



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.446 OF 2019

DR. CHRISTOPHER KARITU.....PETITIONER

VERSUS

VETERINARY MEDICINES DIRECTORATE.....1<sup>ST</sup> RESPONDENT

DR.NAPHTAL MWANZIKI.....2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

JUDGMENT

**The Petition**

1. The petitioner filed a petition dated 5<sup>th</sup> November 2019 for the alleged contravention of Articles 19, 20, 21, 22, 23, 33(1) (a), 35(1)(a), 258 and 259 of the Constitution.

He seeks the following orders: -

- i. A declaration that the petitioner's fundamental rights and freedoms as enshrined under Article 33(1)(a) and 35(1)(b) of the Constitution of Kenya have been contravened and infringed upon by the 1<sup>st</sup> and 2<sup>nd</sup> respondents by their refusal to give the petitioner the information he requested vide the letter dated 13<sup>th</sup> August 2019;**
- ii. A declaration that the petitioner is entitled to the payment of damages and compensation by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for violation of his fundamental human rights and freedoms as provided under Articles 33(1)(a) and 35(1)(a) of the Constitution;**
- iii. The Court to assess the quantum of damages and compensation to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> respondents;**
- iv. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to release all the documents requested for in the letter dated 13<sup>th</sup> August 2019 within 30 days and more particularly the following documents;**
  - a. Letter of Appointment as Ag. Chief Executive Officer from the VMD Council to Dr. Nathan Songok.**
  - b. Letter of removal from the VMD Council to the Ag. CEO, Dr. Nathan Songok.**
  - c. Letter of appointment as Ag. CEO from the VMD Council to Dr. Naphtal Mwanziki.**
  - d. Letter from Permanent Secretary (PS) livestock requesting VMD Council to find a suitable replacement for the outgoing Ag. CEO of VMD, Dr. Nathan Songok.**
  - e. Letter from the VMD Council to the PS livestock forwarding names of suitable replacement for the outgoing Ag.**

CEO of VMD, Dr. Songok.

- f. Letter from the PS livestock appointing Dr. Naphtal Mwanziki as Ag. CEO of VMD.**
  - g. Letters from the PS Livestock directing VMD to transfer money to KMC.**
  - h. Minutes of the VMD Council meeting resolving not to transfer the money to KMC.**
  - i. Letters of reprimand to the VMD Council Chairperson from the PS livestock for defying his unlawful orders to the Council.**
  - j. Minutes of the VMD Council meeting held on 23<sup>rd</sup> April 2019.**
  - k. The corrupted minutes of the meeting held on 23<sup>rd</sup> April 2019.**
  - l. Letter of the Ag. CEO of VMD, Dr. Mwanziki convening the meeting of 8<sup>th</sup> August 2018.**
  - m. Letter from the Chairperson of the VMD Council cancelling the meeting of 8<sup>th</sup> August 2019.**
  - n. Minutes of the meeting held on 8<sup>th</sup> August 2019 defying the cancellation letter.**
  - o. Documents of the VMD Council generated from the deliberations of the 8<sup>th</sup> August 2019 meeting.**
  - p. Letters from Dr. Mandieka and Prof. Mbaria withdrawing their signatures from the Council Bank Account.**
- v. General damages, exemplary damages and aggrieved damages under Article 23(3) of the Constitution for the unconstitutional conduct of the 1<sup>st</sup> and 2<sup>nd</sup> respondent;**
- vi. Costs of the suit with interest at court rates; and**
- vii. Any other or further orders or relief as this Honourable Court may deem just and fit to grant.**

2. The core of this petition, as supported by the averments in the petitioner's sworn affidavit of even date, is that the petitioner, a member of the Veterinary Medicines Directorate (VMD) sought information from the 1<sup>st</sup> respondent through a letter dated 13<sup>th</sup> August 2019. This information has not been issued hence violating his fundamental rights.

3. To put the matter into context the petitioner claims that he became aware of administrative and operational issues at VMD as were being discussed in various forums. Particularly that the 1<sup>st</sup> respondent had been involved in disputes since February 2019. Aggrieved by the allegations of abuse of office and un-procedural dealings, he sought to ascertain the veracity of these claims by requesting specific information from the 1<sup>st</sup> respondent in his aforementioned letter.

4. He further alleges that the 2<sup>nd</sup> respondent refused to accept the letter upon delivery at their premises. He adds that the 2<sup>nd</sup> respondent was appointed by the Principal Secretary of the Ministry of Agriculture, Livestock and Fisheries instead of the 1<sup>st</sup> respondent's Council as provided in law. As a result he wrote to the responsible Cabinet Secretary of the Ministry of Agriculture, Livestock and Fisheries petitioning him to take appropriate action.

5. He further states that the Chairman of 1<sup>st</sup> respondent in response to his letter dated 13<sup>th</sup> August 2019 advised him to forward the same to the 3<sup>rd</sup> respondent which he did but no response has been forthcoming. It is on this ground that he filed this suit for the contravention of his constitutional rights under Article 33 (1) (a) and 35 (1) (a) of the Constitution.

6. The 2<sup>nd</sup> respondent vide his replying affidavit dated 29<sup>th</sup> November 2019, avers that the petitioner is a retired veterinary officer and no longer a member of the 1<sup>st</sup> respondent. That he filed this petition with an ulterior motive.

7. He avers that the petitioner's allegations of administrative and operational challenges at the 1<sup>st</sup> respondent in his letter were not addressed to him as the acting Chief Executive Officer (CEO) as required by law. He depones that the request was too vague, as it failed to provide specific information for the respondents to respond effectively. He observes that for the violation of Article 35 of the Constitution to be established, a petitioner must demonstrate that he needed the information to enforce his fundamental right and freedom.

8. He has deponed that from independence, Veterinary Medicines in Kenya were procured and supplied by the government of Kenya where the service was heavily subsidized. When the World Bank came to the scene a lot of things changed. After the struggles here and there the Veterinary Medicines Regulations were enacted in conformity with Section 39 (2) of the Veterinary Surgeons and Veterinary Paraprofessionals Act (Cap 366 Laws of Kenya) which was in fulfilment of Chapter 3, 4 of the Terrestrial Animal Health (OIE), to which Kenya is a member and signatory.

9. He depones that the operationalization of Veterinary Medicines Directorate was contested and challenged through Nairobi Constitution Petition No.457 of 2016. The matter was determined and the Directorate allowed to operate in September 2017.

10. It was on this ground that the Principal Secretary on interim basis appointed the 1<sup>st</sup> respondent's secretariat to operationalize it. On this premise, he denied the existence of the information sought on Dr. Songok's appointment as he was never appointed by the 1<sup>st</sup> respondent and further that he was neither removed from the Council nor gazetted as his tenure as acting Chief Executive Officer came to an end when he attained retirement age.

11. Equally, the 2<sup>nd</sup> respondent's letter of appointment does not also exist as he was never appointed by the Council. He however clarifies that the 1<sup>st</sup> respondent's council has since ratified his appointment. He avers that the petitioner is on a wild goose chase as he has not provided any tangible evidence to support his claim.

12. The petitioner in response filed a supplementary affidavit sworn on 29<sup>th</sup> January 2020, reiterating the contents of his supporting affidavit dated 5<sup>th</sup> November 2019. He also supplied his practicing certificate to rebut the 2<sup>nd</sup> respondent's claim.

13. The petitioner filed written submissions and a list of authorities' dated 12<sup>th</sup> February 2020 through MMW & Co. Advocates. Counsel identified the following as the issues for determination:

i. Whether the petitioner's right of access to information has been violated by the respondents; and

ii. Whether the respondents should be compelled to supply the information sought by the petitioner.

14. On the first issue he submits an answer in the affirmative, arguing that Article 35(1)(a) of the Constitution grants a citizen the right of access to information held by the State, which right was violated by his not being issued with the information. Counsel sought to also rely on Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), Article 9 of the African Charter on Human and People's Rights (ACHPR) which also provide for this right.

15. On the second issue he submits that the respondents have not given any reasons for their failure to avail the information sought. He adds that Section 4(4) of the Access to Information Act, 2016 does not place any conditions to accessing information. This he argues is because this is an inviolable right that is granted by the Constitution as held in the case of **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR**. Additional reliance was placed on the cases of: **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR**, **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR** and **Attorney General v Kituo cha Sheria & 7 others [2017] eKLR**.

