



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.273 OF 2011

BETWEEN

FEDERATION OF WOMEN LAWYERS-KENYA 1ST PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER
INTERNATIONAL COMMISSION OF JURISTS.....3RD PETITIONER
.ANTONY NGANGA KIMANI.....4TH PETITIONER
FATUMA ABDIRAHMAN.....5TH PETITIONER
SUSAN NYAMBURA THUKU.....6TH PETITIONER
BERNARD C. MWANGI.....7TH PETITIONER
WASHINGTON OPONDO OBURA.....8TH PETITIONER
JOHN WANYONYI.....9TH PETITIONER
JAMES NDEGWA MUIGAI10TH PETITIONER
JAMES MUCHINAH KINYAGIAH11TH PETITIONER
PETER KAVITA MULI.....12TH PETITIONER
ZIPPORAH LALA.....13TH PETITIONER
MARY ITOO.....14TH PETITIONER
STEPHEN MUREITHI MUKINYO.....15TH PETITIONER
RAPHAEL EYANAI.....16TH PETITIONER
LUCY J MUGENDY.....17TH PETITIONER

NELSON OLUOCH OWEGI.....	18 TH PETITIONER
JOSEPH ONDUKO ORENGI.....	19 TH PETITIONER
ELIATHA MATE NTHIGA.....	20 TH PETITIONER
DANIEL NJENGA MWANGI.....	21 ST PETITIONER
MORINE ANYANGO APONDI.....	22 ND PETITIONER
THOMAS M. OMBATI.....	23 RD PETITIONER
KAFFA K. MAGENYI.....	24 TH PETITIONER
MARY WANGECI KANYI.....	25 TH PETITIONER
VINCENT WEKESA WAMALWA.....	26 TH PETITIONER
SARAH MORAA.....	27 TH PETITIONER
PATRICK K. GITHINJI.....	28 TH PETITIONER
JOSEPH GITHUKU.....	29 TH PETITIONER

AND

THE ATTORNEY GENERAL.....	1 ST RESPONDENT
THE MINISTER FOR FINANCE.....	2 ND RESPONDENT
THE MINISTER FOR LANDS.....	3 RD RESPONDENT
THE MINISTER FOR STATE AND SPECIAL PROGRAMMES.....	4 TH RESPONDENT

AND

CENTRE FOR RIGHTS EDUCATION AWARENESS.....	1 ST INTERESTED PARTY
KITUO CHA SHERIA.....	2 ND INTERESTED PARTY
ARTICLE 19.....	3 RD INTERESTED PARTY
COALITION ON VIOLENCE AGAINST WOMEN.....	4 TH INTERESTED PARTY

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....	AMICUS CURIAE
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RULING

Introduction

1. The Petitioners' filed their Petition dated 24th November 2011 seeking to enforce the fundamental rights of internally displaced persons allegedly violated during the 2007 and 2008 Post-Election Violence. Their Petition is premised on four issues, namely; injury to person, loss and damage to property, loss of life and gender and sexual based violence. Together with the Petition, they filed a Chamber Summons Application dated the same date seeking an order to compel the Respondents to disclose certain information sought in a letter dated 18th October, 2011.

2. In that letter, some of the Petitioners had requested the following information;

“(a) The budgetary allocations for the resettlement of The Internally Displaced Persons since the year 2007.

(b) The number of reported cases and incidents, their locations and names of victims in respect to:

- ***Injury to persons***
- ***Loss and damage to property***
- ***Murder***
- ***Gender based violence***
- ***Persons living with HIV/AIDS***

(c) The number of perpetrators apprehended, prosecuted and convicted/acquitted in respect to the pre and post 2007 General Elections violence.

(d) Compensation or remedial action for the aforementioned violations, if any.

(e) Number of Internally Displaced Persons and their location in the category of;

- ***Children***
- ***Women***
- ***Men***
- ***Persons with disabilities***
- ***Senior citizens.***

(f) The number of cases in Court of persons charged or convicted of theft of relief food meant for Internally Displaced Persons and their status and outcome.

(g) The names of the programmes and the various deadlines that the State has initiated in its efforts at resettling Internally Displaced Persons since the year 2007.

(h) The State policies on the Internally Displaced Persons, if any.”

Failure to provide the above information therefore led to the filing of the Application under consideration.

