



**Okoti v Cabinet Secretary Ministry of Lands and Physical Planning
& another (Petition E381 of 2020) [2023] KEHC 19947 (KLR)
(Constitutional and Human Rights) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19947 (KLR)

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

PETITION E381 OF 2020

LN MUGAMBI, J

JULY 14, 2023

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL
PLANNING 1ST RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The petitioner herein is a member of the public. He describes himself as the Executive Director of an entity known as Kenyans for Justice Development Trust (KEJUDE) which he says was established for purposes of promoting democratic governance, economic development and prosperity.
2. He filed this petition against the 1st and 2nd respondent (the Cabinet Secretary, Ministry of Lands and Physical Planning and the Attorney General respectively) seeking to assert his right to access information held by the 1st Respondent which he avers was denied despite requesting for it.

Petitioner’s Case

3. The petitioner alleged that on August 16, 2019, the Cabinet Secretary for National Treasury and Planning published Legal Notice Number 112 of 2019 in which it he announced that he had considered the recommendations of Cabinet Secretary, Lands and National Planning in directing that the instruments executed in respect of the transactions relating to the merger of NIC Group PLC and Commercial Bank of Africa be exempted for the *Stamp Duty Act*.



4. Consequently, on January 20, 2020, the Petitioner wrote to the 1st Respondent citing the relevant constitutional and statutory provisions and requested that the 1st Respondent do avail to him a copy of the recommendations that it forwarded to the Cabinet Secretary for National Treasury and Planning to facilitate the making of the decision conveyed through the said gazette notice number 112 of June 26, 2019.
5. The petitioner averred that the reason for seeking the information is to understand the reasoning behind the 1st Respondent recommendation whose effect was the said gazette notice that exempted the companies named therein from the provisions of the [Stamp Duty Act](#).
6. The petitioner averred that he neither received a response to his letter nor was he provided with any information and material hence his constitutional rights on the right of access to information under article 35(1) and 3 was violated. He further pleaded that the Respondents action is also in violation of articles 10, 47(1), 201 (a), 232(1) of [the Constitution](#) and sections 3(a), 4, 5(1) (a) (xi), 5(1) (c) of [Access to Information Act](#), 2012 and sections 5 and 6(1) of the [Fair Administrative Act](#), 2015.
7. He, thus payed for the following reliefs: -
 - a. A declaration that the 1st Respondents violated [the Constitution](#) and national legislation by denying the petitioner access to the information and documents which he requested from it vide the petitioner's letter dated 20th January, 2020.
 - b. A declaration that the petitioner and the public should be given the Information and documents he sought from the 1 Respondent vide his letter dated 20th January, 2020.
 - c. A declaration that the petitioner is entitled to the payment of damages and compensation to the tune of Kshs. 10 million for the violation and contravention of his rights and fundamental freedoms by the 1st Respondent.
 - d. A declaration that the 1st Respondent should bear the costs of this petition.
 - e. A mandatory order directing the 1st Respondent to give to the petitioner all the information the petitioner sought from the 1st Respondent vide his letter dated 20 January, 2020.
 - f. An order ordering the 1 and 2 respondents to jointly and severally bear the costs of this Petition for being the parties directly responsible, through actions and/or omissions, for the violations of [the Constitution](#) and the law which necessitated the Petitioner to seek remedy in the Honourable Court.
 - g. The Court gives any other orders required to advance the cause of justice and the rule of law in this case.
8. The respondents did not file any responses but filed written submissions dated January 23, 2022.
9. The petitioner filed initial submissions dated January 27, 2021 and with leave of the court, filed his supplementary submissions dated January 27, 2023.



