Okioma & 12 others (9th to 13th Petitioners suing on behalf of Health and Human Rights Civil Society and Non- Governmental Organisation) v Kagwe, Cabinet Secretary for Health & 8 others; Kenya National Commission on Human Rights (KNCHR) (Interested Party) (Petition 218 of 2020) [2023] KEHC 22245 (KLR) (Constitutional and Human Rights) (15 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22245 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 218 OF 2020

M THANDE, J

SEPTEMBER 15, 2023

BETWEEN

ERICK OKIOMA ..... 1ST PETITIONER

ESTHER NELIMA ..... 2ND PETITIONER

CHRIS OWALLA ..... 3RD PETITIONER

CM ..... 4TH PETITIONER

FA ..... 5TH PETITIONER

KB ..... 6TH PETITIONER

MO ..... 7TH PETITIONER

EL ..... 8TH PETITIONER

KATIBA INSTITUTE ..... 9TH PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV/AIDS (KELIN) ..... 10TH PETITIONER

THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA) ..... 11TH PETITIONER

TRANSPARENCY INTERNATIONAL KENYA ..... 12TH PETITIONER

ACHIENG ORERO ..... 13TH PETITIONER

9TH TO 13TH PETITIONERS SUING ON BEHALF OF HEALTH AND HUMAN RIGHTS CIVIL SOCIETY AND NON- GOVERNMENTAL ORGANISATION

AND

MUTAHI KAGWE, CABINET SECRETARY FOR HEALTH ... 1ST RESPONDENT

PATRICK AMOTH, AG DIRECTOR GENERAL, MINISTRY OF HEALTH ..... 2ND RESPONDENT

CORNEL RASANGA, GOVERNOR OF SIAYA COUNTY ..... 3RD RESPONDENT

COUNCIL OF GOVERNORS ..... 4TH RESPONDENT

FRED OKENG'O MATIANGI, CS INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 5TH RESPONDENT

HILLARY NZIOKI MUTYAMBAI, INSPECTOR GENERAL OF THE POLICE, KENYA ..... 6TH RESPONDENT

JOSEPH WAKABA MUCHERU, CABINET SECRETARY FOR INFORMATION AND COMMUNICATIONS ..... 7TH RESPONDENT

THE COMMISSION ON ADMINISTRATIVE JUSTICE ..... 8TH RESPONDENT

DANIEL YUMBYWA, CHIEF EXECUTIVE OFFICER, KENYA MEDICAL PRACTITIONERS' AND DENTISTS COUNCIL ..... 9TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR) ..... INTERESTED PARTY

JUDGMENT

1. In their Petition dated 18.6.2020 and filed in the height of the COVID-19 pandemic, the Petitioners seek the following reliefs:

    a. A declaration be issued that the 1st -6th and 9th respondents' failure to proactively publish and publicize important information about the pandemic and the State's response violates the right of access to information as guaranteed under Article 35(3).

    b. A declaration be issued that the 1st and 4th respondents' failure to affirmatively provide information about the COVID-19 pandemic and the government's response violates the right to life as guaranteed under Article 26(1).

    c. A declaration be issued that the 1st and 4th respondents' failure to affirmatively provide information about COVID- 19 pandemic and the government's response violates the right to health as guaranteed under Article 43(1) (a) and the *Health Act*, 2017.

    d. A declaration be issued that the 1st -6th and 9th respondents' failure to affirmatively provide information regarding the pandemic and the State's response violates Article 10 and 232 of the *Constitution*.

e. A declaration be issued that the 1st -6th and 9th respondents' failure to provide for information sought by the petitioners violates their right of access to information as guaranteed under Article 35(1) and the *Access to Information Act*.

f. A declaration be issued that the 1st -6th and 9th respondents' failure to provide the information sought by the petitioners violates their right to freedom of expression as guaranteed under Articles 33(1) (a).

g. A declaration be issued that the 1st and 4th respondents' failure to provide the information sought by the petitioners violates their right to life as guaranteed under Article 26(1).

h. A declaration be issued that the 1st and 4th respondents' failure to provide the information sought by the petitioner violates their right to health as guaranteed under Article 43(1) (a) and the *Health Act*, 2017.

i. A declaration be issued that the 1st -6th and 9th respondents' can be held criminally liable in their individual capacities for breach of sections 28(4) (b) of the *Access to Information Act*, 2016.

j. A declaration be issued that the 1st and 2nd respondents' decision to extend mandatory quarantine as communicated via circular by the 2nd respondent violated the 7th and 8th petitioners' rights to fair administrative action as guaranteed under Article 47 and the *Fair Administrative Action Act*, 2015.

k. A declaration be issued that the 8th respondent has failed to exercise its mandate to provide oversight and ensure the enforcement of the *Access to Information Act*, 2016 and has resultantly violated Article 35 of the *Constitution*.

l. An order of mandamus be issued compelling the 1st -6th and 9th respondents to provide the petitioners with the information sought in the letters dated 30 March 2020; 6 April 2020; 9 April 2020, 10 April 2020, 15 April 2020, 17 April 2020, 27 April 2020 and 28 April 2020 within 48 hours of this order.

m. An order of mandamus compelling the 8th respondent to exercise its statutory mandate under section 21(1) (a) of the *Access to Information Act*, 2016 to investigate the alleged violations of the Act.

n. An order of mandamus compelling the 7th respondent, in consultation with the 8th respondent, to draft and publish regulations within 90 days of this order on:

    i. The manner in which applications under the *Access to Information Act*, 2016 may be made;

    ii. The form in which information requested under the *Access to Information Act*, 2016 may be supplied; and

    iii. The measures to be taken by public entities to facilitate the exercise of the right under Article 35 of the *Constitution* and the implementation of the *Access to Information Act*, 2016.

