



Gatarakwa Farmers Company Limited & 3 others v Attorney General & 12 others (Petition 3 of 2021) [2023] KEELC 17690 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17690 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
PETITION 3 OF 2021**

**AK BOR, J
APRIL 26, 2023**

BETWEEN

**GATARAKWA FARMERS COMPANY LIMITED 1ST PETITIONER
SIRIMA LIMITED 2ND PETITIONER
NDUNGU GICHERU 3RD PETITIONER
KIIRU GACHUIGA 4TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
DISTRICT COMMISSIONER KIENI WEST DISTRICT 2ND RESPONDENT
DISTRICT OFFICER GATARAKWA DIVISION 3RD RESPONDENT
ASISTANT CHIEF LAMURIA SUB-LOCATION, REBECCA NYANGUI
MUHANG'I 4TH RESPONDENT
DEPUTY COUNTY COMMISSIONER LAIKIPIA CENTRAL
DISTRICT 5TH RESPONDENT
CHIEF, THIRIMA LOCATION CHARLES NDERITU WAHOME 6TH
RESPONDENT
ROBERT RUHENI MATHENGE 7TH RESPONDENT
THE GOVERNMENT OF LAIKIPIA COUNTY 8TH RESPONDENT
LAND REGISTRAR, LAIKIPIA COUNTY 9TH RESPONDENT
LAIKIPIA VOCATIONAL TRAINING INSTITUTE (SUED THROUGH:
EPHRAIM MWANGI WACHIRA, JOHN GICHONI WARUI, TITUS NDUMIA
AND PRISCILLA WANGECI WACHIRA) 10TH RESPONDENT**



MWANGI MUREITHI 11TH RESPONDENT
REGISTRAR OF COMPANIES 12TH RESPONDENT
NATIONAL LAND COMMISSION 13TH RESPONDENT

RULING

1. The Petitioners brought the application dated 15/6/2022 seeking to have the Registrar of Companies and the National Land Commission (NLC) joined to these proceedings as the 12th and 13th Respondents respectively.
2. They also seek an order to compel the Attorney General to supply to them the original titles in respect of the following parcels of land whose total acreage is 85,843 acres: land reference number (L.R No.) 6313, L.R No.6357, L.R No. 2531, L.R No. 6312, L.R No. 3312, L.R No. 6355, L.R No. 9484, L.R No. 2616, L.R No. 2621, L.R No. 2621, L.R No. 7321, L.R No. 9423, L.R No. 9424/2, L.R No. 2580, L.R No. 2581, L.R No. 4725/2, L.R No. 3358, L.R No. 3359, L.R No. 3363, L.R No. 9515, L.R No. 3362, L.R No. 11988 and L.R No. 2620. They indicated that further particulars of these were supplied by the Petitioners at pages 85 to 87 of the exhibits accompanying the supporting affidavit of the late Ndungu Gicheru, sworn on 28/5/2009, filed in support of the original petition.
3. Further, they seek to have the Attorney General give correspondence of the Petitioners touching on dealings with the properties listed above up to 9/6/1986; an inventory of the moveable assets described at pages 92 to 96 of the same exhibits; all particulars of the Petitioners' bank accounts and bank statements in respect of the banks mentioned at pages 126 to 128 of the exhibits as at 9/6/1986 as well as those of the time the State finished distributing the Petitioners' land amongst its current owners; ledgers and journals evidencing dealings with the Petitioners' assets from 10/6/1986 when they were and have been under State control; and an account of how the immoveable properties were subdivided and distributed among the shareholders and the State itself.
4. Further, they seek an account of the monies received by the State from the extraction of stones and their conversion into material from the parcel of land known as Uaso Nyiro/Sunguroi/Block VI/3027 for tarmacking the Nyeri Nyahururu Road; an account of all proceeds of sale of the moveable assets of the Petitioners on the suit properties as of 10/6/1986; the original instrument setting up the F. Mwangi Committee on Gatarakwa Farmers Company Limited ("the Mwangi Probe Committee") and all minutes of the Committee from the date of appointment on 10/6/1986 up to disbandment; a list of the Petitioners' documents which the State has been holding since 10/6/1986 and their copies; all maps and other documents touching the subdivision of the farms mentioned above; and all documents evidencing dealings with the Petitioners' moveable and immoveable properties from the time the Mwangi Probe Committee was appointed to the time it was disbanded.
5. Prayer number 3 of the application seeks to have the 9th Respondent ordered to supply to the Petitioners the following documents forthwith: Ewaso Nyiro/Sunguroi Block VI/1550 (10.27 ha.), Ewaso Nyiro/II Pejeta Block I/1205 (154.23 ha.), Ewaso Nyiro/II Pejeta Block I/1206 (49.12 ha.), Ewaso Nyiro/II Pejeta Block I/952 (49.64 ha.), Ewaso Nyiro/Sunguroi Block VI/305 (40 acres), Ewaso Nyiro/Sunguroi Block I/1088 (20 acres), Ewaso Nyiro/Sunguroi Block I/1089 (20 acres), Ewaso Nyiro/Sunguroi Block I/1095 (5 acres), Ewaso Nyiro/Sunguroi Block V/421-425(116 acres), Ewaso Nyiro/Sunguroi Block V/443-444 (16 acres), Ewaso Nyiro/Sunguroi Block V/707-709 (48 acres), Ewaso Nyiro/II Pejeta Block I/1209 (56 acres), Ewaso Nyiro/Sunguroi BL II/741, Ewaso Nyiro/Sunguroi BL III/236, 757, Ewaso Nyiro/Sunguroi BL IV/216, Ewaso