Petitioner's Submissions

10. The petitioner submitted that failure by the 1st respondent to provide information sought violates the constitution under article 35(1) (a) which gives every citizen the right to access information held by the state. The petitioner argued that the right to access information held by public authorities is critical for democratic conduct of government affairs as the right enables citizens to participate in governance for if the citizens do not know what is happening within government, they will not be able meaningfully participate in the democratic governance of their country. To buttress this submission, the petitioner relied on the South African Case of President of South Africa Vs M & G Media where the court held that it is not possible to hold accountable a government that operates in secrecy.
11. He also cited the case of Trusted Society of Human Rights Alliance & 3 others Vs Judicial Service Commission (2016) eKLR where it was held that with the exception of very limited circumstances, public bodies have an obligation to disclose information and every member of public has corresponding right to receive information.
12. He also relied on the case of Nairobi Law Monthly Vs Kenya Electricity Generating Company & 20 Others where it was held that the state has a duty not only to publish information in public interest under Article 35(3) of the Constitution but also to provide open access to specific information the people may require from the state unless the public body can prove that it is legitimate to deny access to information.
13. It was the petitioner's contention that the 1st respondent was in breach of legitimate public expectation as well as that of the petitioner for failing to strictly comply with the relevant legal provisions to provide the information the Petitioner required.
14. In the supplementary submissions the petition filed in reaction to the State's submissions; the Petitioner submitted that the Constitution has set out principles to guide public finance singling out Article 201(a) which provides that "there shall be openness and accountability including public participation in financial matters." He also relied on Article 210 of the constitution and Section 77 of Public Finance Management Act which he insisted specifically direct that "a public record of each waiver shall be maintained together with reason for the waiver."
15. The petitioner submitted the fact that the constitution provides that a public record of each waiver shall be maintained means that information sought ought to be made available to the public, who include the petitioner.
16. In addition, the petitioner also relied on the Stamp Duty Act, section 106(1) which he submitted it could only be applied if public interest justified the action taken hence the 1st Respondent was under an obligation to make known to the public and the Petitioner reasons for making that decision.

Respondent's Submissions

17. The Respondent faulted the decision by the petitioner to file this suit without exhausting all the available dispute resolution mechanisms provided for in law hence offending the doctrine of exhaustion.
18. The respondent cited Section 14 of access to Information Act whereby the applicant is required to apply to Commission on Administrative Justice (CAJ) requesting a review of the decision made by a public entity in relation to request of access to information and insisted that petitioner ought to have lodged this grievance with the CAJ prior to filing this petition.



19. In this regard, the respondent relied on the case of Commissioner for Human Rights (CHRJ) & another Vs Chief Officer Medical Service County of Mombasa & 3 Others (Constitution Petition No. 003 of 2020), where it was held that:

“If a statute expressly stated exhaustion of internal remedies was an indispensable condition precedent before launching an application to court, the condition had to be fulfilled.”

Also, the decision of Secretary, County Public Service Board & Another Vs Hulbhai Gedi Abdille (2017) eKLR.

20. On whether the 1st Respondent had violated *the constitution* and statute by denying access to information required; the respondent after reviewing the relevant constitutional and statutory provisions, urged this court to find that the 1st respondent had not. In that regard, respondent submitted that Article 35 of *the Constitution* can be limited by law as provided for in Article 24 of *the Constitution* has in fact been limited by dint of Section 6 of *Access to Information Act*.
21. The Respondent’s position was that the information sought by the petitioner squarely falls under the exception 6 (j) being in the nature of:-

“Information provided to a state organ, independent office or constitutional commission conducting investigations, examining audits or review in the performance of its functions.”

22. In this regard, the respondent thus submitted: -

“...The information sought was to be provided only to the Cabinet Secretary of Treasury and National Planning recommending that the instruments executed in respect of transactions relating to merger of NLC Group PLC and Commercial Bank of Africa be exempted from the provisions of the *Stamp Duty Act*, therefore, the respondent humbly submit that the petitioner and public should not be given the information and documents sought...”

