



**Machua v Deputy County Commissioner Kiambu Subcounty & 4 others (Environment & Land Petition 2 of 2021) [2022] KEELC 4000 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 4000 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION 2 OF 2021**

**JG KEMEI, J**

**JULY 28, 2022**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF  
ARTICLE 35 OF THE CONSTITUTION OF KENYA, 2010  
AND THE CONTINUED CONTRAVENTION OF THE SAME.**

**BETWEEN**

**CAROLINE WANJIKU MACHUA ..... PETITIONER**

**AND**

**DEPUTY COUNTY COMMISSIONER KIAMBU SUBCOUNTY ... PETITIONER**

**AND**

**DISTRICT LAND REGISTRAR, KIAMBU ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF EXECUTIVE OFFICER- KENYA REVENUE AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**COMMISSION OF ADMINISTRATIVE JUSTICE ..... 3<sup>RD</sup> RESPONDENT**

**HONORABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. On the 3/4/2020 the petitioner moved the court and filed this petition against the respondents seeking the following orders;
  - a. That the Kiambu County Commissioner (the 1<sup>st</sup> respondent herein) forthwith provide the petitioner with; (i) a certified true copy of an extract of the proceedings of the board of its monthly in relation to land parcel no Ndumberi/ndumberi/ 3460 and, (ii) certified true copies of the applications tendered to the board alongside the booking for the same in relation to Ndumberi/ndumberi/ 3460.



- b. In the absence of the documents in prayer (a) hereinabove, the 1<sup>st</sup> respondent forthwith supply the petitioner a written declaration to the effect that the documents do not exist.
  - c. That Kiambu District Lands Registrar (the 2<sup>nd</sup> respondent herein) supply the petitioner with a certified true copy of the documents that his office used to effect entry no 5 in the records of title no Ndumberi/ndumberi/ 3460 In Favour Of Kirtish Chandulal Karania On May 2, 2019.
  - d. That the Kenya revenue authority (3<sup>rd</sup> respondent herein) do forthwith furnish the petitioner with information as to whether Kirtish Chandulal Karania (kirtish) was exempted from paying stamp duty on the transfer of lands or evidence of any stamp duty paid if at all in relation to the transfer of land parcel no Ndumberi/ndumberi/ 3460.
  - e. Any other further order(s) and/or writs or directions the honorable court may deem fit to grant.
2. It is the petitioners case that she sought certain disclosed documents from the petitioners on various dates under the provisions of article 35 of the Constitution. That in total contravention of her rights to information provided under article 35 of the said Constitution, the respondents have refused to provide the information requested. That she requires the information for the exercise of her right to property namely land reference no Ndumberi/ndumberi/3460 (suit land) in the prosecution of a case she is involved in ELC No 37 of 2019 in the Chief Magistrates Court in Kiambu. She is of the view that if the information is not provided she stands to be prejudiced in the case and justice may be defeated.
  3. The petition is supported by the affidavit sworn by the petitioner on the 1/4/2020 in which she detailed efforts she has made in seeking to be furnished with the information as follows;
    - a. A certified true copy of the proceedings of the board of its monthly meeting for the month of October 2018 from the 1<sup>st</sup> respondent
    - b. Certified true copies of the application tendered to the board alongside the booking for the same from the 1<sup>st</sup> respondent.
    - c. Certified true copies of the duplicate consents issued in the month of October from the 1<sup>st</sup> respondent.
    - d. A certified true copy of the documents used to effect entry No 5 in the register of the suit land in favour of Kirtish Chandulal Karania on the 2/5/2019.
    - e. Information as to whether the said Kirtish Chandulal Karana was exempted from paying stamp duty on the transfer of lands and in which Kenya Gazette if at all the exemption was published from the 3<sup>rd</sup> respondent.
  4. The deponent annexed to the affidavit various letters addressed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents seeking for the information aforestated.
  5. That when she failed to receive any responses from the 1<sup>st</sup> – 3<sup>rd</sup> respondents, the deponent stated that on the 1/10/2019 she wrote to the 4<sup>th</sup> respondent regarding the denial of information sought by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.
  6. Further she also wrote to the 4<sup>th</sup> respondent seeking assistance over the denial of the information requested by the 2<sup>nd</sup> respondent.
  7. That on the 17/9/2019 the 3<sup>rd</sup> respondent advised her in writing that they were going to respond to the requisition for information as soon as possible.



