



**Omusundi & another v Nakuru County Assembly & another (Constitutional Petition 13 of 2023) [2024] KEHC 2716 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CONSTITUTIONAL PETITION 13 OF 2023**

**HM NYAGA, J**

**MARCH 13, 2024**

**BETWEEN**

**LABAN OMUSUNDI ..... 1<sup>ST</sup> PETITIONER**

**BENSON OLWANDE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAKURU COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**NAKURU COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners filed a petition dated 29<sup>th</sup> June, 2023 seeking the following orders: -

A. A declaration that the refusal to supply information sought from the 1<sup>st</sup> Respondent by the petitioners is a violation of Article 35 and 47 of our progressive constitution.

B. A Declaration that the act of the 1<sup>st</sup> Respondent not responding to the petition filed before them, as exhibited in the annexures is a breach of Section 89 of the County Government Act, 2012.

C. An Order for the 1<sup>st</sup> Respondent to supply information sought in the herein attached annexures including all companies that were involved in all tenders in Menengai Ward-Nakuru East Sub County plus the Bill of Quantities of those projects, including those that were funded by donors for social accountability.

D. An Order for the 1<sup>st</sup> Respondent to supply information of how much funds for bursaries was allocated for the year 2021, 2022 and 2023, the names of the beneficiaries and the institutions that received those funds including driving schools if there was any.



E. An Order for the 1<sup>st</sup> Respondent to come up with the online tracker system where all projects and their signatures including Bill of quantities are updated(as it is done in our courts where all suits filed country wide are tracked online) to enhance transparency and accountability as to minimize the excesses of corruption.

F. An Order for the 1<sup>st</sup> Respondent to deposit all necessary documents of ward projects including Bill of Quantities at ward administrators' offices, countywide for easier accountability for residents who cannot access them online.

G. A Declaration that having a legal framework of public participation during projects proposals and not having a legal framework of public participation during implementation of project amounts to discriminating the public at the critical part where serious oversight is needed for the value of public funds be realized.

H. A temporary injunction restraining the 1<sup>st</sup> respondent from implementing County Projects until there is a legal framework that will enable the public participation during the implementation of Nakuru County projects in enhancing principles of governance espoused in article 10 of our progressive constitution.

I. A declaration that putting political personal names on the site boards of Nakuru County projects contravenes Article 75(1), (a),(b) of *the constitution* of Kenya 2010 for it amounts to compromising official interest in favour of personal political interests.

J. A perpetual Order restraining both respondents from putting political personal names or pictures of political elites on site boards of County projects.

K. Any other Order(s) the court may deem just and appropriate to grant.

L. Costs of the Petition to be borne by the Respondents.

2. It is the petitioners' case that they sought information through various letters addressed to the respondents but no response was received from them. This forced the petitioners to file the petition herein. That for example:

\* On 26<sup>th</sup> November 2019, the 1<sup>st</sup> petitioner, jointly with others wrote to the 1<sup>st</sup> Respondent's cabinet executive member of the Ministry of Trade requesting information of Kiratina Market Project in Menengai Ward- Nakuru Town East Sub-County, specifically on the full disclosure of the millions spent on building that fallen market; the amount of money paid to the contractor; whether the retention money was paid to the contractor; the amount of money spent but that was not meant for the market and where it is; the amount intended to be spent on the fallen market; the internal administrative measures that have been taken to prevent such kind of shoddy work in future in constructing markets; copy of certificates of completion; the future plans for the idea of the market; and copies of ownership documents of the public land grabbing supply.

\* In December 2019 ,the 1<sup>st</sup> petitioner wrote to the 1<sup>st</sup> respondent's Chief Officer of the Ministry of Education in charge of early childhood and vocational training requesting for the allocation of money for ECD classes and places where they will be built for the financial year 2019-2020 and the amount of money allocated for vocational training of young people to Kenya Industrial training institute, the financial year and terms and reference of the contract of their training with respect to MENENGAI Ward in Nakuru East- Sub County.

\* On 2<sup>nd</sup> January 2020, the 1<sup>st</sup> petitioner, jointly with others wrote a public petition under certificate of urgency to the 1<sup>st</sup> respondent's County Secretary and copied the same to Chief of Staff ,office of the governor ,county executive finance and planning and Nakuru East Sub-County



Administrator requesting to be supplied with all projects for Menengai Ward and their costs for financial years 2016-2017,2017-2018,2018-2019 and 2019-2020; the minutes of public participation in the implementation of those projects that have been implemented; all beneficiaries of bursary from the year 2018 and 2019 plus the total sum spent on each phase and other related expenditure on bursary; the names of the bursary committee of Menengai ward and minutes of how they were elected or appointed; the expenditure of sports or the intended money to be spent on sports since 2018,2019 and 2020 of Menengai Ward; & the expenditure of money for maintenance in Menengai Ward from the year 2017 to 2020.

\* In March 2021, the 1<sup>st</sup> petitioner filed a verbal complaint to the commission on administrative justice at Nakuru Huduma centre for failure to disclose information sought from the 1<sup>st</sup> respondent and the said commission wrote a letter to the 1<sup>st</sup> respondent compelling them to supply information sought but it did not comply.

\* On 11<sup>th</sup> April, 2022, the 1<sup>st</sup> petitioner wrote to the 1<sup>st</sup> respondent's CEC in charge of ECD, director of trade, on the matter of ECD dossier which were supposed to be built at Kiratina Market.