Nyiro/Sunguroi BL V648, 956, 960, Euwaso Nyiro/Sunguroi BL IV/45, 318, 997, Euwaso Nyiro/Sunguroi BL VII/305 (40 acres), Euwaso Nyiro/Sunguroi BL 1/1088 (20 acres), Euwaso Nyiro/Sunguroi BL 1/1089 (20 acres), Euwaso Nyiro/Sunguroi BL 1/1095 (5 acres), Euwaso Nyiro/Sunguroi BL V/111 (8 acres), Euwaso Nyiro/Sunguroi BL V/421 (116 acres), Euwaso Nyiro/Sunguroi BL V/443-444 (116 acres), Euwaso Nyiro/Sunguroi BL I/707-709 (48 acres), Euwaso Nyiro/Sunguroi BL I/1205 (380 acres), Euwaso Nyiro/Sunguroi BL I/1209 (56 acres), Euwaso Nyiro/Sunguroi BL VI/952 (122 acres), Euwaso Nyiro/Sunguroi BL VI/1551 (21 acres), Euwaso Nyiro/Sunguroi BL VI/1550 (24 acres), Euwaso Nyiro/Sunguroi BL IV/935 (10 acres), Euwaso Nyiro/Sunguroi BL VI/616 (8 acres), Euwaso Nyiro/Sunguroi BL IV/282(28 acres), Euwaso Nyiro/Sunguroi BL VI/94 (90 acres) and Euwaso Nyiro/Sunguroi BL I/190 (2 acres).

