



Kenya Legal and Ethical Issues Network on HIV & Aids (KELIN) v Cabinet Secretary, Ministry of Health & another; The Commission on Administrative Justice (Interested Party) (Petition E063 of 2021) [2023] KEHC 22351 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E063 OF 2021
LN MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

**KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS
(KELIN) PETITIONER**

AND

CABINET SECRETARY, MINISTRY OF HEALTH 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

THE COMMISSION ON ADMINISTRATIVE JUSTICE ... INTERESTED PARTY

JUDGMENT

1. Kenya Legal and Ethical Issues Network (KELIN) describes itself as a non-governmental organization registered under *Non-Governmental Organization Act* and its objective is to protect and promote health related human rights in Kenya.
2. It sued the respondent Cabinet Secretary, Ministry of Health and Attorney General vide this petition dated 25th February, 2021 citing respondent’s violation of right of access to information; an assertion that the respondents vehemently deny.



Petitioner's Case

3. The petitioner commenced by setting out the relevant constitutional and statutory provisions upon which this petition is founded. It relies on Articles, namely, 2(4), 10, 19(1), 21(1), 35, 129, 201(9), 232 (e) and (f) of the Constitution and proceeds to plead how alleged violations were orchestrated.
4. The petitioner also relies on the provisions of the Access to Information Act No 3 of 2016 and in particular cites Section 9 and Section 14. In addition, the petition relies on the Fair Administrative Action Act, 2015 that calls for public duties to be discharged in an expeditious, efficient lawful and procedurally fair manner.
5. The petitioner pleads that health service is a devolved function to all the 47 counties. The National Government retains the oversight role through legal and policy development under the Fourth Schedule of the Constitution.
6. The petitioners averred that between 1st July, 2009 and June, 2015 the Ministry of Health with the support of various partners including the Global Alliance for Vaccines Immunisation (GAVI) provided significant financial aid to Kenyan Expanded Programme of Immunisation (KEPI).
7. As at September, 2015, the total support both in cash and kind amounted to USD 391,807,902 out of which cash grant was USD 26,178,992. From the amount constituting the cash grant, USD 11,515,312 was paid through partners. The 1st Respondent received a total of USD 14,663,680.
8. GAVI and 1st Respondent had agreed that the USD 26,178,992 would be for operational costs for measles-rubella campaign and to support the introduction of new vaccines – pentavalent, yellow fever, pneumococcal conjugate vaccine, rotavirus and injectable polio vaccine and the human papilloma virus demonstration project.
9. At the end of the project, Global Alliance for Vaccines Immunisation (GAVI) conducted an audit on Kenyan Expanded Programme of Immunisation (KEPI) between September, 2015 and March, 2016 to ascertain if the funds had been used for the intended purpose and in line with the terms and conditions as agreed. The audit came up with findings as follows: -
 - (a) There were questioned expenditures (relating to unsupported or inadequately supported expenditure) of USD 1.6 million.
 - (b) There were balances held of GAVI funds not utilized and not reprogrammed of USD 0.25 million.
 - (c) There were 0.73 million doses of pneumococcal vaccine not accounted for.
10. The results of the audit were then discussed and vide a letter dated 14th June, 2016, the 1st respondent agreed that: -
 - a. The questioned expenditures (as set at 6 (a) above) will be reimbursed.
 - b. The unused programme funds held at the National Treasury (as set at 6 (b) above) will be repaid.
 - (c) KEPI was able to reconcile and account for the unaccounted 0.73 doses of pneumococcal vaccine (as set at 6 (c) above
11. In a transaction made between September and October, 2016; the 1st Respondent reimbursed Global Alliance for Vaccines Immunisation GAVI a sum of over Kshs. 160 million at tax payer's cost.



