



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**HUMAN RIGHTS & CONSTITUTIONAL DIVISION**

**PETITION NO 162 OF 2017**

**APOLLO MBOYA.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION..... 1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> INTERESTED PARTY**

**JACK MUKHONGO MUNIALO & 12 OTHERS....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. In a Petition dated 19<sup>th</sup> April 2017 and filed in Court on 20<sup>th</sup> April 2017, **Apollo Mboya**, the Petitioner, sued the Attorney General of the Republic of Kenya in his capacity as the principal advisor to the government, who is also charged with the mandate to promote, protect and uphold the rule of law as well as the defender of the Public Interest. Included in the petition as interested parties are the **Independent Electoral and Boundaries Commission (IEBC)** a constitutional Commission established under Article 88(1) of the Constitution, and the **Director of Public Prosecution (DPP)** a constitutional office established under Article 157 of the Constitution with power to undertake Criminal Prosecutions in the Country.

2. The facts of this petition are on 10<sup>th</sup> April 2017 that the national government launched a website known as Kenya Government Delivery Portal –www delivery go.ke to be used to advertise government achievements on various projects across the country during its term of 4 years in power. The petitioner states that the launch of the Portal or Website, was contrary to section 14(2) of the Election Offences Act and the Constitution because it was done during election period.

3. The petitioner states that the 1<sup>st</sup> interested Party having declared election period to be between 17<sup>th</sup> May 2017 and 8<sup>th</sup> August 2017 the date of the general elections and published various Gazette Notices to that effect, the launch of the portal and or website during election period amounted to advertising and publishing contrary to section 14(2) of the Election Offences Act and action ought to have been taken by the 2<sup>nd</sup> interested party against the government for breaking the law.

4. The petitioner avers that on 12<sup>th</sup> April 2017 two days after the launch of the Portal, he notified the 1<sup>st</sup> and 2<sup>nd</sup> interested parties by letter of even date that, the action of launching the Portal during election period contravened section 14 of the Election Offences Act and requested that investigations be conducted with a view to taking action if there was criminal culpability.

5. The petitioner further avers that section 22 of the Election Offences Act empowers the 2<sup>nd</sup> interested party to commence prosecutions in relation to election offences, and that Article 157(II) of the Constitution requires the 2<sup>nd</sup> interested party to have regard to Public interest and the need to avoid abuse of legal process in undertaking his mandate.

6. The petitioner states that Article 252(2) of the Constitution allows a person to make a complaint to commissions or independent offices such as the 1<sup>st</sup> and 2<sup>nd</sup> interested parties by any person entitled to institute Court proceedings under Article 22(1) and (2) of the Constitution.

7. The petitioner contends that the decision by the government to launch the portal and maintain the same is a breach of Article 73(2) of the Constitution on leadership and integrity. It is further contended that the action violates electoral principles set out in Article 81(e) of the constitution since it amounts to improper influence, and is also a contravention of the Elections Offences Act hence amounts to unlawful conduct on the part of the government.

8. On the above basis, the petitioner sought the following Orders.

**1. A declaration that the Kenya Government Delivery Portal/website [www.delivery.go.ke](http://www.delivery.go.ke) to advertise achievements by the National Government on various programmes and project undertaken across the country in the last four (4) years is unconstitutional and unlawful was made in violation of section 14 of the Election Offences Act No 37 of 2016, Articles 10, 382, 73(2) 81(e) 82, 88, 136, 137, 148 and 219 of the Constitution of Kenya and therefore is null and void.**

**2. A declaration be made that the purported use of public resources to launch and maintain Kenya Government delivery portal/website – [www.delivery.go.ke](http://www.delivery.go.ke) to advertise achievements by the National government on various programmes and projects undertaken across the country in the last four(4) years contravenes section 14 of the Elections offences Act hence irregular, illegal, unlawful and unconstitutional.**