6. Additionally, under prayer 3, the Petitioners seek to have the 9th Respondent ordered to supply them with documents listed in a schedule entitled “ utility” with three rows indicating the map, plot number and purpose under which they listed maps, plot numbers and gave their purpose as follows: Euaso Nyiro/Suguroi/Block V (Sirima): 254-water point, 697-nursery School, 653- water point, 253-church, 260-Primary school, 256-church, 255-nursery school, 965-church, 966-Nursery School, 944-Church, 850-Sirima Secondary School, 951-Church, 952-Church, 953-Water point, 954-Dairy, 664-Trading Centre, 421-444-Forest, 707-709-Forest, 711-Church & Nursery School, 1068-Church, 1075-Withare Primary School, 905-Church, 1211-Tree Nursery, 628-Church & Nursery School, 1022-Dam, 1076-Nursery School & Church, 734-Tree Nursery, 1199-Church & Nursery School, 1203-Church, 1204-Tree Nursery, 1207-Nursery School, 1089-Tree Nursery, 905-Church, 952-Afforestation, 948-Cattle Dip, 616-Water point, 617-Church, 618-Church, 619-Trading Centre, 620-Church, 621-Nursery School, 622-Borehole, 623-Cattle Dip, 624-Nursery School, 625-Church Nursery School, 627-Water point, 632-Church, 604-605-Tree Nursery, 606-7-Church, 608-Kijabe Primary School, 609-Water Point, 610-Church, 611-Water Point, 612-Church & Nursery School, 631-Church & Nursery School, 613-Cattkle Dip, 614-Holding Ground, 629-Church. Euaso Nyiro/Suguroi Block VI (Ngobit): 186-Church, 185-Nursery School, 182-Ngobit Secondary School, 183-Church, 177-Ngobit Primary School, 935-Village Polytechnic, 1551-Hospital, 189-Dip, 633-Church & Nursery Sch., 616-Afforestation, 308-Ruai Primary Sch., 974-Dip & Holding Ground, 318-Market School, 308-Ruai Primary Schoo., 44-Dip, 45-Market. Euaso Nyiro/Suguroi Block VI (Ngobit I): 94-Nyambugichu Pri-Sch., 798-Dam, 977-Makutano Market, 200-Water point, 186-Church, 308-Ruai Primary Sch. Euaso Nyiro/Suguroi Block VII (Ngobit I): 305-Afforestation, 132-Dam, 278-Rutunguru Primary Sch., 235-Dam, 164-Market & Trading Centre, 278-Rutunguru Primary Sch. Euaso Nyiro/Suguroi Block VIII (Ngobit III): 13-Nursery School, 36-Kariguini Primary Sch., 422-Dam. Euaso Nyiro/Suguroi Block IV (Sigira): 246-Water Point, 248-Nursery School, 252-Church, 138-Primary School, 142-Swamp & Dam, 276-Church & Nursery School. Euaso Nyiro/Suguroi Block III (Suguroi Estate)757-Trading Centre, Euaso Nyiro/Suguroi Block II (Suguroi Estate): 288-Church, 209-Water Point. Euaso Nyiro/Suguroi Block I (Gatarakwa II): 1066-Dam, 749-Nursery School, 807-Church, 1088-Afforestation and 1089-Afforestation.
7. The Petitioners also sought to have the 12th Respondent supply them with the memorandum and articles of association of Gatarakwa Farmers Company Limited; documents pertaining to incorporation of that company; returns of allotment of shares; annual returns of shares between 1973 and 1986; notice of change of directors filed between 1973 and 1986; copies of all letters exchanged by the Registrar with Gatarakwa Farmers Limited between 1973 and 2021; Memorandum and Articles of Association of Sirima Limited; documents pertaining to the incorporation of that company; returns of allotment of shares; annual returns of shares between 1973 and 1986; notice of change of directors filed between 1973 and 1986; copies of all letters exchanged by the Registrar with Sirima Limited between



1973 and 2021; and all correspondences exchanged by the Petitioners with the Registrar of companies between 1973 and 2001.

