REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 2A OF 2020

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1) –(4), 21, 22, 33, 35, 258 AND 259 OF THE CONSTITUTION

BETWEEN

CHARLES APUDO OBARE..1ST PETITIONER

IRINE ADHIAMBO ODHIAMBO...2ND PETITIONER

-VERSUS-

CLERK, COUNTY ASSEMBLY OF SIAYA................................1ST RESPONDENT

ERICK OGENGA...2ND RESPONDENT

JUDGMENT

1. The Petitioners in this Petition are **CHARLES APUDO OBARE** and **IRENE ADHIAMBO ODHIAMBO.** They bring this petition demanding for access to information as stipulated in Article 35 of the Constitution, from the Respondents who are the **CLERK OF COUNTY ASSEMBLY OF SIAYA,** as First Respondent and **HONORABLE ERIC OGENGA**, the second Respondent. The information sought to be accessed relates to tenders for the construction of a County Assembly Complex Building.

2. The request for information was formally made to the Respondents by the Petitioners vide their letter dated 12th February, 2020, seeking to access the information held by the Respondents in respect to the tender, evaluation and award of the construction of an Assembly Complex Building, on account that there was apprehension that colossal sums of public money may be utilized for a project that is not warranted or genuine and where value for money will have been lost.

3. The Petitioners assert that they bring this Petition and the request dated 12th February, 2020, as citizens of the Republic of Kenya and in the public interest.

4. The Petitioners further allege that the Respondents resisted this demand to access the requested information prompting the Petitioners to institute this Petition pursuant to the provisions of Article 1, 2, 3, 10, 19, 20 (1) -(4), 21, 22, 33, 35, 258 and 259 of the Constitution.

5. The Petition which is supported by the Affidavit sworn by the second Petitioner **Irine Adhiambo Odhiambo** sworn on 22nd April 2020 at Nairobi seeks the following ORDERS:

> ***(i) THAT a declaration be issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) on the basis of the Petitioners' request dated 12th February, 2020, is a violation of the right to access to information.***
>
> ***(ii) THAT a declaration be issued that the failure by the 1st Respondent to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) on the basis of the Petitioners' request dated 12th February, 2020, is a violation of Article 10 of the Constitution and specifically the value of the rule of law, participation of the people, human rights, good governance, transparency and accountability.***
>
> ***(iii) THAT a declaration be issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) is a violation of the obligations imposed on the said Respondents by Chapter six specifically Articles 73 (1) and 75 (1) of the Constitution and Section 3 of the Leadership and Integrity Act and Sections 8, 9 and 10 of the Public Officers Ethics Act.***

(iv) <u>THAT</u> an Order be issued compelling the 1st and 2nd Respondents to forthwith provide, at the Respondents' cost, information sought by the Petitioner in their letter to the Respondents dated 12th February, 2020.

(v) <u>THAT</u> costs for this Petition, assessed at Kenya Shillings Five Hundred Thousand (Kshs. 500,000) be payable to the Petitioners by the Respondents.

(vi) <u>THAT</u> this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.

6. Opposing the Petition, the Respondents filed a Replying Affidavit sworn by **Eric Ogega**, the 2nd Respondent and with leave of Court, the Petitioners filed a Further Affidavit in rejoinder.

7. In opposing the Petition, the Respondents at paragraph 18 of the Replying Affidavit and in their written submissions respectively deposed and contended that the Petition is premature for failure to follow the dispute resolution mechanisms provided under the Access to Information Act.

8. In my humble view, that is a very crucial preliminary point of law which I must determine ***in limine*** as it goes to the jurisdiction of this court, notwithstanding the jurisdiction of this court as stipulated in Articles 22, 23, 35, 258 and 165 of the Constitution. Should I find that the petitioners had an alternative effective dispute resolution mechanism, then I need not delve into the merits of the Petition as I will be obligated to down my tools. This is because it is trite law that jurisdiction is everything without which a court of law acts in vain. See **Motor Vessel "Lilian S" v Caltex Oil (K) Limited** Further, jurisdiction cannot be conferred by consent of parties and neither can a court of law arrogate itself the jurisdiction that it is devoid of or which is expressly taken away by statute or by the constitution.

