



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 249 OF 2018

INTERNATIONAL CENTRE FOR POLICY AND

CONFLICT (ICPC).....PETITIONER

-VERSUS-

THE ETHICS AND ANTI-CORRUPTION COMMISSION

(EACC).....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

JUDGEMENT

1. Through the petition dated 3rd July, 2018, the Petitioner, International Centre for Policy and Conflict (ICPC) seeks reliefs against the 1st Respondent, Ethics and Anti-Corruption Commission, and the 2nd Respondent, Independent Electoral Boundaries Commission, as follows:

“i) A Declaration be issued that the failure by the Respondents to provide information sought under Article 35(1) pursuant to the Petitioner’s request dated 24th January, 2018 is a violation of the Right of Access to Information.

ii) An order compelling the Respondents to provide the Petitioner with the information requested vide its letters dated 24th January, 2018.

iii) Costs and interest thereof of this Petition.

iv) Such further, other and consequential orders as this Honourable Court may deem fit to make.”

2. The Petitioner’s case is very brief. It is that by a statement dated 22nd March, 2017, the respondents herein together with the Office of the Attorney General and the Registrar of Political Parties issued a statement informing the general public of the formation of a working group among themselves for purposes of ensuring that issues of ethics and integrity as envisaged under the Constitution in respect of aspirants or candidates for the 2017 General Election were harmoniously and expeditiously addressed.

3. The Petitioner’s averment is that by letters dated 24th January, 2018 addressed individually to each of the respondents, it sought to be provided with information as follows; the list of aspirants with integrity queries forwarded by the 1st Respondent to the 2nd Respondent prior to the August 2017 General Election, particulars of each aspirant’s integrity queries, and reasons why the affected aspirants were cleared.

4. According to the Petitioner, it has never received any response to the requests for information from either of the respondents. The Petitioner contends that the respondents’ failure to provide the information requested renders the clearance of aspirants with integrity issues opaque and in breach of the national values and principles of governance and more specifically, leadership and integrity.

5. The Petitioner asserts that the respondents’ failure to act has violated its rights and freedoms by contravening the national values and principles of governance under Article 10 and the provisions of Articles 73 and 232 of the Constitution. It is the Petitioner’s case that the respondents failed to abide by the obligations imposed upon them of promoting good governance, integrity, transparency and accountability by failing to provide the requested information.