12. On 14th November, 2016; the petitioner together with other health organizations drawn from health, human rights and governance sector wrote to the 1st respondent to exercise of their right of access to information and requested for the following information that was held by the 1st respondent: -
- (a) A copy of the intergovernmental agreement on the retention of this function (immunisation) by the national government pursuant to Article 187 of the Constitution and Section 26 of the Intergovernmental Relations Act.
 - (b) A report on the action taken against the persons adversely mentioned in the audit report including whether the Ministry has referred this case to relevant authorities for investigations and possible prosecution and whether any funds have been collected from those responsible in line with the law.
 - (c) Copies of documentation showing transfer of payment of the above money from the Ministry of Health and GAVI.
 - (d) Information on the source of the money paid back to GAVI; in particular, the budget line the money came from.
 - (e) Information on the measures the Ministry put in place to ensure compliance with the audit report
 - (e) information on the measures the Ministry put in place to ensure compliance with the audit report.
13. The request was not acted upon and a reminder was sent to the 1st respondent on 29th November, 2016, which was also not responded to.
14. On 23rd August, 2017, the petitioner applied to the Commission on the Administrative Justice for Review of the refusal to supply information in line with Section 14 of the Access to Information Act.
15. Despite the Commission on Administrative Justice repeated efforts to have the 1st Respondent supply the information that the petitioner had sought, the 1st respondent did not provide that information as requested by the petitioner.
16. The petitioner averred that the refusal by the 1st Respondent to supply the information sought violated Article 35 (1) of the Constitution and also Article 10 on values, principles of rule of law, participation of the people, good governance, transparency and accountability.
17. That refusal to supply the information hinders the petitioner's obligation under Article 3 to defend the Constitution and the right to ensure the enforcement of the right to the attainment of the highest standards of health under Article 43(1).
18. That the refusal to provide the information is in breach of principle of openness and accountability whereby Article 201 (d) & (e) which requires that public money shall be used in a prudent and responsible way and fiscal reporting shall be clear.
19. The petitioner thus prayed for the following reliefs: -
- a. A Declaration be issued that the failure by the 1st respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the petitioner's request violates the right to access to information.
 - b) A declaration be issued that the failure by the 1st respondent to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3)



on the basis of the petitioner's request is a violation of Article 10 of the Constitution and specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.

- c) A declaration be issued that the failure by the 1st respondent to provide information sought by the petitioner under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) is a violation of the obligations imposed on the 1st respondent to ensure public finance is utilized in an open and accountable manner and in a prudent and responsible manner as stipulated in Article 201(a) and (d) of the Constitution.
 - d) A mandatory order be issued compelling the 1st respondent to forthwith provide, at the respondents' cost, information sought by the petitioner in the letter dated 14 November 2016.
 - e) Costs of the Petition
20. The petition was supported by the replying affidavit of Allan Achesa Maleche sworn on 25th February, 2021 which reaffirmed the contents of the petition and provided the relevant documents that the petition and affidavit referred to as annexures (AMMI to AAM14).

The Respondents' Case

21. The 1st respondent responded to the petition through the replying affidavit sworn on 5th June, 2023 by the Acting Director of General of health, Ministry of Health, Dr. Patrick Amoth.
22. The respondent denied the allegations in the petition and stated that in its exercise of constitutional powers and functions, it understands that its obligations under Article 21(1) of the Constitution which binds the state and every state organ to observe, respect, promote and fulfil the rights and fundamental freedom in the Bill of Rights and has at all times observed the national values as per the Constitution.
23. The 1st respondent insisted that it provided the petitioner with access to information that had been sought, in any case, that information was always available to the public through a link that the Respondent provided in the letter ref. Moh/adm/conf/caj/1/31 Vol Iii (132) dated 14th August, 2018.
24. The respondent stated that the orders sought should not be granted and pleaded that the petition is frivolous, vexatious and an abuse of the process of court.

