



**Owiti v Registrar of Lands, Nairobi & 2 others (Environment & Land
Petition 16 of 2022) [2023] KEELC 19305 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 16 OF 2022**

MD MWANGI, J

JULY 27, 2023

BETWEEN

THOMAS ODHIAMBO OWITI PETITIONER

AND

REGISTRAR OF LANDS, NAIROBI 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

THEADUS ONDINJO OWITI 3RD RESPONDENT

JUDGMENT

Background

1. By a Petition dated 29th August, 2022, expressed to be based on Article 35 of *the Constitution* of Kenya, 2010 the Petitioner sought the following reliefs;
 - a. A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 35 (1) (b) of *the Constitution* of Kenya 2010, have been contravened and infringed upon by the Respondents by their refusal to give the Petitioner the information it requested.
 - b. An Order directing the Respondents, their employees, agents, representatives, assigns or any other person acting through their direction to release all the information relating to the Transfer of the suit property Nairobi/ Block 61/381 to the Petitioner.
 - c. The costs of the Petition.

The Petitioner’s Case

2. The Petition was supported by an affidavit sworn by the Petitioner, Thomas Odhiambo Owiti, on 29th August, 2022 and the annexures thereto. The Petitioner contends that his late father, Nelson Audi was the registered owner of Nairobi/ Block 61/381, the Suit Property. The suit property has been



transferred to the 3rd Respondent herein albeit irregularly without the family consent. He alleges that upon investigating the documents within his reach through a forensic audit, he established that the signature appended on the transfer does not belong to his late father, Nelson Audi.

3. He avers that he made demands to the Land Registrar on 14th June, 2022 requesting for information relating to the suit property which demands have been met with blatant disregard of his constitutional right to access to information. The Respondent's failure to avail the said information is unconstitutional, capricious, arbitrary, pre-determined, injudicious, and contaminated by and actuated by malice, self-interest and improper motive and violates Article 35 of [the Constitution](#).

Court's directions

4. The court directed that the Petition be canvassed by way of written submissions. The record shows that the Petitioner filed his submissions dated 18th May, 2023, the 1st and 2nd Respondent's Submissions are dated 23rd May, 2023 whereas the 3rd Respondent's submissions are dated 31st May, 2023.

Petitioner's submissions

5. The Petitioner submits that he sought information vide a Letter dated 14th June, 2022 requesting for information relating to the suit property. The Letter was delivered but no response was received from the Respondents. This forced the Petitioner to file this Petition and even as at the time of the hearing the Petition no response had been received from the Respondents.
6. The Petitioner asserts that this amounted to violation of his Constitutional right under Article 35 of [the Constitution](#) which grants citizens' access to information as a Constitutional right. He cited the case of Nairobi Law Monthly –vs- Kenya Electricity Generating Company & 2 Others, where the court held that the article 35 of [the Constitution](#) not only entitles a citizen to information but obligates the state to provide the information. The decision was affirmed in the case of Trusted Society of Human Rights Alliance & 2 others vs Judicial Service Commission (2016) eKLR.
7. He further submitted that in order to enforce this right, a citizen claiming the right to access information must not only show that the information is held by the person from whom it is claimed but the citizen must go further and show that the information sought is required for the exercise or protection of another right. That the Petitioner asserts that he duly complied with the said requirement in requiring information from the 1st Respondent on the registration particulars to the 3rd Respondent's name.
8. He submits that the Respondents were under obligation to obey the law and allow the Petitioner access information or where not possible give reasons for that. They failed in both instances thus violating the Petitioner's right under [the Constitution](#) and the law. The Respondents' actions curtails the right to acquire and own property under Article 40 of [the Constitution](#).

1st and 2nd Respondent's Submission

9. The 1st and 2nd Respondents submitted that the issue for determination was whether the Petitioner's right to information has been infringed. They cited Article 35 of [the Constitution](#) on the right to information and the provisions of Section 10 of the [Land Registration Act](#) which mandates the Registrar to make information in the register accessible to the public by electronic means or other means.



