



**Shah & another v Kenya Deposit Insurance Corporation & another
(Constitutional Petition E203 of 2021) [2023] KEHC 485 (KLR)
(Constitutional and Human Rights) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E203 OF 2021**

**M THANDE, J
JANUARY 27, 2023**

BETWEEN

RASHIK KUMAR PUNJA SHAH 1ST PETITIONER

MITTUN SHAH 2ND PETITIONER

AND

KENYA DEPOSIT INSURANCE CORPORATION 1ST RESPONDENT

CHASE BANK LIMITED 2ND RESPONDENT

RULING

1. In the Petition herein dated 7.6.21, the Petitioners seek the following reliefs:
 - (a) A Declaration that the Respondents have violated the rights of the Petitioners under Article 35(1)(b) of *The Constitution* of Kenya, 2010 and Section 4(1)(b) of the *Access to Information Act* No. 21 of 2016.
 - (b) An order compelling the Respondents to provide the Petitioners with and/or disclose:
 - (i) Disclose where the Petitioners' deposits amounting to Kshs. 266,864,438.35 are held. The particulars of the bank, and the account details including account number and account type.
 - (ii) A copy of Receivers Report to Central Bank of Kenya recommend ding liquidation of Chase Bank.



- (iii) A copy of the report of the comprehensive audit carried out by the external auditor.
 - (c) An order against the Respondents to sequester the petitioners' cumulative deposits amounting to Kshs. 266,864,438.35 and this is sequestered and its shall not be part of the funds for distribution during liquidation.
 - (d) This Honourable Court be pleased to grant any other further relief as it may deem fit.
 - (e) The Petitioners be awarded costs of this Petition.
2. It is the Petitioners' case that that they are both customers of and have held bank accounts with the 2nd Respondent since 2015. The Petitioners claim that their bank accounts with the 2nd Respondent had the sum of Kshs. 145,864,438/35 and 121,000,000/= respectively. The 2nd Respondent was placed under receivership and the 1st Respondent appointed receiver thereof in April 2016. The Petitioners contend that unlike other depositors, they did not receive any partial payments. They claim that the 1st Respondent insisted that no payment would be paid to the Petitioners, until the 2nd Respondent was discharged of its obligations to HDFC Bank, Bahrain, under Stand By Letters of Credit (SBLC) Guarantees, given at the Petitioner's request. The Petitioners however state that they fully settled their obligations to HDFC Bank, which discharged them and indemnified the 2nd Respondent. In spite of this, the Respondents declined to release the Petitioners' deposits and classified them as secured creditors and no longer depositors. Thereafter, the banking business of the 2nd Respondent was taken over by SBM Bank and the Petitioners were informed that their accounts had been transferred to that Bank. Their money was however not transferred to their new accounts.
3. The Petitioners filed Milimani Commercial Misc, Appl. No. E1200 of 2021 and during the pendency of the said matter, the Central Bank of Kenya (CBK) announced that on the recommendation of the 1st Respondent and based on an undisclosed revised auditor's report by an unidentified external auditor, liquidation was the only feasible option. CBK proceeded to appoint the 1st Respondent under Sections 53(2) and 54(2) of the Kenya Deposit Insurance Act (KDIC Act). The Petitioners contend that they sought information from the 1st Respondent relating to the liquidation recommendation, but their request was not granted. This is they say is what has provoked the Petition herein
4. The Application before me for consideration is dated 8.9.21 and filed by the Respondents, who seek the striking out of the Petition herein. They seek in the alternative, that the 1st Respondent be struck out from the Petition. The Application is supported by the affidavit sworn on even date by David Irungu, the 1st Respondent's General Manager-Resolutions. The Respondents state that the Petition has been filed without leave of the Court contrary to Section 56(2) of the KDIC Act, which expressly prohibits the commencement of civil proceedings against the 1st Respondent without leave of the Court. The Respondents further contend that the Petition is an abuse of the court process as the Petitioners have filed proceedings on the same subject matter against the Respondents, namely Miscellaneous Application No. E1200 and a Complaint dated 19.7.21 of 2021. Further that the remedy sought of disclosure of confidential information is not available by dint of Section 15 of the KDIC Act. The Respondents assert that the Petitioners ought to have raised the issues herein in the other suits.
5. David Irungu further deponed that in December 2015, the Petitioners took various credit facilities amounting to USD 1,350,000 from HDFC Bank, and secured by the SBLC from the 2nd Respondent which were in turn secured by a lien over the Petitioners' fixed deposits. Following inability to meet its financial obligations, the 2nd Respondent was on 7.4.16, placed under receivership by CBK vide



