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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTION AND HUMAN RIGHTS DIVISION
PETITION NO. 218 OF 2020

- ERICK OKIOMA.....1ST PETITIONER**
 - ESTHER NELIMA.....2ND PETITIONER**
 - CHRIS OWALLA.....3RD PETITIONER**
 - CM.....4TH PETITIONER**
 - FA5TH PETITIONER**
 - KB.....6TH PETITIONER**
 - MO.....7TH PETITIONER**
 - EL.....8TH PETITIONER**
 - KATIBA INSTITUTE.....9TH PETITIONER**
 - KENYA LEGAL AND ETHECAL 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-government organisation)**

-VERSUS-

- MUTAHI KAGWE, CABINET SECRETARY FOR**
- HEALTH1ST 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**
- HIRARY NZIOKA MUTYAMBAL, INSPECTOR**
- GENERAL OF THE POLICE, KENYA.....6TH RESPONDENT**
- JOSEPH WAKABA MUCHERU,**
- CABINET SECRETARY FOR INFORMATION**
- AND COMMUNICATIONS7TH RESPONDENT**
- THE COMMISSION ON ADMINISTRATIVE JUSTICE8TH RESPONDENT**
- DANIEL YUMBYA, CHIEF EXECUTIVE**
- OFFICER, KENYA MEDICAL PRACTITIONER**
- AND DENTISTS COUNCIL.....9TH RESPONDENT**

-AND-

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR).....1ST INTERESTED PARTY

9TH RESPONDENT'S SUBMISSIONS

May it Please Your Lordship!

A. INTRODUCTION

1. The Petitioners seek to have the Honourable court find that the 9th Respondent has *inter alia* violated the Petitioners' right to information under Article 35 of the Constitution for failure to proactively publish and publicize important information about the Covid-19 pandemic and on the state's response.
2. The 9th Respondent, Daniel Yumbya, is the Chief Executive Officer of the Kenya Medical Practitioners Council ("**the 9th Respondent**") and he submits that he is not in violation of the Constitution or any Law. He further submits that the Kenya Medical Practitioners & Dentists Council, herein after referred to as "**the Medical Council**", was wrongly suit in this matter as the Ministry of Health has proactively published all the required information on its role on the Covid-19 pandemic.
3. Your Lordship the information sought by the Petitioners from the 9th Respondent is in the public domain and the Petition is thus unnecessary as the 9th Respondent has neither withheld nor denied the Petitioners or any other person the information within his possession as a staff of the Medical Council. Further, the 9th Respondent, on behalf of the Medical Council, provided the information as deponed in the Replying Affidavit sworn on 6th January, 2021 and the information in his possession was and it is available on the website of the Medical Council. He thus submits that he has not violated any Laws or any provision of the Constitution. The 9th Respondent thus submits that the Petitioner's case against him is unmerited, lacking in merit and it ought to be dismissed with costs.

B. PETITIONERS' CASE

4. The Petition seeks for several prayers. The prayers sought against the 9th Respondent are prayers **(a), (d), (e), (f), (i), (l), (r)** and **(s)** as follows:

- a) *A declaration be issued that the 1st-6th and 9th Respondent's failure to proactively publish and publicise important information about the pandemic and the State's response violates the right of access to information as guaranteed under Article 35(3).*
- d) *A declaration be issued that the 1st -6th and 9th Respondent's failure to affirmatively provide information regarding the pandemic and the State's response violates Article 10 and 232 of the Constitution.*
- e) *A declaration that the 1st-6th and 9th Respondent's 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.*
- f) *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).*
- i) *A declaration that the 1st -6th and 9th Respondents can be held criminally liable in their individual capacities for breach of Sections 28(4)(b) of the Access to Information Act, 2016.*
- l) *An Order of mandamus compelling the 1st -6th and 9th Respondents to provide the Petitioners with the information sought in the letters dated 30th March 2020, 6th April 2020, 9th April 2020, 10th April 2020, 15th April 2020, 17th April 2020, 18th April 2020, 27th April 2020 and 28th April 2020 within 48 hours of this order.*
- r) *That the Respondents within twenty-one (21) days from the date the order, file affidavits with the court detailing their compliance with these orders.*
- s) *Costs of this Petition and any other just and expedient order the Court may deem fit to make.*

