



REPUBLIC OF KENYA



**Mwaniki v Attorney General & 6 others (Constitutional Petition E342 of 2020)
[2023] KEHC 22385 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E342 OF 2020**

AC MRIMA, J

SEPTEMBER 21, 2023

BETWEEN

PETER MAINA MWANIKI PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

AMICA SAVING AND CREDIT LIMITED 2ND RESPONDENT

PATRICK MULI (FORMER GATANGA DO) 3RD RESPONDENT

**KAMAU (FORMER MURATA SACCO MANAGER AT
KIRWAR) 4TH RESPONDENT**

JAMES GACAU 5TH RESPONDENT

JAMES KIMANI MBUI 6TH RESPONDENT

**MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 7TH RESPONDENT**

JUDGMENT

Background:

1. The Petitioner, Peter Maina Mwaniki, claims that his mother, Ruth Muthoni Mwaniki died intestate on 1st November 2004. It is his case that at the time of her death, she held an account with Amica Saving and Credit Limited, the 2nd Respondent (hereinafter referred to as ‘the Sacco’) that had over Kshs. 10 Million.



2. The Petitioner contends that upon her mother's death, John Kibaiya Mwangi, Jamleck Ngugi Ng'ang'a and Peter Maina Ng'ang'a, all of whom are now deceased, purported to be bona-fide beneficiaries of the estate of Ruth Mwaniki's and fraudulently accessed the Petitioner's mother's Account No. 8017, in the Sacco.
3. In order to achieve the foregoing, the Petitioner contended that on 28th December 2004, John Kibaiya Mwangi, Jamleck Ngugi Ng'ang'a and Peter Maina Ng'ang'a went to the 3rd Respondent, Patrick Muli, the District Officer at the time, and got a letter written to the Mr. Kamau the 4th Respondent herein who at the time was the Manager Murata Sacco at Kirwar.
4. It is the Petitioner's case that the 3rd and 4th Respondents conspired with John Kibaiya Mwangi, Jamleck Ngugi Ng'ang'a and Peter Maina Ng'ang'a to fraudulently withdraw all the money from his deceased's mother's account.
5. The Petitioner asserts that since the year 2005, he has been requesting the Sacco for the details of his late mother's account for purposes of taking out letters of administration to no avail.
6. The foregoing sequence of events precipitated the instant Petition.
7. The Respondents vehemently opposed the Petition.

The Petition:

8. Through the Petition dated 16th September 2020, supported by the Affidavit of Peter Maina Mwaniki deposed to on a similar date, the Petitioner sought to have this Court vindicate violation of his Constitutional rights.
9. He averred that the Sacco's refusal to divulge the details of his mother, Ruth Mwaniki account details was contrary to Article 33(1)(a), 35(1)(b) 40(1)(a) of *the Constitution* and has tortured him psychologically, mentally and physically.
10. It was further his case that the 3rd and 4th Respondent's actions were contrary to section 45 of the *Law of Succession Act* that prohibits intermeddling with the deceased's property without the express permission of the Honourable Court.
11. The Petitioner posited that the Mr. Kamau, the 3rd Respondent who was the District Officer abused his office and Article 10, 73 and 75 and 232 of Constitution and is not fit to serve as a civil servant.
12. The Petitioner claimed that his bid to report the 3rd Respondent's actions to the Ministry of Interior and Coordination of national Government, The Attorney General the 1st and 2nd Respondents herein respectively and the Police have been unfruitful.
13. It was his case that despite issuing many demands and notices about instituting suit, the Respondents have not done anything.
14. The Petitioner prayed for the following reliefs;
 1. This Honourable Court to declare that my constitutional rights were and are still being violated.
 2. This Hon. Court to order the 2nd, 4th, 5th and 6th Respondents to divulge the details of account no. 8017 of Ruth Muthoni Mwaniki, who died on 01/11/2002 to enable me apply for letters of administration and have the rightful beneficiaries enjoy their inheritance.



3. This Honourable Court to Order the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents to compensate me for violating my rights to property an information.
4. This Honourable Court to order the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents to compensate me for violating my rights for not to be tortured and for human dignity which they have violated.
5. This Honourable Court to Order the Respondents to pay for costs and interests of this Petition.
6. This Honourable Court to Order the Amica Savings and Credit Limited to ensure that my mother's money is save (sic) till letters of administration are given by the Honourable Court for the money to be given to the rightful heirs.
7. This Honourable Court to Order the Inspector general of Police to investigate the matter and have the cilprits brought to book.
8. Any other relief this Honourable Court deems fit.