8. On the 9/10/2019 she avers that the 4<sup>th</sup> respondent advised her to resubmit a new application to the 1<sup>st</sup> respondent specifically pointing out the exact information she needed. On the October 23, 2019 she resubmitted the application as advised by the 4<sup>th</sup> respondent to the 1<sup>st</sup> respondent, which letter was received at the said office of the 1<sup>st</sup> respondent by a lady named Elizabeth who refused to stamp her copy with the official stamp. This action irked the petitioner to the point that she filed a complaint against the said Elizabeth with the 4<sup>th</sup> respondent.
9. When the 1<sup>st</sup> respondent did not respond the deponent wrote a reminder to the 4<sup>th</sup> respondent and on the 24/3/2020 the 4<sup>th</sup> respondent ordered the Deputy County Commissioner Kiambu to facilitate the petitioner to access the abstract of the Land Control Board proceedings held on the October 17, 2018, copy of the application for Land Control Board consent and the official receipt for the payment made in respect of the proceedings in relation to the petitioner and /or Kirtish Chanulal Karana over the suit land. A copy of the said letter was annexed to the supporting affidavit.
10. She avers that the 4<sup>th</sup> respondent went mute with regards to the information sought from the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without giving any direction or expressing any of their misgivings towards the information sought from the said respondents.
11. On the 26/8/2020 Kirtish sought to be enjoined in the suit as an interested party in a motion dated the 25/8/2020. The motion was heard and determined by Hon Lady Justice Kasango who on perusal of the file noted that the High Court lacked jurisdiction to handle the matter, it being a land matter, hence the jurisdiction lay with this court and ordered the file be transferred to the ELC Court.
12. Following the transfer it is clear from the record that the said Kirtish did not pursue his application which remains undetermined to date. The court will take a view that the said Kirtish must have abandoned the application. The same is hereby struck out for want of prosecution.
13. The 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> respondents opposed the petition through their grounds of opposition filed on the 1/12/2021 on the following grounds;
  - a. That this petition does not meet the test of a Constitutional Petition as laid down in the case of *Anarita Njeru Vs Republic* (1979) KLR 154 and further buttressed in the case of *Mumo Matemu Vs Trusted Society of Human Rights Alliance* (2014) EKLR.
  - b. That this petition offends the principle of Constitutional avoidance; not each and every violation of the law must be raised before the High Court as a constitutional issue. There exist alternative remedies through statutory law that the petitioner fort ought to pursue.
  - c. That this petition is ill conceived unmeritorious an abuse of the process of the court and ought to be dismissed forthwith.
14. The 4<sup>th</sup> respondent opposed the petition and through a reply to the petition sworn on the October 12, 2021 by Leonard Ngaluma who introduced himself as the Secretary to the 4<sup>th</sup> respondent. That the 4<sup>th</sup> respondent is mandated under the *Access to Information Act* to give effect to the provisions of article 35 of the *Constitution* which provides for the rights to access information held by the state.
15. That the commission received application for the review of decisions failing to facilitate access to information and or documents by the 1<sup>st</sup> and 3<sup>rd</sup> respondent as requested by the petitioner. That pursuant to its mandate under the law the 4<sup>th</sup> respondent reviewed the information that had been submitted by the respondent to the 1<sup>st</sup> respondent and advised the petitioner in writing *vide* its letter dated the 9/10/2019 to submit the request afresh indicating the exact information that she wanted to be facilitated in accessing. With respect to the information required from the 3<sup>rd</sup> respondent the 4<sup>th</sup>



respondent was of the view that the information sought touched on a third party and thus advised the petitioner in its letter dated the 9/10/2019 that she had to obtain a court order to be able to access the information. This was in line with the limitation of disclosure of information of private information as provided under section 6(1) of the *Access to Information Act*, 2016.

