THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUIONAL AND HUMAN RIGHTS DIVISION

CONSITUTIONAL PETITION NO. 201 of 2019

SAVRAJ SINGH CHANA.....PETITIONER

VERSUS

DIAMOND TRUST BANK (KENYA) LIMITED.....1ST RESPONDENT

AIRTEL NETWORK (KENYA) LIMITED.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner, Savraj Singh Chana, through the petition dated 15th May, 2019 in pursuit of the right of access to information under Article 35 of the Constitution seeks certain information from the 1st Respondent, Diamond Trust Bank (Kenya) Limited and the 2nd Respondent, Airtel Network (Kenya) Limited. The Petitioner alleges that he held two bank accounts with the 1st Respondent and had a mobile telephone number with the 2nd Respondent which he used to operate a Mobile Banking Facility known as "DTB Mobile Banking" with the 1st Respondent. He avers that the mobile telephone number was linked to his savings and current accounts in order for him to actively use the mobile banking facility.

2. Upon experiencing network loss on his mobile telephone number on or about 12th November, 2018 the Petitioner contacted the 2nd Respondent's customer service who directed him to their head office for assistance.

3. On or about 13th November, 2018 the Petitioner was contacted by the 1st Respondent's one Mr. Karim Shivji who informed him of certain irregular, illegal and unauthorized transactions had been made vide the Mobile Banking Facility resulting in a total of Kshs. 592,864/- being irregularly, illegally and/or unlawfully withdrawn from both accounts between 12th and 13th November, 2018 and sent to unknown and/or alien numbers using the Mobile Banking Application. The Petitioner was informed by Mr. Shivji that his mobile number's SIM card had been compromised and advised to pursue the 2nd Respondent in order to establish the circumstances leading to his SIM card being compromised, including seeking logs of the Mobile Banking Facility transactions made on the SIM card and the location in which his SIM card may have been compromised.

4. The Petitioner made a formal complaint to the 1st Respondent through a letter dated 13th November, 2018 enumerating the series of events leading to the loss of the money. Thereafter he attended to the 2nd Respondent's head office and requested for the details of the transaction logs and pertinent data touching on the irregular transactions. The Petitioner's request was declined and he was informed that such information would only be availed to him upon the issuance of a court order compelling the 2nd Respondent to do so.

5. The Petitioner informed Mr. Shivji on the outcome of his attendance to the 2nd Respondent's office and subsequently sent a follow-up letter on his initial complaint dated 14th November, 2018. The Petitioner was assured by the said Mr. Shivji that the 1st Respondent was working to establish the circumstances leading to the loss of the money from his accounts; and that the bank was working with Safaricom Kenya Limited to establish the identify of persons who may have compromised his SIM card. It is the Petitioner's averment that despite the follow up with the respondents through letters and attendances, the respondents have both neglected, refused and/or avoided to remedy the loss of funds that occurred in both his savings and current accounts.

6. It is the Petitioner's deposition that he lodged a formal complaint with the Directorate of Criminal Investigations (DCI) on 14th February, 2019. On the same date he sent a letter to both respondents which was received on 15th February, 2019, requesting for information relating to the transaction and data logs from both of them. The 1st Respondent responded vide a letter dated 21st February, 2019 declining to furnish the information without any reason or justification and/or foundation under law. It is alleged that the 2nd Respondent has hitherto ignored,

neglected, avoided and/or refused to furnish the Petitioner with any response whatsoever.

7. The Petitioner claims that the decision by the respondents declining, ignoring, avoiding and/or neglecting to provide him with access to information relating to transactional data and/or logs pertaining to unlawful access, tampering and/or manipulation of his mobile telephone number and his accounts, was in gross violation of his rights of access to information under Article 35 of the Constitution of Kenya 2010.

8. It is further alleged that the decision by the respondents to decline to provide the Petitioner with the information sought also violated his right to information necessary for him to gain full benefit from goods and services as provided under Article 46 of the Constitution. It is asserted that if the reliefs sought are not granted, the Petitioner is likely to suffer substantial loss and damage as he will be deprived of the opportunity to cogently and with particularity, pursue the remedies available under law for loss of the withdrawn amount. The Petitioner claims that the documentation sought is necessary to enable him to seek recourse as provided by the law for the loss of the withdrawn amount.

