



**Dodcon Savings and Credit Co-operative Society Limited v Co-operative Bank of Kenya Limited (Petition 84 of 2020) [2023] KEHC 23392 (KLR) (Constitutional and Human Rights) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23392 (KLR)

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

**PETITION 84 OF 2020**

**LN MUGAMBI, J**

**OCTOBER 12, 2023**

**BETWEEN**

**DODCON SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED ..... PETITIONER**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner is a body corporate incorporated under the *Co-operative Societies Act*. The original petition is dated 24<sup>th</sup> February 2020. It was amended on the 18<sup>th</sup> March 2021. The amended petition prays for following reliefs against the respondent:
  - a. A declaration that the arbitrary action taken by the respondent of withholding/ refusing to provide certified copies of the signatories/signatures that were used to authorize the transfer of funds from Account Number 011xxxxxxxxx00 for the period between 1<sup>st</sup> January 2017 and 31<sup>st</sup> October 2017 is unconstitutional, illegal, null and void.
  - b. An order of mandamus be issued and directed to the respondent compelling it to forthwith provide and at its costs, certified copies of the signatories/signatures that were used to authorize the transfer of funds from Account Number 011xxxxxxxxx00 for the period between 1<sup>st</sup> January 2017 and 31<sup>st</sup> October 2017.
  - c. An order of mandamus be issued and directed to the respondent compelling it to forthwith provide and at its costs, the names and the identity documents



of the signatories who used to authorize the transfer of funds from Account Number 011xxxxxxxxx00 for the period between 1<sup>st</sup> January 2017 and 31<sup>st</sup> October 2017.

- d. An order of mandamus be issued and directed to the respondent's company secretary compelling him/her to forthwith provide the names, identity documents and signatures of the persons who used to withdraw funds from Account Number 011xxxxxxxxx00 for the period between 1<sup>st</sup> January 2017 and 31<sup>st</sup> October 2017.
- e. An order of mandamus be issued and directed to the respondent's company secretary compelling him/her to forthwith provide the name of the person(s) who presented/delivered for payment to the respondent the payment authorization forms generated by the petitioner for account number 011xxxxxxxxx00 during the period between 1<sup>st</sup> January, 2017 and 31<sup>st</sup> October, 2017 and the bank official who acted on the instructions.
- f. An order of mandamus be issued and directed to the respondent's company secretary compelling him/her to forthwith provide the list of the beneficiaries/recipients (distribution forms) accompanying the payment authorization forms generated by the petitioner to the respondent.
- g. An order of mandamus be issued and directed to the respondent's company secretary compelling him/her to forthwith provide the corresponding bank disbursements slips showing the actual recipient for each transaction per the payment authorization forms.
- h. The Court be pleased to stay the Criminal Proceedings before the Nairobi City Court being Magistrates Court Criminal Case Number 2049 of 2018 - *The Republic v Alfred Mbatia Zakayo* pending the hearing and determination of this application and the petition.
- i. The Honourable Court be pleased to award the petitioner general damages against the respondent to be assessed by the Court for the unlawful actions of refusing to provide the petitioner with the information that belongs to it.
- j. The Honourable Court be pleased to award the petitioner punitive/exemplary damages against the respondent for the continued unlawful refusal to provide the petitioner with the information and/or documents belonging to it.
- k. The Honourable Court be pleased to award the petitioner general damages against the respondent should the Magistrates Court acquit the accused in Criminal Case Number 2049 of 2018 - *The Republic v. Alfred Mbatia Zakayo* before the information that has been withheld unlawfully by the respondent has been provided to the petitioner.
- l. This Honourable Court be pleased to order the respondent to pay the petitioner Kshs.2,750,000.00 being the estimated amount lost as a result of the fraudulent transactions in the petitioner's account number 011xxxxxxxxx00 during the period between 1<sup>st</sup> January 2017 and 31<sup>st</sup> October 2017.



- m. The respondent to be condemned to pay the costs of this petition and the costs incurred by the petitioner in Criminal Case Number 2049 of 2018 - The Republic v. Alfred Mbatu Zakayo plus interest.
- n. Any other relief that this Honourable Court may deem fit and just to grant.