**3. A declaration be made that the delay refusal and abdication of the 2<sup>nd</sup> interested party to exercise his Constitutional powers to direct investigations with a view of prosecuting those responsible to the offences under section 14 of the elections Act (No 37 of 2016) contravenes Articles 38(2) 81(e) and 157 of the Constitution of Kenya and is therefore illegal irregular, unlawful and unconstitutional.**

**4. An order of permanent injunction be issued restraining the national Government whether by itself, gents, servants proxies and/or any other person acting under its or their authority or direction from advertising achievements by the national government of any programmes and or projects undertaken across the country in the last four (4) years in the Kenya government, delivery portal/website [www. Delivery.go.ke](http://www.Delivery.go.ke) or in any other print media electronic media or by way of banners or hoardings in Public places during the election period.**

**5. Costs of the petition be awarded to the petitioner.**

## Responses

9. The 1<sup>st</sup> interested party filed grounds of opposition dated 31<sup>st</sup> May 2017 and filed in Court on 2<sup>nd</sup> June 2017. The 1<sup>st</sup> interested party took the view that it was non- suited in these proceedings and has no role to investigate election offences, that the petition against the 1<sup>st</sup> interested party is without merit since its

mandate is to oversee elections, that by virtue of section 21 of Election Offences Act the mandate to prosecute electoral offences is on the 2<sup>nd</sup> respondent, that the petitioner is on a fishing expedition not sure of who to sue, and that the petition does not disclose a particular constitutional right violated against the petitioner, and finally, that no relief is sought against the 1<sup>st</sup> interested party.

10. The 2<sup>nd</sup> interested party filed grounds of opposition dated 3<sup>rd</sup> May 2017 and filed in Court on the same day. The 2<sup>nd</sup> interested party contends that no person had lodged a complaint of commission or omission constituting an offence under section 24 of the election Act or any other relevant statute with the national police service for purposes of investigation and subsequent submission of recommendations to the interested party for recommending prosecutions, that the petition is premature, and that the 2<sup>nd</sup> interested party has not refused to discharge its mandate because no investigation report has been transmitted to him, hence the petitioner has not demonstrated a prima facie case.

11. Thirteen other people applied and were enjoined in these proceeding as third interested parties. They filed a replying affidavit sworn by Jack Mukhongo Munialo on 19<sup>th</sup> June 2017 opposing the petition. According to the deponent, the portal is a source of information since it allows Kenyans trace projects undertaken by the government. It was deposed that the petitioner is mischaracterizing the portal to engender a political discourse, that the portal is not a means of advertising but a source of information to the public, and that the portal ascribes for Articles 10(1)(c), 10(2)(c) and (d) of the Constitution on national values and principles of governance for purposes of transparency and accountability. It was also deposed that the national government has a responsibility to account the use of public resources hence the public has a right to be informed, through the portal.

### **Submissions**

12. During the hearing of the Petition, Apollo Mboya, the petitioner, submitted that the government introduced the portal which contains some misinformation regarding the projects it had done. He submitted that the information in the portal is contrary to Article 81(e) (ii) of the constitution with regard to improper influence.

13. The petitioner submitted that although he brought to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' attention through letter dated 12<sup>th</sup> April 2017 the violation of section 14 of the Election Offences Act no action was taken. The petitioner contended that the portal was put up using public resources which is outlawed by section 14(2) of the Election Offences Act notwithstanding that the portal was also put up during the election period contrary to law. The petitioner further contended that although he is cognizant of Article 35 of the Constitution, the same has been limited by section 14 of the Election Offences Act but for a limited period.

14. The petitioner relied on a number of in his list of authorities with regard to interpretation and construction of statutes and urged the Court to grant the prayers in the petition. He also asked the Court to look at the historical circumstances that led to the enactment of the statute as well as the object and purpose of the legislation. He contended that this is a continuing violation which is giving an improper influence to voters, in addition to using public resources. The petitioner argued that the words of the statute are clear and therefore the court should not allow a clear breach of the law.