5. The Petition filed herein is supported by the affidavits of Erick Okioma, Esther Nelima, Chris Owala, CM, F.A., K.B., M.O., E.L., Christine Nkonge, Allan Achesa Maleche, Kelvin Mogeni, Sheila Masinde and Achieng Orero. The Petitioners also filed a Supplementary Affidavit sworn by Allan Achesa Maleche on 4th March, 2021.
6. Your Lordship, a review of the Petition, as filed, shows that it is the Petitioner's case against the 9th Respondent is premises on the following allegations, that;
- i) That the 9th Respondent, is sued in his capacity as the Chief Executive officer of the Medical Council and in his individual capacity for allegedly failing to respond to the request for information dated 27th March, 2020;
 - ii) The Respondents allegedly failed to provide information requested to enable Kenyans to protect their health and mitigate the spread of the virus;
 - iii) The 1st to 6th and the 9th Respondents are alleged to have breached the values and principles of rule of law, human rights, good governance, transparency and accountability and the provision to the public of timely and accurate information that is required of them under Article 10 and 232(1)(f) of the Constitution;
 - iv) The 1st to 6th and 9th Respondents are alleged to be in violation of section 9(2) of the Access to Information Act which requires them to provide information relating to the life or liberty of the person within 48 hours of receiving request;
 - v) The 1st to 6th and 9th Respondents allegedly violated section 9(2) of the Access to Information Act by failing to provide information regarding the detention of those in quarantine and had their lives and liberty directly threatened;
 - vi) That the 1st to 6th and 9th Respondents allegedly failed to affirmatively publish and publicise information affecting the nation has been exacerbated by their failure to respond to requests for information, and

- vii) That the 1st to 6th and 9th Respondents allegedly violated section 9(1) and 4(3) of the Access to Information Act for failing to provide information.

C. THE 9TH RESPONDENTS' CASE

7. Your Lordship the 9th Respondent filed the Replying Affidavit sworn on 6th January, 2021 and in response and in opposition to the Petition he states that:

- a) Apart from the Ministry of Health and the Government of Kenya, the Medical Council provided timeous and accurate information on its role and the actions taken on its part in relation to the Covid-19 Pandemic;
- b) All the requisite information relating to the Covid-19 pandemic, which was within the Medical Council's possession at all the material times, were all published on the Council's website and the said website was at all times accessible to the general public, including the Petitioners. Details of the Medical Council's website is <https://kmpdc.go.ke/> is as set out in the copy *annexed to the Replying Affidavit bearing the checklist marked "DY-1"* and its within public knowledge;
- c) The Kenya Health Professions Oversight Authority ("**KHPOA**") developed a checklist for inspection of quarantine units for Covid-19 preparedness and response and also the requirements for a quarantine unit so as to ensure quality and ethical care as borne out in the *annexed copy of the checklist in the Replying Affidavit marked "DY-2"*;
- d) The list of quarantine facilities which had been selected in Nairobi and Mombasa were operational at a time when there was an increase in the numbers of reported cases affected with Covid-19 as provided in the *Annexure marked "DY-3"* in the Replying Affidavit. Further, the said list contained details of the officer-in-charge for each of the centres;
- e) During the material times the Ministry of Health had also provided the Covid-19 Protocols for the centres which were situated in schools and those with shared

accommodation, as set out in the annexed copy marked “**DY-4**” in the Replying Affidavit;

- f) Since March 2020 to-date the management of Covid-19 patients has changed drastically and all the quarantine facilities, which existed previously, have been closed;
- g) Health facilities which are treating and managing Covid-19 patients have isolation facilities which are managed by the respective Hospitals, which are Government, County or private facilities, and they are using existing protocols;
- h) The use of quarantine facilities at the initial stage was intended to mitigate the spread of Covid-19 during that formative period but with the spread of the disease to the communities across the country the practicability of having the quarantine facilities was no tenable;
- i) The Petitioners have not exhausted their rights to alternative remedies available under the Access to Information Act No. 31 of 2016, Laws of Kenya which gives the Commission on Administrative Justice the mandate of oversight and enforcement of the Access to Information Act;
- j) Notwithstanding the change of circumstances in the management of Covid-19 patients since March, 2020, the Petitioners ought to have exhausted the mechanism provided under the Access to Information Act before resorting to filing the present Petition before this Honourable Court;
- k) The information requested by the Petitioners in the Petition filed herein is all within the public domain and the Petition is thus unnecessary as the Medical Council has neither withheld nor denied the Petitioners or any person the information within its possession;

- l) The 9th Respondent has not violated any of the Constitutional provisions pleaded in the Petition, specifically Articles 35, 10, 232, 33(1)(a) of the Constitution, nor the provisions of Sections 28(4)(b) of the Access to Information Act;
- m) The Petitioners have not proved the alleged infringement to the required threshold to warrant grant of any of the orders sought in the Petition;
- n) The Petition, as pleaded against the 9th Respondent, lacks merit and should therefore be dismissed with costs to the Respondent.