9. According to the Respondent, section 14 of the Access to Information Act provides that an applicant may apply in writing to the Commission on Administrative Justice (CAJ) requesting a review of the decisions of a public entity in relation to a request for access to information.

10. It was therefore submitted in contention that the petitioners have in filing this petition offended the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court. Reliance was placed on several cases of ***Geoffrey Muthinja Kabiru v& 2 others v Samuel Munga Henry & 1756 others [2015]eKLR; Orie Rogo Manduli v Catherine Mukite Nabwala &3 others [2013]e KLR and Susan Kihika &2 others Exparte George Mwaura Njenga [2014] e KLR*** where the Courts in the respective cases found that they lacked jurisdiction to entertain the petitions since the petitioners had not exhausted the dispute resolution mechanisms provided for by legislation.

11. The Respondents maintained that without exhausting the alternative dispute resolution mechanism available as provided for in section 14 of the Access to Information Act, this Petition is premature and brought with *mala fides.*

12. In response to the deposition by the Respondents that the Petitioners had not exhausted the available dispute resolution mechanisms provided for in section 14 of the Freedom of Information Act, the 2nd Petitioner swore a further affidavit on 15th May 2020 and at paragraph 12 thereof, the Petitioners deposed that no dispute resolution mechanism is available outside this honourable court when a right or fundamental freedom is threatened, denied, violated or threatened, denied, violated or infringed in the manner the Respondents did.

13. The Petitioners assert that they came to court because the Respondents refused to respond to their request for information as requested in the letter dated 12th February, 2020.

14. It is the Petitioners' case that the failure or refusal to release the information that was sought, the Respondents are in violation of the Petitioners' rights as guaranteed under Article 35 of the Constitution, which entitle them to access information such information held by the state.

15. The Petitioners assert that the failure to release the information sought and thereby violating the Petitioners' rights under Article 35 (1) (a), the Respondents are in further breach of Article 2 on the supremacy of the Constitution as well as Article 10 on the national values and principles of governance that includes good governance, integrity, transparency and accountability and are binding on all persons and all state organs.

16. Parliament in the year 2016, passed a legislation that was to give effect to this Article known as Access to Information Act No. 31 of 2016. This Act requires the state and its agencies to make official information more freely available and also to protect official information to the extent consistent with the public interest.

17. The basic principle of the Access to Information Act 2016 is that all information held by the state and its agencies shall be made available to the public, unless reasons exist for withholding it. The Act at Section 6 specifies the reasons that are appropriate for an agency to withhold the requested information. It further governs the handling of requests of information and sets the timeframe within which the request ought to be responded to.

18. Further, the Fair Administrative Action Act, 2015 obligates public officers to discharge their duties to the public in an expeditious, efficient, lawful, reasonable and procedurally fair manner.

19. The Petitioners therefore asserted that the Respondents violated the Petitioners rights by failing or refusing to provide the Petitioners with the information sought under Article 35(1) together with all the enabling laws, that is to say, Access to Information Act and Fair Administrative Action Act.

20. It was further submitted that **Article 35 (1) (a)** of the Constitution grants a citizen the right to seek and have information from a state or state organ. That the 1st Respondent as a public body is bound by **Article 35 (1) (a)** to disclose information sought in terms of **Section 4** of Access to Information Act, 2016.

21. The Petitioners further submitted that **Section 9** of the Access to Information Act gives a time line for **twenty-one (21) days** within which to give information sought, but that no information was ever supplied to the Petitioners or their Advocates despite the Respondent acknowledging receipts of the demand in their Replying Affidavit filed in these proceedings.

22. The question issue I must resolve is whether the petitioners are entitled to the orders sought in their Petition in view of the preliminary point of law raised by the Respondents that this court is devoid of jurisdiction by virtue of section 14 of the Access to Information Act which provides for an avenue for resolving such disputes where there is failure or refusal to provide information required as requested by the petitioner.