The Petitioners' case

3. Mr. Chigiti, Learned Counsel, acting for the Petitioners submitted that the Respondents have a constitutional obligation to provide the information sought as provided under **Article 35** of the **Constitution** unless there are sufficient reasons for non-disclosure thereof. He relied on the case of **Nairobi Law Monthly and Another vs Kenya Electricity Generating Company (Kengen) (2013) e KLR** for that proposition.

4. On the contention that the information sought is in the public domain, and that they have no obligation to disclose it, he claimed that the information in the public domain is scattered,

incomprehensive and asking the Petitioners to go look for it amounts to a limitation on the right to access information. That such a limitation in any event is unreasonable and does not meet the threshold set out under **Article 24** of the **Constitution**. It was his further position that the Respondents are the authors and the custodians of the documents and information sought and therefore they should be compelled to produce the same.

5. It was his further case that the procedure for introducing a public document in Court as evidence is well stipulated under **Section 80** of the **Evidence Act** and that the said **Section** helps guarantee the authenticity and integrity of the documents relied upon in Court. He therefore claimed that parties should not disregard the law and use illegal methods to access information. In addition, he submitted that **Article 50(4)** of the **Constitution** excludes admission of evidence that is obtained in a manner that violates any right or fundamental freedom in the Bill of Rights and in that context, he relied on the decision of *Okiya Okioti Omtatah & 2 Others vs Attorney General & 3 others (2014) e KLR*.
6. Lastly, Mr. Chigiti stated that the Respondents would not suffer any prejudice if they provided the information in their custody to the Petitioners and urged the Court to grant the order sought.

The Respondents' case

7. The Respondents opposed the Application through the following Grounds of Opposition dated 30th September 2012;
 1. *That the information sought is available in the public domain including in the reports attached to the Petition.*
 2. *That the budget making process and the Appropriations Act together with the estimates of expenditure are public documents accessible by the public at the Government Press.*
 3. *That the information sought in relation to other persons does not fall within the realm of Article 35 of the Constitution.*
 4. *That the entire Petition is not public interest litigation but rather a Petition by the specific individuals seeking to specifically avail themselves reparations.*
 5. *That the 1-4 Petitioners together with the Interested Parties are busy bodies in relation to the issues raised in the Petition. (sic)*
 6. *That the entire Petition is convoluted and the remedies sought are legally untenable. Besides it is not clear how the information sought would be useful to the individual Petitioners and the Court.*
 7. *The information sought as part of the prayers in the Petition would serve no purpose upon the determination of the Petition either way unless the Petition is being brought for ulterior motives.*
 8. *That the State is not civilly liable for the acts of criminals to whom it had no control over and who are admitted to have overwhelmed the State machinery.*
 9. *That it is the civic duty of the Petitioner to provide information to the State machinery which would enable the State apprehend the criminals.*
 10. *That the Petition and the summons seeking for information lack merit and ought to be dismissed with costs."*

8. Mr. Mohammed, Learned State Counsel in support of the above grounds submitted firstly, that,

while the information sought by the Petitioners was in the public domain the Respondents have gone further and provided additional information through the Replying Affidavit of the then Permanent Secretary Ministry for Special Programmes, Mr. Andrew A. O. Mondoh sworn on 16th March 2012.

9. Secondly, he submitted that the application for information has been made by a body corporate which is not a citizen and therefore cannot be a beneficiary of the right to access information as contemplated under **Article 35(1)** of the **Constitution**. In that regard, he relied on the case of *Nairobi law Monthly Company Ltd vs Kengen (supra)* where it was held that corporations are not citizens and as such are not entitled to the right to information.
10. Thirdly, he claimed that the Petitioners had not demonstrated that the information sought is required for the exercise or protection of fundamental right and freedom and therefore the basis for the claim to that information is weak. He relied on the case of *Nairobi law Monthly Company Ltd vs Kengen (supra)* in support of that proposition
11. Fourthly, he submitted that the information cannot be granted to the Petitioners as it cannot be given without the consent of some of the persons *inter alia* concerned since it is protected under **Article 31** of the **Constitution** which protects the right to privacy of persons who have been victims of gender based violence and persons living with HIV/AIDS.
12. Lastly, it was Mr. Mohammed's position that the Petitioners ought to have sought for the information before the institution of the Petition and not simultaneously with it. He therefore urged the Court to dismiss the application for the above reasons.
13. All the Interested Parties and *Amicus Curiae* neither failed to file any response to the application neither did they make oral or written submissions.