D. ISSUES FOR DETERMINATION

8. Your Lordship it is the 9th Respondent submissions that the issues for determination in this matter, guided by the pleadings filed herein, are as follows;
 - i) **Whether the 9th Respondent is in violation of the Petitioner's right to access to information;**
 - ii) **Whether the Petitioners ought to have exhausted remedies provided under statute;**
 - iii) **Whether a Request for information includes a request for reasons; and**
 - iv) **Whether the orders sought ought to be granted.**

E. SUBMISSIONS ON THE ISSUES

- i) **Whether the 9th Respondent is in violation of the Petitioner's right to access to information.**
9. Your Lordship, the 9th Respondent is the Chief Executive Officer of the Medical Council and he is an ex-officio member of the said Council. He is also the Secretary to the Council and the Registrar as provided in Section 3A (e) of the Medical Practitioners and Dentists Act.

10. The Medical Council is established under the provision of Section 3A of the Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya, hereinafter referred to as “**the Act**” and it carries out some of its statutory duties through Committees which consist of Council members, with the guidance of the Secretariat, and the Council has the powers to incorporate other members guided by the required expertise or specialties.

11. The objective of the Act as set out in the Preamble is “*to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto.*” The functions of the Medical Council are set out under section 4 of the Act. These are to:

- a) *establish and maintain uniform norms and standards on the learning of medicine and dentistry in Kenya;*
- b) *approve and register medical and dental schools for training of medical and dental practitioners;*
- c) *prescribe the minimum educational entry requirements for persons wishing to be trained as medical and dental practitioners;*
- d) *maintain a record of medical and dental students;*
- e) *conduct internship qualifying examinations, preregistration examinations, and peer reviews as deemed appropriate by the Council;*
- f) *inspect and accredit new and existing institutions for medical and dental internship training in Kenya;*
- g) *license eligible medical and dental interns;*
- h) *determine and set a framework for professional practice of medical and dental practitioners;*
- i) *register eligible medical and dental practitioners;*
- j) *regulate the conduct of registered medical and dental practitioners and take such disciplinary measures for any form of professional misconduct;*
- k) *register and license health institutions;*
- l) *carry out inspection of health institutions;*

- m) regulate health institutions and take disciplinary action for any form of misconduct by a health institution;
- n) accredit continuous professional development providers;
- o) issue certificate of status to medical and dental practitioners and health institutions; and
- p) do all such other things necessary for the attainment of all or any part of its functions.

12. In a nutshell, the Medical Council has the function of licensing and registration of medical and dental practitioners, community oral health officers, licensing medical institutions, and conducting disciplinary proceedings against medical and dental practitioners or medical institutions as provided by the Act. We do humbly submit that the role of the Medical Council is the regulation of medical and dental practitioners, medical institutions and oral health officers.

13. Your Lordship, the 9th Respondent is the Chief Executive Officer and Registrar of the Medical Council and his office is established pursuant to the provision of **Section 4C** of the Medical Practitioners and Dentist Act. His functions are set thereto, as being responsible for the daily management of the staff and affairs of the Council. The functions of the Chief Executive Officer are set out at section 5(2) and (3) as to;

“annually maintain the register for interns, medical and dental practitioners, community oral health officers, general practitioners, specialist practitioners, foreign medical and dental practitioners, approved medical and dental schools, approved internship training centres, health institutions, and such other registers as may from time to time be required by the Council”.

14. Your Lordship we do thus submit that the functions of the 9th Respondent under the above-stated section of the Act is to maintain the various registers as set out above.

