



**Kenya Human Rights Commission & another v Attorney General & another;
Law Society of Kenya & another (Interested Parties) (Petition E179 of 2022)
[2024] KEHC 15702 (KLR) (Constitutional and Human Rights) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15702 (KLR)

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

PETITION E179 OF 2022

LN MUGAMBI, J

DECEMBER 13, 2024

BETWEEN

KENYA HUMAN RIGHTS COMMISSION 1ST PETITIONER

WANJIRU GIKONYO 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

Access to information requests from government institutions does not need justification

The High Court ruled that Treasury’s failure to disclose loan agreements and sovereign bond details violated article 35 of the Constitution. The court found that the government had a constitutional duty to provide access to financial information and that its refusal breached principles of transparency under articles 10 and 201. It rejected Treasury’s argument that the information was publicly available or protected by data laws. The court issued a mandamus order compelling disclosure within 45 days. The case arose after the petitioners’ 2022 request for loan details was ignored, despite intervention by the Commission on Administrative Justice.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – right to access information – application for access of information - procedure for applying for information from a State Organ under the Access to Information Act – whether persons seeking to obtain information from governmental institutions under the Access to Information Act had an obligation to justify why they needed the information - whether State Organs were obliged to justify not



granting access to information requests - whether the failure to provide the Treaties/Agreements/Contracts signed between Kenya and any was unconstitutional and a violation of the right to access information - Constitution of Kenya, articles 10, 20(3), 24, 35, and 201; Access to Information Act (cap 7M) sections 4, 6, 8, and 9(1).

Brief facts

The petitioners alleged that the respondents had failed to provide information regarding international and bilateral loans procured by Kenya, contrary to article 35 of the Constitution, which guaranteed the right to access information. The petitioners requested specific details from the Treasury, including sovereign bond agreements, a list of bondholders, and the utilization of bond proceeds. The Treasury received the request on February 11, 2022 but failed to respond within the statutory 21-day period under the Access to Information Act. The Commission on Administrative Justice intervened, but the information was not provided. A response from the Treasury was eventually issued stating that some information was publicly available while other details, such as individual bondholder identities, were protected under data protection laws.

The petitioners contended that Treasury's refusal violated transparency and accountability principles under articles 10 and 201 of the Constitution. The High Court ruled in favor of the petitioners, ordering the government to disclose the requested loan agreements and bond expenditure details within 45 days.

Issues

- i. What was the procedure for applying for information from a State Organ under the Access to Information Act?
- ii. Whether the failure to provide the Treaties/Agreements/Contracts entered by Kenya was unconstitutional and a violation of the right to access information.
- iii. Whether persons seeking to obtain information from governmental institutions under the Access to Information Act had an obligation to justify why they needed the information.
- iv. Whether State Organs were obliged to justify not granting access to information requests?

Held

1. Article 35 of the Constitution provided for the right to access information. The Access to Information Act (The Act) was enacted to give effect to article 35. Section 4 of the Act provided the process to be followed in order to obtain information held by the State or another person. It gave exemptions under section 6(1).
2. A person seeking to access information held by the State or private body was in the first instance required to address the request to the designated officer under section 7 of the Act and the request was made on an application under section 8(1) which provided details and sufficient particulars for the public officer to understand extent and nature of the information requested.
3. The public officer would under section 9 of the Act process the application and make a decision on the application as soon as possible. Where the applicant did not receive a response to an application within the period stated in subsection (1), the application was deemed to have been rejected as provided under section 9(6) of the Act.
4. The petitioners wrote to the 2nd respondent seeking to be supplied with information on Kenya's debt obligation on February 7, 2022 but the said letter did not elicit any response. The petitioners even sought the intervention of the Commission on Administrative Justice to no avail.
5. The 2nd respondent readily admitted the receipt of the letter by the petitioners seeking the said information and did not deny the claim that the Commission on Administrative Justice had attempted to intervene but the information was not supplied prompting the filing of the instant petition.
6. The response by the 2nd respondent came after a long time, that is on May 22, 2022 well past the 21-day period required under section 9(1) of Access to Information Act. Already there was a breach of the statutory provision that was meant to give effect to the Constitutional requirement. It was acknowledged that the 2nd respondent received the petitioners' correspondence dated February 7, 2022