Determination

14. The main issue for consideration in this Ruling is whether the Petitioners have fulfilled the criteria established under **Article 35** of the **Constitution** as regards the right to access information.
15. In that regard, the right to access information is provided under the provisions of **Article 35** of the **Constitution** in the following terms;

(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 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.

16. The right of access to information is also recognized in international instruments to which Kenya is a party for instance. *The Declaration of Principles on Freedom of Expression in Africa* adopted by the African Commission on Human and Peoples Rights (32nd Session, 17 - 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of **Article 9** of the *African Charter on Human and Peoples' Rights* which provides, ***“Every individual shall have the right to receive information.”*** The Commission noted that right of access to information held by public bodies and companies, will lead to greater public transparency and accountability

as well as to good governance and the strengthening of democracy. I subscribe to that basic principle.

17. I also note that in *Famy Care Limited vs Public Procurement Administrative Review Board & Another Petition No.43 of 2012*, Majanja J. stated thus;

“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.”

18. Similarly in *Nairobi Law Monthly Company Ltd vs Kengen (supra)* Ngugi J held thus;

“The right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution.”

(See also *Brummer vs Minister for Social Development (2009) (II) BCLR 1075 (CC).*)

19. As to who can enjoy the right to access information, in *Famy Care vs Public Procurement Administrative Review Board & Another (supra)* Majanja J. in declining to issue the orders sought by the Petitioner, a limited liability company incorporated in India, took the view that the right to information under **Article 35** is limited in that it can only be enforced by natural persons. At paragraph 18 of the judgment, he therefore stated as follows;

“The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to ‘every person’ or ‘a person’ or ‘all persons’ this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term ‘person’ and ‘citizen’ as applied in Article 35.”

The learned judge went on to observe at Paragraph 22 of the Judgment that;

“Though the term “citizen” is not defined in Article 260, citizenship is dealt with under Chapter Three of the Constitution, Articles 12 to 18. The purport and effect of these provisions is that citizenship is in reference to a natural person.... A juridical person is neither born nor married as contemplated by these Articles. Similarly, the provisions on citizenship by registration and dual citizenship set out in Articles 15 and 16 of the Constitution negative an intention to define a citizen as including a juridical person.”

The learned judge then reached the following conclusion;

“The rights protected under Article 35(1) and 38 are essential for the purpose of organising a democratic state. The exercise of these rights excludes juridical persons as they are not “the people” referred to in the Preamble to the Constitution. A reading of the Constitution and an examination of words “person” and “citizen” within the Constitution can only lead to one conclusion; That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution. I therefore conclude that for purposes of Article 35(1), a citizen is a natural person who is a citizen of Kenya as defined by Chapter Three of the Constitution.”

20. I am in agreement with the learned judge and in applying the above finding to the instant case, the

Respondents have argued that some of the Petitioners, not being natural persons but juristic persons are not “**citizen**” for the purposes of **Article 35** and are therefore not entitled to seek the enforcement of its provisions.

21. On my part, and on that issue, it is not in dispute that the 1st to 3rd Petitioners are the ones that who requested for the information through their Advocate’s letter of 18th October 2011. For avoidance of doubt, at paragraph 1 of that letter, the Advocate thus wrote;

“We have been retained by Federation of Women Lawyers, Kenya Chapter (FIDA-KENYA), International Commission of Jurists-Kenya Chapter (ICJ-KENYA) and Kenya Human Rights Commission (KNHCR), our clients upon whose instructions we hereby write to, and notify, you.....”

As can be seen, the letter which is the subject of this Ruling does not refer to the 4th to 29th Petitioners who are natural persons but is in reference to the 1st to 3rd Petitioners who are not natural persons. Accordingly, they are excluded from enjoying the right to access information protected under **Article 35(1)** of the **Constitution** and the rationale for that finding has been explained elsewhere above.

22. In addition, Ngugi J held in *Nairobi Law Monthly vs Kengen (supra)* that in order to enforce the right to access information as stipulated under **Article 35** a person must demonstrate that the information sought is required for the exercise or protection of another fundamental right or freedom. In that regard, the learned judge held that;

“The Petitioner needs to show that it requires the information from the Respondents for the exercise or protection of another right. In this case, its rights to freedom of expression and of the media. Our courts have not yet had occasion to interpret the phrase ‘for the exercise or protection of another right’. However, the Constitutional Court of South Africa, in interpreting a similar provision of the Constitution of South Africa, has ruled that the information sought in an application for disclosure of information, must be such as is required for the protection or exercise of another fundamental right.”

