



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO. 25 2021**

**JEREMIAH DINGI LOIRHA.....1<sup>ST</sup> PETITIONER/APPLICANT**

**CHARLES KATUTA.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application is dated 10<sup>th</sup> June 2021 and is brought under Articles 2, 3, 10, 20, 21, 22, 23, 24 and 35 of the Constitution, Rule 10 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking the following orders;

1. That Motion Application be and is hereby certified urgent and for hearing on priority basis owing to the urgency of the Petitioner circumstances.
2. That pending the hearing and determination of this Motion or until further orders of the court, a conservatory order be issued directing the 1<sup>st</sup> Respondent to avail to your Petitioner, the following information;
  - a. A copy of the Application for Renewal of Lease over Land Reference No. 5827, Taveta;
  - b. Written confirmation whether Lease over Land Reference No. 5827, Taveta has been renewed, and if not, the status of the Application; and
  - c. A copy of the Certificate of Lease/Title of Land Reference No. 5827, Taveta.
3. That pending the hearing and determination of the Petition or until further orders of the court, a conservatory order be issued directing the 1<sup>st</sup> Respondent to avail to your Petitioner, the following information;
  - a. A copy of the Application for Renewal of Lease over Land Reference No. 5827, Taveta;
  - b. Written confirmation whether Lease over Land Reference No. 5827, Taveta has been renewed, and if not, the status of the Application; and
  - c. A copy of the Certificate of Lease/Title of Land Reference No. 5827, Taveta.
4. That costs of this Application be provided for.
5. That any other or further interim relief or reliefs pending Petition as deemed just and expedient by the court in the circumstances.

It is based on the grounds that the Petitioners are residents of Taveta Sub-County, and bring this Petition on its behalf, and on behalf of hundreds of residents occupying Land Reference No. 5827, Taveta. The Scheduled Property has since 1992 been occupied by the Petitioners and the local community on the express permission of the then land owner, Hon. Basil Criticos, which occupation has been continuous and

uninterrupted until in 2012 when Hon. Basil Criticos lease expired. Upon the expiry of the Lease, and until very recently, the County Government of Taita -Taveta has been very express that Hon. Basil's lease will not be renewed and suit the land will be adjudicated and titles issued to the genuine squatters living on the Scheduled Property. In the recent past, the Petitioners have come across letters dated 20<sup>th</sup> May, 2020 and 9<sup>th</sup> June, 2020, which letters were to the effect that the 1<sup>st</sup> Respondent has received application for renewal of the Lease from Hon. Basil Criticos. The Petitioners have also come across a judgment in Nairobi ELC Petition No. 576 of 2012, Hon. Basil Criticos vs. the National Land Commission, and a subsequent appeal being Nairobi Court of Appeal Civil Appeal No. 275 of 2020 where in essence Hon. Basil Criticos is seeking an order evicting persons occupying the suit property. Recently, there has been a lot of utterances from the political leaders that the 1<sup>st</sup> Respondent has fraudulently renewed the lease, and that mass eviction is imminent. In view of the political utterances aforesaid, compounded by the suits in court seeking eviction of the squatters, the Petitioners are apprehensive that unless the 1<sup>st</sup> Respondent give clear directions on the status of the application for renewal of the lease over the said property, the eviction of hundreds of families occupying the said property is real and imminent. On the basis of the apprehension aforesaid, on 25<sup>th</sup> May, 2021, the Petitioners requested information under article 35 of the Constitution and section 5 of the Access to Information Act inter alia copies of the application for renewal of the lease, and a confirmation in writing whether the lease over the said property has been renewed. Despite the request for information under Article 35, the 1<sup>st</sup> Respondent has deliberately refused to provide the information, or giving any explanation as to why the information cannot be provided. The actions of the Respondents to refuse to provide the information as requested by the Petitioners' letter of 25<sup>th</sup> May, 2021 is illegal and goes against values and principles of governance as provided under article 10 of the Constitution, and violates the Petitioner's right to information as guaranteed by Article 35 of the Constitution. The information sought by the Petitioners is very critical in protection of the Petitioners' right as guaranteed under the Constitution, and also in making decision as to whether to participate in the proceedings before the Court of Appeal. The Petitioners are apprehensive that unless the Honourable Court intervenes by issuing the Orders sought herein, the 1<sup>st</sup> Respondent is likely to violate and continue violating the Petitioner's fundamental rights and freedom. Further legal arguments will be made at the hearing of the application. That it is in the interest of justice demands that the prayers sought herein are granted.

This court has considered the application and submissions by the Applicants. Article 35 of the Constitution provides that;

- 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.*

The Constitution is clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the State, State Officer or Public Body. Consequently, Parliament enacted Access to Information Act 2016. Section 4 of the Act which is material, to this petition provides for the procedure to access information. The section provides;

- 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.*

It is instructive to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information. In the case of *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* (2016)eKLR, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

*“[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public’s Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.*

Be that as it may, I have peruse the petition filed in court on the 14<sup>th</sup> June 2021 and find that the orders sought therein are the same ones in the application. These are final orders and cannot be granted at this interim stage. Indeed there is no evidence adduced that the Petitioners tried to access the said information from the concerned Government entities and were denied the same to warrant this court’s intervention. I find this application is not merited and I dismiss it with no orders as to costs as the same was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2022.**

**N.A. MATHEKA**

**JUDGE**