- which the petitioner confirmed was served on the 2nd respondent on February 11, 2022 yet the 2nd respondent wrote a response in a letter dated May 6, 2022.
7. The 2nd respondent had not provided a proper justification for the denial of information sought by the petitioners. The 2nd respondent provided that the information was readily available in budget policy statements but what was contained in the budget policy statements were proposals for borrowing and not records of what had actually been borrowed. The information the petitioners sought were records of what had actually been borrowed, not proposals that may or may not have been actualized. According section 4 (2) of the Access to Information Act the right to the information was not affected by the reason the petitioner might have given in requesting for information held by the State. The petitioner needed not to have justified the request since the State was under duty to provide the information on request by a Citizen unless the State could validly justify its refusal to supply the information under section 6 of the Act. The State had not justified the non-supply except in to a very limited way, that was revealing the names of Companies, Institutions or names of persons that hold Kenya's sovereign bond could breach privacy laws of investors in some countries. The court was careful not to gamble with a possibility that had potential of exposing Kenya to legal liability.
 8. The refusal to supply the information requested by the 2nd respondent violated the right of access to information under article 35 (1) of the Constitution as well as the principle of openness and accountability in financial matters as provided for in article 201(a) of the Constitution and generally, the principles of transparency and accountability provided for under article 10(2)(c) of the Constitution.

Petition allowed.

Orders

- i. *Declaration issued that the failure to provide the Treaties/Agreements and/or Contracts signed between the Republic of Kenya and any other State, any international financial institution, any international corporation and any other entity howsoever described was unconstitutional in so far as it contradicted the constitutional requirements on access to information under article 35(1) of the Constitution.*
- ii. *Declaration issued that the failure to provide information relating to sovereign bonds floated for and on behalf of Kenya in the past nine years by the National Executive was unconstitutional for infringing the principle of openness and financial accountability in matters of public finance as was required by article 201 and; further governance, integrity, transparency and accountability as provided for in article 10(2) of the Constitution.*
- iii. *An order of mandamus was issued compelling the respondents to provide the documents and/or information sought by the petitioners per the petitioners' letter of February 7, 2022 and acknowledged in the petition by the 2nd respondent. The information was to be provided within 45 days. That was:*
 1. *Information on all sovereign bond agreements/contracts signed by the Government of Kenya and any bond that contain the terms and conditions in case of default as set out in the said letter.*
 2. *Information concerning how the funds raised from the sovereign bonds were or had been expended.*
- iv. *Each Party was to bear its own costs.*

Citations

Cases

1. Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties) (Constitutional Petition E006 of 2020; [2021] KEHC 9284 (KLR)) — Mentioned
2. Famy Care Limited v Public Procurement Administrative Review Board & 5 others (Petition 43 of 2012; [2012] KEHC 5194 (KLR)) — Explained
3. Fugicha v Methodist Church in Kenya (Suing Through its Registered Trustees) & 3 others (Civil Appeal 22 of 2015; [2016] KECA 273 (KLR)) — Mentioned



4. Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others (Civil Appeal 224 of 2017; [2017] KECA 436 (KLR)) — Mentioned
5. Institute of Social Accountability & another v National Assembly & 4 others (Petition 71 of 2013; [2015] KEHC 6975 (KLR)) — Mentioned
6. Kandie v Alassane BA & another (Petition 2 of 2015; [2017] KESC 13 (KLR)) — Mentioned
7. Katiba Institute v President's Delivery Unit & 3 others (Constitutional Petition 468 of 2017; [2017] KEHC 2183 (KLR)) — Explained
8. Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another (Interested Parties) (Constitutional Petition E032 of 2019; [2022] KEHC 368 (KLR)) — Explained
9. Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Election Petition 4 of 2017; [2017] KESC 30 (KLR)) — Explained
10. Nairobi Law Monthly Limited v Kenya Electricity Generating Company Limited & 2 others (Petition 278 of 2011; [2013] KEHC 6054 (KLR); [2013] 2 KLR 672) — Mentioned
11. Njoya, Timothy v Attorney General & another (Civil Appeal 112 of 2015; [2017] KECA 264 (KLR)) — Explained
12. Nyawade, Mercy v Banking Fraud Investigation Department & 2 others (Petition 143 of 2017; [2017] KEHC 9108 (KLR)) — Mentioned
13. Nyawade, Mercy v Banking Fraud Investigations Department & 2 others (Petition 143 of 2017; [2017] KEHC 9108 (KLR)) — Mentioned
14. Opre, Zebedeo John v The Independent Electoral And Boundaries Commission (Petition 418 of 2017; [2017] KEHC 9217 (KLR)) — Explained
15. Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission (Petition 440 of 2019; [2019] KEHC 2492 (KLR)) — Mentioned
16. Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another; Law Society of Kenya (Interested Party); Article 19-Eastern Africa Curiae (Amicus Curiae) (Petition 314 of 2016 & Judicial Review 306 of 2016 (Consolidated); [2016] KEHC 3581 (KLR)) — Mentioned
17. President of the Republic of South Africa v M & G Media Ltd ((CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC)) — Mentioned
18. Osland v Secretary to the Department of Justice ([2008] HCA 37) — Explained
19. Ontario (Public Safety and Security) v Criminal Lawyers Association ([2010] 1 SCR 815) — Explained
20. R. v Oakes ((1986) 1 SCR 103) — Mentioned
21. Regina v Shayler ([2003] 1 AC 247) — Explained