### **Petitioner's Case**

2. The supporting affidavit of even date was filed with the amended petition. There was a further supplementary affidavit dated 16<sup>th</sup> July 2021 sworn by Simon Mathenge Wambugu, the petitioner's Chairman. He disclosed that the petitioner was incorporated on 2<sup>nd</sup> December 2011, It operated Account Number 011xxxxxxxx00 with the respondent.
3. The account could only be transacted by at least three signatories of the petitioner who had to authorize and approve any funds transfer. The process included generation of the payment authorization (advice forms) by the petitioner to be signed by the signatories. The forms could then be presented to the respondent through its bank agents namely Alfred Mbatu Zakayo and Johnson Ongechi Omache. The authorization forms would be accompanied by a list of the beneficiaries/recipients of the amount contained in the advice forms and their bank details. Once the authorization forms were received, the respondent would then call the petitioner's bank signatories to confirm the instructions before completing the transfer to the beneficiaries/recipients.
4. Nonetheless, sometime in October 2017 the petitioner learnt that there were transfers that had been made by the respondent on diverse dates between 1<sup>st</sup> February 2017 and 31<sup>st</sup> October 2017 from the said account which had not been authorized by any of the petitioner's signatories. The matter was immediately reported to the police who sought to arrest its bank agents. Alfred Mbatu Zakayo was arrested and charged on 29<sup>th</sup> October 2018 with the offence of stealing by servant contrary to Section 281 of the *Penal Code* in Criminal Case No. 2049 of 2018 – *Republic v Alfred Mbatu Zakayo*. Johnson Ongechi Omache is still at large.
5. In the course of investigations, the investigating officer, CPL Kavutha sought the certified copies of the signatories/signatures that were used to authorize the transfer of these funds from the account for the period between 1<sup>st</sup> January 2017 and 31<sup>st</sup> October 2017. The respondent was however reluctant to provide the documents according to the investigating officer. On 9<sup>th</sup> August 2018 vide Miscellaneous Criminal Application No. 7917 of 2018 - *Central Police Station v Cooperative Bank* he applied to the Court for orders of inspection of the respondent's books for Account Number 011xxxxxxxx00 and the orders were issued.
6. Nevertheless, despite obtaining the Court Order, the respondent's reluctance to and avail the documents continued. The intervention of the petitioner through its advocates on 4<sup>th</sup> July 2019 did not yield anything. On 25<sup>th</sup> October, 2019 the Petitioner's Advocate wrote to the Director of Public Prosecutions (DPP) to intervene in the matter further indicating that the progress of Criminal Case Number 2049 of 2018 had been hindered by numerous adjournments due to lack of the said documents. It was clearly indicated that while the respondent had provided certified copies of the payment authorization forms, it had failed to provide information concerning the name of the person/persons who presented for payment to the respondent the payment authorization forms; the list of beneficiaries/recipients (distribution forms) accompanying the payment authorization forms and the bank disbursement slips showing the actual recipient for each transaction per the payment authorization forms.



7. The petitioner wrote to the respondent on 29<sup>th</sup> January 2021 seeking the information but the respondent refused to accept the said letter. A follow up letter by its Advocate dated 4<sup>th</sup> February, 2021 was also not responded to.
8. The petitioner was aggrieved by the respondent's continuous refusal to provide it with the much-needed information. Due to lack of the evidential material to support Criminal Case Number 2049 of 2018, its prosecution was delayed such that on 28<sup>th</sup> November 2019 a final adjournment was granted by the Court to the prosecution with the next hearing set for 4<sup>th</sup> March 2020.
9. Consequently, he deposed that respondent was in violation of the petitioner's right of access to information as guaranteed under Article 35 (1) (b) of the Constitution, Section 4 of the Access to Information Act No. 31 of 2016 and Section 19 of the Victim Protection Act No. 17 of 2014.