8. Under prayer number 5 of the application, the Petitioners sought to have the 13th Respondent supply them with the following documents: Ewaso Nyiro/Sunguroi Block VI/1550 (10.27ha.), Sunguroi Block VI/935 (4.12 ha.), Euwaso Nyiro/Sunguroi Block VIII/319 (21.34 ha.), Ewaso Nyiro/II Pejeta Block I/1205 (154.23 ha.), Ewaso Nyiro/II Pejeta Block I/1206 (49.12 ha.), Ewaso Nyiro/II Pejeta Block I/952 (49.64 ha.), Euwaso Nyiro/Sunguroi Block VI/305 (40 acres), Euwaso Nyiro/Sunguroi Block I/1088 (20 acres), Euwaso Nyiro/Sunguroi Block I/1089 (20 acres), Euwaso Nyiro/Sunguroi Block I/1095 (5 acres), Euwaso Nyiro/Sunguroi Block I/1089 (20 acres), Euwaso Nyiro/Sunguroi Block I/1095 (5 acres), Euwaso Nyiro/Sunguroi Block V/421-425(116 acres), Euwaso Nyiro/Sunguroi Block V/443-444 (16 acres), Euwaso Nyiro/Sunguroi Block V/707-709 (48 acres), Euwaso Nyiro/II Pejeta Block I/1209 (56 acres), Euwaso Nyiro/Sunguroi BL II/741, Euwaso Nyiro/Sunguroi BL III/236, 757, Euwaso Nyiro/Sunguroi BL IV/216, Euwaso Nyiro/Sunguroi BL V 648, 956, 960, Euwaso Nyiro/Sunguroi BL IV/45, 318, 997, Euwaso Nyiro/Sunguroi BL VII/305 (40 acres), Euwaso Nyiro/Sunguroi BL 1/1088 (20 acres), Euwaso Nyiro/Sunguroi BL 1/1089 (20 acres), Euwaso Nyiro/Sunguroi BL 1/1095 (5 acres), Euwaso Nyiro/Sunguroi BL V/111 (8 acres), Euwaso Nyiro/Sunguroi BL V/421 (116 acres), Euwaso Nyiro/Sunguroi BL V/443-444 (116 acres), Euwaso Nyiro/Sunguroi BL I/707-709 (48 acres), Euwaso Nyiro/Sunguroi BL I/1205 (380 acres), Euwaso Nyiro/Sunguroi BL I/1209 (56 acres), Euwaso Nyiro/Sunguroi BL VI/952 (122 acres), Euwaso Nyiro/Sunguroi BL VI/1551 (21 acres), Euwaso Nyiro/Sunguroi BL VI/1550 (24 acres), Euwaso Nyiro/Sunguroi BL IV/935 (10 acres), Euwaso Nyiro/Sunguroi BL VI/616 (8 acres), Euwaso Nyiro/Sunguroi BL IV/282(28 acres), Euwaso Nyiro/Sunguroi BL VI/94 (90 acres) and Euwaso Nyiro/Sunguroi BL I/190 (2 acres).
9. The Petitioners also sought the 13th Respondent to supply them with documents for public utility relating to: Euwaso Nyiro/Suguroi/Block V (Sirima): 72- dip and holding ground, 259- church, 254-water point, 697-Nursery School, 653-Water Point, 253-church, 260-Primary school, 256-Church, 255-Nursery School, 965-Church, 966-Nursery School, 944-Church, 850-Sirima Secondary School, 951-Church, 952-Church, 953-Water point, 954-Dairy, 664-Trading Centre, 421-444-Forest, 707-709-Forest, 711-Church & Nursery School, 1068-Church, 1075-Withare Primary School, 905-Church, 1211-Tree Nursery, 628-Church & Nursery School, 1022-Dam, 1076-Nursery School & Church, 734-Tree Nursery, 1199-Church & Nursery School, 1203-Church, 1204-Tee Nursery, 1207-Nursery School, 1089-Tree Nursery, 905-Church, 952-Afforestation, 948-Cattle Dip, 616-Water point, 617-Church, 618-Church, 619-Trading Centre, 620-Church, 621-Nursery School, 622-Borehole, 623-Cattle Dip, 624-Nursery School, 625-Church Nursery School, 627-Water point, 632-Church, 604-605-Tree Nursery, 606-7-Church, 608-Kijabe Primary School, 609-Water Point, 610-Church, 611-Water Point, 612-Church & Nursery School, 631-Church & Nursery School, 613-Cattkle Dip, 614-Holding Ground, 629-Church. Euaso Nyiro/Suguroi Block VI (Ngobit): 186-Church, 185-Nursery School, 182-Ngobit Secondary School, 183-Church, 177-Ngobit Primary School, 935-Village Polytechnic, 1551-Hospital, 189-Dip, 633-Church & Nursery Sch., 616-Afforestation, 308-Ruai Primary Sch., 974-Dip & Holding Ground, 318-Market School, 308-Ruai Primary Schoo., 44-Dip, 45-Market. Euaso Nyiro/Suguroi Block VI (Ngobit I): 94-Nyambugichu Pri-Sch., 798-Dam, 977-Makutano Market, 200-Water point, 186-Church, 308-Ruai Primary Sch. Euaso Nyiro/Suguroi Block VII (Ngobit I): 305-Afforestation, 132-Dam, 278-Rutunguru Primary Sch., 235-Dam, 164-Market & Trading Centre, 278-Rutunguru Primary Sch. Euaso Nyiro/Suguroi Block VIII (Ngobit III): 13-Nursery School, 36-Kariguini Primary Sch., 422-Dam. Euaso Nyiro/Suguroi Block IV (Sigira): 246-Water Point, 248-Nursery School, 252-Church, 138-Primary School, 142-Swamp & Dam, 276-Church & Nursery School. Euaso Nyiro/Suguroi Block III (Suguroi Estate)757-



