



Aburi v County Secretary, Meru County; Murungi (Interested Party) (Petition E013 of 2021) [2022] KEHC 11204 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E013 OF 2021
TW CHERERE, J
MAY 26, 2022
IN THE MATTER OF ARTICLES 1, 10, 19(1), 21(1)
& 35 OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF CONTRAVENTION OF SECTIONS
4 & 8 OF THE ACCESS TO INFORMATION ACT 2016
BETWEEN
MPURU ABURI PETITIONER
AND
COUNTY SECRETARY, MERU COUNTY RESPONDENT
AND
KIRAITU MURUNGI INTERESTED PARTY**

JUDGMENT

1. By a petition dated May 18, 2021 and filed on May 19, 2021, petitioner seeks the following orders as against the respondent: -
 1. A declaration that the failure by the respondent to provide information sought under article 35 of the Constitution as read with section 4 & 8 of the Access to Information Act, 2016 on the basis on the petitioner's request dated March 26, 2021 is a violation to access information.
 2. A declaration that the failure by the respondent to provide information sought under article 35 of the Constitution as read with section 4 & 8 of the Access to Information Act, 2016 on the basis on the petitioner's request dated March 26, 2021 is a violation of article 10 of the Constitution specifically that the values of rule of law, participation by people, human rights, good governance, transparency and accountability.



3. A declaration that the failure by the respondent to provide information sought under article 35 of the Constitution as read with section 4 & 8 of the Access to Information Act, 2016 on the basis on the petitioner's request dated March 26, 2021 is a violation of the obligations imposed upon the respondent by chapter six of the Constitution specifically articles 73(1) and 75(1) of the Constitution and section 3 of the Leadership and Integrity Act and sections 8, 9 and 10 of the Public Officer Ethics Act.
 4. An order of mandamus compelling the respondent to forthwith provide at the respondent's costs, information sought by the petitioner vide his letter to the respondent dated March 26, 2021.
 5. General damages for gross violation of rights and abuse of the legal process.
 6. Costs of the petition.
 7. Such further orders may deem just and appropriate to grant
2. The petition is premised on the grounds on the face its face and on the supporting affidavit sworn by the petitioner on May 18, 2021. He avers that in exercise of his rights under article 35 of the Constitution as read and the Access to Information Act, 2016, his counsel on his instructions by a letter to the respondent dated March 26, 2021 requested for 24 documents set out in the letter. He avers that the letter was received by the respondent March 29, 2021 but to date the documents have not been supplied as a result of which he contends that his right to information has been denied.
 3. In response to the petition, the respondent filed a preliminary objection dated July 5, 2021 raising 3 grounds as follows: -
 1. That this honorable court lacks jurisdiction to determine the petition filed herein in light of article 159(2) of the Constitution.
 2. That this honorable court lacks jurisdiction to determine the petition filed herein in light of section 14 of the Access to Information Act and section 9(4) of the Fair Administrative Action Act.
 3. That the instant suit sub judice in light of HCCC Misc App No E016 of 2020, Mpuru Aburi and Meru County Public Service Board, Meru County Secretary and 3 others.
 4. The respondent also filed a replying affidavit sworn on January 24, 2022 by Rufus Miriti, the County Secretary, averring that petitioner's request for information was vague, generalized and unrealistic and provided no details or sufficient particulars of the information sought which made it difficult for him to understand and provide the information sought. He further stated that the information concerning tenders is in public domain and can be obtained from <http://meru.go.ke>. It was additionally averred that the petition is premature and an abuse of the court process for the reason that the petitioner has not exhausted the alternative dispute resolution mechanisms provided for in the Access to Information Act nor has he demonstrated that the respondent declined to grant his request. It was finally contended that this court lacks jurisdiction in light of article 159(2) of the Constitution, section 14 of the Access to Information Act and section 9(4) of the Fair Administrative Action Act.
 5. By a replying affidavit dated December 15, 2021, the 1st interested party avers that he filed a suit against petitioner for defamation on the grounds that he made false and malicious allegations against him which suit is still pending determination. He avers that the respondent does not have in its custody or possession any information relating to either Anglo Leasing or Triton transactions both of which



happened away from Meru County prior to the formation of County Governments and urges the dismissal of this petition and costs be awarded to him.