15. Your Lordship, we have reviewed the Petition, as pleaded and filed, and note that the Petitioners seek from the 9th Respondent the following;

- a) *Information on the criteria that was used to select hotels and facilities as quarantine centres;*
- b) *The check list used in selection and approval of the facilities;*
- c) *The list of all places certified as quarantine facilities both at the national and county level as from 23rd March to date;*
- d) *The approved standard operating procedures of the quarantine facilities, and*
- e) *The designated medical personnel responsible for oversight at each quarantine centres.”*

16. Your Lordship, we submit that the evidence before this Honourable Court shows that the Ministry of Health and the Government of Kenya provided timeous and accurate information on all aspects as relates the Covid-19 pandemic and the actions taken in relation to the said pandemic. It is within the public domain that the Ministry of Health through the Cabinet Secretary, Hon. Mutahi Kagwe and other officials of the Ministry provided daily updates to the entire Country as relates to the Covid-19 pandemic and all such reports are posted on the web site of the said Ministry. We do further submit that all the information sought by the Petitioners were and are still easily accessible on the web site of the Ministry of Health and also that of the Medical Council, as set out in the annexure marked “**DY-1**” to the 9th Respondent’s Replying Affidavit.

- a) *The checklist used in selection and approval of facilities was developed by the Kenya Health Professions Oversight Authority and this was annexed to the 9th Respondent’s Replying Affidavit and marked “**DY-2**”;*
- b) *The list of quarantine facilities which had been selected in Nairobi and Mombasa were operational at a time when there was an increase in the numbers of reported cases of Covid-19 as provided in the Annexure marked “**DY-3**”. Further, the said list contained details of the officer in charge for each of the centres.*

c) *During the material times the Ministry of Health had also provided the Covid-19 Protocols for the centres which were situated in schools and those with shared accommodation as set out in the annexed copy marked "DY-4".*

17. Your Lordship we thus submit that it is the 9th Respondent submissions that the information sought by the Petitioners in the present Petition was provided and it has been accessible to the General Public at all times and consequently the 9th Respondent cannot be deemed as being in violation of Article 35 of the Constitution.

18. Article 35 of the Constitution provides for the right to access information. The right to information however has certain limitations. Article 24 of the Constitution provides for the limitation of rights and fundamental freedoms. It states that a right or fundamental freedom in the Bill of Rights shall not be limited *except by law* and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the relevant factors.

19. Your Lordship, the Access to Information Act, No. 31 of 2016, was enacted to give effect to Article 35 of the Constitution. Section 6 of the Act provides for the **Limitations of** the right to access to information. Section 6(5) of the Act states that:

(5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.

20. Your Lordship, the essence and purpose of the limitation provided under Section 6(5) of the Access to Information Act is to ensure that there is no need to request for information through the Act if the information is accessible by other means. We submit Section 6(5) is an absolute exemption to the right to information request. In the present case it is an undisputed fact that the information sought by the Petitioners had been provided and published by the Ministry of Health and in some instances by the Medical Council on their respective websites and the said web site are accessible to the Petitioners.

21. In the case of **John Mang'uru Kabiri & 3 others –vs- County Government of Kiambu & 6 Others Petition No. 407 of 2015 [2018] eKLR** the court stated as follows:

*“The right to information is not an absolute right as each institution or person is entitled to assert any limitations consistent with Article 24 of the Constitution. Section 6(5) of the Access to Information Act precludes a public entity from the obligation to supply information if the requested information is reasonable accessible by other means by other means. The said section stipulates as follows:-
A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.”*

22. Your Lordship, we humbly and respectfully submit that the evidence on record shows that the Medical Council provided timeous and accurate information on its role and the actions taken on its part in relation to the Covid-19 pandemic. All the information which was held by the Medical Council is and it has at all times been in the public domain and it has been accessible to the general public. Further, the Medical Council has been updating its web site on every new development on the subject matter so long as the information is within its mandate or powers to disseminate.

23. Your Lordship under Section 6(5) of the Access to Information Act, 2016 a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means. In this case, the Medical Council's website and also the web site of the Ministry of Health contained all reports and information relating to the Covid-19 pandemic and the site were accessible to the general public.

24. Further, the information requested has also been provided through the Replying Affidavit of Michael Onyango and therefore the contents of the said affidavit does comprehensively answers all the information which the Petitioners were requesting from the Medical Council though it has always been available in the web site for the said Council.

25. Your Lordship we do humbly submit that the Medical Council has provided all the information requested and therefore it has fully complied with the law on access to information and it has therefore been discharged of its obligation under Article 35 of the Constitution and the Access to Information Act, 2016.

