



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CAUSE NO 94 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS FOR PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT 2015**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ELGEYO MARAKWET COUNTY GOVERNMENT**

**AND**

**IN THE MATTER OF THE AWARD OF TENDER FOR FINANCIAL YEARS 2018/2019, 2019/2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR, SUPPLY CHAIN MANAGEMENT**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET.....2<sup>ND</sup> RESPONDENT**

**THE GOVERNOR**

**ELGEYO MARAKWET COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**AND**

**ELIJAH K. KIBET.....EX-PARTE APPLICANT**

## RULING

1. The ex-parte applicant herein via a notice of motion dated the 22<sup>nd</sup> of July 2020 and brought pursuant to Order 53 rule 1(1) (2) (4) and Rule 2 of the Civil Procedure Rules 2020, the Judicature Act and Part 1 Rule 3 of the High Court (practice and Procedure) rules seeks order of;

***a. Prohibition against the respondents to forthwith stop any further tendering process for the financial year 2020/2021 and subsequent years to come until the respondents supply the list of award of tenders for 2018/2019, 2019/2020 and subsequent financial years to the ex-parte applicant and or any other interested person who makes such an application for the same.***

***b. Mandamus to compel the respondents to forthwith supply the Ex-parte applicant and any other interested party, that shall apply for the same, with the list of award of tenders for the financial year 2018/2019 and 2019/2020 and the subsequent financial years to come.***

***c. Leave so granted to act as a stay of further tendering process by the County Government of Elgeyo Marakwet from doing any kind of tendering process until hearing and final determination of the main motion to be filed within the time frame to be given by the honorable court.***

2. The application is based on the grounds that the ex-parte applicant applied for tenders in various counties including Elgeyo Marakwet County and requested information from the county on the list of awarded tenders but the same have not been supplied to him. The applicant avers that the respondents are bound by law to provide the information requested for.

3. The application is further supported by the affidavit of the ex-parte applicant herein one Elijah K. Kibet sworn on the 15<sup>th</sup> of July 2020 wherein he averred that the County Government of Elgeyo Marakwet have hidden information on tendering processes including list of tenders awarded for each financial year. In this regard, it was stated that the ex-parte applicant has on various occasions requested the County Government of Elgeyo Marakwet to issue him with a list of tenders awarded but the requests have never been honored. In particular, the ex-parte applicant deponed that his advocate wrote letters to the County Government on diverse dates including the 14<sup>th</sup> of May 2020, 2<sup>nd</sup> June 2020 and 16<sup>th</sup> June 2020 requesting for information on tenders awarded in the financial years 2019/2020, but in vain.

4. It is the ex-parte applicant's averment that he strongly feels and believes that the respondents have not followed the correct procurement procedure in awarding the project to the relevant institutions thus the delay and failure to respond to his requests for information. Finally, the ex-parte applicant averred that he has a right to be supplied with information as provided for in the Constitution, which law binds the respondents and as such, this court has jurisdiction to entertain, hear and determine this matter since the respondents have failed to furnish the ex-parte applicant with the requested for, information.

5. The application is opposed by the respondents via the replying affidavit of the 2<sup>nd</sup> respondent and a further affidavit by Kipkemboi Sirma Levi, counsel for the respondents.

6. The 2<sup>nd</sup> respondent in his replying affidavit sworn on the 15<sup>th</sup> of December 2020 averred that the application lacks merit as it is an abuse of court process which the court ought to dismiss. In particular, the 2<sup>nd</sup> respondent admitted that the County Government of Elgeyo Marakwet did received the letters of request from the ex-parte applicant's advocates but that the said advocate was orally informed that the information he requested for was available on the county government website at a click of the button.

7. Further, it was averred that the ex-parte applicant has not informed court how he will be prejudiced or suffer if indeed the application is genuine and made in good faith. The 2<sup>nd</sup> respondent thus averred that the ex-parte applicant should have gone online to download the documents since the County Government in light of the Covid-pandemic retorted to online transactions.

8. The 2<sup>nd</sup> respondent further noted that information as regards suppliers and list of tenders awarded are available on the county government website in line with the presidential Executive Order No. 2 of Procurement of Public Goods, Works and Services by public entities of 28<sup>th</sup> June 2018 and also in furtherance of the Open Governance Partnership that the county subscribed to in the year 2016.

9. Finally, the 2<sup>nd</sup> respondent averred that the orders sought by the ex-parte applicant have the effect of bringing the operations and development undertakings of the county to a halt and as such should not be granted.

