



Patel & 2 others (Suing as Officials as Kenya Sugar Manufacturers Association) v Agricultural and Food Authority & another; Seal Sugar Mills Limited & 4 others (Interested Parties) (Constitutional Petition E001 of 2024) [2024] KEHC 10136 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E001 OF 2024
RE ABURILI, J
AUGUST 8, 2024**

BETWEEN

**JAYANTILAL G PATEL (CHAIRMAN) 1ST PETITIONER
JOYCE AWINO OPONDO (SECRETARY) 2ND PETITIONER
FREDRICK COOMBES NORTH (TREASURER) 3RD PETITIONER
SUING AS OFFICIALS AS KENYA SUGAR MANUFACTURERS ASSOCIATION**

AND

**THE AGRICULTURAL AND FOOD AUTHORITY 1ST RESPONDENT
THE SUGAR DIRECTORATE 2ND RESPONDENT**

AND

**SEAL SUGAR MILLS LIMITED INTERESTED PARTY
DHARMESHBHAI RASIKBHAI PATEL INTERESTED PARTY
CHLINE ODUOL ODIPO INTERESTED PARTY
FREDRICK OTIENO ONYANDO INTERESTED PARTY
RAVJI DEVJI CHHABHADIA INTERESTED PARTY**

JUDGMENT

Introduction

1. The Petitioners herein filed the petition dated 28th December 2023 in their capacities as officials of a Sugar Millers’ Association known as Kenya Sugar Manufacturers Association (KESMA).



2. At the heart of the petitioners' claim is the alleged violation of their constitutional rights enshrined under Article 35 (1) (b) of *the Constitution* that grants locus to every citizen to access information held by public bodies as well as Article 47 (1) that guarantees a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
3. It was the petitioners' case that they are a major stakeholder in the sugar industry whose members have made investments of about Kshs.150 billion in the sugar industry and further that owing to the investments of its members, the petitioners have a responsibility of organizing the sector in a manner which protects its member's investments and that where the respondents consider registration of new millers, their location is scrupulously considered to confirm its viability so as not to affect existing sugar millers.
4. The petitioners further averred that it is not opposed to registration of new millers but is keen to ensure that investments by its members are not jeopardized thus the respondents are supposed to consider the necessary documents outlined in paragraph 28 of the petition to process applications for registration of new millers.
5. It was the petitioners' case that the respondents were processing several applications while the sector is in serious decline, thereby threatening the stability of the industry and that the processing of new applications openly contravenes the statutory obligation of the Respondent as under the *Crops Act*, the Respondents are supposed to come up with policies which stabilize the sugar sector before registering new entrants.
6. The petitioners averred that they have a settled right to be heard on any application of new sugar millers before such decisions are made and that being desirous of exercising the right to be heard, they wrote to the Respondents vide letters dated 10th July, 2023 and 2nd October, 2023 seeking documents on the Financial capability statement, Technical expertise of the promoters, Cane development capacity for respective TCD mill applied for registration, Feasibility studies, Crop studies, Technical studies and NEMA studies from the respondents.
7. The petitioners averred that the Respondents acknowledged their request vide letter dated 5th October, 2023 and promised to address their requests/concerns but that they did not do so, forcing the petitioner to instruct advocates who in a letter dated 8th November, 2023 wrote to the Respondents reiterating the request in the letters dated 10th July, 2023 and 2nd October, 2023.
8. It was the petitioners' case that the Respondents instead of addressing the petitioners' concerns, by a letter dated 11th December, 2023 urged the 1st interested party to carry on construction of an impugned sugar plant and to submit a timeline for commissioning of the project.
9. The Respondents filed a Replying Affidavit sworn by one Jude Chesire, the 1st Respondent's) Acting Director in which he deposed that the 2nd Respondent is a directorate which lacks legal capacity to be sued.
10. It was the respondents' case that the Authority received an application from the 1st interested party and published the same in the Kenya Gazette No.8983 of 29th July, 2022 inviting objections but the petitioners did not lodge any objection within the statutory fourteen (14) days window.
11. The respondents deposed that the petition was an attempt at circumventing the law by mischievously seeking to expand, vary and/or review allowed timelines as the right to be heard was effectively extinguished fourteen (14) days after 29th July, 2022 and the petitioners having failed to demonstrate the impact the provision of the documents it had sought would affect the registration and licensing of the 1st interested party.



12. It was further deposed on behalf of the respondents that the right of access to information is not an absolute one as it ought to be exercised within the confines of section 6 of the [Access to Information Act](#) as in this case provision of the information sought would be tantamount to an invasion of the 1st interested party's privacy contrary to Article 31 of [the Constitution](#) especially considering that the information sought comprised of commercial information which the petitioners as competitors have no right to.
13. The respondents further deposed that the Commission on Administrative Justice (the CAJ) has exclusive authority to review decisions of public entities to grant access to information and as such, the court did not have first instance jurisdiction.
14. The interested parties opposed the petition by means of a replying affidavit sworn by the 5th interested party in his capacity as director of the 1st Interested party. It was deposed that the petition was bereft of basis because the petitioner had all the information it required to lodge an objection.
15. The interested parties further deposed that the petitioners had a right to be heard by way of lodging an objection to the 1st interested parties' application for a letter of comfort within fourteen (14) days of 29th July, 2022 when the public was invited to lodge objections.
16. It was further deposed that the Petitioners were seeking to circumvent mechanisms provided by the law for them to challenge the issuance of a letter of comfort by purporting to seek information to lodge an objection they should have lodged by 11th August, 2022 and as such, the Petition offended the doctrine of exhaustion of remedies.
17. It was deposed that the decision by the 1st Respondent to issue a letter of comfort was an administrative one which the Petitioners have never challenged, the implication being that the second decision to allow the 1st interested party to carry out construction of a sugar milling factory, to submit a timeline for commissioning of its project was a sequel to the issuance of the letter of comfort and could not be challenged in the manner done herein.
18. The interested parties further deposed that the petition raised technical issues such as market response to the registration or licensing of the 1st interested party which were issues the court lacked the capacity to pronounce itself on and further that the petition was an invitation for the court to usurp the jurisdiction of the 1st Respondent whereas the Petitioners had on the other hand constituted themselves into an illegal authority meant to sieve who was allowed to invest in the sugar industry.
19. It was deposed that some of the documents sought from the 1st Respondent included a NEMA (National Environment Management Authority) Report which would ordinarily be in the possession of NEMA thus the instant petition was an attack on the functions of NEMA which had not been made a party in the proceedings. It was further deposed that the Petition was an illegal attempt at curtailing the 1st interested party's economic rights enshrined in Article 40 of [the Constitution](#) of Kenya and further that no constitutional issues were disclosed by the Petition.
20. The parties filed submissions to canvass the petition.

The Petitioners' Submissions

21. On jurisdiction of this court to entertain the instant petition, it was submitted that the jurisdiction of this Honourable Court as invoked through the present Petition flows from not only [the Constitution](#) but also written law, under Article 165(3)(b) and (d)(ii) of [the Constitution](#) of Kenya, 2010 and Section 38 of the [Crops Act](#), 2013.



22. It was further submitted that the present Petition lodged is omnibus in nature, it does not only encompass a claim for violation of the rights under Article 35(1) of *the Constitution* but also the obligation under Article 10 as read together with Article 232 of *the Constitution* and the violation of the right and obligation under 47(1) of *the Constitution*. That in the circumstances, to limit the facts of this Petition to the issue relating to access to information solely, and invite the Court to dismiss the Petition on the premise of lack of jurisdiction on the said singular premise, would be to disregard the substance of the Petition in its entirety which has been lodged as a whole and to defeat its purpose as relates to the several violations cited and demonstrated therein, which cannot be addressed through a tribunal with a prescribed narrow mandate under the *Access to Information Act*, 2016.
23. The petitioners submitted that guided by the provisions of Article 165(3) of *the Constitution*, just because Section 14 of the *Access to Information Act* and or Section 7(2), 9(2) & (3) of the *Fair Administrative Action Act*, which are ouster clauses offer a remedy that would be utilized in a situation that informs the present Petition, the same cannot and ought not to be utilized as a basis of ousting and or substituting this Honourable Court's unlimited jurisdiction under Article 165(3)(b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
24. It was submitted that that alternative remedies contained in ouster clauses cannot prevent the court from intervening in matters falling under the ambit of the protection and infringement of Constitutional and natural justice rights as was held in the case of Apollo Mboya vs Attorney General & 2 Others (2018) eKLR.
25. It was submitted that for the Court to dismiss the present Petition in favour of exhaustion of a remedy that only address a single facet of the present dispute, while disregarding and failing to consider the present Petition as a whole and not in part, leaving out the claim for the enforcement of the obligation to maintain and uphold the National Values and principles of governance under Article 10 and 232 of *the Constitution* and mandate to protect the right to a fair administrative action as guaranteed by the Article 47(1) of *the Constitution* and the provisions of the *Fair Administrative Action Act*, would not serve the values enshrined in *the Constitution* or law.
26. In support of the aforementioned submissions, the petitioners relied on the cases of Legal Advice Centre t/a Kituo Cha Sheria & another v Attorney General & 7 others; Law Society of Kenya & another (Interested Parties); Kenya Legal and Ethical Issues Network on HIV & Aids (KELIN) & another (Amicus Curiae) (Constitutional Petition 007 of 2022) [2024] KEELC 1521 (KLR) (20 March 2024) (Ruling) and the decision of the Court of Appeal in Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR.
27. It was further submitted that the petitioners were entitled to access information and that all that a citizen as are the Petitioners herein need to satisfy in order to enforce this right, is show that the information is held by the person from whom it is claimed; and that the information sought is required for the exercise or protection of another right.
28. It was further submitted that the Petitioners herein were under no obligation while making the requests for the information, neither are they under any such obligation presently to disclose to the Respondents the impact the information sought has on the registration process and or to prove that the information is necessary for the exercise and or protection of any rights and fundamental freedoms, as long as the twin ingredients under Article 35(1) are satisfied.
29. The petitioners submitted that the documents sought constituted what is envisaged by Section 5(1)(a) (vi) as records, that are held by and or that under the control of the 1st Respondent as a public entity



- and that have been utilized by its employees in the discharge of the functions under Regulation 6(2), 7(2) and 8 of the Crops (Sugar)(General) Regulations,2018 in registering the 1st Interested Party as a sugarcane miller and as such, the Respondents were obligated under mandatory terms to provide access to the Petitioners in reaction to the Applications by the Petitions.
30. It was submitted that the Respondents having not preferred a reaction and any action to the request by the Petitioner, this inferred rejection to the request and reasons and evidence having not been provided to the Petitioners for the said denial, the above circumstances captures the essence of the petition before this Honourable Court that the Respondents were under obligation to obey the law and allow the Petitioners access information or where not possible give reasons for that which they failed thus violating the Petitioner's rights under *the Constitution* and the law.
 31. The petitioners submitted that under the provisions of Regulation 8(1) of the Crops (Sugar)(General) Regulations, 2018, the information sought is information that ought to have been disclosed to the Petitioners during assessment and or evaluation of the 1st Interested Party's Application for certification and licensing and that the same cannot now be deemed to be private information, to wit, that access would amount to unwarranted invasion of privacy of the 1st Interested Party and or its officials as the Petitioners through their representative body were entitled to this information which cannot now be camouflaged as private information to defeat the Petitioners' rights.
 32. It was submitted that the Respondents have not provided any evidence whatsoever for this Honourable Court to conclude that the petitioners are not entitled to the information sought and or documentation sought nor have the respondents satisfied the constitutional test nor have they established that the refusal falls with the exceptions under Section 6 of the Act
 33. Further submissions are that the failure to avail the said information amounts to determination and or decision that is not based on reasonability within the meaning of Articles 24(1) and 47(1) of *the Constitution* and Section 4(1) of the *Fair Administrative Action Act*.
 34. It was further submitted that by denying the Petitioners access to the information sought as discussed earlier in this submissions, the Respondent failed to adhere to the rule of law under Articles 35(1) and 47(1) of *the Constitution*, Section 5 of the *Access to Information Act* and Section 4 of the Fair Administrative Actions Act. That the respondents also failed to uphold and protect the rights of the Petitioners as guaranteed under Articles 35(1) and 47(1) of *the Constitution*, further failing to be transparent on its governance as mandated under Section 6(6)(a) and (e) of the *Access to Information Act*, which bespeaks poor governance.

The Respondents' Submissions

35. The Respondents submitted that the Petition is a misguided attempt by the Petitioners to un-procedurally circumvent section 20 of the *Crops Act* that requires the 1st Respondent to publish a gazette notice of intention to issue a certificate of registration /milling licence at least 30 days before the granting of such licence, specifying the name or other particulars of the applicant, the purpose of the proposed licence and the proposed date of issuance of the licence, and the right of the public to lodge with the 1st Respondent, any objections to the proposed grant of licence/certificate within 14 days following the date of the notice for consideration.
36. It was submitted that Regulation 8 of the Crops (Sugar) (General) Regulations of 2018 requires the 1st Respondent to engage all relevant stakeholders, including the county governments, in a consultative process within 90 days of receipt of the application for issuance of licence and registration and that the petitioners having failed to participate in the consultation process, the petitioners were now before this court.



37. The respondents submitted that the alleged violation of the Regulation aforesaid offends the principle laid down in *Anarita Karimi Njeru v Republic* [1979] eKLR as the alleged violation of right to be heard under Regulation 8 of the Regulations was not pleaded with precision nor proven to be infringed vide the said Petition. It was submitted that as a consequence thereof, the Petitioner is bound by its pleadings and cannot purport to amend its petition through its submissions as was held in the case of *Palms Resort Limited v Qureshi & 2 others (Civil Appeal E167 of 2022)* [2023] KEHC 23644 (KLR) (16 October 2023) (Judgment).
38. It was submitted that the Petition offends the principle of constitutional avoidance to the extent that it raises issues and further seeks reliefs which could otherwise be resolved vide the provisions of the Fair Administrative Actions Act as read together with the provisions of the *Access to Information Act*. Reliance was placed on the case of *SG v Standard Media Group & 3 others (Constitutional Petition E066 of 2021)* [2022] KEHC 13633 (KLR) (6 OCTOBER 2022), where the court quoted with approval the case of *Ashwander v Tennessee Valley Authority* in which the US Supreme Court determined that it would not determine a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.
39. It is submitted that the decision/action challenged in the petition is an administrative action falling under the Fair Administrative Actions Act, particularly section 9 thereof, which prohibits this Honourable Court from reviewing an administrative action or decision unless the mechanisms including internal mechanisms of review and appeal, and all remedies available under any written law have been exhausted first and that as a result, this Court lacks the first instance jurisdiction to handle the dispute before it by virtue of the doctrine of exhaustion of remedies provided for under section 9 of the Fair Administrative Actions Act as read together with the above-cited provisions of the *Access to Information Act*.
40. It was further submitted that there was no exceptional circumstance in the petition that warranted the bypassing of a clear statutory process, more so, none was alleged or substantiated and no application was lodged and/or leave granted to by-pass the statutory remedy processes highlighted above as was stated by the Supreme Court in the case of *NGO'S Coordination Board vs EG & 4 Others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR).
41. The respondents submitted that the Petitioners have belatedly through their submissions irregularly amended their petition by introducing the new allegation that their right to be heard under Regulation 8 of the Crops (Sugar) (General) Regulations of 2018 was violated thus have irregularly deprived the 1st Respondents of the right and opportunity to defend itself by way of evidence or howsoever otherwise, which act constitutes trial by ambush and further violating the respondents' right to a fair hearing protected under Article 50 of *the Constitution*. The respondents argued that on this ground alone, the Court ought to dismiss the alleged violation of the right to be heard under article 47 of *the Constitution* premised on the provisions of the Regulation 8 aforesaid and further, that the Petitioners have failed to demonstrate how the information sought is to be relied on to advance their rights under article 47 of *the Constitution*.
42. The Respondents submitted that the Petitioner's request for documentation for purposes of lodging an objection under section 20 (7) of the *Crops Act*, more than a year after the Gazette Notice, and further lodging of this petition more than two years after the Gazette Notice of 29 July 2022 constitutes an illegal and mischievous attempt to expand, vary or review 14 days' statutory timelines set out under section 20 (7) of the *Crops Act* within which the right to be heard could be exercised by way of lodging an objection. It was therefore submitted that this Honourable Court has no jurisdiction to exercise such powers, whether under the *Crops Act* or any other written law.



43. Reliance was placed on the Supreme court case of *Karua v Independent Electoral and Boundaries Commission & 3 others (Petition 3 of 2019)* [2019] KESC 26 (KLR) (6 August 2019) (Judgment) where while addressing the question of statutory timelines relied on the judgement in *Gerald Iba Thoya vs Chiriba Daniel Chai and Another Election Petition Number 1 of 2018*, where the court stated inter alia that The calendar is not shifted by conduct of parties and neither can it be breached by actions of an election court. The period is cast in stone and once the six months' lapse, the election court no longer has any powers to hear and determine the election petition. It must down its tools. It was argued that similarly in the instant case, once the timelines for lodging an objection passed without any formal objection being lodged as required by section 20 (7) of the *Crops Act*, the Petitioner's right to be heard by way of the said objections extinguished/lapsed, and any attempted application for documentation with the intention to resurrect the timelines for exercising the right to be heard by way of the objection must be rendered a nullity and a waste of time because, neither the court nor the 1st Respondent can expand the timelines as stipulated in the law.
44. The Respondents submitted that the Petitioner's right to access to information particularized above was not fundamental to the realization of the right to be heard or any other right under *the Constitution* given the belated time that the information was being requested and that there was no demonstration by the Petitioners as to how the lack of the said documents/information currently sought prevented it from lodging an objection under section 20 (7) of the *Crops Act*.
45. It was submitted that the information supplied to the 1st Respondent while exercising its statutory mandate to review, examine and consider the 1st Interested Party's Application for licence and registration constitutes information that would undermine national security within the meaning of section 6(2) of the *Access to Information Act* and is therefore not subject to access by any member of the public and that is why Section 20 (7) of the *Crops Act* is so clear and unambiguous on the nature and extent of information to be released to the public for purposes of an application for licensing and registration of a miller, which information is limited to: name or other particulars of the person or class of persons to whom a licence is to be granted, state the purpose for the proposed licence and indicate the date such proposed licence is to be issued to the successful applicant and invite objections to the proposed grant of licence and direct that such objections be lodged within fourteen days following the date of the notice. The respondents argued that in the instant case, the Information that ought to have been disclosed by law was disclosed via the Gazette Notice (JC-1) and that therefore the Respondents were not under any further obligation to go beyond the scope provided under section 20 (7) of the *Crops Act*.
46. It was further submitted that the information sought by the Petitioner constitutes unwarranted invasion of privacy of various individuals or officials of the 1st Interested Party as well as an invasion of privacy of the 1st Interested party itself, without their proper authority.

The Interested Parties' Submissions

47. On behalf of the interested parties, it was submitted that the purported quest for information was a back door means by which the petitioners are seeking to contest the issuance of the letter of comfort issued to the 1st interested party.
48. It was further submitted that the provisions of section 20(7) and (8) of the *Crops Act*, 2013 clearly indicate that the legal authority to receive and entertain objections is vested in the Authority and the petitioners cannot by means of its petition bypass the jurisdiction of The Authority by claiming infringement of Constitutional rights. Reliance was placed on the Court of Appeal case of *Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another* [2015] eKLR where the court emphasized



- the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes as well as the case of *Kones v Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others* (2008) 3 KLR (ER) 296).
49. It was submitted that the Court of Appeal frowned upon the presentation of multifaceted claims through “the art and craft of pleading” as this promotes forum shopping in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 Others* [2020] eKLR.
 50. The interested parties further submitted that the Petitioners had not demonstrated that they sought the aid of the Commission on Administrative Justice (CAJ) in accessing the information they say was held by the 1st Respondent nor had they demonstrated that their interests would not have been sufficiently taken care of if the CAJ directed release of information.
 51. It was further submitted that the place and functions of the 1st Respondent and the CAJ (the CAJ being a Constitutional Commission) cannot be wished away, merely because the petitioners consider their grievances to be in the nature of violations of *the Constitution*. Reliance was placed on the Court of Appeal case of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* [2015] eKLR that appreciated and restated the need for parties to resort to courts of law, not as a first port of call, not that there must be postponement of judicial intervention, but after exhausting available remedies.
 52. It was submitted that not every violation of the law must result in the filing of a Constitutional petition especially where there are statutory remedies and that the reliefs sought by the petitioners would have all been available to it had it pursued its grievances either before the Authority or the CAJ. Reliance was placed on the case of *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others* [2018] eKLR.
 53. It was submitted that having failed to lodge any objection on the issuance of a letter of comfort, the petitioners could not purport to challenge the condition set forth in the said letter of comfort.
 54. It was further submitted that in law, there is a presumption of regularity as was held in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR and that the bar for impugning an act done by a public officer as irregular is a high one on the part of the person challenging the same – in this instance, the petitioners.
 55. The interested parties submitted that nowhere in the petition did the petitioners, KESMA aver that it was not aware of the publication of the 1st respondent’s application vide Kenya Gazette No.8983 of 29th July, 2022 and thus it was malicious and oppressive for them to sleep on their laurels, through their inaction, allow massive investments to be done by the 1st interested party for a period of almost one (1) year then begin writing letters to the Authority generally casting aspersions on all applicants and singling out the 1st respondent without logical basis.
 56. It was submitted that the Court’s jurisdiction cannot be invoked based on unfounded apprehensions and that there must be empirical evidence that the 1st interested party’s registration, as a single applicant, has the possibility of endangering the petitioners’ members’ commercial interests.

Analysis & Determination

57. I have considered the petition, replying affidavits, submissions and authorities placed before me. I observe that the instant petition is alleged to be founded on the petitioners’ right to access information as enshrined under Article 35 of *the Constitution*. It is on the alleged violation of their right to access information regarding the 1st interested party that the petitioners deemed their right to fair administrative action as enshrined under Article 47 (1) had been violated.



58. The right to access information is a fundamental right upon which other rights guaranteed in the Bill of Rights can be realized. This right encompasses the right to seek and receive information and is guaranteed to every citizen. Traditionally, the right to access to information has been utilized to render public authorities accountable and to promote transparency in the public sector.
59. There has been a paradigm shift in substantial measures from the demand for information from public bodies to private bodies and this is an important guard against abuses, mismanagement, and corruption. Therefore, the codification of the right to information from private bodies in *the Constitution* of Kenya 2010 is one of the major milestones in the protection of the right to access to information.
60. Accordingly, Article 35 of *the Constitution* provides for the right to access to information in the following terms:
- “ 35. Every citizen has the right of access to-
- (1) 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 publicize any important information affecting the nation.”
61. Similarly, section 4 of the *Access to Information Act*, No 31 of 2016 which was enacted to give effect to the rights under Article 35 of *the Constitution* provides for the right of access to information held by the State and information held by another person and is required for the exercise or protection of any right or fundamental freedom.
62. The right to access information is also contained in several international conventions and treaties ratified by Kenya. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) for example makes the right to information imperative when it states that:
- “ Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”
63. The right to access to information is also stipulated under article 9(1) of the African Charter on Human and Peoples Rights which states that ‘every individual has the right to receive information.’
64. The *Access to Information Act* defines a ‘public body’ as:
- “(a) any public office, as defined in article 260 of *the Constitution*; or
- (b) any entity performing a function within a commission, office, agency or other body established under *the Constitution*.”



65. The Act further defines ‘private body’ as a body which:
- “ a. Receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services, or resources); or
 - b. Is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment, or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.”
66. The respondents’ objections in this regard relates to the court’s jurisdiction to hear and determine the petition herein. The parties are agreed to the extent that jurisdiction is everything. Without it, the court must stop.
67. The Main issue that I will determine, therefore, is whether this court is clothed with jurisdiction to hear and determine the issues raised by the petitioners. Only after I have satisfied myself of the presence of jurisdiction will I determine the merits of those matters raised.
68. In the locus classicus case of Owner of the Motor Vessel Lillian “S”v Caltex oil Kenya Ltd. (1989) 1 KLR the Court of Appeal held that::
- “Without jurisdiction a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending before it. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
69. The Supreme Court in the case of Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2012] eKLR held that:
- “A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
70. 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. These are the words of Majanja, J (RIP) in the case of Famy Care Limited v Public Procurement Administrative Review Board & another Petition No. 43 of 2012 [2012] eKLR.
71. Section 8 of the *Access to Information Act* (AIA) stipulates the procedure for an application for access to information. Such request 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. Inability to make a written request for information is not a hinderance. The law makes appropriate provision and requires that an applicant who is unable to make a request in writing is facilitated to make a request in the manner that meets their needs.
72. Section 9 of the AIA makes provision for the processing of such application or request for information 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.
73. The Respondents being public entities are bound by the provisions of Article 35(1) of *the Constitution* and the provisions of the AIA and the obligation to disclose is placed upon them.
74. The Petitioners' complaint is that they sought information from the indicated Respondents, which information was not forthcoming within the period stipulated, and indeed at the time of filing the Petition. By dint of the provisions of Section 9(6) of the AIA, therefore, the application is deemed to have been rejected. Following this rejection, the Petitioners were at liberty to invoke the provisions of Section 14 of the AIA which provide a remedy as follows:
1. Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—
 - a. a decision refusing to grant access to the information applied for;
 - b. a decision granting access to information in edited form;



- c. a decision purporting to grant access, but not actually granting the access in accordance with an application;
 - d. a decision to defer providing the access to information;
 - e. a decision relating to imposition of a fee or the amount of the fee;
 - f. a decision relating to the remission of a prescribed application fee;
 - g. a decision to grant access to information only to a specified person; or
 - h. a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.
2. An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.
 3. The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.
 4. The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.
75. It is easily discernible from the above provisions that the AIA has provided a remedy and the procedure to be followed, in the event an application for access to information is rejected. To begin with, an application will only be deemed to have been rejected if no response is received within 21 days. Thereafter, an applicant is to apply within 30 days to the CAJ for a review of the rejection of the application for information. A person aggrieved by the decision of the CAJ may then appeal to the High Court within 21 days of the date of the decision. Put differently, the jurisdiction of this Court may only be invoked by a party aggrieved by an order made by the CAJ. Section 23(3) of the AIA provides as follows:
- A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.
76. It is the Respondents' and interested parties' contention that the Petitioners ought to have exhausted the remedy available to them before moving to this Court. They argue that this Court does not have first instance jurisdiction to enforce the provisions of the AIA and that no application under section 9 of the *Fair Administrative Action Act* was made for exemption to resorting to the established internal dispute resolution mechanism. The Petitioners countered this by contending that this court has jurisdiction to entertain the instant petition notwithstanding the ouster clauses in the AIA since there are other violations that are hinged on Article 10 of *the Constitution* and as such, this Court has the requisite jurisdiction to hear and determined the Petition.
77. It is now well settled law is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others(supra), the Supreme Court succinctly stated:
- “A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue



as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

78. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution*. The unlimited original jurisdiction of the High Court in civil and criminal matters includes the jurisdiction to hear any question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.
79. It is not in doubt that Article 165(3) of *the Constitution* confers upon the High Court unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of *the Constitution*. In particular, and relevant to the matter herein, under Article 23 this Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
80. The jurisdiction of this Court may however be limited by *the Constitution* and statute in certain instances. The Court may thus only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. There is a long line of judicial authorities where our superior courts have stated that where an alternative sufficient and adequate forum exists for resolving a dispute, then such forum should be pursued before invoking the court process.
81. In the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:
- “ 11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In Halsbury’s Laws of England, Volume 10 at paragraph 319, the learned authors state: “The subject’s right of access to the courts may be taken away or restricted by statute.” ...Paragraph 723 states: “Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”
12. In *Narok County Council V Trans-mara County Council* (supra) this Court held that: “... though section 60 of *the Constitution* gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.”
13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of *the Constitution* only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in *The Matter Of The Interim Independent Electoral Commission* [2011] eKLR: “[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent.”



14. Similarly, in *Suleiman Ibrahim V Awadh Said* [1963] E. A. 179, Windham, C. J. held that section 33 of the *Rent Restriction Act* of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.”
82. What I gather from the cited authority is that the jurisdiction of this Court does not extend to matters or disputes that a statute has directed should be resolved or handled by another legal entity. The jurisdiction of the Court is ousted where statute has conferred exclusive jurisdiction on an entity to deal with claims arising therefrom. This is in line with Article 159(2)(c) of *the Constitution* which mandates this court and tribunals established under *the Constitution* in their exercise of judicial authority to, among others, be guided by the following principles:
- a.
 - b.
 - c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).
83. The filing of constitutional petitions where other dispute resolution mechanisms are available has been the subject of many a court case. In *Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others* [2011] eKLR, Asike-Makhandia, J. (as he then was in the High Court stated:
- “The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitution petition is not excepted either much as *the Constitution* is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to *the Constitution*. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose. In the case of *Harrikson -vs- Attorney General* (1979) WLR 62, the Privy Council held:-“...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individuals by Chapter 6 of *the Constitution* is fallacious. The right to apply to the High Court under section 6 of *the Constitution* for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial controls of administrative action...”.
84. Thus, the failure by an entity or an organ to comply with the law does not necessarily entail a contravention of a right or fundamental freedom requiring redress by the constitutional court.
85. Our superior courts have repeatedly and consistently restated that where a clear sufficient and adequate legal avenue and procedure for redress has been provided by law, such procedure must be followed to



the letter. In the age-old yet ever relevant case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

86. The AIA has made adequate provision for redress where a party’s application for information has been rejected, leading to violation of the right to information. A party aggrieved by a body or authority from which information is sought is required to invoke the mechanisms set out in AIA for redress before moving to the High Court.

87. In Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR the Court of Appeal considered the doctrine of exhaustion and expressed itself thus:

Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.

88. And in the case of Charles Apudo Obare & another v Clerk, County Assembly of Siaya & another [2020] eKLR, this court stated, quite extensively, citing other binding decisions that:

“Most recently in Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR, Weldon Korir J observed as follows, persuasively but authoritatively, and I have no reason to differ from the learned Judge’s findings and holding:

“It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of *the Constitution* to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute. The preamble of the *Access to Information Act*, 2016 clearly states that it is an “Act of Parliament to give effect to Article 35 of *the Constitution*; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”

“It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of *the Constitution*. The legislators in



their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-“The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order- a.the release of any information withheld unlawfully;b.a recommendation for the payment of compensation; or c. any other lawful remedy or redress.”Section 23(3) of the Act provides that:“A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.”“I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the [Access to Information Act](#). Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice.”

53. I have quoted the decisions that I have relied on in extensor for reasons that they resolve several questions on the principle of exhaustion of remedies. In light of the binding case law cited and what I have stated in this judgement, it follows that the matters raised in the petition are not yet ripe for the determination by this Court. In view of that, I will not delve into the merits of the substantive issues raised in the petition. Doing so will prejudice the parties since they may want to revert to the statutory body mandated to deal with the issues raised in the petition.”

89. From the above cited case law, it can be seen that this Court does not have original jurisdiction to deal with matters relating to access to information. In this regard, I agree with Korir, J. (as he then was in the High Court and this courts own judicial pronouncement in the above cited case), that it could not have been the intention of Parliament when enacting the AIA to confer both original and appellate jurisdiction on the High Court in matters where the CAJ has been given jurisdiction under the Act.
90. Albeit the petitioners claimed that their Right to fair administrative action was violated, Section 9(3) of the [Fair Administrative Action Act](#) too makes provision in mandatory terms for resort to alternative mechanisms for resolving disputes related to violation of the right to fair administrative action as stipulated in Article 47 of [the Constitution](#). Where a party seeks to be exempted from resorting to such alternative remedies, they must apply for such exemption. No such application has been made, setting out the exceptional circumstances that warrant exemption for consideration by this court has been sought and obtained and neither do I find any exceptional circumstances to warrant exercise of discretion to exempt the petitioners herein. These are matters which superior courts have pronounced themselves on time and again but there is no harm restating them more decisions here.
91. In the above cited case of Charles Apudo Obare & another v Clerk, County Assembly of Siaya & another [supra], I had the opportunity to explore some of the cases already cited above and I pronounced myself as follows, regarding the claim that the right to fair administrative action had been violated:

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“51. In the *Ndiara Enterprises Ltd v Nairobi City County Government* (supra) case, an appeal from my very own judgment where I declined jurisdiction on the ground that the *ex parte* applicant in the judicial review application had not exhausted the available alternative remedy as stipulated in the Physical Planning Act, the Court of Appeal, agreeing with my decision stated:

“.....Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of *The speaker of The National Assembly v Njenga Karume* (2008) 1 KLR 425, *Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor* (2015) eKLR for that proposition.

The appellant also alleged that the respondent’s refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9(2) of the Act from reviewing “an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted.” The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows:

“In addition under Section 9(2) of the *Fair Administrative Action Act* No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and “shall not” review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

- (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under section (1)
- (4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice ...

From the above provisions of the law and decided cases, it is clear that even the *Fair Administrative Action Act* which the *ex parte* applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review.



However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary.”

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent’s refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It’s clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court’s power to exercise its jurisdiction under Article 165 of *the Constitution* was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.”

Ultimately, we agree with the findings of the learned Judge that the orders sought by the appellant were untenable in the circumstances.

This appeal must therefore fail as it is without merit. It is accordingly dismissed with costs to the respondent.”[emphasis added].”

92. The same Court of Appeal in *Kenya Revenue Authority & 2 others v Darasa Investments Ltd* [2018] eKLR [Visram, Karanja and Koome JJA] stated as follows when it posed the following question:

“What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies” As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*[2017] e KLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No. 2 of 2008*. Perhaps that why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:



“Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

“Our reading of the above provision reveals that contrary to the appellant’s contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.”

93. Having said so much on jurisdiction of this court to hear and determine this petition, and having found that this court in the instant petition is devoid of that jurisdiction for want of exhaustion of the available effective and expeditious alternative remedies, I must do what the Motor Vessel Lilian “S” decision commands me to do and that is, down my tools and not delve into the merits of the petition.
94. The upshot of the above is that I find that the instant petition incompetent and for want of jurisdiction, it is hereby struck out, with an order that each party bear their own costs.
95. This file is closed.
96. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