6. The 2nd interested party did not file a response to the petition. The petition was argued by way of written submissions.

Submissions

7. The petitioner filed submissions dated January 7, 2022 submitting that the respondent neither responded to his request for information nor gave any explanation for its failure to supply and that the respondent has by its conduct violated his rights under articles 10, 33, 35 and 47 of the Constitution. He submitted that it was not necessary for him to disclose the reason for seeking the information though the information will be pertinent in protecting his right to a fair trial in Meru HCCC No E002 of 2020. The petitioner additionally submitted that the information sought is not of a personal nature nor is it exempt under the Access to Information Act. He relied on the case law of Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR, Mpuru Aburi v Meru County Public Service Board & 4 others [2021] eKLR, Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR.
8. The petitioner filed further submissions dated March 25, 2022 submitting that the High Court has original jurisdiction in matters for declarations and violations of Constitution and has authority to uphold and enforce bill of rights. He faults the respondent for not responding to his request for information and for its failure to inform him that the said information could be accessed through its website. On this proposition, reliance was placed on Teresia Wairimu Kairu v Independent Electoral & Boundaries Commission [2014] eKLR.
9. The respondent in its submissions dated January 24, 2022 stated that jurisdiction must be exercised in accordance with the Constitution and statutes.
10. Reference was made to section 9(2) as read with section 9(3) of the Fair Administrative Action Act which it was submitted requires that a court shall not review an administrative action or decision unless it is satisfied that the applicant has exhausted all other available mechanisms. Reference was also made to section 14 of the Access to Information Act which it was submitted requires that a person dissatisfied with a public entity's refusal to grant access to information may apply to the Commission on Administrative Justice (CAJ) to review that decision. The respondent contends that the petitioner has not demonstrated any effort made to resolve the dispute and thus the petition is premature and abuse of the court process and a violation of article 159(2)(d) of the Constitution. Respondent reiterated its response to the petition that the petitioner's letter did not meet the provisions of section 8(1) of the Access to Information Act as it was not specific as to the information sought to be supplied with making it very difficult for the respondent to comply. In support of its proposition, respondent relied on Secretary County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR, KRA & 2 others v Darasa Investments Ltd [2018] eKLR, Charles Apudo Obare & another v Clerk County Assembly of Siaya & another [2020] eKLR, Coast Legal Aid & Resource Foundation v Coast Water Board Services and 2 others [2021] eKLR.
11. The 1st interested party by its submissions dated January 31, 2022 contends that the petitioner ought to have made an application in writing to the CAJ requesting for a review of the decision of refusal to grant him access to the information applied for. It is the 1st interested party's case that the information sought is not for purposes of purging allegations in the defamation case as alleged by the petitioner, but is an afterthought and an attempt by the petitioner to delay prosecution of the defamation suit and ought to be dismissed with costs.



Analysis & Determination

12. I have considered the petition, the affidavits both in support of and in opposition, the parties' submissions and authorities relied upon and the respondents PO and I have deduced the following issues for determination: -
- a. Whether the court has jurisdiction to determine this petition
 - b. Whether the respondent has violated the petitioner's right of access to information
 - c. Whether the respondent should be compelled to give information

a. Jurisdiction

13. *In Re the Matter of the Interim Independent Electoral Commission* Constitutional Appl No 2 of 2011, the Supreme Court stated as follows: -

“(29) Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p 14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”

14. In yet another case of *Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others*, Application No 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.....”

