Wamanji v Airtel Networks Kenya Limited & 2 others; Kerich (Interested Party) (Petition E078 of 2023) [2023] KEHC 22360 (KLR) (Constitutional and Human Rights) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22360 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E078 OF 2023

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

ERICK MAINO WAMANJI ..... PETITIONER

AND

AIRTEL NETWORKS KENYA LIMITED ..... 1ST RESPONDENT

SAFARICOM LIMITED ..... 2ND RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA ..... 3RD RESPONDENT

AND

CHARLES KIPRONO KERICH ..... INTERESTED PARTY

RULING

1. The petitioner filed the petition dated 17th March 2023 claiming violation of his rights under Articles 35, 47, 232, of *the Constitution* and Section 27A of the Kenya Information and communication Act. He prayers for the following orders:

    i. A declaration that to the extent that the Respondent's have failed, refused and or neglected to provide the particulars sought by the petitioner pursuant to the letters dated 10th January, 2023 and 31st January, 2023, the Respondents are in violation of Article 35 of *the Constitution* that entitles the petitioner as a citizen to information held by the State and information held by another person and required for the exercise of protection of any right or fundamental freedom.

ii. A declaration that the 1st Respondent failed to adhere to the mandatory requirements of Section 27A of Kenya Informational and Communication Act (No.2 of 1998) in registering Airtel SIM card number 0731xxxx using the Petitioner's ID Card Number.

iii. A declaration that Airtel SIM card Number 0731xxxx was not registered by the petitioner.

iv. A declaration that to the extent that the 3rd Respondent has failed, refused and or neglected to respond to the Request for Information by the Petitioner dated 10th January, 2023, the 3rd Respondent is in violation of Article 232 of *the Constitution* of Kenya, 2010 which obligates the 3rd Respondent to exercise accountability for administrative act; and to practice transparency and provision to the public of timely, accurate information.

v. General damages.

vi. Costs of the petition.

vii. Any other or further reliefs that the honourable Court may deem fit to grant.

2. Upon service of the petition two preliminary objections were filed by the 2nd respondent (dated 13th April 2023) and the 3rd respondent (dated 8th May 2023) respectively. These preliminary objections are the subject of this Ruling.

3. The 2nd respondent raised the following grounds in support of the preliminary objection:

i. The proceedings are offensive of the doctrine of exhaustion in so far as the matters raised are largely complaints within the meaning of sections 14 and 22 of the *Access to Information Act* 2016 the determination of which lies within the exclusive jurisdiction of the Commission on Administrative Justice.

ii. The proceedings are offensive of the doctrine of exhaustion in so far as the matters raised are largely complaints within the meaning of section 102A of the Kenya Information and Communicators Act Number 2 of 1998 the determination of which lies within the exclusive jurisdiction of the Communications and Multimedia Appeals Tribunal: and

iii. The reliefs sought are aimed at attacking and/or directing the matter of discharging of the constitutional mandate of the offices of the Director of Public Prosecutions, Inspector General and Director of Criminal Investigations.

4. On the other hand the 3rd respondent raised the following as its grounds:

i. That the petitioner's application and petition dated 17th March, 2023 offends the doctrine of exhaustion of remedies as the petitioner has not exhausted the dispute resolution mechanisms set out under section 102 of the Kenya Information communications Act, 1999 and under Rule 3 of the Kenney Information Communications (Dispute Resolution) Regulations, 2010.

ii. That the petition and application dated 17th March 2023 are premature and offend the doctrine of exhaustion as the alleged violations fall within section 14 and 22 of *Access to information Act* which confer the oversight and enforcement role on the commission of Administrative Justice (CAJ).

iii. That based on the aforesaid reasons the jurisdiction of this court has been improperly invoked.

iv. That the application and petition as filed herein are frivolous, vexatious and an utter abuse of the Court's process and should be struck off with costs to the Respondents.

5. The petitioner filed a replying affidavit to the preliminary objections. He averred that the dispute resolution mechanisms under both KICA and the *Access to Information Act* are optional. He referred to Section 14(1), 22(1) of the *Access to Information Act* and Section 102A of KICA. He thus believes that he is entitled to the information sought through the petition filed by virtue of Articles 23(1), 48, 159(2)(d), 165(3)(b), 165(b) of *the Constitution*.

6. He deponed that he was charged and convicted of the offence of threatening to kill using cell phone no. 0731xxxx. He appealed to the High Court which affirmed the lower court's decision. He has filed a further appeal to the Court of Appeal. He annexed copies of the documents (EMW 1, 2(a) & (b), 3(A) & (b) in respect of the matter. He reckons that the bodies to facilitate the dispute resolution would not be able to interrogate the various proceedings that have taken place before the courts including the High Court. He thus needs the information held by the respondent. He is not sure before which entity (end & 3rd respondents) he should have lodged his complaint.

7. Parties agreed to dispose of both preliminary objections by written submissions.

Parties submissions

The 2nd respondent's submissions

8. These are dated 16th May 2023 and were filed by Majanja Luseno & Co. advocates. On the first issue as to whether the court has jurisdiction to determine the dispute herein, he submitted that jurisdiction is so central in judicial proceedings. He relied on the famous case of Owners of Motor Vessel "Lilian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1. He further cited the case of Samuel Kamau Macharia & another vs. Commercial Bank Limited & others [2012] eKLR where the Supreme Court of Kenya held that a Court's jurisdiction flows from either *the Constitution* or legislation or both.

9. Counsel submitted that Article 35 guarantees the right of access to information, which has been actualized through the *Access to information Act*. He set out the procedure for accessing information as set out under Section 8(1), Sections 14, 22 & 23 of the Act. He contends that if the Petitioner was aggrieved by the 2nd respondent's decline to give him the data sought, the best cause of action would have been to file a complaint with the commission, under Section 21 of the *Access to Information Act* 2016, which offers alternative dispute resolution. Reference was made to the case of Savraj Singh Chana v. Diamond Trust Bank (Kenya) Limited & another [2020] eKLR where it was held that:

> "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.
>
> 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.

Further reference was made to the case of Charles Apudo Obare & another vs. Clerk, County Assembly of Siaya & another [2020] eKLR.

10. Highlighting section 14 of the Act counsel re-submitted that the section brings to the fore the doctrine of Constitutional avoidance and the doctrine of exhaustion, which is the second issue. He relied on the case of Paragon Electronics Limited vs. Njeri Kariuki [2021] eKLR to buttress this point.

11. Counsel submitted while further referring to section 102A of the Kenya Information & Commission Act (KICA) that this Court lacks jurisdiction to determine this dispute due to the petitioner not adhering to the doctrine of exhaustion. Reliance was placed on the case of Geoffrey Muthinja Kabiru & 2 others vs. Samuel Muguna Henry & 1756 others [2015] eKLR where 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 fora of last resort and not the first port of call the moment a storm brews...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 the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

12. Additionally counsel argued that the petitioner had not demonstrated that he cannot get an effective remedy under the dispute resolution mechanism established under the statute. Reference was made to the case of Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR.

The 3rd Respondent's submissions

13. These are dated 16th May 2023 and filed by J. K. Kibicho & company advocates. Counsel raised one issue for determination which is whether the jurisdiction of this court has been properly invoked by the petitioner. He submitted that the KICA (Dispute Resolution) Regulations 2010 empowers the Communications Authority of Kenya to address complaints arising from the KICA, 1998. Rule 3 of the said Regulations state as follows:

> " 3. Powers of the Commission
>
> The Commission shall have power to resolve disputes between –
>
> a. A consumer and a service provider;
>
> b. A service provider and another service provider; or
>
> c. Any other persons as may be prescribed under the Act."

14. While further referring to Section 102A (1) (c), Section 102 B - Section 102E of KICA counsel submitted that these provide the procedure to be followed incase of a complaint upto the appeal level. It's thus his argument that the petitioner failed to invoke the provisions of the Act that provide for dispute resolution.

15. On the *Access to Information Act* (No. 31 of 2016) Counsel submitted that the petitioner's election to ignore the statutory provisions for dispute resolution is causing uncalled for congestion of matters herein. He cited Article 159(2) of *the Constitution*, and the case of Dreamers Green Houses Limited vs. Agriculture & Food Authority, Horticulture Crops Directorate and another [2020] eKLR and Geoffrey Muthinja & another (supra).

16. He additionally cited the case of Speakers of National Assembly v. Njenga Karume [2008] 1 KLR 425 where the Court of Appeal stated:

> " This means that where there are statutory provisions that provide for alternative dispute resolution the court ought to defer to and support such processes. This principle has been embraced by the court in several decisions of our courts and was well articulated by the Court of Appeal in Speaker of National Assembly v. Njenga Karume [2008] 1 KLR 425 where it held that: in our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed"

17. It is counsel's submission that courts have laid down exceptional circumstances that would warrant a party to bypass dispute resolution mechanisms and appeal processes provided in the statutes and file a dispute directly in the High court. On this he referred to the Court of Appeal decision in the case of Flever Investments Limited vs. Commissioner of Domestic Taxes & another [2018] eKLR where the Court stated:

> " Whereas courts of law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

18. Counsel therefore submitted that the petitioner had not disclosed any exceptional circumstances to warrant the by passing of the dispute resolution mechanisms set out. It's his contention that the petition herein was filed prematurely and should be dismissed.