o. An order of mandamus compelling the 7th respondent, in consultation with the 8th respondent, to draft and publish regulations on the procedures for requesting and supplying information that concerns the life and liberty of a person within 90 days of this order (under section 9 of the *Access to Information Act*, 2016).

p. An order of mandamus compelling the 1st respondent in consultation with the 4th respondent, and other relevant stakeholders, to update and re- publish the Reproductive Maternal and New-born Health Guidelines: A Kenya Practical Guide for Continuity of Reproductive, Maternal, Newborn and Family Planning Care and Services in the Background of COVID 19 Pandemic, to include comprehensive information to health care workers, women and girls on the provision of essential services which includes access to all sexual and reproductive health and rights.

q. An order that the 1st respondent pays general damages to the 4th -8th petitioners for the emotional distress these petitioners underwent as a result of the inadequate information received during the mandatory quarantine period.

r. That the respondents, within twenty-one (21) days from the date the order, file affidavits with the Court detailing their compliance with these orders.

s. Costs of this Petition and any other just and expedient order the Court may deem fit to make.

2. The Petition is founded on Articles 1, 2(1) (4) and (6), 3(1), 10, 19(1), 20(1) (2) and (4), 21(1), 26(1), 27, 28, 29, 33, 35(3), 43(1) (a), 47 and 232 of the *Constitution*; Articles 3, 7, and 19 of the *Universal Declaration of Human Rights* (UDHR); Articles 19 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR); Articles 2, 3 and 12 of the *International Covenant of Economic, Social and Cultural Rights*; Article 16 of the *African Charter on Human and Peoples' Rights* (the Banjul Charter); Article 2 of the *Convention on Elimination of All Forms of Discrimination Against Women* (CEDAW), Article 12 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)*; sections 4(1)(3), 9(2), 25(1) and (2) and 28(4) of the *Access to Information Act*, 2016; section 5(1) and 10 of the *Health Act*; and section 4(3) of the *Fair Administrative Action Act*, 2015.

3. The Petition is supported by the affidavits of Erick Okioma, Esther Nelima, Chris Owalla, CM, FA, KB, MO, EL and Sheila Masinde, the Executive Director of 12th Petitioner all sworn on 18.6.2020; Allan Achesa Maleche (undated); Kelvin Mogeni sworn on 23.6.2020; Christine Nkonge sworn on 30.6.2020; and Achieng Orero sworn on 17.6.2020.

4. The genesis of the matter herein is the declaration by the World Health Organization (WHO) on 30.1.2020 of COVID-19 as a global health emergency of international concern and subsequent declaration as a pandemic on 11.3.2020. The first case of COVID-19 in Kenya was announced by the 1st Respondent on 12.3.2020 and a series of events followed thereafter, to wit, a 7pm-5am nationwide curfew, ban on public gatherings, reduction of the number of passengers in public service vehicles; suspension of international flights with the exception of cargo flights; quarantining of travelers entering the country in government designated facilities; announcement and publication of nationwide curfews; publishing of the *Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020* - the 'Prevention and Control Regulations'; publishing of the *Public Health (COVID- 19 Restriction of Movement or Persons and Related Measures) Rules 2020* – the Movement Restriction Regulations; curfew breakers no longer being held in government quarantine facilities and the Inspector General designating a curfew breakers holding place; issuing of the Kenya COVID-19 RMNH Guidelines, A Kenya Practical Guide for Continuity of Reproductive, Maternal, Newborn and Family Planning Care and Series in the Background of COVID 19 Pandemic among others (RMNH).

5. The Petitioners state that the Movement Restriction Regulations imposed broad limitations on individual movement and transportation into and out of and within infected areas during the

restriction period. The Regulations further required all persons to wear a mask covering the nose and mouth and maintain a 1-meter distance. Further, businesses were required to provide handwashing are sanitizing facilities and regularly sanitize their facilities. Violation of the regulations attracted a fine of Kshs. 20,000/=, 6 months' imprisonment or both. The Rules and Regulations also provided guidance on removal and disposal of bodies of persons who died of Covid-19 and limited the numbers of persons to attend burial or cremation, to 15 persons.

6. Subsequent to the aforementioned series of events, the Petitioners wrote a series of letters to the Respondents, requesting information, under Article 35 of the *Constitution*. These letters are dated 30.3.2020, 6.4.2020, 9.4.2020, 10.4.2020, 15.4.2020, 16.4.2020, 17.4.2020, 18.4.2020, 27.4.2020 and 18.4.2020. The Petitioners sought information on the implementation of the mandatory quarantine; Siaya County's burial of James Oyugi in the dead of the night without dignity, thereby violating cultural norms and in contravention of the standards of burial during the pandemic; the support that the 1st Respondent was providing to healthcare workers risking their health to protect the community; the 8th Respondent's obligation to enforce the *Access to Information Act*, 2016; the rationale for extending quarantine beyond the initial 14 day period; the rationale for mandatory quarantine as punishment for those who allegedly committed curfew offences; and the guarantee on essential reproductive health services during the COVID- 19 pandemic.

7. On 14.4.2020, the 9th, 10th and 12th Petitioners set up a legal and support system to provide pro bono legal advice to those facing human rights violations during the COVID-19. The 10th Petitioner received complaints from the 4th -8th Petitioners, persons, or the family of persons, who were being held in mandatory quarantine. The 4-7th Petitioners complaint was that they arrived into Kenya after the 23.3.2020 travel ban, and at the mandatory quarantine facilities, they were not given information on the protocols and processes to be used during the mandatory quarantine. The 8th Petitioner had to send the Ministrry of Health Quarantine protocols online because her daughter who was travelling had not been given any information and was getting increasingly distressed.