10. In a further affidavit sworn by Kipkemboi Sirma Levi, counsel for the respondents, the procedure to access and download information requested for by the ex-parte applicant was availed. Further, counsel averred that the applicant had not exhausted all remedies available under Section 14 of the Access to information Act by approaching the Commission on Administrative Justice (CAJ) but rather proceeded to court. In this regard, counsel argued that without exhausting the alternative dispute resolution mechanism, the petition is premature and brought with mala fides and should thus be dismissed.

11. On the 25<sup>th</sup> of May 2021, court directed the matter be canvassed by way of written submissions and the parties filed their respective submissions.

### **Ex-Parte Applicant Submissions**

12. The ex-parte applicant via his submissions dated the 7<sup>th</sup> of June 2021 relied on Section 138 of the Public Procurement and Asset Disposal Act No. 33 of 2015 and submitted that the respondents did not comply with the law to the extent that they did not publish and or publicize

the contract awards. Further, the ex-parte applicant relied on Article 227 (1) of the Constitution submitting that the respondents should not assume that all Kenyan citizens have access to the internet and that there is no evidence that the respondents published and or publicized all contract awards on their notice boards at conspicuous places and website if available within the period prescribed.

13. In addition, the ex-parte applicant submitted that his rights under Article 35 of the Constitution were violated by the respondents.

14. Finally, the ex-parte applicant relied on Article 47 and Article 50(1) of the Constitution submitting that he was never granted fair administrative action and as such the court should entertain his case pursuant to Article 22 and 165(3)(b) of the Constitution.

### **Respondents Submissions**

15. The respondents via their submissions dated the 17<sup>th</sup> of June 2021 submitted that they fully complied with Section 138 of the Public Procurement and Asset Disposal Act of 2015 by availing all the documents relating to the tendering process and awards of contract in the county government website. They thus submitted that it is wrong for the ex-parte applicant to state that the said information was not available when he has not demonstrated that he sought the said information to no avail. The respondents thus reiterated the fact that the County complied with the Executive Order No 2 of 2018 and have subscribed to the Open Governance Partnership Action Plan and thus all tender awards are published on the county's website.

16. The respondents further submitted that the court lacks jurisdiction since all the available remedies have not been exhausted as contemplated under Section 14 of the Access to Information Act, as the ex-parte applicant should first have written to the CAJ. In this regard, the respondents submitted that Article 35 of the Constitution has been operationalized by the enactment of the Access to Information Act, and as such the two must be read together. They thus submitted that the procedure in Section 14 must be followed, and relied on the case of *Nairobi Law Monthly Co. Ltd vs Kenya Electricity Generating Company Limited & 2 Others [2013] eKLR*.

17. The respondents further relied on the cases of *Geofrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & others [2015] eKLR*, *Rogo Manduli vs Catherine Mukite & 3 others [2013] eKLR* and *Susan Kihika & 2 Others ex-parte George Mwaura Njenga [2014] eKLR* and submitted that without exhausting the alternative dispute resolution mechanism available as provided for in Section 14 of the Access to Information Act, the petition is premature and brought mala fides. They submitted further that it is trite law that where the constitution or statute confers jurisdiction upon a court, tribunal, person or body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute and relied on the case of *Secretary, County Public Service Board & another vs Hulbhal Gedi Abdille [2017] eKLR* and *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd [2018] eKLR*.

18. It is only in exceptional circumstances, so it was submitted, that the court can exercise jurisdiction even where another body has been granted jurisdiction. To buttress this point, the respondents relied on the case of *Ndiara Enterprises Ltd vs Nairobi City County Government [2018]*.

19. Finally, the respondent opine that the suit does not disclose any reasonable cause of action and the orders sought only seek to halt the operations of the county. In this regard the respondents relied on the cases of *Crescent Construction Co. Ltd vs Delphis Bank Ltd [2007] eKLR* and *DT Dobie & Co (K) Ltd vs Muchina [1982] KLR* and urged court to dismiss the application.

### **Analysis & Determination**

20. After carefully perusing the pleadings and submissions of the parties it is my finding that there are two issues for determination namely:

*i. Whether the court has Jurisdiction and if so,*

*ii. Whether the Ex-parte applicant has made out a case for grant of the orders sought*

#### **i. Whether the Court has Jurisdiction**

21. It is indeed trite law that Jurisdiction is everything and without it, the court must down its tools. This was the position in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR* which is considered the locus classicus on Jurisdiction. Without belaboring the point, this position has been affirmed and finds support in a litany of cases. As such, where jurisdiction has been challenged, the court must first address itself to this question before taking any further steps and if indeed the court finds that it has no jurisdiction, then it downs its tools instantly.