The petitioner's submissions

19. These are dated 25th May 2023 having been filed by Kamwaro & Associates. On whether the petition offends the doctrine of exhaustion counsel answers in the negative. First of all he argues that the word used in the statutes mentioned is "may" and not "must" or "shall". He particularly refers to section 14(1) of the *Access to Information Act* and Section 102A of the KICA. Reference was made to the case of Khelif Khalifa & another vs. Principal Secretary, Ministry of Transport Mombasa Constitutional Petition No. E032 of 2019 where Mativo J (as he then was) stated:

> " 6. At Common law, the existence of internal remedies was not a bar to approach a court for appropriate relief after an administrative decision had been taken. When a statute expressly stated that the exhaustion of internal remedies was an indispensable condition precedent before launching an application to a court then that condition had to be first fulfilled. Section 14 of the *Access to Information Act* (the Act) provided for review of a decision. Had Parliament desired the mechanism provided to be mandatory, it would have done so in clear terms."

20. Counsel additionally submitted that the petition does not in any way direct or interfere with the mandate of the ODPP or any other constitutional holder. All he seeks is access to documents which will enable him pursue his fundamental rights. That it's only the High Court under Article 23 & 165 of *the*

Constitution which can handle the issue. That even if the petitioner opted to choose the respondents' option he would not know which entity to approach. Further that the information sought is to assist the petitioner pursue his appeal against the conviction against him.

21. He cited the case of LO vs Republic Siaya High Court Criminal Appeal No. 51 of 2017 where an application for additional evidence was allowed. The court held as follows:

> " 16. And applying the principles set out in the Elgood case to the circumstances of that case, it found like the learned Judge that the forensic evidence sought to be adduced and annexed to the affidavit in support of the application was not within the knowledge of the respondent during the trial. That he only leant of the same when the detective form Scotland Yard testified; he promptly made application for adducing additional evidence after receiving the evidence in question. Equally, the Court of Appeal found that such evidence which the respondent contended went to the issue of whether the shoes recovered on the respondent matched the impressions at the scene ought to be considered together with the evidence on record to determine whether it would create a reasonable doubt in the prosecution's case."

22. Counsel further relied on the case of Deepak Lalchand Nichani vs. Kenya Revenue Authority & another High Court Nairobi Constitutional Petition No. E042 of 2021 where a preliminary objection was dismissed with the court holding that:

> " ....The Rules clearly define tax decisions. Such decisions do not include any aspects of infringement of rights and fundamental freedoms and the interpretation of *the Constitution*.
>
> 33. The Petition before Court challenges the manner in which the DPO was allegedly issued, but from a constitutional perspective. The petition alleges abuse of discretion by the 1st respondent where arbitrariness, malice, capriciousness and disrespect of *the Constitution* and the Rules of natural justice are raised which allegedly adversely affect the rights and fundamental freedoms of the petitioners. The High Court therefore, has exclusive jurisdiction under Article 165(3) of *the Constitution* to interrogate the issues raised. In such instances the jurisdiction of the 1st Respondent created under the Act cannot apply."

23. It's counsel's view that the orders sought here cannot be obtained from the cited bodies / tribunals as they would be reviewing judicial proceedings. On this he referred to the case of Catherine Mwihaki Ngambi vs. International Leadership University Nairobi High Court Constitutional Petition No. E208 of 2012 where it was held thus:

> " 27. It is however not lost on this Court as guided by the principles in Geoffrey Muthinja & Another (supra) that it is necessary for the court to look carefully at the suitablity of the dispute mechanism in the context of each particular case in making its determination. Where the adequacy and availability of the mechanism is deemed wanting this creates an exceptional case that allows the court to intervene. This was well captured in the case of Krystalline Salt Limited vs. Kenya Revenue Authority [2019] eKLR."
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> Also see: Vincent Mwanthi Kioko vs. Edward Sigei & others Nairobi High Court Constitutional Petition No. E387 of 2020.

24. Counsel in response to the respondent's submissions urged that the existence of criminal proceedings against the petitioner and subsequent appeals shows that the jurisdiction of the courts has already been invoked. To him this is a special circumstance making the matter suitable for hearing on merit.

