

**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  
(10, 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 OKIOMA.....1<sup>ST</sup> PETITIONER**  
**ESTHER NELIMA.....2<sup>ND</sup> PETITIONER**  
**CHRIS OWALLA.....3<sup>RD</sup> PETITIONER**  
**CM.....4<sup>TH</sup> PETITIONER**  
**FA.....5<sup>TH</sup> PETITIONER**  
**KB.....6<sup>TH</sup> PETITIONER**  
**MO.....7<sup>TH</sup> PETITIONER**  
**EL.....8<sup>TH</sup> PETITIONER**

**KATIBA INSTITUTE.....9<sup>TH</sup> PETITIONER**  
**KENYA LEGAL AND ETHICAL ISSUES NETWORK**  
**ON HIV/AIDS (KELIN).....10<sup>TH</sup> PETITIONER**  
**THE KENYA SECTION OF THE INTERNATIONAL**  
**COMMISSION OF JURISTS (ICJ**  
**KENYA).....11<sup>TH</sup> PETITIONER**  
**TRANSPARENCY INTERNATIONAL**  
**KENYA.....12<sup>TH</sup> PETITIONER**  
**ACHIENG ORERO.....13<sup>TH</sup> PETITIONER**  
**(9<sup>th</sup> to 13<sup>th</sup> Petitioners suing on behalf of health and human rights civil society**  
**and non-governmental organizations)**

**VERSUS**

**MUTAHI KAGWE, CABINET SECRETARY**  
**FOR HEALTH.....1<sup>ST</sup> RESPONDENT**  
**PATRICK AMOTH, AG DIRECTOR GENERAL,**  
**MINISTRY OF HEALTH.....2<sup>ND</sup> RESPONDENT**  
**H.E CORNEL RASANGA, GOVERNOR**  
**FOR SIAYA COUNTY.....3<sup>RD</sup> RESPONDENT**  
**COUNCIL OF GOVERNORS.....4<sup>TH</sup> RESPONDENT**  
**FRED OKENGO MATIANGI, CABINET SECRETARY FOR INTERIOR**  
**AND COORDINATION OF NATIONAL**  
**GOVERNMENT.....5<sup>TH</sup> RESPONDENT**  
**HILARY NZIOKI MUTYAMBAL, INSPECTOR GENERAL OF THE**  
**POLICE, KENYA.....6<sup>TH</sup> RESPONDENT**

**JOSEPH WAKABA MUCHERU, CABINET SECRETARY FOR  
INFORMATION AND  
COMMUNICATIONS.....7<sup>TH</sup> RESPONDENT**

**THE COMMISSION ON ADMINISTRATIVE  
JUSTICE.....8<sup>TH</sup> RESPONDENT**

**DANIEL YUMBA, CHIEF EXECUTIVE OFFICER KENYA MEDICAL  
PRACTITIONER AND DENTISTS  
COUNCIL.....9<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS  
(KNCHR).....1<sup>ST</sup> INTERESTED PARTY**

**4<sup>TH</sup> RESPONDENT’S WRITTEN SUBMISSIONS**

If it may please the Court,

1. The Petitioners filed a petition dated the 18<sup>th</sup> day of June 2020 supported by an affidavit sworn on even date.

In the petition the petitioners *inter alia* seek the following pertinent reliefs from this Honorable court as against the 4th Respondent:

- i. A declaration that the 4<sup>th</sup> Respondent’s failure to proactively publish information about the pandemic and the State’s response violates the right of access to information guaranteed under article 35(3).
- ii. A declaration that the 4<sup>th</sup> Respondent’s failure to proactively publish information about the pandemic and the State’s response violates Articles 10 and 232 of the Constitution.

- iii. A declaration that the 4<sup>th</sup> Respondent can be held criminally liable in its individual capacity for breach of section 28(4) (b) of the Access to Information Act, 2016.
- iv. An order of mandamus be issued compelling the 4<sup>th</sup> Respondent to provide the Petitioners with the information sought.