\* On 11<sup>th</sup> April, 2023 ,the petitioner wrote to the 1<sup>st</sup> Respondent's Chief Officer of Administration seeking that Menengai Ward Administrator be directed to supply information regarding projects done in his jurisdiction for the Last five financial years and another one to the Chief Officer of Education to access information of the certified list of the Bursary Beneficiaries in Menengai Ward.

3. It is the petitioners' case that as per supplementary budget of the year 2020/2021 Ksh. 1.3 million was allocated for the purchase of land in Kiratina ECDE and Ksh. 3.499,975 was allocated for the construction ECD Classrooms and toilets at Kiratina Primary School and fencing but despite such allocation no single project has been implemented on the ground.
4. The petitioners state that between February 15<sup>th</sup> and 20<sup>th</sup> 2022, the 1<sup>st</sup> respondent ran an advert in Daily Nation Newspaper for buying land for Muhoro - Kiratina link and the money was allocated for that course however the same has not been implemented on the ground.
5. They aver that all the above requests were founded on Articles 35(1) and 47 of *the Constitution* Kenya 2010 as read together with *Access to Information Act* 2016 and Administrative Action Act 2015 which dictates public officers to act expeditiously, efficiently, lawfully, reasonably and in a procedurally fair manner.
6. They aver that the 1<sup>st</sup> respondent violated the above articles and also Article 89 of the County Government Act 2012 by not responding to the petition filed before them.
7. They aver that the 1<sup>st</sup> respondent has been implementing ward projects under the oversight of the 2<sup>nd</sup> respondent without an enabling legislative framework for public participation in total disregard of article 10(2) (a).
8. That on 11<sup>th</sup> October, 2019, the petitioner wrote to the 1<sup>st</sup> respondent's county secretary requesting for publication on its website of the minutes of public participation, bill of quantities of both headquarters and ward projects from the year 2013 up to 2019 for purposes of transparency and accountability and to be supplied with an enabling legislation of the county government of Nakuru that enables the public participation in the implementation of both Headquarters and Ward projects but there has been no reply to that effect.
9. The petitioners aver that the Nakuru County Revenue Allocation Act 2019 only allows public participation during project proposals but not during the implementation of the same, and it is thus discriminatory to that effect.



10. They state that the 1<sup>st</sup> petitioner being a patriotic citizen and with a view to enhance service delivery in the unbecoming circumstances set above, wrote a letter to the 1<sup>st</sup> Respondent's County Secretary on 5<sup>th</sup> December, 2022 pursuant to Sections 88 and 89 of the County Government Act, requesting him to develop a service charter to regulate those in the administrative roles to act on all matters but the officer ignored the same.
11. The petitioners contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have been putting up individual names of the Governor and individuals' names of the Members of County Assembly on site boards of the County projects in advancing their personal political interests and satisfying their individual egos, contrary to Article 75(1)(a) of *the Constitution*.
12. They contend that they live in fear of sinking into the abyss of bottomless pit of the banana republic due to respondents' acts of disregarding the law. They also live in fear that the alienable right imposed by *the Constitution* to access to information will be trampled on willingly and the public funds are likely to be spent abnormally by the Respondents if there will be no transparency and accountability thereof.
13. Simon Kamau who is the ward administrator of Menengai Ward, opposed the Application on behalf of the 1<sup>st</sup> Respondent through his replying affidavit sworn on 19<sup>th</sup> October, 2023. He deposes that the project of ECD classrooms and the venue was proposed for implementation for the financial year 2020/2021 and not 2019/2020 as stated and during the public participation members of the public proposed construction of Kiratina ECD classrooms and also allocated money for the purchase of Land within Kiratina for the said construction.
14. He avers that since there was no public land to construct the said classrooms, land was to be purchased first and the department of land advertised in local dailies for Kiratina Residents to submit interest in selling Land to County Government for ECD classrooms constructions.
15. That in the subsequent financial public participation for 2021/22 financial year on projects proposals, members of the public including the 1<sup>st</sup> petitioner wanted to know the status of the ECD Classrooms construction project and they explained on the status and that the advertisement was still on.
16. He avers that in accordance with Section 4 of the *Access to Information Act*, all information concerning bursaries within Menengai Ward was available at the ward offices and a certified copy was displayed at the ward notice board for the public to be informed of which the 1<sup>st</sup> petitioner went and confirmed.
17. He posits that the right to access to information is not absolute and there may be circumstances in which a person may be denied particular information as provided for under Section 6 of the *Access to information Act*, 2016.
18. He states that there are specific procedures provided in a law on how a person ought to access information held by a state organ or entity and that the petitioners did not make any formal request at the ward level for the information regarding the Subject Matter.
19. He avers that as per Nakuru County Bursary Fund Regulations the management of the bursary fund was done by Menengai Ward Bursary Committee members whereas the oversight was done by Menengai Ward member of County Assembly.
20. He deposes that the bursary is usually launched by the Governor in a public meeting widely publicized and during the launch all the ward bursary lists an amount for all wards and released to the public.
21. He deposes that the list of the beneficiaries, amount awarded for the students, a certified list of all students on vocational training from Kenya Industrial Training Institute (KITI) that successfully did their studies, list of all paid amounts for respective students and the cheque numbers indicated are



