

**REPUBLIC OF KENYA**  
**COMMISSION ON ADMINISTRATIVE JUSTICE**  
**(OFFICE OF THE OMBUDSMAN)**  
**ATI REVIEW APPLICATION NO. CAJ/ATI/PE/040/52/22-MW**

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**MILLICENT ANYANGO.....APPLICANT**

**VERSUS**

**NCBA BANK KENYA PLC.....RESPONDENT**

**DETERMINATION**

**Factual Background**

1. The Commission on Administrative Justice (Office of the Ombudsman) (herein after referred as CAJ or the Commission) is established under Article 59(4) of the Constitution, and its constitutive Act; Commission on Administrative Justice Act, 2011 (CAJ Act, 2011) with the mandate to enforce administrative justice in the public sector by addressing all forms of maladministration. The Commission has a further mandate of oversight and enforcement of the right of access to information as guaranteed by Article 35 of the Constitution, through the Access to Information Act, 2016 (ATI Act, 2016).
2. The Commission's work is guided by the following laws: -
  - i) The Constitution;
  - ii) The Commission on Administrative Justice Act, 2011 and its Regulations of 2013;
  - iii) Access to Information Act, 2016;
  - iv) The Fair Administrative Action Act, 2015;
  - v) The Public Service (Values & Principles) Act, 2015.

3. Article 35 of the Constitution guarantees the right of every citizen to access: -

***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.***

The importance of access to information to a country's citizenry is premised on the fact that all sovereign power belongs to the people and all State information is held by public entities in trust for the people. Article 1 of the Constitution expressly provides that all sovereign power belongs to the people and should only be exercised in accordance with the Constitution. It further provides that the power may be exercised directly by the people or through their democratically elected representatives. Access to information equips citizens with requisite knowledge about government policies, procedures and decisions thereby enabling them to have meaningful participation. In addition, informed citizens are able to scrutinize the actions and decisions of duty bearers thereby promoting principles of good governance. This ultimately engenders open government, efficient delivery of services and rule of law. It further strengthens public trust in institutions thereby building back strong institutions for the public good and sustainable development.

### **Facts of the Review Application**

4. The Commission received a complaint by the Applicant through her advocate Mr. Victor Odhiambo dated 22<sup>nd</sup> November 2022 requesting for review of a decision by the Respondent on the Applicants' request for information. The Applicant states that on 4<sup>th</sup> August, 2022, her bank account (No. xxxxxxxx) with the Respondent's Bank was infiltrated by fraudsters who stole Kshs 143,771.00 from the account in circumstances that she were not fully explained by the Respondent. In

the letter, the Applicant state that she holds the view that the unauthorized access to her account was occasioned by security lapses on the part of the Respondent. Further, the Applicant states that the Respondent requested for and retained her mobile phone for purposes of conducting forensic analysis as part of the investigations into the incident.

5. On 29<sup>th</sup> September 2022, the Applicant through her advocates wrote to the Respondent a letter with the subject '*Fraudulent transfer of Kshs 143,771.00 from account No. xxxxxxxxxx*'. Paragraph 6 of that letter is relevant to this review as it states that: -

***“In view of the foregoing, we are looking forward to receiving the forensic analysis or investigations report as we mull over the avenues and options available to my client in law.”***

6. In her review application letter to the Commission dated 22<sup>nd</sup> November 2022, the Applicant stated that the Respondent refused to share the forensic analysis/investigation report or any part of it citing security reasons. The Applicant asserted that it is her right to receive such report since the same is material to her understanding of the circumstances under which funds were lost from her account including levels of culpability thereof.

### **Commission's Review Procedure**

7. The request for information in this review is a letter dated 29<sup>th</sup> September 2022 signed by the Applicant advocate and addressed to the Respondent. Whereas the letter is not explicitly titled as a request for information, its contents in paragraph 6 state clearly that information was being sought being '*the forensic analysis or investigations report*'. Section 8 (4) of the Act stipulates that a request for information cannot be rejected on want of form and as such, the Commission opines that

the Applicant's letter dated 29<sup>th</sup> September 2022 is a proper request for information.

8. Section 22(3)(a) of ATI Act, 2016 gives the Commission the power to call for information or report regarding a complaint lodged with it from a public entity or private body. Upon receipt of the Applicant's request for review letter dated 22<sup>nd</sup> November 2022, the Commission wrote a letter Ref: CAJ/ATI/PE/040/52/22-MW dated 7<sup>th</sup> December 2022 to the Respondent requiring compliance with section 9(4) of ATI, 2016. No response to the letter dated 7<sup>th</sup> December 2022 was received from the Respondent either at the Commission or with the Applicant.
9. The Commission in its inquiry process as stipulated by section 22(3) sought to bring the parties to the dispute together to seek a common understanding vide the powers granted by section 29 of the Commission on Administrative Justice Act, 2011. The meeting took place on 2<sup>nd</sup> March 2023 whereof the parties agreed that the Respondent would respond officially to the Commission on or before 6<sup>th</sup> March, 2023. The Commission notes that no communication was received from the Respondent after the said meeting. Section 22(3)(a)(i) of the ATI Act, 2016 provides that ....

***“if the information or report called for is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information”.***

Hence, in the absence of a response from the Respondent even after being notified of this review application, and after a meeting convened to seek such a response, the Commission has no alternative but to proceed as guided by section 23(3)(a)(i) of ATI, 2016.

**Issues for determination:**

10. After a careful analysis of the request for information by the Applicant dated 29<sup>th</sup> September 2022 as well as the request for review letter dated 22<sup>nd</sup> November 2022, the Commission frames the following as the issues for determination in this review:

- i. Whether the Commission has jurisdiction under ATI Act, 2016 to review a decision by Respondent;**
- ii. Whether the Respondent had in its custody/possession the information requested by the Applicant;**
- iii. Whether the information requested by the Applicant and which was in the custody/possession of the Respondent should be disclosed to the Applicant;**
- iv. The orders which the Applicant is entitled to.**

**Whether the Commission has jurisdiction under ATI Act, 2016 to review a decision by Respondent:**

11. The Respondent is a private body in banking sector established under Companies Act Cap 486 Laws of Kenya to carry out banking operations in Kenya in accordance with the Banking Act Cap. 488 Laws of Kenya. According to information available at the Respondent's website [<https://ke.ncbagroup.com>], the Respondent describes itself as "... a universal bank that aims to support the aspirations of Kenya and the region [...] a true market leader in Corporate Banking, Asset Finance, and Digital Banking." The application of the ATI Act, 2016 in so far as private bodies are concerned is not express to all private bodies but only to bodies whose roles, functions or description fit within the definition of a private body provided by section 2 of the Act. The said section defines a 'private body' as...

**“Private body’ means any private entity or non-state actor that -  
(a) receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources); or  
(b) is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right;”**

12. In her review application letter to the Commission dated 22<sup>nd</sup> November 2022, the Applicant asserted that it is her right to receive the Investigations report since the same is material for her understanding of the circumstances under which funds were lost from her account including levels of culpability thereof. Again, the Applicant’s advocates in the request letter dated 29<sup>th</sup> September 2022 to the Respondent at paragraph 6 states: -

**“In view of the foregoing, we are looking forward to receiving the forensic analysis or investigations report as we mull over the avenues and options available to my client in law.”**

The foregoing is a clear indication that the Applicant herein is desirous in protecting her fundamental rights as enshrined in the bill of rights including the right to property, social-economic rights among others. As the Applicant’s request for information is premised on the foregoing understanding, the Commission holds that the Respondent becomes a relevant private body based on part (b) of the definition of a private body under the ATI Act, 2016.