Statutes

1. Access to Information Act (cap 7M) — section 4; 6; 8; 9(1) — Cited
2. Constitution of Kenya — article 10; 20(3); 24; 35; 201; Chapter 6 — Cited
3. Official Secrets Act (cap 187) — section 3 (6), (7) — Cited
4. Public Finance Management Act (cap 412A) — section 49; 53A — Cited
5. Treaty Making And Ratification Act (cap 4D) — In general — Cited

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — article 9
2. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 19

Advocates

None mentioned



JUDGMENT

Introduction

1. The Petition dated April 21, 2022 is supported by the 1st Petitioner's affidavit in support sworn on even date. Additionally, a further affidavit dated 27th March 2023.
2. The Petition relates to application of Article 35 of the Constitution and the main grievance is on the Respondents' failure to provide information about the bilateral and international loans procured by the Executive. According to the Petitioners, the Executive has over the years borrowed loans without transparency in that process or the involvement of the public which is contrary to the constitutional principles.
3. Accordingly, the Petitioners seek the following reliefs:
 - i. A declaration be issued that the failure to provide the Treaties/ Agreements and/or Contracts signed between the Republic of Kenya and any other state, any international financial institution, any international corporation and any other entity however described is unconstitutional in so far as it contradicts the constitutional requirements on access to information.
 - ii. A declaration be issued that the failure to provide information relating to sovereign bonds floated for and on behalf of Kenya in the past nine years by the National Executive is unconstitutional for not being open and accountable as required by Article 201 of the Constitution.
 - iii. A declaration be issued that the failure to provide the Treaties/ Agreements and/or Contracts signed between the Republic of Kenya and any other state, any international financial institution, any international corporation and any other entity however described is unconstitutional in so far as it contradicts the constitutional principle of the Rule of Law at Article 10 which requires that any legal instrument must be publicly accessible and available.
 - iv. A declaration be issued that the failure by the 2nd Respondent to provide the Treaties/ Agreements and/or Contracts signed between the Republic of Kenya and any other state, any international financial institution, any international corporation in paragraph (a) hereinabove and the information relating to sovereign bonds floated for and on behalf of Kenya in the past nine years in paragraph (b) hereinabove amounts to a violation of Chapter 6 provisions of the Constitution and the laws that flow therefrom.
 - v. An order of mandamus do issue compelling the Respondents and/or any other responsible State and/or Public Officer to provide the documents and/or information sought in paragraphs (a) and (b) hereinabove.
 - vi. An order of mandamus do issue compelling the Respondents and/or any other responsible state/public officer to provide documents and information sought in the access to information request letter, specifically;
 - a. Any information on any sovereign bond agreement/contract signed by the Government of Kenya and any bondholder(s) that contain the terms and conditions in case of default.



- b. The List of Kenya's sovereign bond holders including beneficial ownership information of the issuing company/companies.
 - c. The use made of the proceeds of the sovereign bonds.
- vii. The Respondents bear the costs of this Petition for their willful constitutional violations.

Petitioners' Case

4. On 7th February 2022, the Petitioners wrote to the 2nd Respondent seeking: information on any sovereign bond agreement/contract signed by the Government of Kenya and any sovereign bond holder(s) that contain the terms and conditions in case of default; information on the list of Kenya's sovereign bond holders including beneficial ownership information of the issuing company/companies; information on the use made of the proceeds of the sovereign bonds and information on treaties entered by Kenya with regards to procuring external lending for the period of the last 9 years.
5. He informs that this correspondence was served on the 2nd Respondent on 11th February 2022. It is stated that the 2nd Respondent has refused to provide the sought information and the documents requested. The Petitioners contend that this is contrary to Article 35 of the Constitution.
6. He states that the Commission on Administrative Justice (CAJ)'s intervention in this matter has also been futile. It is as well averred that the 2nd Respondent's letter dated 6th May 2022 issued after filing of this suit, did not also provide the sought information.
7. Consequently, the Petitioners posit that the Respondents refusal to issue the information equally violates Article 201(a) of the Constitution which necessitates openness, accountability and public participation in financial issues.
8. The Respondents actions are also argued to be contrary to the rule of law as espoused under Article 10 of the Constitution. Similarly, the 2nd Respondent's failure to issue the sought information is argued to be in violation of the dictates of Chapter Six of the Constitution.