9. The 1st Respondent filed grounds of opposition dated 10th September, 2019 in which it is contended that the petition is premature as the Petitioner has not followed the laid out procedure in Section 14 of the Access to Information Act, 2016. It is further claimed that this Court lacks jurisdiction to determine this matter as it is superseded in precedence by the Commission on Administrative Justice.

10. In its replying affidavit sworn on 10th September, 2019 by Karim Shivji, the 1st Respondent deposes that on 13th November, 2018, the Security, Fraud Management and Investigations Department (SID) received an email from Safaricom Mpesa Fraud requesting them to validate 6 suspicious bank to customer transactions done through the bank's paybill Number 516601. The SID requested Safaricom Limited to block the funds so that the bank could investigate and contact the Petitioner but the money had already been withdrawn.

11. The 1st Respondent upon contacting the Petitioner about the suspicious transactions, also commenced its investigation into the transactions. It is further confirmed that on 13th November, 2018 the Petitioner visited SID where he was interviewed. The Petitioner allegedly revealed to them that the day before the suspicious transactions on 12th November, 2018 his Airtel line was offline, and that he had been informed by the 2nd Respondent that there had been an unauthorised SIM swap. SID noted that even if a SIM swap occurred, a transfer of funds could occur unless the private 4-digit PIN was used.

12. The 1st Respondent asserts that it informed the Petitioner that given that the transactions involved mobile banking service any information regarding International Mobile Equipment (IMEI) numbers, identities of the mobile subscribers, IMSI numbers, Mast Profile Locations would be processed and be in the possession of Safaricom Limited and the 2nd Respondent. The only information in the possession of the 1st Respondent was the Petitioner's statement of accounts.

13. The 1st Respondent affirms that upon advising the Petitioner to contact the Directorate of Criminal Investigations Cybercrime Unit, Sergeant Nicholas Ole Sana obtained a search warrant dated 28th November, 2018 in **Nairobi Crim. Mic App. No. 456 of 2018 Republic vs Diamond Trust Bank A/C 5604620001.** It is averred that the bank fully complied with the search warrant and furnished the DCI with the required information. Shivji claims that neither he nor the bank are aware whether such orders were obtained in respect to the 2nd Respondent or Safaricom Limited.

14. Shivji confirms receipt of the Petitioner's demand letter dated 19th November, 2018 seeking compensation of Kshs. 592,864/= being the amount withdrawn from his accounts. He avers that the bank responded to the Petitioner on 11th December, 2018 clarifying that it was the duty of the Petitioner to ensure that his 4-digit PIN remained private and therefore the bank cannot be held liable for his own negligence.

15. It is deposed that the bank has provided the Petitioner with all the information that is within its possession and has not violated the Petitioner's constitutional rights as alleged. Furthermore, it is alleged that the petition is an abuse of the court process as the Petitioner has not followed the prescribed procedure. It is additionally averred that the Petitioner is not entitled to any compensation and that he is using the petition to recover the funds which were lost owing to his own negligence rather than pursuing the same through a civil claim.

16. The 2nd Respondent filed a replying affidavit sworn by Lillian Mugo on 18th July, 2019. The 2nd Respondent contends that the petition does not raise constitutional issues and or does not qualify as a constitutional matter but is a civil dispute between the Petitioner and the 1st Respondent.

17. It is asserted that contrary to the Petitioner's allegations, the 2nd Respondent does not conjunctively or otherwise operate "a DTB Mobile Banking" with the 1st Respondent; and the mobile banking system operated by the 1st Respondent is independent from 2nd Respondent. The 2nd Respondent avers that what it provides to the 1st Respondent is a merchant till (an equivalent of a pay bill number) where the 1st Respondent avails and maintains funds hence enabling its customers to deposit or withdraw funds from their bank accounts hence enabling the 1st Respondent to undertake mobile banking business.