8. On 30.3.2020, the 4th-6th Petitioners wrote to the 1st Respondent requesting that testing takes place and that the results be made available within 24 hours. Further following the concerns raised by the 4th-8th Petitioners, their family members, other individuals in mandatory quarantine, and the media reports on 6.4.2020, the 9th -12th Petitioners together with 23 others organizations and 47 individuals wrote to the 1st Respondent requesting, an explanation as to why the Ministry of Health was reportedly not adhering to its guidelines relating to managing the designated mandatory quarantine facilities; clarification on the circular issued by the 1st Respondent that extended the quarantine, where the extension would apply, why it had been issued, and who would bear the cost of the extension; the total number of designated quarantine facilities as at the date of the letter; the number of health care workers that had been deployed to each of these facilities; the number of people held in quarantine who had been tested and had received their results; the measures being taken to safeguard the health of people in quarantine facilities with pre-existing medical conditions; the time between a positive test and the referral to an isolation facility and whether health care workers and other staff who had contact with people who had tested were also tested and whether healthcare workers and staff had access to personal protective equipment.

9. Due to the increasing frustration for the lack of response, the 8th Petitioner wrote a follow up letter dated 8.4.2020 to the 1st Respondent while the 12th Petitioner wrote a letter and 16.4.2020 to the 8th Respondent asking them to comply with the requirements of the *Access to Information Act*. They stated that following the burial of James Oyugi in Kamalunga village, Simur Kondiek Sub-location, Ukwala on 12.4.2020 the 3rd Petitioner begun to receive enquires from communities in which he was working, who were afraid that the incident would result in a bad omen and that they would be treated similarly if

found with Covid 19. Consequently, the 3rd, 10th and 12th Petitioners, together with 1 other person and 12 other organisations, wrote to the 1st and 3rd Respondents seeking information on the undignified burial and violation of the guidelines for handling bodies that were either suspected or confirmed to be infected with COVID-19. The information requested further included an explanation as to the process undertaken to authorize the burial that took place contrary to the Ministry of Health's' Guidelines for a safe disposal of human remains of a person who had died from suspected or confirmed COVID-19; the measures put in place to ensure that the act was not replicated; the measures put in place to protect and secure the mental health and wellbeing of James Oyugi's family and community and to protect them from stigma and measures for the quarantine or isolation of his close contacts.

10. It was further stated that the 1st Petitioner who was working with a community based organisation in Nyalenda, Kisumu County with an experience in advocacy on behalf of those infected with HIV, TB and Malaria, was becoming increasingly frustrated with the lack of information from the County Government of Kisumu. He had not been told, which facilities had been designated COVID-19 facilities, where people could be tested, the resources made available by the county and how the same were being used.

11. Additionally, it was stated that the 10th Petitioner, collaborated with healthcare workers' unions and conducted 3 surveys to gauge the preparedness of clinical officers, nurses and doctors to respond to COVID-19. Informed by the results of the surveys and lack of information from the 1st Respondent, the 1st and 10th -12th Petitioners, together with 13 other organisations and 14 individuals, wrote to the 1st Respondent on 17.4.2020 seeking information on the provision of support to healthcare workers in response to COVID-19; the number of healthcare workers trained in each designated COVID-19 facility by cadre; evidence of team based approaches in COVID-19 facilities; the number of designated COVID-19 management facilities; their distribution around the country; their capacity to manage severe cases; their capacity to manage critical cases, and laboratory capabilities; the number of personal protective equipment procured and distributed to health care workers and the distribution schedule; the number of healthcare workers tested for COVID-19; and whether health care workers in health facilities treating suspected and confirmed COVID-19 patients were being provided with catering services, accommodation and transport to their accommodation.

12. The 7th petitioner was tested for Covid-19 on 2.4.2020, seven days after he arrived in Nairobi and detained in a mandatory quarantine. He did not receive his results within 24 hours as expected but received oral results after 48 hours. On 7.4.2020, the day his 14-day quarantine period was to end, he and other people in his facility were informed that they were required to stay an additional 14 days because of the positive tests. He wrote to the 1st Respondent on 9.4.2020 seeking an explanation for the extension.

13. Similarly, on learning of the extension of her daughter's quarantine for a further 14 days, the 8th Petitioner wrote a letter to the 1st Respondent on 9.4.2020 and another dated 10.4.2020 to the 2nd Respondent, seeking information as to why her daughter has not been issued with the personal notification slip confirming she had tested negative for Covid 19; why she was still being held in quarantine facility in violation of the Ministry's protocols and best practice recommendations issued by WHO; why she had not been told when she would be discharged and the conditions that would be imposed once discharged; why the 1st Respondent had not informed her daughter about the effect of a positive test of another person at her quarantine facility, would have on her and what protocols had been put in place to address positive tests in the facility; who was responsible for ensuring that people who had tested positive were removed from the quarantine facility as soon as reasonably possible and the steps being taken to mitigate the risk to her daughter and others while still protecting the rights to privacy and dignity of those who had tested positive. .

14. The Petitioners further stated that those affected by the circular issued by the 2nd Respondent extending the mandatory quarantine period beyond 28 days, wrote to the 2nd Respondent and copied the 10th and 12th Petitioners requesting explanation as to why the period was extended based on violations of social distancing requirements yet most of those in quarantine had complied; whether ministry of health officials assigned to their quarantine facilities posed a risk to them; why there was a delay in moving people who had tested positive in the quarantine facilities to isolation facilities; and whether the ministry of health would bear the cost of the extended stay. They also raised an issue of inequitable treatment in quarantine facilities.

15. It was further averred that the 2nd Petitioner, a community health advocate based in Mombasa, Kilifi and Kwale counties faced challenges accessing information about the pandemic and government response; that women were not attending ante-natal and post-natal care and others did not know whether or where to access the health services; that many who lived in Kilifi and Kwale counties travelled to Mombasa to receive essential health services; that following the ban to enter Mombasa, she did not know what to tell them and could no longer assist them effectively.