13. Further, the Banking Act, Cap 488 Laws of Kenya in section 2 defines a bank as **“a company which carries on, or proposes to carry on, banking**

**business in Kenya but does not include the Central Bank**". Again, the Act in section 2 defines banking business as...

***"(a)the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;***

***(b)the accepting from members of the public of money on current account and payment on and acceptance of cheques; and***

***(c) the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money;"***

From the foregoing definitions, it is quite clear that banks play a vital role in the society in supporting and facilitating financial services and capital formation to citizens which is an important factor of production and economic growth for any Country. Banks play a central role in the transmission of monetary policy, one of the government's most important tools for achieving economic growth. Accordingly, Central Bank of Kenya controls money supply at the national level, while banks facilitate flow of money in the markets within which they operate. Hence, the role of a bank is not simply an ordinary business of *'trading'* or *'profit making'* but of enhancing a Country citizenry' experience in social-economic growth and development. The role of a bank is akin to an investment meant to serve the 'public good'. Accordingly, the Commission holds that the legal definition of a Bank coupled with its unique role in the society places banks within the definition of relevant private bodies for purposes of the ATI Act, 2016.

**Whether the Respondent had in its custody/possession the information requested by the Applicant:**

14. The facts of this review contained in the Applicant's review letter dated 22<sup>nd</sup> November 2022 and the request for information dated 29<sup>th</sup> September 2022 reveal that the Applicant is a holder of a bank account (No. xxxxxxxx) with the Respondent Bank. The Applicant gave an account of what transpired on 4<sup>th</sup> August, 2022, whereof the said account was infiltrated by fraudsters who stole Kshs 143,771.00 from the account. The applicant stated that her mobile phone was retained by the Respondent for investigations purposes.
15. The reported fraudulent activity which occurred on the Applicant's account number xxxxxxxx with the Respondent Bank requires the Respondent to establish clearly the circumstances under which such incident happened. Based on this obligation and the Applicant's account that her mobile phone was retained by the Respondent for purposes of carrying out investigations, the Commission's is clearly convinced that the Respondent carried out, authored or directed the said investigations into the occurrences of 4<sup>th</sup> August 2022 that led to loss of money from the Applicant's account No. xxxxxxxx and a report to that effect is available. As such, the Commission holds that the requested information being 'forensic analysis or investigation report' is being held by or is in the custody of the Respondent.

**Whether the information requested by the Applicant and which was in the custody/possession of the Respondent should be disclosed to the Applicant:**

16. The Applicant's advocates supplied a copy of a letter by the Respondent dated 6<sup>th</sup> October 2022 as part of the supporting documents in this review application. The Commission takes note of the

fact that the said letter was written to the Applicant on a ‘without prejudice’ basis and thus the Commission will not rely on its contents in this review based on the provisions of section 23 of the Evidence Act, Cap. 80 Laws of Kenya. Nevertheless, the Commission notes that the Applicant in her letter dated 22<sup>nd</sup> November 2022 stated the reason why the Investigations Report was not supplied by the Respondent was due to security reasons. The Commission is not in a position to know the nature of security reasons relied upon by the Respondent since no response was submitted by it in this review.

17. The Commission wishes to give guidance that where a public entity or a private body relies on a limitation in a response to a request for information, the entity or body has a statutory obligation to state clearly the exact section of the law relied upon, the particular set or sets of information applicable and further explain on how such limitation applies to such information. This is in accordance with the holding in **Legal Advice Centre t/a Kituo cha Sheria & 33 Others vs Cabinet Secretary Ministry of Education & Others, Nairobi Petition No 104 of 2019 [2021] eKLR**, at paragraph 54 that...

***“The burden on justifying the limitation on the right to access of information rested on the person resisting disclosure, as provided for in article 24(3) of the Constitution which stated that the State or a person seeking to justify a particular limitation should demonstrate to the court, tribunal or other authority that the requirements of the article had been satisfied.”***

Further, In **Mercy Nyawade vs. Banking Fraud Investigations Unit [2017] eKLR**, the Honourable court at paragraph 45 held that...

***“It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable***

***to ours that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state.”***

18. The Applicant's advocates letter to the Commission dated 22<sup>nd</sup> November 2022 states in that ***“...the bank has refused to share the FORENSIC Report or any part of it with my client citing security reasons...”***

Whereas the Commission does not have the benefit of understanding fully the nature of the security reasons cited by the Respondent, the Commission cannot close its eyes to such response as it is alive to the nature of investigations report whereof many such reports contain personal information, information belonging to third parties as well as other sets of information whose disclosure would not be permitted under the law.

19. The Commission's role in reviewing a decision where the Respondent invokes a limitation is to confirm whether such limitation applies to the particular set of information concerned and if so, whether such limitation applies partly or wholly to the requested information. This is in recognition of the letter and spirit of the Act as provided in section 4 of the Act specifically section 4 (4) which provides that...

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

Further, the Commission's role on this issue is informed by the fact that the ATI Act in section 6 subsection (2) gives specificity on what amounts to national security and further subsections (3) and (7) gives clarity on

certain sets of information which do not fall within the limitation clause even though the same may be expressly listed in section 6 subsection (1) of the Act.

20. The Applicant in her application to the Commission asserted that it is her right to receive the Investigation Report since the same is material for her understanding of the circumstances under which funds were lost from her account including levels of culpability thereof. On the other hand, the Respondent stated that it cannot share the Report based on security reasons. These two divergent positions call for the Commission to have clarity required in dealing with the delicate balancing act to ensure proper management of competing rights and interests.
21. The Honourable Court took note of this delicate balance in the **Legal Advice Centre t/a Kituo cha Sheria case**, whereof the court adopted a proportionality test to a limitation by holding in paragraph 60 that...

***“The test for determining whether a restriction was appropriate should be one of proportionality. A proportionality test was appropriate as it preserved rights, provided a framework for balancing competing rights and enabled other important public concerns, such as national security and public order, to be duly taken into account.*”**

Similarly, in **Kenya Human Rights Commission vs Communication Authority of Kenya & 4 Others [2018] eKLR** at paragraph 72, the court held that ...

***“A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative*”**

**measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.”**

22. The question which arises in the instant review application is whether there is a way in which disclosure of the Respondent's Investigations Report can be done to enable the right of the Applicant to access information while at the same time protecting the Respondent's 'security interests'. Adopting the proportionality test as well as examining whether there are other alternatives, the Commission while fully appreciating the Respondent reasons as to why disclosure of the '*full investigations report*' cannot be done, observes that other ways exist which if explored can enable disclosure of some parts of the investigation report (not the full report) or information contained in the investigation report which is relevant and applicable to the Applicant. One of the ways in which this can be done is through redacting information on the requested investigation report and providing such redacted copies to the Applicant unless the redacted document is likely to directly or indirectly leak 'security' or limited information to the Applicant. If the latter is true, then the Respondent can enable access through providing an abridged version (summary) of the investigations report to the Applicant to allow access to necessary and relevant information applicable to her but at the same time, protect the disclosure of limited information.

23. In ***Legal Advice Centre t/a Kituo cha Sheria case*** whereof petitioners sought access to the 'full investigation reports' in relation to the Garissa University terrorists attack conducted by Independent Policing Oversight Authority (IPOA) (7<sup>th</sup> Respondent) and the Commission on Administrative Justice (CAJ) (8<sup>th</sup> Respondent), the Court did not order the release of

such 'full investigations report' based on a limitation of national security but recognized that petitioners rights of access to information had been met through supply of an “...**abridged version of the report for their purpose.**” (see paragraph 75 thereof). Thus, the Commission is guided by the holding of the Honorable Court that an abridged version of an investigations report can suffice as an alternative to limiting the 'full investigations report' and thus meet the delicate balance of competing interests. Thus, the Commission directs the Respondent herein to facilitate disclosure as guided herein before.

**The orders which the Applicant is entitled to:**

24. Having made a careful analysis of all the facts and information provided in this Review Application, the Commission, pursuant to the powers granted by section 23(2)(a) of the Access to Information Act, 2016 makes the following **ORDERS: -**

1. **THAT** the Respondent should redact the Investigations Report conducted in relation to the Applicant's Account number xxxxxxxxx or in the alternative prepare an abridged version thereof and supply such redacted or abridged version of the investigations report to the Applicant.
2. **THAT** compliance with No.1 be within **twenty-one (21) days** from date hereof.

**Dated, Signed** and **Delivered** at **Nairobi** this..... **11<sup>th</sup>** .... day of..... **April** .....2023

**LUCY NDUNGU, EBS**  
**ACCESS TO INFORMATION COMMISSIONER**