- Trading Centre, Euaso Nyiro/Suguroi Block II (Suguroi Estate): 288-Church, 209-Water Point. Euaso Nyiro/Suguroi Block I (Gatarakwa II): 1066-Dam, 749-Nursery School, 807-Church, 1088-Afforestation, 1089-Afforestation. The last prayer is for the costs of the application to be provided for.
10. The application was made on the grounds that the Court of Appeal held in Civil Appeal No. 156 of 2013 *Elizabeth Wambui v KURA & 27 Others* that under the country's Torrens system of land registration embodied in the repealed Registration of Titles Act, the repealed Registered *Land Act* and now the Registration of *Land Act* 2012, the State is the custodian of land documents and guarantees title.
 11. The Petitioners referred to Article 232 of *the Constitution* and urged that public officers like the Attorney General and the intended Defendant (sic) were mandated by *the Constitution* to be impartial but that they had chosen to be partisan in the production of documents touching the suit properties thereby by extension being an agent of the Plaintiff (sic) in an adversarial system of justice.
 12. They also referred to Article 35 of *the Constitution* which was interpreted in *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company Ltd and 2 others* [2013] eKLR to mean this court had power to order that the State supplies to the Defendant/applicant documents required to enforce his rights. They added that under both the Registration of Titles Act and the *Land Registration Act*, the State was obliged to supply to the applicant the documents sought and that it was in the interest of justice that the orders sought be granted.
 13. The application was supported by the affidavit of Peter Murage sworn on 17/6/2022 in which he deponed that he is a member of the Board of Directors of the 1st Petitioner. He averred that on 13/5/2022, the Petitioners requested the Attorney General to supply the documents listed in this application and that on the same day, the Petitioners served on the 9th Respondent a copy of a request to be supplied with documents described in the application. Further, that the Petitioners also served on the intended 12th and 13th Respondents requests for documents.
 14. The 1st to 6th, 9th, 10th and 12th Respondents filed Grounds of Opposition on 22/11/2022 in which they urged that the application was fatally and incurably defective. They contended that the 3rd and 4th Petitioners had not established their authority to sue on behalf of the company and that the application was filed without due authority from the 1st and 2nd Petitioners who are non-existent entities. Further, that there is no resolution from the 1st and 2nd Petitioner companies approving the filing of this application and or appointing Kamau Kuria & Company Advocates to institute this application on behalf of the Petitioners. They challenged the authority of Peter Murage to swear the supporting affidavit.
 15. They maintained that the Applicants could not be issued with the original title deed documents belonging to public entities because the Cabinet Secretary for National Treasury and Planning was the custodian of such documents which are not held by the 9th Respondent.
 16. The Honourable Attorney General (the AG) urged that *the Constitution* imposed an obligation on public officers to provide open access to specific information as people may require and the Respondents had endeavored to do so through platforms like the E-Citizen. Further, that some of the documents that are the subject of the application were documents which the Applicants could retrieve easily and the court should take judicial notice of that fact. The AG mentioned that the applicants could get the documents in paragraph 4 of the application through the Petitioners E- Citizen account, if the company exists. Further, that the documents were not public documents with the meaning of Section 79 of the *Evidence Act*.



17. The Respondents contended that the court had directed the Petitioners to apply for the maps in paragraph 13 of the application from the Director of Surveys upon payment of the facilitation fee and thereafter file the documents in court but they did not do as directed. They contended that paragraph 14 (3) and (5) of the application listed parcels of land and their acreage without listing the documents sought.
18. They maintained that the Petitioners had no case against the Respondents and were on a fishing expedition having filed a petition without any documents to support their claims. They added that the Petitioners were trying to build their case by blaming and harassing the Respondents for documents. They averred that the Attorney General and other Government institutions sued in the petition were Respondents in this case and as such, they have to respond to the petition in the best way possible to defend themselves and that the AG was not therefore being partial as alleged by the Petitioners.
19. The court directed parties to file written submissions. In their filed written submissions, the Petitioners stated that the application was brought under Article 35 of *the Constitution*, Order 51, Rules 1, 2 and 3 of the Civil Procedure Rules and Section 4 of the *Access to Information Act*. They relied on *Punch Nigeria Ltd v Attorney General 1996 Commonwealth Human Rights Law Digest 46* on the point that where a party fails to controvert an affidavit supporting an application against it, it is deemed to have accepted the facts supporting that application. They took issue with the Respondents' failure to file an affidavit and relied on *Kariuki Gathitu v Attorney General (2011) eKLR*, and contended that the court will take the allegations against the Respondents as representing the factual position where there is no reply. They reiterated the values of public service contained in Article 232 of *the Constitution*.
20. The Petitioners contended that under Article 35 of *the Constitution* as interpreted in *Nairobi Law Monthly Company Ltd v Kenya Electricity Company Limited and 2 Others [2013] eKLR*, this court had power to order the State to supply the documents the Petitioners require to enforce their rights.
21. On the proposed joinder of parties, the Petitioners submitted that pursuant to Rule 5 (d) and (e) of the Mutunga Rules, and at any stage of the proceedings, the court had jurisdiction even on its own motion, to join parties who were likely to be affected as respondents on terms that appear just. They added that the rule of law demands that a party be heard before any adverse determination is made against him.
22. The Petitioners submitted that the law is that where a party is enforcing his rights under Articles 22 and 23 of *the Constitution*, the court has power to make such orders as will enable the party get an effective remedy. They mentioned that they were enforcing their rights under Article 35 of *the Constitution* which guarantees every citizen the right of access to information held by the State and information held by another person required for the exercise or protection of any right or fundamental freedom. It also requires the State to publish and publicize important information affecting the nation. They elaborated that that provision was modeled on Article 32 of the South African Constitution which guarantees everyone the right to any information held by the State or another person which is required for the exercise or protection of any right.
23. The Petitioners relied on the South African decision in *Brummer v Minister for Social Development and Others Case CCT 25/19 (2009) ZACC 21* where the South African Court discussed the right of access to information and observed that Constitution demanded that transparency must be fostered by providing the public with timely, accessible and accurate information. Further, that the access to information was fundamental to the realisation of the rights guaranteed in the bill of rights.
24. The Petitioners relied on Section 4 of the *Access to Information Act* which they reproduced. They cited the decisions in *Narok ELC Petition No. 380 of 2017: Koeleken Sandiko & 2 Others v Attorney General & Others* and *Mombasa Constitutional Petition No. E032 of 2021: Khelif Khalif & Another*