Respondents' Case

9. The Respondents' through the 2nd Respondent's Principal Secretary, Julius Muia, filed a Replying Affidavit sworn on 26th July 2022.
10. He acknowledges that the 2nd Respondent received the Petitioners correspondence dated 7th February 2022. He depones that the 2nd Respondent made its response in a letter dated 6th May 2022.
11. He depones that the 2nd Respondent issued the records in line with Section 49 and 53A of the Public Finance Management Act, 2012. Furthermore that information on any sovereign bond issued by the Government is accessible on the prospectus for the years the bonds were issued and the reasons for issuance.
12. He makes known that the purported bonds are traded at the London Stocks Exchange therefore tradeable and changing hands consistently. Owing to this, the beneficial owners' information changes with every trade conducted. Moreover, it is averred that individual bond holders' information is protected within their jurisdictions' data protection laws.
13. It is additionally deponed that the Annual Budget Policy Statement provides information for all the monies borrowed in each year and the same is subject to public participation. Moreover, this information is supplied to the National Assembly who then publish it on their website.



14. He further avers that information regarding Treaties and Agreements procured between Kenya and other states or international financial institutions, is held by the Ministry of Foreign Affairs as provided under the [Treaty Making and Ratification Act](#), 2012.
15. In light of these assertions, it is argued that the 2nd Respondent is not obliged to issue information that can be reasonably accessed by other means as provided under Section 6(6) of the [Access to Information Act](#).
16. Additionally, he avers that information relating to sovereign bond agreements and any bond holder is protected under Section 6(1) (d) and (f) of the [Access to Information Act](#). This provision protects against invasion of privacy of an individual investor.
17. On this premise, the Respondents take the position that the Petition is defective since the Petitioners have failed to demonstrate the necessity of production of the sought information and documents.

1st Interested Party's Case

18. In support of the Petitioners' case, the 1st Interested Party filed a Replying affidavit by Florence Muturi sworn on 31st January 2023.
19. She stresses that the Respondents as public servants are bound by the dictates of Article 10 of the [Constitution](#) to ensure that Government transactions are transparent. Unquestionably this cannot be achieved without access to the information in relation to these transactions.
20. She further asserts that the [Constitution](#) is clear under Article 35 that information as held by the State should be issued so as to facilitate accountability on the Respondents' part. Additionally, she argues that public fund management entails transparency and accountability, which can only be attained if such information is provided to the public.
21. Accordingly it is argued that the public's right to participate in governance, pertaining the issues raised herein, is being hindered as the Respondents withhold the bilateral agreements, contractual dealings and sovereign bonds floated on their behalf. Consequently she contends that it is in the interest of justice for the Petition to be allowed.

2nd Interested Party's Case

22. The 2nd Interested Party also in support of the Petitioners case filed a Replying affidavit by Christopher Kerkering sworn on 6th February 2022.
23. He echoes that the right to access information is guaranteed under Article 35 of the [Constitution](#). He notes that under the [Access to Information Act](#), if a public body receives a request to issue information and fails to do so, the same is supposed to be a rejection of the application to access the information.
24. As a result, it is argued that the Respondents violated the right to access information when they failed to issue the sought information even after CAJ intervened in the matter.
25. Counsel also restated that disclosure of information and documentation relating to public finance is vital as ensures the public participates in public finance. Failure to do so is argued to be in violation of Article 10 and 201(a) of the [Constitution](#).



Parties Submissions

Petitioners' submissions

26. In support of their case, the Petitioners through their Counsel Evans Ogada filed two sets of submissions one undated and other dated 26th July 2023. The issues sought to be discussed were: whether the Request for Information by the Petitioners dated 7th February 2022 is valid in law and under the *Constitution* and whether the reasons canvassed by the Respondents for refusing to provide the information are valid in law.
27. It was submitted in the first issue that the Article 35 of the *Constitution* places an obligation on the State to publicize any important information. It is argued that according to Section 4(4) of the *Access to Information Act*, lack of disclosure is only permissible within the confines of Section 6 of the Act.
28. Counsel submitted that the 2nd Respondent refusing to issue the sought information in its letter outlined a list of reasons why it would not comply with the request. It is argued that the concerns stated for their refusal to grant the information are not justified thus making it obvious that the Petitioners' right to access information was violated. This is despite the Petitioners validly seeking the information.
29. Reliance was placed in *Famy Care Limited v Public Procurement Administrative Review Board & another* [2012]eKLR where it was held that:
- “The right to access to information is one of the rights that underpins the values of good governance, integrity, transparency and accountability and other values set in article 10 of the *Constitution*. It is based on the understanding that without access to information the achievement of 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.”
30. This right is further argued to be protected under various international laws such as the United Nations General Assembly, Resolution 59 on Freedom of Information, Article 19 of the *International Convention on Civil and Political Rights* and Article 9 of the *African Charter on Human and Peoples' Rights* which were cited in additional support. Considering this, Counsel argued that the Petitioners request for the sought information is anchored in law.
31. Counsel additionally argued that issuance of information held by the Government is a requirement of the democratic process as the information held in custody of the people. As such failure to provide such information can only be done where the exception to the rule is clearly established. According to Counsel none of the reasons issued by the Respondents are anchored in law or meet the set threshold.
32. In answering the second question, Counsel urged the Court to be guided by Article 20(3) of the *Constitution* which provides that the Court must adopt an interpretation that favours the enforcement of a fundamental right and freedom. Likewise, to consider the public interest in this matter. In Counsel's view, it was evident that the 2nd Respondent had failed to appreciate the rationale of the right to access information thus violating the right in the end.
33. To buttress this argument reliance was placed in *Regina v Shayler* [2003] 1 AC 247 where it was held that:
- “The reasons why the right to free expression is regarded as fundamental are familiar . . .Modern democratic government means government of the people by the people