Gazette Notice No. 2321. Pursuant to the statutory mandate under Section 43 of the Act, CBK appointed the 1st Respondent as receiver for a period of 12 months. On 27.1.17, HDFC Bank notified the 2nd Respondent that it was drawing under the SBLC on the basis that the Petitioners had failed to service the credit facility granted to them. Before the Petitioners settled the HDFC Bank facility, the 1st Respondent on 17.4.16, entered into an agreement with SBM Bank for the acquisition of all assets and liabilities of the 2nd Respondent. On 16.4.21, on recommendation of the 1st Respondent, CBK placed the 2nd Respondent into liquidation and proceeded to appoint the 1st Respondent as liquidator, pursuant to Section 53(2) and 54(1)(a) of the Act. It is the Respondents' contention that the law prohibits commencement of any suit against the 1st Respondent which is an agent of a disclosed principal. Also, following the appointment of the 1st Respondent, the 2nd Respondent cannot be sued as this is prohibited under Section 56(1) of the Act.

6. For the foregoing reasons, the Respondents urged that the Petition be struck out, further contending that the same is fatally defective being supported by an affidavit sworn by both Petitioners, in contravention of the [Civil Procedure Act](#) and Rules, which do not envisage an affidavit sworn by 2 deponents,
7. The Application is opposed by the Petitioners vide an affidavit sworn on 28.3.22 by the 1st Petitioner. They reiterated their averments in the Petition. They further averred that the causes of action herein and in the other suits are distinctly different. Misc. App. E1200 of 2020 seeks leave of court to institute judicial review proceedings which was heard and determined in favour of the Petitioners. HCCC No. E703 of 2021 was instituted after grant of leave and seeks a declaration that the Petitioners are depositors and not creditors, an order halting the liquidation of the 2nd Respondent, pending the settlement of amounts awarded, in the alternative, the suit seeks preservation of the Petitioners' deposits, value of their deposits together with compound interest, damages for breach of contract and for breach of the Respondents' statutory duty to the Petitioners.
8. The Petitioners contend that leave is not required to file a constitutional petition for enforcement of human rights and fundamental freedoms, a right guaranteed under Article 48 of [the Constitution](#). They assert that it was necessary to institute the Petition seeking information necessary to enforce the claim against the Respondents and to seek conservatory orders to preserve their deposits from distribution before the civil claim is determined. They further denied that the information sought is confidential and that the same falls within the exceptions set out in Section 15 of the Act. The Petitioners further contended that it is the present Application and not the Petition that is an abuse of the court process and urged the Court to dismiss the same and set down the Petition for hearing.
9. In a rejoinder vide a further affidavit sworn on 5.7.22, by David Irungu, the Respondents reiterated their earlier averments. The Respondents further asserted that the pending suits raise similar issues raised in the Petition, hence the matter is sub judice. In particular, prayer (c) in the Petition is for an order that the Petitioners' deposits be sequestered and not form part of the funds for distribution during liquidation, which prayer is sought in the other suits. Further that the information sought is confidential and disclosure thereof is barred by Section 15 of the Act, Section 32 of the [Banking Act](#) and Section 6 of the [Access to Information Act](#). Additionally, it was deposed that such disclosure will undermine the 1st Respondent's decision-making process in so far as liquidation of the 2nd Respondent is concerned. The Respondents urged that the Application be allowed as prayed.
10. Parties filed their written submissions which I have duly considered. The issues that arise for determination are:
 - i) Whether Petition is an abuse of the court process.



- ii) Whether Petition is fatally defective.
- iii) Whether leave was required before filing Petition and whether the Petitioners have a valid cause of action against the 1st Respondent.

Whether Petition is an abuse of the court process

- 11. The Respondents submitted that by reason of the fact that the Petitioners seek that their deposits amounting to Kshs. 266,864,438.35 be sequestered and not form part of the funds available for distribution during liquidation, the Petition is an abuse of the court process as the same order is sought in HCCC No. E703 of 2021. It was further submitted that the Petitioners have commenced multiple suits against the Respondents seeking the similar remedies. They further argued that seeking the said reliefs in one suit will avoid a situation where 2 courts of concurrent jurisdiction arrive at different decisions on the same issue.
- 12. On their part, the Petitioners denied that the Petition is an abuse of the court process and submitted that the constitutional relief under Article 35 could only be sought in these proceedings. Further that there is a stark difference in the prayers sought herein and those sought in the other suits. s
- 13. In *Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, Mativo, J. (as he then was) stated:
 - 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
 - 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
 - (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.



- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
 - (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]
14. The Court has considered the prayers sought in HCCC No. E703 of 2021 and has noted that the Petitioners have sought the preservation of their deposits with the 2nd Respondent in. Specifically in prayers c and d, the Petitioners seek the following orders:
- c. In the alternative and without prejudice to prayer (b) above preservation of the plaintiff's deposits, or an amount equivalent to the plaintiff's deposits.
 - d. The value of the deposits placed in the Plaintiffs bank account held with the 1st Defendant Bank being Kshs. 145,864,438.35 and 122,821,366.45.
15. In the present Petition, the Petitioners seeks inter alia the following prayers:
- (b) An order compelling the Respondents to provide the Petitioners with and/or disclose:
 - (i) Disclose where the Petitioners' deposits amounting to Kshs. 266,864,438.35 are held. The particulars of the bank, and the account details including account number and account type.
 - (ii) ...
 - c. An order against the Respondents to sequester the petitioners' cumulative deposits amounting to Kshs. 266,864,438.35 and this is sequestered and its shall not be part of the funds for distribution during liquidation.
16. The above prayers in both suits are similar and seek the preservation of the Petitioners' deposits in the 2nd Respondent. The risk of having these similar prayers in different suits in courts of



concurrent jurisdiction is the arrival at different and conflicting decisions on the same facts, evidence and cause of action.

17. The seeking of an order for preservation of the Petitioners' deposits in this Petition, which prayer has been sought before the Commercial Court, a court of concurrent jurisdiction, is clearly an abuse of the court process. In so finding, I am guided by the holding in the case of Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others [2019] eKLR, wherein the Court of Appeal had this to say on the filing of parallel proceedings before 2 different courts of concurrent jurisdiction:

The learned Judge in her considered ruling held that the filing of the petition in respect of the same parties in which the matter in issue was directly and substantially in issue in ELC No. 231 of 2012 pending before a court of competent jurisdiction was clearly an abuse of the court process...Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action. The filing of the petition before the trial court in the face of the consent order in ELC No. 231 of 2012 was clearly an abuse of court process and sub judice. The trial court cannot therefore be blamed for so holding.

18. Having found as I have that the prayer for preservation of the Petitioners' deposit is in both suits and therefore an abuse of the court process, the Court must exercise its jurisdiction to protect itself from abuse and to ensure that its process is not abused.

Whether Petition is fatally defective

19. The Respondents contend that the Petition is fatally defective for being supported by a joint affidavit by both Petitioners. Further that the affidavit was sworn on 4.6.21 before the existence of the facts and prayers pleaded in the Petition which is dated 7.6.21. As such, the Petition is incurably defective.
20. For the Petitioners, it was submitted that the affidavit in support of the Petition has not violated Order 19 Rule 5 of the Civil Procedure Rules. Further that the phrase first person does not mean 1 person. Additionally, there is no legal provision that requires that an affidavit be sworn by only a single person.
21. Order 19 Rule 5 of the Civil Procedure Rules provides:

Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.
22. In the case of Francis Kariu Gakumbi & another v Piliska Njoki Maina [2008] eKLR, the Court of Appeal considered whether an affidavit may be sworn by more than one person and stated:

“In view of the foregoing Miss Mwai's submission that an affidavit may be sworn by two or more persons is not without merit. Support for that proposition can also be found in O.19 rule 7 of the Indian Code of Civil Procedure (Allahabad), and The Supreme Court Practice 1997, O.41 rule 2. The latter provides that:



“2. Where an affidavit is made by two or more deponents the names of the persons making the affidavit must be inserted in the jurat except that, if the affidavit is sworn by both or all the deponents at one time before the same person, it shall be sufficient to state that it was sworn by both (or all) of the “above named deponents.”