Analysis and Determination

23. Having reviewed the petition and the submissions by both parties, I find the following to be the issues for determination in this petition: -
- a. Whether this petition offends the principles of the doctrine of exhaustion.
 - b. Whether the failure to provide the information sought to the petitioner violates the relevant constitution and statutory and/or whether it falls within the statutory excluded information.
 - c. Whether or not the petitioner is entitled to reliefs sought.
24. The respondents staunchly contended that this petition has been filed in disregard of the other statutory dispute resolution mechanisms hence offending the doctrine of exhaustion of other available remedies.
25. They contended that pursuant to *Access to Information Act* No. 31 of 2016, under Section 14, the petitioner ought to have filed his grievance with the Commission on Administrative Justice instead of approaching the court directly.
26. The respondents relied on a number of Judicial Authorities where this principle has been applied.



27. The doctrine of constitutional avoidance or doctrine of exhaustion as others call it basically means that, where there is an alternative statutory procedure for dispute resolution, the procedure should be exhausted first before a party approaches the court for resolution of the dispute. This has been applied by courts in many decisions with the basis being Article 159 (c) *the Constitution* which recognizes alternative means of dispute resolution as a part and parcel of the principles that shall guide Courts and Tribunals in the exercise of judicial authority.
28. In *Geoffrey Muthiga Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others* [2015] eKLR, the Court of Appeal affirmed this principle in the following words: -
- “... It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...”
29. The Supreme Court in *Communications Commission of Kenya & 5 Others Vs Royal Media Services Ltd & 5 Others* (2014) eKLR also upheld this position by holding that the principle of avoidance entails that a court will not determine a constitutional issue when the matter may properly be decided on another basis.
30. The question thus becomes, does this petition violate the exhaustion principle for failure to refer this dispute to the Commission of Administrative Justice?
31. First, there is need to examine the relevant provisions of *Access to Information Act* No. 31 of 2016. The objects of the Act are provided in Section 3. For purposes of this determination, I will only set out paragraph (a) and (b) of Section 3 which state the objects as including:
- a. Give effect to the right of access to information by citizens as provided under Article 35 of *the Constitution*;
 - (b) Provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.
32. Turning now to the facts of this case, it is not disputed that on 20th January, 2020, the petitioner wrote a letter to the 1st respondent (as required by Section 8 of the Act) seeking information that the 1st Respondent had provided to the Cabinet Secretary of National Treasury and Planning, and which the said Cabinet Secretary of National Treasury relied on in exempting NIC Group PLC and National Bank of Africa from the provisions of Stamp Duty pursuant to gazette notice number 112 of 26th June, 2019. This fact was not controverted.
33. Another uncontroverted fact is that this information was neither provided nor his letter responded to. Under Section 9 of *Access to Information Act*, once a request has been made, it is imperative that a decision be communicated to the requester within 21 days. My take is that the decision need not be positive. It can be negative, satisfactory or unsatisfactory, partial or complete. All what the section requires is that a decision to be communicated. It is the decision that then should inform whatever action that the requester takes and that is how section 14 which the Respondent hammered kicks in. Would section 14 come into operation when there is no decision whatsoever that has been made and communicated as was the case here? This becomes my next concern.
34. The Respondent argued that Section 14 of *Access to Information Act* was not complied with by the petitioner prior instituting this petition in court.