for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated.”

34. Counsel additionally argued that the onus to prove that the denial was reasonable and justifiable lay on the Respondents. He contended that the Respondents had failed to discharge this burden.
35. Reliance was placed in the Canadian Supreme Court case of *R. v Oakes* (1986) 1 SCR 103. Additional reliance was placed in *President of the Republic of South Africa v M & G Media Ltd* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011) (paras. 85-104) and *Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission* [2019] eKLR, *Trusted Societies of Human Rights Alliance and 3 others v JSC* Petition 314 of 2016 & Judicial Review 306 of 2016 (Consolidated).
36. Counsel on the argument that the information sought revolves around individual bond holders, stated that public interest outweighs these investors private rights. Counsel stressed that the citizenry has to be informed about the affairs and conduct of government so as to be capable of making informed decisions owing to the information obtained. As such, public participation can only be possible with access to information.
37. To buttress this point reliance was placed in *Khalifa and another v Principal Secretary Ministry of Transport* (Constitutional Petition E032 of 2019) [2022] KEHC 368 (KLR) where it was held that:
- “The *Access to Information Act* sought to establish voluntary and mandatory mechanisms or procedures to give effect to the right to access to information in a manner which enabled persons to obtain access to records of public and private bodies swiftly, inexpensively and effortlessly as soon as reasonably possible. It sought to promote transparency, accountability and effective governance of all public and private bodies.”
38. Counsel further stressed that the significance of the right to information was highlighted in *Osland v Secretary to the Department of Justice* [2008] HCA 37 at [62] as follows:
- “The basic purpose of the introduction of freedom of information legislation is the same in all jurisdictions. It is to reinforce “the three basic principles of democratic government, namely, openness, accountability and responsibility”. The central objective is to strengthen constitutional principles of governance not always translated into reality because of a lack of material information available to electors. Fundamentally, the idea behind such legislation is to flesh out the constitutional provisions establishing the system of representative government; to increase citizen participation in government beyond a fleeting involvement on election days; and to reduce the degree of apathy and cynicism sometimes arising from a lack of real elector knowledge about, or influence upon, what is going on in government.”

Respondents’ submissions

39. State Counsel, Edna Makori for the Respondents filed submissions dated 6th June 2023 where she identified the issues for determination as: whether the Respondents violated the Petitioners right of access to information and whether this Right can be limited.



40. On the first issue, Counsel reiterating the 2nd Respondent’s averments as stated in their Replying affidavit submitted that the sought information revolves around individual bond holders, which is protected under the Data Protection laws.
41. It was further argued that the information is protected under Sections 6(1) (d) & (f) of the [Access to information Act](#) as involves violation of an investor’s right to privacy. Furthermore, that disclosure of this information would offend Section 3(6) and (7) of the [Official Secrets Act](#).
42. Counsel in light of this argued thus that the right to access information can be limited in line with Article 24 of the [Constitution](#). This is affirmed under Section 6(1) of the [Access to Information Act](#) which lawfully limits the right to access information. Reliance was placed in [Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Ltd & another](#) (2021) eKLR.
43. Consequently, Counsel in the second issue was certain that the right to access information is subject to limitation in compliance with the dictates of Article 24 of the [Constitution](#). Reliance was placed in [Public Safety and Security v Criminal Lawyers Association](#), 2010 SSC 23, [2010] 1 SCR 815 where the Supreme Court of Canada on the considerations to be observed in enforcing this right held as follows:
- “ 15. “First, Necessity has to be established. The petitioners have to prove the necessity of having the prayers granted.
- Secondly, if this necessity is established, a prima facie case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by Section 2(b) of the Charter.”
44. Like dependence was placed in [Nairobi Law Monthly Limited v Kenya Electricity Generating Company Limited & 2 others](#) (2013) eKLR and [Institute of Social Accountability & another v National Assembly & 4 others](#) High Court, [2015] eKLR.
45. To this end, Counsel submitted that the Petitioners had not proved the considerations set out in the Canadian case to justify issuance of the sought information.