16. It is counsel's submission that the information sought is meant to serve public interest as provided for under Section 6 of the Access to Information Act, 2016. Further it is meant to uphold accountability of public entities to the public, ensure that expenditure of public funds is subject to oversight while ensuring that the 1<sup>st</sup> respondent discharges its functions.

17. It is therefore the petitioner's case that the respondents should be compelled to give the information sought and compensate him for this violation.

18. The respondents filed written submissions dated 31<sup>st</sup> August 2021, through Mr. Thande Kuria Principal State Counsel. The issues counsel identified are similar to those of the petitioner and I will not repeat them here.

19. On the first issue counsel submits that the petitioner's request was flawed *ab initio*. This is since the request was addressed to the Chairperson of the 1<sup>st</sup> respondent instead of the 2<sup>nd</sup> respondent who was the acting CEO. Further that the petitioner failed to demonstrate that the information was required for the exercise or protection of a right. Lastly that the petitioner failed to exhaust the statutory prerequisites prior to seeking redress from the High Court.

20. It is submitted that Section 4 of the Access to Information Act expressly provides that the CEO is the person from whom this information should be sought. He adds that Article 35(1)(b) of the Constitution requires that one indicate which right the information seeks to exercise or protect. This was the position adopted in the case of **Nairobi Law Monthly Company Limited (supra)** which he cited in support.

21. Additional reliance was placed on the cases of **Cape Metropolitan Council v Metro Inspection Services Western Cape CC and others [10/99] [2001] ZASCA 56** and **Unitas Hospital v Van Wyk and another [231/05] [2006] ZASCA 34**. It is their case hence that the petitioner sought the information without complying with the Constitution.

22. Counsel submits that the petitioner failed to exhaust the available statutory remedies before filing this petition. The Access to Information Act under Section 14 provides that parties aggrieved by decisions made by public bodies are to lodge their complaints with the Commission on Administrative Justice. It is counsel's submission while quoting the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR** that where there is an adequate forum to resolve a dispute a party ought to pursue that avenue first and not invoke the Court's jurisdiction if the dispute can effectively be dealt with in that avenue.

23. Further reliance was placed on the cases of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR**, **Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR** and **Kenya Revenue Authority & 5 others v Keroche Industries Civil Appeal No. 2 of 2008**.

24. Counsel additionally submits that the petitioner failed to apply for exemption for by passing the jurisdiction of the Commission on Administrative Justice as required under Section 9(4) of the Fair Administrative Act prior to filing this petition.

25. He contends that the respondents cannot as a result be compelled to provide the information sought by the petitioner in his letter dated 13<sup>th</sup> August 2019. The court is urged to dismiss the petition.

### **Analysis and Determination**

26. From the foregoing account, the key issue that arises for determination is whether the petitioner's rights under Articles 33(1) (a) and 35(1)(b) of the Constitution were violated and if so whether he is entitled to the reliefs sought.

### **Whether the Petitioner's rights under Articles 33(1)(a) and 35(1)(b) of the Constitution were violated:**

27. The petitioner's central contention is that when he sought information from the 1<sup>st</sup> respondent through a letter dated 13<sup>th</sup> August 2019 the information was not issued. He claims that the respondents failure to issue the information essentially violated his fundamental rights under Articles 33(1) (a) and 35(1) (b) of the Constitution.

28. The respondents on the contrary state that the aforementioned letter was first of all not addressed to the 2<sup>nd</sup> respondent as is required by the law. Secondly, that the petitioner's request failed to provide specific information to enable the respondents to respond effectively thus going against Article 35's instruction that the petitioner must demonstrate that he needs the information to enforce his fundamental right and freedom. Lastly it is their contention that the petitioner failed to exhaust the procedure as espoused in the Access to Information Act No.31 of 2016.