18. The 2nd Respondent asserts that it does not store, retain or have possession of any content of any communication between subscribers, and therefore it is not possible to retrieve any communication between the Petitioner's number with any other subscriber either within the 2nd Respondent's network or across other networks. Furthermore, the 2nd Respondent claims that it is bound by the principle of confidentiality relating to third party information. The information can only be shared with the owner of the mobile number with their written request, or with a government security agency but upon sanction by a court of law through a court order. It is asserted that the 2nd Respondent has not been approached by police in relation to the alleged fraud herein. It is averred that if the Petitioner's Subscriber Identification MSIDN was compromised it was due to his own negligence or fraudulent acts or omissions.

19. The 2nd Respondent avers that the data sought on the Mobile Banking Platform is not accessible or available to it as the same is in the control of the 1st Respondent. The only information that the 2nd Respondent could and did provide to the Petitioner was on the SIM swap which occurred on 12th November, 2018 causing the loss in network; and the only assistance that the 2nd Respondent could and did provide the Petitioner was to re-gain control of his SIM card.

20. The 2nd Respondent deposes that it does not play any role in relation to the processing, procuring, securing and or facilitation of the security PIN used by the Petitioner in operating the DTB mobile banking facility. However, the 2nd Respondent is willing to provide information to the police as to which mobile number was used to undertake the alleged irregular SIM swap should the investigating officers conducting investigations request. The 2nd Respondent alleges that it does not have information and cannot access information relating to "logs of the mobile banking facility transactions made on the SIM card".

21. On the matter of the right to information, the 2nd Respondent asserts that the same is not absolute and may be limited both under the Constitution and Section 6 of the Access to Information Act. Therefore, it is averred that the petition is premature and incompetent.

22. The 2nd Respondent additionally contends that the information sought by the Petitioner, which would assist him to have civil recourse in law for his loss of the alleged sums, may be made in a civil suit and not a constitutional petition.

23. The 2nd Respondent also filed a supplementary affidavit sworn on 2nd October, 2019 sworn by Lillian Mugo. It is deposed that the letter dated 14th February, 2019 annexed to the Petitioner's supporting affidavit makes reference to other letters dated 14th December, 2018 and 22nd January, 2019 which have not been produced and which the 2nd Respondent believes to be relevant to the petition. It is averred that the 2nd Respondent does not have on record the letter dated 22nd January, 2019 but did receive the letter dated 14th December, 2018. Furthermore, it is contended that contrary to the Petitioner's allegations, the 2nd Respondent did respond to the issues raised in their letter of response dated 24th December, 2018.

24. The Petitioner filed a further affidavit dated 26th November, 2019 in response to the respondents' responses. The Petitioner opposes the 1st Respondent's contention that the he has failed to comply with the provisions of Section 14 of the Access to Information Act, 2016 which required him to approach the Commission on Administrative Justice. The Petitioner asserts that the Act does not contemplate approaching the Commission as a condition precedent to involving the Court's jurisdiction to hear and determine petitions filed seeking to challenge the violation of the rights to access information under Article 35 of the Constitution.

25. The Petitioner insists that at no juncture did he divulge the details pertaining to his private 4-digit PIN to any third party or parties. It is further asserted that the 1st Respondent has admitted in its replying affidavit, that it abrogated its fiduciary duty in ensuring that the funds situated in his bank accounts were safeguarded from unauthorised access.

26. The Petitioner further alleges that the 1st Respondent's assertion that it is not seized with the information that he sought is untrue and grossly misleading to this Court as the 1st Respondent by dint of it being his fiduciary for purposes of the Airtel Mobile Banking Application, is indeed seized of all information relating to the transactions that were conducted vide the mobile banking platform.

27. The Petitioner avers that the criminal complaint and the present proceedings for the access to information are mutually exclusive to one another. In line with this it is deposed that the information supplied by the 1st Respondent to the DCI in compliance with the search warrant was not in respect to the proceedings herein and therefore the Petitioner was never supplied with the same.

28. On the invitation to the Court by the 1st Respondent to address itself as to whether an order would issue against Safaricom, the Petitioner asserts that Safaricom bears no relevance to the proceedings.

29. The Petitioner avers that Section 26 of the Data Protection Act, 2019 grants him the right to access his personal data pertaining to the transactions that led to the loss of his money, which information is in the custody of the respondents.

