REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 218 OF 2020

In the matter of Articles 1, 2, 3, 10, 19, 20(1)(4), 21, 22, 24, 25, 26(1), 28, 29, 35, 47, 165, 232(1), 258 and 259 of the Constitution of Kenya 2010
and
In the matter of Section 4, 9, 20, 25 and 28 of the Access to Information Act, 2016
and
In the matter of Section 5, 6 and 10 of the Health Act, 2017
and
In the matter of Section 3 and 4 of the Fair Administrative Action Act, 2015

BETWEEN

ERICK KIOMA.....1ST PETITIONER
ESTHER NELIMA.....2ND PETITIONER
CHRIS OWALLA.....3RD PETITIONER
CM.....4TH PETITIONER
FA.....5TH PETITIONER
KB.....6TH PETITIONER
MO.....7TH PETITIONER
EL.....8TH PETITIONER
KATIBA INSTITUTE.....9TH PETITIONER
KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV/AIDS(KELIN).....10TH PETITIONER
THE KENYA SECTION OF THE INTERNATIONAL
COMMISSION OF JURISTS (ICJ) KENYA.....11TH PETITIONER
TRANSPARENCY INTERNATIONAL KENYA.....12TH PETITIONER
ACHIENG ORERO.....13TH PETITIONER

(9th to 13th petitioners suing on behalf of health and human rights civil society and non-governmental organisations)

VERSUS

MUTAHI KAGWE, CABINET SECRETARY FOR HEALTH.....1ST RESPONDENT
PATRICK AMOTH, AG DIRECTOR GENERAL,
MINISTRY OF HEALTH.....2ND RESPONDENT
CORNEL RASANGA, GOVERNOR OF SIAYA COUNTY.....3RD RESPONDENT
COUNCIL OF GOVERNORS.....4TH RESPONDENT
FRED OKENGO MATIANGI, CS INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT
HILARY NZIOKI MUTYAMBAI, INSPECTOR GENERAL
OF THE POLICE, KENYA.....6TH RESPONDENT
FOR INFORMATION AND COMMUNICATIONS.....7TH RESPONDENT
THE COMMISSION ON ADMINISTRATIVE JUSTICE.....8TH RESPONDENT
DANIEL YUMBYA, CHIEF EXECUTIVE OFFICER,
KENYA MEDICAL PRACTITIONERS' ADN DENTISTS COUNCIL.....9TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....INTERESTED PARTY

3RD RESPONDENT'S SUBMISSIONS

Your lordship, the petitioners filed this petition seeking *inter alia* the following reliefs:-

1. A declaration that the 1st - 6th and 9th respondents' failure to proactively publish and publicize information about the pandemic and the State's response violates the right of access to information as guaranteed under Article 35(3).
2. A declaration that the 1st - 6th and 9th respondents' failure to affirmatively provide information regarding the pandemic and the State's response violates Article 10, and 232 of the Constitution.
3. A declaration that the 1st - 6th and 9th Respondents' failure to provide the information sought by the Petitioners violates their right of access to information as guaranteed under Article 35(1) and the Access to Information Act.
4. A declaration that the 1st - 6th and 9th respondents' failure to provide the information sought by the Petitioners violates their right to freedom of expression as guaranteed under Article 33(1)(a).
5. A declaration that the 1st - 6th Respondents' can be held criminally liable in their individual capacities for breach of Sections 28(4)(b) of the Access to Information Act 2016.
6. An order of mandamus compelling the 1st - 6th and 9th Respondents to provide the petitioners with information sought in their letters to the respondents within 48 hours of the Order.

The gist of the petitioners case is that they wrote letters to the various respondents seeking information on among others issues, the measures taken to combat the covid -19 pandemic, which information they were allegedly denied thus infringing their constitutional right of access to information. More specifically, with regard to the 3rd respondent, the 3rd petitioner alleges that he sought information on the circumstances surrounding the death and burial of the late James Oyugi, which information the 3rd respondent failed to give.

Your lordship, the issues for determination are fivefold:-

i) Whether the Court has jurisdiction to hear and determine this petition;
ii) Whether the questions surrounding the burial of the late James Oyugi have already been heard and disposed of before a Court of competent jurisdiction;
iii) Whether the 3rd respondent violated the petitioners right of access to information;
iv) Whether the 3rd respondent should be compelled to give information; and,
v) Whether the petitioners are entitled to costs of the petition.

Whether the Court has jurisdiction to determine this petition.

Your lordship, this Court does not have the jurisdiction to hear and determine this petition. Section 14 of the Access to Information Act requires an applicant who feels aggrieved by the decision of either a public or private entity to apply to the Commission on Administrative Justice for a review of the said decision.

Your Lordship, the Access to Information Act, No 31 of 2016 was enacted to actualize Article 35 of the Constitution of Kenya 2010. This essentially means that the requirement that parties apply to the Commission on Administrative Justice is constitutional, and in tandem with Article 159(2) of the Constitution that obliges the courts to be guided by the principles among others, of alternative forms of dispute resolution, in exercising judicial authority.

Section 14 of the Access to Information Act, lists the decisions liable for review as follows:-

- a decision refusing to grant access to the information applied for;
- a decision granting access to information in edited form;
- a decision purporting to grant access, but not actually granting the access in accordance with an application;
- a decision to defer providing the access to information;
- a decision relating to imposition of a fee or the amount of the fee;
- a decision relating to the remission of a prescribed application fee;
- a decision to grant access to information only to a specified person; or
- A decision refusing to correct, update or annotate a record of personal information in accordance with an application made under Section 13.

The Commission on Administrative Justice is empowered to review any of the above decisions. However where any party is dissatisfied with the decisions of the Commission, Section 23(3) of the Access to Information Act gives the option of appeal to the High Court. This means that the High Court is devoid of original jurisdiction in matters relating to Access to Information.

In the case of *Charles Apudo Obare & Another versus Clerk, County Assembly of Siaya & Another* (2020) eKLR, the Honourable Judge Aburili, in striking out the petition quoted a plethora of case law that basically argued that an applicant who claims that their rights have been violated must show that they had exhausted all the available remedies provided by law before resorting to the Court. The learned Judge argued that the petitioners still had an alternative dispute resolution

mechanism which was available under Section 14 of the Access to Information Act. Furthermore she found that the Court was devoid of original jurisdiction to hear and determine the petition as there was an alternative dispute resolution mechanism available in law which the petitioners had not exhausted.