29. The starting point in this matter is in the Constitution. The right to access information falls directly within the ambit of fundamental rights and freedoms under Chapter 4 of the Constitution. This right is provided under Article 35 of the Constitution 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.**

**(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**

**(3) The State shall publish and publicise any important information affecting the nation.**

30. Likewise, this right is also expressed under Article 33(1)(a) of the Constitution as follows:

1. Every person has the right to freedom of expression, which includes--

a. freedom to seek, receive or impart information or ideas;

31. The right to access information is not only a hallmark of the new Constitution, but is also envisaged as a critical right universally. This was appreciated by the Court in the case of **Nairobi Law Monthly Company Limited** (*supra*).

**“26. It is, I believe, beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognised expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution. Article 19 of the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948 provides that**

**‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’**

**27. Similarly, Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations in 1966, provides that:**

**‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print in the form of art, or through any other media of his choice.’**

**28. The right to freedom of information has also been recognized in regional treaties to which Kenya is a party. Article 9 of the African Charter on Human and People's Rights (The (Banjul Charter) states that:**

**Every individual shall have the right to receive information.”**

32. The Access to Information Act (No. 31 of 2016) was enacted to give effect to Article 35 of the Constitution. This Act in essence provides the procedures to be followed when seeking any information held by the State or another person. At its preamble the Act states its purpose as ‘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’.

33. Section 3 of the Act provides for its objectives which are as follows:

- a. give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;
- b. provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;
- c. provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;
- d. promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;
- e. provide for the protection of persons who disclose information of public interest in good faith; and
- f. provide a framework to facilitate public education on the right to access information under this Act.

34. The Supreme Court while discussing this right in the case of Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR observed as follows:

**“[13] Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd Respondent. In addressing that issue, the Court in *Petition No. 479 of 2013 Rev. Timothy Njoya v. Attorney General & Another*; [2014] eKLR, it was held;**

**A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In *Nairobi Law Monthly v. Kengen (supra)* the Court dealt with the applicability of the right to information as follows;**

**"The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the state".**

**[14] This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.”**

35. Likewise, the Court in the case of Katiba Institute v Presidents Delivery Unit (supra) expressed itself as follows:

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

**“Subject to this Act and any other written law, every citizen has the right of access to information held by—**

**the State; and another person and where that information is required for the exercise or protection of any right or fundamental freedom.**

**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.
- c. Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

**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.**

**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.

**It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information.”**

36. The Court went further to state as follows under paragraph 54:

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

37. While it is certain that citizens enjoy the right to access information held by the state and private bodies, citizens are required to request this information as prescribed by the Act. Of relevance to the present matter is how the information was requested for by the petitioner. It is therefore incumbent on this Court to analyze this matter in light of the procedures set out in the Access to Information Act, 2016. To do so, an examination of the relevant provisions is necessary.

38. A party seeking to access information held by the state or private body is first required to address the request to the designated information access officer under Section 7. This Section provides as follows:

1. A chief executive officer of a public entity **shall** be an information access officer for purposes of this Act.

2. A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.

39. To access this request the party under Section 8(1) of the Act is required to make an application to access the information in writing either in English or Kiswahili and to provide details and sufficient particulars for the public officer to understand what information is being requested. The public officer will under Section 9 process the application and make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application.

40. Once the party receives a response on the request but is disgruntled, the Act under Section 14 provides the following procedure:

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;

b. a decision purporting to grant access, but not actually granting the access in accordance with an application;

c. a decision to defer providing the access to information;

d. 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.

41. The Commission on Administrative Justice in performance of this function and the others listed under Section 21 is empowered by the Act under Section 23 to act as follows:

1. In the performance of its functions under this Act, the Commission shall have the power to—

a. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;

b. question any person in respect of any subject matter under investigation before the Commission; and

c. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

2. 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.

3. 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.

4. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.

5. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

42. The Court in the case of **Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties) [2021] eKLR** while referring on the mandate of the Commission on Administrative Justice with regards to solving grievances under Article 35 of the Constitution with reference to the Access to Information Act pronounced as follows:

**“29. Under section 23 of the Access to Information Act No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR, Korir J observed correctly in my view, as follows:**

**“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.”**

I entirely agree with the above holdings.