The 1st respondent's submissions

25. These are dated 17th May 2023 having been filed by Aquino Advocates. Counsel firstly relied on the 1st respondent's replying affidavit to the petition and Notice of Motion sworn on 31st March, 2023 which raises similar issues as those in the preliminary objections. The said affidavit was done by Lilian Mugo. Counsel submitted that the express statutory provisions of the Access Information Act as read together with Article 35 of *the Constitution* duly provide for an alternative dispute resolution mechanism. He argued that the petitioner ought to have made either a complaint or applied for review of the alleged unlawful withholding and/or refusal to release the information allegedly held by the respondents as had been requested by the Petitioner to the commission on Administrative Justice.

26. To buttress this point he referred to the following cases:

    i. Savraj Singh Chana (supra)

    ii. Republic vs. Isaiah Kubai & another; Commission on Administrative Justice (interested party) Ex-parte Duncan Muthusi [2019] eKLR (Nairobi ELRC Misc Application No. 140 of 2019) and

    iii. Mombasa High Court Constitutional Petition No. 159 of 2018 Williams Odhiambo Ramogi & 3 others vs. Attorney General & 4 others ; Muslims for Human for Human Rights & 2 others (Interested Parties) (2020) eKLR where it was held by a five (5) Judge bench as follows:

> "...The exhaustion doctrine 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 the courts...."

27. He urged the court to find that failure to comply with the requirements under the dispute resolution mechanisms is fatal to the petition. He relied on the cases of:

    i. Republic vs Sam Nthenya, Chief Executive Officer Nairobi Women's Hospital & another Ex-parte Christine Nzula; Commission on Administrative Justice (Interested Party) [2021] eKLR

    ii. Dock Workers Union of Kenya vs. Kenya Ports Authority: Portside Freight Terminals Limited & another (Interested Party [2021] eKLR.

28. The Interested party did not participate in these proceedings.

Analysis and determination

29. I have carefully considered the pleadings, both preliminary objections, submissions & decided cases. The issues I find falling for determination are as the following:

    i. Whether the petition offends the doctrine of exhaustion.

    ii. If the answer to (i) is in the affirmative whether the breach is fatal to the petition.

    Issue No. (i) Whether the petition offends the doctrine of exhaustion.

30. This petition is founded on the petitioner's letters to the respondents requesting for certain particulars in respect of:

    i. Registration of SIM Card No.0731xxxx by the 1st respondent using the petitioner's identity card number.

ii. The text message allegedly sent from SIM card number 0731xxxx to sim card no.0722xxxx.

> The 1st & 2nd respondents responded to the letters declining to release the information requested for (EMW 1 – 4). The incident in issue took place in 2015. The respondents have stated vide their responses that they had never been informed of this complaint before receipt of the letters (EMW1 & 2) in early 2023.

31. The respondents have argued that in both the *Access to Information Act* and the Kenya Information Act (KICA) is a laid out alternative dispute resolution mechanism. This they argue must be the first point of call in the case of a dispute.

32. The principle of alternative dispute resolution is grounded in our Constitution 2010 under Article 159(2) (c) which provides:

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

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

33. In compliance with this provision the KICA under section 102A(1)(c) and the KICA (Dispute resolution) Regulations (Regulation 8(6) & Rule 3); and under section 14 & 23 (2)(a) of the *Access to Information Act* have provided for alternative dispute resolution mechanisms. The petitioner does not dispute the presence of this mechanism in both Acts. His argument is that the requirement is not compulsory as the word used is not 'must' or 'shall' but 'may'. He further does not deny not adhering to this requirement as he contends that since it is not compulsory he elected to come to court.

34. I have considered all the arguments made by all the parties herein. One thing that comes out clear is that there is an alternative dispute mechanism under both statutes governing the respondents herein. I agree with the holding in the case of Catherine Mwihaki Ngambi vs. International Leadership University (supra).

35. There are instances and in very special circumstances when the court may not apply the general rule to a matter. It however calls on the party claiming to be treated differently to demonstrate how the general rule should not apply to them.

36. The reasons given by the petitioner as per the pleadings and submissions for the exclusion are:

a. That the requirement is not compulsory

b. That the matter has been in the courts and so can't go to the Tribunal or any other committee.

37. On the first reasoning I am not in agreement with him supported by a plethora of authorities.

See (i) William Odhiambo Ramogi (supra), (ii) Charles Apundo Obare & another (supra), (iii) Paragon Electronics Limited (supra) among many others. The fact that this principle on alternative disputes resolution is anchored in *the Constitution* of Kenya sends a strong message on its seriousness. Therefore for a party to turn away from it, the party ought to fully demonstrate why he/she should be exempted.

38. On the second argument – it is true the matter is in the court. The petitioner was charged with the offence of threats to kill contrary to section 223(1) of the Penal Code. From the copy of the charge sheet (Criminal Case no. 388/2015) the petitioner's replying affidavit of 11th May 2023 – the particulars of the charge are so detailed. After a full hearing the petitioner was found guilty and convicted on 6th May 2021. He appealed against the conviction and sentence vide Nairobi High Court Criminal Appeal No.