Your lordship, the petitioners herein have not shown that they had exhausted all available mechanisms available under the law. This Court therefore does not have the jurisdiction to handle this petition.

Whether the questions surrounding the burial of the late James Oyugi have already been heard and disposed of before a Court of competent jurisdiction.

Your lordship, the Court ought to take judicial notice of the fact that the matter concerning the late James Oyugi has already been entertained and disposed of by the High Court at Siaya, a court of competent jurisdiction, in Constitutional Petition Number 1 of 2020, which case is a part of the public record, and the judgment readily available in online platforms.

The issues arising therefrom should not be litigated or interrogated any further particularly in a Court with similar jurisdiction as the Court of the first instance.

The 3rd petitioner had every opportunity to apply to the High Court at Siaya to be enjoined as a petitioner or an interested party during the subsistence of the Siaya Constitutional Petition, an opportunity he failed, neglected and/or refused to exercise. We submit therefore that this petition is designed to waste the Court's time and to put the Court into a path of conflict with its sister court in Siaya.

Whether the 3rd respondent violated the petitioners' rights of access to information.

Your lordship, we contend that the 3rd respondent did not violate the petitioners' rights of access to information. Article 35 of the Constitution of Kenya 2010 provides that every citizen has the right of access to information held by the state, and information held by another person and required for the exercise or protection of any right or fundamental freedom.

Section 4 of the Access to Information Act also provides that every citizen has the right of access to information held by the State, and, another person and where that information is required for the exercise or protection of any right or fundamental freedom. Section 4(4) further provides that the

Act shall be interpreted and applied on the basis of a duty to disclose. This means that the right of access to information is inviolable. It is a right granted by the Constitution and protected by the very same Constitution. This was stated by the learned Judge in the case of *Katiba Institute -versus-Presidents Delivery Unit & 3* Others (2017) eKLR.

Your lordship, every rule however has an exception. In the case of *Youth Initiative for Human Rights versus Serbia* (Application no 48135/06) quoted in *Trusted Society of Human Rights Alliance & 3 Others versus Judicial Service Commission*, the learned judge observed that, '*The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions…*'

This system of exceptions is well encapsulated in both the Constitution and the Access to Information Act. Article 24 (1) of the Constitution states that a right or fundamental freedom may be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society. Section 6 of the Access to Information Act further outlines the specific situations whereby the right of access to information may be qualified.

Your Lordship we contend that at the time of request, the information sought by the petitioners was limited by virtue of Section 6(1)(g) and (h) of the Access to Information Act. For ease of reference, the section reads as follows: '*The right of access to information shall be limited in respect of information whose disclosure is likely to: 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; or damage a public entity's position in any actual or contemplated legal proceedings.*"

Your lordship, it is a matter of general notoriety that the case of the late James Oyugi was the first covid-19 related case in Siaya County. In Constitutional Petition Number 1 of 2020, even the learned Judge Aburili acknowledges the level of panic that must have bedeviled public health officers in Siaya County at the time.

The response by the Ag County Secretary of the County Government of Siaya to the 3rd petitioner's request for information was in no way intended to deny the petitioners their right of access to

information. The matter was still the subject of active consideration. A Taskforce, as the letter clearly explained, had been established and was in the process of investigating the circumstances revolving around the death and burial of the late James Oyugi. It was only after the exercise had been finalized and the findings presented would the County Government of Siaya have been able to make a substantive statement on the issues. Any information released at the time would have undermined the Taskforce's ability to carry out its mandate judiciously. The assertion therefore that the 3rd respondent failed to give information to the petitioners is false. The 3rd respondent vide the letter dated 20th May 2020 only appealed for the 3rd petitioner's patience while the process of investigations was ongoing.

Furthermore your lordship, it is also a matter of general notoriety that the relatives of the deceased James Oyugi filed a Constitutional Petition Number 1 of 2020 in the High Court at Siaya against the County Government of Siaya and several others. Any information that would have been released at the time of petitioners request would have damaged the County Government of Siaya's position in the legal proceedings. It therefore followed that the County Government of Siaya reserved the right to await the conclusion of both processes. It was simply a decision to defer providing the access to information for a time.

Whether the 3rd respondent should be compelled to give information.

Your lordship, we contend that the 3rd respondent should not be compelled to give any information. While at the time of request, there wasn't much information to give because investigations were still underway, at present all the information required relating to the death and burial of the late James Oyugi is easily accessible online. Further all the information concerning the measures taken to combat the COVID-19 crisis is accessible online. Section 6(5) of the Access to Information Act states that a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.

We contend that this petition has actually been overtaken by time. All the information needed is easily accessible. The 3rd respondent should therefore not be compelled to give information.

Whether the petitioners are entitled to costs of this petition.

Your lordship, we contend that the petitioners are not entitled to the costs of this petition. Having established that the 3rd respondent did not violate the petitioners rights of access to information as

per the Access to Information Act, it therefore follows that the petitioners are not entitled to the costs of this petition.

Your Lordship, this petition in its entirety lacks merit, and should be struck off with costs.

for **Leonard Okanda**
For: Office of the County Attorney
FOR THE 3RD RESPONDENT

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 2A OF 2020

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1) –(4), 21, 22, 33, 35, 258 AND 259 OF THE CONSTITUTION

BETWEEN

CHARLES APUDO OBARE.....1ST PETITIONER

IRINE ADHIAMBO ODHIAMBO.....2ND PETITIONER

-VERSUS-

CLERK, COUNTY ASSEMBLY OF SIAYA.....1ST RESPONDENT

ERICK OGENGA.....2ND RESPONDENT

JUDGMENT

1. The Petitioners in this Petition are **CHARLES APUDO OBARE** and **IRENE ADHIAMBO ODHIAMBO.** They bring this petition demanding for access to information as stipulated in Article 35 of the Constitution, from the Respondents who are the **CLERK OF COUNTY ASSEMBLY OF SIAYA,** as First Respondent and **HONORABLE ERIC OGENGA**, the second Respondent. The information sought to be accessed relates to tenders for the construction of a County Assembly Complex Building.