Interested Party Response

25. It was contained in its replying affidavit dated 29th October, 2021 which essentially supported the petition.

Petitioner's Submissions

26. Other than filing the written submissions dated 29th March, 2013, the petitioner's advocate M/s Nyokabi Njogu, appeared before this court on 19th April, 2023 and highlighted the submissions. She pointed out that the replying affidavit of the Respondent was filed outside the stipulated timeframe hence the petitioner should be taken not to have responded to the petition.
27. She set out the factual background that informed the filing of this petition and stated that it arose out of mismanagement and misappropriation of donor funds advanced to the 1st respondent on behalf of the public by Global Alliance for Vaccines and Immunization for purposes of immunization of children.
28. That the result of the audit conducted by the donor at the end of the project revealed massive losses through misappropriation and mismanagement of over 160 Million Kenya shillings which the 1st



- respondent refunded using public funds. The information that the petitioner was seeking on public funds used to cover those losses through refunds and whether any action had been taken against those people involved.
29. That information was not provided despite writing to the respondent and seeking the intervention of the Commission on Administrative Justice (Interested Party) as per the provisions of [Access to Information Act](#) which requires that an appeal against refusal for provision of information be by way of review to the Commission on Administrative Justice.
 30. The petitioner submitted that the 1st respondent was in breach of the obligation on disclosure that is spelt out in Section 5 (1) (c) of the [Access to Information Act](#) for failing to disclose information relating to refund of USD 1.6 Million for not informing the public why and how it was done yet this money was intended to support immunization of children under Kenya Expanded Programme Immunization (KEPI). It is that the matter directly affects the public.
 31. Relying on the case of [Khalifa and another v Secretary, National treasury & Planning – Katiba Institute and another \(Interested party\)](#) Constitutional Petition 032 of 2019) (2022) KEHC 368 (KLR) 13 May 2022) Judgment), counsel submitted that there was failure to supply information within 21 days which amounted to refusal. That the purpose of Article 35 was to subject the state to the new regime of openness in dealing with the public.
 32. Counsel submitted the right to information is the founding value of democratic society since it enables citizens to participate in governance and hold leadership to account as held in [Katiba Institute v Presidential Delivery Unity & 3 others](#) (2017) eKLR.
 33. She contended that the state is under an obligation under the International Law to provide access to information. She pointed out that Kenya is a party to [International Covenant on Civil and Political rights](#) (ICCPR) where the right of access to information is protected under Article 19(2). Similarly, the right is protected in the [Universal Declaration of Human Rights](#) (UDHR) under Article 19 as well.
 34. The petitioner thus argued that the state is not only bound by the [Constitution](#) to provide vital information; Section 4 and 5 of [Access to Information Act](#) but also under International Human Rights law for which the State is constitutionally obligated by dint of Article 2(5) and (6).
 35. The petitioner argued that the failure to provide the information sought undermined the principles of public finance under Article 201 and the principles on public service under Article 232 as the funds were not used for intended purpose.
 36. That to date, the 1st respondent had never given any reasons for not providing the information requested six years since the findings of the audit report. Relying on the case of [Republic v Public Procurement Administrative Review Board and 2 others Ex-parte Higawa Enterprises Limited](#) (2017) eKLR, the petitioner’s advocate quoted the review by the court on Article 201 where it stated that: -

“...Article 201 demands openness and accountability in financial matters. Openness is an overarching concept that is characterized by an emphasis on transparency and free unrestricted access to knowledge and information...”
 37. She concluded by urging the court to grant the reliefs sought in the petition.

Interested Party’s Submissions

38. M/s Musembi for the interested party relied on her oral highlights before the court and the written submissions dated 18th April, 2023.



39. She was firm in her submissions that let the interested party was supporting the petition. She echoed the submissions by the petitioner's counsel that KEPI Project was an important project that affected the public hence information about the project ought to have been readily disclosed under the principle of maximum disclosure. She relied on the case of *Nairobi law Monthly Company Ltd v Kenya Electricity Company and 2 others* (2015) eKLR where it was held that the right to information not only implies the entitlement by citizen to information but also imposes a duty on the state to proactively provide the information in public interest.
40. She further relied on International and instruments namely: *ICCPR*, *Universal Declaration of Human Rights*, UN Human Rights General Comment 34 on Article 19 of ICCPR, the Declaration of principle of Freedom of access to Information that affirmed the right of expression and Access to information under the African Charter being part of International Instruments reinforce the principles of access to information and which by dint of Article 2(6) of the *Constitution* are binding on Kenya.