- available and as such the accusation of being in contravention of Article 75(1)(a)(b) of the Constitution is unwarranted.
22. It is his averment that in accordance with Section 6(5) of the Access to information Act, 2016 a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means and in this case the information was published and placed on notice board and online system for the public to access.
  23. He depones that that the 1<sup>st</sup> respondent has put in place a County Integrated Monitoring and Evaluation System to track implementation of the outlined programmes and projects. However, the 1<sup>st</sup> respondent is not obligated to give information on matters Bill of Quantities since its disclosure is likely to cause substantial harm to the ability of the government to manage the economy of Kenya.
  24. That during the financial year 2022/23 the launch for bursary took place on 29<sup>th</sup> March, 2023 at Nyayo Gardens Nakuru Town and Menengai ward list was placed at Menengai Ward list was placed at Menengai Ward Administration office notice board.
  25. He contends that there was neither an advert in Daily Nation Newspaper for buying land for Muhoro-Kiratina link nor any allocation, and that the 15 million that was allocated for 2023/24 financial year is yet to be implemented.
  26. It is his further averment that under Section 9(6) of the Access to information Act, 2016 an application that is not responded to within 21 days shall be deemed to have been rejected.
  27. The 2<sup>nd</sup> Respondent opposed the petition through a Replying affidavit sworn by its Speaker, one Joel Karuri Maina on 19<sup>th</sup> October, 2023. He depones that the petition is fatally and incurably defective and should not be entertained by this honourable court for failure to cite with precision the relevant provisions of the Constitution alleged to have been violated and the manner in which the 2<sup>nd</sup> respondent has violated the same as was espoused in the case of Annarita Karimi Njeru.
  28. He states that the issues raised in the petition with regards to establishment of project management committee (PMCs) are moot for reasons that the County Government of Nakuru developed the necessary monitoring and evaluation structures via its county integrated development plan (CIDP 2023-2027) in line with the Council of Governors (COG) guidelines for the development of County Integrated Monitoring and Evaluation Systems.
  29. That in furtherance to the above, the County Government established County Monitoring and Evaluation structure consisting of the County Executive Committee, the County Monitoring and Evaluation Unit, County Monitoring and Evaluation Committee (COMEC), Departmental Monitoring and Evaluation Committees and the Project Implementation and Management Committees (PIMCs)
  30. He states that the Monitoring and Evaluation structures provide linkages with the state department for Economic Planning (SDEP), Council of Governors (COG) and the citizen engagement forums. Additionally, the County Assembly provides oversight through the Implementation Committee and the respective Sectoral Committee(s).
  31. With respect to the Petitioners' contention on individual names on site boards, he avers that it is a legal requirement by the national Construction Authority (NCA) to display a site board for every proposed private or public project displaying the name of the location to be constructed, ownership details, supervising consultants, contractors and all the statutory approvals. He avers that members of the County Assembly are not involved in implementation of projects but rather their inclusion on the site board is limited to their oversight role.



32. He prays that the Application be dismissed with costs to the 2<sup>nd</sup> Respondent.
33. The petition was canvassed through Written Submissions.

### **Petitioners' Submissions**

34. The petitioner framed the following issues for determination;
  1. Whether the 1<sup>st</sup> Respondent refused to supply information sought contrary to Article 35 of *the Constitution* of Kenya.
  2. Whether there is a legal frame work for public participation during implementation of County Projects.
  3. Whether putting political individuals' names on the site boards of public funded County Project contravenes Article 75(1) (a)(b) of *the Constitution*.
35. On the first issue, the petitioners submitted that on the strength of Section 88 of the County Government Act, 2012, the 1<sup>st</sup> petitioner did six applications of Access to information, in line with section 35 of *the Constitution* of Kenya as read together with *Access to information Act* 2016 which gives every citizen the rights to access to information but the Commission on Administrative Justice did not supply the information sought which information under Section 6(1) of the *Access to information Act*, 2012 was not limited. To buttress their submissions, the petitioners cited the cases of;
  1. Famy Care Limited vs Public Procurement Administrative Review Board & Another Petition No.43 of 2012, where 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.”
  2. Katiba Institute vs Presidents Delivery Unit & 3 others [2017] eKLR57 where the court stated that;

“We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused.”
36. The petitioners submitted that access to information was done to the right person as all the applications were addressed to the Chief officers who are the accounting officers as per Section 7(1) of the *Access to information Act* 2012.
37. The petitioners contended that the information on bursary displayed on the notice board is extremely limited and is uncertified information as it was unsigned and unstamped by the Accounting Officer who in this case is the Chief Officer of Education. He said the same has been provided after the filing of this petition.



38. Regarding the second issue, the petitioners submitted that the Nakuru County Public Participation Act 2016 is silent, opaque and hollow when it comes to public participation during implementation of County Projects while Nakuru County Integrated Development Plan by the 2<sup>nd</sup> Respondent is just a plan between 2023/2027 for the maker to follow or ignore but a legislation is binding and must be followed.
39. They argued that public participation is a three steps layers that starts from proposing of projects, allocation of funds and implementation and is an enabler of transparency and accountability. In this regard, reliance was placed on the case of Robert N. Gakuru & Another vs Governor Kiambu County & 3 others [2013] eKLR where the court stated;
- “In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may for a as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1) (b) just like the South African position requires just that.”
40. The petitioners invited this court to note that there is necessity of having a structured legislative framework of public participation in the critical part of implementation of county projects and to grants reliefs no. G and H of the petition.
41. With respect to the last issue, the petitioners submitted that it is the legal requirement by National Construction Authority to display a site board for every proposed private or public project displaying the name of location to be constructed, ownership, supervising consultants, contractors and all the statutory approvals.
42. The argued that the inclusion of governor’s and Members of County Assemblies’ names and pictures is not a requirement in law. They therefore urged this court to grant reliefs number I and J of the petition.