### **Respondent's Case**

10. The respondent in replied to the petition through its legal officer, Christopher Ndoro via replying affidavit dated 23<sup>rd</sup> October 2020 and a further affidavit dated 29<sup>th</sup> June 2021 by the legal officer, one Lucy Muthama who responded to the amended petition.
11. The respondent affirmed that the investigating officer, Corporal Regina Kavutha Francis on 14<sup>th</sup> August 2018 served it with a Court Order dated 9<sup>th</sup> August 2018 in relation to the investigation of the transfer of funds in the petitioner's Account Number 011xxxxxxxx00. This was in relation to Criminal Case Number 2049 of 2018.
12. He deposed that the respondent retrieved the documents. It then handed over the same to the certified bank statements of the said account. However, the officer did not collect the other documents she had sought but that were later sent to the investigating officer through an email dated 7<sup>th</sup> January 2020. After the respondent had provided the required documents to the investigating officer, no further communication seeking additional information or issue about their inadequacy was received from the investigating officer.
13. He acknowledged receipt by the respondent of the petitioner's advocates request for the same information and documents. The respondent did not however release the information as the advocates did not provide authorization in from of a written consent from the petitioner for release of the sought information.
14. He affirmed that the petitioner never personally sought the said information and documents as alleged in the petition. He emphasized that the relationship between the respondent and the petitioner was contractual and as such any dispute between them could not be resolved by resorting to the Constitution but the Terms of the agreement between them.
15. He swore that the petition was already overtaken by events as the sought information and documents had been released to the investigating officer. It was noted further that owing to the Bank's mandate in its relations with its customers the respondent had not refused to issue the documents to the petitioner. In fact, the petitioner was at liberty to collect copies of the documents issued to the investigating officer from the respondent.
16. The respondent moreover faulted the petitioner's amended supporting affidavit as incompetent in law terming it a fishing expedition of new information despite the respondent having in November 2020 already issued the petitioner with the requested information and documents.



17. The respondent equally opposed the petitioner's claim for compensation for the amounts allegedly lost on account of the fraudulent transactions. This was on the basis that their relationship was contractual in nature hence the dispute can only be litigated in a civil suit where the petitioner ought to provide proof of its claim with the respondent being granted an opportunity to defend itself.
18. The respondent additionally argued that it does not fall within the definition of private bodies to whom the *Access to Information Act* applies. In any case, it was indicated that the petitioner had failed to prove the respondent's refusal to grant the information the petitioner had sought. The respondent further stated that the petition is premature since the petitioner did not exhaust the remedies provided under the *Access to Information Act*, 2016 in the event that access to information had been denied.
19. It was claimed that the petition does not raise constitutional issues for determination by the Court. The sum of its averments therefore was that the petitioner is not entitled to the sought reliefs claimed hence the petition should be dismissed.

### **Petitioner's Submissions**

20. The written submissions on behalf of the Petitioner dated 17<sup>th</sup> June, 2022 were filed by Omulele and Tolo Advocates. They identified the main issues as being whether the petitioner's right under Article 35(1)(b) of the *Constitution* had been violated and if so, whether the respondent ought to be compelled to provide the information. The submissions were also accompanied by a list of authorities of equal date.
21. On the first issue, Counsel reiterated the petitioner's statements on oath in its affidavits and submitted that the respondent's failure to furnish the petitioner with the information sought, breached its right to access information as provided for by the Constitution. As a consequence of refusing to issue this information Counsel submitted that the petitioner's right to a fair hearing in view of Criminal case No.2049 of 2018 was threatened as the information is vital evidence in that case. Counsel relied on the case of *Zebedeo John Opore v Independent Electoral and Boundaries Commission* [2017] eKLR to buttress this position where it was held thus:

“Refusal to furnish the information to the petitioner which he requires for enforcement of a constitutional right, the right to access the courts is in my view a gross violation of the Constitution and a breach of his fundamental rights under Article 35 of the *Constitution*...”
22. He similarly relied on the cases of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 others* [2013] eKLR, *Katiba Institute v Presidents Delivery Unit and 3 others* [2017] eKLR and *Attorney General v Kituo cha Sheria and 7 others* [2017] eKLR.
23. In view of the foregoing, Counsel submitted on the second issue and asserted that the respondent ought to be compelled to provide the information. He equally urged the Court to order the respondent to pay costs of the suit. In support of this issue Counsel sought to rely on the Uganda case of *Tinyefuze v Attorney General of Uganda* (1997) UGCC3 where it was held that:

“If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.”



## Respondent's Submissions

24. The respondent was represented by the firm of S.M. Kilonzo and Associates which filed written submissions and the list of authorities dated 12<sup>th</sup> June 2023. They submitted that the petition was not properly before this Court based on the following main reasons.

