



**Ledama v Narok County Government (Constitutional Petition
1 of 2024) [2024] KEHC 12661 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION 1 OF 2024**

F GIKONYO, J

OCTOBER 16, 2024

**N THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22,
23, 24, 35, 73, 165, 201, 227, 232, 258 AND 259 OF**

**THE CONSTITUTION OF KENYA, 2010 IN THE
MATTER OF THE ACCESS TO INFORMATION ACT, 2016**

BETWEEN

HON OLEKINA LEDAMA PETITIONER

AND

THE NAROK COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. Vide petition dated 20/02/2024, the Petitioner seeks the following reliefs from the court;
 - i. A declaration that by failing, neglecting, or refusing to provide the information sought by the petitioner within reasonable time, the respondent has denied, violated, infringed, or threatened the petitioner's right to access to information contrary to the Article 35 of *the constitution* and section 4 of the *Access to Information Act*.
 - ii. A declaration that by failing, neglecting, or refusing to provide information sought by the petitioner within reasonable time hence hindering the petitioner from exercising his duty to represent the people, the respondent has violated *the constitution* by failing to abide by constitutional principles of rule of law, democracy, human rights, good governance, openness, transparency and accountability contrary to Articles 10, 201, 227 and 232 of *the Constitution*.
 - iii. A declaration that by failing, neglecting, or refusing to provide the information sought by the petitioner within reasonable time hence hindering the petitioner from exercising his duty to represent the people, the respondent has violated *the constitution* by breaching public trust; failing to demonstrate respect for the people; acting in a manner that does not promote public



confidence in the integrity of the office and failing to provide to the public with timely, accurate information contrary to Article 73 and Article 232 of *the Constitution*.

- iv. An order compelling the respondent to provide the information sought by the petitioner vide the three letters dated 21/12/2023 regarding tender number NCG/MACHINE REPAIR/001/2022-2023 for maintenance and repair of Earth moving equipment and vehicles; tender number NCG/OT/04/2022-2023 for supply and delivery of earth moving equipment and use of Helicopters by officials of the respondent within 7 days.

Brief facts

2. The petitioner in exercising his oversight role as a member of the senate representing Narok County, requires information from the respondent and without such information, it would be impossible for him to fulfill his role.
3. On the petitioner on 21/12/2023 through his advocates wrote and sent 3 letters to the respondent requesting information within 21 days of the said letters.
4. In the first letter, the petitioner sought information relating to tender number NCG/MACHINE REPAIR/001/2022-2023 for maintenance and repair of earth-moving equipment and vehicles. The particulars of the information sought were;
 - a. The contract(s) awarded pursuant to the tender;
 - b. The list of earth-moving equipment and vehicles so far repaired and maintained under the said contract(s) together with their vehicle identification numbers;
 - c. Current status of serviceability of the machinery and vehicles subject of repairs and maintenance under the contract;
 - d. Current location of the machinery and vehicles subject of repairs and maintenance under the contract and;
 - e. Availability of the subject machinery and vehicles for verification by the senate oversight office and in particular the date between January and March 2024 when the area senator and his oversight team can access the said machinery for verification of their condition.
5. In the second letter the petitioner sought information on tender number NCG/OT/2022-2023 for the supply and delivery of earth-moving equipment. The particulars of the information sought in respect to this tender were;
 - a. The delivery notes or other relevant information documenting delivery of the said equipment;
 - b. Information on the payment for the said equipment including payment vouchers for the equipment;
 - c. Receipts issued following the payment for the said equipment;
 - d. Copies of log books or other registration documents for the said equipment.
6. In the third letter the petitioner sought for information relating to the frequent use of helicopters by the officials of the respondent. The particulars sought were as follows;
 - a. The contract(s) between the respondent and the company/companies that supply helicopter services to the county;



- b. The budget line in the approved budget of the county that supports this expenditure item;
 - c. Records of the requisitions for helicopter services by the Narok County government of the last one year;
 - d. Payment vouchers for helicopter services by the respondent over the last one year
 - e. information regarding the tendering process for helicopter services including;
 - i. The advertisement for the tender
 - ii. The companies that bid for the tender
 - iii. The companies that were awarded the tender
 - f. The frequency of the weekly use of the helicopter(s) over the last one year.
7. On 05/01/2024, the respondent wrote back to the petitioner through his advocates and indicated that the petitioner's letters to the respondent were only brought to the attention of the respondent on 3/01/2024 and therefore more time was required for the compilation of the information sought.
 8. In the said communication, the respondent acknowledged the importance of the petitioner's oversight function and undertook to furnish him with the information.
 9. The respondent however failed to honour the undertaking and has failed, neglected, or refused to supply the information sought and further communication to the respondent by the petitioner has not been responded to.

The Supporting affidavit

10. The Petition is supported by the supporting affidavit sworn on 20/02/2024 by Hon. Olekina Ledama, the Petitioner herein wherein deposed that the Respondent has failed to provide the information he sought in his three letters in furtherance of his oversight role as a senator Narok County.

The Replying affidavit

11. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 08/05/2024 by its county secretary John Mayiani Tuya. He deposed that the respondent handed over the requested documents to the petitioner. The ethics and anti-corruption commission on 05/02/2024 wrote to the respondent informing them of ongoing investigations on alleged procurement irregularities on account of a complaint by the petitioner with respect to tender number NCG/MACHINE REPAIR/001/2022-2023 and tender number NCG/OT/04/2022-2023 the subject matter of this proceedings. The commission therefore requested the original documents relating to the said tenders. Therefore, the said documents are in the custody of the commission and not of the respondent.
12. The respondent contends that the matter is still pending investigations before the commission. Furnishing the said documents to any other person and or entity including the petitioner who is the complainant before the commission will likely impede on the due process of law and undermine the ongoing investigation by the commission.
13. The respondent contends that the information and documents requested by the petitioner are available on the public procurement information portal. Consequently, the respondent ought not to provide and/ or furnish information that can be accessible from the portal. Therefore, there is no infringement of the petitioner's right.



14. The respondent contends that the petition offends the doctrine of constitutional avoidance which stipulates that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.
15. The respondent contends that the petitioner failed to lodge the complaint with the Commission on Administrative Justice before approaching this court and thus has infringed the doctrine of exhaustion.
16. The respondent averred that the petitioner lodged a complaint against tender no. NCG/OT/2022-2023 to the public procurement regulatory authority. The authority conducted its investigations and vide letter dated 27/02/2023 closed the investigations finding no fault with the tendering process. The petitioner did not appeal the decision of the authority but elected to lodge another complaint with the commission and subsequently file the present petition.
17. The respondent averred that it has not hindered the right of the petitioner to represent the people of narok county in the Senate. In any event, the individual senator cannot exercise the oversight role of the Senate. The mandate to oversight is bestowed on the county assembly. The petitioner ought to have petitioned the county assembly of narok to look into any issue before approaching this court.
18. The respondent contends that the petition is therefore a witch hunt, reeks of bad faith, an abuse of the court process, and should be dismissed with costs.

The supplementary affidavit

19. The petitioner filed a supplementary affidavit sworn on 22/05/2024 by Hon. Olekina Ledama.
20. The petitioner averred that upon making a formal request for information from the Respondent, the Respondent on 5/01/2024 wrote back to the petitioner through my advocates and indicated that his letters to the Respondent were only brought to the attention of the Respondent on 3/01/2024 and therefore more time was required for the compilation of the information sought.
21. The petitioner averred that on 10/01/2024, through his advocates, he responded to the Respondent's letter dated 5/1/2024 indulging the Respondent for a further seven (7) days to supply the said information but the Respondent did not provide the said information.

Directions of the court

22. The Petition was disposed of by way of written submissions.

Submissions

The petitioner's submissions.

23. The Petitioner submitted that the Respondent has not complied with any of the statutory timelines in any manner whatsoever. It therefore, does not lie in the Respondent's place to now question whether the said information is available and whether the Petitioner is entitled to it, as the Respondent has purported to do in the Replying Affidavit. The petitioner contends that it is curious that the Respondent claims to have handed over the original documents, the subject matter of this petition to the Ethics and Anti-Corruption Commission following the EACC's Request for the information dated 05/02/2024. In the first instance, the Respondent has not furnished this court with a letter forwarding the said documents to EACC to support the allegation that the said documents were, in fact, released to EACC. Secondly, it is implausible for the Respondent to claim that they released the original documents to EACC without retaining any copies for their records. Such copies can be supplied to the Petitioner in fulfillment of the demands of this petition. Thirdly, this request by



the EACC is dated 5/2/2024, one month after the Respondent undertook to furnish the Petitioner with the said information. It follows therefore that while compiling the documents to hand over to EACC, the Respondent had an opportunity to make copies therefore for supply to the Petitioner as had been undertaken in the Respondent's letter dated 05/1/2024. Fourth, some of the depositions in the Replying Affidavit are simply counter-intuitive. The Respondent claims at paragraph 16 of the Replying Affidavit that having furnished the EACC with ORIGINAL documents relating to the said Tenders which are the subject matter of the instant petition, "the same are not in the custody of the Respondent". The Respondent then proceeds to claim in paragraph 20 of the Replying Affidavit that "the information and documents requested by the Petitioner are available on the public procurement information portal. Consequently, the Respondent ought not to provide and/or furnish information that can be accessible from the portal. The petitioner relied on Articles 35,10, 201, 227, and 232 of *the Constitution* of Kenya, Sections 9, and 11 of the *Access to Information Act*, Sanjay Ramniklal Shah and Others Vs Central Bank of Kenya and Others, Nairobi HCCOMM E708 OF 2021 Nairobi Law Monthly Vs Kenya Electricity Generating Company and 2 Others [2013]eKLR, Trusted Society of Human Rights Alliance and 3 Others Vs Judicial Service Commission [2016]eKLR, Katiba Institute Vs President's Delivery Unit, and 3 Others [2017] eKLR, and President of Republic of South Africa Vs M & G Media CCT 03/11.

24. The petitioner submitted that the Respondent has taken refuge in the doctrine of exhaustion. Unfortunately for the Respondent, this is a beaten path. The petitioner relied on Katiba Institute V Presidents Delivery Unit & 3 others [2017] eKLR.

The respondent's submissions.

25. The respondent submitted that the respondent has not contravened Article 35 of *the constitution* and Section 4 of the *Access to Information Act*. The right of access to information is not absolute. Some of the information sought by the petitioner is readily accessible by other means for example the public procurement information portal (PPIP), Supplementary budget. Section 6(1)(a) and (b), 2(g) and (j) (5) of the *Access to Information Act* precludes the respondent from availing the requested documents to the petitioner pending the conclusion of the ongoing investigations. The respondent relied on Articles 24, 25, 35 of *the Constitution*, Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others [2015] eKLR, Centre For Rights Education And Awareness & Another V John Harun Mwau & 6 Others [2012] eKLR, Wanuri Kahiu & Anor V CEO-Kenya Film Classification Board Ezekiel Mutual & 2 Others [2020] eKLR, President of the Republic Of South Africa Vs M& G Media CCT 03/11, Katiba Institute Vs President's Delivery Unit & 3 Others [2017] eKLR, Mercy Nyawade Vs Banking Fraud Investigations Department & 2 Others [2017] eKLR, and Commission For Human Rights & Justice (CHRJ) & Another V Chief Officer, and Medical Services County Government Of Mombasa & 3 Others [2022] eKLR.
26. The respondent submitted that the petitioner ought to have first lodged a complaint with the Commission on Administrative Justice before approaching this court for redress. Therefore, this petition is defective and this court is without jurisdiction pursuant to the doctrine of exhaustion. The respondent relied on Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 Others [2015] eKLR, Speaker of National Assembly Vs Njenga Karume, Civil Application No. Nai 92 of 1992 eKLR, and sections 20, and 22 of the *Access to Information Act*.

Analysis And Determination.

27. This court has considered the Petition, the affidavits on record, and the submissions of the parties.



Issues

28. The following issues fall for determination by the court: -
- i. Whether the petition offends the doctrine of exhaustion of remedies
 - ii. Whether the petitioner's right to access to information was infringed by the respondent.
 - iii. Whether the respondent should be compelled to provide information and documents sought
 - iv. Who bears the cost of these proceedings?

Competence issues

29. The respondent averred that the petitioner lodged a complaint against tender no. NCG/OT/2022-2023 to the public procurement regulatory authority. The authority conducted its investigations and vide letter dated 27/02/2023 closed the investigations finding no fault with the tendering process. The petitioner did not appeal the decision of the authority but lodged another complaint with the commission and subsequently filed the present petition.
30. The respondent submitted that the petitioner ought to have first lodged a complaint with the Commission on Administrative Justice before approaching this court for redress. Therefore, this petition is defective and this court is without jurisdiction pursuant to the doctrine of exhaustion.
31. The petitioner submitted that the Respondent has taken refuge in the doctrine of exhaustion. Unfortunately for the Respondent, this is a beaten path.

Constitutional avoidance doctrine

32. The doctrine of constitutional avoidance posits that; '...a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion' (Black's Law Dictionary, 10th Ed. Page 377). Or, as per the Supreme Court; '...when a matter may properly be decided on another basis' (CCK & 5 Others vs. Royal Medial Services & 5 Others [2014] eKLR)
33. The doctrine of constitutional avoidance is related to the doctrine of exhaustion of remedies.
34. Whereas the petitioner seems to have employed all avenues available for redress without considering the practical implications for such approach, there is nothing which stops him from accessing the court for redress for violation or threatened violation of a right.
35. Except for good reason especially on jurisdiction, the policy of court is to hear on merit, a constitutional petition for redress for violation or threatened violation or enforcement of a right or fundamental freedoms, rather than dismiss it summarily; informed by the call to uphold, promote and protect *the Constitution* and constitutional reliefs (Rashid Odhiambo Aloggoh & 245 others vs Haco Industries Limited)[19].
36. Accordingly, this court has jurisdiction to determine this petition on merit.

Right to access to information

37. The right to Access to Information is provided for in article 35 of *the Constitution* as follows: -
- Access to information.
1. 35. (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
38. Other than being a human right, the right to access to or freedom of information, is an important tool to engage and empower citizens in demanding for transparency and accountability in the exercise of public power. Which brings out the intrinsic nexus between the right to information and freedom of expression. The twinning of these rights, aid in the fight against crime such as corruption, economic crimes, money-laundering, amongst others. See for instance the United Nations Convention against Corruption (UNCAC), 2005 whose Chapter Two is particularly important on the right to information.
39. The centrality of these rights in governance as well as protection or exercise of other rights cannot be gainsaid which justifies strict and restrictive interpretation of any limitation to the right.
40. It is therefore, important how public authorities and the courts apply the right to access to information, and build jurisprudence which will shape the practice.

Emphasis on the duty of disclosure

41. *Access to Information Act* was enacted to further and facilitate the realization of the right to access to information. Section 4(4) of the Act emphasizes on the duty to disclose and makes non-disclosure permissible only on the exceptional circumstances set out in section 6.
42. The person seeking to justify a particular limitation of a right or fundamental freedom, bears the burden of proving that the provisions of article 24 of *the Constitution* have been complied with. See article 24(3) of *the Constitution* which states that: -
- ‘The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied
43. The limitation must satisfy the article 24 test.
44. The general rule is that, any limitation of a right of fundamental freedom shall not be interpreted in a manner that jeopardizes the essence of the right concerned, but, any limitation shall be interpreted strictly and in favour of the right at issue.
45. Thus, unless there is good reason stated in law, a citizen should not be impeded from accessing information held by the State or a State entity that was needed for the exercise or advancement or protections of a right.

Article 24 analysis

46. It bears repeating that, the law leans towards the promotion of access to and disclosure of information. And, non-disclosure is permitted only in exceptional circumstances.
47. In accordance with Article 24 of *the Constitution*, any limitation of rights and fundamental freedoms, must, inter alia: -:



- a. Be provided by law.
 - b. Be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, considering all relevant factors including those enumerated in Article 24 of *the Constitution*.
 - c. Be proportionate;
 - d. Not derogate from the core or essential content of the right
48. The burden of justifying the limitation on the right to access of information rested on the respondents as provided for in article 24(3) of *the Constitution*.
49. The respondent has confirmed that they held the documents in question but had surrendered the originals to the Ethics and Anti-corruption Commission. The respondents also stated that these documents are available in PPR website, where the petitioner can obtain them, and so they need not provide them to him.
50. The respondent has to demonstrate that the limitation imposed on a constitutional right was fair, reasonable, necessary, and justifiable in a democratic society and that it fell within the exceptions provided in the *Access to Information Act*. It must pass article 24 analysis.
51. The duty to disclose information of the tenders lay with the respondent. The duty is not diminished or abrogated by the fact that the documents may be accessed through other fora.
52. The respondent contends that, and were legally obligated to prove that the information is limited by virtue of sections 6(1) (a) of the *Access to Information Act*. They did not show how the information sought will undermine the national security of Kenya.
53. The letters seeking for the information were written on 21/12/2023 and delivered immediately.
54. Th respondent replied on 05/01/2024, through his advocates and indicated that the petitioner’s letters to the respondent were only brought to the attention of the respondent on 3/01/2024 and therefore more time was required for the compilation of the information sought.
55. In the said communication, the respondent acknowledged the importance of the petitioner’s oversight function and undertook to furnish him with the information.
56. It appears from the evidence that EACC asked for the original documents on 05/02/2024 which was over one month since the letters by the petitioner were brought to the attention of the respondents.
57. Section 9 of the Act requires the state or state organs to give a decision on application for access to information within 21 days. or respond to the request within that period.
58. The respondent ought to have acted on the request for information expeditiously. But, they did not. The inertia is a breach or threat to breach the right to information. Nevertheless, there are intervening incidents with significant effects on the viability of relief for provision of the documents; which shall be dealt with separately especially in determining the request for provision of the documents.
59. It is worth noting that, the respondents are under constitutional and legal obligation to allow the petitioner under article 35 of *the Constitution* and *Access to Information Act* to access information in their possession and held on behalf of the public. The duty to disclose is the rule; and non-disclosure is permitted only in exceptional circumstances set out in law, for instance section 6 of *Access to Information Act*.