### **1<sup>st</sup> Respondent’s Submissions**

43. On whether the 1<sup>st</sup> respondent violated the petitioner’s right of access to information, the 1<sup>st</sup> respondent relied on the decisions in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR where the court referred to the case of *Nairobi Law Monthly Ltd v Kenya Electricity Generating Company* [2013] on what the state should bear in mind when considering the request to access information, *Nelson O Kadison v Advocates Complaints Commission & another* [2013] eKLR where the court held that the right to access information is one of the rights underpinned in Article 10 of *the constitution* and the rights thereunder cannot be achieved unless the citizen has access to information and *Trusted Society of Human Rights Alliance & 13 others v Judicial Service Commission* [2016]eKLR where the court made reference to *Brummer v Minister for Social Development & others*



CCT 25/09 2009 ZACC 21 paragraphs 62 on the openness in government's operations and principles of access to information.

44. The 1<sup>st</sup> respondent submitted that from the foregoing, all information concerning bursaries within Menengai Ward was available at the ward offices and furthermore a certified copy was displayed at the ward notice board for the public to be informed and to be able to access the same; and it has put in place a County Integrated Monitoring and Evaluation system to track implementation of the outlined programs and projects so as to ensure transparency, accountability, openness and accessibility of accurate information.
45. The 1<sup>st</sup> respondent further submitted that Nakuru County Public Participation Act 2016 was implemented to give effect to article 1,10(2)(a),1749c), (d), 196,232(1)(d) and paragraph 14 of part 2 of the Fourth Schedule of *the Constitution* and encourage participation on matters of public interest and to establish modalities and platforms in the governance of the County.
46. On whether the 1<sup>st</sup> respondent should be compelled to give information, the petitioners submitted that under Section 6(5) of the *Access to information Act*, a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means and that in this case the information was published and placed on notice board and also online system for the public to access and therefore it is the obligation of the petitioners to use other means made available in order to access information needed. To bolster its submissions, the respondent placed reliance on the case of *Mue & another vs Chairperson of Independent Electoral and Boundaries Commission & 3 others* (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling) where the court observed that;

“This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.

16. section 8 of the *Access to Information Act* in the above context thus provides that a person may apply in writing, or where one is unable to write, may apply orally to an information officer who shall then put the request in written form and any such request for information must be processed within 21 days.”

47. The 1<sup>st</sup> Respondent submitted that pursuant to section 9(6) of the *Access to Information Act*, 2016, the application that is not responded to within 21 days shall be deemed to have been rejected and as such it should not be compelled to give out information
48. The 1<sup>st</sup> respondent relied on the case of *Cape Metropolitan Council vs Metro Inspection Services Western Cape & 9 Others* (2001) ZASCA 56 cited in *Timothy Njoya vs Attorney General & another* [2014] eKLR & *Unitas Hospital vs Van Wvk & another* (231/05) (2006) ZASCA 34 cited in *Njonjo Mue & another vs Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR for the proposition that if the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied.
49. Regarding the prayer for a permanent injunction, the 1<sup>st</sup> Respondent cited the case of *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* [2018] eKLR for the proposition that the injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered.
50. In view of the above, the 1<sup>st</sup> Respondent submitted that this is not a case that necessitates issuance of a Permanent Injunction.



51. The 1<sup>st</sup> Respondent argued that allegation of contravention of Article 75(1)(a)(b) of *the Constitution* is unwarranted. It posited that although there is no legal requirement to have names and pictures on projects boards, it has been a tradition with Kenya Politicians for ages to have portraits of the president in projects at the National Government and therefore county projects being under the leadership of the Governor, a governor cannot separate himself/herself from the success of the devolution.
52. The 1<sup>st</sup> respondent reiterated that all the information concerning bursaries within Menengai Ward were available at the ward offices and a certified copy was displayed at the ward notice board for the public to access.
53. On who should bear the costs of the suit, the 1<sup>st</sup> respondent submitted that in the public interest matters the litigant shall not be required to pay costs. For this proposition, reliance was placed on the case of Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR.

## **2<sup>nd</sup> Respondent's Submissions**

54. on whether the petition is bad in law for lack of specificity and clarity, the 2<sup>nd</sup> respondent submitted that a party seeking redress for alleged breach of fundamental and constitutional rights have an obligation to plead with reasonable specificity the rights that have been breached and the articles of *the constitution* he relies on. In support of this position, the 2<sup>nd</sup> respondent relied on the cases of Japheth Ododa Origa vs Vice Chancellor University of Nairobi & 2 others [2018] eKLR; Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR;& Anarita Karimi Njeru vs The Republic (1979) KLR
55. The respondent submitted that the petitioners cited Articles 10, 35, 47 and 75(1) of *the Constitution*, however, the petition provided little or no particulars as to the allegations and the manner of the alleged infringement. It averred that in particular the petitioners have provided the manner in which it has infringed Article 75(1)(a) of *the Constitution*.
56. On whether the petition was moot, the 2<sup>nd</sup> respondent referred to Black's law dictionary 10<sup>th</sup> edition that defined moot as having no practical significance, hypothetical or academic and a "moot case" as a matter in which a controversy no longer exists, a case that presents only an abstract question that does not arise from existing facts or rights.
57. On what amounts to mootness, the 2<sup>nd</sup> respondent referred to the Court of Appeal in Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others [2020]eKLR where at paragraph 65, cited the case of Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs County Government of Nairobi [2019] eKLR, where Mativo J stated that:
 

“ A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact”.
58. The 2<sup>nd</sup> respondent argued that the doctrine of mootness was discussed in the case of in the case National Assembly of Kenya & another vs Institute of Social Accountability & 6 others [2017] eKLR when the court rendered that:
 

“...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence



of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the constitution law and public interest.”

59. The 2<sup>nd</sup> respondent thus submitted that in the present matter, the allegations that it failed to enact guidelines for the establishment of the project management committees (PMCs) for every project undertaken in the County is moot since the 1<sup>st</sup> respondent developed the necessary monitoring and evaluation structure via its county integrated development plan (CIDP 2023-2027) which it subsequently approved in line with the Council of Governors (COG) guidelines issued to all the County Governments for the development of County Integrated Monitoring and Evaluation structures.
60. On whether the petitioners failed to discharge the legal burden of proof, the 2<sup>nd</sup> respondent cited the provisions of Section 107 of the Evidence Act and the opinion by Rajah J A in *Bristone Pte Ltd v Smith & Associates Far East Ltd* {2007} 4 SLR 855 expressed the notion as follows:
- “The Court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the Evidence Act. The term proof whenever it appears in the Evidence Act and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact.”
61. In light of the above, the 2<sup>nd</sup> respondent submitted that the petitioners failed to prove the alleged violation of the Constitution and its culpability on the same.
62. With regard to the inclusion of members on the site boards, the 2<sup>nd</sup> respondent submitted that its members are not involved in implementation of projects but rather their inclusion on the site board is only limited to their oversight role.
63. On whether the petition is an abuse of the court process, the 2<sup>nd</sup> respondent submitted that this court has inherent powers to prevent its processes from being abused and that court processes are geared at effective and efficient delivery of justice. In support of this position, the 2<sup>nd</sup> Respondent relied on the case of *Republic vs Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR.
64. Regarding the definition of abuse of judicial process, the 2<sup>nd</sup> respondent referred to the case of *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR which cited the Court of Appeal in Abuja, Nigeria in the case of *Attahiro vs Bagudo* 1998 3 NWLL pt 545 page 656, which stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice.
65. The 2<sup>nd</sup> respondent thus submitted that the petition has been pleaded at large as the complaints of infringement of the constitution are not specific and clear. Additionally, the petitioners have failed to demonstrate its culpability with regards to the alleged violation of the Constitution.
66. The 2<sup>nd</sup> respondent prayed that the court dismisses the petition with costs to it.



### **Issues For Determination**

67. Having considered the pleadings, submissions and the authorities cited by the parties, I discern the following issues suffice for my determination;
- i. Whether the Petitioners failed to set out their complaint with a reasonable degree of precision.
  - ii. Whether the respondents violated the petitioner's right of access to information.
  - iii. Whether the 1<sup>st</sup> respondent should be compelled to give information.
  - iv. Whether the 1<sup>st</sup> respondent contravened Section 89 of the County Government Act, 2012.
  - v. Whether putting political names on the site boards of Nakuru County Projects contravened Article 75(1)(a) and (b) of *the Constitution*.
  - vi. Whether the Petition is moot.
  - vii. Who should bear the costs of the Petition?

### **Issue No.1**

68. The court in *Anarita Karimi Njeru vs The Republic* (supra) held that a Constitutional petition should set out with a degree of precision the petitioner's co-plaint, the provisions infringed and the manner in which they are alleged to be infringed.
69. This principle was later reaffirmed by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (Supra) when the Court at paragraph 87(3) of the judgment stated as follows: -
- “It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act, 2011*, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.”
70. It is thus well settled law that in a constitutional petition therefore, a party is not supposed to merely cite constitutional provisions. He/she must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegation accordingly.
71. I have perused the petition and I do note that the Petitioners did indeed cite Articles 10, 35, 47 and 75(1) of *the Constitution* purportedly infringed but only set out the manner in which Articles 10, 35 and 75(1) are alleged to be infringed, as set at paragraphs 21, 23 and 29 thereof.
72. In my view, it is incorrect to state that the petition has insufficient particulars regarding the manner in which the aforesaid articles of *the constitution* were allegedly infringed. In any case, the Petitioners' claims are easily discernible from the Petition and the Affidavit filed. It is also evident from the



responses and submissions filed by the Respondents that they were able to understand the issues in controversy.

I therefore decline to accept the argument that the Petition was imprecisely drafted.

## **Issue No.2**

73. Article 35 of *the Constitution* guarantees citizens right to access public information. The said Article as follows:

QUOTE{startQuote “}

35(1) Every Citizen has a right of access to:

- (a) Information held by the state,
  - (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.”

74. Pursuant to this Article, there was enacted the *Access to Information Act*, No. 31 of 2016 whose preamble is in these terms:

An Act of Parliament to give effect to Article 35 of *the Constitution*; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

75. By reason of the above enactment, PART III of that Act makes provision for ACCESS TO INFORMATION, and then, at Section 7(1) thereof provides as follows:

“(1) A chief executive officer of a public entity shall be an information access officer for purposes of this Act.”

76. Then, sub-section (2) provides:

“(2) A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.”

77. Section 8 makes provision for the Application for Access to such information as follows:

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

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.



- (3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.”
- (4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.”

78. Once such an application has been made, provision is made at Section 9 of the manner in which this information is to be processed. That Section 9 provides as follows:

- “(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application.
- (2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.
- (3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—
- (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or
  - (b) Consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.
  - (4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating —
    - (a) whether or not the public entity or private body holds the information sought;
    - (b) whether the request for information is approved;
    - (c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and
    - (d) if the request is declined, a statement about how the requester may appeal to the Commission”;
  - (5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.”
  - (6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.”



79. *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.
80. It is also clear that the Act has laid down a mechanism of the manner in which a citizen should apply for and obtain information from the state or other public body. Where any such information is denied, then the public body is duty bound, by the provisions of Section 9 (d) to provide the applicant, in that Section called “the requester” with a comprehensive Statement on how such “requester” will make an appeal “to the Commission”.
81. All request for access of information have to be made to the chief executive officer of a public entity pursuant to Section 7(1) of the Act.
82. The right to access information is inviolable because it is neither granted nor grantable by the state. See the case Nairobi Law Monthly vs Kenya electricity Generating Company & 2 Others (supra).
83. In the case of Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission [supra], the Court reaffirmed the position that *the Constitution* does not limit the right to access information the Court stated of what the state should bear in mind when considering the request to access information.
84. The right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of Brummer vs Minister for Social Development & Others (supra).
85. I have considered this case in light of the above statutory provisions and precedents. The petitioners have annexed various letters to show that they requested to access information but their requests were ignored by the Respondents. In compliance with the Section 7 of the Act, the Petitioners wrote a letter dated 26<sup>th</sup> November 2019 addressed to CEC Ministry of trade and copied to the Chief Officer Ministry of trade requesting access to information of the Kiratina Market Menengai Ward, a letter dated 16<sup>th</sup> December,2019 addressed to the Chief Officer Ministry of Education seeking access to information allocation of money to ECDS and contract of vocational training to KITTI of young people in Menengai Ward, and a letter dated 11<sup>th</sup> April,2023 addressed to Chief Officer of Education, Nakuru County seeking access to information of the certified list of the Bursary Beneficiaries in Menengai Ward.
86. The letters were delivered to the Respondents, however, no response was received from them, either giving access to information, or declining to disclosure and giving reasons for that. Section 9 mandates the state or state organs to give information within 21 days or respond to the request within that period.
87. The 1<sup>st</sup> respondent contended that right to access to information is not absolute and there are instances where the same can be denied. It however neither disclosed whether any of the information sought was limited by section 6(1) (a) and 6(2)(j) of *Access to Information Act* nor demonstrated how the information sought affected state security and therefore, falls within section 6 of the Act.
88. The 1<sup>st</sup> respondent stated that section 9(6) provides that where the applicant does not receive a response to an application within 21 days of receipt of the application, the application shall be deemed to have been rejected, and argued that the respondents should not be compelled to give out information and the petitioners ought to follow the due process.



89. It is indeed true that pursuant to Section 9(6) of the Act the information sought shall be deemed to have been rejected if the requester does not receive a response within 21 days. However, under Section 9(4)(d) the respondents upon declining the request they ought to have supplied the Petitioners with a comprehensive statement on how they may appeal to the commission. The respondents did not so and it cannot be argued that the petitioners flouted the procedural requirements.
90. The respondents were under both a constitutional and legal obligation to allow the petitioners to access information in their possession and held on behalf of the public in compliance with Article 35 of *the Constitution*.
91. The Court of Appeal addressed the issue of respecting constitutional rights in the case of Attorney General v Kituo cha Sheria & 7 others [2017] eKLR and stated;
- “The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”
92. From my evaluation and analysis of the facts and evidence in this petition, and submissions by counsel for the parties and bearing in mind precedent and the law, I find that the respondents violated the petitioners’ right of access to information.

### **Issue No.3**

93. To answer this issue, I will be guided by what the Court stated in the case of Tinyefuze vs Attorney General of Uganda [1997] UGCC3 that;
- “if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.”
94. The petitioners have successfully laid a basis for grant of prayer no. C.
95. The petitioners have also asked this court to compel the 1<sup>st</sup> Respondent to supply information for bursary fund allocated for the year 2021-2023 and the names of the beneficiaries of the same.
96. In their submissions they have acknowledged that this information has been availed by the 1<sup>st</sup> Respondent after filing of this petition.
97. I have perused the annexed documents by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> respondent have attached a copy of the bursary award list for vocational training students and copies of pictures of the and list of bursary award marked as “SK1 & SK 2” respectively. Prayer no. D therefore has been overtaken by events.

### **Issue No.4**

98. Section 89 of the *County Governments Act* imposes an obligation upon the County Government to respond to all Petitions and challenges lodged by citizens.
99. The said section provides as follows: -



“(89) County government authorities, agencies and agents have a duty to respond expeditiously to petitions and challenges from citizens”

100. The petitioners at paragraph 22 of the petition averred that the 1<sup>st</sup> Respondent violated Section 89 of the above Act by not responding to the petition filed before it. The petitioners annexed a copy of petition dated 2<sup>nd</sup> January, 2020 and marked as Ex-L03 that was received by the 1<sup>st</sup> Respondent’s Secretary on 3<sup>rd</sup> January, 2020. The petition in question was in regards to all projects for Menengai ward. There was no evidence adduced to the contrary by the 1<sup>st</sup> Respondent and it is clear that the grievances raised by the petitioners were not considered in line with Section 89 of the said Act. In the circumstances therefore, I find prayer no. B of the petition is merited.

#### **Issue No. 5**

101. The petitioners submitted that the display of the Governor’s and Members’ of the County Assembly names and pictures on the site board of the 1<sup>st</sup> Respondent is not a requirement in Law, and that public projects are not for political elites to advance their personal glory or taking of credit whereas the 1<sup>st</sup> respondent denied that the names and pictures on the public project are for advancement of the Governor’s personal interest but believes that a Governor cannot separate himself/herself from the success of devolution.

102. Article 75(1) (a) and (b) provides that:-

“A state officer shall behave, whether in public and official life, in private life or in association with other person, in a manner that avoids-

- a. Any conflict between personal interest and public or official duties;
- b. Compromising any public or official interest in favour of a personal interest.”

103. It is trite law that he who alleges must prove. ( See Section 107 of the *Evidence Act*). The petitioners herein did not advance cogent evidence to prove that the aforesaid pictures and names on the 1<sup>st</sup> respondent’s site board were meant to advance the personal interest of the said political elites and to massage their egos.

104. In my opinion, “the massaging of a politician’s ego” does not automatically become unlawful. The placing of the photograph of the politician may be interpreted as a sign of proof of a project he he/she has initiated, and reporting tool to the electorate that elected him/her.

105. This finding must be distinguished from the facts in *Katiba Institute vs President’s Delivery Unit* (supra). The finding of the court in that matter was on account of the *Elections Act* and the use of State Machinery to propagate individual interest.

106. I therefore find that prayers nos. I & J of the petition are unmerited.

#### **Issue No.6**

107. The Court of Appeal in the case of *Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others* [supra] borrowing from the Black’s Law Dictionary defined mootness as follows:

“In Black’s Law Dictionary, 8th edition, a “moot case” is defined as “a matter in which a controversy no longer exists; a case that presents only an abstract question that does not



arise from existing facts or rights”, and as a verb, as meaning “to render a question as of no practical significance”.

108. Equally, expounding on this doctrine the court in the case of Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) vs County Government of Nairobi [supra] eKLR opined as follows:

“A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.”

109. The 2<sup>nd</sup> respondent contended that the issues raised in the petition with regard to the establishment of Project Management Committees are moot for reasons that the 1<sup>st</sup> Respondent developed the necessary Monitoring and Evaluation structures via its County Integrated Development Plan. I have considered its entire averments & submissions vis a vis the Petitioners’ submissions in that regard.
110. I have perused the Nakuru County Allocation Act. One of the Objects and purposes of the Act is to provide for participation of the Public in the determination and implementation of identified projects within the ward. To this effect, the 2<sup>nd</sup> respondent demonstrated that the 1<sup>st</sup> respondent developed the County Integrated Development Plan (CIDP 2023-2027) which it duly approved. There is therefore a legislative framework for public participation and prayers no E-H of the petition are moot.

#### **Issue No.7**

111. The petitioners and the 2<sup>nd</sup> respondent have urged this court to award them costs of the petition.
112. The 1<sup>st</sup> respondent on its part submitted that costs are not ordinarily awardable in a public interest litigation.
113. What then is Public Interest litigation (PIL) and does a petition brought in public interest qualify to be exempted from an award of costs?
114. The Black’s Law Directory the 10<sup>th</sup> Edition describes public interest litigation as follows: -
- “Public Interest Litigation means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.”
115. The court in Kenya Anti-Corruption Commission vs Deepak Chamanlal Kamni and 4 others [2014] eKLR was also called upon to determine what a matter of public interest is. It held that:
- “...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.”



116. In the Indian case of Thakur Bahadur Singh and Another vs Government of Andhra Pradesh the court also described what public interest litigation was. It stated: -

“PIL has a significant American development. The Council for Public Interest Law set up by the Ford Foundation in USA, in its report (1976) at pp.6-7 defined PIL thus:

“Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.”

117. In another Indian case of People’s Union for Democratic Rights & Others vs Union of India & Others (1982) 3 SCC 235, the court observed that: -

“Public interest litigation is essentially a cooperative or collaborative effort by the Petitioner, the State or public authority and the Court to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.”

118. In the case of Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others [2014] eKLR the Supreme Court explained the essence of public interest litigation as follows;

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the Constitution*’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance”.