25. That this Court is the wrong forum as the petitioner's claim was instigated by the Search Order that sought the information for the purpose of prosecution of Criminal Case Number 2049 of 2018: *Republic v Alfred Mbatia Zakayo*. Counsel impugned the petitioner's action as being an attempt to have this Court enforce an Order issued by a different Court, yet no order had been issued to show the respondent's lack of compliance and neither had the investigating officer denied receiving the documents. Counsel emphasized that if the search order had not been complied with; it is the Magistrate Court which should have been moved to punish for contempt of the orders as provided in Section 10 of the Magistrates' Court Act, 2015. Counsel relied on the case of *Re ZJA and TA(Minors)* (2020) eKLR which held thus:

"30. ...I am in agreement with the respondent that the court with original jurisdiction is the court which issued the impugned orders and not this court. See *HAO v PLS* (2017) eKLR. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR."

26. On the second limb, Counsel asserted that the petitioner's claim in view of the criminal proceedings invoked the doctrine of sub judice as the matters in the criminal proceedings are yet to be fully adjudicated and so the fraud alleged by the petitioner in the instant suit has not been established. Counsel decried this act as is an effort to have this Court make a conclusion while considering the criminal proceedings which would be in breach of this rule.

27. On the third limb, it was submitted that the petitioner's relationship with the respondent is that of a customer and banker hence contractual in nature. According to Counsel this suit is a commercial dispute disguised as a constitutional petition. This was said to be discernable from the reliefs seeking compensation from the respondent. It was stated that such a suit can only be litigated in a civil suit where each party is given an opportunity to defend their case by adducing the requisite proof. To buttress this point reliance was placed on the case of *Kenya Commercial Bank of Kenya Limited v Kenya Pipeline Company Limited* [2014] eKLR where it was held that:

"In the mind of this court, the right to access of information envisaged under the said Article relates to the protection or exercise of any right or fundamental freedom contemplated under Chapter 4 Part 2 of the *Constitution* of Kenya, 2010. The matter before this court is a commercial one."

28. Counsel on the issue whether the petitioner's constitutional right of access to information under Article 35(1)(b) of the *Constitution* had been violated, answered in the negative. It was submitted that the *Access to Information Act* does not apply to the instant proceedings as the respondent does not fall within the definition of private bodies to whom the Act applies. Besides, it was submitted that the petitioner had not demonstrated that the respondent had refused to issue the information and how its right to fair hearing arose in this matter and was breached. Considering this, Counsel asserted that the petition failed the specificity test as reckoned in the case of *Anarita Karimi Njeru* (No.1) (1979) 1 KLR 154.



29. Counsel in this issue also submitted that the petition was premature as the petitioner had failed to exhaust the remedies provided in the [Access to Information Act](#), 2016 as follows:
- a. Section 9(1) provides that a public officer shall make a decision on an application to access information within 21 days of the receipt of the request.
  - b. Section 9(4) provides that the request can be rejected with reasons. Failure to respond to a request is considered rejection (Section 9(6)).
  - c. Section 14(1)(a) provides that an Applicant may seek review of the decision of the public officer with the Commission on Administrative Justice.
  - d. Section 23(3) provides that an appeal from the decision of the Commission lies to the High Court.
30. Counsel submitted that it is evident that the petitioner can only approach this Court in view of access to information as an appeal from the Commission on Administrative Justice's decision. As such it was stated that the matter was filed prematurely. Counsel urged this Court to decline assuming jurisdiction owing to the doctrine of exhaustion. Counsel in closing submitted that the respondent had not breached the petitioner's right under this Article as it was also evident that the sought information had already been supplied to the petitioner. As a result, it was submitted that the petitioner was not entitled to the reliefs sought.

### **Analysis and Determination**

There are two major issues for determination, namely:

1. Whether the instant suit is appropriately before Court, and;
2. Whether the petitioner's constitutional rights under Article 35(1)(b) of the [Constitution](#) were violated by the respondent.

### **The Guiding Legal Principles**

#### **Whether the instant suit is appropriately before the Court**

31. The respondent submitted on this issue under three sub-titles, namely: whether this Court has jurisdiction to make a pronouncement on the alleged violation of the Magistrates Court Orders; whether the instant suit invokes the sub judice rule and whether this is a commercial suit disguised as a constitutional petition.
32. The Petitioner did not address this particular issue in its submissions. It was raised in the written submissions of the respondent. No supplementary submissions were filed by the petitioner as a rejoinder to this particular submission.
33. The point is whether this Court can competently deal with the alleged violation of the Magistrates Court Orders that were issued in Miscellaneous Application No. 7919 of 2018; *Central Police Station v Co-operative Bank*
34. To start with, evidence that there was refusal to comply with those orders is what in my view would pass as hearsay. The investigating Officer who made the application for the supply of the information is alleged to have told the petitioner the respondent did not comply but no affidavit was obtained from the said investigating officer to that effect so as to support that contention in this petition. Further, there is no indication that he complained about the alleged non-compliance in the court that issued the



order in the first place. Consequently, all what is before this court about the alleged non-compliance with the order of the Magistrate Court in Miscellaneous Application Number 7919 are nothing but mere conjectures which this Court is afraid cannot act upon as the basis for making a finding. The failure to provide credible evidence of this critical fact in the wake of the respondent's contention that it duly supplied what was stated in the order served upon it by the investigating officer (incidentally has no documented complaint of the respondent's failure to supply him with documents) exposes the claim by the petitioner as lacking in substance and credibility.

#### **Whether the doctrine constitutional avoidance applies in the present petition.**

35. The Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR elaborated on this doctrine as follows:

“... The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 [1936].

36. Correspondingly the High Court in the case of *Council of County Governors v Attorney General & 12 others* [2018] eKLR expressed as follows while relying on the Supreme Court: -

“59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved...”

In the instant petition, it is clear to me that there existed a well-defined arrangement between the petitioner and the respondent. The Petitioner in the petition described meticulously how this arrangement worked when it came to operating the account which is the major reason behind this petition when apparently, those procedures appear to have been circumvented and monies disappeared leading to prosecution of certain individuals. It is thus obvious that the underlying issue is the loss of the funds which in my considered view is a matter that is best sufficiently determined by way of recovery suit based on breach of contract or tortious claim but framing the issue as a constitutional question in the circumstances is certainly an overkill. I would thus hold that the doctrine of constitutional avoidance prevails in the instant petition and decline to entertain the same.

#### **Whether the petitioner's constitutional right under Article 35(1)(b) of the Constitution was violated by the respondent**

37. Closely interconnected to this principle is the doctrine of exhaustion of remedies. The petitioner had alleged that respondent's refusal to grant it the sought information was in breach of its right to access



information. This assertion was opposed by the respondent. The respondent further argued that the petitioner failed to exhaust the mechanisms provided in the [Access to Information Act](#).

38. The right to access information is provided under Article 35 of the [Constitution](#) 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.

39. The [Access to Information Act](#) (No. 31 of 2016) which was enacted to give effect to Article 35 of the [Constitution](#) provides for the procedures to be applied when seeking information held by the State or another person. The objectives of the [Act](#) under Section 3 provide as follows:

- a. give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;
- b. provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;
- c. provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;
- d. promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;
- e. provide for the protection of persons who disclose information of public interest in good faith; and
- f. provide a framework to facilitate public education on the right to access information under this Act.

40. Section 4 of the [Act](#) provides for the procedure to access information as follows:

Right to information

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.
41. When a party receives a response in regard to request for information but is dissatisfied, the Act under Section 14 the procedure is to appeal before the Commission on Administrative Justice. The Commission is empowered by the Act under Section 23 to act as follows:
1. In the performance of its functions under this Act, the Commission shall have the power to—
    - a. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
    - b. question any person in respect of any subject matter under investigation before the Commission; and
    - c. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
  2. 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.
  3. 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.
  4. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
  5. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave



to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

42. The Court in the case of *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties)* [2021] eKLR speaking to the mandate of the Commission on Administrative Justice with regards to solving grievances under Article 35 of the *Constitution* pronounced as follows:

“29. Under section 23 of the *Access to Information Act* No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another* [2020] eKLR, Korir J observed correctly in my view, as follows:

“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.”

43. It is apparent that although the Petitioner stated that it repeatedly applied to be supplied with further/ additional information to boost what the respondent had availed to investigating officer and its efforts were ignored, it never complied with the procedure provided for in section 14 of *Access to Information Act* by appealing to the Commission on the Administrative Justice for a review of the respondent’s refusal to provide the further information that the petitioner wanted. Instead of pursuing this statutory mechanism, it approached the High Court directly, my view is that this was equally improper as there was need to exhaust the statutory remedies first before invoking the constitutional violation.

44. In view of the foregoing reasons, I find no merit in this petition which I accordingly dismiss. Each Party will bear its own costs of the petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2023.**

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**L N MUGAMBI**

**JUDGE**