E065 of 2021. The Appeal was heard and Judgment delivered by Kimondo J who dismissed the appeal on 13th December 2022.

39. One of the main reasons why the petitioner's wishes to have the information sought is to counter the evidence adduced in the criminal case. He cites section 358 of the Criminal Procedure Code, which empowers the High Court to call for additional evidence if need be. This brings me to the crux of the matter herein.

Whether this Court is the proper forum in the circumstances of this case

40. The matter herein involves the petitioner seeking to enforce his right to access information to enable him adduce further evidence in support of his appeal filed in the Court of Appeal. The pertinent question is whether this is the right forum to make the application. In answering this question an examination of the law on adducing further evidence following an appeal is necessary.

41. The applicable law as regards the admission of additional evidence in an appellate Court is found in the *Civil Procedure Act* under Section 78.This Section provides as follows:

1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power -

    a. to determine a case finally;

    b. to remand a case;

    c. to frame issues and refer them for trial;

    d. to take additional evidence or to require the evidence to be taken;

    e. to order a new trial.

2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

42. Section 358 of the Criminal Procedure Code Court also provides for admission of additional evidence by the High Court in an appeal from the lower court. It provides as follows:

" 358. Power to take further evidence

(1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.

(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court."

43. The manner in which this evidence is to be taken in the appellate court according to the Civil Procedure Rules, 2010 is as follows:

> Production of additional evidence in appellate court [Order 42, rule 27.]
>
> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
>
> a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
>
> b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
>
> i. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.
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> Mode of taking additional evidence [Order 42, rule 28.]
>
> Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

44. In like manner the Court of Appeal Rules, 2022 on adducing of additional evidence provides as follows under Rule 31:

> Power to re- appraise evidence and to take additional evidence
>
> (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
>
> a. to re-appraise the evidence and to draw inferences of fact; and
>
> b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.
>
> i. When additional evidence is taken by the Court, the evidence may be taken orally or by affidavit and the Court may allow the cross- examination of any deponent.
>
> ii. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence.
>
> iii. When additional evidence is taken by a commissioner, the commissioner shall certify the evidence to the Court, without any such statements of opinion.
>
> iv. Each party to the appeal shall be entitled to be present when the additional evidence is taken.

1. The Supreme Court in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR in view of further evidence being admitted stipulated the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

> "79....
>
> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> e. the evidence must be credible in the sense that it is capable of belief;
>
> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
>
> g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
>
> h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
>
> i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
>
> j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
>
> k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
>
> [80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.

46. A reading of the law and guiding principles discloses that the admission of further evidence is at the discretion of the appellate court once it interrogates and analyzes the circumstance of the case before it. This is a procedural element which according to Rule 31 of the Court of Appeal Rules, 2022 grants the Court the power to admit further evidence.

47. Furthermore, the cited Rules make it clear that in the circumstance that the appellate court finds it prudent to receive further evidence, the Court may direct the Trial Court, either the High Court or other lower that determined the matter, to take the evidence.

48. I am further guided by the Court of Appeal case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR where Kiage J.A. observed as follows:

> " I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

49. I have done all this analysis because there was nothing that stopped the petitioner from seeking to have the particulars he now wants availed in both the lower court and the High Court. He had all the knowledge from the evidence in the two courts in respect of the sought for particulars and could have raised it. The two counts that heard him could have called for that evidence.

50. When section 358 of the Criminal Procedure Code talks of the "High Court" my interpretation is that it refers to the High Court that is dealing with the particular case. Therefore since the petitioner did not make his application before the lower court and they High court that dealt with his appeal he has an opportunity to do so before the Court of Appeal. He knows why he needs those particulars and he has to convince the Court of Appeal of the same.

51. My finding is that the petitioner had all the time from the time the criminal case was filed plus the appeal to file his complaint either under the *Access to Information Act* or the KICA to send the petitioner. He failed to do that, claiming it was not compulsory. Since the Magistrates court and the High Court have already dealt with the criminal case which is the basis of this petition the mechanisms anchored in the *Access to Information Act* and KICA will not be of any assistance to him.

52. I therefore find that the best placed forum to address the petitioner's issues is the Court of Appeal where he has already filed an Appeal against the High Court decision in Criminal Appeal no. E 065 of 2021.

53. In the circumstances of this case, this court does not have the requisite jurisdiction to handle the petition. I therefore find merit in the preliminary objections which I allow and hereby strike out the petition dated 17th March 2023 with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT