of filing the suits and that the power to quash criminal proceedings amounted to the exoneration of a suspect before trial. On the other hand, the High Court allowed the constitutional petition on the ground that the appellants' rights to access to information were violated and issued an order compelling the respondents to provide them with the documents sought plus the costs of the petition.

The appellants' appeals on the two judicial review suits were dismissed by the Court of Appeal upholding the decisions of the High Court. The respondent also filed an appeal against the decision of the High Court in the constitutional petition. The Court of Appeal overturned the said decision holding that the appellant's right to access to information was not violated. Aggrieved by the three appellate court decisions, the appellants filed three distinct appeals before the Supreme Court. The Supreme Court delineated the following issues for determination:

- i) *Whether the appellants had properly invoked the Court's jurisdiction under Article 163(4) (a) of the Constitution.*
- ii) *Whether the appeal, or any part of it, was moot, leaving no live controversy requiring adjudication.*
- iii) *Whether the scope of judicial review has evolved to include merit review of an administrative decision or other action complained of.*
- iv) *Whether the decision to investigate, arrest and prosecute the appellants constituted an abuse of power by the 1st and 2nd respondents.*
- v) *Whether the appellants are entitled to the right to access to information under Article 35(1) (b) of the Constitution.*
- vi) *What relief is available to parties?*

Upon consideration of the same, the Supreme Court has dismissed the appeal for the reasons that;

- 1. The appeal was moot in regard to the issue of prohibition of the 1st and 2nd respondents from harassing and charging the appellants.**
 - 2. The appellants did not prove that the 1st and 2nd respondents abused their investigative or arrest powers as conferred by the Constitution and statute.**
 - 3. The appellants did not provide any evidence to prove that the 2nd respondent did not meet the expectations required of it under Article 157 (11) of the Constitution or that the action to prosecute them amounted to an abuse of the process of the court.**
 - 4. On the right to information, the appellants did not establish a demonstrable link between the rights they intended to exercise or protect and the information requested.**
- 3. The Court awards costs to the 1st, 2nd, 3rd, 4th, and 6th respondent.**
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