43. A consideration of the facts of the case herein reveals that the petitioner did indeed request for access to the 1<sup>st</sup> respondent information on 13<sup>th</sup> August 2019. The contents of the letter touched majorly on his request to access various documentation with regards to appointment of the acting CEO, the 2<sup>nd</sup> respondent and his predecessor and operations of the 1<sup>st</sup> respondent. What is more is that the letter indicated that the information was required to enable the petitioner’s advocate represent the petitioner appropriately without giving any details. This letter was addressed to the Chairperson of the 1<sup>st</sup> respondent.

44. The 1<sup>st</sup> respondent responded to the petitioner’s letter vide a letter dated 15<sup>th</sup> August 2019. The Chairperson while declining to action the request referred the petitioner to the 3<sup>rd</sup> respondent who he said was in a better position to advise on the matter. The petitioner in his response dated 19<sup>th</sup> August 2019 disclosed that although he was aware that the right person to address the request to was the Chief Executive Officer as provided for in the Access to Information Act, he had chosen to address the 1<sup>st</sup> respondent’s chairperson as the Council had not appointed a CEO. In the end he sent letter to the 3<sup>rd</sup> respondent, as advised.

45. Based on the said account it is reasonable to deduce that despite the petitioner’s knowledge of the 2<sup>nd</sup> respondent position as the acting CEO he chose to make the request to the 1<sup>st</sup> respondent’s chairman and later the 3<sup>rd</sup> respondent. In addition the letter failed to disclose which fundamental right and freedom it sought to exercise or protect. While aware of the dictates of the Access to Information Act, the petitioner failed to adhere to the grievance mechanism provided in the said Act.

46. The Courts have from time to time pronounced themselves on the significance of exhausting the dispute resolution mechanisms provided by law before resorting to Court. The High Court in the case of **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** while addressing this matter stated as follows:

**“42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:**

**Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.**

43. While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others* [2015] eKLR, where the Court of Appeal stated that:

**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...”**

47. Be that as it may, the Court went on to further state as follows:

**“46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.”**

48. It is appreciated as guided by the cited authorities that while this Court is vested with the requisite jurisdiction to entertain the matter owing to the constitutional question of a violation of a fundamental right, jurisprudence appeals to restraint where an alternative mechanism is outlined in a Statute. This restraint is however not a bar in circumstances where a party substantiates that their case is one that falls in the exceptional categories of the doctrine of exhaustion.

49. In the matter before this Court the petitioner through his documentation shows that he was aware of the rules as espoused by the Access to Information Act and Article 35 of the Constitution. He however failed to show why he failed to adhere to the law as prescribed. Failure to give any explanation means he deliberately failed to comply with the law.

50. Secondly he fails to state the fundamental right sought to be exercised or protected by seeking this information. The importance of this disclosure cannot be emphasized enough. The South African Court examining this element in the case of *Institute for Democracy in South Africa and Others v African National Congress and Others* (9828/03) [2005] ZAWCHC 30 pronounced itself as follows:

**“55. The phrase ‘required for the exercise or protection of any rights’ has been considered by our courts on a number of occasions, both in the context of the interim and the final Constitution. Thus, it has been held that the word ‘required’ in this context must be understood to mean ‘reasonably required’.<sup>30</sup> In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*,<sup>31</sup> Streicher JA summed up the position as follows:**

**Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”**

51. I find that a demonstration of the fundamental right and freedom sought to be exercised or protected would have enabled this Court to make a determination whether this case is one that implores it to consider this matter as one that falls within the exception rule.

52. In light of these findings, I am of the view that the petitioner has not properly and with the required precision demonstrated the manner in which the respondents violated his rights under Articles 33(1) (a) and 35(1) (b) of the Constitution. Suffice to say, it cannot be left to the Court to speculate on behalf of the petitioner to fill in these gaps. My conclusion is that the respondents owing to the circumstances of this case did not violate the petitioners rights under Articles 33(1) (a) and 35(1) (b) of the Constitution.

53. I therefore find that the petition lacks merit and the petitioner is not entitled to the reliefs sought. The upshot is that the petition is dismissed. Having been a matter citing public interest, I order each party to bear his or her own costs.

Orders accordingly.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 27TH DAY OF JANUARY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI**

**HEDWIG ONG’UDI**

**JUDGE OF THE HIGH COURT**