60. See the Court of Appeal e of respecting constitutional rights in the case of Attorney General v Kituo cha Sheria & 7 others [2017] eKLR and stated;

“The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection, and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human, and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

61. The respondent should not take the right to access to information in article 35 of *the Constitution* as a fringe benefit it may choose to obey or not to obey. It is integral to democracy and governance as well as to the realization of right of expression; and enabler in checking exercise of public power calling for transparency and accountability.

62. The respondent’s contention that the information sought is limited by sections 6(1) (a) of the *Access to Information Act* has not been proved.

63. The overall impression of the evidence in this petition, and submissions by counsel for the parties and the law, is that, the respondents violated the petitioner’s right of access to information.

Provision of documents

64. In a Replying Affidavit sworn on 08/05/2024 by its county secretary John Mayiani Tuya, it was deponed that the Ethics and Anti-corruption Commission on 05/02/2024 wrote to the respondent informing them of ongoing investigations on alleged procurement irregularities on account of a complaint by the petitioner with respect to tender number NCG/MACHINE REPAIR/001/2022-2023 and tender number NCG/OT/04/2022-2023 the subject matter of this proceedings. The commission therefore requested the original documents relating to the said tenders. Therefore, the said documents are in the custody of the commission and not of the respondent.

65. The respondent contends that the matter is still pending investigations before the commission. Furnishing the said documents to any other person and or entity including the petitioner who is the complainant before the commission will likely impede on the due process of law and undermine the ongoing investigation by the commission.

66. The court notes that, investigations by EACC are upon a complaint by the petitioner over the same matters forming part of this petition. Equally relevant is the claim by the respondents that they forwarded the original documents to EACC following the letter by EACC calling for the documents. According to the respondents, the investigations are on-going and the documents are with EACC, thus, unable to provide the documents. The petitioner argued that they ought to have retained some copies which they should provide to him. The ideal situation is to retain scanned copies which are capable of certification for official use; this will guarantee the integrity of the documents for purposes of any official engagement such as a request under article 35 of *the Constitution*. Keeping photocopies may not serve the purpose for such suffer lack of probity or propriety required of law. Nothing shows such proper copies were retained.

67. The argument by the respondent in this respect partakes of the appropriateness and viability of the relief for provision of the said documents or copies thereof.

68. Therefore, despite the finding by the court that the respondent breached the petitioner’s right to information, the fact that the documents are with EACC for investigations on matters in question,



is reasonable explanation by the respondent; and the relief for provision of the documents or copies thereof not feasible or appropriate especially in light of the pending investigations.

69. Therefore, the order to compel the respondent to provide the information sought by the petitioner vide the three letters dated 21/12/223 regarding tender number NCG/MACHINE REPAIR/001/2022-2023 for maintenance and repair of Earth moving equipment and vehicles; tender number NCG/OT/04/2022-2023 for supply and delivery of earth moving equipment and use of Helicopters by officials of the respondent is hereby denied.

Disposition

70. In the upshot the petition succeeds to the extent encapsulated in the following specific orders;
- i. A declaration that by failing, neglecting, or refusing to provide the information sought by the petitioner within reasonable time, the respondent has denied, violated, infringed, or threatened the petitioner's right to access to information contrary to the Article 35 of *the constitution* and section 4 of the *Access to Information Act*.
 - ii. All other declarations and orders sought but has not been specifically granted are deemed to be denied.
 - iii. The costs of the Petition are awarded to the Petitioner.

71. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 16TH DAY OF OCTOBER, 2024.

HON. F. GIKONYO M.

Judge

In the Presence of: -

C/A - Otololo

Wambola holding brief for Ongoya for Petitioner – Present

Njiru for Gitonga for Respondent – Present