The English practice appears to permit deponents to swear generally, but the Indian practice is stricter. O.19 rule7, aforesaid provides that:

“Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge; and such facts shall be stated in separate paragraphs.”

Form No. 11, part of which we reproduced earlier, appear to be couched in the terms of the Indian practice. This to us appear to lend credence to what the learned single Judge of this Court was complaining about. On that we have no basis for faulting him. He however fell into error when he expressed the view that he doubted whether two people can swear one oath at the same time. He expressed himself too widely on that aspect because as we have shown above certain common law jurisdictions freely allow two or more people to swear one affidavit at the same time”

23. It is noted that in the case of *Duncan Gakuna Kionga & 2 others v Timboroa Hotels Limited* [2008] eKLR relied on by the Respondents, Kimaru, J. (as he then was) spoke to the issue of a joint affidavit and expressed himself thus:

Having considered the said arguments made in regard to whether two or more deponents can swear to an affidavit in support of an application seeking interim reliefs under the *Arbitration Act*, I hold that the only competent affidavit which can be sworn in support of such an application is an affidavit sworn by one deponent. The plaintiffs can swear to as many affidavits as they wish in support of their application provided each affidavit is sworn by a single deponent.

24. At the time this decision was made, the learned Judge served in the High Court, a court of concurrent jurisdiction. Accordingly, the decision is not binding on this Court. In any event, a careful reading of Order 19 Rule 5 shows otherwise, and the cited decision of the Court of Appeal do not support that position.

25. I now turn to the date of the affidavit 4.6.21 while the Petition is dated 7.6.21. It is the Respondents’ contention that the fact that the affidavit was sworn before the Petition it seeks to support renders the Petition fatally defective. Reliance was placed on the case of *Justus Achinga Kebari & 25 others v Attorney General* [2018] eKLR in which Marete, J. stated:

It is trite law and process that a petition shall be accompanied and supported by a valid affidavit in such support. In the instant case, the validity of the affidavits in support are dubious for want of veracity in their commissioning. The petitioner has failed to controvert the clear provisions of law negating their case in the circumstances. It must fail.

26. In the cited case, the learned Judge found the validity of the supporting affidavits of the petitioners to be “dubious” because they were commissioned by the petitioner’s advocates in contravention of Section 4(1) of the *Oaths and Statutory Declarations Act*. This is not the situation in the present case.



27. Also relied upon was the case of *Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others* [2020] eKLR in which Onyango, J. stated:

It is evident that without the affidavit and the documents attached thereto, the averments of fact in the petition are incapable for proof. It is therefore my considered opinion that the petition will be a hollow shell without the documents attached to the affidavit.

28. In the cited case, the learned judge found the petition therein to be hollow as there was no affidavit or documents in support thereof. In the present case, there is an affidavit that has been filed.

29. And in the case of *Charles Muturi Mwangi v Invesco Assurance Co Ltd* [2014] eKLR, the facts are distinctly different from the circumstances herein. In that case Mbaru, J. struck out an affidavit which was undated. The learned Judge stated:

The defect on the affidavit is not a mere technicality that can be addressed as under Article 159 of *the Constitution*. The undated affidavit violates a statutory mandatory provision and thus the striking out.

30. The law governing affidavits is the *Oaths and Statutory Declarations Act*. Section 5 provides:

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

31. For an affidavit to be valid, it must be sworn before a commissioner for oaths who must state at what place and on what date the affidavit was sworn before him.

32. In the present case however, an affidavit has been duly filed unlike in the case of *Maureen Nyambura Ngigi Warui* (supra) where no affidavit had been filed. The affidavit was sworn before Musa Juma, a commissioner for oaths. It was sworn at Nairobi on 4.6.21. The affidavit is thus valid as it complies with the provisions of Section 5 of the *Oaths and Statutory Declarations Act*.

33. The question on the table is whether the fact that the affidavit is dated before the Petition in support of which it was filed, renders the Petition fatally defective. To answer this question posed, it is necessary to consider the purpose of an affidavit. Every affidavit sworn presents facts which are within the knowledge of the deponent and those that are not, the source thereof must be indicated. It is for this reason that every affidavit must be expressed in the first person whether singular or plural.