16. On 27.4.2020, the 1st, 2nd and 10th -12th Petitioners, together with 24 other organisations and 26 individuals, wrote to the 1st, 4th, 5th, 6th, 8th and 9th Respondents and the Interested Party seeking information. From the 1st Respondent, they sought information on the use of mandatory quarantine for punitive measures as part of the COVID-19 response; a justification, legal scientific or otherwise, for the use of mandatory quarantine as a punishment; on the actions being taken to ensure that public health measures were in line with human rights. From the 4th Respondent, they sought information on the number of people being held in mandatory quarantine in each county; the number of people that had been tested in various facilities in the counties; the testing schedule for persons being held in quarantine; and the number of people in quarantine for breach of COVID-19 regulations and rules. From the 5th and 6th Respondents, they sought information on whether the police were being used to screen and decide who was suspected to have contracted COVID-19, and if so, the training the officers had been given; the infection, prevention and control protocols the police were using and whether police officers had access to personal protective equipment. From the 9th Respondent, they sought information as to the criteria used to select hotels and facilities as quarantine centres; the checklist for the approval of the facilities as quarantine facilities; a list of places certified as quarantine facilities as at the date of the letter; approved standard operating procedures at quarantine facilities and designated medical personnel responsible for oversight at each centre.

17. Following the launch of RMNH Guidelines by the 1st Respondent in April 2020, the 13th Petitioner and 12 other organisations that promote access to sexual and reproductive health rights wrote a joint letter on 28.4.2020, raising concerns around the comprehensive nature of the guidelines, seeking clarity and provision of supplementary information on securing sexual and reproductive health rights and a provision of services for women and girls in the country in a manner that was comprehensive and accessible to all.

18. Lastly, the Petitioners stated that as at the date of filing of the Petition, none of the Respondents, had responded to any of the aforementioned letters, save for the 3rd Respondent who only acknowledged receipt but did not provide the information requested. As a result of the aforementioned failure to respond to the letters, the Respondents violated Articles 35(3), 10, 232 (1) (f), 26, 35(1), 29, 27, 47 of the *Constitution*, Sections 4(1) & (3), 9(2), 20, 21 and 25 of the *Accesss to Information Act*, 2016, Section 5(1), 6, 7 and 10 of the *Health Act*, 2017 and Sections 4(1) and (3) of the *Fair Administrative Action Act* .

19. In his replying affidavit sworn on 26.7.2020, on behalf of the 1st, 2nd, 5th, 6th and 7th Respondents, Dr. Patrick Amoth dismissed the allegation that the said Respondents had failed to proactively publish and publicize important information about the pandemic and State response thereto, as alleged by the Petitioners. On the contrary, since the confirmation of the first case of Covid-19 in Kenya, the State consistently put in place a contingency plan on prevention, surveillance, control and response measures in a bid to stop the rapid spread of the virus in the country. He deposed that all the guidelines and measures undertaken by the government to contain the spread of Covid-19 were published and publicized and were made available to the general public including the Petitioners. Further that the Ministry of Health provided prompt and regular updates to the members of public regarding Covid-19 in the country and advised on the modalities of reporting any suspected cases and accessing medical facilities. He denied that there was breach of the Fair Administrative Action Act and contended that mandatory quarantine and its necessary extension was an acceptable WHO recommended practice globally. It was introduced in the country as a precautionary measure to mitigate the spread of Covid-19 at the formative period and to ensure that persons who may have been exposed to the virus remained isolated for the entire 14-day incubation period of the virus to assure their health status.

20. Dr. Amoth further averred that Section 25 of the *Access to Information Act* gives the Cabinet Secretary in consultation with the Commission, the discretion to make regulations for the better carrying into effect the provisions of the Act. Hence this Court does not have power to compel the 7th Respondent to publish subsidiary legislation. He stated that the Petitioners failed to demonstrate that they had suffered any prejudice or hardship due to lack of the alleged regulations; they did not also show with precision that bringing into effect the provisions of the Access to Information Act and fulfilment of its objectives failed due to lack of the regulations. Further that the constitutionality of the *Access to Information Act* is not contended.

21. On his part, the 3rd Respondent, Cornel Rasanga, the Governor of Siaya County swore a replying affidavit on 20.7.2020. He deposed that the issue surrounding the burial of the late James Oyugi was res judicata, the same having been dealt with in Siaya Constitutional Petition 1 of 2020. Further that failure to provide information was due to the fact that the matter was already the subject of an ongoing court process, and County Government of Siaya which had initially formed a taskforce to investigate the matter, had paused its own process to await the final determination of the court. Additionally, the information being sought by the Petitioners was easily accessible online. He urged that in the interests of justice, the Petition as against him be dismissed with costs.

22. The 4th Respondent opposed the Petition vide a replying affidavit sworn by Jacqueline Mogeni, its Chief Executive Officer on 18.1.21. She deposed that pursuant to the declaration of Covid-19 as a global pandemic by the WHO, the guidelines to mitigate its spread, namely wearing of face masks, washing of hands, sanitizing and maintaining physical distance, were being implemented by both the National and the County Governments. Following the spread of the disease locally, the operations in both Government institutions and the private sector were scaled down. Further that a majority of the 4th Respondent's employees were working from home, pursuant to a directive issued by the President through a circular by the Head of Public Service on 23.4.2020, that where possible, government offices, businesses and companies were to allow employees to work from home, with the exception of those in essential services. As such a lot of the information requested by the Petitioners was not readily available in view of the fact that operations in the 4th Respondent's offices were not optimal.

23. She further averred that the 4th Respondent's chairman had been delivering weekly press briefings on the preparedness of the county governments to handle Covid-19; the designated Covid-19 amenities in the counties; the total number of trained healthcare workers; the total bnumber of personal protective equipment kits procured; the total number of quarantine facilities and the number of tests carried out

in the counties. She further averred that the press statements were usually broadcast in both print and electronic media and could be readily accessed on its website and social media platforms. It was stated that in view of the foregoing, the 4th Respondent has not violated the Petitioners' right of access to information under Article 35(3) of the *Constitution* and the *Access to Information Act*. As such the 4th Respondent cannot be held criminally liable for failure to respond to a request of information under section 28(4)(b) of the Act. Further that Section 28(9), vindicates that 4th Respondent. According to the deponent, Counties have continued to put in efforts towards preparedness to handle Covid-19 and those found to have contracted the same are given the necessary medical care and hence the right to life under Article 26(1) of the *Constitution* was not violated. The 4th Respondent contended that the Petitioners have not demonstrated how their right to fair administrative action under Article 47 of the *Constitution* and the *Fair Administrative Action Act* were violated.

24. The 8th Respondent did not file response and submissions to the petition.

25. In his replying affidavit sworn on 6.1.21, the 9th Respondent Daniel Yumbya averred that apart from the Ministry of Health and the Government of Kenya, the medical council provided timeous and accurate information on its role and the actions taken in relation to the Covid-19 pandemic. All this information was accessible at all times to the general public, including the Petitioners, on the Kenya Medical Practitioners and Dentist Council's website at https://kmpdc.go.ke/. He further deposed that the Kenya Health Professions Oversight Authority developed a checklist for inspection of quarantine units for Covid-19 preparedness and response and the requirements for a quarantine unit so as to ensure quality and ethical case. Further, the list of quarantine facilities which had been selected in Nairobi and Mombasa were operational at a time when there was an increase in the numbers of reported cases of Covid-19 and the said list contained details of the officer in charge of each of the centres. He further deposed that the Ministry of Health had provided the Covid-19 protocols for centres situated in schools and those with shared accommodation. Since 2020 to date, the management of Covid-19 patients had changed drastically and all the quarantine facilities had been closed. Consequently, the health facilities treating and managing the Covid-19 patients had isolation facilities managed by the respective hospitals using the existing protocols.

26. The 9th Respondent further deposed that the use of quarantine facilities at the initial stage was intended to mitigate the spread of Covid-19 during the formative period but with the spread of the disease to the communities across the country the practicability the said facilities became untenable. According to the 9th Respondent, the Petitioners have not exhausted their rights to alternative remedies available under the *Access to Information Act* that gives the Commission on Administration of Justice the mandate of oversight and enforcement of the Access to Information Act. Further that all the information requested by the Petitioners was in the public domain and the Petition was thus unnecessary as the Medical Council neither withheld nor denied the Petitioners or any person the information it held. Additionally, he denied that he had violated Articles 35, 10, 232, 33(1) (a) of the *Constitution*, and the provisions of Sections 28 (4) (b) of the *Access to Information Act*.

27. The 10th Petitioner filed a supplementary affidavit by Allan Achesa Maleche sworn on 4.3.21 in response to the 3rd, 4th, and 9th Respondents' and denied their allegations in their replying affidavits. He affirmed that this is a matter that ought to be determined by this Court. Further no evidence was provided that the information sought by the Petitioners was easily accessible online and that it was subject to an enquiry by a task force which had since been halted. He further stated that there was no evidence that a large majority of the 4th Respondent's employees were working from home with restricted access to the office and that the information sought was not readily available due to the operations not being optimal. Also, that the press statements attached as evidence were not made weekly. He dismissed the assertion that the information within the press statements covered what

was requested by the 1st–3rd, 10th and 12th Petitioners; that the only information available was the number of people held in quarantine, and the said data was not disaggregated to indicate the numbers in each county as requested by the Petitioners.

28. Further that the information sought was urgent and was not responded to then or as at the date of filing the Petition or at all. He deposed that publicizing information through a press statement did not negate the duty to provide information directly sought from the 4th Respondent who had an obligation to provide information sought and failing to do so for almost 11 months was a violation of the Petitioners' rights. He further dismissed the 9th Respondent's assertion that information was readily available and contended that the 9th Respondent did not provide accurate and timeous information or evidence on how the checklist and quarantine list were published, if at all and publicized. It was contended that the list dated 24.3.2020 was not evidence of a response to a request that sought information up to 27.4.2020. Further, that the Kenya Medical Practitioners and Dentists Council as an agent of the State had an obligation to provide information sought from it and failing to do so for almost 11 months was a violation of the Petitioners' rights. Additionally, that the 9th Respondent has not provided evidence to show that the information sought was within the public domain and cannot willfully ignore a request for same brought by the citizens of Kenya because he feels it is unnecessary to provide the information.

29. The interested party did not file any response or submissions to the Petition.

30. Before I embark on considering the issues for determination, it is necessary to state that I have looked at the entire record and I do not see the identity of the 4th-8th Petitioners. Only their initials were provided. They were described in the Petition as "persons and the family members of persons who were held in mandatory quarantine after they travelled to Kenya." These Petitioners have been described by their initials and there is nothing on record that discloses their identity to the Court. While the Court appreciates that parties may need to have their identities protected, such parties must disclose their identity to the Court to enable the Court know whose rights are being agitated. The Court has mechanisms for protecting the identity of vulnerable persons who file cases before it or those whose identity may need to be concealed. It is thus not acceptable for parties to move the Court with only their initials. The Court could very well be dealing with and give orders in favour of fictitious persons. In view of the fact that the identity and indeed existence of the 4th- 8th Petitioners cannot be ascertained, the Court will not delve into the question as to whether their rights were violated or their entitlement to general damages as sought.

31. After considering the pleadings and submissions by the respective parties which were highlighted by the parties' respective counsel. The following issues arise for determination:

    i. Whether this Court has jurisdiction to entertain this petition in view of:

        a. The doctrine of exhaustion.

        b. The doctrine of res judicata.

    ii. Whether Articles 35(1) and (3), 26(1), 43(1) (a), 10, 232, 33(1) (a) and 47 of the *Constitution* were violated by the Respondents.

    iii. Whether the 1st – 6th and 9th Respondents should be held criminally liable in their individual capacities for breach of Section 28(4)(b) of the *Access to Information Act*, 2016.

    iv. Whether the orders sought should be granted.

Whether this Court has the Jurisdiction to Entertain this Suit

32. The 3rd Respondent challenged the jurisdiction of this Court to entertain the Petition on the ground that the Petitioners have not exhausted all available mechanisms under the law. Reliance was placed on the provisions of Section 14 of the *Access to Information Act* (AIA), which require an applicant aggrieved by the decision of any entity from which he seeks information to seek review of the same by the Commission on Administrative Justice CAJ. Further that by virtue of Section 23(3) of the *AIA*, this Court is devoid of original jurisdiction in matters relating to access to information.

33. The 9th Respondent also challenged the jurisdiction of the Court to hear the Petition on similar grounds. The 9th Respondent argued that the Petitioners ought to have invoked the provisions of Section 14 of the *AIA* to request a review of the alleged decision refusing to grant access to information sought. It was submitted that the Petitioners have not provided a copy of the request for review made to the CAJ as set out under Rule 5 of the First Schedule of the *Commission on Administrative Justice Regulations, 2013* under the *Commission on Administrative Justice Ac*t, 2011. Further that the Petitioners have not demonstrated that there were exceptional circumstances preventing them from requesting the review of the decision of the Respondents. It was additionally submitted that the CAJ is the body mandated to enforce the provisions of the *AIA*. As such, it is the CAJ that is to determine whether or not the Respondents may be held criminally liable in their individual capacity for any breach of the Act. The Petitioners ought therefore to revert to the CAJ, the body mandated to enforce access to information.

34. For the 1st – 8th, 10th, 12th and 13th Petitioners, it was submitted that no internal mechanisms are available and that the CAJ has been named a respondent in the Petition for failure to exercise its mandate. They urged the Court to be guided by the case of *Jawara v the Gambia*, in which it was stipulated that for the exhaustion rule to be applicable, the remedy must be available, effective and sufficient. On availability, it was stated that "A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."

35. It was further submitted that the 12th Petitioner did on telephone and in writing request the CAJ (8th Respondent) to address the continued and wilful failure by the 1st Respondent to respond to letters requesting information. This was done in line with Part V of the *AIA*. Additionally, the Petitioners copied and dispatched to the CAJ, all letters of request for information. In response thereto, CAJ wrote to the 1st Respondent on 8.4.2020 requesting that he responds to the letter of 6.4.2020 as required under Sections 9(1) and (4) of the *AIA*. CAJ further wrote to the 3rd Respondent on 3.6.2020 requesting that he consider the matter in the letter of 17.4.2020 and revert. No further action was however taken by the CAJ. Despite reminders and invitations to participate in this Petition where its conduct and exercise of its mandate have been called into question, CAJ has refused to do so. It was thus submitted that CAJ's failure to discharge its mandate, the internal remedies are neither available nor effective. The Petition is thus also a prosecution of the 8th Respondent's conduct or failure to discharge its mandate under the *AIA*. It was submitted that Section 9(4) of the *Fair Administrative Action Act* (FAAA) recognises that exceptional circumstances may exist to warrant judicial intervention before exhaustion of internal remedies. The Petitioners thus argued that exceptional circumstances as envisioned in Section 9(4) of the *FAAA* do exist herein.

36. The 11th Petitioner echoed the submissions of its Co-Petitioners.

37. The Petition herein is anchored on the right of access to information, which the Petitioners claim was violated by the Respondents. The right of access to information is a fundamental right that is guaranteed under Article 35 of the *Constitution of Kenya, 2010* as follows:

> 1. Every citizen has the right of access to—
>
> a. information held by the State; and
>
> b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
>
> 2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
>
> 3. The State shall publish and publicise any important information affecting the nation.

38. The *AIA* was enacted to give effect to Article 35 of the *Constitution*. Section 4 of the Act restates the provisions of Article 35(1) on the right to information as follows:

> 1. Subject to this Act and any other written law, every citizen has the right of access to information held by—
>
> a. the State; and
>
> b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.
>
> 2. Subject to this Act, every citizen's right to access 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 the person's reasons for seeking access.
>
> 3. Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
>
> 4. This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
>
> 5. Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.

39. The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the *Constitution*. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the *Constitution* and Article 10 cannot be achieved unless the citizen has access to information. These are the words of Majanja, J in the case of *Famy Care Limited v Public Procurement Administrative Review Board & another* Petition No. 43 of 2012 [2012] eKLR.

40. Section 8 of the *AIA* stipulates the procedure for an application for access to information. Such request shall be made in writing in English or Kiswahili and the applicant shall provide details and

sufficient particulars for the public officer or any other official to understand what information is being requested. Inability to make a written request for information is not a hinderance. The law makes appropriate provision and requires that an applicant who is unable to make a request for in writing is facilitated to make a request in manner that meets their needs.

41. Section 9 makes provision for the processing of such application as follows:

1. Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application

2. Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.

3. The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—

    a. the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or

    b. consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

4. As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—

    a. whether or not the public entity or private body holds the information sought;

    b. whether the request for information is approved:

    c. if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

    d. if the request is declined, a statement about how the requester may appeal to the Commission;

5. A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.

6. Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.