## **BRIEF BACKGROUND OF THE CASE**

---

- 2. The 4<sup>th</sup> Respondent herein, the Council of County Governors, is a statutory body established by dint of section 19 of the Intergovernmental Relations Act No. 2 of 2012 (the Act), whose functions under Section 20 of the Act are to provide a forum for *inter-alia*:
  - a) Consultation amongst County Governments.
  - b) Sharing information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive of corrective action.
  - c) Considering matters of common interest to County Governments.

## **ISSUES FOR DETERMINATION BY THE COURT**

---

- 3. The 4<sup>th</sup> Respondent submits that the following issues crystalize for determination by the honourable court:
  - i. Whether the 4<sup>th</sup> Respondent violated the petitioners' right of access to information.
  - ii. Whether the 4<sup>th</sup> Respondent can be criminally liable for breach of section 28(4) (b) of the Access to Information Act.

- iii. Whether the 4<sup>th</sup> Respondent violated the Petitioners' rights to fair administrative action under article 47 of the Constitution and the Fair Administrative Actions Act.
- iv. Whether the orders sought can issue against the 4<sup>th</sup> Respondent.

**i. Whether the 4<sup>th</sup> Respondent violated the petitioners' right of access to information.**

- 4. The 4<sup>th</sup> Respondent submits that most of the employees were working from home pursuant to the Circular by the Head of Public Service dated the 23<sup>rd</sup> day of April 2020 when the President issued a directive to inter alia government offices to work from home whenever possible. Consequently, the operations at the 4<sup>th</sup> Respondent's offices have not been optimal.
- 5. Therefore, the letters of request sent by the petitioners were not promptly relayed to the relevant officers because the registry was closed.
- 6. Despite the challenges aforementioned, the 4<sup>th</sup> Respondent submits that it has been proactively publishing information through weekly press briefings delivered by the Chairman. They are broadcasted in both print and electronic media and are readily accessible on its website and other social platforms. Some of the relevant issues addressed include:
  - a) The preparedness of county governments to handle COVID-19.
  - b) The designated covid-19 amenities in the Counties.
  - c) The total number of trained healthcare workers.
  - d) The total amount of Personal Protective Equipment (PPE) kits procured.
  - e) The total number of quarantine facilities.
  - f) The number of tests carried out in the Counties.

7. Additionally, **Part IV(C) of the Public Health Act of 2012** provides that the Cabinet Secretary for Health will take charge in the event of an epidemic. This falls under the national government and not county governments.
8. At the national level, the Ministry of Health has been publishing information on COVID-19 response on a daily basis since the first case was reported in Kenya on 13<sup>th</sup> March 2020. This information is also easily accessible on the website and social media platforms of the Ministry of Health.
9. According to section 6(5) of the Access to Information Act No. 31 of 2016, *a public entity is not obligated to supply information to the requester if that information is reasonably accessible by other means.*
10. Therefore, the 4<sup>th</sup> Respondent submits that it did not violate the rights of the petitioners to access to information. On the contrary, it fulfilled the alleged right by proactively publishing information on a weekly basis.

**ii. Whether the 4<sup>th</sup> Respondent can be criminally liable for breach of section 28(4) (b) of the Access to Information Act.**

11. The 4<sup>th</sup> Respondent submits that it discharged its mandate under article 35 of the Constitution and under the Access to Information Act No. 31 of 2016.
12. Despite the unprecedented pandemic which made its workers to keep away from the office, it acted in good faith and published the information through press briefing which are easily accessible to the public via the website and social media platforms.
13. Notwithstanding the fact that pandemic response falls under the docket of the Cabinet Secretary for Health, the counties have gone out of their way to make information available to the public.

14. Under section 28 (9) of the Access to Information Act No. 31 of 2016, *A person shall not be criminally liable for the disclosure or authorisation of the disclosure made in good faith in reliance on this Act.*
15. Consequently, the 4<sup>th</sup> respondent submits that it is not liable for breach of section 28(4) (b) of the Access to Information Act as alleged.