30. In response to the 2nd Respondent's replying affidavit, the Petitioner contends the averment that the petition herein merely relates to a civil dispute is a misapprehension of the import of Article 35 of the Constitution and Section 4 of the Access to Information Act, 2016.

31. It is deposed that there is no indication provided under the contractual provisions that state that the 2nd Respondent is entitled to refuse, decline, and or ignore to provide its subscribers with information relating to mobile banking transactions conducted on its Airtel money platform. The Petitioner avers that the contractual provisions alluded to can only be relied upon in the event that the petition is allowed and the 2nd Respondent is ordered to supply the information.

32. The Petitioner contends that the 2nd Respondent does indeed store and maintain records of all data and transactional logs pertaining to transactions conducted on the mobile banking facility and therefore the 2nd Respondent has disregarded its duty to provide such data to its rightful owner. Furthermore, it is asserted that the 2nd Respondent in order to operate the merchant till would require certain data such as the Petitioner's SIM card's IMEI number and the respective Mast Profile Location.

33. The Petitioner asserts that the admission by the 2nd Respondent of the occurrence of the SIM swap amounts to an admission of its failure to adhere to its duty of care. It is further asserted that the admission that the 1st Respondent failed to report the loss of funds in the Petitioner's account demonstrates that both respondents disregarded their duties of care.

34. The Petitioner alleges that the 2nd Respondent as a mobile network operator is indeed seized of possession of his messages, call communication and data as encrypted under his SIM card and which revolve within its network and across other networks. Furthermore, it is asserted that the 2nd Respondent is seized of information pertaining to the date and time of the SIM swap and the transaction logs made on the Petitioner's SIM card.

35. In response to the 2nd Respondent's supplementary affidavit, the Petitioner avers that the letter dated 22nd January, 2019 was attached to the letter dated 14th February, 2019 and its receipt by the 2nd Respondent is confirmed by the fact that its receiving stamp is inscribed on the face of the letter dated 14th February, 2019 acknowledging receipt. Furthermore, the Petitioner avers that it was upon receiving the 2nd Respondent's response to its initial demand letter that he requested for the information vide his letters dated 22nd January, 2019 and 14 February, 2019.

36. The Petitioner contends it is the request for information that forms the crux of these proceedings and not the demand for compensation for the loss of the withdrawn amount. It is his averment therefore that the letter dated 14th December, 2018 is only relevant to these proceedings in so far as it demonstrates the Petitioner's intention to enforce his rights.

37. The Petitioner filed written submissions dated 26th November, 2019 in which he identified the issues for determination as:-

i. Whether the Court is properly seized of jurisdiction to hear and determine the petition herein;

ii. Whether the Petitioner has set out with particularity the violation of his right to access of information presently held by the respondents;

iii. Whether the respondents have discharged the burden of proof in alleging wilful disclose of the Petitioner's PIN; and

iv. Whether the Petitioner is entitled to the reliefs sought herein.

38. On the first issue, the Petitioner relies on the decision in **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR** where is was held that there was no provision which makes a report to the Commission on Administrative Justice a condition to invoking the jurisdiction of the High Court. The Petitioner argues that his right to access information is at the epicentre of the right to the enjoyment of other rights and freedoms. He relies on the decision in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR** on the right to information, together with Section 26 of the Data Protection Act, 2019 to support his assertion that he has the right to access his personal data which is in custody of the respondents.

39. On the second issue, the Petitioner relies on the case of **Zebedeo John Opore v The Independent Electoral and Boundaries Commission [2017] eKLR** where the Court distinguished between petitions for access to information and ordinary civil claims. In further reliance on the said case, the Petitioner asserts that the presumption is always in favour of disclosure of the information sought unless the information meets the three-part test, that is:-

a. the information relates to legitimate interests protected by the law, and

b. disclosure of the information threatens to cause substantial harm to that interest, and

c. the harm to the interest is greater than the public interest in receiving the information.