23. Article 35 of the Constitution 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 publicize any important information affecting the nation.***

24. The above Article has been operationalized by the enactment of **Access to Information Act**. Access to information is a critical governance, transparency and accountability tool. Without access to information, higher values of democracy, rule of law and social justice cannot be achieved. This position was succinctly captured in **Famy Care Ltd v Public Procurement Administrative Review Board and others, High Court Pet. 43 of 2012 [2013] eKLR** where it was held:

> ***"The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble of the Constitution and Article 10 cannot be achieved unless the citizen has access to information."***

25. This position was further elaborated in **Nairobi Law Monthly Co. Ltd v Kenya Electricity Generating Company Limited & 2 Others [2013] eKLR** where the court stated:

> ***"…in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests……A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information is under a Constitutional obligation to provide the information sought."***

26. In the instant petition, it is an undisputable that the information being sought is information held or supposed to be held by the Petitioners who are state organ and state officer respectively and therefore qualifies as public information for purposes of Article 35 of the Constitution.

27. However, the right to access information is not absolute. Article 35 falls outside the absolute rights that are not limitable therefore the right can be limited subject to Article 24 of the Constitution. In addition, the petitioner must demonstrate that he has suffered injury as a result of non-disclosure of the information sought. The burden of proof that a right has been denied, violated, infringed or threatened to be infringed always lies with the petitioner.

28. However, given the provisions of sections 14 of the Freedom of Information Act and section 9(4) of the Fair Administrative Action Act, does this court have jurisdiction to hear and determine this petition at this point in time or is the petition premature?

29. **PART IV of the Access to Information Act provides for REVIEW OF DECISIONS BY THE COMMISSION. Section 14 of the Act, provides for** Review of decisions by the Commission. The Commission, under section 2 of the Act is the Commission on Administrative Justice. (CAJ).

30. It is important to note that the preamble to Access to Information Act stipulates that it is AN ACT of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. The Act provides for an elaborate procedure for request for information and in the event that such request is not acceded to, section 14 thereof provides for the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is requested.

31. The said section 14 provides:

> ***(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) <u>a decision refusing to grant access to the information applied for;</u>***
> >
> > ***(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.***
>
> ***(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.***
>
> ***(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.***

(4) <u>The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission</u>.

32. Under section 3 of the Act, the object and purpose of Access to Information Act is to—

> ***(a) Give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;***
>
> ***(b) Provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;***
>
> ***(c) Provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;***
>
> ***(d) Promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;***
>
> ***(e) Provide for the protection of persons who disclose information of public interest in good faith; and(f)provide a framework to facilitate public education on the right to access information under the Act.***

33. Whereas the Respondents contend that there is an alternative dispute resolution mechanism under section 14 of the Access to Information Act such that if the Petitioner believes that his right and request to access Information as per their letter of 12.2.2020 is declined by the Respondent, then the remedy lay in section 14 of the Act, which involves filing of a review application to the Commission on Administrative Justice, a constitutional body established by Section 3 of the Commission on Administrative Justice Act, No.23 of 2011, which is one of the Chapter 15 Independent Commissions established under the Constitution.

34. The functions of the Commission as stipulated in section 8 of the Act shall be to—

> (a) ***investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;***
>
> ***(b) Investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;***
>
> ***(c) Report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;***
>
> ***(d) Inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;***

(e) Facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

(f) Work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

(g) Recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

(h) Provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

(i) publish periodic reports on the status of administrative justice in Kenya;

(j) Promote public awareness of policies and administrative procedures on matters relating to administrative justice;

(k) Take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

(l) Work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

(m) Perform such other functions as may be prescribed by the Constitution and any other written law.

35. Under the said Act and Regulations made thereunder, there are elaborate procedures for determining any complaints referred to the Commission and the modes of resolution include Mediation and Conciliation.

36. In the instant Petition, the Petitioners requested for information from the Respondents but the Respondents are alleged to have refused to respond to the letter of request and that despite the filing of the Petition herein, the Respondents have declined to submit to the request claiming that most of the documents sought are on the website of the 1st Respondent and that the other documents were submitted to the Ethics and Anti-Corruption Commission (EACC) which is investigating certain activities of the 1st Respondent including the construction of the County Assembly Complex.