**iii. Whether the 4<sup>th</sup> Respondent violated the Petitioners' rights to fair administrative action under article 47 of the Constitution and the Fair Administrative Actions Act.**

16. The right to fair administrative action is provided for in Article 47 of the Constitution. Section 4 of the Fair Administrative Action Act, 2015 reiterates the importance of this right by amplifying the prominence of Article 47 and the process to be followed in conducting administrative actions.
17. However, a party alleging infringement of his right is required to demonstrate the alleged violation.
18. This was the position in the case of **Anarita Karimi Njeru vs Republic, Miscellaneous Criminal Application No. 4 of 1979 in the High Court at Nairobi (Authority No. 1 in the 4<sup>th</sup> Respondent's List of Authorities)** the court held that where a person alleges the contravention or a threat of a contravention of a constitutional right, he or she must set out the specific right infringed and the particulars of such infringement or threat.
19. This position was affirmed in **Geoffrey Oduor Sijeny v Kenyatta University; Petition No. 292 of 2017 in the High Court of Kenya at Nairobi (Authority No. 2 in the 4<sup>th</sup> Respondent's List of Authorities)** where the court held that:

*“A party coming to this Court on the basis that his or her right to fair administrative action was violated, must show that the standards enumerated in Article 47(1) as amplified by section 4 of the Fair Administrative Act were nonexistent in that administrative action and or that they were violated., and only then should the Court summon its jurisdiction under Article 165 (3) (b) of the Constitution. Looking at the petitioner’s averments, depositions and submissions, the petitioner has not stated why he thinks the respondent violated Article 47 of the Constitution.*

20. We therefore urge the court to find that the 4<sup>th</sup> Respondent’s actions did not violate the rights of the petitioner to fair administrative action.

**iv. Whether the orders sought can issue against the 4<sup>th</sup> Respondent**

21. The 4<sup>th</sup> Respondent submits that it discharged its mandate by publishing information received from the counties to the public faithfully.

22. Under section 20 of the Intergovernmental Relations Act No. 2 of 2012, the scope of its functions are limited to inter alia providing a forum for consultation among county governments, information sharing, receiving reports and considering matters of common interest to county governments.

23. Therefore, the information under the Custody of the 4<sup>th</sup> Respondent was limited to what was received from the county governments and this was faithfully relayed to the public through press briefings by the Chairman.

24. The 4<sup>th</sup> Respondent submits that the orders as being sought by the Petitioners cannot issue as against it and **WITHOUT PREJUDICE** urges the court not to issue orders in vain.



25. In the case of **James Titus Kisia v Said Majid Said [2013]**, Kasango, J quoted the Court of Appeal in the case **ERIC V. J. MAKOKHA & OTHERS -VS- LAWRENCE SAGINI & OTHERS CIVIL APPLICATION NO. NAI. 20 OF 1994 (12/94 UR)** (Authority No. 3 in the 4<sup>th</sup> Respondent's) whereby the court stated as follows:

*“An application for an order is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that **equity would not grant its remedy if such order will be in vain.** As is said, “Equity, like nature, will do nothing in vain. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an order which will be ineffective for practical purposes. If it will be impossible to comply with the order sought, the Court will decline to grant it.”*

26. In the case of **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) vs. County Government of Nairobi [2019]** (Authority No. 4 in the 4<sup>th</sup> Respondent's List of Authorities) *Mativo, J.* stated that:

*“No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.”*

27. The Court of Appeal in **Kenya National Examination Council v. Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal 266 of 1996 in the Court of Appeal at Nairobi (Authority No. 5 in the 4<sup>th</sup> Respondent's List of Authorities)** pronounced itself as such:

*An order of mandamus will issue to compel the performance of a public duty which is imposed on a person or body of persons by statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.*

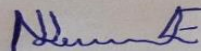
28. We submit that the 4<sup>th</sup> Respondent has rightly discharged its constitutional and statutory duty by proactively publishing information. There is no other way the 4<sup>th</sup> Respondent can be compelled to act other than how it has acted.