The above reasoning has also been applied by the Constitutional Court of South Africa in cases such as *Cape Metropolitan Council vs Metro Inspection Services Western Cape and Others CC (10/99) (2001) ZASCA 56* and also *Unitas Hospital vs Van Wyk and Another (231/105) (2006) ZASCA 34*.

23. In that context, the Respondents opposed the Petitioners’ Application by *inter-alia* claiming that they have not demonstrated that the information sought would be used for the exercise and protection of another fundamental right. If that be so, I understood Mr. Chigiti to have submitted that the Petitioners are seeking the information for two reasons. First, the Petitioners’ have no mechanisms of verifying the information sought and secondly, the information is sought for a legitimate purpose.

24. On the former issue, it was Mr. Chigiti’s concern that the **Evidence Act** at **Section 80** has provided for the mechanisms in which public documents are to be produced and it is common ground that the bulk of the information sought is in the public domain. If that be so, it is possible to tell who the maker of the documents is and there are procedures known in law in which a party can compel another to produce any document which they have authored. For instance, if a document is of use to prove the Petitioners case, they can make an application for an order to compel the maker of that document to produce it in Court without recourse to **Article 35** of the **Constitution**.

25. In saying so, the Petitioners’ have a legitimate purpose for seeking the information in question but it is not enough for a party to state that it has a legitimate purpose without expressly stating that

purpose. I say so because the interpretation accorded to **Article 35** of the **Constitution** is that the right to access information can only be enforced where a party intends to advance or enforce another fundamental right or freedom. Which fundamental right or freedom do Petitioners intend to enforce with the requested information? How does that information prove their case for the violation of fundamental rights and freedoms? I do not have the answers to these questions and it is difficult to speculate that the information is sought to enforce the rights set out in the Petition which was already before the Court prior to the filing of the present Application.

26. Although parties did not address me on the issue it seems to me **Article 35** rights are substantive rights that must be proved, not in interlocutory proceedings, but in a substantive hearing on the merits. To do otherwise would mean that **Article 35** processes are merely facilitative of a hearing to prove the alleged violation of other rights in the Bill of Rights by invocation of **Article 35(2)** of the **Constitution**. At face value, I see no merit in such a proposition. I digress.

27. Lastly, it has been held that right to access information is not absolute and may be restricted in appropriate circumstances. In that regard, in *Nairobi Law Monthly vs Kengen (supra)* Ngugi J held as follows;

“It is however, recognized that there may be need to restrict access to some information, and some exceptions to the information that can be disclosed. In this regard, Article 19(3) of ICCPR provides that;

“The exercise for the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. *For respect of the rights or reputations of others;*
- b. *For the protection of national security or of public order (order public), or of public health or morals’.*

The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be clear. Narrow and subject to strict “harm” and “public interest” tests, and to the rights and interests of others.

In considering restrictions or exceptions to the right to information in Kenya, regard must be had to the express provisions of Article 24 of the Constitution.”

I entirely agree with the learned judge and if I heard the Respondents correctly their claim was that some of the information sought cannot be granted because it would in essence violate the constitutional rights of third parties who had not consented to disclosure of the information in question. I must agree with the Respondent in that regard. I say so because as can be seen from the letter setting out the request for information reproduced elsewhere above, it is true that the Petitioners are *inter alia* seeking information relating to names and victims of gender based violence, persons living with HIV/AIDS, injured and murdered persons as well as information on persons whose properties were damaged and lost property during the relevant period. Such information is of a private nature and it cannot be produced without consent as that would in essence violate **Article 31** of the **Constitution** and that is all to say on that subject.

Conclusion

28. In light of my findings above, my conclusion is that the Petitioners have not proved their case to the required standard and they are not entitled to the information they have sought from the Respondents.

29. Before I dispose of the Application, I also heard the Petitioners to claim that they have brought the Petition in public interest and that being so, that **Article 35(1)** must be read broadly as affording the Petitioners the right to obtain the information requested for. In that regard it is possible that, in fact, the Petition raises matters of public interest or is brought in public interest but that alone cannot be an excuse to evade the clear provisions of **Article 35(1) of the Constitution**.

30. For the reasons above, the Application dated 24th November, 2011 is dismissed.

31. As regards costs, let the same abide the outcome of the Petition.

32. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Bitta for Respondent

Mr. Ituga for petitioner

Miss Wanjiku holding brief for Miss Gacheru for 4th Respondent

Mr. Ligunya holding brief for Miss Kirui for Amicus

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE