



**Mutia & another v Attorney General & 3 others; Kenya National Commission
on Human Rights & 2 others (Interested Parties) (Petition E508 of 2021)
[2024] KEHC 9329 (KLR) (Constitutional and Human Rights) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E508 OF 2021

LN MUGAMBI, J

JULY 25, 2024

BETWEEN

DIANA NDINDA MUTIA 1ST PETITIONER

TREVOR NDWIGA NYAGA 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

SAFARICOM LIMITED 4TH RESPONDENT

AND

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED
PARTY**

MUHURI INTERESTED PARTY

GOLDEN COACH LIMITED INTERESTED PARTY

RULING

Introduction

1. Pursuant to a Notice of Motion Application dated 28th March 2022, the Petitioners seek orders that:
 - a. Having been served with the Replying affidavit of the 3rd Respondent dated the 22nd February, 2022 and reference having been made to OB Number 36/6/2019 (which is erroneous on the



part of the year, it should be 2021); call data records requested on the 14th September, 2021 but certified on the 3rd February, 2022; a passenger manifest of the 4th September, 2021 (being annexure VK-4) and CCTV the alluded footages from the Golden Coach Company -

- i. The AG to supply the Inquiry file no. opened at the Jogoo Road Police Station, signals sent out following the report of the disappearance of the 2nd Petitioner and the efforts made to date and findings therein.
 - ii. The AG to provide a certificate under Section 106B of the *Evidence Act* in support of their call data records marked VK-4 and it is very important that the affiliation of the maker of the said certificate is made clear for we don't expect a police officer to be the maker to avoid conflict of interest but an employee of Safaricom Limited.
 - iii. Besides the passenger manifest marked VK-4 and the call data records marked VK-5, the AG to supply the basis for which the intelligence agencies went on to claim that the 2nd Petitioner had travelled to Somalia through Wajir County to join the Al Shabaab.
 - iv. The management of Golden Coach Limited to resupply a certified copy of the passenger manifest of the 4th September, 2021 Nairobi to Wajir departure at 05.30am via Bus Registration KCL 969S, proof of payment by the alleged passenger on seat no. 42 and specification of the CCTV fitted at their Eastleigh offices, storage capacity and any other useful information.
- b. Having been served with the Replied affidavit of the 4th Respondent dated the 28th February, 2022 and reference having been made to a call data records marked DMM – 1 and a certificate under section under section 106B of the *Evidence Act* –
- i. Safaricom Limited to confirm and avail subscriber details of mobile no. 0790742949 by September, 2021.
 - ii. Safaricom Limited to ascertain the affiliation of Quinto Odeke on whether he is an employee of Safaricom Limited or the National Police service to avoid a conflict of interest scenario.
 - iii. Safaricom Limited to supply a detailed list of all their base stations coordinates in the Country and their corresponding GPS locations to aid the analysis of the call data records supplied this far while working on our submissions.
- c. Stay orders to issue for the proceedings in Chief Magistrate Milimani - Criminal Case No. 2014 of 2019 in as far as the determination of the whereabouts of the 2nd Petitioner is concerned which is already the subject of the present Petition.
- d. The cost of this Application be provided for.
2. The Notice of Motion is based on the grounds set out in the Application and is supported by the affidavit of the 2nd Petitioner and a further supplementary affidavit dated 28th June 2022.

Contextual Background

3. The contextual background surrounding the filing of this instant Petition needs to be set out. The 1st Petitioner filed the Petition on 26th November 2021 on behalf of the 2nd Petitioner. The 1st Petitioner is the 2nd Petitioner's mother. She alleged that the 2nd Petitioner disappeared mysteriously around the 5th



September 2021. A missing person's report was booked at Jogoo Road Police Station vide OB No.36 of 6th September 2021.

4. At the time of his disappearance, the 2nd Petitioner had a pending criminal case at Milimani Law Court being Criminal Case No.2014 of 2019 where he had been charged with terrorism and related offences.
5. The investigating officer was requested to track the 2nd Petitioner using his mobile phone. In addition, the 1st Petitioner and her husband were asked to also check in various hospitals and prisons to find out if the 2nd Petitioner might be there.
6. In due course they were informed that a CCTV footage retrieved from Golden Coach Bus Company at Eastleigh, showed that the 2nd Petitioner boarded a bus headed to Wajir on 4th September, 2021 at 5:00am. When they made a request to review that footage, it was rejected.
7. The 2nd Petitioner's father visited the Anti-terrorism Police Unit on 13th September 2021 to follow up on the matter and actually saw his son (2nd Petitioner) at the entrance of the police cells which was confirmatory that the 2nd Petitioner was actually in custody at the Anti-Terrorism police unit.
8. On the strength what 2nd Petitioner's father had found out at the Anti-Terrorism Police Station, the 1st Petitioner filed the habeas corpus application as they were apprehensive grave harm might happen to the 2nd Petitioner at the hands of the 3rd Respondent.

Petitioners' Case

9. In the present application, the 1st Petitioner states that to prevent any cover up, the 3rd Respondent should avail the inquiry file opened at Jogoo Police Station. Further, call data records reference to (marked as VK -5 in the 3rd Respondent's replying affidavit) to ascertain authenticity should be accompanied by a certificate under Section 106B of the Evidence Act. Similarly, avail information on the officer who generated the call data records.
10. She challenges that in view of the 1st Respondent's grave allegation that the 2nd Petitioner travelled to Somalia to join Al shabab, the same should be substantiated with solid evidence. This is because the 3rd Respondent has not yet availed the alleged CCTV footage that shows the 2nd Petitioner getting into the bus to Wajir.
11. The 1st Petitioner also contends that the 4th Respondent ought to confirm the subscriber of mobile no. 0790742949 considering that the call data records supplied by the 1st Respondent allege that it belongs to one Francis Gathagu. The 1st Petitioner alleges that she is the registered subscriber of the said number having purchased the same from a Safaricom shop and later gave the line to the 2nd Petitioner.
12. She pointed out at the discrepancy in the call data records supplied by the 3rd Respondent (Annexure VK- 5) and that of the 4th Respondent (Annexure DMN -1) and urged this Court verify the 1st, 3rd and 4th Respondents adduced documents.
13. She stated that there has been an on-going inquiry in Criminal case no. 2014 of 2019 to determine the whereabouts of the 2nd Petitioner in which a warrant of arrest was issued against the 2nd Petitioner. The 1st petitioner urged this Court to stay the Trial Court's inquiry and await the determination by this Court.
14. The 1st Petitioner asked this Court to take judicial Notice of the numerous extra-judicial disappearances of persons suspected of being involved in terrorism activities as reported by Haki Africa.



2nd Respondent's case

15. There was neither a response nor submission by the 2nd Respondent in the Court file or in the Court Online platform (CTS).

1st and 3rd Respondent's Case

16. The 1st and 3rd Respondents' did not file a response to the instant application however filed submissions.
17. The impugned replying affidavit that is the subject of this application was sworn on 22nd February 2022 by Vitalis Kibet, the Chief Inspector attached to the Directorate of Criminal Investigations- Section Antiterrorism Police unit in response to the Petition.
18. In the affidavit, it was deponed that the 2nd Petitioner was arrested by the Anti-terrorism Police Unit on the 9th November 2019 at Uhuru Park on suspicion of preparing to commit a terrorism act. During the arrest an AK 47 riffle and 3 magazines among other items were recovered.
19. He was detained on the same day and arraigned before the Milimani Magistrates' court on 11th November 2019 for custodial days. He was formally charged on 21st November 2019 vide Court file Number 2014 of 2019 & PCR 53/2019 with 12 counts of being in possession of an article contrary to Section 30 of the Prevention of Anti-terrorism Act. He swore that the 2nd Petitioner was released on bond on 21st July 2020 despite their opposition to his release on bond.
20. Following the 1st Petitioner's missing person's report, he deposes that their team did parallel investigations to establish the whereabouts of the 2nd Petitioner. He depones that the investigations unearthed that the 2nd Petitioner had departed from Nairobi to Wajir on 4th September 2021 at 5:30am vide vehicle registration Number KCL 969S owned by Golden Coach company and was on seat Number 42.
21. Moreover, it is deponed that the impugned phone number 0790742949 was indicated in the passenger manifest as belonging to the 2nd Petitioner. The phone bearing the number was switched off in Wajir on 4th September 2021 at 22:26 pm. He informs that at the time of seeking the Golden Coach company CCTV footage, the CCTV DVR machine had overwritten.
22. He depones as well that the Director of Criminal Investigations released a poster of the 2nd Petitioner as a wanted criminal upon receipt of Intelligence information that the 2nd Petitioner had travelled to Somalia through Wajir County to join Al-Shabaab.
23. For these reasons, he denied the allegation that the 2nd Petitioner was in their custody. He stressed that the 2nd Petitioner had long been released on bond as at the time of the Report. He concluded that the police had acted lawfully and as required by the law in this matter.

4th Respondent's Case

24. In response to the Application, the 4th Respondent filed a replying affidavit by Daniel Mwenja Ndaba sworn on 27th May 2022.
25. He depones that vide the Petitioners Chamber Summons application dated 26th November 2021 that sought call data records for mobile number 0790742949, this Court in its Order dated 8th February 2022 directed the 4th Respondent to supply the Petitioners with the information, which it did.



26. It is noted that in the instant application the Petitioners seeks confirmation of the subscriber of mobile number 0790742949 which the 1st Petitioner claims to be the legitimate subscriber. In this regard, he avers that the 4th Respondent is obligated to maintain the privacy of its subscribers. It is further stated that *the Constitution* protects a person's private affairs and thus the same cannot be unnecessarily disclosed. This protection is also provided under the Kenya Information and Communications (Consumer Protection) Regulations, 2010.
27. He also makes known that the 1st Petitioner has failed to establish a proper case for disclosure of the sought information. It is noted that the 1st Petitioner in the Petition claimed that the number belonged to the 2nd Petitioner then went ahead to change the tune in this application by stating that the impugned number belonged to her. It is argued that the burden to discharge the 1st Petitioner's allegation lays on her before the same is shifted to the 4th Respondent.
28. It is further alleged that the 1st Petitioner's suspicion of conflict of interest on the call data records report prepared by Quinto Odeke should be premised on reasonable grounds. This argument also applied to the 1st Petitioner's other assertions. Furthermore, it is asserted that the disclosure of the 4th Respondent's list of base stations and their corresponding GPS locations would pose a great threat to national security thus would not in public interest.
29. He as well takes issue with the fact that Petitioners did not make an application to have the deponent who adduced the call records be cross examined so as to ascertain the veracity of evidence. Further, neither have they adduced evidence to demonstrate the specific difficulties they have experienced in analyzing the call data records produced in Court. The application thus lacks merit and is an abuse of the Court process.

1st and 2nd Interested Parties case

30. The 1st and 2nd interested party responses and submissions to the instant application were not in the Court file or Court Online Portal (CTS).

3rd Interested Party's Case

31. Opposing the Petitioners' Application, the 3rd Interested Party filed its replying affidavit by its Director, Abdulkarim Ali Hassan sworn on 26th May 2022.
32. The deponent deposes that it supplied the 3rd Respondent with the requisite documents upon their request. In particular the supplied documents were: a copy of the passenger manifest for 4th September 2021, route Nairobi to Wajir, departure 05:30hrs via Bus Reg. No. KCL 969S; an electronic system generated Ticket Update Log confirming payment for Seat No. 47 by the 2nd Petitioner and the subject CCTV footage archives.
33. He opposes production of information as requested by the 1st Petitioner as the same contains private data of their clients which ought not to be availed without exigent cause or protections. Nonetheless he argues that the 3rd Respondent who is already in possession of said information did not point out the information's insufficiency or seek further information from the 3rd Interested Party. As such it would serve no meaningful purpose for this Court to issue an order for them to re-supply the same information.
34. The 3rd Interested Party is additionally apprehensive that seeking the specifications of their security camera (CCTV) installations is a broad, and risky request, as the information could be used to hack their system or otherwise compromise the said system.



35. Equally, it is asserted that the Petitioners have not demonstrated any lawful ground that entitles them to the private data of other passengers who are not party to these proceedings. Notwithstanding the cited averments, it is argued that any re-supply of the requested information ought to be through the 3rd Respondent who this suit was primarily instigated against and not the 3rd Interested Party.

Petitioners' Submissions

36. Submissions dated 28th June 2024 were filed by Kakai Mugalo and company Advocates in support of the Petitioners' application.
37. Counsel relying on Article 35(1)(a)(b) of *the Constitution* as read with Section 4(1)(a) (b) of the *Access to Information Act* submitted that access to information is a constitutional right. Moreover, that the 1st Petitioner in her supplementary affidavit had established the reason why it was necessary to be supplied with the sought information.
38. Counsel further submitted that the 2nd Petitioner's rights and fundamental freedoms are under serious threat if the information is not supplied. This also includes the 1st Petitioner's and her family rights in relation to extra judicial disappearances and arbitrary arrest of persons.
39. According to Counsel, the 1st, 3rd and 4th Respondents failure to avail the sought information is an additional tactic to defeat justice and to aid the alleged extra judicial disappearance of the 2nd Petitioner.
40. To support this case reliance was placed in Philip Njoroge Kimani v Liberty Africa Technologies Limited & another [2021] eKLR, Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR and Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission [2019] eKLR.

1st and 3rd Respondent's Submissions

41. On 24th April 2023, Senior State Counsel Dan Weche filed submissions in support of these Respondents' case in opposition to the instant application. Counsel highlighted the issues for determination as whether the orders sought are contrary to the scope of an application for habeas corpus, whether the Respondents are limited from disclosing certain information in light of the application and whether stay orders should be issued for the proceedings in the Chief Magistrate Milimani - Criminal Case No. 2014 of 2019.
42. To begin with, Counsel submitted that the Petitioners application is contrary to the scope for an application for habeas corpus. It was noted that primarily the 1st Petitioner is seeking the information so as to determine the whereabouts of the 2nd Petitioner which is termed as a fishing expedition. Reliance was placed in Masoud Salim Hemed and Another v Director of Public Prosecutions & 3 others (2014) eKLR where it was held that:
- “Habeas corpus may not be used as a means of obtaining evidence on the whereabouts of a person or as a means of finding out who he specifically abducted or caused the disappearance of a certain person.”
43. Counsel submitted that the scope of such an application is only limited to a subject unlawfully detained. In this matter, it is stated that the 3rd Respondent in the Replying Affidavit stated that the 2nd Petitioner was not in custody and that he was released on bond when he was arraigned in court.



44. In the circumstances, Counsel stressed that it was incumbent for the 1st Petitioner to establish her claim that the 2nd Petitioner was illegally detained. It is argued that the 1st Petitioner failed to discharge this burden.
45. To buttress this point reliance was placed in *Daniel Baru Nyamohanga & Another v Director of Public Prosecution & 3 others* (2018) eKLR where it was held that:
- “It therefore unveils itself that the right in the nature of an order of habeas corpus can only be enforced when it is proved that a victim is in the legal or otherwise custody of the state or state agencies. In the event the issue of custody is not firmly established then the matter falls under another realm; either on further police investigations or inquest proceedings.”
46. On the second issue, Counsel submitted that the 1st and 3rd Respondents are limited from issuing information supplied by the Intelligence Agency by virtue of Sections 6(1)(a) and (2)(c) of the [Access to Information Act](#) 2016. This is because the information falls under the restricted category of national security in Kenya.
47. To conclude, Counsel submitted that Section 193A of the Criminal Procedure Code is clear that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
48. Accordingly, Counsel opposed grant of the sought order to stay the criminal proceedings as prayed. Reliance was placed in *Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 Others* (2016) eKLR where it was held that:
- “The conclusion that one can draw from Section 193A of the Criminal Procedure Code together with decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse the process of the court in whatever manner.”
49. Like dependence was also placed in *James Mutisya & 5 Others v Alphayo Chimwaya Munala & 2 Others* (2021) eKLR.

4th Respondent’s Submissions

50. The 4th Respondent through TripleOKLaw, LLP filed submissions dated 3rd October 2022. Counsel focused on discussing whether the 4th Respondent should be directed to confirm and avail subscriber details of mobile number 0790742949, whether the 4th Respondent should be directed to ascertain the affiliation of Quinto Odeke to avoid conflict of interest and whether the 4th Respondent should be directed to supply a detailed list of all their base stations coordinates in the Country and their corresponding GPS locations to aid the analysis of the call data records.
51. On the first issue, Counsel reiterating the averments in the 4th Respondent’s replying affidavit emphasized that this Respondent as a telecommunications operator is required by law to maintain the privacy of its subscribers. This is according to Article 31 of [the Constitution](#) and the Kenya Information and Communications (Consumer Protection) Regulations, 2010.
52. It was further submitted that the Petitioners had failed to establish the proper foundation for the disclosure of the information sought. As such it was argued that the Petitioner had failed to discharge



the first burden of proof. Reliance was placed in *Mourine Mukonyo v Embu Water and Sanitation Company* [2020] eKLR where it was held that:

“The party must present to the court all the evidence reasonably available on a litigated factual issue. Section 109 and 112 of the *Evidence Act* provides for the evidential burden of proof. The two provisions were dealt with in *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that: -

”As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

53. On the second point, Counsel submitted that this issue was based on the apprehension to avoid conflict of interest. It is argued that suspicion must be founded on reasonable grounds which must be substantiated by way of evidence. To buttress this point reliance was placed in *British-American Investments Company (K) Limited v Njomaita Investments Limited & another* [2014] eKLR where it was held that:

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”

54. Lastly, Counsel submitted that it is clear that the 1st Petitioner’s prayer for a detailed disclosure of the 4th Respondent’s base stations coordinates is premised on the mere allegation that anybody could have travelled with the 2nd Petitioner’s mobile phone towards Wajir. This is despite these call data records not being adjudged insufficient by this Court.

55. Equally it is argued that the Petitioners are obligated under Article 35 of *the Constitution* to demonstrate that the same is sought to exercise or protect a constitutional right. This is because the right to information is not absolute as provided under Section 6(1) (a) of the *Access to Information Act*.

56. Reliance was placed in *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] eKLR where it was noted that:

“The reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.”

57. Counsel additionally argued that it is common knowledge that Kenya has been a target of terrorist attacks and the release and disclosure of the detailed list of all the base stations and their corresponding GPS locations would pose a great threat to national security. As a result it was stated that the greater public interest outweighs the disclosure of such delicate information.



58. To buttress this point reliance was placed in *Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others (Petition 104 of 2019)* [2021] KEHC 390 (KLR) (Constitutional and Human Rights) (26 November 2021) (Ruling) where it was held that:

“Terrorism has a serious impact on a wide range of fundamental human rights, and States therefore have not only a right, but a duty to take effective counter-terrorism measures. Such measures and the protection of human rights are complementary and mutually reinforcing objectives, which must be pursued together as part of States’ duty to protect individuals within their jurisdiction. Specifically, with regard to the limitation on the right to disclosure of information on terrorism related activities strategies and sources, this limitation serves a legitimate purpose of safeguarding national security, public safety, public order, and the human rights and freedoms of others.”

Analysis and Determination

59. Two issues arise for determination in this application, namely:
- i. Whether this Court should grant the order to access the sought information.
 - ii. Whether the proceedings in the Chief Magistrate's Court at Milimani (Criminal Case no. 2014 of 2019) should be stayed following the 2nd Petitioner’s alleged disappearance.

Whether to grant an order of access to information sought by the 1st petitioner

60. The right of access to information is fundamental right provided for under Article 35 of *the Constitution* 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.
61. The Court in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR discussing this right noted as follows:

“31. *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... 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.”

62. In *Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another (Interested Parties)* (Constitutional Petition E032 of 2019) [2022] KEHC 368 (KLR) (13 May 2022) (Judgment) the Court went on to illuminate article 35 further as follows:

“84. A reading of the provisions of *Access to Information Act* leaves no doubt that the act was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of the sections casts the exercise of this right in peremptory terms – the requester must be given access to the information so long as the request does not fall within the exceptions in section 6 of the act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

85. A reading of section 6 reveals that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

86. However, the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. As was held in *President of the Republic of South Africa & others vs M & G Media Limited* CCT 03/11 {2011} ZACC 32:

“The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... *the Constitution*. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ... Hence ...the evidentiary burden rests with the holder of information and not with the requester.”

87. In order to discharge its burden under Section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.

88. Any restriction on information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. To establish that a restriction



on access to information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
- (b) the restriction imposed is the least restrictive means possible for protecting that interest; and
- (c) the restriction is compatible with democratic principles...”

63. The information that the Petitioner is seeking is in the hands three parties. The State (that is the 3rd Respondent). There is also the information held by private entities, the 4th Respondent and the 3rd Interested Party.
64. Considering the principles articulated in the judicial precedents above; the Petitioner is entitled as of right to obtain information held by the State and need not give reasons for seeking the information unless the State can demonstrate the information is exempted by Section 6 of [Access to Information Act](#). The question therefore is, whether the Petitioner is entitled to the totality of information sought from the 3rd Respondent (Inspector General of Police).
65. The 3rd Respondent in the replying affidavit dated 22nd February 2022 which prompted the filing of the instant application had deposed that the 2nd Petitioner was arrested on terrorism charges and subsequent criminal proceedings were commenced against him as per annexure VK - 2. The 2nd Petitioner was released on bond pending trial by the Court.
66. Further, according to information supplied by intelligence agency, the 2nd Petitioner is suspected to have disappeared into Somalia to join the Al shabab. This information was stated but not presented in detail. However, there was a passenger manifest (annexure VK 4) showing that 2nd Petitioner boarded a bus belonging to the 3rd Interested Party that was enroute to Wajir and occupied seat number 42.
67. Looking at the affidavit of the 3rd Respondent, I fail to understand or see the reason for declining to provide the Inquiry file at Jogoo Road Police Station that was opened after report of his disappearance who requested as well as the relevant certificate under Section 106B of the [Evidence Act](#) in respect annexure VK-4 since this does not fall within the information restricted under Section 6 of the [Access to Information Act](#). It is the finding of this Court that this information ought to be supplied to the 1st Petitioner.
68. There is however information that was shared with the 3rd Respondent from the Intelligence Service. It should not be lost in mind that this was a terrorism related activity. Terrorism directly impacts on national security under the [Prevention of Terrorism Act](#).

Section 6 (1) (a) of the [Access to Information Act](#) provides as follows:

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.

69. To protect the sources of information and avoid revealing how such sensitive information is acquired to protect national security or interests, it is my considered view that there exist valid/reasonable grounds for withholding the information from the Intelligence Service under Section 6 of the [Access to Information Act](#) and so should this portion of information need not be availed to the Petitioner.



70. Going back to the 4th Respondent (Safaricom Limited) and 3rd Interested Party (Golden Coach Limited), being private entities, the provision of information by them is governed by Article 35 (b) of *the Constitution*. Under this part, the requester of information must demonstrate that it is needed for the protection of a right or fundamental freedom. Thus, the Petitioner must discharge that burden if he requires the aid of the Court. In *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015)eKLR* the court stated as follows:

“ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

71. One of the requests for information by the Petitioner is to be supplied with information to confirm who the subscriber of the impugned phone number is. This is because the 3rd Respondent’s evidence indicated that it belonged to one Francis Gathagu. The 1st Petitioner on the other hand in her supplementary affidavit marshalled evidence (annexture DDM7) indicating that she had purchased line under her name.

72. The 1st Petitioner having substantiated that fact with proof; it fell upon the 4th Respondent to rebut the assertion. Ownership of that line is cogwheel in facilitating the Petitioner to assert the constitutional rights of the 2nd Petitioner looking at the totality of facts raised in this Petition. Consequently, the 4th Respondent is under duty to disclose the identity of the impugned mobile number subscriber to resolve the discrepancy.

73. In regard to requests numbers two and three from the 4th Respondent and request number four with reference to the 3rd Interested Party, it is my finding that the 1st Petitioner has not demonstrated which right she seeks to enforced with this specific information she wants disclosed by 4th Respondent and the 3rd Interested Party. Possible conflict of interest is not a fundamental right so as to justify disclosure of information. Further, the 1st Petitioner did not provide or lay a basis for seeking all of the 4th Respondent’s base stations coordinates in the Country or the reason why the 3rd Interested Party’s should re- supply the passenger manifest.

Whether this Court should stay the criminal proceedings in the lower court

74. The Court in the *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR* enunciated the principles to consider in an application for stay as follows:

“ ... To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a. Whether the applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought...”



75. Likewise, in *Timothy Kisina Kithokoi v Elijah Kitele & another* [2022] eKLR it was discoursed as follows:

“

“ 15. The Halsbury’s Law of England 4th Edition Vol. 37 pages 330 and 332 states that;

“The stay of proceedings is a serious, grave, and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases... It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50(2) (e) of *the Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. The threshold for such proof is beyond reasonable doubt.”

76. Guided by the above principles, I note that the 1st Petitioner justifies the grant of stay of criminal case proceedings premised on the argument that it will prevent two parallel investigations on the disappearance of the 2nd Petitioner. My humble view is that it does not hurt the interest of justice as it even doubles the effort to establish the truth about the alleged disappearance. Further, grant of stay might serve to delay the finalization of the criminal case as the allegation that the 2nd Petitioner is detained is subject to proof in this Petition. That fact is not yet determined and a possibility that the 2nd petitioner could also be out there may thus not be ruled out. Granting a stay would be based on an assumption that the 2nd Petitioner is being illegally detained. There is also no prejudice which has been shown as to cause the two processes not to continue at the same time. Section 193A of the Criminal Procedure Code states:

193A. Concurrent Criminal and Civil Proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

77. In the end, I make the following orders:

- a. The inquiry file opened at Jogoo Road Police Station on the disappearance of the 2nd petitioner and the relevant certificate under Section 106B of the *Evidence Act* in respect of call data records (annexure VK-4) be provided to 1st Petitioner.



- b. The 4th Respondent is ordered to disclose the subscriber details of the registered owner of the mobile number 0790742949 as at September, 2021 in view competing claims made by the 1st Petitioner and 3rd Respondent.
- c. All other prayers not specifically granted are declined.
- d. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 25TH DAY OF JULY, 2024

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L N MUGAMBI

JUDGE