42. Section 9(1) provides that a decision on an application for access to information shall be made as soon as possible, but in any event, within 21 days of receipt of the application. Subsection (2) provides that where the information sought concerns the life or liberty of a person, such information shall be provided within 48 hours of request. Under Subsection (6), an application in respect of which no response has been received within the stipulated period shall be deemed to have been rejected. In the procedure as set out, an applicant may apply to the CAJ for a review of the decision of an entity in relation to a request for access to information. Such application is to be made within 30 days from the date the decision in question is notified to the applicant.

43. The Respondents being public entities are bound by the provisions of Article 35(1) of the *Constitution* and the provisions of the *AIA* and the obligation to disclose is placed upon them. The Petitioners' complaint is that they sought information from the indicated Respondents, which information was not forthcoming within the period stipulated, and indeed at the time of filing the Petition. By dint of the provisions of Section 9(6) therefore the application is deemed to have been rejected. Following this rejection, the Petitioners were at liberty to invoke the provisions of Section 14 of the *AIA* which provide a remedy as follows:

> 1. Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—
>
> a. a decision refusing to grant access to the information applied for;
>
> b. a decision granting access to information in edited form;
>
> c. a decision purporting to grant access, but not actually granting the access in accordance with an application;
>
> d. a decision to defer providing the access to information;
>
> e. a decision relating to imposition of a fee or the amount of the fee;
>
> f. a decision relating to the remission of a prescribed application fee;
>
> g. a decision to grant access to information only to a specified person; or
>
> h. a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.
>
> 2. An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.
>
> 3. The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.
>
> 4. The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

44. It is easily discernible from the above provisions that the *AIA* has provided a remedy and the procedure to be followed, in the event an application for access to information is rejected. To begin with, an application will only be deemed to have been rejected if no response is received within 21 days. Thereafter an applicant is to apply within 30 days to the CAJ for a review of the rejection of the application for information. A person aggrieved by the decision of the CAJ may then appeal to the High Court within 21 days of the date of the decision. Put differently, the jurisdiction of this Court may only be invoked by a party aggrieved by an order made by the CAJ. Section 23(3) of the *AIA* provides as follows:

> A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.

45. It is the Respondents' case that the Petitioner ought to have exhausted the remedy available to them before moving to this Court. They argue that this Court does not have original jurisdiction to enforce the provisions of the *AIA*. The Petitioners countered this by contending that the remedy provided in the *AIA* was not available or effective on account of the failure by the CAJ to discharge its statutory mandate. As such, this Court has the requisite jurisdiction to hear and determined the Petition.

46. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by the Constitution, statute or both. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court succinctly stated:

> A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

47. This Court derives its jurisdiction principally from Article 165(3) of the *Constitution* which provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration

48. The unlimited original jurisdiction of the High Court in civil and criminal matters includes the jurisdiction to hear any question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. It is not in doubt that Article 165(3) of the *Constitution* confers upon the High Court unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of the *Constitution*. In particular and relevant to the matter herein, under Article 23 this Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

49. The jurisdiction of this Court may however be limited by the Constitution and statute in certain instances. The Court may thus only exercise that jurisdiction which has been conferred upon it by the Constitution, statute or both. There is a long line of judicial authorities where our superior courts have stated that where an alternative sufficient and adequate forum exists for resolving a dispute, then such forum should be pursued before invoking the court process.

50. In the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:

11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In Halsbury's Laws of England, Volume 10 at paragraph 319, the learned authors state:

> " The subject's right of access to the courts may be taken away or restricted by statute."
>
> ...
>
> Paragraph 723 states:
>
> "Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner."

12. In *Narok County Council v Trans-mara County Council* (*supra*) this Court held that:

> " ... though section 60 of the Constitution gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty."

13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of the Constitution only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court *in The Matter Of The Interim Independent Electoral Commission* [2011] eKLR:

> "[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent."

14. Similarly, in *Suleiman Ibrahim v Awadh Said* [1963] EA 179, Windham, C. J. held that section 33 of the Rent Restriction Act of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.

51. What I understand from the cited authority is that the jurisdiction of this Court does not extend to matters that a statute has directed should be done by another entity. The jurisdiction of the Court is ousted where statute has conferred exclusive jurisdiction on an entity to deal with claims arising therefrom.

52. The filing of constitutional petitions where other dispute resolution mechanisms are available has been the subject of many a court case. In *Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others* [2011] eKLR, relied on by the 1st and 2nd Respondents, Asike-Makhandia, J. (as he then was) stated:

> The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose. In the case of *Harrikson v Attorney General* (1979) WLR 62, the Privy Council held:-
>
> "...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individuals by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial controls of administrative action...".

53. As can be seen, the failure by an entity or an organ to comply with the law does not necessarily entail a contravention of a right or fundamental freedom requiring redress by the constitutional court.

54. Our courts have repeatedly stated that where a clear sufficient and adequate legal avenue and procedure for redress has been provided by law, such procedure must be followed to the letter. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated:

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

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

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

> Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, this Court emphasized:-
>
> "....In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions...."
>
> Similarly, in the case of *Republic v National Environment Management Authority exparte Sound Equipment Ltd*, [2011] eKLR, this Court observed:-
>
> ".....Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."
>
> This authority obviously puts to rest the submission by the respondent that she need not have exhausted all other available remedies before suing the appellants for judicial review.

57. And in the case of *Charles Apudo Obare & another v Clerk, County Assembly of Siaya & another* [2020] eKLR, Aburili, J stated:

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

> "It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the *Constitution* to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.
>
> The preamble of the *Access to Information Act*, 2016 clearly states that it is an "Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes."
>
> "It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the *Constitution*. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-
>
> "The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-
>
> a. the release of any information withheld unlawfully;
>
> b. a recommendation for the payment of compensation; or
>
> c. . any other lawful remedy or redress."
>
> Section 23(3) of the Act provides that:
>
> "A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made."
>
> "I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the *Access to Information Act*. Section 23(5) of the Act actually provides that an order of the Commission on

> Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice."

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

58. From the cited authorities it can be seen that this Court does not have original jurisdiction to deal with matters relating to access to information. In this regard, I agree with Korir, J. (as he then was), who stated that it could not have been the intention of Parliament when enacting the *AIA* to confer both original and appellate jurisdiction on the High Court in matters where the CAJ has been given jurisdiction under the Act.

59. While acknowledging the process set out in the *AIA* for redress, the Petitioners submitted that they wrote to and copied to the CAJ letters to the Respondents seeking the information in question, but did not get any relief. As such, the remedy is neither available nor effective.

60. Section 14(4) of the *AIA* provides that procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission. Section 22 provides:

> 1. A person wishing to lodge a complaint under this Act shall do so orally or in writing to the secretary or such other person as may be duly authorized by the Commission for that purpose.
>
> 2. A complaint lodged under subsection (1) shall be in such form and contain such particulars as the Commission may, from time to time, prescribe.
>
> 3. ...

61. It is quite evident that the CAJ has not prescribed any form or particulars for lodging a request for a review by, or a complaint with the Commission. This notwithstanding, Section 14 of the *AIA* stipulates that an aggrieved person may apply in writing to the CAJ requesting a review of a decision of an entity in relation to a request to access information. The provision contemplates an application in writing for review of a decision complained of. In light of this, the act of copying to the CAJ, letters to the Respondents requesting information as the Petitioners did, cannot be said to be an application in writing for review of the Respondents' decisions. I have also looked at the exhibited letter dated 16.4.2020 addressed to the CAJ by the 12th Petitioner. What was sought in that letter was that CAJ indicate to us in writing and within 48 hours, what actions and the timelines for the actions the Commission will take in line with the Provisions of Part V of the *Access to Information Act* to ensure that this information is received within 48 hours. To my mind, this cannot be said to be an application for review as contemplated in the Act, and even if it were, the Petitioners could only move this Court by way of appeal in line with the provisions of Section 23(3) of the *AIA*.

62. The Respondents' failure to provide information to the Petitioners is an administrative decision within the meaning in Section 2 of the *FAAA* which provides:

> " administrative action" includes–

i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

63. Section 9 of the *FAAA* sets out the procedure for judicial review of an administrative action as follows:

1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.

2. The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

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

5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

64. Section 9(2) of the *FAAA* is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion and accords with Article 159(2)(c) of the *Constitution*, which recognizes and entrenches the use of alternative dispute resolution mechanisms in the following terms:

(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

65. The doctrine of exhaustion encourages disputants to seek other means of resolving their conflicts rather than, or before, moving to Court. The jurisdiction of the Court should only be invoked when all other means of dispute resolution fail or are exhausted. This was the holding in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR wherein the Court of Appeal stated:

> 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that

> a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

66. It is noted that situations do arise in which a court may exercise its discretion to exempt a party from the obligation to exhaust all available remedies before applying to the Court for judicial review of any administrative action. Parliament recognized this and enacted Section 9(4) of the *FAAA* which provides:

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

67. In the case of *Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura* [2019] eKLR, Mativo, J. (as he then was) considered the factors to be considered to determine the existence of exceptional circumstances contemplated under Section 9(4) of the *FAAA* and stated:

> 50. Factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[52] An internal remedy is adequate if it is capable of redressing the complaint.[53]

68. Exceptional circumstances exist where a remedy is unavailable, ineffective or inadequate. The remedy set out in the *AIA* is that an applicant aggrieved by the decision of an entity from whom information has been requested, may apply to the CAJ for review of such decision. If aggrieved such applicant may then appeal to this Court. This in my view is a remedy that is available, efficacious and adequate. The Petitioners herein have pleaded that the remedy provided in the *AIA* was unavailable and ineffective and relied on the case of *Jawara v the Gambia* (*supra*) to support their submission. As indicated earlier, there was no demonstration of an application made to the CAJ for review of the decision of the Respondents and even if there was such application and the Petitioners were unhappy, then they ought to have come to this Court by way of appeal.

69. For the Court to exercise its discretion in favour of a party, it must be demonstrated that exceptional circumstances exist to warrant such exemption and that such exemption is in the interest of justice. Further, such exemption is made on application by the party desiring the same. The Petitioners herein have not demonstrated the existence of exceptional circumstances to warrant a waiver and further there is no application on record by the Petitioners for exemption from the mandatory provisions of Section 9(2) of the *FAAA*. Accordingly, the discretion of the Court is not available to the Petitioners.

70. Jurisdiction is everything. Jurisdiction is what gives a court the power, authority and legitimacy to entertain a matter before it. The locus classicus on jurisdiction is the oft cited case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1., where Nyarangi, JA. famously stated:

> Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment

> it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.

71. After carefully analysing the matter, the law and the authorities cited, this Court has found that by dint of Section 9(2) of the *FAAA*, it lacks the jurisdiction to entertain the Petition herein. The Court must therefore decline jurisdiction and down its tools. Without jurisdiction, the Court will not delve into the merits of the remaining issues raised in the Petition.

72. Having declined jurisdiction, the Petition is hereby struck out. The circumstances herein do not call for an award of costs.

DATED AND DELIVERED IN NAIROBI THIS 15TH DAY OF SEPTEMBER 2023

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M. THANDE

JUDGE

In the presence of: -

..... for the Petitioners

..... for the Respondents

..... for the Interested Party

.....Court Assistant