The Submissions:

15. The Petitioner filed written submissions dated 29th Jul 2021. It was his case that, contrary to the Sacco's assertion that it was obliged to release the money to the next of kin, no one was allowed to meddle with his mother's account until Court gave its nod.
16. It was his submissions that the evidence of the next of kin has not been produced before this Court and as such the Saccos's assertion is farfetched.
17. It was his case that the 3rd Respondent did not enter appearance and has not produced the list of beneficiaries he claimed was given to him by unidentified elders.
18. In respect to the Preliminary, it was his case that the grounds raised are not merited since Article 35 of *the Constitution* as read with section 51(1) & (2)(h) of the *Law of Succession Act* gives him the right to information that he needed to file for succession.
19. The Petition submitted that the 1st Respondent, who is the principal government adviser had abdicated its duty by supporting the corrupt activities of its Senior Civil Servants.
20. It was his submission that the 1st and 7th Respondents had acknowledged that what happened at Kirwara was criminal and that, alone, was enough proof that his constitutional rights had been violated.
21. In the end, the Petitioner urged the Court to dismiss the Preliminary Objection and allow the Petition. He reiterated that his constitutional rights under Article 10,22,23,24,25,27,28,29,33,35,40,47,48 and 50 had been violated.

The 1st and 7th Respondents' case:

22. The Attorney General & the Ministry Interior and Coordination of National Government challenged the Petition through the Preliminary Objection dated 24th November 2020. It stated as follows;
 1. That the Petition is a non-starter and bad in law as the Petitioner has not been granted and /or filed Grant of Letters of Administration ad Litem and therefore has no jurisdiction to file and prosecute this Petition on behalf of the alleged Estate of Ruth Muthoni Mwaniki.



2. That without prejudice, the Petition does not indicate with precision the Constitutional violations complained of and neither does the Petition particularized the manner in which the alleged violations were committed by the Respondents, particularly the 1st and 2nd Respondent. The Petition therefore fails the competency test set out in the case of Anarita Karimi Njeru vs. Republic [1976] eKLR.
3. That the issues raised are largely criminal in nature hence this Honourable Court has no jurisdiction to hear and determine the issues raised.
4. That by virtue of the grounds above, the present proceedings are incompetent and a blatant abuse of the court's processes and therefore ought to be dismissed

The submissions:

23. The 1st and 7th Respondents filed written submissions dated 27th April 2021 and 17th November 2021 in opposition to the Petition and in support of the Preliminary Objection respectively.
24. It was its case that since the Petitioner was seeking to protect his mother's estate, under Order 4 Rule 4 of the Civil Procedure Rules, he ought to have instituted the Petition in a representative capacity.
25. It was their case that he ought to have first obtained Grant of letters of Administration to give authority to file suit on behalf of the deceased's estate.
26. The Respondents submitted further that the Petitioner ought to have taken out limited letters of administration Ad litem that is generally used when the estate of a deceased is required to be represented in Court proceedings.
27. It therefore was the 1st and 2nd Respondents' case that the Petitioner lacked locus standi in this suit. To buttress its case, reference was made to the decision in Julian Adoyo Ongunga & Another -vs- Francis Kiberenge Bondeva (suing as the administrator of the Estate of Fanuel Evans Amudavi (Deceased) (2016) eKLR.
28. The Respondents submitted that miscarriage of justice would arise if tis Court were to entertain this Petition withot evidnce of death of Ruth Muthoni Mwaniki and her relation with the Petitioner.
29. It further was the Petitioner's case that the Petition had not been pleaded in a precise manner, a requirement of Constitutional Petitions established in the case of Anarita Karimi Njeru -vs- Republic (1979) eKLR.
30. To demonstrate lack of precision, the Respondents referred to prayer 3 and 4 where the Petitioner sought compensation for violation of property, information and not to be tortured and submitted that the Petitioner had failed to set out with precision the manner of violation of the rights.
31. The respondents further submitted that this Court lacked the requisite territorial jurisdiction since the cause of action arose in Murang'a. To that end, reference was made to the Rule 8(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 that requires every case to be instituted in the High Court within whose jurisdiction the alleged violation took place.
32. In the submissions dated 17th November 2021, the Respondents submitted that the Petition did not raise any cause of action against the 1st and the 7th Respondents.



33. It was its case that the alleged conduct of the 3rd Respondent is criminal in nature and is not in relation to relation to his capacity as an employee of the 7th Respondent.
34. The Respondents urged Court to find that the Petition was unproved and ought to be dismissed. Persuasion to that end was drawn from the decision in *Abdiwahad Ibrahim Ali & Another -vs- Inspector General of Police & 3 Others* where it was observed;

... the Petitioner also prays for damages for alleged violation of fundamental rights. In all fairness, considering that no violation of constitutional rights has been proved, such a relief is totally misplaced and unavailable in the circumstances.
35. In the end, The Respondents prayed that the Petition is dismissed.

The 2nd, 3rd, 4th and 6th Respondents' case:

36. Amica Savings and Credit, Patrick muli, Kamau & James Kimani Mbui filed written submissions dated 27th February 2021 only.
37. It was their case that the Petitioner had no legal capacity to sue since a deceased person can only be represented in any legal proceedings by a person authorized to do so on behalf of the estate.
38. It was their case that since the whole Petition revolves around bank account of deceased person Ruth Muthoni Mwaniki, the Petitioner had failed to prove that he had the consent to act on behalf, a requirement under section 82(a) of the Law of Successions Act.
39. On the merits of the Petition, it was submitted that the Petitioner had failed to prove that the Respondents conspired to withdraw funds from his deceased's mother's account.
40. It was further her case that the Petitioner had failed to prove that there were monies in her mother's account at the time of her death and even if there was, the Respondents did not withdraw after her demise.
41. It was submitted further the Ruth Muthoni Mwaniki had Kshs. 87,000/- in her account at the time of her demise and that no coffee farmer had Kshs. 10,000,000/- in their account during that period.
42. They claimed that they transferred Kshs. 87,000/- to the account of Peter Maina Mwaniki, John Kibaiya Mwaniki and Peninah Wanjiru, being the sons and daughters respectively of Ruth Muthoni Mwaniki and closed her account.
43. The Respondents submitted that the Petitioners had not shown sufficient cause in support of his case. They prayed that the Petition is dismissed with costs.

The 5th Respondent's case:

44. James Kamau Gachua, the General Manager of Amica Savings & Credit opposed the Petition through his Replying Affidavit deposed to on 15th January 2021.
45. He deposed that Ruth Muthoni Mwaniki was their client at Kirwara Branch through the old account No. 7661-04-8017 and that the Petitioner herein is her son.
46. The 5th Respondent reiterated the position that the Petitioner lacked legal capacity to institute suit for lack of documentation demonstrating his administrative role.
47. It was his deposition that the Petition arises out of criminal cause and ought not to be a Constitutional Petition.



48. He further deposed that it is common practice that a deceased's account would be inherited by the next of kin from the Chief or through authority of Deputy County Commissioner for amount less than Kshs. 100,000/-.
49. He deposed, therefore, that the money in the deceased's account was transferred to her children, Peter Maina Mwaniki, John Kibaiya Mwaniki and Peninah Wanjiru, through account 8056-09-809, in the year 2005.
50. He urged the Court to find that the Petition is without merit and ought to be dismissed with costs for lacking legal basis.

Analysis:

51. The Petition subject of this judgment is a challenge to alleged infringement of the Petitioner's right to information by the Respondents.
52. As a preliminary issue, it is the duty of a Court before which a matter is laid to ascertain whether it has the requisite jurisdiction. That was the position taken by the Respondents that this Court lacks jurisdiction over the matter for the Petitioner's want of locus standi for failure to obtain the requisite letters of administration over the Estate of Ruth Muthoni Mwaniki, the deceased herein.
53. In dealing with the preliminary issue, this Court will take a tour of Article 35 of *the Constitution*.
54. Article 35(1) of *the Constitution* provides as follows: -
 - 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.
55. The right of access to information under Article 35 of *the Constitution* is not among the rights enumerated under Article 25 of *the Constitution* which rights cannot be limited in anyway whatsoever. That being the case, any limitation to the right of access to information must comply with the requirements set out in Article 24 of *the Constitution*.
56. In balancing the citizen's rights to information and the permissible limitations to access to information, the *Access to Information Act*, No. 31 of 2016 (hereinafter referred to as 'the Access Act') was enacted.
57. The object and purpose of the Access Act is in Section 3 thereof. It is to: -
 - 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;
 - c. provide a framework to facilitate access to information held by private bodies in compliance with any right protected by *the Constitution* and any other law;
 - d. promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;



- e. provide for the protection of persons who disclose information of public interest in good faith; and
- f. provide a framework to facilitate public education on the right to access information under this Act.

58. Section 4 of the Access Act provides for the right of every citizen to information. Section 6 provides for the limitation to the right of access to information. Section 6(1) provides as follows: -

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.

59. Courts have variously dealt with the limitation of the right of access to information. In Presidential Election Petition No. 4 of 2017, Njonjo Mue & Another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR, the Supreme Court had the occasion to consider the limitations on the right of access to information. Before the Learned Judges was an application by H.E. Uhuru Muigai Kenyatta (then the 3rd Respondent) which sought to expunge from the record Internal Memos belonging and exchanged by members of Independent and Electoral and Boundaries Commission (IEBC) (then the 2nd Respondent).

60. It was the Respondents' case that the said Internal Memos were illegally obtained and were still the subject of internal discussions within the IEBC and as such, the Petitioners could not place any right to use them in the pretext of exercising right of access to information. It was further their case that the



Petitioners could not explain how they came into possession of internal memos which under Section 27 of the IEBC Act, fell within information that the Commission was entitled to decline as it was still being used at a deliberative stage.

61. Upon weighing and balancing the Petitioners' right of access to information vis-à-vis that of the Commission to decline to divulge documents being used at deliberative stage, the Learned Judges made the following findings in the first instance: -

... that Article 35(1)(a) and (b) of *the Constitution*, read with Section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd Respondent.

62. In agreeing with the Respondents' claim that the Petitioners ought not to have accessed the impugned information, the Court went ahead and addressed the limitation of the right of access to information. The Court specifically referred to those instances where such information relates to a matter under deliberation by a person or entity and made following findings: -

(14) This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information.

(16) The rights of access to information relevant to the matter before us is therefore from the foregoing, limited by operation of law, in this instance, being the procedures for access of any information under Section 27(2) of the *Independent Electoral and Boundaries Commission Act*, as read together with Sections 6(1) of the *Access to Information Act*. Article 24(1) of *the Constitution*, further sets limitations on rights including necessarily the right to access to information. It provides thus:

A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and
- (d) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.



63. The Court further spoke to the balance which Courts must strike while protecting litigants' right of access to information under Article 35 of *the Constitution* against the requirement of adherence to prescribed procedure while seeking such information. They observed as follows: -

..... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

(23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under *the Constitution* and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.

(24) The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information

64. In the end the Learned Judges stated that there is need to protect right to property if information being sought would violate that right. It expunged from the record the Internal Memos and stated that: -

(25) The Court also has to find a balance between the Petitioners' rights to access of information as guaranteed under Article 35 of *the Constitution*, against those of the 1st and 2nd Respondents' rights to privacy and protection of property also guaranteed under Articles 31 and 40 of *the Constitution*. If access was in the instance, obtained through the laid down procedure under Section 27 of the *Independent Electoral and Boundaries Commission Act*, and Section 6(1) of the *Access to Information Act*, then the rights of both the Petitioners and the Respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information.

65. In this matter, the reason why the Respondents declined to release the information sought is two-fold. One, on account of locus standi and, two, on account of possible infringement of professional ethics.

66. There is no doubt that the *Law of Succession Act*, Cap. 160 of the Laws of Kenya, is an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

67. The said Act provides on how estates of deceased persons are to be managed and administered. Of paramount importance is the requirement of a party to obtain relevant representation under that law.



The representation may be by way of a Grant of Probate of Will (in testamentary succession) or Letters of Administration (in intestate succession).

68. One of the limitations to access to information permitted under Section 6 of the Access Act is on account of a disclosure that will impede the due process of the law. Another limitation arises when the disclosure involves 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. Another limitation relates to where disclosure will infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.
69. The above limitations speak to the matter at hand. Without the requisite representation, any disclosure to the Petitioner will be tantamount to impeding the due process of the law and that will amount to the unwarranted invasion of the privacy of the deceased's estate.
70. The foregoing is in line with the holding in the Presidential Election Petition No. 4 of 2017, Njonjo Mue & Another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR where the Supreme Court stated thus: -
- (23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under *the Constitution* and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.
71. The Respondents are, therefore, within the law in declining to disclose any information they hold on account of the deceased without the Petitioner obtaining the relevant representation.
72. This Court, hence, finds and hold that the Respondents acted within the law and, as such, the Petitioner has failed to demonstrate any infringement of *the Constitution* and the law.

Disposition:

73. Having failed to demonstrate any constitutional infractions in this matter, the following final orders do hereby issue: -
- a. The Petition is unmerited and is hereby dismissed.
- b. The Petitioner shall bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A the Petitioner in person.

N/A for the 1st and 7th Respondents.

Mr. Nyambura for Mr. Ngimo the 2nd - 6th Respondents.