10. The 1st and 2nd Respondent submitted that the Petitioner had not explained how the Constitutional provisions apply to him or the alleged infringement. They cited the case of *Meme –vs- Republic & Another* (2004) eKLR where the court pronounced itself in the following terms:

“Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with a reasonable precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed.”
11. They pointed out that in the instant case, there is no proof of request of the information and how the request was made to the 1st Respondent. They submit that the Petition was filed prematurely. They urge the court to find that there is no proof of a violation of the right to access information.
12. Under Section 8 (1) of the *Access to Information Act*, 2016, an individual is required to make an application to access the information in writing either in English or Kiswahili and provide details and sufficient particulars for the public officer to understand what information is being requested. The Public Officer is then required under Section 9 to make a decision on the application within 21 days of receipt of the application. Reliance is made on the case of *Andrew Omtatah Okoiti vs Attorney-General & 2 Others* (2011) eKLR
13. It is their further submission that the Petitioner has not exhausted the relevant avenues in seeking information before filing the petition in court. The 1st and 2nd Respondent further cited the case of *Anarita Karimi Njeru –vs- Republic* (1976-1980)KLR 1272 which set out the principles to be adhered to in filing a petition alleging a contravention or threat of contravention of a constitutional right. It is their position that the instant case does not satisfy the principles in *Anarita Karimi Njeru* case as the Petitioner has failed to prove any violation of his constitutional rights. As such they pray that the Petition be dismissed with costs.

3rd Respondent’s submissions

14. The 3rd Respondent on his part submitted that although the Petitioner alleges to have written a letter to the Land Registrar requesting for information relating to the suit property there was no evidence before the Court of such a letter or the particulars of the information sought if at all.
15. As to whether the transfer of the suit property was irregular, the 3rd Respondent submits that no evidence has been adduced to prove that indeed the transfer was irregular. He cites Section 26 of the *Land Registration Act* on the indefeasibility of the Title.

Issues for determination

16. Having considered the petition together with the supporting affidavit and annexures thereto and the submissions on record, the court is of the opinion that the only issue for determination in this petition is whether the Respondents have violated, denied or infringed the Petitioner’s right to information.

Analysis and determination

17. The Petitioner contends that he sought for information from the Land Registrar vide a letter dated 14th June, 2022 on the registration particulars of the suit property. That the suit property was initially registered in his late father’s name but has since been transferred to the 3rd Respondent herein, albeit fraudulently. Further that no consent was sought from the other family members and that the signature on the transfer instrument is not of his deceased father either. The information sought from the Land



Registrar is therefore intended to ascertain who signed the transfer instrument in regard to the suit property.

18. The Petitioner alleges violation of his right under Article 35 of *the Constitution* on access to information. Article 35 of *the Constitution* provides that;

“Every Citizen has the right of access to;

- a. information held by the State
- b. information held by another person and required for the exercise or protection of any right or fundamental freedom”

19. Section 8 (1) of the *Access to Information Act*, 2016, (which is the Act of Parliament legislated to give effect to Article 35 of *the Constitution*), provides that an individual is required to make an application to access the information in writing either in English or Kiswahili and provide details and sufficient particulars for the public officer to understand what information is being requested. The Public Officer is then required under Section 9 to make a decision on the application within 21 days of receipt of the application.

20. The Court of Appeal in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR upheld the requirement pronounced in the *Anarita Karimi* case that constitutional violations must be pleaded with precision. The court held that,

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

..... We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

21. I fully associate with the decision of Musinga J (as he then was) in the case of *Andrew Okoiti Omutatah vs Attorney General & 2 others* (2011) eKLR where he stated that,

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required



was made to the state or the other person in possession of the same and the request was disallowed. The court cannot be the first port of call.”

22. First and foremost, the Petition before me does not meet the threshold of a Constitution Petition. Although the Petitioner has pleaded provisions of *the Constitution*, he has not demonstrated how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. Secondly, the Petitioner has not adduced any evidence to demonstrate the alleged violations. The letter he alleges to have sent to the 1st Respondent was not attached to his supporting affidavit. How then was the court to establish that he actually requested for the alleged information? It is a prerequisite under section 8 of the *Access to Information Act* that an application to access information be made in writing with sufficient details to enable the public officer understand what information is being requested.
23. I need to point out that the Petitioner in his petition alleges that the suit property was irregularly transferred to the 3rd Respondent. He allegedly conducted a forensic investigation which revealed that the deceased’s signature on the transfer was a forgery. It is apparent from that averment that the Petitioner is already in possession of the very information he seeks to be furnished with by the Land Registrar. The Petitioner’s claim of fraudulent transfer of the suit property should be litigated by way of an ordinary civil suit. Under the provisions of the *Civil Procedure Act* and the *Evidence Act*, the trial Court has the powers to summon any witness to produce any document. It is unnecessary for the Petitioner to file a Constitutional Petition while he could have gotten whatever he was looking for by way of an ordinary suit.
24. The conclusion is that this petition is hereby dismissed with costs to the Respondents.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Oluoch for the Petitioner.

No appearance for the 1st and 2nd Respondents.

Ms. Theuri for the 3rd Respondent.

Court Assistant –Yvette.

M.D. MWANGI

JUDGE