- v Principal Secretary, Ministry of transport and Others. They urged that in the latter case the court stated that the failure to take a decision in the context of that Act migrated into a refusal of the request. Further, that the mere request for information held by a public body obliged the public officer to produce it or justify withholding it. The court added that public bodies had a constitutional duty to give people access to information so that they can exercise their rights.
25. The Petitioners contended that they were enforcing the right to property which is protected by Article 40 of *the Constitution*. They argued that courts have given decisions and held that the State could not take away property rights of a land owner without adhering to the law that governed compulsory acquisition of properties.
 26. The Petitioners relied on an Article titled “Democracy and Access to Information in the South African Constitution, Some Reflections by Lady Justice Kate O’Regan” in which her Ladyship argued that the right to information had to be viewed against the concept of democracy described by *the Constitution* and that it served two purposes, firstly to enable citizens get information to enable them form options and secondly, to compel the government to be accountable to the governed.
 27. The Petitioners argued that a grant by the State in respect of land constituted a binding contract between the State and the individual. They relied on the decision in *Fletcher v Peck* – 10 U.S 87 [1810].
 28. The main issues for determination in this application are firstly, whether the court should join NLC and the Registrar of Companies as parties to the suit and secondly, if the court should order the Respondents to supply the documents sought by the Petitioners. The Petitioners seek to join the Registrar of Companies and NLC as the 12th and 13th Respondents in the petition. They also seek to have these parties compelled to supply them documents listed in the application. At this point in time, it is only reasonable to add the two Respondents to the petition and the Petitioners will be at liberty to request the two parties to supply the documents after they join the proceedings.
 29. To address the second issue, it is useful to have the background of the petition. The Petitioners claim as can be discerned from the Amended Amended Petition dated 26/3/2022, is that between June 1986 and 2002, the Government was in possession of the suit properties through the Mwangi Probe Committee which was chaired by the then Provincial Commissioner for Central Province Mr. Fred E O Mwangi. That in 1988 the Mwangi Probe Committee published a report of its work spanning between 1986 and 1988. The Petitioners gave the history of how they bought farms where dairy cows were kept and wheat among other crops were grown. Their contention is that the Government of Kenya compulsorily acquired part of their land in 1986 for the construction of the Nyeri Nyahururu highway among other public utilities. They also contend that the Late Retired President Moi dissolved the 1st Petitioner’s board of directors and appointed a Commission to run its farm which had movable property.
 30. They contend that contrary to Section 75 of old Constitution, their property was compulsorily taken away including the Petitioners’ records. They also claim that while in possession of the Petitioners farms, the Government subdivided the land and distributed it to shareholders and non-shareholders. That since 1986, the Government has remained in possession of 286 acres of the Petitioners’ land. They also fault the Government for taking over the management of the Petitioners business including the farms. They gave a list of the parcels of land which were transferred to the Government including those said to have been into use for public utilities.
 31. The prayers sought in the petition include a declaration that the entry of the Government into the Petitioners’ land in 1986 and subdivision of the land and setting aside of 286 acres for public utility contravened the rights of the Petitioners under Section 75 of *the Constitution*. Further, they seek a