1st Interested Party’s Submissions

46. On 10th July 2023, Ombok and Owuor Advocates LLP filed submissions in support of the 1st Interested Party’s case. Counsel identified the issues for determination as: whether the request for information by the Petitioners dated 7th February 2022 is valid in law and whether the reasons canvassed by the Respondents for refusing to provide the information are valid in law.
47. Counsel in the first issue answered in the affirmative. Reliance was placed in [Katiba Institute v President’s Delivery Unit & 3 others](#) (2017) eKLR where it was held that:
- “ 28. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen’s ability to access information held by public authorities. Where they don’t know what is happening in their government and or if actions of



those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

29. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. the Constitution therefore grants citizens' access to information as a constitutional right and only the same Constitution can limit that access.”
48. Comparable dependence was placed in Regina v Shayer (2003) 1 AC 247 and Famy Care Limited (*supra*).
49. Counsel further noted that this right is protected under the Access to Information Act. Section 4(2) makes known that the request to access information is not affected by any reason the person gives for seeking the access or the public entity's belief as to what the person's reasons for seeking the access are.
50. Counsel submitted that the Petitioners request to access the information was reasonable. Counsel also noted that there was no justifiable public interest outweighing issuance of the sought information. In fact, it was stressed that the Government is mandated under the Public Finance Management Act to keep all records with reference to public finance.
51. Turning to the second issue, Counsel submitted that contrary to the Respondents' assertion, the onus to proof that the information is protected as alleged lies on them. Reliance was placed in Zebedeo John Oporo v the Independent Electoral and Boundaries Commission [2017]eKLR where it was held that:
- “The right of access to information is not absolute, but to satisfy the requirements set out under article 24 of the Constitution, the respondent must demonstrate that the limitation imposed on the constitutional right is "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and that it falls within the exceptions provided in section 6 of the act. "In my view, the Respondent did not satisfy this constitutional test nor did they establish that the refusal falls within the exceptions in section 6. The Respondents only made a reliance of section 6 without offering evidence to discharge the burden.”
52. Similar dependence was placed in Khalifa & another (*supra*), Trusted Society of Human Rights Alliance & 3 others(*supra*), Mercy Nyawade v Banking Fraud Investigations Department & 2 others [2017]eKLR and Nairobi Law Monthly Company Limited (*supra*).
53. Counsel stressed that the reasons provided for non - disclosure by the Respondents were not justifiable in the circumstances of this case. As a consequence, Counsel submitted that the Respondents had violated the Petitioners' rights under Article 10, 35 and 201 of the Constitution.

2nd Interested Party's Case

54. Emily Kinama for the 2nd Interested Party filed submissions dated 24th July 2023 where she identified the issues for determination as: whether the Petitioners' right of access to information under Article 35 of the Constitution was violated by the 2nd Respondent; whether the 2nd Respondent violated Article



- 201 (1) of the Constitution and whether the 2nd Respondent violated the national values and principles under Article 10 of the Constitution.
55. It was submitted on the first issue that the Petitioners in compliance with the dictates of Section 8 of the Access to Information Act made an application to access the sought information in line with their right under Article 35 of the Constitution. It is stated that since the 2nd Respondent failed to respond to the application within 21 days, Section 9(1) of the Act provides that the same was deemed rejected. A further rejection was encountered when the CAJ intervened. It was also noted that the 2nd Respondent only purported to respond after the instant Petition had been filed. Counsel as such argued that the 2nd Respondent had indeed violated the Petitioners' right to access information.
56. Reliance was placed in Khalifa & another (supra) where it was held that:
- “70. It is common ground that a proper request was directed at respondents. In terms of section 9 of the Act, the respondents were supposed to decide whether to grant or refuse the request within a reasonable time but in any event within 21 days after receiving the request. The requester must be notified of the outcome and the next step that he or she may take. However, if the Public Officer fails to give a decision on a proper request within 21 days, and no extension has been sought, the public officer is, for the purposes of the Act, regarded as having refused the request as provided under section 9(6) of the Act.”
57. Analogous reliance was placed in Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR, Nairobi Law Monthly Company Limited (supra) and Trusted Society of Human Rights Alliance & 3 others (supra).
58. Counsel as well argued that the right to access information can only be limited under Article 24 of the Constitution as read with Section 6 of the Access to information Act. In this case it was asserted that the 2nd Respondent had failed to establish its case for non-disclosure yet disclosure of the information was in public interest.
59. To buttress this point reliance was placed in the Khalifa case (supra) where it was held that:
- “86. However, the burden of establishing that the refusal of access to information is justified rests on the State or any other party refusing access. As was held in President of the Republic of South Africa & others v M & G Media Limited:-
- “The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions. Hence the evidentiary burden rests with the holder of information and not with the requester.”



87. In order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.”
60. Equal dependence was placed in *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* Civil Appeal No 22 of 2015; [2016] eKLR, *Karen Kandie v Alassane Ba and another* S.C Petition No 2 of 2015; [2017] eKLR and *Mary Nyawade v Banking Fraud Investigation Department & 2 others* (2017) eKLR.
61. On the second issue, Counsel submitted that failure by the 2nd Respondent to issue the sought information violates Article 201(1) of the *Constitution* and the principles of openness and accountability in public finance. Reliance was placed in *President of Republic of South Africa v M & G Media* CCT 03/11 where it was held that:
- “ [10] The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy.”
62. Correspondingly, Counsel submitted that the 2nd Respondent has violated the rule of law as espoused under Article 10(2) (a) of the *Constitution* by failing to supply the information. Reliance was placed in *Famy Care Limited (supra)*.
63. Additional reliance was placed in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017; [2017]eKLR.

Analysis and Determination

64. Having read through the parties’ pleadings and submissions, it is my considered view that the issues that arise for determination are as follows:
- i. Whether the Respondents violated the Petitioners’ right to access information as envisaged under Article 35 of the *Constitution*.
 - ii. Whether the Petitioners are entitled to the reliefs sought.

Whether the Respondents violated the Petitioner’s right to access information as envisaged under Article 35 of the *Constitution*

65. The right to access information is provided for in the *Constitution* under Article 35. It provides 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.
66. To give effect to this right, the *Access to Information Act* (No 31 of 2016) was enacted. This Act in essence provides the process to be followed in order to obtain information held by the State or another person. Section 4 provides as follows:
1. Right to information
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 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 the person's reasons are 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.
67. The exemptions under Section 6 (1) of the Act are as follows:
- Pursuant to Article 24 of the *Constitution*, the right of access to information under Article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to—
- a. undermine the national security of Kenya;
 - b. impede the due process of law;
 - c. endanger the safety, health or life of any person;
 - d. involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - e. substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - f. cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - g. significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;



- h. damage a public entity's position in any actual or contemplated legal proceedings; or
 - i. infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.
68. A person seeking to access information held by the state or private body is in the first instance required to address the request to the designated officer under Section 7 of the Act and the request is made on an application under Section 8 (1) which provides details and sufficient particulars for the public officer to understand extent and nature of the information requested.
69. The public officer will under Section 9 process the application and make a decision on the application as soon as possible. Where the applicant does not receive a response to an application within the period stated in subsection (1), the application is deemed to have been rejected as provided under Section 9 (6) of the Act.
70. The Supreme Court in *Njonjo Mue & another* (*supra*) affirmed the right of access to information by stating thus:
- “(13) Article 35(1)(a) and (b) of the *Constitution*, read with Section 3 of the *Access to Information Act* would thus show without equivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd Respondent...”
71. Likewise, the Court of Appeal in *Timothy Njoya v Attorney General & another* (2014) eKLR held thus:
- “Still, we entertain no doubt that the right to information is critical to the attainment of transparent and accountable government and is an enabler to the exercise and enjoyment of other rights by citizens.... This means, simpliciter that no law supersedes the *Constitution* and that therefore, the law-making freedom of Parliamentary cedes to the requirements and precepts of the *Constitution*. It follows that any interpretational approach, no matter how esoteric and esteemed its source, must pass muster the principles set out in Articles 259 and 10 of the *Constitution*.”
72. This right has also been discussed by the High Court on numerous occasions. In *Katiba Institute* (*supra*) the Court noted as follows:
- “31. the *Constitution* is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the *Constitution* does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body... It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information... The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively



publish information in the public interest-this, I believe, is the import of Article 35(3) of the *Constitution* of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...”

73. Likewise, in *Khalifa & another (supra)* it was held that:

“ 84. A reading of the provisions of *Access to Information Act* leaves no doubt that the Act was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of the sections casts the exercise of this right in peremptory terms – the requester must be given access to the information so long as the request does not fall within the exceptions in section 6 of the act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

85. A reading of section 6 reveals that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

86. However, the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. As was held in *President of the Republic of South Africa & others v M & G Media Limited CCT 03/11 [2011] ZACC 32*:

“The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the *Constitution*. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ... Hence ...the evidentiary burden rests with the holder of information and not with the requester.”

87. In order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim.... Any restriction on information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. To establish that a restriction on access to information is



necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.”

74. It is a matter of fact, that the Petitioners wrote to the 2nd Respondent seeking to be supplied with information on Kenya’s debt obligation on 7th February, 2022 but the said letter did not elicit any response. The Petitioners even sought the intervention of the Commission on Administrative Justice to no avail. That assertion is not disputed by the 2nd Respondent.
75. The 2nd Respondent readily admits the receipt of the letter by the Petitioners seeking the said information and does not deny the claim that the Commission on Administrative Justice had attempted to intervene but the information was not supplied prompting the filing of this Petition.
76. It is also important to acknowledge as is apparent, that the response by the 2nd Respondent came after a long time, that is on 22nd May, 2022 well past the 21-day period required under Section 9 (1) of *Access to Information Act*. Already there was a breach of the statutory provision that is meant to give effect to the Constitutional requirement. It is acknowledged that the 2nd Respondent received the Petitioners correspondence dated 7th February 2022 which the Petitioner confirmed was served on the 2nd Respondent on 11th February, 2022 yet the 2nd Respondent wrote a response in a letter dated 6th May 2022.
77. The 2nd Respondent tries to justify that the information the Petitioners sought is readily available in the public domain pursuant to Section 49 and 53A of the *Public Finance Management Act*, 2012. This is because the Annual Budget Policy Statement provides information for all the monies borrowed in each year and the same is subject to public participation. Moreover, that the information is supplied to the National Assembly which then publishes it on its website.
78. Furthermore, that information on any sovereign bond issued by the Government is accessible on the prospectus for the years the bonds were issued and the reasons for the issuance. The 2nd Respondent further claimed that the bonds are traded at the London Stocks Exchange hence are equally traceable although the 2nd Respondent added the bondholders keep on changing as bond are constantly being traded and the beneficial owners’ information keeps on changing with every trade conducted. Moreover, that the individual bond holders’ information is protected by laws within their countries of jurisdictions’ data protection laws. Additionally, that the information relating to sovereign bond agreements and any bond holder is protected under Section 6(1) (d) and (f) of the *Access to Information Act* that protects against the invasion of privacy of individual in so far as it relates to individual investors.
79. That in any event, the information regarding Treaties and Agreements procured between Kenya and other states or international financial institutions is held by the Ministry of Foreign Affairs as provided under the *Treaty Making and Ratification Act*, 2012.
80. That consequently, the 2nd Respondent is not obliged to provide information that can be reasonably accessed by other means as provided under Section 6(6) of the *Access to Information Act*.
81. In my humble view, the 2nd Respondent has not provided a proper justification for the denial of information sought by the Petitioners. The 2nd Respondent insists the information is readily available in budget policy statements but what is contained in the budget policy statements are proposals for borrowing and not records of what has actually been borrowed. My understanding is that the information the Petitioners seek are records of what has actually been borrowed, not proposals that may



or may not have been actualized. According Section 4(2) of the [Access to Information Act](#) the right to the information is not affected by the reason the Petitioner might have given in requesting for information held by the State, in other words, the Petitioner needed not to have justified the request since the State is under duty to provide the information on request by a Citizen unless the State can validly justify its refusal to supply the information under Section 6 of the Act. In my view the state has not justified the non-supply except in to a very limited way, that is revealing the names of Companies, Institutions or names of persons that hold Kenya's sovereign bond could breach privacy laws of investors in some countries. This Court is careful not to gamble with a possibility that has potential of exposing Kenya to legal liability.

82. In the overall analysis, I find that the refusal to supply the information requested by the 2nd Respondent violates the right of access to information under Article 35 (1) of the [Constitution](#) as well as the principle of openness and accountability in financial matters as provided for in Article 201(a) of the [Constitution](#) and generally, the principles of transparency and accountability provided for under Article 10 (2) (c) of the [Constitution](#).

83. The upshot therefore is that this Petition succeeds. I grant the following reliefs:

1. A declaration is hereby issued that the failure to provide the Treaties/ Agreements and/ or Contracts signed between the Republic of Kenya and any other state, any international financial institution, any international corporation and any other entity howsoever described is unconstitutional in so far as it contradicts the constitutional requirements on access to information under Article 35 (1) of the [Constitution](#).
2. A declaration is hereby issued that the failure to provide information relating to sovereign bonds floated for and on behalf of Kenya in the past nine years by the National Executive is unconstitutional for infringing the principle of openness and financial accountability in matters of public finance as is required by Article 201 and; further governance, integrity, transparency and accountability as provided for in Article 10 (2) of the [Constitution](#).
3. An order of mandamus is hereby issued compelling the Respondents to provide the documents and/or information sought by the Petitioners per the Petitioners' letter of 7th February, 2022 and acknowledged in this Petition by the 2nd Respondent. The information be provided within 45 days. This shall be:
 - a. Information on all sovereign bond agreements/contracts signed by the Government of Kenya and any bond that contain the terms and conditions in case of default as set out in the said letter.
 - b. Information concerning how the funds raised from the sovereign bonds were/have been expended.
4. Each Party to bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024.

L N MUGAMBI
JUDGE