2. The request for information was formally made to the Respondents by the Petitioners vide their letter dated 12th February, 2020, seeking to access the information held by the Respondents in respect to the tender, evaluation and award of the construction of an Assembly Complex Building, on account that there was apprehension that colossal sums of public money may be utilized for a project that is not warranted or genuine and where value for money will have been lost.

3. The Petitioners assert that they bring this Petition and the request dated 12th February, 2020, as citizens of the Republic of Kenya and in the public interest.

4. The Petitioners further allege that the Respondents resisted this demand to access the requested information prompting the Petitioners to institute this Petition pursuant to the provisions of Article 1, 2, 3, 10, 19, 20 (1) -(4), 21, 22, 33, 35, 258 and 259 of the Constitution.

5. The Petition which is supported by the Affidavit sworn by the second Petitioner **Irine Adhiambo Odhiambo** sworn on 22nd April 2020 at Nairobi seeks the following ORDERS:

(i) THAT a declaration be issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) on the basis of the Petitioners' request dated 12th February, 2020, is a violation of the right to access to information.

(ii) THAT a declaration be issued that the failure by the 1st Respondent to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) on the basis of the Petitioners' request dated 12th February, 2020, is a violation of Article 10 of the Constitution and specifically the value of the rule of law, participation of the people, human rights, good governance, transparency and accountability.

(iii) THAT a declaration be issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) is a violation of the obligations imposed on the said Respondents by Chapter six specifically Articles 73 (1) and 75 (1) of the Constitution and Section 3 of the Leadership and Integrity Act and Sections 8, 9 and 10 of the Public Officers Ethics Act.

(iv) THAT an Order be issued compelling the 1st and 2nd Respondents to forthwith provide, at the Respondents' cost, information sought by the Petitioner in their letter to the Respondents dated 12th February, 2020.

(v) THAT costs for this Petition, assessed at Kenya Shillings Five Hundred Thousand (Kshs. 500,000) be payable to the Petitioners by the Respondents.

(vi) THAT this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.

6. Opposing the Petition, the Respondents filed a Replying Affidavit sworn by **Eric Ogega**, the 2nd Respondent and with leave of Court, the Petitioners filed a Further Affidavit in rejoinder.

7. In opposing the Petition, the Respondents at paragraph 18 of the Replying Affidavit and in their written submissions respectively deposed and contended that the Petition is premature for failure to follow the dispute resolution mechanisms provided under the Access to Information Act.

8. In my humble view, that is a very crucial preliminary point of law which I must determine ***in limine*** as it goes to the jurisdiction of this court, notwithstanding the jurisdiction of this court as stipulated in Articles 22, 23, 35, 258 and 165 of the Constitution. Should I find that the petitioners had an alternative effective dispute resolution mechanism, then I need not delve into the merits of the Petition as I will be obligated to down my tools. This is because it is trite law that jurisdiction is everything without which a court of law acts in vain. See **Motor Vessel "Lilian S" v Caltex Oil (K) Limited** Further, jurisdiction cannot be conferred by consent of parties and neither can a court of law arrogate itself the jurisdiction that it is devoid of or which is expressly taken away by statute or by the constitution.

9. According to the Respondent, section 14 of the Access to Information Act provides that an applicant may apply in writing to the Commission on Administrative Justice (CAJ) requesting a review of the decisions of a public entity in relation to a request for access to information.

10. It was therefore submitted in contention that the petitioners have in filing this petition offended the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court. Reliance was placed on several cases of ***Geoffrey Muthinja Kabiru v& 2 others v Samuel Munga Henry & 1756 others [2015]eKLR; Orie Rogo Manduli v Catherine Mukite Nabwala &3 others [2013]e KLR and Susan Kihika &2 others Exparte George Mwaura Njenga [2014] e KLR*** where the Courts in the respective cases found that they lacked jurisdiction to entertain the petitions since the petitioners had not exhausted the dispute resolution mechanisms provided for by legislation.

11. The Respondents maintained that without exhausting the alternative dispute resolution mechanism available as provided for in section 14 of the Access to Information Act, this Petition is premature and brought with *mala fides*.

12. In response to the deposition by the Respondents that the Petitioners had not exhausted the available dispute resolution mechanisms provided for in section 14 of the Freedom of Information Act, the 2nd Petitioner swore a further affidavit on 15th May 2020 and at paragraph 12 thereof, the Petitioners deposed that no dispute resolution mechanism is available outside this honourable court when a right or fundamental freedom is threatened, denied, violated or threatened, denied, violated or infringed in the manner the Respondents did.

13. The Petitioners assert that they came to court because the Respondents refused to respond to their request for information as

requested in the letter dated 12th February, 2020.

14. It is the Petitioners' case that the failure or refusal to release the information that was sought, the Respondents are in violation of the Petitioners' rights as guaranteed under Article 35 of the Constitution, which entitle them to access information such information held by the state.

15. The Petitioners assert that the failure to release the information sought and thereby violating the Petitioners' rights under Article 35 (1) (a), the Respondents are in further breach of Article 2 on the supremacy of the Constitution as well as Article 10 on the national values and principles of governance that includes good governance, integrity, transparency and accountability and are binding on all persons and all state organs.

16. Parliament in the year 2016, passed a legislation that was to give effect to this Article known as Access to Information Act No. 31 of 2016. This Act requires the state and its agencies to make official information more freely available and also to protect official information to the extent consistent with the public interest.

17. The basic principle of the Access to Information Act 2016 is that all information held by the state and its agencies shall be made available to the public, unless reasons exist for withholding it. The Act at Section 6 specifies the reasons that are appropriate for an agency to withhold the requested information. It further governs the handling of requests of information and sets the timeframe within which the request ought to be responded to.

18. Further, the Fair Administrative Action Act, 2015 obligates public officers to discharge their duties to the public in an expeditious, efficient, lawful, reasonable and procedurally fair manner.

19. The Petitioners therefore asserted that the Respondents violated the Petitioners rights by failing or refusing to provide the Petitioners with the information sought under Article 35(1) together with all the enabling laws, that is to say, Access to Information Act and Fair Administrative Action Act.

20. It was further submitted that **Article 35 (1) (a)** of the Constitution grants a citizen the right to seek and have information from a state or state organ. That the 1st Respondent as a public body is bound by **Article 35 (1) (a)** to disclose information sought in terms of **Section 4** of Access to Information Act, 2016.

21. The Petitioners further submitted that **Section 9** of the Access to Information Act gives a time line for **twenty-one (21) days** within which to give information sought, but that no information was ever supplied to the Petitioners or their Advocates despite the Respondent acknowledging receipts of the demand in their Replying Affidavit filed in these proceedings.

22. The question issue I must resolve is whether the petitioners are entitled to the orders sought in their Petition in view of the preliminary point of law raised by the Respondents that this court is devoid of jurisdiction by virtue of section 14 of the Access to Information Act which provides for an avenue for resolving such disputes where there is failure or refusal to provide information required as requested by the petitioner.

23. Article 35 of the Constitution provides:

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.

24. The above Article has been operationalized by the enactment of **Access to Information Act**. Access to information is a critical

governance, transparency and accountability tool. Without access to information, higher values of democracy, rule of law and social justice cannot be achieved. This position was succinctly captured in **Famy Care Ltd v Public Procurement Administrative Review Board and others, High Court Pet. 43 of 2012 [2013] eKLR** where it was held:

"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 of the Constitution and Article 10 cannot be achieved unless the citizen has access to information."

25. This position was further elaborated in **Nairobi Law Monthly Co. Ltd v Kenya Electricity Generating Company Limited & 2 Others [2013] eKLR** where the court stated:

"…in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests……A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information is under a Constitutional obligation to provide the information sought."

26. In the instant petition, it is an undisputable that the information being sought is information held or supposed to be held by the Petitioners who are state organ and state officer respectively and therefore qualifies as public information for purposes of Article 35 of the Constitution.

27. However, the right to access information is not absolute. Article 35 falls outside the absolute rights that are not limitable therefore the right can be limited subject to Article 24 of the Constitution. In addition, the petitioner must demonstrate that he has suffered injury as a result of non-disclosure of the information sought. The burden of proof that a right has been denied, violated, infringed or threatened to be infringed always lies with the petitioner.

28. However, given the provisions of sections 14 of the Freedom of Information Act and section 9(4) of the Fair Administrative Action Act, does this court have jurisdiction to hear and determine this petition at this point in time or is the petition premature"

29. **PART IV of the Access to Information Act provides for REVIEW OF DECISIONS BY THE COMMISSION. Section 14 of the Act, provides for** Review of decisions by the Commission. The Commission, under section 2 of the Act is the Commission on Administrative Justice. (CAJ).

30. It is important to note that the preamble to Access to Information Act stipulates that it is AN ACT of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. The Act provides for an elaborate procedure for request for information and in the event that such request is not acceded to, section 14 thereof provides for the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is requested.

31. The said section 14 provides:

(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

32. Under section 3 of the Act, the object and purpose of Access to Information Act is to—

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

(b) Provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;

(c) Provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;

(d) Promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;

(e) Provide for the protection of persons who disclose information of public interest in good faith; and(f)provide a framework to facilitate public education on the right to access information under the Act.

33. Whereas the Respondents contend that there is an alternative dispute resolution mechanism under section 14 of the Access to Information Act such that if the Petitioner believes that his right and request to access Information as per their letter of 12.2.2020 is declined by the Respondent, then the remedy lay in section 14 of the Act, which involves filing of a review application to the Commission on Administrative Justice, a constitutional body established by Section 3 of the Commission on Administrative Justice Act, No.23 of 2011, which is one of the Chapter 15 Independent Commissions established under the Constitution.

34. The functions of the Commission as stipulated in section 8 of the Act shall be to—

(a) ***investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;***

(b) Investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) Report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) Inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;

(e) Facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

(f) Work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

(g) Recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

(h) Provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

(i) publish periodic reports on the status of administrative justice in Kenya;

(j) Promote public awareness of policies and administrative procedures on matters relating to administrative justice;

(k) Take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

(l) Work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

(m) Perform such other functions as may be prescribed by the Constitution and any other written law.

35. Under the said Act and Regulations made thereunder, there are elaborate procedures for determining any complaints referred to the Commission and the modes of resolution include Mediation and Conciliation.

36. In the instant Petition, the Petitioners requested for information from the Respondents but the Respondents are alleged to have refused to respond to the letter of request and that despite the filing of the Petition herein, the Respondents have declined to submit to the request claiming that most of the documents sought are on the website of the 1st Respondent and that the other documents were submitted to the Ethics and Anti-Corruption Commission (EACC) which is investigating certain activities of the 1st Respondent including the construction of the County Assembly Complex.

37. It is trite that where the Constitution or statute confers jurisdiction upon a court, tribunal, person or body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. In ***Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] e KLR*** the Court of Appeal stated:

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

38. The same Court of Appeal in ***Kenya Revenue Authority &2 others v Darasa Investments Ltd [2018] eKLR*** [Visram,Karanja and Koome JJA] stated as follows when it posed the following question:

"What then, ids the consequence, if any, of the respondent's failure to invoke the alternative remedies" As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. Tis position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others[2017]e KLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No. 2 of 2008. Perhaps that why the legislature at section 9(4) of the Fair Administrative Action Act stipulates that:

"Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

"Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

39. In ***Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR*** the Court of Appeal in upholding the judgment of the High Court, Aburili J in ***Nairobi J.R Misc. Civil Application No. 91 of 2016) Ndiara enterprises Limited v Nairobi City County Government stated:***

"Though the High Court can exempt a party from following such clear laid down procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

On the authority of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings."

40. The above holding was informed by the provisions of section 9(1) (2),(3) and (4) of the Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution on the right to fair administrative action, and which clearly stipulate ***that an applicant must first exhaust the available internal dispute resolution mechanisms before resorting to court although in exceptional circumstances and on application, the court may exempt such party from resorting to alternative internal dispute resolution mechanisms.***

41. In the instant Petition, the Petitioners have stated that there is no available alternative dispute resolution mechanism where their rights and fundamental freedoms have been violated and that therefore this court has jurisdiction to hear and determine the petition. The petitioners did not make any reference to the import of section 14 of the Access to Information Act, which Act Implements Article 35 of the Constitution on the right to access information.

42. Moreover, even before the enactment of the above provisions of the Fair Administrative Action Act, and the Access to Information Act incorporating sections 9 and 14 thereof respectively, the Court of Appeal had earlier in the case of ***MUTANGA TEA & COFFEE COMPANY LTD v*** **SHIKARA LIMITED AND MUNICIPAL COUNCIL OF MOMBASA** determined the issue of whether a party aggrieved by a decision of the ***Director of Physical Planning*** under the ***Physical Planning Act***, C***ap 286 (PPA)*** or of the ***National Environment Management Authority (NEMA)*** under the ***Environmental Management and Co-ordination Act***, ***Cap 387 (EMCA), may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed under those Acts***.

43. By a ruling dated ***12th July 2012***, the subject of that appeal, ***Okwengu, J.*** (as she then was), sustained a preliminary objection raised by the 1st respondent, ***Shikara Ltd*** and supported by 2nd respondent, the former ***Municipal Council of Mombasa***, and held that under the two Acts, the jurisdiction of the High Court is appellate rather than original.

44. Accordingly, the learned judge struck out the suit by ***Mutanga Tea & Coffee Company Ltd. (the appellant)***, which had sought to challenge, by invoking the original jurisdiction of the High Court, the change of user and consent for development given to the 1st respondent by the relevant authorities under the PPA and the EMCA. The Court of Appeal held:

"Like under the PPA, any person aggrieved by a decision of the Director General, of NEMA or of any of its Committees has a

right of appeal to the National Environment Tribunal under section 129(2) of EMCA, which may confirm, set aside, or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is, under section 130 appealable to the High Court.

The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance. This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

"[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed." (See also KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS (2008) 3 KLR (ER) 296).

It is readily apparent that in those cases, the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.[Emphasis added].

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.[emphasis added].

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In RICH PRODUCTIONS LTD. V. KENYA PIPELINE COMPANY & ANOTHER, PETITION NO. 173 OF 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

"The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."[emphasis added].

45. Similarly, the Court of Appeal in ***REPUBLIC V. THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, CA NO 84 OF 2010*** upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that ***where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted.***

46. **In VANIA INVESTMENT POOL LTD. V. CAPITAL MARKETS AUTHORITY & 8 OTHERS, CA NO 92 OF 2014** the Court of Appeal also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the **Capital Markets Appeals Tribunal**

47. The Court of Appeal differently constituted in all the above cases made it clear that it was satisfied that the learned judges did not err by striking out the applicants'/appellants suits and applications which sought to invoke the original jurisdiction of the High Court in circumstances where the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellants the right to access the High Court by way of appeal, which mechanisms the appellants had refused to invoke. The Court of Appeal

concluded that ***"to hold otherwise would, in the circumstances, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts."***

48. Even where the appellant claimed that the High Court had failed to invoke its inherent jurisdiction or abdicated its jurisdiction, or that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under **Article 159 (2) (d)** of the Constitution, the Court of Appeal held that where the constitutional principle under which the dispute resolution mechanisms provided by the relevant statutes like the Physical Planning Act and the Environment Management Coordination Act are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality.

49. In ***RAILA ODINGA & 5 OTHERS v IEBC & 3 OTHERS, PETITION NO. 5 OF 2013,*** the Supreme Court stated that in interpreting the Constitution, it must be read as one whole and that Article 159(2)(d) cannot be read or applied in a manner that ousts the provisions of other clear Articles of the Constitution.

50. Further in ***LEMANKEN ARAMAT v HARUN MAITAMEI LEMPAKA, Petition No. 5 of 2014,*** the same Supreme Court, while considering the provisions of Article 159(2) (d) of the Constitution, noted that where the issue at hand is one of mere procedural lapse which has no bearing on jurisdiction, the court can cure the same under Article 159(2)(d). ***However, that where the Constitution links certain vital conditions to the power of the court to adjudicate a matter, Article 159(2)(d) has no application. [Emphasis added].***

51. **In the Ndiara Enterprises Ltd v Nairobi City County Government (supra) case,** an appeal from my very own judgment where I declined jurisdiction on the ground that the exparte applicant in the judicial review application had not exhausted the available alternative remedy as stipulated in the Physical Planning Act, the Court of Appeal, agreeing with my decision stated:

"……..Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.

The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9(2) of the Act from reviewing "an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted." The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows:

"In addition under Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "shall not" review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under section (1)

(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice …

From the above provisions of the law and decided cases, it is clear that even the Fair Administrative Action Act which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue."

Ultimately, we agree with the findings of the learned Judge that the orders sought by the appellant were untenable in the circumstances.

This appeal must therefore fail as it is without merit. It is accordingly dismissed with costs to the respondent."[emphasis added].

52. Most recently in **Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR,** Weldon Korir J observed as follows, persuasively but authoritatively, and I have no reason to differ from the learned Judge's findings and holding:

"It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.

***The preamble of the Access to Information Act, 2016 clearly states that it is an* "Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes."**

"It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-

"The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-

a. **the release of any information withheld unlawfully;**

b. **a recommendation for the payment of compensation; or**

c. **any other lawful remedy or redress."**

Section 23(3) of the Act provides that:

"A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made."

"I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice."

53. I have quoted the decisions that I have relied on in extensor for reasons that they resolve several questions on the principle of exhaustion of remedies. In light of the binding case law cited and what I have stated in this judgement, it follows that the matters raised in the petition are not yet ripe for the determination by this Court. In view of that, I will not delve into the merits of the substantive issues raised in the petition. Doing so will prejudice the parties since they may want to revert to the statutory body mandated to deal with the issues raised in the petition.

54. In conclusion, and on the basis of the above plethora of authorities, I have no doubt in my mind that the Petitioners herein had and still have an alternative dispute resolution mechanism which is available under section 14 of the Access to Information Act, which Act Implements Article 35 of the Constitution. The Petitioners should therefore have first and foremost resorted to that alternative dispute resolution mechanism which is recognized by Article 159(2)(c) of the Constitution which obliges the courts in exercising judicial authority, to be guided by the principles among others- that alternative forms of dispute resolution including reconciliation, mediation, arbitration and reconciliation and traditional dispute resolution mechanisms shall be promoted.

55. It is therefore not correct for the Petitioners to depose and assert that there are no alternative dispute resolution mechanisms where there is an allegation of violation of fundamental rights and freedoms guaranteed by the Constitution.

56. For the above reasons, I find that this court is devoid of original jurisdiction to hear and determine this petition as there is an alternative dispute resolution mechanism available in law which the petitioner had not exhausted.

