



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

PETITION NO. 1 OF 2020

MICHAEL KOJO OTIENO1ST PETITIONER

EVANCE OTIENO OLOO GOR2ND PETITIONER

AND

CABINET SECRETARY

NATIONAL TREASURY & PLANNING.....1ST RESPONDENT

UKUR YATANI.....2ND RESPONDENT

GOVERNOR, HOMA BAY COUNTY.....3RD RESPONDENT

COUNTY

EXECUTIVE MEMBER FOR FINANCE HOMA BAY.....4TH RESPONDENT

CHIEF OFFICER

IN CHARGE FINANCE HOMA BAY COUNTY.....5TH RESPONDENT

DEPARTMENT OF WATER, ENVIRONMENT

& NATURAL RESOURCES HOMA BAY COUNTY.....6TH RESPONDENT

DEPARTMENT OF EDUCATION

& ICT HOMA BAY COUNTY.....7TH RESPONDENT

HON. ATTORNEY GENERAL.....8TH RESPONDENT

CABINET SECRETARY INTERIOR

& CO-ORDINATION.....9TH RESPONDENT

RULING

1. Michael Kojo Otiemo and Evance Otiemo Oloo Gor, the petitioners herein have petitioned this court to grant the following declarations and orders:

a) A declaration be and is hereby issued that 1st, 2nd, 3rd, 4th and 5th respondents have engaged in corrupt practices amounting to gross violation of the Constitution and have been rendered incapable of discharging their mandates as required under various statutes.

b) A declaration be and is hereby issued that the honourable court is satisfied that the petitioners have adduced irrefutable material evidence to prove gross and flagrant violations of statutes, breach of trust and abuse of the due process by the respondents.

c) A declaration be and is hereby issued that failure by 1st, 2nd, 3rd, 4th and 5th respondents to provide information sought under Article 35(1) (a) and also publicize the information in accordance with Article 35 (3) is a violation of the obligations imposed on the respondents by Articles 73 (1) and 75 (1) of the Constitution and section 3 of the Leadership and Integrity Act as well as sections 8, 9 and 10 of the Public Officers Ethics Act.

d) That this court do issue and hereby issues an order compelling the respondents forthwith provide, at the respondents costs, information sought by the petitioners in their letter to the respondents dated 26th November, 2019.

e) That this court do issue and hereby issues an order ordering the respondents to pay costs of these proceedings.

2. The petition was premised on the following grounds:

a) That on 26th November, 2019 the petitioners wrote a letter to the Cabinet Secretary National Treasury and Planning and the 2nd respondent. The letter was to be served upon the 3rd, 4th and 5th respondents.

b) That letter was seeking some information which has not been supplied to date.

c) That failure to supply the information sought infringed on their right to information.

3. The petition was opposed on grounds that:

a) The petitioners had not exhausted the alternative disputes resolutions before approaching this court.

b) The 3rd, 4th and 5th, 6th and 7th respondents were not served with the letter dated 26th November, 2019.

4. A letter dated 26th November, 2019 was hand-delivered to the 1st and the 2nd respondents. According to the petitioners, it was to be served to the other respondents. However, they do not state how and by whom it was to be served.

5. The letter was seeking information on the list of companies, persons and suppliers who had been paid eligible bills by the County Government of Homa Bay. This was triggered by a press release by the acting National Treasury Cabinet Secretary. The letter was signed by Evance Otieno Gor, the chairman Interface Community Help Desk. This inquiry went unanswered and led the petitioners to file this petition.

6. 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.

7. Section 4 of Access to Information Act 2016 Provides:

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

a) the State; and

b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

2) 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.

3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4) 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.

5) 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.

8. The 3rd, 4th, 5th, 6th, & 7th respondents have acknowledged this right. Even if they had not, this right is provided for in the Constitution.

9. The 1st, 2nd, 8th and 9th respondents were not custodians of the information the petitioners were seeking. The letter to the 1st and 2nd respondents was misdirected.

10. The 3rd, 4th, 5th, 6th, & 7th respondents have denied that they ever received the letter. Indeed from the narration by the petitioners they were not served with the letter. There was therefore no way they could have responded to it.

11. I make a finding that the petitioners' right to information was not breached. The petition must therefore be dismissed. Since the information sought was for public good, each party will meet own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MAY, 2021

KIARIE WAWERU KIARIE

JUDGE