



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**PETITION NO. E006 OF 2021**

**SAMUEL OGUTU OBUNGA.....PETITIONER/APPLICANT**

**AND**

**KENYA NATIONAL ARCHIVES**

**& DOCUMENTATION SERVICE DEPARTMENT.....1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION &**

**SETTLEMENT DEPARTMENT SUBA/ MBITA.....2<sup>ND</sup> RESPONDENT**

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

**RULING**

1. Samuel Ogutu Obunga, the petitioner/applicant herein moved the court by way of Notice of Motion dated 11<sup>th</sup> November, 2021. The application is brought under sections 11A, 1B, 3A and 63(e) of the Civil Procedure Act, Orders 22 & 51 Rule 13 (2) of the Civil Procedure Rules & Articles 22(1), 23 (1) & (3), 35 (b) 47 (1) & 48 of the Constitution of Kenya. He is seeking the following orders:

- a) That the service of this application be disposed with at the 1<sup>st</sup> instance. [Spent]
- b) That 1<sup>st</sup> respondent be ordered, compelled and/or commanded to produce and/or avail the file that covers the acquisition of lands of Ungoe Area within Nyagwethe Adjudication Section before the 2<sup>nd</sup> respondent for the purposes of Arbitration between the applicant and ICIPE (International Center of Insect Physiology and Ecology).
- c) That the proceedings at the 2<sup>nd</sup> respondent between the applicant and ICIPE that took place on 21st October, 2021 be stayed till the determination of this application.
- d) That costs of this application be in the cause.

2. The petition was premised on the following grounds:

- a) That there is an objection proceedings No.144 of 2021 before the 2<sup>nd</sup> respondent between the applicant and the said ICIPE which is proceeding and the production of the said documents will enable the said Tribunal to reach to a fair and reasonable ruling.
- b) That it is the interest of justice that this application be granted for the said objection proceedings shall go against the applicant for non-production of the document sought for.
- c) That there will be no prejudice that shall be occasioned to the respondents herein in the event that this application is allowed.
- d) That this application is prompt.

3. The application was opposed on grounds that:

- a) The information sought by the petitioner does not belong to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent is only custodians of the said

records on behalf of the office District County Commissioners who are the only entity entitled to the information. Therefore there is no valid cause of action against the respondents.

b) The said information is classified under the code/title DN/20/120 and amounts to an official secret pursuant to cap 187 the Official Secrets Act.

c) The disclosure of such information is restricted and can only be made available to the public after they have been in existence for a period of not less than thirty years pursuant to section 6 of the Public Archives and Documentation Service Act.

d) According to section 3(6) the Official Secrets Act any person who communicates the code word, plan, article, document or information to any person, other than a person to whom he is authorized to communicate it or to whom it is his duty to communicate it shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.

e) The petitioner can only obtain the information through the office of the District County Commissioner and the petitioner should follow request for it from the County Commissioner. The application is thus an abuse of court process.

4. Article 35 of the Constitution of Kenya Provides for access to information 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.**

This right to access information was amplified in the case of **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR** at paragraph 29 thus:

**The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access.**

5. Article 24 of the Constitution gives instances when the fundamental right may be limited.

6. After perusing the supporting affidavit and the reply thereof, I find that the applicant did not follow the right procedure in requesting for the information he is seeking orders. This procedure is provided for in the Access to Information Act. Secondly, the first respondent is only a custodian of documents and does so for all public institutions. The applicant ought therefore to have applied to the right entity.

7. Though the applicant has contended that the Official Secrets Act is repealed, the same is in existence.

8. From the foregoing analysis I make a finding that the applicant's right to information was not breached. His application must therefore be dismissed. Each party will meet own costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**