



REPUBLIC OF KENYA



KENYA LAW
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**Toroitich v County Chief Trade Officer Trade, Uasin Gishu County & 2 others
(Petition E007 of 2021) [2022] KEHC 12616 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E007 OF 2021
EKO OGOLA, J
JULY 26, 2022**

BETWEEN

KENNETH KIPKORIR TOROITICH PETITIONER

AND

**COUNTY CHIEF TRADE OFFICER TRADE, UASIN GISHU
COUNTY 1ST RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR ICT, EEADE AND
INDUSTRIALIZATION, UASIN GISHU 2ND RESPONDENT**

THE COUNTY GOVERNMENT OF UASIN GISHU 3RD RESPONDENT

RULING

1. By way of notice of motion dated May 18, 2021 the petitioner herein seeks the following orders;
 - 1) Spent
 - 2) That following *inter partes* hearing of the notice of motion and pending the hearing of the petition an order issue requiring the 1st and 2nd respondents to provide information sought by the petitioner under article 35 of the [Constitution](#) through a letter dated March 31, 2021.
 - 3) That pending inter partes hearing of the notice of motion and petition an order issue restraining the respondents or their agents from in any way, changing the design, or effecting further payment to Kenya Service Market Toilet Project.
 - 4) Costs
 - 5) That this court be pleased to issue any orders that it considers just under the circumstances.
2. The application is based on the grounds contained therein and the supporting affidavit.



3. The applicant filed submissions on October 21, 2021. The applicants' case is that he filed the petition dated May 18, 2021 seeking prayers that he be provided with information concerning the Kenya Service Market Toilet Project. The information he sought was; Notice of invitation to tender Copy of the public participation notice Copy of the bill of quantities and A certificate of completion.
4. The applicant cited article 35 of the Constitution and section 4 of the Access To Information Act in support of his submission that if anyone wishes to have information held by the state or a public body then one is required to follow the laid down procedure and make a formal application to be provided with the information or for publication of the same. He cited the case of Okiyah Omtatab Okoiti & 2 others vs Attorney General & 4 others [2020] eKLR where it was held that;

"83. ...based on the foregoing, the appellants ought to have requested the concerned government departments to supply them with information they required and to which they were entitled to receive in accordance with article 35 of the Constitution."

He also relied on Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR in support of his submission.
5. The applicant submitted that there is no evidence of public participation, advertisement of tender, zero bill of quantity nor plan of the proposed development. Additionally, there is no information on the sources of funding for the project and the exact amount expended.
6. The applicant contended that the conduct of the respondents through the pendency of the petition are contemptuous to the court and they should not be heard. He stated that initially the respondents had told the applicant that they were not opposed to the application and that all the applicants were to do was appear before the respondents' office to pick the requisite documents. The court order dated May 28, 2021 captured the exact documents the respondent had told the court was available. However, the documents they produced were not in line with the documents the respondent had told the court she had in possession that morning of May 25, 2021.

Respondents' Case

7. The respondents filed a replying affidavit in response to the application on July 26, 2021 and submissions on October 25, 2021. The respondents' contention is that the applicant was supplied with all documents save for the copy of public participation as the same is not done on individual projects but rather collectively at ward level; under the supervision of the county assembly. Further, that the information sought by the applicant is available on the county government website and the applicant has not made any effort to do so.
8. The respondents contend that the orders being sought are final in nature and should not be granted in the interim. The issuance of the information is the subject matter of the petition therefore should these orders be granted in the interim, the subject matter of the petition would be exhausted leaving no substance for the continuance of the petition.
9. The respondents further submitted that it is not proper for the applicant to seek interim orders for prayers that have not been sought in the main petition. The substratum of the petition is a matter of the petitioners' right to information and not whether or not the Kenya Service Market Toilet Project should continue. Since the appellant has been provided with the information sought, the prayer seeking orders to restrain the respondents from changing the design or effecting further payment to Kenya Service Market Toilet Projects is unfounded and should not be granted.



10. The respondents cited *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* and submitted that the applicant ought to demonstrate that in the absence of conservatory orders he/she is likely to suffer prejudice. Further, the court should decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Their submission was that the application be dismissed with costs.
11. Upon considering the pleadings and submissions by all parties I have identified the following issues for determination;

Whether The Respondents Should Provide The Information Sought By The Petitioner

12. There is an order at this court made on May 25, 2020 requiring the applicant be supplied with the following documents; Notice of invitation to tender Copy of the bill of quantities and A certificate of completion.

The copy of the public participation notice and facts showing residents attended and supported the project were to be collected on June 22, 2021.
13. The respondents claim to have supplied three of the required documents pursuant to the court order. I have perused the record and the applicant has provided the court with a copy of what was supplied. Evidently, the applicant was supplied with a cancelled one-page certificate of completion, a GOK/IFMIS evaluation matrix report and an empty template of a bill of quantity with no figures.
14. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This right is instrumental in the proper and democratic conduct of government affairs, as citizens are enabled to participate in that governance. Successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities.

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 publicise any important information affecting the nation.
15. In the case of *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* [2016] eKLR, the Court reaffirmed the position that the *Constitution* does not limit the right to access information when it stated;

“ [270] Article 35 (1) (a) of the *Constitution* does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public's Right to Know: Principles on Freedom of Information Legislation* –article 19 at page 2 that the principle



of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.

16. The respondents’ conduct is quite wanting with regard to compliance with the courts’ orders. The picture painted is one of deceit and a game of hide and seek perpetrated by the respondents. The fact that the provision of information will exhaust the petition should be a reason for the respondents to provide the information rather than prolong the pendency of the petition. Further, if indeed the information is on the county government website, why have the respondents chosen to play a cat and mouse game instead of simply complying with the request?
17. The respondents have shown disdain for the court orders that were issued on May 28, 2021 and a total disregard for the applicants’ rights under article 35 of the Constitution. Court orders are not made in vain and the respondents’ failure to comply with the orders is contemptuous. Consequently, the application dated May 18, 2021 is allowed and the following orders granted;
 - a) Following the *inter partes* hearing of the application and pending the hearing of the petition an order is hereby issued requiring the 1st and 2nd respondents to provide information sought by the petitioner under article 35 of the Constitution through a letter dated March 31, 2021.
 - b) Costs of the application shall be for the applicant.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH JULY 2022.

EK OGOLA

JUDGE