40. On the third issue it is submitted that in line with the decision in **Zebedeo John Opore (supra),** the burden of proving that the refusal to grant the Petitioner access to the information sought is justified rests with the respondents. The burden, he submits, has not been discharged by the respondents in this case. The Petitioner once again denies the allegation that the withdrawn amount was lost due to his disclosure of this private 4-digit PIN, and asserts that the loss of the amount serves as *prima facie* evidence that his SIM card was swapped as a result of the respondents' abdication of their respective duty of care and fiduciary duty.

41. The Petitioner asserts that the respondents have failed to discharge the burden of proving that he disclosed his SIM card PIN to third parties, and that the SIM swap was successfully done as a consequence of the Petitioner's own negligence. Section 107(1) of the Evidence Act, Cap. 80 is relied upon in support of the proposition that he who alleges must prove.

42. The 1st Respondent filed its written submissions dated 3rd February, 2020 and states that the first issue to be determined is whether the petition is premature. It relies on the holdings in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR**; **Mutanga Tea & Coffee Company Limited v Shikara Limited & another [2015] eKLR;** and **Master Freighters Limited v Kenya Bureau of Standards & another [2019] eKLR** to assert that the Petitioner must first exhaust the statutory mechanisms before approaching the Court. The 1st Respondent points out that the alternative dispute resolution mechanism is provided under sections 14 and 22 of the Access to Information Act. It is asserted that the Petitioner ought to have made either a complaint or applied for review to the Commission on Administrative Justice which is bestowed with vast powers under Section 23(2) of the Act.

43. It is averred that the Petitioner's reliance on **Katiba Institute v Presidents Delivery Unity (supra)** and **Zebedeo John Opore (supra)** is misplaced as the same refer to public entities and the 1st Respondent herein is a private entity. Furthermore, it is pointed out that the decision in **Nairobi Law Monthly Company Limited (supra)** cannot be relied on as the decision preceded the Access to Information Act. Further, that the Data Protection Act came into force in 2019 and it cannot therefore be applied retrospectively.

44. The second issue according to the 1st Respondent is whether the petition is a civil claim. The 1st Respondent relies on the case **Anne Nzaumi Munyaka v Oliver Nzeki Munyaka & another (as the Legal Rep' of the Estate of George Muyaka Kavuku) [2019] eKLR** where it was held that **"not each and every litigation that makes reference to the Constitution merits being litigated as a constitutional cause."** The 1st Respondent asserts that the claim by the Petitioner for the compensation of monies irregularly and unlawfully withdrawn is in the realm of fraud and therefore can be litigated in a civil suits. The 1st Respondent relies on the holding in **John Gachanga (supra)**, and submits that the Petitioner ought to have sued it for fraud in a civil suit and made an application under the Civil Procedure Rules, 2010 for discovery.

45. The third issue raised by the 1st Respondent is that the petition is without merit. It is submitted that the Petitioner is not an expert in mobile banking or information technology field. Additionally he has not furnished the Court with a report from an expert explaining that the information is readily available in this field. Reliance is placed on the case of **Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR** where the Court set out the importance of expert opinion. The 1st Respondent asserts that it has, through the evidence of Karim Shivji who is an officer in its Security, Fraud Management and Investigations Department, explained the kind of information which the bank would be in possession of.

46. The 2nd Respondent filed its written submissions dated 22nd January, 2020 and submits that the first issue is that of the prematurity of the suit. It is argued that the letter dated 14th February, 2019 which was copied to the 2nd Respondent did not require it to act in any manner, as copying a letter to a third party does not amount to a demand. It is further claimed that the letter is devoid of any demand for information as it consists of the demand for compensation and therefore the claim against the 2nd Respondent cannot be sustained.

47. The 2nd Respondent states that the petition does not indicate whether the Petitioner invoked the provision of Section 14 of the Access to Information Act and therefore it is an abuse of the court process to overlook the procedure provided under the Act by filing a constitutional petition. The cases of **Communication Commission of Kenya& 5 others v Royal Media Services Limited & 5 others [2014] eKLR** and **Council of Governors v Attorney General & 12 others [2018] eKLR** are relied on to support the 2nd Respondent's assertion that the Petitioner must exhaust the available dispute resolution mechanisms before approaching the High Court.

