



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D.S. MAJANJA J.**

**PETITION NO. 8 OF 2018**

**BETWEEN**

**BONIFACE ONGERA MANGAA..... 1<sup>ST</sup> PETITIONER**

**VINCENT MOSE GEKONE.....2<sup>ND</sup> PETITIONER**

**AND**

**THE GOVERNOR, KISII COUNTY.....1<sup>ST</sup> RESPONDENT**

**CEC ROADS AND PUBLIC WORKS.....2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER, ROADS AND PUBLIC WORKS...3<sup>RD</sup> RESPONDENT**

**KISII URBAN ENGINEER .....4<sup>TH</sup> RESPONDENT**

**KISII COUNTY HEAD OF PROCUREMENT.....5<sup>TH</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KISII..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. On 25<sup>th</sup> June 2018, the petitioners filed a petition before this court contending that the respondents, representing the County Government of Kisii (“the County”), failed to release information pertaining to the construction of streets within Kisii town and that failure to release such information is unconstitutional and has occasioned the petitioners grave prejudice. The petitioners’ case that the County violated **Article 35** of the Constitution and the **Public Procurement and Disposal Act, 2005**. The petitioners therefore seek the following reliefs;

*a) That the Respondent be ordered to provide information as per the demand notice served upon it as required by article 35 of the constitution of Kenya 2010.*

*b) A declaration that the Petitioners and the residents constitutional rights to involvements and equal participation in the process of awarding of tenders have been infringed and violated and payment be stopped to such illegal tenders, until fresh advertisement is announced and any person who is found to have violated the provisions of the public procurement and disposal act 2005 and the relevant laws be declared unfit to hold office and issue orders and directions to the appropriate institutions to immediately commence his removal from the position he is currently holding.*

*c) The ongoing projects which have been illegally allocated be stopped forthwith.*

*d) Costs of the petition.*

*e) Any other relief that the Honourable court deem fit to grant in the circumstance of this petition.*

2. The petitioners case is that prior to instituting the petition, their advocates sent to the County a notice demanding certain information concerning the construction of certain streets in Kisii town. They claimed that the County failed to advertise and invite tenders for the construction of several streets within Kisii Town in violation of the provisions of the **Public Procurement and Disposal Act, 2005**. The petitioners averred that they do not have information regarding the parties who won the tenders at the end of the tendering process. They

further stated that as the construction of the streets progressed, the companies involved in the construction failed to display sign posts to show who was responsible for the construction in violation of the **Public Procurement and Disposal Act**.

3. The County opposed the petition by filing a notice preliminary objection, Response to the Petition and a Replying Affidavit sworn by Evans Nyachio on 19<sup>th</sup> February 2019. The County's case was that the **Public Procurement and Disposal Act, 2005** had already been repealed through the **Public Procurement and Asset Disposal Act, 2015** which had a commencement date of 7<sup>th</sup> January 2016. Its case was that no advertisement was made in 2018 for construction of road/streets as no rehabilitation to the streets took place in 2018. They further averred that since the information sought by the petitioners was not available, no relief could be granted under **Article 35** of the Constitution.

4. When the matter came up for hearing, the 1<sup>st</sup> petitioner submitted that the petitioners were looking for documents to show that work was done on the streets of Kisii town was being executed in accordance with the law. Mr. Onsembe, counsel for the respondents, opposed the petition submitting that it was not possible to furnish the documents requested as the works referred to by the petitioners were unknown and that the documents in support of the petition were vague and could not assist the petitioners in their case.

5. The right of access to information from the State by the citizen is protected by **Article 35(1)** of the Constitution which provides as follows;

*35. (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.*

Under **Article 260**, State is defined as follows; “ “State” when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.”

6. Thus under the **Article 35** as read with **Article 260** of the Constitution, the petitioners are entitled to information from the County government as an entity of the State. The importance of the right to access to information cannot be overemphasized. As I observed in **Famy Care Limited v Public Procurement Administrative Review Board & another Nairobi Petition No. 43 of 2012 [2012] eKLR**,

*[16] 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 to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.*

7. The petitioners' request for the information was contained in the letter dated 26<sup>th</sup> May 2018 by their advocates, *Oguttu, Ochwangi, Ochwal and Company Advocates*, who sought information concerning the procurement of construction works being carried in streets within Kisii Town. The letter sought the details of the tenders including when the tenders were advertised and who won and the bills of quantities prepared to support the tenders.

8. The County's position was that the request was vague and in any case there were no tenders for public works in reference to the streets set out in the petitioners' advocates letter. By a letter dated 14<sup>th</sup> June 2018, the Acting County Attorney responded as follows:

*We acknowledge receipt of your letter dated 26<sup>th</sup> May 2018 and duly noted its contents.*

*We confirm we do not know any works, construction and or improvement tendered as alleged or at all.*

*Kindly furnish us with further and better particulars to enable us respondent appropriately.*

9. Although other issues have been raised by the petitioner regarding the remedies for breach of applicable procurement law and regulations, I do not think that they are germane to or fall within the scope of a petition under **Article 35** of the Constitution. In particular, any determination of prayers (b) and (c) of the petition can only be settled when the information is available and in the appropriate forum for that purpose.

10. Although the parties did not refer to it, this matter is now governed by **Access to Information Act, 2016** (“the **AIA**”) which was enacted to give effect to and regulate the manner of exercise of the freedom of access to information under **Article 35** of the Constitution. **Section 8** thereof, requires an applicant to make an application for information with precision and it provides as follows:

*8. (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.*

11. The lack of precision however is not the end of the matter as the public entity is under a statutory obligation to provide certain information under the **AIA** but also facilitate the provision of such information in light of the duty of the State under **Article 21** of the Constitution to observe, respect, protect, promote and fulfil fundamental rights and freedoms. **Section 5** thereof provides as follows:

*5. (1) Subject to section 6, a public entity shall —*

(a) facilitate access to information held by such entity and which information may include —

(i) the particulars of its organization, functions and duties; Right to information.

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) salary scales of its officers by grade;

(v) the norms set by it for the discharge of its functions;

(vi) guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; and

(vii) a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person;

(b) during the year commencing on first January next following the first publication of information under paragraph (a) and during each succeeding year, cause to be published statements updating the information contained in the previous statement or statements published under that paragraph;

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;

(d) provide to any person the reasons for any decision taken by it in relation to that person;

(e) upon signing any contract, publish on its website or through other suitable media the following particulars in respect of the contract entered into-

(i) the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference;

(ii) the contract sum;

(iii) the name of the service provider, contractor or individual to whom the contract has been granted; and

(iv) the periods within which the contract shall be completed.

(2) Information shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used.

(3) At a minimum, the material referred to in subsection (1) shall be made available —

(a) for inspection by any person without charge;

(b) by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made; and

(c) on the internet, provided that the materials are held by the authority in electronic form. (4) Subsection (1)(a) shall come into operation twelve months after the commencement of this Act. [Emphasis mine]

12. The import of **section 5** of the *AIA* is that the County or any other public entity cannot claim that the request by any citizen is vague. Under **section 5(a)(vii)** of the *AIA*, the County or public entity has a duty to facilitate the provision of such information by providing sufficient guidance to enable any person wishing to apply for information identify the classes of information held by it, the subject to which they relate and the location of any indexes to be inspected by any person.

13. In addition, and in so far as the information sought by the petitioners concerns construction works by the County, it is the kind of information the County is required to provide to the public. Under **section 5(e)** of the *AIA*, the public entity is required to publish particulars of contracts for public works entered into by the entity hence it is not out of order for the petitioners to request for tenders issued by the County. Such information concerning each and every tender for public works and particulars thereof should readily be available as part of the public information the County is required to publish from time to time. This provision is a logical application of **Article 35(3)** of the

Constitution which provides that, “*The State shall publish and publicise any important information affection the nation.*”

14. As I have shown, it is the County government’s duty not only to publish and publicise information regarding contracts it has entered into but also facilitate the provision of such information to the petitioners and any other citizens who seek it.

15. In order to enforce that right of access to information under **Article 35** of the Constitution and in light of the obligation of this court to provide appropriate relief under **Article 23** of the Constitution, I order as follows:

(a) The petitioner’s letter dated 28<sup>th</sup> May 2018 shall be deemed to be an application for information under the ***Access to Information Act, 2016***.

(b) The County Government of Kisii is directed to deal with the request in accordance with the provisions of the ***Access to Information Act, 2016*** without prejudice to the duty of the County Government of Kisii to provide the information required under **section 5(e)** of the ***Act***.

(c) The shall be no order as to costs.

**DATED and DELIVERED at KISII this 27<sup>th</sup> day of MAY 2019.**

**D.S. MAJANJA**

**JUDGE**

Petitioners in person.

Mr Onsembe, Ag. County Attorney instructed by the County Government of Kisii for the respondents.