57. The petition is hereby struck out with no orders as to costs.

Orders accordingly

Dated, signed and delivered at Siaya this 17th Day of June, 2020 via Zoom in the presence of Mr. Osiemo Advocate for the Petitioners and Mr. Ogola Advocate for the Respondents.

R.E.ABURILI

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 468 OF 2017

KATIBA INSTITUTE……..PETITIONER

VERSUS

PRESIDENTS DELIVERY UNIT…….1ST RESPONDENT

ANDREW WAKAHIU…….2ND RESPONDENT

NZIOKA WAITA……..3RD RESPONDENT

JOSEPH KINYUA……...4TH RESPONDENT

JUDGMENT

1. The Petitioner, Katiba Institute, is a registered Constitutional research Policy and Litigation Institute established to further the implementation of the 2010 Constitution, and to generally seek the development of a culture of Constitutionalism in Kenya.

2. The 1st respondent, the Presidential Delivery Unit, is described in this petition as the centre of Government functions whose primary duty is to improve coordination of National Government flagship programs, monitor, evaluate and report on timely fulfillment of projects of the Government in development priorities.

3. The 2nd respondent, Andrew Wakahiu, is secretary in the 1st respondent's office and a State Officer, while the 3rd respondent, Nzioka Waita, is a State Officer and Deputy Chief of Staff and Deputy Head of Public Service. The 4th respondent, Joseph Kinyua, is also a State Officer and the Chief of Staff and Head of Public Service. They have all been sued in their respective capacities.

4. In a Petition dated 20th September 2017 and filed in Court on 21st September 2017, the petitioner states that on diverse dates during this year 2017, the 1st respondent published advertisements in the media, through billboards and in business messaging or tags # gok. DELIVERS and # JUBILEE DELIVERS.

5. The petitioner states that on 17th August 2017 in pursuit of its right of to access information, wrote to the 1st respondent seeking information on how many advertisements had been published, through what media, schedules and dates when it was done, copies of the documents advertised, total cost incurred and the relevant government accounting office(r) and the individual or government agency that met the cost. The information sought was to cover the period 25th May to 16th August 2017.

6. The Petitioner further states that the request was founded on Articles 1, 10, 19(1) 21(1) and 35(1) of the Constitution as well as Access to information Act, 2016. The petitioner also relied on the fair Administrative Action Act, 2015 which obliges Public Officers to act expeditiously, efficiently, lawfully, reasonably and in a procedurally fair manner.

7. The petitioner further cited Article 129 of the Constitution which requires that executive authority be exercised in a manner compatible with the principle of service to the people of Kenya and their well-being and benefits and the principles of leadership and integrity under sections 9 and 10 of the Public Officers Act, as well as section 23 of Leadership and Integrity Act which requires political neutrality on the part of state officers.

8. The petitioner further cited section 14(2) of the Elections Offences Act which prohibits government from advertising in print or electronic media or by way of banners or hoardings in public places its achievements during election period. The petitioner avers that the respondents refused and or failed to supply the information sought under Article 35(1) and have failed to observe Article 10 of the Constitution, more so the values and principles of the rule of law, participation of the people, human Rights, good governance, transparency and accountability. The petitioner therefore states that the respondents violated the Constitution and Sought the following reliefs:-

1) A declaration that the failure by the 1st and 2nd respondents to provide information sought under Article 35(1) and also to publicize the information in accordance with Article 35(3) on the basis of the petitioner's request dated August 17th 2017 is a violation of the right to access information.

2) A declaration that the failure by the 1st respondent to provide information sought under Article 35(1)(a) and also publicize the information in accordance with Article 35(3) on the basis of the petitioner's request dated August 17th 2017 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.

3) A declaration that failure by the 2nd, 3rd and 4th respondents to provide information sought under Article 35(1)(a) and also to publish the information in accordance with Article 35(3) is a violation of the obligations imposed on the said respondents by chapter six specifically Articles 73(1) and 75(1) of the Constitution and section 3 of the leadership and integrity Act and sections 8, 9 and 10 of the Public Officers Ethics Act.

4) An order of mandamus compelling the 1st and 2nd respondents to forthwith provide at the respondents lost, information sought by the petitioner in their letter to the respondents dated August 17, 2017.

5) Costs of the petition assessed at Ksh500,000/-.

6) Such further orders the court may deem just and appropriate to grant.

Response

9. The respondents did not file a formal response to the petition. They had filed an application dated 5th October 2017 seeking to set aside interim conservatory order granted on 2nd October 2017, which both parties agreed to treat as a response to the petition for purposes of quick disposal of this matter.

10. The gist of the response as can be discerned from the grounds supporting the motion, is that the provisions of Article 35 of the Constitution are only justiciable in respect to citizens who are natural persons but not the petitioner, a juristic person. It was also stated that the petition is pre mature since Access to information Act confers oversight and enforcement role on the commission of Administrative justice (CAJ) It was further stated that the information sought by the petitioner is available at the Auditor General and Parliament which are constitutionally mandated to oversight public expenditure.

11. The respondents finally stated that the information sought is exempted under section 6(1)(a) and 6(2)(j) of the Act. These responses were substantially reiterated in the affidavit of the 2nd respondent sworn on 5th October 2017 and particularly at paragraphs 3, 4 and 6.

Petitioner's submission

12. Mr. Waikwa, learned counsel for the petitioner, submitted that although the petitioner made a request for information by letter dated 17th August 2017, no response was received from the respondents or information supplied. Counsel submitted that Article 35 (1) (a) of the Constitution grants a citizen the right to seek and have information from a State or State organ. Counsel contended that even after the petition was filed and served no information has been supplied as required to date.

13. Learned Counsel argued that Article 35(1)(a) of the Constitution is clear that every citizen has a right to information, that the 1st respondent as a public body is bound by Article 35(1)(a) to disclose information sought in terms of section 4 of Access to information Act, 2016.

14. Counsel submitted that section 9 of the Act gives a time line of 21 days within which to give information, but the days lapsed before information was given and has not been given to date. Mr. Waikwa contended that the respondents' conduct violated Articles 10, 33 and 35 of the Constitution. In learned Counsel's view, Article 10 has the minimum standard on how public officers should conduct themselves but they have violated the Article by failing to disclose the information.