48. The second issue is whether the petition is a pure civil dispute clothed as a constitutional petition. The 2nd Respondent once again relies on the letter dated 14th December, 2018 to assert that the Petitioner's claim is that it was liable for payment of the amount lost from the Petitioner's accounts on account of breach of a duty of care. It is the 2nd Respondent's position that the petition involves alleged breach of contractual relationships between the Petitioner and the respondents and is therefore purely a commercial and or civil dispute. In support of this assertion, reliance is placed on the cases of **Maggie Mwaniki Mtalaki v The Housing Finance Company of Kenya [2015] eKLR** and **John Gachanga & another v Competition Authority of Kenya [2019] eKLR.**

49. The third issue identified by the 2nd Respondent is that of the limitation of the right to information. It is submitted that the information sought by the Petitioner relates to third parties and may not be disclosed due to the principle of confidentiality, unless requested through a government security agency. The 2nd Respondent avers that the right to information under Article 35 is not absolute and may be limited under Section 6 of the Access to Information Act. Reliance is placed on **John Gachanga (supra)** where the Court discussed the limitation of the right to information.

50. The final issue raised is that the 2nd Respondent does not conjunctively with the 1st Respondent operate or establish the "DTB Mobile Banking" as alleged by the Petitioner. The 2nd Respondent asserts that it does not store, retain or have possession of data relating to messages or phone call communication between subscribers, and therefore it cannot provide information relating to text messages or communication between the Petitioner's mobile telephone number and other numbers.

51. Having carefully considered the substance of the petition, the responses thereto, and the submissions of the parties I find that the issues for determination are as follows:-

a. Whether the Court has jurisdiction to determine this matter?

b. Whether the Petitioner's right to access information under Article 35 of the Constitution was infringed by the actions or omissions of the respondents?

52. The respondents claim that the petition is premature as the Petitioner has failed to exhaust the available dispute resolution mechanisms before approaching the High Court. The Petitioner contends that Section 14 of the Access to Information Act, 2016 does not contemplate approaching the Commission on Administrative Justice as a condition precedent to invoking this Court's jurisdiction to hear and determine petitions filed seeking to challenge the violation of the rights to access information under Article 35 of the Constitution.

53. It established under the Constitution of Kenya, 2010 Article 159(2)(c) that in exercising judicial authority, courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. This position has been adopted by Kenyan courts, such as in the case of **Violet Ombaka Otieno & 3 others v Moi University [2019] eKLR** where the Court cited with approval the Court of Appeal's decision in **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others (2015) eKLR** where it was held that**:-**

"[30] […] It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to

encourage alternative means of dispute resolution."

54. The learned Judge then went ahead to explain the exception to that principle as follows:-

"31. While it is this Court's jurisprudential policy in this regard to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for, and this is also now required by section 9(2) and (3) of the Fair Administrative Action Act, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Where such an alternative remedy cannot be used by an applicant, this Court can exempt such an applicant from its application as provided by section 9(4) of the Fair Administrative Action Act."

55. The exception to the exhaustion doctrine was also explained in **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** thus:-

"47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in the case before us, the alternative statutory forum envisaged in the PPAD Act, namely the Public Procurement Administrative Review Board, in an earlier suit involving at an attempt to award the same tender, referred some of the issues raised to the High Court for hearing and disposition since the Review Board was persuaded that resolution of the issue involved serious questions of constitutional and statutory interpretation…"

56. The approach adopted by the Court in the case above was based on the decision of the Court of Appeal in **Republic v National Environmental Management Authority [2011] eKLR** where it was held that:-

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…"

57. It is understood from the above cases that, although the High Court has jurisdiction to hear and determine matters on the interpretation of the Constitution and other statutory provisions, where there is a mechanism already established to determine such disputes the same should be pursed before approaching the Court. However, there are exceptions to this rule, being situations where the mechanism provided is not well placed to determine such an issue. Furthermore, the jurisdiction of the Court can be invoked where the question raised concerns a constitutional value which is at stake.