26. In the case of **International Centre for Policy & Conflict (ICPC) –vs- Ethics & Anti-Corruption Commission (EACC) & another, Petition No. 249 of 2018 [2020] eKLR** the Court stated as follows:

“Once a State organ or agency has published and publicised information, as was done by the 2nd Respondent, its obligation in terms of Article 35 of the Constitution is discharged.”

27. Your Lordship, the evidence on record shows that the 9th Respondent has provided the following:

- i) The Checklist on Inspection of Quarantine Units for Covid-19 Preparedness and Response which provided a Checklist for establishing a Quarantine Centre and the Requirements for a Quarantine Unit. (This information is annexed to the 9th Respondent’s Replying Affidavit and marked “**DY-2**”).
- ii) The List of Quarantine Hotels/Facilities as at 24th March, 2020. (This information is annexed to the 9th Respondent’s Replying Affidavit and marked “**DY-3**”).
- iii) The Covid-19 Quarantine Protocols dated 27th March, 2020. (This information is annexed to the 9th Respondent’s Replying Affidavit and marked “**DY-4**”).
- iv) The Covid-19 Protocols dated 27th March, 2020 also provided for the contact information persons responsible for Ambulance services, Medical Response, Quarantine sites, Port Health, PPE, Transport, Disinfection, Laboratory testing, Psychosocial support for Mental health and psychosocial support services, Psychologists and Inter-hotel transfers.

ii) Whether a Request for information includes a request for reasons.

28. Your Lordship the Petitioners seek from the 9th Respondent, “*Information on the criteria that was used to select hotels and facilities as quarantine centres.*” This we submit is a

request for reasons or the justification for the selection used to select the hotels and facilities as quarantine centres.

29. The 9th Respondent submits that the said information requested for the criteria used for the selection of quarantine centres is not within the mandate of the 9th Respondent nor with the Medical Practitioners and Dentist Council. The request for information under this limb ought to have been requested from the concerned state agency. We do submit that the said request was misplaced as the Medical Council and the 9th Respondent have no mandate on the issues thereto and they cannot speculate on issues which are not within their mandate.

30. In the case of **Kenya Society for the Mentally Handicapped (KSMH) –vs- Attorney General and Others Nairobi Petition No. 155A of 2011 [2011] eKLR** the court stated that:

“[43] I am not inclined to grant the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied.”

31. Your Lordship we do humbly reiterate that the Medical Council is established under **Section 3 of the Medical Practitioners and Dentists Act, Cap 253 Laws of Kenya** and its functions are set out at Section 4 of the said Act. The main function of the Medical Council is to regulate medical and dental practitioners and medical institutions. The 9th Respondent is the Registrar of the Medical Council and the Chief Executive Officer, whose office is established under Section 4C of the Act and he is responsible for the daily management of the staff and affairs of the Council and maintenance of the various registers set out at Section 5(3) of the Act.

32. The Medical Council is not involved in the setting up of medical institutions but it has the mandate of licensing and registration of medical institutions upon application by the respective applicants seeking registration or licensing of medical facilities.
33. Your Lordship we do submit that under the Health Act No. of 2017, it is the Ministry of Health that has the obligation to ensure that the National and County Governments ensure the progressive and equitable distribution of public health institutions, hospitals, amongst others to provide promotive, preventive and rehabilitative health services. The Medical Council or the 9th Respondent cannot usurp the powers or mandate of other organs of the State in any way or at all.
34. Your Lordship we do submit that the obligation under Article 35 of the Constitution is to provide information and not justification. Section 2 of the Access to Information Act defines information as to include *“all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production.”*
35. Your Lordship the 9th Respondent humbly submits that information does not include reasons or justification for the action taken by the entity from whom information is requested. In the Indian case of **Prakash Agrawal –vs- PIO, Ministry of Health and Family Welfare Ministry of Health & Others, New Delhi 110067, Second Appeal No. CIC/ MH&FW/A/2020/135477** the Central Information Commission on an Appeal stated as follows:

“In the light of the extensive arguments of the Appellant, challenging the information provided by the Respondent, it is essential to mention that the Section 2(f) defines "information" which can be availed by information seekers through the RTI Act, 2005. This aspect has been dealt with by the Hon'ble Supreme Court in the decision dated 04.01.2010 titled **Khanapuram Gandaiah vs Administrative Officer & Ors.** in the following words: "...6. Under the RTI Act "information" is defined under

Section 2(f) which provides: "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, report, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force." This definition shows that an applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law. Of course, under the RTI Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., **but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed.**"

36. The Supreme Court of India in the case of **Khanapuram Gandaiah –vs- Administrative Officer & Ors, Petition No. 34868 of 2009** although making a determination on a request for information on a Judge stated as follows:

“Moreover, in the instant case, the petitioner submitted his application under Section 6 of the RTI Act before the Administrative Officer-cum- Assistant State Public Information Officer seeking information in respect of the questions raised in his application. However, the Public Information Officer is not supposed to have any material which is not before him; or any information he could have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force. The answers sought by the petitioner in the application could not have been with the public authority nor could he have had access to this information and Respondent No. 4 **was not obliged to give any reasons as to why he had taken such a decision in the matter which was before him.**

37. The Bombay High Court in the case of **Dr. Celsa Pinto, Ex-Officio Joint –vs- The Goa State Information, 2008 (110) Bom L R 1238** held as follows on the definition of information:

“The definition cannot include within its fold answers to the question **why**, which would be the same thing as asking the reason for a justification for a particular thing. The Public Information Authorities cannot expect to communicate to the citizen the reason why a certain thing was done or not done in the sense of a justification because the citizen makes a requisition about information. Justifications are matter within the domain of adjudicating authorities and cannot properly be classified as information. In this view of the matter, the order of the Commission appears to suffer from a serious error of law apparent on record and results in the miscarriage of justice. In the result, the impugned order is hereby set aside.”

38. Your Lordship we do submit that, from the Petition filed herein, the Petitioners seek for *“Information on the criteria that was used to select hotels and facilities as quarantine centres.”* We do submit that the Petitioners seek for a justification on the selection of the hotels and the facilities used as quarantine centres and it is our respectful submissions that the information sought thereunder cannot be a subject for a request for information as *it includes reasons for a decision* and not for information.

iii) Whether the Petitioners ought to have exhausted remedies provided under statute.

39. Your Lordship, Article 35 of the Constitution provides for the right to information. The Access to Information Act No. 31 of 2016 gives effect to the right. The Title to the Act provides:

“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”

40. Your Lordship, we do submit that the body that is mandated under statute to oversee and enforce the right to access information is the Commission on Administrative Justice. Section 21 of the Access to Information Act provides for the functions of the

Commission on Administrative Justice. Section 21(1)(f) of the Act provides that the Commission on Administrative Justice is obligated to **hear and determine complaints and review decisions arising from violations of the right to access to information.**

41. Section 14 of the Access to Information Act provides for the review of decisions¹ by the Commission on Administrative Justice. Section 14(1) states that:

*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.*

42. Your Lordship, the 9th Respondent humbly submits that the Petitioners ought to have requested for a review of the alleged decision refusing to grant access to information applied for in accordance with Section 14(1) of the Access to Information Act. The Petitioners have not provided a copy of the Request for review of the decision made to the Commission on Administrative Justice in accordance with its required form under Section 14 and also set out under Rule 5 and the First Schedule of the Commission on Administrative Justice Regulations, 2013 enacted pursuant to the Commission on Administrative Justice Act No. 23 of 2011.

43. Your Lordship, we do further submit that the Petitioners have not demonstrated in their Petition that there were exceptional circumstances preventing them from requesting for a review of the decision of the Respondents. In the case of **Ndiara Enterprises Ltd – vs- 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 –vs- Nairobi City County Government** cited by the Court in **Charles Apudo Obare & another –vs- Clerk, County Assembly of Siaya & another [2020] eKLR** 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... We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings. 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.***

44. In the same decision, the court cited **Savraj Singh Chana –vs- Diamond Trust Bank (Kenya) Limited & another [2020] eKLR**, where the court stated:

“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.”

45. In the case of **Charles Apudo Obare & another –vs- Clerk, County Assembly of Siaya & another [2020] eKLR** the court stated:

“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.

46. In the case of **Secretary, County Public Service Board & another –vs- Hulbhai Gedi Abdille [2017] eKLR** the exhaustion doctrine was expressed by the Court of Appeal as follows:

“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.”

47. Similarly the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 others –vs- Samuel Munga Henry & 1756 others (2015) eKLR** thus:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution, which commands Courts to encourage alternative means of dispute resolution.”

48. Your Lordship, the 9th Respondent submits that the Commission on Administrative Justice is the body mandated to enforce the provisions of the Act. It is the body to determine whether or not the Respondents may be held criminally liable in their individual capacities for breaches of the Act if any. We therefore submit that the Petitioners ought to revert to the statutory body mandated to enforce access to information.

iv) Whether the prayers sought ought to be granted.

49. The Petitioner seeks against the 9th Respondent a declaration that:

- i) An Order of mandamus compelling the 9th Respondent to provide the Petitioners with the information sought within 48 hours of the order.*
- ii) The 9th Respondent to, within twenty one (21) days from the date the order, file affidavits with the court detailing their compliance with these orders.*
- iii) Costs of this Petition.*

50. The 9th Respondent submits that the Orders sought against him are unmerited for the following reasons:

- a) The Petitioner has failed to exhaust the remedy provided under the Access to Information Act. It failed to request for a review of the decision to the Commission on Administrative Justice as is required under Section 14 of the Access to Information Act, or file an application seeking to be exempted.
- b) Apart from the Ministry of Health and the Government of Kenya, the Medical Practitioners provided timeous and accurate information on its role and the actions taken on its part in relation to the Covid-19 Pandemic.
- c) The information published was reasonably accessible to members of the public including the Petitioners who requested for information.
- d) The right of access to information is not absolute and may be limited. In this case it is limited under Section 6(5) of the Act which states that a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means. Further the 9th Respondent has provided the information requested in his Affidavit sworn on 6th January, 2021.
- e) The 9th Respondent is not in violation of Articles 35, 10, 33(1)(a), and 232 of the Constitution, nor Section 28(4)(b) of the Access to Information Act.

51. On the issue of costs we rely on the decision in **International Centre for Policy & Conflict (ICPC) –vs- Ethics & Anti-Corruption Commission (EACC) & another, Petition No. 249 Of 2018 [2020] eKLR** where the court stated:

“On the question of costs, I find that the litigation was initiated in contravention of the exhaustion principle. The suit was also filed when the information being sought was already in the public domain. Although the petition may have had a public interest element, its institution in the first place was unnecessary and a waste of public resources as the respondents, which are public bodies, have been

forced to engage legal services at the public expense. For the stated reason, I award costs to the respondents against the Petitioner.”

52. We urge Your Lordship to be persuaded by the decision in **Kenya Society for the Mentally Handicapped (KSMH) –vs- Attorney General and Others Nairobi Petition No. 155A of 2011 [2011] eKLR** where the court stated that,

“[43]...Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.”

53. Your Lordship, we do respectfully reiterate that the 9th Respondent has provided the information requested in his Replying Affidavit, which information was also reasonably accessible on its website and this is sufficient as was held in the case of **John Mang’uru Kabiri & 3 others –vs- County Government of Kiambu & 6 Others Petition No. 407 of 2015 [2018] eKLR**.

54. Your Lordship, the Medical Council proactively publicised information on its role on the Covid-19 pandemic. Further, the information which was held by the Medical Council has been in the public domain and it was also available from the web site of the Ministry of Health.

55. The Central Information Commission of India in the case of **Dr. Prakash Agrawal –vs- PIO, Ministry of Health and Family Welfare** cited the decision of the Supreme Court of India in the case of **Central Board of Secondary Education & Anr. –vs- Aditya Bandopadhyay & Ors. Civil Appeal No.6454 of 2011** stated as follows;

“Before concluding, the Commission wishes to refer to the decision dated 09.08.2011 passed by the Hon’ble Supreme Court in the case Central Board of Secondary Education and Anr. vs. Aditya Bandopadhyay and Ors, SLP(C) NO. 7526/2009 [Civil

Appeal No.6454 of 2011] "...Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties." In the light of the above decision, the Commission is of the considered opinion that no further action is deemed necessary in this appeal.

F. CONCLUSION

56. Your Lordship, it is the 9th Respondent's submissions that it provided the information which was within its possession and mandate and there is no evidence to prove allegations that it was denying the public the said information to insulate himself from scrutiny or preventing the public from participating in and being informed about the Government's response as alleged by the Petitioners allege. Further, the Petitioners have not proved their claim to the required threshold. It is thus the 9th Respondent's submission that the Petition, as filed against him, is unmerited and ought to be dismissed.

DATED at Nairobi this 15th day of February, 2022.

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