37. It is trite 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. In ***Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] e KLR*** the Court of Appeal stated:

> ***"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."***

38. The same Court of Appeal in ***Kenya Revenue Authority &2 others v Darasa Investments Ltd [2018] eKLR*** [Visram,Karanja and Koome JJA] stated as follows when it posed the following question:

> ***"What then, ids the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. Tis position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others[2017]e KLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No. 2 of 2008. Perhaps that why the legislature at section 9(4) of the Fair Administrative Action Act stipulates that:***
>
> > ***"Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."***
>
> ***"Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."***

39. In ***Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR*** the Court of Appeal in upholding the judgment of the High Court, Aburili J in ***Nairobi J.R Misc. Civil Application No. 91 of 2016) Ndiara enterprises Limited v Nairobi City County Government stated:***

> ***"Though the High Court can exempt a party from following such clear laid down procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article***

165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

On the authority of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings."

40. The above holding was informed by the provisions of section 9(1) (2),(3) and (4) of the Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution on the right to fair administrative action, and which clearly stipulate ***that an applicant must first exhaust the available internal dispute resolution mechanisms before resorting to court although in exceptional circumstances and on application, the court may exempt such party from resorting to alternative internal dispute resolution mechanisms.***

41. In the instant Petition, the Petitioners have stated that there is no available alternative dispute resolution mechanism where their rights and fundamental freedoms have been violated and that therefore this court has jurisdiction to hear and determine the petition. The petitioners did not make any reference to the import of section 14 of the Access to Information Act, which Act Implements Article 35 of the Constitution on the right to access information.

42. Moreover, even before the enactment of the above provisions of the Fair Administrative Action Act, and the Access to Information Act incorporating sections 9 and 14 thereof respectively, the Court of Appeal had earlier in the case of ***MUTANGA TEA & COFFEE COMPANY LTD v* SHIKARA LIMITED AND MUNICIPAL COUNCIL OF MOMBASA** determined the issue of whether a party aggrieved by a decision of the ***Director of Physical Planning*** under the ***Physical Planning Act***, C***ap 286 (PPA)*** or of the ***National Environment Management Authority (NEMA)*** under the ***Environmental Management and Co-ordination Act***, ***Cap 387 (EMCA), may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed under those Acts***.

43. By a ruling dated ***12th July 2012***, the subject of that appeal, ***Okwengu, J.*** (as she then was), sustained a preliminary objection raised by the 1st respondent, ***Shikara Ltd*** and supported by 2nd respondent, the former ***Municipal Council of Mombasa***, and held that under the two Acts, the jurisdiction of the High Court is appellate rather than original.

44. Accordingly, the learned judge struck out the suit by ***Mutanga Tea & Coffee Company Ltd. (the appellant)***, which had sought to challenge, by invoking the original jurisdiction of the High Court, the change of user and consent for development given to the 1st respondent by the relevant authorities under the PPA and the EMCA. The Court of Appeal held:

"Like under the PPA, any person aggrieved by a decision of the Director General, of NEMA or of any of its Committees has a right of appeal to the National Environment Tribunal under section 129(2) of EMCA, which may confirm, set aside, or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is, under section 130 appealable to the High Court.

The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance. 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.[Emphasis added].

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.[emphasis added].

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.”[emphasis added].**

45. Similarly, the Court of Appeal 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.***

46. **In VANIA INVESTMENT POOL LTD. V. CAPITAL MARKETS AUTHORITY & 8 OTHERS, CA NO 92 OF 2014** the Court of Appeal 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**

47. The Court of Appeal differently constituted in all the above cases made it clear that it was satisfied that the learned judges did not err by striking out the applicants'/appellants suits and applications which sought to invoke the original jurisdiction of the High Court in circumstances where the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellants the right to access the High Court by way of appeal, which mechanisms the appellants had refused to invoke. The Court of Appeal concluded that ***"to hold otherwise would, in the circumstances, 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."***

48. Even where the appellant claimed that the High Court had failed to invoke its inherent jurisdiction or abdicated its jurisdiction, or that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under **Article 159 (2) (d)** of the Constitution, the Court of Appeal held that where the constitutional principle under which the dispute resolution mechanisms provided by the relevant statutes like the Physical Planning Act and the Environment Management Coordination Act are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality.