119. In determining whether the Petition herein is a public interest litigation, the court needs to look at the pleadings as drawn. Such was the finding of the court in Dindi Oscar Okumu vs Robert Pavel Oimeke & 5 others [2021] eKLR, where the court approached the issue as follows;

“In determining whether the Petition herein is a public interest litigation, I have to have a look at the Petition as drawn and filed. The Petition herein is dated 10<sup>th</sup> March 2020 drawn by Petitioner Mr. Dindi Oscar Okumu under paragraph 1 of the Petition, the Petitioner states:-

“The Petitioner is a Kenyan Citizen residing and working in Nairobi City County within the Republic of Kenya. He is a tax payer and a consumer of various products directly and or indirectly under the ambit of the Energy & Petroleum Regulatory Authority as managed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He brings this Petition on his own behalf and on behalf of the entire Kenyan Public as the issues to be addressed in this Petition affecting or are likely to affect the entire country.”



From the contents of paragraph 1 of the Petition it is clearly pleaded that “He brings this Petition on his own behalf and on behalf of the entire Kenyan Public as the issues to be addressed in this Petition affect and or are likely to affect the entire country.

From the contents of paragraph 1 of the Petition herein, it is clear that this Petition is brought in public interest litigation, as the legal action as initiated in this Petition is purely for enforcement of public interest or general interest in which the public or class of community have pecuniary interest or some interest by which their legal rights or liabilities are affected. The whole society has a stake in the Petition in which the legal rights or liability are threatened and this Petition purely is for advancement of the cause of minority or disadvantaged groups or individuals and is not for Petitioner’s personal gain.”

120. Accordingly, and guided by the above decision, I have perused the Petition as drawn and filed. In paragraph 1, the Petitioners herein state that: -

“The Petitioners are citizens of the Republic of Kenya, Residents of Nakuru County, Public Spirited individuals, patriotic citizens who look into the future of our county where society strictly follows the established laws for betterment of the society, with the objective of enhancing good governance as espoused in Article 10 of our progressive constitution...”

121. At paragraphs 31 and 32 of the Petition, the petitioners state as follows: -

“31. That we live in fear that the alienable rights imposed by the constitution to access to information will be trampled on willingly by the establishments who are the Respondents.

31. That we live in fear by living normally for the public funds are likelihood to be spent abnormally if there will be no transparency and accountability of the public.”

122. From the contents of the above paragraphs it is clear that the Petition is not for Petitioners’ personal gain but it has been brought as public interest litigation. The legal action as initiated in this Petition is purely for enforcement of public interest or general interest through which the constitution, constitutional institutions as well as the constitutional rights of people of Kenya will be safeguarded.

123. Rule 26(1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms Practice and Procedure Rules 2013) provides: -

“26. (1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

124. The Supreme Court in *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* [2014] eKLR regarding costs in such cases stated that: -

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question,



shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs.

125. In the ruling in *Raila Odinga and Others vs The Independent Electoral and Boundaries Commission and Others* Supreme Court Petition No. 5 of 2013, in which the parties were required to bear their own respective costs, the Court’s reasoning was captured as follows;

“Yet we have to take into account certain important considerations. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

“Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel”

126. In the case of *Brian Asin & 2 others vs Wafula W. Chebukati & 9 others* [2017] eKLR the issue as to whether public interest litigation should attract costs was determined as follows:

“The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren’t violated. *The constitution* envisages the judiciary as “a bastion of rights and justice...”

The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations.”

127. In the case of *Feisal Hassan & 2 others vs Public Service Board of Marsabit County & another* [2016] eKLR it was stated that: -

“In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria.



Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of *the Constitution*. Indeed, the rights of access to court under Article 22 and 258 of *the Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of *the Constitution* are in the same terms.”

128. Further in *John Harun Mwau & 3 Others vs Attorney General & 2 Others* [2012] eKLR it was held that: -

“In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”

129. Lastly, in *Khelef Khalifa & 2 others vs Independent Electoral and Boundaries Commission & another* [2018] eKLR the court stated that while it appreciated that the emerging practice in our courts is not to award costs in public interest litigation matters, the said practice does not in any way take away the discretionary powers of the court to award costs to successful litigants in such cases, where in the opinion of the judge, such an award is merited.

130. In an ordinary suit or petition touching on personal issues, costs are at the discretion of the court and they normally follow the event.

131. Having already opined that this is a public interest litigation, and being duly guided and persuaded by the above authorities, I direct each party to bear their own costs.

132. Consequently, this petition is partially allowed and the following orders granted;

\*\*I. A declaration be and is hereby issued that the refusal to supply information sought from the 1<sup>st</sup> Respondent by the petitioners is a violation of Article 35 of *the Constitution*.\*\*

\*\*II. A declaration be and is hereby issued that the act of the 1<sup>st</sup> Respondent not responding to the petition filed before them, as exhibited in the annexures is a breach of Section 89 of the County Government Act, 2012.\*\*

\*\*III. The 1<sup>st</sup> Respondent is hereby ordered to supply information sought in the herein attached annexures including all companies that were involved in all tenders in Menengai Ward- Nakuru East Sub County plus the Bill of Quantities of those projects, including those that were funded by donors for social accountability.\*\*

\*\*IV. Each party to bear their own costs.\*\*

\*\*V. Orders accordingly.\*\*

**Dated, Signed and Delivered at Nakuru this 13<sup>th</sup> day of March, 2024.**

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**H. M. NYAGA,**



**JUDGE.**

**In the presence of;**

C/A Oleperon

Petitioner present

Ms Kahunga for 2<sup>nd</sup> Respondent

No appearance for 1<sup>st</sup> Respondent

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