1st & 2nd Respondents Submissions

41. M/s Mwangi appeared for both respondents. She relied on her oral highlights, the written submissions dated 6th June, 2023 and the replying affidavit of the 1st respondent of even date.
42. She submitted that the petitioner was not a donor in the KEPI Programme. Further, that the petitioner had not even indicated the rights they seek to advance upon receiving the information, describing the petitioner as a busy body.
43. In regard to the Interested Party, she submitted that it is a body funded by the tax-payer but had chosen to wade into this dispute in partisan manner by taking up and prosecuting the petitioner's case to the extent of not even disclosing that the information provided by the 1st Respondent was sufficient.
44. Referring to the contention that the respondent had not provided information, she insisted that the respondent had provided all the information at its disposal and pointed to paragraph 44 of petitioner's affidavit which she said the petitioner had confirmed that the 1st respondent provided the information that it required.
45. She submitted the petitioner had clearly indicated that the body responsible for the information was KEPI hence the information should have been sought from KEPI or the donor. She argued that the 1st respondent had no constitutional mandate to provide the information as there was an independent body which should have done so (KEPI) and not the 1st respondent as it had no such information to give.
46. Concerning the issue of documents that effected the transfer of funds between GAVI and MOH; she submitted that the information was a matter for the Ministry and GAVI; and that GAVI should be asked to provide the same.
47. She submitted that the right to information under Article 35 of the *Constitution* is not a right that can extend to juristic persons citing the ration in the *Nairobi Law Monthly case* (*supra*).
48. She contended that the dispute concerns finances and ought to be resolved as a civil matter, not as a constitutional issue. She submitted:

“... it is money that has brought the dispute. If it is a dispute on access to information, it is the donor who should have been in court not the petitioner...”



49. Miss Mwangi was emphatic that the 1st respondent did not violate the right of any citizen.
50. In the written submissions, counsel for the respondent contended that the petition had not been drawn with precision showing how the right of Access to information had been violated. She relied on the case of *Judicial Service Commission v Gladys Boss Shollei & another* (2014) eKLR and *Annarita Karimi Njeru v Republic*, which held that a constitutional dispute alleging violation of rights ought to define the dispute to be decided with particularity and reasonable precision.
51. In a quick rejoinder, M/s Nyokabi Njogu took issue with the submissions on standing and relied on Articles 22 and 260 of the *Constitution* on the expanded category of persons that can file constitutional petitions alleging violation of fundamental freedoms or violation of the *Constitution*.
52. In response to the submissions on the ratio in Nairobi law Monthly case that a right under Article 35 does not extend to a juristic person, M.s Nyokabi countered that this authority was longer applicable following the enactment of the *Access to Information Act* which defines a person to include a juristic person.
53. She concurred that the right of Access to Information can be limited but the limitation must comply with the requirements of Article 24 of the *Constitution* which has to be justified in an open and democratic society.
54. Referring to the affidavit of Allan Makache that the 1st Respondent counsel had pointed to, she submitted in paragraph 26 of the affidavit, the deponent was categorical that the 1st respondent did not provide information.
55. On submissions by the Respondent counsel that KEPI is an independent entity from Ministry of Health from which information should have been directly sought, she insisted that it is a body run by the Ministry of Health (the 1st respondent).
56. As to the submission that the interested party was partisan, she argued that stating a position should not make the interested party termed partisan.