22. In the instant case, the respondents submitted that the court lacks jurisdiction since the ex-parte applicant has not exhausted all available dispute resolution mechanism, pursuant to Section 14 of the Access to information Act. In particular, the respondents aver that the said provision requires one to first approach the Commission on Administrative Justice before coming to court. Consequently, the respondents submitted that without first exhausting the available alternative dispute resolution mechanism provided for in Section 14 of the Access to Information Act, then the ex-parte applicant's petition is premature.

23. I have perused the Access to Information Act and cannot find the provision that requires one to report first to the Commission on Administrative Justice before going to Court. That is, there is no provision whatsoever in the Act that makes a report to the CAJ a condition precedent to triggering the jurisdiction of this Court.

24. This position was confirmed in *Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR* where the court noted

**“The respondents further contended that the petition is premature basing their argument on section 21 of the Act. Their take was that the petitioner should have first complained to the Commission on Administrative Justice (CAJ) before filing the petition. I have read the Act but could not trace a provision making 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.”**

25. An individual can thus come to Court directly to seek redress where an alleged violation of his or her right has taken place or has been threatened. This is the essence of Article 22 of the Constitution as read with Article 165(3)(b) which grants the High Court with unlimited jurisdiction to **determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.**

26. Consequently, the respondents’ contention that the petition is premature is unsustainable, and in the circumstances, this court finds that it has jurisdiction to hear and determine this petition.

## **ii. Whether the Ex-Parte applicant has made out a case for grant of the orders sought**

27. The Ex-parte applicant specifically seeks for Judicial review orders of Prohibition and Mandamus. It is the ex-parte applicant contention that the respondents indeed failed to carry out their functions as required by law and in particular Article 35 of the Constitution by refusing to furnish him with information relating to the list of tenders awarded by the County Government of Elgeyo Marakwet for the financial years 2018/2019 and 2019/2020.

28. It is trite law that Judicial review concerns itself with the decision-making process and not with the merits of the decision itself. Judicial review thus deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law, while prohibition restrains abuse of power. This was the position of court in **Director of Public Prosecutions vs Martin Maina & 4 Others [2017] eKLR.**

29. Similarly, in **Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 other [1997] eKLR**, the Court stated the grounds upon which such an order may issue as follows;

**“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition, and Vol.1 at pg. 37 paragraphs 128”**

30. In the instant case, it is not in doubt that the County Government of Elgeyo Marakwet is authorized under the law to carry out procurement of services and goods for the operations and functioning of the County. Secondly, this court is alive to the fact that the order of prohibition as sought has the effect of stalling the operations of the county and ultimately negatively affecting the innocent residents of the County. The Court must take into account public interest which remains a relevant factor where an order would affect the needs of the public and or good administration. This was affirmed by court in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42** wherein the learned Judge cited the decision in **R vs Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763** to the effect that the Court can refuse to make orders whose effect would violate the needs of good administration.

31. In the circumstances, this court finds that it is not tenable to grant prayer 2(a) of the Petition.

32. As regards prayer 2(b), the ex-parte applicant seeks an order of mandamus, compelling the respondents to forthwith supply the Ex-Parte applicant with the list of award of tenders for the financial year 2018/2019 and 2019/2020. It was submitted by the ex-parte applicant that despite letters to the county requesting for this information, the same was never furnished. In response, the respondents averred that the documents requested for were available on the county’s website and as such the ex-parte applicant should have accessed them online.

33. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. This was the position of court in **Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**. Mandamus is thus, a judicial command requiring the performance of a specified duty which has not been performed and is employed to compel the performance, when refused, of a Ministerial duty.