15. Section 14 of the *Access to Information Act, 2016* uses the word may and does therefore not make a report to CAJ a condition precedent to triggering the jurisdiction of this court to deal with petitions filed seeking to challenge violations of the right to access information under article 35 of the Constitution. (See *Katiba Institute v Presidents Delivery Unit & 3 others* (*supra*)).
16. Under the provisions of article 165(3)(b) of the Constitution, this court has unlimited jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. The respondent's and 1st interested party's contention that the petition is premature is therefore unsustainable.



(b Whether The Respondent Has Violated The Petitioner’s Right Of Access To Information

17. Article 35 of the Constitution provides that:

- 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 publicize any important information affecting the nation.

18. In the case of Mpuru Aburi v Meru County Public Service Board & 4 others (*supra*), the court held that

“The Constitution undoubtedly provides that information held by the state is accessible by citizens and that that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information.

19. For purposes of actualizing article 35, Parliament enacted Access to Information Act, 2016 (the Act). Section 8 of the Act provides for procedure of accessing information in the following terms:

- (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

20. The pleadings filed by the petitioner demonstrate that indeed a request for information was made in writing in English and respondent concedes receiving the request. I have perused the request and it is my considered view particularised and contains sufficient detail of the information sought and the respondent’s contention that the request was vague, generalized and unrealistic and provided no details or sufficient particulars of the information sought which made it difficult to understand and provide the information sought is therefore without merit.

21. The respondents contends that information relating to tenders can be obtained from <http://meru.go.ke>. Whether or not the information is available on the respondent’s website was not communicated to the petitioner expeditiously in terms of section 4 (1) (3) of the Access to Information Act, 2016.

22. Concerning the 1st interested party contention that the information sought is not relevant to Civil Case No E002 of 2020 Kiraitu Murungi v Mpuru Aburi & anor, I find that that the contention is unsustainable for the reason that section 4 (2) of the Act provides that the right to access 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.

23. The Court of Appeal addressed the issue of respecting constitutional rights in the case of Attorney General v Kituo cha Sheria & 7 others [2017] eKLR and stated;

“The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state



largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

24. The respondent in this case was under an obligation to obey the law and allow the petitioner access information or where not possible give reasons for that. The respondent failed in both instances and thus violated the petitioner’s rights under the Constitution and the law.

(c) Whether The Respondent Should Be Compelled To Give Information

25. The court stated in the case of Tinyefuze v Attorney General of Uganda [1997] UGCC3 that;

“if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.”

26. Having come to the conclusion that the respondent violated the petitioner’s right of access to information and that no effort was made to justify this violation, i find that the petitioner is entitled to the orders sought.

27. Finally, the respondent has not demonstrated that the issues in this petition are the same as in HCCC Misc App No E016 of 2020, Mpuru Aburi and Meru County Public Service Board, Meru County Secretary and 3 others and its contention that this petition is sub judice is not substantiated.

28. In the end, the orders which commend to me and which I hereby issue are as follows;

1. The petition dated May 18, 2021 and filed on May 19, 2021 has merit.
2. Preliminary objection dated July 5, 2021 is without merit and it is overruled.
3. A declaration is hereby issued that failure by the respondent to provide information sought under article 35 of the Constitution as read with section 4 & 8 of the Access to Information Act, 2016 on the basis on the petitioner’s request dated March 26, 2021 is a violation of petitioner’s right to access information.
4. An order of mandamus is hereby issued compelling the respondent to forthwith provide at the respondent’s costs, information sought by the petitioner vide his letter to the respondent dated March 26, 2021.
5. Costs to the petitioner.

DATED AT MERU THIS 26TH DAY OF MAY 2021.

TW CHERERE

JUDGE

Appearance

Court Assistant - Morris Kinoti.

For the applicant - Mr Atheru for Thurania Atheru & Co Advocates.

For the respondent - Ms Matiri (County Attorney).

For 1st interested party – Mr Mogire for Munga Kibanga & Co Advocates.

For 2nd interested party - Mr Atheru for Thurania Atheru & Co Advocates.