34. This Court is enjoined to do substantive justice to all parties and a party ought not be driven from the seat of justice on a mere technicality as a date. In this regard, I adopt the following sentiments expressed by Kimondo, J. in the case of *Bakex Millers Limited v Esgee Industries Limited* [2014] eKLR:

Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in *Dyson Vs. Attorney General* [1911] 1 KB 410 at 418 when he delivered himself thus;



“To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad”

35. I have found that the impugned affidavit is not defective having been sworn in compliance with the law. The only “defect” is the date thereof. The Respondents have not stated that the deponents of the said affidavit have deponed to facts that are not within their personal knowledge. It has also not been demonstrated that the fact of the said affidavit being dated before the Petition has in any way prejudiced the Respondents, who have in any event substantially responded to the issues raised therein. Being mindful of the constitutional imperative in Article 159(2)(d) of *the Constitution* that justice shall be administered without undue regard to procedural technicalities, I find and hold that the date of the affidavit is an error that can be overlooked.
36. The upshot is that having considered the foregoing, my finding is that the affidavit in support of the Petition is not defective and does not render the Petition fatally defective as alleged by the Respondents.

Whether leave was required before filing Petition and whether the Petitioners have a valid cause of action against the 1st Respondent

37. It is the Respondents’ contention that leave of Court was required before filing the present Petition, which was filed post liquidation of the 2nd Respondent. They relied on the provisions of Section 56(2) of the Act. The Petitioners oppose this contention and submitted that no leave was required to file the Petition. According to the Petitioners, it is only Section 56(1) that applies to the 1st Respondent while sub-sections (2) and (3) do not. Further that their seeking the information in question does not fall within the categories of prohibited causes of action. Relying on Article 23 of *the Constitution*, the Petitioners submitted that leave is not required to institute a constitutional petition. Further that *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) do not require the leave of court before certain classes of petitions are filed.
38. The Respondents countered this by submitting that when the 1st Respondent was appointed receiver and subsequently liquidator of the 2nd Respondent, it acted as the agent of the 2nd Respondent and hence did not assume any liability of the 2nd Respondent. Relying on Section 46 of the Act, they submitted that a liquidator always acts as an agent of the institution in receivership or liquidation and cannot be held liable for acts undertaken in its behalf. The Respondents therefore urged that the 1st Respondent be struck out of the proceedings herein, given that no cause of action lies against it.
39. Section 46(2) of the Act provides that where the 1st Respondent has assumed of control as a receiver of the whole of the assets, liabilities, businesses and affairs of an institution, no injunction may be brought or any other action or civil proceeding commenced against the 1st Respondent, in respect of the assumption of such control.
40. Where on the other hand, the 1st Respondent has been appointed as liquidator of an institution, Section 55(2) provides that any party aggrieved by the exercise by the 1st Respondent of any of its powers may apply to the High Court for orders as appropriate. The



vider however is that Section 56(2) provides that leave of the Court is required for filing such application as follows:

No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

41. It is clear from the foregoing that the bringing a suit against the 1st Respondent as receiver of an institution is barred while any suit against the 1st Respondent as liquidator may only be commenced or continued, with the sanction of the Court. It follows therefore that the Petitioners are barred from filing this Petition against the 1st Respondent as receiver and were required to seek leave of the Court before filing this Petition against the 1st Respondent as liquidator.
42. The Petitioners contend that this being a constitutional petition, leave of the Court was not required. They relied on Article 23 of *the Constitution* and the Mutunga Rules.
43. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, the Court of Appeal had this to say on bypassing a statutory procedural provision:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

44. And in *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR the Court of Appeal stated:

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions.

45. That the Petitioners have a right under Article 22(1) to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened and access to justice under Article 48 cannot be gainsaid. That right must however be exercised in the manner provided by law. In light of this, I hold that in seeking redress against the 1st Respondent, with regard to the matters herein, the Petitioners ought to have followed the route prescribed by the Act. My further finding is that the Petitioners have no valid cause of action against the 1st Respondent as receiver of the 2nd Respondent. Additionally, the Petitioners required the leave of the Court to file a Petition against the 1st Respondent as liquidator of the 2nd Respondent.
46. On the prayer for access to information, the Petitioners seek disclosure of the whereabouts of their deposits, particulars of the bank and the account details. They also seek a copy of the receiver's report to CBK recommending liquidation of the 2nd Respondent and the external auditor's comprehensive report. Relying on Article 35 of *the Constitution*, the Petitioners submitted that the information sought is for exercising a fundamental right and that by declining to provide the information demanded of it, the 1st Respondent violated their rights and the appropriate remedy under Article 23 is the declaration and orders sought compelling the 1st Respondent to provide the same.



47. I have noted an aspect which neither party has raised, but goes to the jurisdiction of the Court. Article 35 of *the Constitution* upon which the Petitioners have relied, confers upon every citizen, 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. Article 35(1) provides as follows:
- (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
48. The *Access to Information Act* (AIA), was enacted to give effect to Article 35. The objects of the Act include inter alia, to provide a framework for public entities and private bodies to proactively disclose information they hold; to provide information on request in line with constitutional principles; to provide 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. Similarly, the framework is intended to protect persons who disclose information of public interest in good faith.
49. Section 4 of the Act reiterates the provisions of Article 35 and goes on to provide as follows:
- (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) any reason the person gives for seeking access; or
 - (b) the public entity's belief as to what are the person's reasons for seeking access.
 3. Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 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.
50. It is quite evident that a constitutional and statutory obligation is placed upon both public and private entities, to disclose- held by them. Additionally, a citizen's right to access information



is neither affected by the reasons given for seeking access nor by what the holder of the information sought, may think are the reasons for seeking access.

51. The 1st Respondent as a public entity established under statute and is bound by Article 35 of *the Constitution*. Section 5 of the Act is plain that, subject to section 6, a public entity has an obligation to facilitate access to information it holds. Section 6(1) stipulates the limitations of access to information, subject to Article 24. Grounds for limitation enumerated in that section include inter alia national security, while section 6(2) expounds on national security interests.
52. The Respondents contend that the information sought is confidential and may not under Section 15 of the Act be disclosed. My view is that the question as to whether the information sought is confidential and should not be disclosed cannot be dealt with in this Application as it goes to the merit of the Petition.
53. The AIA provides stipulates the procedure for request to access to information held by an entity, whether public or private. The provisions of Section 14 of the AIA provide a remedy, where an application for information is rejected as follows:
 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.

54. Section 23(3) of the Act provides for appeal of the decision of the Commission on Administrative Justice (CAJ) to the High Court:

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.

55. It is easily discernible from the above provisions that the Act has provided an elaborate procedure to be followed, in the event an application for access to information is rejected. To begin with, an application will only be deemed to have been rejected if no response is received within 21 days. Thereafter an applicant is to apply within 30 days to the CAJ for a review of the rejection of the application for information. A person aggrieved by the decision of the CAJ may then appeal to the High Court within 21 days of the date of the decision.

56. In seeking information from the 1st Respondent, the Petitioners were required to follow the procedure stipulated in Sections 8 and 9 of the AIA. The Petitioners claim that they sought the information which was declined. They have not however told the Court that they then followed the very clear remedial provisions by appealing to the Commission on Administrative Justice in the manner contemplated in the Act. The Petitioners ought to have sought redress with the Commission before coming to this Court. Put differently, the Petitioners ought to have exhausted the stipulated avenues for resolving the dispute, before approaching this Court. In this regard, I concur with the holding in *Coast Legal Aid & Resource Foundation (CLARF) v Coast Water Board Services & 2 others* [2021] eKLR, where, Ogola, J stated:

Even supposing the 1st Respondent had declined to give the Petitioner the information required after request, the Petitioner still had to exhaust all the avenues of dispute resolution mechanism under the *Access to information Act* before approaching this Court by way of a constitutional Petition. Section 14 of the Act provides 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.

57. Similarly, in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, the Court of Appeal had this to say about the doctrine of exhaustion:

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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.



58. For this Court to assume jurisdiction by by-passing the dispute resolution mechanism provided under statute, it must be demonstrated that special circumstances exist to warrant such action by the Court. For instance, where there is a clear abuse of discretion, arbitrariness, malice, capriciousness and disrespect of the rules of natural justice. In the present case however, the Petitioners have not demonstrated or even stated that any special circumstances exist to warrant a departure from the procedure set out in the AIA under which they sought the information in question.
59. Having carefully considered the Application, responses, submissions, *the Constitution* and the law, I determine that the Application dated 8.9.21 is merited and is hereby granted with the result that the Petition dated 7.6.21 is hereby struck out with costs.

DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JANUARY 2023

.....

M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioners**

.....**for the Respondents**

.....**Court Assistant**