16. In line with the advice given by the 4<sup>th</sup> respondent the petitioner submitted another request on the 30/9/2019 against the 1<sup>st</sup> and 2<sup>nd</sup> respondent and again on review it was discovered that the request to the 1<sup>st</sup> respondents were incomplete on the November 11, 2019 the petitioner was asked to resubmit the complete request to allow the 4<sup>th</sup> respondent to make informed decision on the cases, a request which was complied by the petitioner on the October 28, 2019 with respect to the 1<sup>st</sup> petitioner only as she failed to attach a copy of the request to the 2<sup>nd</sup> respondent.
17. On the 4/3/2020 the 4<sup>th</sup> respondent directed the respondent to facilitate access to the requested information within 7 days, a decision that was not met with compliance by the 1<sup>st</sup> respondent. That the failure of the 1<sup>st</sup> respondent to implement the decision of the 4<sup>th</sup> respondent in the absence of an appeal to the High Court amounts to a violation of *Access to Information Act*.
18. It was the opinion of the deponent that there being no appeal the court should order the decision of the 4<sup>th</sup> respondent to be enforced as a decree and be executed as an order of the court as stipulated under section 35(5) of the *Access to Information Act*, 2016. He urged the court to order the enforcement of the 4<sup>th</sup> respondent's orders issued on the 4/3/2020.
19. The 3<sup>rd</sup> respondent did not file any response to the petition. It therefore did not oppose the petition.

### **The written Submissions**

20. The submissions of the petitioner were filed by the firm of Amutallah Robert & Co Advocates.
21. The petitioner submitted that her rights under the *Access to Information Act* were breached by the respondents in the manner in which they all refused to furnish her with the information.
22. Relying on article 35 of the *Constitution*, the petitioner submitted that her rights under the said proviso were violated by the respondents despite several requests to access the information. That none of the respondents have denied that the information sought was not within their custody or knowledge. That as a result of the refusal her right to access the information in respect to the suit land has been breached by the respondents. She submitted that every citizens rights to access information is not affected by any reason the person gives for seeking access and that in her case she was not duty bound to disclose the reasons as to why she sought the information touching on the suit land and to the contrary he respondents being state organs and in custody of the sought information were duty bound to comply with the law and the Constitutional provisions and avail the information sought.
23. Ms Fatma Ali, Learned State Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondent filed written submissions and urged the Court to make a finding that the right to information is not absolute. In support of this proposition the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents relied on the decision of the court in the case of *Nairobi Law monthly company limited vs Kenya electricity company limited & 2 others* (2013) where the court held as follows;

“... What is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.”