29. The 4<sup>th</sup> Respondent therefore urges this Honourable Court to dismiss the Petition with costs.

30. We so submit.

**DATED** at **NAIROBI** this 14<sup>th</sup> day of ...February.. 2022.

**EUGENE N. LAWI**



**ADVOCATE FOR THE 4<sup>TH</sup> RESPONDENT**

**DRAWN AND FILED BY:**

**Eugene N. Lawi**  
**Advocate,**  
**Council of Governors,**  
**Delta House, Waiyaki Way,**  
**P.O.Box 40401-00100,**  
**Westlands,**  
**Nairobi.**  
**Email: [eugenelawi@cog.go.ke](mailto:eugenelawi@cog.go.ke) Tel: 0727301448**

**TO BE SERVED UPON:**

Ochiel J. Dudley, Advocate,  
C/o Katiba Institute,  
House No. 5, The Crescent Avenue,  
P.O Box 26586-00100,  
**NAIROBI.**

Email: [ochieljd@katibainstitute.org](mailto:ochieljd@katibainstitute.org)

Phone: 0731740766

AG Director General, Ministry of  
Health

Afya House, Cathedral Road,

Patrick Amoth,  
Mutahi Kagwe,  
Cabinet Secretary for Health,  
Afya House, Cathedral Road,  
P.O Box 30016-00100,

**NAIROBI.**

Email: [ps@health.go.ke](mailto:ps@health.go.ke)

Phone: +254-20-2717077

P.O Box 30016-00100,

**NAIROBI.**

Email: [ps@health.go.ke](mailto:ps@health.go.ke)

H.E Cornel Rasanga,  
Governor for Siaya County,  
P.O Box 803-40600,  
**SIAYA.**

Mobile: 0727898309

Email: [info@siaya.go.kess](mailto:info@siaya.go.kess)

Fred Okengo Matiangi,  
Cabinet Secretary for Interior and  
Coordination of National Government,

Harambee House,  
P.O Box 30510-00100,

**NAIROBI.**

Phone; +254-20-2227411

Email: [ps@interior.go.ke](mailto:ps@interior.go.ke)

Hillary Nzioki Mutyambai,  
Inspector General of Police, Kenya,  
Office of the Inspector General,

Taifa Road, Jogoo House 'A',

**NAIROBI.**

Tel: +254-20-222-1969

Email: [nps@nationalpolice.go.ke](mailto:nps@nationalpolice.go.ke)

John Wakaba Mucheru,  
Cabinet Secretary for Information and  
Communications,  
Teleposta Towers, Koinange Street,  
P.O Box 30025-00100,

**NAIROBI.**

Phone: +254-20-4920000

Email: [info@information.go.ke](mailto:info@information.go.ke)

The Commission on Administrative  
Justice,

West End Towers, Waiyaki Way,

P.O Box 20414-00200,

**NAIROBI.**

Phone: +254-20-2270000

Email: [info@ombudsman.go.ke](mailto:info@ombudsman.go.ke) /  
[complain@ombudsman.go.ke](mailto:complain@ombudsman.go.ke)

Daniel Yumbya,  
CEO, Kenya Medical Practitioners and  
Dentists Council,

Woodlands Road off Lenana Road,

P.O Box 44839-00100,

**NAIROBI.**

Phone: 0720771478/ 0738504112

Kenya National Commission on  
Human Rights,

Kasuku Lane off Lenana Road,

P.O Box 74359-00200,

**NAIROBI.**

Phone: 0724256448/ 0733780000

Email: [haki@knchr.org](mailto:haki@knchr.org)

The Hon Attorney General,

Sheria House, Harambee Avenue,

P.O Box 40112-00100,

**NAIROBI.**

Phone: +254-2-2227461/ 0732529995

Email: [communications@ag.go.ke](mailto:communications@ag.go.ke)

