



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

MISC. CIVIL APPLICATION NO. E016 OF 2020

BETWEEN

MPURU ABURI.....APPLICANT

AND

MERU COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

MERU COUNTY SECRETARY.....2ND RESPONDENT

CHIEF OFFICER FINANCE-MERU COUNTY.....3RD RESPONDENT

CHIEF OFFICER, WATER & IRRIGATION-MERU COUNTY.....4TH RESPONDENT

CHIEF OFFICER FINANCE-MERU COUNTY.....5TH RESPONDENT

RULING

1. Applicant, is the 1st Respondent in **HIGH COURT CIVIL CASE NO. E002 OF 2020** in which the Plaintiff thereof, KIRAITU MURUNGI, seeks damages for defamation.
2. The Respondents, as described in this application are the Public Service Board and Chief Officers of the County Government of Meru respectively.
3. By a Notice of Motion dated 21st October, 2020 and filed in Court on even date, the Applicant seeks an order directing the Respondents to furnish him with various documents which are in their custody.
4. The Notice of Motion is supported by an affidavit sworn by the Applicant on 21st October, 2020 in which he avers that the documents sought are public documents which are necessary in the just determination of **HIGH COURT CIVIL CASE NO. E002 OF 2020**.
5. The Applicant further avers Article 35 of the Constitution as well as Articles 174 (a) and (c) and Article 196 of the Constitution obligates the Respondents to supply the documents as sought. Annexed to the affidavit is a copy of the Plaint in **HIGH COURT CIVIL CASE NO. E002 OF 2020**.
6. In response, the Respondents on 02nd November, 2020 filed a Notice of Preliminary Objection of the same date in which they stated that the application offends the mandatory provisions of Rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
7. On 03rd November, 2020, the court directed that the P.O be disposed off by way of written submissions.

Respondent's submissions

8. The Respondent's counsel submitted that from the reading of the application, the Applicant contends that his constitutional right to access to information under Article 35 has been violated and hence seeks redress.
9. Counsel submitted that the procedure adopted by the Applicant for instituting court proceedings under the Constitution violates Rule 4 and 10 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (***Rules***) which

specifically provides that an application for enforcement of rights under the Constitution be filed by way of a Petition which may be supported by an affidavit.

10. Counsel urged the court to uphold the P.O on the ground that the Applicant has not stated which of his constitutional rights have been infringed, the facts in support thereof, the injury caused and the reliefs sought but is instead seeking to be furnished with documents to defend another suit.

11. Counsel relied on the decisions in **Director Peter Mutune T/A Weaver Birds Ltd & 17 Others V County Commissioner Machakos County & 3 Others [2020]** where the court dismissed a Petition that did not disclose infringement of constitutional rights.

Applicant's submissions

12. The Applicant's counsel concedes that this application is brought under Article 35 of the Constitution, acknowledges that the Applicant's rights have not been violated but states however that the Applicant seeks to enforce his right to information under Article 35.

13. Counsel submitted that the application complies with Section 8(1) of the Right to Information Act (**Act**) and further stated that the right to information under Section 4 of the **Act** is unequivocally and urged court to find that the Respondent's P.O which seeks to elevate form over substance is untenable under Section 10 (3) of the Rules which provides the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

ANALYSIS AND DETERMINATION

14. I have considered whether the Respondent's Notice of Preliminary Objection is merited.

15. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer". The *locus classicus* on Preliminary Objection is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**, where Law J.A. stated:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

16. Sir Charles Newbold, President stated in the same judgment as follows:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

17. Article 35 of the Constitution provides that:

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 publicize any important information affecting the nation.

18. The Constitution undoubtedly provides that information held by the state is accessible by citizens and that 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.

19. For purposes of actualizing Article 35, Parliament enacted Access to Information Act 2016 (**the Act**). Section 4 of the Act which is material, to this Application provides for the procedure to access information. The section provides;

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

20. Section 8 of the Act provides for procedure of accessing information in the following terms:

(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

21. The foregoing section presupposes that an Applicant seeking the court's intervention to access information ought to first, request for the information, in writing, in English or Kiswahili with details and sufficient particulars to Respondent to understand what information is being requested.

22. It is important to note here that the Applicant has not demonstrated that he has sought the information he now seeks from the Respondents, in writing, in English or Kiswahili with details and sufficient particulars for them to understand what information is being requested or that the Respondents have declined to provide the said information to warrant intervention by this court.

23. And even supposing that the Applicant had demonstrated that his request for information had not been responded to, he'd have been expected to approach the court by way of a Petition as provided for under Rule 4 and 10 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (**Rules**) which specifically provide that an application for enforcement of rights under the Constitution be filed by way of a Petition.

24. I have considered whether the Applicant's application is tenable under Section 10 (3) of the **Rules** and I find that it is not, for the reason that the Applicant concedes that his right to information has neither been violated, infringed nor threatened.

25. I have purposely avoided delving into the issue of whether the issues raised by the Applicant are *subjudice* for the reason that the issue might arise in the event that the Applicant files a Petition seeking enforcement of rights.

26. From the foregoing analysis, I am persuaded that the Preliminary Objection has merit.

27. Accordingly,

a) The Preliminary Objection by the Respondent is upheld

b) The Notice of Motion dated 21st October, 2020 and filed in Court on even date is struck out with costs to the Respondents

DATED IN MERU THIS 04th DAY OF February 2021

T.W. CHERERE

JUDGE

Court Assistant For the Applicant For the Respondents

- Morris Kinoti

- Mr. Kimaita for Thurania Atheru & Co. Advocates

- Mr. Muriuki for Mbogo Muriuki Advocates