58. According to Section 14(1) of the Access to Information Act:-

"14. (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

59. Section 2 of the Act states that "Commission" **"means the Commission on Administrative Justice established by section 3 of the Commission on Administrative Justice Act, No. 23 of 2011."** Section 14 is clear that the Commission on Administrative Justice is conferred with the authority to review a decision restricting the access to information not only by public entities but also private bodies. A private body is defined under Section 2 of the Act as:-

"...any private entity or non-state actor that—

(a) receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources); or

(b) is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right."

60. The respondents herein fall within the definition of private bodies under the Act since they provide public services in the banking and information and technology sectors. Therefore the Commission on Administrative Justice is well placed to adjudicate on a matter in relation to the two entities.

61. The Petitioner, however, places reliance on the decision in **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR** and urges that this Court has a duty to protect rights and approaching the Commission on Administrative Justice was not a precondition for coming to this Court. In the cited case it was held that:-

"52. 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. This Court has unlimited jurisdiction under Article 165(3)(b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The respondents' contention that the petition is premature is therefore unsustainable."

62. It is appreciated that the cited decision does indeed recognise the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.

63. The preamble of the Access to Information Act, 2016 clearly states that it is an **"Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes."** It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-

"The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-

a. **the release of any information withheld unlawfully;**

b. **a recommendation for the payment of compensation; or**

c. **any other lawful remedy or redress."**

64. Section 23(3) of the Act provides that:-

"A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made."

I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice.

65. The Court of Appeal in **Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR** explained the purpose of the exhaustion doctrine as follows:-

"This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. *SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra*), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

"[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

(See also *KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS (2008) 3*

KLR (ER) 296).

It is readily apparent that in those cases the Court was speaking to issues of the correct *procedure* rather than of the correct *forum* for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, *including* reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word *"including"* leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In *RICH PRODUCTIONS LTD. V. KENYA PIPELINE COMPANY & ANOTHER, PETITION NO. 173 OF 2014,* the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

"The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."

On the same reasoning, this Court, in *REPUBLIC V. THE NATIONAL ENVIRONMENTAL*

***MANAGEMENT AUTHORITY, CA NO 84 OF 2010* upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in *VANIA INVESTMENT POOL LTD. V. CAPITAL MARKETS AUTHORITY & 8 OTHERS, CA NO 92 OF 2014* this Court also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the *Capital Markets Appeals Tribunal* established by the *Capital Markets Act*.**

We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very *raison d'etre* of the mechanisms provided under the two Acts.

What we have stated above also sufficiently disposes of the appellant's contention that the High Court failed to invoke its inherent jurisdiction or abdicated its jurisdiction. It also answers the applicant's contention that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under *Article 159 (2) (d)* of the Constitution. Granted the express constitutional principle under which the dispute resolution mechanisms provided by the PPA and the EMCA are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality."

66. I have quoted the decision at length because it answers several questions about the exhaustion principle. In light of the cited case law and what I have stated in this judgement, it follows that the matters raised in the petition are not yet ripe for the determination of this Court. In view of that finding, I will not delve into the substantive issues raised in the petition for doing so will be prejudicial to the parties since they may want to go back to the statutory body mandated to deal with the issues raised in the petition.

67. Before I conclude, it is important to state that the respondents are indeed correct that the Petitioner cannot place reliance on the decision in **Nairobi Law Monthly Company Limited (supra)** in an attempt to confer jurisdiction on this Court. The reason being that the decision was made prior to the enactment of the Access to Information Act.

68. The Petitioner also pointed to Section 26 of the Data Protection Act, 2019 in support of the submission that he is entitled to his data. There are two reasons why the Data Protection Act, 2019 cannot be of any help to him. Firstly, the Act which came into force on 25th November, 2019 cannot apply retrospectively to the Petitioner's case. Secondly, the Act, just like the Access to Information Act, provides for an alternative dispute resolution mechanism-see Part VIII which provides for enforcement provisions.

69. On the issue of costs, I find that the Petitioner ignored express provisions of the law when he bypassed the Commission on Administrative Justice. He has made the respondents incur unnecessary expenses and he must compensate them. Consequently, this petition is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi through video conferencing/email this 28th day of May, 2020.

W. Korir,

Judge of the High Court