- declaration that the rights of the 3rd and 4th Petitioners under Section 72 of *the Constitution* were contravened on 10/6/1986 when they were held for 10 hours.
32. They seek to have the AG account for the 1st Petitioners' movable properties and a declaration that the Government holds the parcels of land in trust for the 1st and 2nd Petitioners, which should be transferred to the Petitioners. They also seek compensation for loss of user of the land registered in the Government's name and to be paid Kshs. 230,000,000/= as the value of chattels. Additionally, they seek vacant possession of some parcels of land and a declaration that the 8th to 11th Respondents have committed the tort of trespass to land. The Petitioners also seek general and special damages against the Respondents.
 33. The application is grounded on Article 35 of *the Constitution* and the *Access to Information Act*, both of which confirm that a person should not be denied access to information in the possession of the State or another person required for exercise or protection of a right or fundamental freedom guaranteed in *the Constitution*. The date of commencement for the *Access to Information Act*, enacted to give effect to Article 35 of *the Constitution* was 21/9/2016. The petition was initially filed in 2009. The reliefs sought in the petition fall under the pre- 2010 Constitution.
 34. Section 3 of the *Access to Information Act* gives the main objective of the Act as to give effect to the citizen's right to access information enshrined in Article 35 of *the Constitution*. The other objects are to provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; to provide a framework to facilitate access to information held by private bodies in compliance with any right protected by *the Constitution* and any other law; to promote routine and systematic disclosure of information by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; to provide protection for persons who disclose information of public interest in good faith; and to provide a framework to facilitate public education on the right to access information under that Act.
 35. Section 4 expounds on what the right entails. A citizen has the right to access information held by the State or by another person where the information is required for the exercise or protection of a right or fundamental freedom. Section 5 gives the nature of the information which a public entity is to facilitate access to and includes the particulars of the organization, its functions and duties, the powers exercised by its officers, the procedure followed in the decision making procedure and a guide sufficient to enable any person wishing to apply for information under the Act to identify the classes of information held by it, the subjects to which they relate and the location of any indexes to be inspected by any person. The duty placed on a public entity to facilitate access to information held by it including those specified in Section 5 (1) (a) (i) to (vii) came into force a year later, which would be on 20/9/2017.
 36. While opposing the application, the AG intimated that some of the information sought by the Petitioners can be retrieved from the E-citizen platform. Section 5 (3) (c) of the Act allows information to be made available on the internet if the materials are held by the authority in electronic form. Based on this provision, the Petitioners ought to retrieve the information that is available on the E-citizen and that information will be deemed to have been provided under Section 5 (3) (c) of the Act.
 37. The original titles sought in the application may be held by the registered owners. The Petitioners can conduct searches at the Lands Office for copies of those titles. The maps can be bought from the Survey Department. It is not clear why the Petitioners did not seek the documents from the relevant Government offices.



38. Some of the documents sought by the Petitioners such as particulars of banks, bank accounts and statements are not public records and ought to be given by the banks in question.
39. Prayer 3 of the application merely gives land references, sizes and public purposes without specifying the particular records relating to those parcels of land required. The same case applies to prayer number 5 of the application.
40. The limitations to the right to information are given at Section 6 of the Act. Section 7 designates the chief executive officer of a public entity or an officer he or she delegates to, as an enforcement officer for purposes of the Act. The manner in which the application to access to information is to be made is set out in Section 8, which requires the applicant to provide details and particulars that will enable the public officer understand the information sought. Section 9 enjoins a public officer to make a decision on the application as soon as possible and not later than 21 days after receiving the application to access the information. Where the information is held by another public entity, the information access officer may within 5 days of receiving the application transfer it or part of it to the public entity holding the information under Section 10 of the Act.
41. Part IV of the Act gives the Commission on Administrative Justice (CAJ) power to review decisions of a public or private officer in relation to a request to access information where the officer refuses to grant information, or purports to decide to grant the information, defers the decision or the other specified reactions. The procedure for applying for review to the CAJ is also provided under the Act.
42. Section 17 not only enjoins every public entity to keep and maintain accurate records that have integrity and are useable, but to keep the records in a manner which facilitates the right of access to information. The Section sets the bare minimum for a person or the State to be deemed to have complied with the duty to maintain records and among other things, requires an entity to computerize its records and information management systems to facilitate efficient access to information within three years of the date the Act begins to apply to it
43. A reading of the [Access to Information Act](#) leaves no doubt that it is a complete code encompassing the whole procedure for enforcing the right to access information enshrined in [the Constitution](#). The Act specifies the nature of the right, the information to be accessed and the mode of pursuing that right. CAJ oversees the enforcement of the Act and is mandated by Section 21 to investigate violations of the right to access information. The Petitioners disregarded the provisions of that Act.
44. Looking at the right to access information guaranteed by Article 35 of [the Constitution](#) whose essence is to enable a citizen enforce a right or fundamental freedom, it is apparent that it presupposes situations where the request to access information is made before filing the petition to enforce a right or fundamental freedom under the 2010 Constitution. This petition was filed prior to the promulgation of the 2010 Constitution and mainly seeks to enforce rights to property and liberty under Sections 75 of the pre-2010 Constitution.
45. [The Constitution](#) of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 which were in force then did not provide how a party was to obtain documents required to enforce the fundamental right or freedom. Section 2 of the [Civil Procedure Act](#) defines a suit to mean all civil proceedings commenced in any manner prescribed.
46. Hearing of constitutional petitions are currently governed by [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Part II of the rules prescribes the procedure for instituting court proceedings where a right or fundamental freedom in [the Constitution](#) is violated, infringed or threatened. It gives the details which a petition should disclose