15. Counsel relied on the decisions in ***Nairobi Law Monthly Ltd v Kenya Electricity Generating Company*** [2013] eKLR paragraphs 26, 34 and 36, and ***Trusted Society of Human Rights Alliance & 13 others v Judicial Service Commission*** [2016]eKLR (paragraph 270). Learned Counsel referred to section 32 of the South African Constitution which is similar to our Article 35 and in that regard, relied to the decision in ***President of Republic of South Africa v M & G Media*** **CCT 03/11** (paragraph 10) 3 and ***Brummer v Minister for Social Development & others*** **CCT 25/09 2009 ZACC 21** paragraphs 62 – 63 emphasizing on the openness in government's operations and principles of access to information.

16. Learned Counsel made further reference to ***Article 19 of the Universal Declaration of Human Rights***, ***Article 19(2)*** of ***International Convention on Civil and Political Rights*** and ***Article 9*** of the ***African Charter for Human and Peoples Rights***. He also relied on Articles 2(4) and 2(5) of the Constitution to support his submissions.

17. On why the respondents should meet costs of the petition, learned counsel relied on the case of ***Bio Watch*** **CCT 86/08/2009 ZACC 14(** paragraph 21) on the explanation by ***justice Sachs*** that people are entitled to costs should they succeed.

Respondent's submissions

18. Mr. Ogosso, learned counsel for the respondents, on his part submitted that the right to access

information under Article 35(1) of the Constitution is limited to citizens and that this right is not available to juristic persons like the petitioner. Counsel relied on the decision in ***Nairobi Law Monthly (supra)*** in support of this submission.

19. Mr. Ogosso further contended that the information sought is exempt under section 6(a), (b) and 6(2)(j) of Access to information Act. Counsel submitted that the information sought had already been made public to the Auditor General who then reports to the National Assembly. In Counsel's view, the two organs have the Constitutional mandate to Oversee and Supervise Public Expenditure.

20. Learned Counsel went on to submit that under Article 35(3) as read with Articles 10 and 232 of the Constitution, the state is under a constitutional obligation to publish and publicize any important information affecting the nation and, in his view that is what the 1st respondent is doing. Counsel further contended that the petition is premature since under Access to Information Act, **C.A.J** is the body with enforcement and oversight functions, hence the petitioner could have approached **C.A.J** before coming to Court.

21. Mr. Ogosso further argued that the Court should weigh the right of a non-citizen against that of the general public in view of Article 35(1)(a). In counsel's view, the balance should tilt in favour of the general public against that of a non-citizen.

22. Regarding costs, counsel submitted that costs are at the discretion of the Court and, if granted, should be left to the taxing officer

Petitioner's rejoinder.

23. In a short rejoinder, Mr. Waikwa submitted that the judgment in ***Nairobi law monthly(supra)*** was delivered in 2013 relying on a decision by **Majanja J** made in 2012 on Juristic person's right of access to information. Counsel pointed out that Section 2 of Access to information Act is clear on the fact that a citizen includes juristic person. Counsel contended that the right to information is a constitutional right and referred to the case of ***Gatiru Peter Munya v Dickson Mwenda Kithinji & 2 others*** **[2014]eKLR.** He argued that by extending the definition of a citizen in the Act, Parliament intended juristic Persons to access information.

24. Learned Counsel submitted that exemptions in section 6 can only apply where there is evidence that the information will undermine national security. He however contended that no response had been given by the respondents when information was sought that the information was exempted. He argued that the respondents cannot hide behind parliament and the Auditor General's office to justify failure to give information.

Determination

25. I have considered the pleadings, submissions by counsel and authorities cited. Two issues arise for determination in this petition, namely :-

(1) Whether the respondents violated the petitioner's right of access to information

(2) Whether the respondents should be compelled to give information.

26. The petitioner sought information through letter dated 17th August 2017. The letter is said to have been delivered but no response was received from the respondents. This forced the petitioner to file this

petition and even as at the time of hearing the petition no response had been received from the respondents.

27. The petitioner has contended that the respondents have violated Articles 10, 33 and 35 of the Constitution and section 4, 9 and 21 of the Access to information Act. The respondents on the other hand hold the position that they did not violate the petitioner's right to access information. The respondents also contended that the information sought is limited by section 6 of Access to Information Act.

28. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

29. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access.

30. In that regard, Article 35 of the Constitution provides that;

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.

31. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

32. For purposes of actualizing Article 35, parliament enacted Access to Information Act 2016. Section 4 of the Act which is material, to this petition provides for the procedure to access information. The section provides;

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) <u>any reason the person gives for seeking access; or</u>

b) <u>the public entity's belief as to what are the person's reasons for seeking access.</u>

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

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)

32. 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.

33. On the other hand, section 5 of the Act further provides that a public entity should facilitate access to information held by it. 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 makes 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.

34. 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. In the case of ***<u>Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others</u>*** (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."

35. 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."

36. 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".

37. The importance of the right to access information as a founding value of constitutional democracy was 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."

38. The right to access information as a basis for accountability, responsiveness and openness was 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."

39. 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."***

40. 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.

41. The respondents in their responses and submissions contended, first, that the petitioner is not a citizen being a ***juristic*** person and, therefore, cannot access information under Article 35(1) (a) of the Constitution contending that this right is limited to citizens only. Reliance was placed on the decision in the case of ***Nairobi Law Monthly Limited v Kenya Electricity Generation Company and 2 others*** (supra). And second, that the information is limited by virtue of section 6(1) (a) and 6(2) (j) of Access to information Act.

42. In the case of ***Nairobi Law Monthly Ltd v Kenya Electricity Generating Company Ltd & 2 Others*** **(supra),** the Court stated that the right to access information was only available to citizens and in arriving at that conclusion, the Court relied on the decision by **Majanja J**, in the case of ***Famy Care Limited –v- Public Procurement Administrative Review Board & Another*** **(High Court Petition No. 43 of 2012).**

43. It is noteworthy, however, that both decisions by **Mumbi Ngugi J** and **Majanja J** in the above cases came before the enactment of Access to Information Act, in 2016. Section 2 of the Act defines a citizen as "***any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens.***" From the above definition, a juristic person whose director(s) is a citizen, is considered a citizen for purpose of exercising the right to access to information under Article 35(1)(a) of the Constitution as read with section 4 of Access to information the Act.