24. Maintaining that it is the right of citizens to seek and obtain information being held by state organs and state officers are bound by article 35 (1) (a) to disclose information sought in terms of section 4 of the [Access to Information Act](#). The respondents faulted the petitioner for imprecise pleading of her case in the Petition and relying on the case of [Anarita Karimi Njeru Vs Republic \(1980\) KLR 1272](#) where the court stated that the petitioner must state and identify the rights with precision and how the same have been infringed upon. They submitted that the petitioner has failed to demonstrate why she requires the information nor demonstrate the correlation between her and the information being sought.
25. Further the court was pointed to the decision of the Court in the case of [Katiba Institute Vs President's delivery Unit & 3 Others](#) (2017) eKLR where the Court stated observed that;
- “The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.”
26. It was the submissions of the respondents that the petitioner ought to have explained the reasons as to why he requires the information. That the Land Control Board matters are sensitive and it behooved her to explain the relationship between herself and the information sought. That the petitioner has not explained what right or fundamental freedom she is seeking to protect and interalia the rights the petitioner claims are limited by article 24 of the [Constitution](#) and essentially are not available.
27. Ms Florence Mumbi Mwikya, Learned Counsel for the 4<sup>th</sup> respondent filed written submissions on the November 17, 2021.
28. The main issue framed by the 4<sup>th</sup> respondent is whether it fulfilled its mandate as envisaged in art 35 of the [Constitution](#) and [Access to Information Act](#), 2016. At the start the 4<sup>th</sup> respondent answered the issue in the affirmative. It submitted that the 4<sup>th</sup> respondent is guided by the provisions of [Access to Information Act](#) and the Fair Administrative Actions Act. That in line with the law it acted on the request of the petitioner and made orders requiring the 1<sup>st</sup> respondent to facilitate the access of the information sought. That the orders were issued under section 23(2) (a) of the [Access to Information Act](#). That under this Section if a party is aggrieved by the order of the 4<sup>th</sup> respondent the party may appeal the same to the High Court within a period of 21 days from the date of the order. It was its submission that the 4<sup>th</sup> respondent is yet to implement the decision nor lodge an appeal against it and this is tantamount to a violation of the right to access information. It urged the court to order that the decision of the 4<sup>th</sup> respondent issued on the 4/3/2020 be enforced as a decree of the court in accordance with the provisions of section 23(5) of the [Access to Information Act](#). The 4<sup>th</sup> respondent relied on the case of [Republic Vs Isaiah Kubai & Another; Exparte Duncan Muthusi](#) (2019) eKLR.
29. In conclusion the 4<sup>th</sup> respondent submitted that it handled the complaint of the petitioner efficiently and effectively and she was kept abreast of the steps and necessary actions undertaken to resolve the complaint.



30. Having read and considered the petition, the grounds of opposition, the affidavit evidence and the rival written submissions and all the materials placed before the court, the issues framed for determination are;
- a. Whether the petitioners right to access to information has been violated.
  - b. What orders should the court issue?
  - c. Who meets the costs of the petition?
31. The right to access information is firmly set in the body of International Human Rights law. It is enshrined in article 19 of the *Universal Declaration of Human Rights* (UDHR), and made legally binding on states parties to the *International Covenant on Civil and Political Rights* (ICCPR). Article 19 of the *ICCPR* states that: ‘everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’
32. Being able to access information is important to each individual’s life that it has consistently been recognized as a fundamental human right. This right is at the core of all human rights because it enables citizens to know their entitlements and when their rights are being upheld and or violated, and demand that their government fulfils its duties under domestic and international law to protect and secure those rights.
33. In Kenya the right to access information is protected and provided for under article 35 of the *Constitution*. It states as follows;
- (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.”
34. This right has been given effect by section 4 of the Right to Information Act which states that;
- “Right to information
- (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 of 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.”
35. Under section 8 of the Act, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding why the citizen wants to access information.
36. Section 9 of the said Act states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information. The limitation of the right to access information is highlighted under section 6(1) of the Act that;

“Limitation of right of access to information

- (1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to-
    - (a) undermine the national security of Kenya;
    - (b) impede the due process of law;
    - (c) endanger the safety, health or life of any person;
    - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
    - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
    - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
    - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
    - (h) damage a public entity's position in any actual or contemplated legal proceedings; or
    - (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.”
37. The right to access information is a right that the individual has to access information held by public bodies acting on behalf of the state. This is an important right for the proper and democratic conduct



of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. See the case of *Katiba Institute VS Presidents Delivery Unit & 3 others* [2017] eKLR.