- including the petitioner's details, facts relied on, constitutional provision violated, nature of injury caused and reliefs sought. The Rules do not deal with request for documents from the opposing party but simply requires documents to be annexed to the supporting affidavit or the petition if a party wishes to rely on any document. The rules allow parties to file further information at any stage of the proceedings with the leave of the court.
47. A petition to enforce a right or fundamental freedom under *the Constitution* falls under the realm of civil proceedings to which the *Civil Procedure Act* would apply as well as the *Evidence Act*. A party who requires documents from the other party in the suit therefore has to invoke the provisions under the two Acts governing the production of documents. For instance, Section 69 of the *Evidence Act* provides for issuance of a Notice to produce a document and the consequences for failing to produce the documents requested, while Order 16 of the Civil Procedure Rules allows the summoning of witnesses to produce documents.
 48. The court notes that some of the documents sought by the Petitioners date back to 1973 and 1986, almost 50 years ago. The *Records Disposal Act* and the Public Archives and Documentations Service Act come into play since the documents the Petitioners seek may well have been disposed of by now. Section 2(2) of the *Records Disposal Act* gives the AG the discretion, after consulting the CAJ and the Kenya National Archives and Documentation Service, to make rules to provide for the disposal by destruction or otherwise of such records, books and papers belonging to or being in the custody of the Registrar General which he considers to be of no further use or unworthy of being permanently preserved. The definition of Registrar General includes the Official Receiver and the Registrar of Companies, from whom the Petitioners sought documents.
 49. The Petitioners contend that they seek public documents from the Respondents. The definition of public records under the *Public Archives and Documentation Service Act* includes records of ministries or Government departments, of any commission or establishment under the Government. Under Section 15 of that Act, the Minister was to make Regulations providing for the examination, disposal or destruction of public archives and records.
 50. Section 7 of that Act was amended in 2016 to require the approval of the Minister and consultation with CAJ before the Director authorizes the destruction or other disposal of public archives or records where the Director is of the opinion that any public archives or records should not be preserved. The public entities would develop Records Retention and Disposal Schedules giving timelines on how long records can be kept before disposal either through transfer to the National Archives or their actual destruction.
 51. The Petitioners have not demonstrated that the documents they sought are still held by the AG. A good place to search would be the database of the National Archives to establish whether the documents relating to the Mwango Probe Committee and the other documents relevant to their claim were transferred by the AG to the National Archives.
 52. The court is not persuaded that the proper procedure for the Petitioners to obtain documents from the Respondents for purposes of enforcing their right to property is by filing an application under Article 35 of *the Constitution* in an existing petition. In this court's view, a breach of the right to access information founds an independent claim to be enforced separately and distinctly. Once the information is provided, then it can be used to enforce a right or fundamental freedom enshrined in *the Constitution*.
 53. The court allows prayer 1 of the application dated 15/6/2022. The Registrar of Companies and the National Land Commission will be joined to this petition as the 11th and 12th Respondents respectively.



The Petitioners withdrew the claim against the 11th Respondent. The Petitioners are directed to serve copies of all the pleadings on these Respondents.

54. The court declines to grant the other prayers sought in the application dated 15/6/2022. The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 26TH DAY OF APRIL 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Karanja Munyori for the Petitioners

Ms. Mumbi Kiarie for the 1st to 6th, 9th, 10th and 12th Respondents

Ms. Diana Kemboi - Court Assistant

No appearance for the other Respondents