44. I have perused the petition and the supporting affidavit sworn on 20th September 2017 and filed in court on 21st September 2017. The deponent of that affidavit ***Waikwa Wanyoike*** describes himself at paragraph 2 of the affidavit as the ***Executive director of the petitioner (***Katiba Institute). During the hearing Mr. Waikwa Wanyoike who also represented the petitioner in this petition, did also state, referring to his affidavit, that he is a director of the petitioner.

45. The respondents on their part have not controverted the averment in the affidavit that learned

counsel is a citizen and director of the petitioner. That being the case, the petitioner though a juristic person, is a citizen for purposes of Article 35(1)(a) as read with section 4 of Access to information Act and was entitled to seek and have information as a citizen.

46. Regarding the contention that the information sought is limited by section 6(1)(a) and 6(2)(1) of Access to information Act, I must state that it was up to the respondents to show how the information sought affected state security and therefore, falls within section 6 of the Act. From the letter dated 17th August 2017, the information sought is about dates, nature of advertisements and copies thereof, the cost of advertisements and who meets that cost.

47. That, in my view, cannot be information that affects state security. How would for instance dates when advertisements were done, nature and copies of advertisements, cost of advertisements and who meets the cost of those advertisements affect state security" It is strite law that where a party alleges, like the respondents have done, that information sought affects state security, it is the duty of that person to show to the satisfaction of the Court that indeed that is the case. It is not enough for a party to merely allege without showing how, that disclosure of information will affect state security.

48. This is even greater a responsibility given the nature of the Constitutional obligation the state, state officers or public bodies have for disclosure. This is so because as observed in ***Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission (***supra), ***the exercise of this right should not require individuals to demonstrate a specific interest in the information.*** And ***where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings***. Access to Information Act is also absolutely clear that information should be disclosed free of charge, the reason for seeking information notwithstanding.

49. In the present petition, although the letter seeking information was written on 17th August 2017 and delivered immediately thereafter, no response was received from the respondents, either giving access to information, or declining to disclosure and giving reasons for that. Section 9 of the Act states in no uncertain terms that the state or state organs should give information within 21 days or respond to the request within that period. This clear legal provision notwithstanding, no access to information was given or reason given; either that the respondents did not have the information or that they would not disclose the information and give justification for it.

50. Furthermore, the respondents' contention that the information sought is limited by section 6(1) (a) and 6(2)(j) of Access to Information Act cannot be accepted. The respondents did not demonstrate the rationale for this contention given the fact that Article 35 has no limitation to this right. They were also under duty to show that the purported limitation falls within the ambit of Article 24(1) of the Constitution and that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the importance of this right in the citizens' quest for public participation in the democratic governance of our country.

51. In that regard I agree with the observation in ***Youth Initiative for Human Rights vs. Serbia (Application* no. 48135/06)** quoted in ***Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission (***supra), that:

"The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the

public authority seeking to deny access to show that the information falls within the scope of the system of exceptions…The access to information law should, to the extent of any inconsistency, prevail over other legislation…National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who willfully obstruct access to information…" *(emphasis)*

52. The respondents further contended that the petition is premature basing their argument on section 21 of the Act. Their take was that the petitioner should have first complained to the Commission on Administrative Justice **(CAJ**) before filing the petition. I have read the Act but could not trace a provision making a report to **CAJ** a condition precedent to triggering the jurisdiction of this Court to deal with petitions filed seeking to challenge violations of the right to access information under Article 35 of the constitution. This Court has unlimited jurisdiction under Article 165(3)(b) ***to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.*** The respondents' contention that the petition is premature is therefore unsustainable.

53. From the facts of this petition precedents and the law, it is uncontroverted that the petitioner sought information in exercise of its constitutional right under Article 35. It is also clear that even though the law requires the public entity to respond to the request within twenty one (21) days on whether or not it is in possession of the information and will or will disclose, the respondents ignored the law.

54. The respondents were under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public. This is an inviolable constitutional right and that is clear from the language of Article 35 of the Constitution, and any limitation must meet the constitutional test and only then can one raise limitation as a ground for non-disclosure.

55. The Court of Appeal addressed the issue of respecting constitutional rights in the case of ***Attorney General v Kituo cha Sheria & 7 others*** **[2017] eKLR** and stated;

"The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."

56. The above statement captures the essence of the petition before me that the respondents were under obligation to obey the law and allow the petitioner access information or where not possible give reasons for that. They failed in both instances thus violated the petitioner's rights under the Constitution and the law.

57. We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused.

58. From my evaluation and analysis of the facts and evidence in this petition, and submissions by counsel for the parties and bearing in mind precedent and the law, I come to the inescapable conclusion that the respondents violated the petitioner's right of access to information and that no effort was made to justify this violation. For that reason, I am equally satisfied that the petitioner has proved its case to the required standard and must succeed.

59. To that end I am guided by what the Court stated in the case of ***Tinyefuze v Attorney General of Uganda*** [1997] UGCC3 that; "***if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course."***

60. Consequently the petition dated 20th September 2017 is allowed and the following orders granted;

a) A declaration is hereby issued that the failure by the 1st and 2nd respondents to provide information sought under Article 35(1) and also to publicize the information in accordance with Article 35(3) on the basis of the petitioner's request dated August 17th 2017 is a violation of the right to access information.

b) A declaration is hereby issued that the failure by the 1st respondent to provide information sought under Article 35(1) (a) and also publicize the information in accordance with Article 35(3) on the basis of the petitioner's request dated August 17th 2017 is a violation of Article 10 of the Constitution specifically the values of the rule of law, participation of the people, human rights good governance transparency and accountability.

c) A declaration is hereby issued that failure by the 2nd, 3rd and 4th respondents to provide information sought under Article 35(1) (a) and also to publish the information in accordance with Article 35(3) is a violation of the obligations imposed on the said respondents by chapter six specifically Articles 73(1) and 75(1) of the Constitution and section 3 of the leadership and integrity Act and sections 8, 9 and 10 of the Public Officers Ethics Act.

d) An order of mandamus is hereby issued compelling the 1st and 2nd respondents to forthwith provide at the respondents cost, information sought by the petitioner in their letter to the respondents dated August 17, 2017.

e) Costs to the petitioner.

Dated, Signed and Delivered at Nairobi this 8th Day of November 2017

E C MWITA

JUDGE