6. According to the Petitioner, the denial of the information effectively violated and continues to violate its right to advance the rule of law and to contribute to good governance especially on leadership and integrity in the public interest. Additionally, the Petitioner avers that the respondents' failure to provide it with the information sought violates its right to access information under Article 35(1) of the Constitution.
7. The 1st Respondent opposed the petition through a replying affidavit sworn on 21st September, 2018 by its Deputy Director of the Ethics and Leadership Directorate, Patrick Owiny. Through the affidavit it is confirmed that in the run up to the 2017 General Election a Working Group was formed comprising the Office of the Attorney General, the respondents and the Office of the Registrar of Political Parties with the sole aim of assisting the 2nd Respondent to execute its mandate in the verification of the integrity of candidates in line with the Constitution and the electoral laws.
8. The 1st Respondent states that the Working Group established collaboration with other State and non-State actors for more expeditious processing of information. Further, that the 1st Respondent submitted a report on the integrity verification of all aspirants for the 2017 General Election to the 2nd Respondent. It contends that having done so, it had discharged its constitutional mandate.
9. According to the 1st Respondent the overall mandate of registering candidates for elections, conducting elections and providing information related to elections lies with the 2nd Respondent. Additionally, that upon receiving all the information necessary for integrity verification of candidates from the various members of the Working Group and stakeholders, the 2nd Respondent compiled a comprehensive report and published it in its official Website (www.iebc.or.ke) thus making it available and accessible to all members of the public.
10. The 1st Respondent avers that the information provided in the 2nd Respondent's Website is what it provided to the 2nd Respondent. It is therefore the 1st Respondent's assertion that the information sought by the Petitioner is in the public domain and the prayers sought in the petition are already spent. The Court is consequently urged to dismiss the petition with costs.
11. The 2nd Respondent opposed the petition through the replying affidavit of Chrispine Owiye, the Acting Director of Legal and Public Affairs. The 2nd Respondent confirmed the formation of a Working Group to assist it in realizing expeditious processing and verification of information on candidates in the run up to the 2017 General Election.
12. It is the 2nd Respondent's case that upon receiving the information necessary for the vetting of candidates it expeditiously compiled a report and shared it with all the members of the Working Group through a letter dated 11th June, 2018. The report was simultaneously published on its Website (www.iebc.or.ke) and was thus available to all members of the public.
13. The 2nd Respondent denies receiving a letter dated 24th January, 2018 or any other letter from the Petitioner requesting for the information sought in this petition. The 2nd Respondent therefore denies violation of the Constitution.
14. The Petitioner filed written submissions dated 8th October, 2019 and highlighted that the right to access information is protected by international instruments, the Kenyan Constitution and statutory provisions. In support of this assertion, the Petitioner cites Article 19 of the Universal Declaration of Human Rights (UDHR), Article 9 of the African Charter on Human and People's Rights (the Banjul Charter), Articles 35(i)(a) and 232(1)(f) of the Constitution of Kenya and Section 29 of the Ethics and Anti-Corruption Commission Act, 2011.
15. The Petitioner stresses that the failure by the respondents to provide information contravenes Article 10(2)(c) of the Constitution which provides that transparency is one of the national values and principles of governance. According to the Petitioner, the 2nd Respondent's claim that it did not receive the letter asking for information is not true because its letter bears a stamp acknowledging receipt of the letter on 24th January, 2019.
16. The Petitioner asserts that the replying affidavits of the respondents have not responded to the question as to whether they provided the requested information.
17. On the averment by the respondents that the 2nd Respondent prepared and published a report dated 11th June, 2018, the Petitioner contends that the said report was prepared after the General Election had been held and is not a valid response to the Petitioner's request for information. Further, that the report relied upon by the respondents was published in June 2018 and it cannot be said the information was in the public domain on 24th January, 2018 when the Petitioner made the request for the information. It is also submitted that in any event, the report is not a direct reply to the Petitioner's specific request for particular information.
18. According to the Petitioner, there are no reasons given by the respondents, which would meet the threshold of limitation provided for in Article 124 of the Constitution, for refusal to disclose the information. Reliance is placed on the decision in **Nelson O. Kadison v Advocates Complaints Commission & another [2013] eKLR** for the proposition that State organs and agencies are obliged to provide information they hold unless there are supervening reasons consistent with Article 24 of the Constitution.
19. The Petitioner insists that the respondents violated the provisions of Articles 10, 35, 73 and 232 of the Constitution. It is the Petitioner's position that it has demonstrated violation of its right under Article 35 of the Constitution as a consequence of the failure by the respondents to furnish it with the information and it is therefore entitled to the remedies sought. The decision in **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR** is cited by the Petitioner as confirming the availability of the remedies sought herein. The Court is therefore urged to allow the petition.
20. The 1st Respondent filed written submissions dated 4th December, 2019 and urged for the dismissal of the petition on the ground that the information sought by the Petitioner was made public by the 2nd Respondent before the institution of the petition. Reliance is placed of

Section 6(5) of the Access to Information Act, 2016 which provides that a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means. The decision in **John Mang'uru Kabiri & 3 others v County Government of Kiambu & 6 others [2018] eKLR** is cited as affirming the said provision.

21. It is further the 1st Respondent's case that the publication and publicization of the decision of the Working Group by the 2nd Respondent was in line with Article 35(3) of the Constitution which places responsibility on public institutions to dispense and share information with the public. The decision in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR** is cited as confirming that the State has a duty to proactively publish and publicise any important information affecting the nation and to provide open access to such information.

22. According to the 1st Respondent, the information sought by the Petitioner has already been provided through the replying affidavits and this is sufficient as was held in **John Mang'uru Kabiri (supra)**. Further, that if the information is insufficient the court can give the State organ or agency an opportunity to respond as was held in **Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & others Nairobi Petition No.155 A of 2011**.

23. Finally, the 1st Respondent asserts that the Petitioner is not a natural person and is thus not entitled to the benefits accruing from Article 35 of the Constitution as was held in **Famy Care Limited v Public Procurement Administrative Review Board & 4 others [2012] eKLR**. According to the 1st Respondent, it is only the rights of a natural person, and not a juristic person like the Petitioner, that are protected by Article 35 of the Constitution.

24. Through submissions dated 19th June, 2020 the 2nd Respondent asserts that by publishing the report in its Website, which is accessible to the public including the Petitioner, and by further annexing the report to its replying affidavit, it has actually provided the information sought by the Petitioner. Further, that the report comprehensively answers the request made by the Petitioner. Section 6(5) of the Access to Information Act, 2016 is cited as providing that a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.

25. It is the 2nd Respondent's position that having made public the report that contains all the information sought by the Petitioner, it had fully complied with the law on access to information and is not obliged to supply such information to the Petitioner as it has already discharged its obligation.

26. The 2nd Respondent also urges that the Petitioner is not a citizen for the purposes of the enforcement of Article 35 of the Constitution. Reliance is placed on **Nairobi High Court Petition No. 43 of 2012 Famy Care Limited v Public Procurement Administrative Review Board & another** for the holding that the right to access information under Article 35(1) is limited to Kenyan citizens who are natural persons.

27. Finally, the 2nd Respondent relies on the decision in **Nairobi High Court Petition No. 278 of 2011 Nairobi Law Monthly Company Limited v Kenya Electricity General Company & others** and submits that a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed but the citizen must go further and show that the information sought is required for the exercise or protection of another right. The Court is therefore urged to dismiss the petition with costs.

28. From the pleadings and submissions filed before this Court by the parties, the only issue for the determination of the Court is whether the Petitioner's right to access information as protected by Article 35 of the Constitution has been violated by the respondents.

29. However, I note that a question of jurisdiction arises, which though not identified by the parties must be addressed by the Court. That the Court can raise the issue of jurisdiction *suo moto* was confirmed in **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** thus:

"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court."

30. In the same decision it was affirmed that a court without jurisdiction has no authority to delve into the substance of the dispute before it. In that regard the Court stated as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

31. A perusal of the instant petition discloses that it violates the exhaustion principle which requires a party to exhaust any alternative dispute resolution mechanism provided by statute before resorting to the courts. The principle has been expressed in several decisions. In the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR** the exhaustion doctrine was expressed by the Court of Appeal as follows:

"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."

32. The same principle was expressed by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others (2015) eKLR** thus:

“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.”

33. Nevertheless, the exhaustion principle has exceptions as confirmed by the Court of Appeal in **Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR** as follows:

“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.”

34. Section 14 of the Access to Information Act, 2016 provides an alternative dispute resolution mechanism as follows:

“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.”

35. 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 access to information not only by public entities but also private bodies.

36. 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.

37. In light of the stated law, this petition is for dismissal and should be dismissed at this stage. I nevertheless, observe that the parties did not address the Court on the question of jurisdiction. It is therefore only just and fair that I should consider the merits of the petition before this Court.

38. Although the parties, as expected of disputants, attempted to disagree on the facts of the case, the facts of this case are not in dispute at all. The facts as disclosed in the pleadings show that the Petitioner wrote to the respondents on 24th January, 2018 seeking certain information. The 1st Respondent was asked for:

“(i) The list of aspirants with integrity queries forwarded to Independent Electoral and Boundaries Commission (IEBC)

prior to the August, 2017 General Elections.

(ii) Particulars of each aspirant's integrity queries.”

39. For the 2nd Respondent the Petitioner demanded information as follows:

“(i) The list of aspirants with integrity queries forwarded to the Independent Electoral and Boundaries Commission (IEBC) by the Ethics and Anti-Corruption Commission prior to the August, 2017 General Elections.

(ii) Particulars of each aspirant's integrity queries.

(iii) Reasons why the affected aspirants were cleared.”

40. The letters exhibited by the Petitioner shows that both respondents received the letters on 24th January, 2018. By the time this petition was filed on 13th July, 2018, the letters had not been responded to.

41. The respondents' defence is that by the time the petition was filed, the information sought was already in the public domain, the same having been posted on the 2nd Respondent's Website on 11th June, 2018. There was no rebuttal of this averment by the Petitioner. What the Petitioner attempted to do through the written submissions was to claim that the information did not satisfy the request and that it was not provided in direct response to its request.

42. In my view, the information sought, although admittedly requested earlier, was already in the public domain by the time the petition was filed. I have looked at the report annexed to the 2nd Respondent's affidavit and find that what was sought is contained in that report. Indeed, the 1st Respondent confirmed that the list of the candidates with integrity issues which it submitted to the 2nd Respondent was actually the list that was published by the 2nd Respondent. The duty of a State organ or agency to publish and publicise information is owed to the Kenyan nation at large and not an individual. Once a State organ or agency has published and publicised information, as was done by the 2nd Respondent, its obligation in terms of Article 35 of the Constitution is discharged.

43. In light of the evidence placed before this Court by the parties, it becomes clear that the Petitioner had no valid constitutional claim against the respondents at the time of the institution of the petition. I therefore find that this petition has no merit and the same is therefore dismissed.

44. On the question of costs, I find that the litigation was initiated in contravention of the exhaustion principle. The suit was also filed when the information being sought was already in the public domain. Although the petition may have had a public interest element, its institution in the first place was unnecessary and a waste of public resources as the respondents, which are public bodies, have been forced to engage legal services at the public expense. For the stated reason, I award costs to the respondents against the Petitioner.

Dated, signed and delivered virtually at Nairobi this 29th day of October, 2020.

W. Korir,

Judge of the High Court