15. Mr. Mutinda, learned counsel for the respondent, opposed the petition submitting that section 14(2) prohibits advertisements, and in counsel's view, a portal is not an advertisement but a platform for providing information to the public pursuant to Article 35 as read with Article 10 of the Constitution and, to that extent therefore, the portal is not illegal.

16. Mr. Mutinda submitted that if section 14(2) was intended to limit Article 35, it should have said so. Counsel contended that the government has a duty to provide information to the public for purposes of accountability and transparency. Counsel took issue with the petitioner for annexing tweets from unknown people but which he said showed engagement with the portal as evidence of enhanced transparency. Counsel submitted that the definition of portal in the oxford English dictionary means it is a

page on the internet which has information.

17. Learned counsel submitted therefore that the portal does not violate section 14(2) since it is not an advertisement. He also contended that no material were provided to enable the Court discern the intention of parliament in coming up with section 14(2) of the Election Offences Act.

18. Mr. Muchemi opposed the petition and relied on their written submissions filed in Court dated 25<sup>th</sup> July 2017. Counsel submitted that section 21 of the Elections Act places mandate to prosecute on the 2<sup>nd</sup> interested party while the 1<sup>st</sup> interested party is a neutral party in the electoral process and has no role to play in the prosecution of election offences.

19. Mr. Ashimosi, learned counsel for the 2<sup>nd</sup> interested party on his part submitted, that the petitioner complained to the 2<sup>nd</sup> interested party on 12<sup>th</sup> April 2017 but he should have complained to the Director of Criminal investigations before complaining to the 2<sup>nd</sup> interested party. Mr. Ashimosi took issue with the petitioner that 8 days after sending a letter to the 2<sup>nd</sup> interested party, he filed this petition without giving the 2<sup>nd</sup> interested party adequate time to direct investigations on the matter.

20. According to Counsel, Article 157(4) of the Constitution empowers the 2<sup>nd</sup> interested party to direct investigations, and this is also clear in section 21 of the Election Offences Act. In his view, section 22 of the Act has limited the period for commencing prosecution in election offences, and contended that following that letter of complaint, the petition is premature. Mr. Ashimosi submitted that the 2<sup>nd</sup> interested party has already commenced action and will make appropriate decision once investigations file is forwarded to him.

21. Mr. Wanyama, learned counsel for 3<sup>rd</sup> interested parties, submitted that the petition has no information and particulars of the portal, and further that those whose rights had been violated, had not sworn affidavits to that effect. Counsel contended that there was no breach of Article 38 of the Constitution and therefore the Court cannot determine whether the portal is an advertisement or not.

### **Analysis and Determination**

22. I have considered this petition, responses there to, submissions by counsel and the authorities cited. Two key issues arise for determination namely; whether the decision by the government to advertise its achievements through the Kenya government Delivery portal/website–[www.delivery.go.ke](http://www.delivery.go.ke) is unconstitutional and unlawful; and depending on the answer to the above issue, what reliefs should the court grant.

23. The petitioner has complained that the government violated the law by launching and maintaining a Public portal and website, Kenya government delivery portal/website [www.delivery.go.ke](http://www.delivery.go.ke) on 10<sup>th</sup> April 2017 which is used to showcase projects the government has initiated in various parts of the country. The petitioner contends that the launch was done during election period as defined under the Election Offences Act, 2016, and is therefore unlawful. He contends that it also violates the law since it is being done through use of public funds contrary to section 14(2), It has been contended that the portal is being used to gain undue advantage and influence in favour of the government.

24. The respondent and 3<sup>rd</sup> interested parties argue that the portal or website does not amount to advertising but is only a platform for allowing members of the Public access information from the government in terms of **Article 35** of the **Constitutions**. The 1<sup>st</sup> interested party contends that it is wrongly sued since it is a neutral party in matters relating to elections while the 2<sup>nd</sup> interested party on its part contends that the petition is premature given that the petitioner only launched a complaint on 12<sup>th</sup> April 2017 but filed this petition before the 2<sup>nd</sup> interested party could act hence the petition is premature.