35. In my view, Section 14 only comes in where the public officer to whom the request is made has communicated his decision which must not be later than 21 days from the date when the request is made. The fact that Section 14 would only be invoked if there is a “decision” is also evident from the title to that section which reads
- “review of decisions by the commission” and then goes further to list different scenarios that constitute the decisions that are reviewable naming them from ‘a to h’
36. In that list, “omission or refusal to make a decision’ is not included. Under the rule of statutory interpretation; *expressio unius est exclusio alterius*- it means that express mention of one thing is the exclusion of the other not mentioned. I find it relevant here. The failure to include ‘omission or refusal to make a decision as part of the circumstances that can be dealt with under Section 14 while listing all others means that this circumstance is not part of what Section 14 covers.
37. In so holding I am emboldened by the decision of Mativo J in *Night Rose Cosmetics (1972) Ltd Vs. Nairobi County Government & 2 Others* (2018) eKLR where he observed that statutory ousting of courts jurisdiction must be interpreted restrictively.
38. It is thus my considered opinion that the action by the Petitioner of approaching this Court directly cannot be faulted under the doctrine of constitutional avoidance given the facts of this case and the applicable law relied on.
39. The next issue is whether failure to provide the information required by the Petitioner violated *the Constitution* and the relevant statutory provisions or alternatively, the said information was lawfully excepted under provisions to Section 6 (2) (j) of *Access to Information Act*.
40. Article 35 of *the Constitution* provides as follows:
- Article 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)
 - 3) The State shall publish and publicise any important information affecting the nation.
41. Flowing from the above Constitutional position, it is clear that in so far as the information held by the State is concerned, citizens are entitled to that information generally and in fact, *the Constitution* in the spirit of openness and transparency directs the State to publish and publicise important information affecting the Nation. Article 35 (3) therefore is the embodiment of the principle of transparency, accountability and good governance by keeping the citizens well informed of affairs of the State and decisions made on their behalf. It erases cloudiness in performance of public affairs and underscores accountable and transparent approach in provision of information by the State.
42. Consequently, even when a limitation to access the information is necessary, by dint of Article 24 of *the Constitution* it must be strictly limited to the extent that it is reasonable and justifiable in an open and democratic society. Opaqueness is abhorred under the current constitutional dispensation.



43. By dint of Section 6 of *Access to Information Act*, the statutory limitation on access to information has been enacted. The section provides as follows:
44. Section 6 Limitation of Right of access to information
1. Pursuant to Article 24 of *the Constitution*, the right of access to information under Article 35 of *the Constitution* shall be limited in respect of information whose disclosure is likely to—
 - (a) undermine the national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
 - (h) damage a public entity's position in any actual or contemplated legal proceedings; or
 - (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.
 - (2) For purposes of subsection (1)(a), information relating to national security includes—
 - (a) military strategy, covert operations, doctrine, capability, capacity or deployment;
 - (b) foreign government information with implications on national security;
 - (c) intelligence activities, sources, capabilities, methods or cryptology;
 - (d) foreign relations;
 - (e) scientific, technology or economic matters relating to national security;
 - (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
 - (g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
 - (h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government; (i) cabinet deliberations and records;



- (j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions; 9 No. 31 of 2016 Access to Information
 - (k) information that is referred to as classified information in the *Kenya Defence Forces Act*; and
 - (l) any other information whose unauthorized disclosure would prejudice national security.
- (3) Subsection (1)(d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.
- (4) Despite anything contained in subsections (1) and (2), a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.
- (5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.
- (6) In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—
- (a) promote accountability of public entities to the public;
 - (b) ensure that the expenditure of public funds is subject to effective oversight;
 - (c) promote informed debate on issues of public interest;
 - (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
 - (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions. (7) Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if the information has been held for a period exceeding thirty years
45. The Respondents in their submissions placed reliance on the above Section 6 (2) (j) and insisted that information sought is protected information pursuant as information relating to National Security falling under the category of:
- Section Information that should be provided to State Organ, independent office or constitutional 6(2)(j):commission when conducting investigations, examinations, audits or reviews in performance of its functions’
46. This claim came through submissions from the bar and was not backed by any evidence that indicated that there was an evaluation which was done by the 1st Respondent and this conclusion arrived at. It is thus a speculation that deserves no further consideration.
47. Looking at the nature of the information requested, it was information relating to tax waiver. *The Constitution* and the relevant statutes have particular provisions specific to the information concerning tax; over and above what Article 35 of *the Constitution* generally provides.



48. Article 210 (2) (a) expressly imposes a duty to maintain a public record of information on tax waiver together with reasons for the waiver and that theme is also carried through into the Public Finance Management Act No. 18 of 2012 Act at section 77(a) which provides that the ‘The National Treasury shall maintain a public record of each waiver together with reason for the waiver’
49. The Stamp Duty Act Section 106 (1) which was invoked in making the impugned legal notice no. 112 of 26th June, 2023 provides: -
- ‘the Minister may on recommendation of the Minister for the time being responsible for matters relating to land, by notice in the gazette, direct that any instrument or any class of instruments shall be exempted from the provisions of this Act if he is satisfied that it is in the public interest to do so’
50. These two phrases feature very prominently in the said provisions; that is, ‘public record’ and ‘public interest’. Black’s Law Dictionary, 10th Edition defines each of them as follows:
- Public record- A record that a government unit is required by law to keep, such as land deeds kept at court house, public records are generally open to view by the public.
- Public interest- The general welfare of the populace; something which the public as a whole has a stake, especially interest that justifies governmental regulation.
51. In principle, therefore, a public record ought to be available for public view or scrutiny unless there are exceptional circumstances such as those listed in Section 6 and the burden of demonstrating that those circumstances exist lies on the public agency or the person that is claiming public privilege. As clearly mentioned earlier on, no attempt was made by the Respondents to demonstrate by way of evidence if any evaluation was done to determine that the release of documents that petitioner wanted posed a threat of any kind. All what came out in these proceeding was a statement from the bar by Counsel through submissions which I considered inconsequential as it was not evidence that can establish a fact.
52. Moreover, the information that the petitioner wanted relates to a matter where the decision that was made is expressed to have been done ‘in public interest’ meaning that it was for the benefit and the protection of the public. Why would the State Agency concerned then conceal such crucial information on a matter of public finance made for the benefit of the public by shielding it away from eyes of same public it is to benefit?
53. Withholding such information runs contrary to what Article 201 (a) which provides that ‘there shall be openness and accountability including public participation in financial matters.’
54. It is thus clear beyond pre-adventure that the Constitution and the relevant statutory provisions were violated by the failure by the 1st Respondent to provide the information that the Petitioner wanted. It was public information that did not enjoy public privilege or confidentiality more so, because it related to matters of public finance where openness, accountability and public participation is constitutionally commanded. Without providing the information, how would the Citizen exercise their right to hold the public entities to account? That cannot promote accountability in public service through participation of the citizenry and runs contrary to principles of good governance which include public participation, transparency, and accountability.
55. Consequently, by failing to provide information to the Petitioner on matters relating to the tax waiver, not only was Article 35 violated but also other Constitutional provisions that directly advocate for transparency and accountability either generally as in Article 10 (1) & 2 (c) and specifically in matters of public finance namely; Articles- 201 and 210. The refusal to allow access to the recommendations



containing the reasons for the tax waiver shows a State organ sprinting away from public accountability for its actions.

56. The Respondents also contravened statutory provisions more so, Section 9 of the *Access to Information Act* which obligated the 1st Respondent to respond to the request by the Petitioner within 21 days. That was a blatant disregard of the law for which no attempt has been made even to this day to explain the lapse. This is a direct affront to the rule of law principle in Article 10 (2) (a) on National Values and Principles of Governance as it leaves a citizen second guessing ‘when and if’ a State agencies or officials will comply with the law. It undermines the predictability of the law in regulating the relationship between State organs and the public yet *the Constitution* dictates a government under the rule of law.
57. In view of the above findings, it is my finding that the Respondents violated both *the Constitution* and the relevant statutory provisions by withholding the information that the Petitioner sought vide the letter dated 20/1/2020.
58. Concerning the reliefs that the Petitioner is entitled to, this court considers and finds that he is entitled to the following which are hereby granted:
- a. A declaration that the 1st Respondent violated *the Constitution* and National Legislation by denying the Petitioner access to information and documents that the Petitioner requested through the letter dated 20/1/2020.
 - b. A mandatory order directing the 1st Respondent to provide the information sought by the Petitioner through his letter of 20/1/2020
 - c. Each Party to bear its own costs of the suit.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 14TH DAY OF JULY, 2023.

L. N. MUGAMBI

JUDGE