Analysis and determination

57. Having reviewed the pleadings, the affidavits and submissions by all parties herein, it is my view that that the following are the issues for determination in this petition: -
 - i. Whether the petitioner has the requisite locus standi to institute this petition.
 - ii. whether as a juristic person, the petitioner can allege violation of right of access to information under Article 35 of the *Constitution*.
 - iii. Whether, given the facts of this case, the 1st respondent was the one responsible for providing the information sought by the petitioner or not.
 - iv. If No 2 is in the affirmative, whether the 1st Respondent availed the information sought fully or partly.
 - v. Whether in the circumstances of this case the 1st respondent violated the rights to information of the petitioner under Article 35 of the *Constitution* or in any other right under the *Constitution*.
 - vi. Whether the petitioner is entitled to the reliefs sought.



58. On the 1st issue, the 1st respondent submissions was that the petitioner was not a donor under the Kenya Expanded Programme on Immunization and had also not even cared to show the rights it would advance upon getting the information it was seeking hence the petitioner was just a busy body.
59. In response, M/s Nyokabi for petitioner submitted that the Constitution has expanded the scope of persons that can institute constitutional petitions alleging that the bill of rights or the Constitution had been violated. In that regard, she relied on Articles 22 and 258 of the Constitution.
60. It is indeed correct that Articles 22 and 258 of the Constitution has expanded the scope of persons that may institute a constitutional petition on violation of bill of rights or the Constitution generally. It need not be the person directly affected or person having a direct stake, one can institute a constitutional petition in public interest. The cited provisions have elaborated on this and I need not belabor the point.
61. Needless to say, it is not a blank cheque that allows abuse of court process by busy bodies through filing of frivolous or vexatious litigation. Courts forever remain vigilant to ensure that their processes are not abused so that only bona fide litigation is given the nod. In Mumo Matemo v Trusted Society of Human Rights & 5 others (2021) eKLR where their Lordships upheld this principle observed thus: -
- “...this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts...However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold...”
62. In a case that claims it has been instituted in public interest, it is necessary to demonstrate that the benefits or the remedies sought in the litigation would accrue to the public at large or a large section of the public.
63. In the present case, the petitioner alleges that the matter touches on misappropriation of donor funds that were provided to the 1st respondent for use in health programmes that targeted the immunization of children in general. The need to know if the money was applied for the stated purpose is a question of great public interest.
64. Furthermore, it was also alleged in the petition that after the audit was done by the donor (GAVI) the 1st respondent offered to repay the funds that had been misappropriated using public coffers. That also raises a public interest question on whether these resources were applied prudently.
65. In view of those considerations, I do find that the petition as framed raises matters of great public interest for which any person, including the petitioner herein, may institute a petition to determine if there was violation of the Constitution or fundamental rights and freedoms under the bill of rights. I thus do not agree with the contention by the 1st respondent that that the petitioner is a busy body who is motivated by frivolity.
66. On whether a juristic person in the capacity of the petitioner can raise claim of violation of fundamental rights under Article 35 of the Constitution which the 1st respondent hammered relying on the decision of Nairobi Law Monthly v KENGEN (*supra*), that prevailed prior to the enactment of the



[Access to Information Act](#), 2016. The Act has enlarged the scope of persons that can seek information by expanding the category to include juristic persons under Section 2 which states as follows:

“any individual who has Kenyan Citizenship, and any entity that is controlled by one or more Kenyan Citizens,”

67. Consequently, the submission by the 1st respondent that the right of Access to Information cannot be claimed by a juristic person does not represent the current position and it thus fails.
68. Was it the responsibility of the 1st respondent to avail the information sought to the petitioner?
69. This issue arises from the submissions made by the 1st respondent counsel in which she stated that the petitioner had indicated that KEPI (Kenyan Expanded Programme for Immunization) was the body in which the information which is sought was held, hence according to the 1st respondent that was the rightful institution to which its request for information should have been directed. She submitted: -