49. In ***RAILA ODINGA & 5 OTHERS v IEBC & 3 OTHERS, PETITION NO. 5 OF 2013,*** the Supreme Court stated that in interpreting the Constitution, it must be read as one whole and that Article 159(2)(d) cannot be read or applied in a manner that ousts the provisions of other clear Articles of the Constitution.

50. Further in ***LEMANKEN ARAMAT v HARUN MAITAMEI LEMPAKA, Petition No. 5 of 2014,*** the same Supreme Court, while considering the provisions of Article 159(2) (d) of the Constitution, noted that where the issue at hand is one of mere procedural lapse which has no bearing on jurisdiction, the court can cure the same under Article 159(2)(d). ***However, that where the Constitution links certain vital conditions to the power of the court to adjudicate a matter, Article 159(2)(d) has no application. [Emphasis added].***

51. **In the Ndiara Enterprises Ltd v Nairobi City County Government (supra) case,** an appeal from my very own judgment where I declined jurisdiction on the ground that the exparte applicant in the judicial review application had not exhausted the available alternative remedy as stipulated in the Physical Planning Act, the Court of Appeal, agreeing with my decision stated:

> ***"…….Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.***
>
> ***The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9(2) of the Act from reviewing "an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted." The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows:***
>
> ***"In addition under Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "shall not" review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under section (1)***
>
> ***(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice …***
>
> ***From the above provisions of the law and decided cases, it is clear that even the Fair Administrative Action Act which the exparte***

applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue."

Ultimately, we agree with the findings of the learned Judge that the orders sought by the appellant were untenable in the circumstances.

This appeal must therefore fail as it is without merit. It is accordingly dismissed with costs to the respondent."[emphasis added].

52. Most recently in **Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR,** Weldon Korir J observed as follows, persuasively but authoritatively, and I have no reason to differ from the learned Judge's findings and holding:

"It is appreciated that the cited decision does indeed recognize that 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.

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."**

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."

53. I have quoted the decisions that I have relied on in extensor for reasons that they resolve several questions on the principle of exhaustion of remedies. In light of the binding case law cited and what I have stated in this judgement, it follows that the matters raised in the petition are not yet ripe for the determination by this Court. In view of that, I will not delve into the merits of the substantive issues raised in the petition. Doing so will prejudice the parties since they may want to revert to the statutory body mandated to deal with the issues raised in the petition.

54. In conclusion, and on the basis of the above plethora of authorities, I have no doubt in my mind that the Petitioners herein had and still have an alternative dispute resolution mechanism which is available under section 14 of the Access to Information Act, which Act Implements Article 35 of the Constitution. The Petitioners should therefore have first and foremost resorted to that alternative dispute resolution mechanism which is recognized by Article 159(2)(c) of the Constitution which obliges the courts in exercising judicial authority, to be guided by the principles among others- that alternative forms of dispute resolution including reconciliation, mediation, arbitration and reconciliation and traditional dispute resolution mechanisms shall be promoted.

55. It is therefore not correct for the Petitioners to depose and assert that there are no alternative dispute resolution mechanisms where there is an allegation of violation of fundamental rights and freedoms guaranteed by the Constitution.

56. For the above reasons, I find that this court is devoid of original jurisdiction to hear and determine this petition as there is an alternative dispute resolution mechanism available in law which the petitioner had not exhausted.

57. The petition is hereby struck out with no orders as to costs.

Orders accordingly

Dated, signed and delivered at Siaya this 17th Day of June, 2020 via Zoom in the presence of Mr. Osiemo Advocate for the Petitioners and Mr. Ogola Advocate for the Respondents.

R.E.ABURILI

JUDGE