### **Whether Establishment of the Public Portal is unlawful.**

25. The preamble to the Election Offences Act 2016 states that it is an act of parliament to provide for election offences and connected purposes. The Act contains various offences relating to elections and referenda. Of importance to this petition is section 14(2) which prohibits government(s) from publishing any advertisements on its achievements either in print or electronic media or by way of banners or hoardings in public places during the election period.

26. Previously election offences were scattered in various statutes but were codified and consolidated into this one piece of legislation for easier implementation and enforcement. The role of prosecuting election offences was also placed in the office of the 2<sup>nd</sup> interested party who has to prosecute these offences within twelve months. The purpose of enacting this legislation was well explained in the memorandum of objects and reasons in the Bill that was tabled in parliament. It is obvious that parliament intended to protect public resources when it enacted this statute. In that regard, some of the reasons were stated thus;

***“...in particular, the Bill prohibits the use of public resources by candidates during elections and empowers the Commission to demand a full account of all public resources ordinarily at the disposal of the candidates, where the candidates are members of parliament, county governors, deputy county governors, or members of county assemblies. The Bill also provides for offences related to the use of Information and Communication Technology in elections. It further generally enhances penalties for election offences in order to make them more deterrent.”***

27. The gravamen of this petition, therefore, is whether the public portal launched by the government on 10<sup>th</sup> April 2017 amounts to advertisement and a violation of section 14(2). The Act, does not define the word “*advertising*”. *Blacks Law Dictionary 9<sup>th</sup> Edition* defines “*advertising*” as (1) *the action of drawing the public’s attention to something to promote its sale* (2) *the business of producing and circulating advertisements*.

28. *Concise Oxford English Dictionary Twelfth Edition* on the other hand, defines the word “*Advertise*” to mean (1) *Publicize (a product, service or event) in order to promote sales or attendance*. (2) *make (something) known* (3) *modify*. The same Dictionary defines the word “*Advertisement*” as (1) *a notice or display advertising something*, (2) *a notice to readers, e.g in a book*. It also defines “*portal*” “as “*an internet site providing a directory or link to other sites*”

29. In the same breath, *Macmillan English Dictionary for Advanced learners, Second Edition*; defines the word “*advertisement*” as “*an arrangement of pictures, words etc. put in a public place or in a newspaper, on the internet etc. that is intended to persuade people to buy something*”. It assigns the same meaning for portal as Concise Oxford English dictionary. Posting information on the portal is therefore intended for advertising.

30. From the above definitions the purpose of advertising even in the portal is notably to make the public aware of something and therefore attract or persuade their acceptance. Information in the internet can also amount to advertising. Taken in the context of the Election offences Act, it means the government in power would wish to persuade and attract people on its side during election by showcasing the projects it is undertaking. People in areas where project are undertaken may particularly be influenced and made to decide in a particular way through such advertisements.

31. The respondent and 3<sup>rd</sup> interested parties argue, that the public portal is not a form of advertisement and therefore the act of advertising government achievements is not unlawful. According to them, it is in line with Articles 10 and 35 of the Constitution. In their view, the advertisement is a way of giving information to the public thus enhancing values and principles of the constitution. They relied on the case of *Nairobi Law Monthly Limited v Kenya Electricity Generating Company and 2 others* 2013 eKLR which held that state or public entities have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a) of the Constitution.

32. The respondent also referred to the case of *Joseph S. Nderitu & 53 Others v Attorney General & 2 Others* [2014] eKLR where it was held the petitioners who had been denied information under Article 35 had a legitimate expectation that they and each of them would be accorded those rights.

33. The facts of the above cases are different from the instant case. In the *Nairobi Law Monthly* case, the petitioner had sought information but was not provided. It filed a petition and the Court held that state and public organs have a constitutional obligation to provide information.

34. The same thing applies to the case of *Joseph S. Nderitu & 53 Others v Attorney General & 2 Others* (supra) where the Court was categorical that the petitioners had been denied information under Article 35 and Participation under Article 10 against their legitimate expectation. These do not apply to the situation before this court.