38. The *Constitution* is therefore 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.
39. It is important 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. On the other hand, section 5 of the *Act* further provides that a public entity should facilitate access to information held by it.
40. In the persuasive decision in the case of *Famy Care Ltd Vs Public Procurement Administrative Review Board and others* [2013] eKLR where it was held that: -

“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 of the *Constitution* and article 10 cannot be achieved unless the citizen has access to information.”
41. The Court of Appeal in the case of *Timothy Njoya v Attorney General & another* [2017] eKLR cited with approval South African Constitutional Court decision in *The President of RSA Vs M & G Media Ltd* 2012 (3) SA 50 (CC) the relevance of this right that;

“In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”
42. The plaintiff's case is fairly straightforward. She contends that she sought information from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents regarding entry no 5 of the land parcel no Ndumberi/ndumberi/3460 (the suit land). She outlined the detailed communication and follow ups in her Supporting Affidavit culminating in CW12, the ultimate decision by the 4<sup>th</sup> respondent to the 1<sup>st</sup> respondent to provide the petitioner the requested documents being the Land Control Board proceedings of October 17, 2018 pursuant to its powers granted by section 23(2) (a) of the *Access to Information Act*. That decision is dated March 4, 2020 and it is signed by Lucy Ndungu.
43. Opposing the application, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents maintained that the application does not meet the threshold for Constitutional breach as laid out in the *Anarita* Case and that the Petition offends the principle of Constitutional avoidance. Neither of the respondents denied receiving the petitioner's requests for information. However, in their submissions, the respondents argued that the petitioner ought to have demonstrated that she sought the impugned information and that she did not disclose the reasons forming the basis of her request.



44. Supporting the Petition, the 4<sup>th</sup> respondent averred that LN 6 being its decision made on 4/3/2020 was never complied with. Further that the decision has never been appealed against and beseeched the court to enforce it as a decree under section 23(5) of the [Access to Information Act](#).
45. The information requested by the petitioner is the kind of information within the custody of the respondents. The respondents are public bodies which are obligated to hold the information that the petitioner is looking for. They are also obligated to give the information requested by the requester in this case the petitioner. The reasons advanced by the petitioner to wit to enable her prosecute a case pending in court relating to the suit land does not in any way fall within the exceptions expressed in section 6 of the [Access to Information Act](#).
46. With respect to the costs, I have carefully reviewed the consistent manner in which the petitioner sought information without any success. The respondents are duty bound to have responded to the petitioner forwarding the information/documents and or explain the difficulty in which they are facing in complying. It is to be noted that some of the respondents like the 1<sup>st</sup> respondent even had the audacity to ignore the orders of the 4<sup>th</sup> respondent, an independent body constitutionally empowered to call for the information. This action on the part of the 1<sup>st</sup> respondent amounts to abstention of duty and must be sanctioned. The petitioner was therefore put into unnecessary costs and expenses in filing this Petition which should have been avoided. I see no reason to deny her costs in the circumstances.
47. In the upshot I find that the petition is merited and I make orders as follows;
- a. That the Kiambu County Commissioner (the 1<sup>st</sup> respondent herein) forthwith provide the petitioner with; (i) a certified true copy of an extract of the proceedings of the Land Control Board in relation to land parcel no Ndumberi/ndumberi/ 3460 and, (ii) certified true copies of the applications tendered to the Board alongside the booking for the same in relation to Ndumberi/ndumberi/ 3460.
  - b. In the absence of the documents in prayer (a) hereinabove, the 1<sup>st</sup> respondent forthwith supply the petitioner with a written declaration to the effect that the documents do not exist.
  - c. That Kiambu District Land Registrar (the 2<sup>nd</sup> respondent herein) supply the petitioner with a certified true copy of the documents that his office used to effect entry no 5 in the records of Title no Ndumberi/ndumberi/ 3460 in favour of Kirtish Chandulal Karania on May 2, 2019.
  - d. That the Kenya Revenue Authority (3<sup>rd</sup> respondent herein) do forthwith furnish the petitioner with information as to whether Kirtish Chandulal Karania (kirtish) was exempted from paying stamp duty on the transfer of lands or evidence of any stamp duty paid if at all in relation to the transfer of land parcel no Ndumberi/ndumberi/ 3460.
  - e. The costs shall be in favour of the petitioner.
48. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JULY 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Amtallah for the Petitioner



1st, 2nd and 3rd respondent – Absent

Ms. Musembi for 4th respondent

5th Respondent – Absent

Court Assistant – Phyllis Mwangi