34. It is also employed to compel action, when denied, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either. This was the holding of court in **Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited [2018] eKLR** which cited with approval the decision in **Wilbur vs. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930) and also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).**

35. The test for mandamus was set out in **Apotex Inc. vs. Canada (Attorney General), [1994] 3 S.C.R. 1100** and was also discussed in **Dragan vs. Canada (Minister of Citizenship and Immigration) 2003 FCA 233 (CanLII), 2003 FCA 233** wherein the court listed eight factors that must be present for the writ to issue. These are: -

**“(i) There must be a public legal duty to act;**

*(ii) The duty must be owed to the Applicants;*

*(iii) There must be a clear right to the performance of that duty, meaning that:*

*a) The Applicants have satisfied all conditions precedent; and*

*b) There must have been:*

*i. A prior demand for performance*

*ii. A reasonable time to comply with the demand, unless there was outright refusal; and*

*iii. An express refusal, or an implied refusal through unreasonable delay;*

*iv. No other adequate remedy is available to the Applicants.*

*v. The Order sought must be of some practical value or effect;*

*vi. There is no equitable bar to the relief sought;*

*vii. On a balance of convenience, mandamus should lie.”*

36. In the instant case, it is my finding that the Ex-parte applicant has met the conditions precedent highlighted above for the following reasons.

37. Firstly, it is clear that the County Government of Elgeyo Marakwet as a public entity owes the ex-parte applicant a duty to act by furnishing him with the requested documents without delay. This is the essence of Article 35 of the Constitution which provides

*“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.”*

38. Article 35 is thus clear that information held by the state or any other person is accessible by citizens and that information shall be availed on request. Article 35 is further strengthened by the provision of Section 4 of the Access to Information Act which 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.”*

39. The provisions of Section 4 of the Act as read with Article 35 of the Constitution confirm that Article 35 applies to public entities of which a County Government is.

40. As rightly held in *Katiba Institute v Presidents Delivery Unit & 3 others [supra]*, the law places a responsibility on the person the information has been requested to avail that information without delay. Article 35 of the Constitution therefore does not in any way place conditions for accessing information. *The most important thing is that information be in possession of the state, state officer or public body.* Furthermore, as held in the Katiba Institute Case, it does not matter the reasons why the information is being sought even what the public officer perceives to be the reason for seeking the information.

41. State organs or public entities therefore have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1) (a) and they cannot easily escape that constitutional requirement that they provide access to information to citizens. This was affirmed in *Nairobi Law Monthly vs Kenya electricity Generating Company & 2 Others [2013] eKLR*.

42. This position was further reiterated by the Court in *Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission [2016] eKLR*, wherein the court held that; -

**“[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.*”**

43. The right to information is thus a fundamental right and forms the basis for accountability, responsiveness and openness in an open and democratic society, and as such cannot be trivialized and neither can it simply be wished away. This was emphasized in the case of *Brummer v Minister for Social Development & Others CCT 25/09 2009 ZACC 21* where the Court stated; -

**“[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”**

**[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”**

44. Secondly, it is vivid that the ex-parte applicant wrote to the respondents requesting for information which was not furnished at all. This was a breach of the duty owed to the ex-parte applicant by the respondents. The argument by the respondents that the information requested for by the ex-parte applicant was available online is therefore immaterial as they owed the ex-parte applicant the duty to respond to his letters and furnish him with the requested for information. At least they should have responded and informed him of the website and how to access it.

45. As regards prayer 3, I am inclined to deny the same due to the effect it would have on good administration of the county. In this regard, the court must take into account public interest and the needs of administration. As rightly held in *R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR* public interest is an overriding factor when determining whether or not to grant stay orders and must be considered when granting stay orders.

46. Similarly, in *R (H). vs Ashworth Special Hospital Authority [2003] 1 WLR 127* the court while dealing with the issue of public interest in the grant of a stay held that where there is a public interest element involved, the Court must strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong case that a tribunal’s decision was unlawful. It is for this reason that in *Re Bivac International SA (Bureau Veritas) [supra]*, the Court held that it can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration and by extension, public interest.

47. In the foregoing and after evaluation and analysis of the facts and evidence in this petition, submissions by counsels for the parties and the relevant law, it is my finding that the respondents violated the ex-parte applicant’s right of access to information and that no effort was made to justify the said violation.

48. For this reason, I am satisfied that the ex-parte applicant has proved its case to the required standard and must succeed.

49. Consequently, the application dated the 22<sup>nd</sup> of July 2020 is allowed in terms of prayer 2(b) with the respondents being directed to forthwith provide the ex-parte applicant with the list of awards of tenders for the financial years 2018/2019 and 2019/2020 within 14 days from the date of this finding.

50. The leave granted shall not operate as stay.

51. Costs are awarded to the ex-parte applicant

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**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 19<sup>th</sup> day of October, 2021.**

In the absence of:-

Mr. Kiboi for the ex-parte Applicant

Mr. Kemboi for the Respondent

Ms Gladys - Court assistant