35. 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 publicise any important information affecting the nation.**

36. Article 35 is plain on the provision of information which is based on a request by a citizen. That is also clear in the Access to Information Act. Section 4 of the Act provides as follows;

**1. Subject to this Act and any other written law, every citizen has the right of access to information held by—**

**a. the State; and**

**b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.**

**2. Subject to this Act, every citizen's right to access information is not affected by—**

**a. any reason the person gives for seeking access; or**

**b. the public entity's belief as to what are the person's reasons for seeking access.**

**3. Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.**

**4. This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.**

**5. Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (emphasis)**

37. The section makes it clear that Information is provided on request and provides for the process of seeking and providing information. The person seeking information must do so in writing and specify the information sought.

38. The respondent also relied on Article 10 (2) (c) of the Constitution to contend that the portal is necessary for purposes enhancing good governance, transparency and accountability. Reliance was placed in the case of *Garissa County Government v National Land Commission & 3 Others* [2016] eKLR to

the effect that good governance denotes upright and wholesome means for making decisions.

39. My understanding of the petitioner's complaint is that the government has violated the law namely section 14(2) of the Elections offences Act. This is informed by the fact that the government launched a web Portal on 10<sup>th</sup> April 2017 despite the fact that the 1<sup>st</sup> interested party had declared election period, but the 2<sup>nd</sup> interested party did nothing about it despite clear provision of the law.

40. The State and Public Officers have a constitutional obligation to provide information to the public wherever they seek such information. That is the import of Article 35(1)(a) of the Constitution which is clear that citizens have a right to access information held by the State, or by another person and required for the exercise or protection of a right or fundamental freedom. Section 4 of the Act also places a duty on the state and any other person to provide information but also an obligation on the citizen to seek information in writing.

41. The respondent and 3<sup>rd</sup> interested parties have also relied on Article 35(3) which provides that the State shall publish and publicize important information affecting the Nation. In my view, that does not mean the kind of information published in the portal. What is in the portal is information on projects initiated, those completed and the ones pending. It is really about government performance than anything else. However the information contemplated to be publicized under Article 35(3) must be information that is important to the nation and its people. Such information may be on draught, floods, outbreak of diseases, environmental and natural disasters, security issues among others. That, in my view, would be the important information affecting the nation that may be publicized for the benefit of the nation and her people.

42. However, because the portal contains information on projects which in essence show the performance of government, including projects it has initiated and those completed, this is a government assessment report on its performance and does not affect the nation and is not the information contemplated under Article 35(3) of the Constitution.

43. The dispute in court is on the import of section 14(2) of the Election Offences Act which prohibits publication or advertisement by government during election period. The section provides that (14 (2)) ***No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.***

44. The portal was launched during election period and for purposes of this judgment, election period was between 17<sup>th</sup> March 2017 and the date of gazettment of the election results after the general elections of 8<sup>th</sup> August 2017, and in the case of the presidential election, after gazettment of presidential elections due on 26<sup>th</sup> October 2017.

45. As seen elsewhere in this judgment, the prohibition is intended to protect public resources by ensuring that they are not used during campaigns. This is also clear from the head note of the section "***use of Public resources***". The intention of the legislature in enacting section 14(2) was no doubt to protect public resources for the public good.

46. There is no doubt that the portal having been launched during election period was done in contravention of section 14(2) of the Act. The law bars not only the national government but also county governments from advertising and that is why it begins with the word "***No Government***". The question that arises is, why would the government launch the portal deep into election period if it was not intended to attract the ruling party support during the campaign? It leaves no doubt that was the intention.

47. The corresponding issue here is the use of public resources to maintain the public portal. During the hearing of this petition, the respondent and 3<sup>rd</sup> interested parties who opposed the petition did not address the court on how the portal is maintained and who meets the expense. This is so despite the fact that the petitioner raised the issue of use of public resources in maintaining the portal against the law in his

petition.

48. The government may want to showcase the success of projects undertaken during its term in office, and there would be nothing wrong about that. However, the law is clear that once election period is declared, there cannot be such showcasing neither can public resources be used for those advertisements. This is because at this time it is political parties that are in competition and not the governments hence they should not therefore be allowed to use public resources to their advantage.

49. Kenya being a multiparty democratic state, the party in power cannot use public resources to its advantage during the election period. Article 201 of the Constitution lays down principles of public finance and states clearly that there should be openness and accountability including public participation in financial matters. Advertising in the public portal is not the same as openness and accountability in financial resources as contended by the respondent and 3<sup>rd</sup> interested party. In my respectful view, therefore, the launch of the portal and its maintenance during election period and using public resources in this regard, is in violation of the laws of the land.

50. Laws are enacted to regulate human conduct including that of government. Article 10 (2) of our constitution embodies the founding values and principles of our democratic state, namely; (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people, (b) human dignity, equity, social justice, inclusiveness two critical national values and principles of governance, equality, human rights, non-discrimination, and protection of the marginalized, and (c) good governance, integrity, transparency and accountability. The significance of the **rule of law** and **democracy** and their close relationship with the ideal of our constitutional democracy where Kenya prides itself as a democratic state cannot be over emphasized.

51. This is because the rule of is founded on values of accountability, openness and responsibility. It demands that government actions be backed by law and not against the law, and that the government should only act through and within the law. This is so because the rule of law guides peoples' behavior in society including the government. Democratic principles on the other hand give citizens the right to make free political choices about leadership and governance of their country.

52. In this context, therefore, Article 81(e) of the Constitution lays down principles under which citizens express their democratic will in choosing their leaders through free, fair and democratic elections. The Elections offences Act is a derivative of the Constitution intended to reassure that there are democratic elections, and section 14(2) stands out in this regard as the safeguard for public resources during elections. When the government fails to observe the rule of law and democratic principles under Articles 10 and 81 of the Constitution by ignoring section 14(2) of the Act, such an act amounts to a violation of the Constitution.

56. The respondent's contention that the portal is in line with Article 35 on access to information cannot be accepted as basis for violating of the law. It cannot be reason for circumventing clear provisions of the law because that right has been limited. As **Madan J**(as he then was) observed in the case of **Githunguri vs. Republic [1986] KLR** :

***“We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community.”***

57. In conclusion therefore, having considered the petition, the responses, submissions and the law, I am satisfied that the petitioner has demonstrated that section 14(2) is meant for the general welfare of the people of Kenya that public resources be safeguarded, but the law has been violated and, that his petition is for granting. I however find no fault on the part of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

58. Consequently the petition dated 19<sup>th</sup> April 2017 is allowed and the following orders granted.

***1. A declaration is hereby issued that the Kenya Government Delivery Portal/website [www.delivery.go.ke](http://www.delivery.go.ke) to advertise achievements by the National Government on various***

*programmes and project undertaken across the country in the last four (4) years is unlawful as it was made in violation of section 14(2) of the Election Offences Act No 37 of 2016 and against Articles 10, and 81(e) of the Constitution of Kenya and therefore is null and void.*

*2. A declaration is hereby issued that the purported use of public resources to launch and maintain Kenya Government delivery portal/website – [www.delivery.go.ke](http://www.delivery.go.ke) to advertise achievements by the National government on various programmes and projects undertaken across the country in the last four(4) years contravenes section 14(2) of the Elections offences Act hence is irregular, illegal, and unlawful*

*3. An order of permanent injunction is hereby issued restraining the national Government whether by itself, Agents, servants proxies and/or any other person acting under its or their authority or direction from advertising achievements by the national government of any programmes and or projects undertaken across the country in the last four (4) years in the Kenya government, delivery portal/website [www. Delivery.go.ke](http://www.Delivery.go.ke) or in any other print media electronic media or by way of banners or hoardings in Public places during the election period.*

*4. Costs being discretionary, the order I make is that each party do bear their own costs.*

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> Day of October 2017**

**E C MWITA**

**JUDGE**