“... they have indicated that the people responsible for this immunization programme is KEPI – Information could have easily been sought from KEPI and then the donor...”
70. M/s Njogu in a quick rejoinder discounted this contention and submitted KEPI operated under the 1st respondent.
71. If KEPI was an independent entity the 1st respondent should have exonerated itself from that responsibility by pleading that fact and backing it up with evidence not raising the issue through submissions. Submissions is not evidence that can never answer a factual issue.
72. Moreover, upon examination of the annexures that were produced in this petition via various affidavits being the correspondences seeking the information on GAVI Audit by various organizations dated 14th November, 2016 and one dated 26th November, 2016; they were all addressed to the 1st respondent – Cabinet Secretary, Ministry of Health.
73. When the two letters were not responded to and a complaint for review was made to the Commission on Administrative Justice (Interested Party), via the letter of 23rd August, 2017, the Commission on Administrative Justice directed its letter dated 14th September, 2017 to Mr. Julius Korir, Principal Secretary, Ministry of Health, Afya House, P.O Box 30016 – 00100, NAIROBI.
74. Then followed another letter to the Principal Secretary in the Ministry of Health this time, Peter K Tum P O Box 30016, Nairobi which was sent by CAJ on 8th June, 2018.
75. Another letter was also sent to the same address to Principal Secretary, Peter K Tum on 24th June, 2018 and another on 17th August, 2018.
76. The Ministry reacted to these correspondences by sending out the letter of 14th August, 2018, Ref. Moh/adm/conf/caj/1/31 Vol. Iii (132) and signed by Peter K Tum, Principal Secretary in which he inter alia wrote: -

“I wish to regret the delay in sharing the information requested and reassure you of my commitment to serve in accordance with the law and adhere to the requirements in the [Access to Information Act](#) No 31 of 2016...”
77. Even taking this particular portion of the response only, it is evident that the 1st respondent understood quite clearly that the responsibility to supply the information required squarely fell under its mandate. It did not shift that responsibility to any other entity.



78. In view of the apparent admission by the 1st respondent to CAJ of its responsibility in regard to the information sought through the respondent letter of 14th August, 2018; the respondent cannot now be allowed to run away way of submissions. The submission is not evidence, lacks merit and is contrary to the evidence on record.
79. The next issue is whether the 1st respondent discharged the obligation to supply the information that was required in full.
80. The initial letter that was directly sent to the 1st respondent by the petitioner is what is attached as annexure “AM 4” in the supporting affidavit of Allan Maleche and indicated the scope of information required as follows: -
- a. kindly provide us with copy of the intergovernmental agreement on the retention of this function by the national government pursuant to Article 187 of the Constitution and Section 26 of the Intergovernmental Relations Act.
 - b. A report on the action taken against the persons adversely mentioned in the audit report including whether the Ministry has referred this case to relevant authorities for investigations and possible prosecution and whether any funds have been collected from those responsible in line with the law.
 - c. Copies of documentations showing transfer of payment of the o money from the Ministry of Health and GAVI.
 - d. Information on the source of the money paid back to GAVI; in particular, the budget line the money came from.
 - e. Information on the measures the Ministry put in place to ensure compliance with the audit report.
81. The letter by the petitioner to the 1st respondent in compliance with section 8 of Access to Information Act that requires that anyone seeking information should do so in writing in English or Kiswahili to the person holding the information.
82. Under Section 9 of Access to Information Act, upon receipt of this latter, it was imperative for the 1st respondent to respond to the same within 21 days whereby it could indicate if the information was available or not or whether it would be released or not, if not willing to release to provide reasons for declining.
83. The letter did not elicit any response from the 1st respondent.
84. This prompted the petitioner to write to the Chairperson of Commission on Administrative Justice after its second reminder letter was also ignored. The 2nd reminder was on 29th November, 2016. The letter to Commission on Administrative Justice was on 23rd August, 2017. The two letters are annexures (AMM 5)” and AMM 6” respectively.
85. The Commission of Administrative Justice had been requested by the petitioner to commence the process of review by dint of Section 14 of the Access to Information Act. It swiftly swung into action and wrote to the Permanent Secretary of the 1st Respondent on 14th September, 2017 – annexure (AMM 7). Despite giving that 1st respondent 14 days to respond, the letter was not responded to by the 1st respondent.
86. On 28th April, 2018, the Commission on Administrative Justice wrote a second letter “AMM 8’ seeking an update of any progress in providing information, there no response was received.



87. On 8th June, 2018, the Commission on Administrative Justice wrote to the Principal Secretary of the 1st respondent another letter and endorsed with words ‘Personal Service’ reminding that it was the final reminder for the 1st respondent to act on the requests made. That letter is ‘AMM 9’.
88. The letter did not elicit any response. On 24th July, 2018, another letter to the Principal Secretary of 1st respondent was sent this time round, with CAJ indicating it would summon the Principal Secretary for the unresponsive office conduct exhibited so far. The letter is “AMM 10’.
89. It would appear that this is what jostled the 1st respondent to respond via the letter of 14th August, 2018 in which stated interalia: -

“I wish to highlight that the information sought is within the public domain on the website of GAVI (<https://www.gavi.org/about/governance/audit-and-investigations/>) and other MoH Development Partners, including HENNET, a complainant, which receives direct financial support from GAVI, and which is the umbrella body of all Health NGOs, including the other complainant.

I recognize that requests for information of Access to the same is a constitution right as per Access for Information Act No 31 of 2016. It is against this background that the information is attached...”

90. The letter is annexure ‘AMM 11’. It is this letter that the 1st respondent relied on and contended that it had supplied the information needed. That letter together with the information attached, i.e. GAVI Audit report was acknowledged by the Commission on Administrative Justice via letter of 17th August, 2018 and by copy of the same forwarded the the attached information to the petitioner. That letter is ‘AMM 12’.
91. The petitioner upon receipt wrote back to the CAJ the letter dated 8th October, 2018 ‘AMM 13’ indicating that the information provided was partial and detailing the outstanding information as follows: -
- a. A copy of the intergovernmental agreement on the retention of this function by the national government pursuant to Article 187 of the *Constitution* and Section 26 of the *Intergovernmental Relations Act*.
 - b. A report on the action taken against the persons adversely mentioned in the audit report including whether the Ministry has referred this case to relevant authorities for investigations and possible prosecution and whether any funds have been collected from those responsible in line with the law.
 - c. Copies of documentations showing transfer of payment of the o money from the Ministry of Health and GAVI.
 - d. Information on the source of the money paid back to GAVI; in particular, the budget line the money came from.
 - e. Information on the measures the Ministry put in place to ensure compliance with the audit report.

Signed

Allan Maleche

Executive Director



92. The Commission on Administrative Justice wrote to the Ministry of Health i.e. 1st Respondent on 8th October, 2018 and attached the letter by the petitioner, stating as follows: -
- “.. We humbly but firmly request you to respond to the foregoing within the next seven (7) days from date of receipt to allow us bring this matter to a conclusion.”
93. The question that this court is required to determine is, was the requested information availed?
94. It is quite evident that from the word go, there was deliberate resistance by the 1st respondent to provide the information the petitioner was seeking. Indeed, the 1st Respondent conduct was contrary to Section 9 of *Access to Information Act* No 31 of 2016 which required it to communicate to the requester of information within 21 days of receiving the request which it did not.
95. Secondly, the 1st respondent also ignored several letters from the Commission on Administrative Justice and to date even the last letter calling upon it to supply the outstanding information has never been responded to.
96. Article 35 of the *Constitution* provides as follows: -
- 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.
97. From the above constitutional position, it is clear that citizens are entitled to the information held by the state. the *Constitution* even calls upon the state to publish all the important information affecting the nation.
98. Article 35 sets out a foundation for transparency and openness in running of public affairs by ensuring that the public is kept abreast of what goes on in government. Public affairs are no longer dens of secrecy. Information sharing by Government is meant to promote and enhance participation of the people in governance to promote accountability in public affairs. Withholding information from the public is tantamount to taking away their right to participate in governance. Only information that can be properly justified in law may be exempt from release.
99. In the present case, despite the bullish desire exhibited by the 1st respondent in withholding the information, it never even bothered to say why it was acting so perilously. The reasons remain unexplained to date.
100. Under Section 9, the 1st respondent could have indicated: -
- a. Whether it held information sought or not and/or
 - b. Whether it approved the request for information, and in case of decline, give reasons.
101. That conduct by the respondent so far is sufficient to make a finding that the rights of access to information for the petitioner were violated.



102. Turning back to the question of whether the information it supplied was sufficient; the 1st respondent only supplied a copy of GAVI Audit Report which it attached to its letter of 14th August, 2018 annexures 'SAA 11' that it sent to CAJ.
103. The letter by the petitioner had 4 other different requests. The respondent attempted to avoid those other requests by stating that the information was in the GAVI Website which it then cited.
104. This conduct by the 1st respondent was escapist. I have personally examined the letter of the petitioner keenly and it is easy to tell what petitioner's request letter listed cannot be in a donor's website. For instance – how would one expect to find a copy of Inter-governmental agreement between National and County Governments pursuant to Article 187 of Constitution in the donor's Website? How about the report of action taken on the persons mentioned in GAVI Audit report and whether refunds had been collected from found to have misappropriated and the information of funds paid back to GAVI?
105. It is also important to underscore that the information that the petitioner sought touched on donor funds that were entrusted to the 1st respondent for the utilization in matters of health for public generally. These were thus public funds of which the principles of public finance enshrined on Article 201 (a) and (d) of the *Constitution* applied.
106. Article 201 (a) and (d) out rightly imposes a duty of ensuring openness, accountability and public participation in matters of public finance while article 201 (d) requires that public money shall be used in prudent and responsible manner.
107. By failing to provide the information on utilization of the said funds, the 1st respondent violated the principles of openness, transparency and accountability under Article 201(a) of the *Constitution*.
108. To that extent, the request by the petitioner for the 1st Respondent to indicate the actions taken in regard to that audit report was not far-fetched as members of public in general desired to know what actions were being taken to remedy the loss of funds meant for their benefit.
109. Consequently, failing to provide the information required by the petitioner not only violated Article 35 of the *Constitution*, but also the provisions of Article 201 (a) on transparency, openness and accountability in public finance. It shows a government institution that was unwilling to be accountable to the people in the administration of resources entrusted for the public benefit which is against the constitutional principles already alluded to in the various articles.
110. Before I conclude, it is also necessary that I address the submission by the respondents that the petitioner did not indicate the rights it wanted to advance upon receiving the information it was seeking. That submissions filed in the face of Section 4 (2) of *Access to Information Act* which clearly says that the right of access to information is not affected by:
 - a. Any reason the person gives for seeking access or
 - b. The public entity's belief as to what are reasons for seeking access.
111. It is thus, clear that the provisions of Article 35 of the *Constitution* on right of access to the information of the petitioner and indeed those of the public were violated by the actions of the 1st Respondent inclusive of the 1st respondent's failure to adhere to the principles of openness, transparency and accountability in public finance required under Article 201 (a) of the *Constitution*.
112. The petition thus succeeds and petitioner shall be entitled to the following reliefs: -



- a. A declaration do hereby issue that failure by the 1st Respondent to provide information sought by the Petitioner under Article 35 (1) (a) violates the right of access to information under Article 35 (1) (a).
- b. A declaration do hereby issue that failure by the 1st Respondent to provide the information sought by the Petitioner under Article 35 (1) is a violation of obligation placed upon the 1st Respondent to ensure openness, transparency and accountability in matters of public finance under Article 201 (a) of the Constitution.
- c. A mandatory order is hereby issued compelling the 1st Respondent to provide forthwith, at the 1st respondent's cost, the information sought by the petitioner in the letter of 14/11/2016.
- d. Pursuant to rule 26 (1) of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules, 2013, costs are granted at the discretion of the Court. Owing to the flippant attitude exhibited by the 1st Respondent in responding to the request by the petitioner thereby leading to filing of this suit, it is ordered that the 1st respondent shall bear the costs of this petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

L N MUGAMBI

JUDGE

