



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)
PETITION NO. 412 OF 2019
PARAGON ELECTRONICS LIMITED...PETITIONER
VERSUS
NJERI KARIUKI.....RESPONDENT
JUDGMENT

Introduction:

1. *Paragon Electronics Limited*, the Petitioner herein, is a limited liability company duly incorporated in Kenya. It has brought this action on the basis of Articles 3(1), 10, 19, 35(1), 47, 48 50(1), 159, 165(6) & (7), 258 and 259 of the *Constitution*. The Petition is further anchored on Sections 4, 5 and 6 of the *Access to Information Act*, No. 3 of 2016 and Sections 4 and 5 of the *Fair Administrative Actions Act* of 2015.
2. The Respondent is *Njeri Kariuki*. She is an Advocate of the High Court of Kenya. She is also a Chartered Arbitrator, FCI Arb., Dip. CI Arb. In this matter, the Respondent is sued in her capacity as the sole arbitrator in arbitral proceedings between the Petitioner (as a Respondent) and Yusuf Sharafally Esufali and Amana Yusuf Sharafally Esufali (as Claimants).
3. The gist of this matter revolves on the Respondent's refusal to release some documents, which documents the Respondent holds in her capacity as the arbitrator, to the Petitioner.

The Petition:

4. The Petition is dated 16th October, 2019. It was filed alongside an evenly dated Notice of Motion. The application sought for interim conservatory orders. The Petitioner later withdrew the application so as to pave way to the hearing of the main Petition.
5. The Petition is supported by two Affidavits sworn by *Clemence Mwakio* on 16th October, 2019 and 5th October, 2020 respectively. They are a Supporting Affidavit and a Supplementary Affidavit.
6. The Petitioner contends that the refusal by the Respondent to release the documents it sought is both unconstitutional and unlawful and calls for the intervention of this Court.
7. In the main, the Petition prays for the following orders: -
 1. A Declaratory order do issue declaring that the Respondent is in breach of the petitioner's rights under Article 35(1)(b) of the Constitution by refusing to provide the petitioner with information requested in the petitioner's letter dated 23rd September, 2019.
 2. Declaratory order to issue declaring that that the Respondent has threatened to breach and will reach the petitioner's right to a fair hearing under Article 50(1) of the Constitution if she carries on with the Arbitration proceedings without first providing the Petitioner with the documents requested by the petitioner vie letter dated 23rd September, 2019.
 3. An order of mandatory injunction compelling the Respondent to avail the documents requested by the petitioner vide letter dated

23rd September, 2019.

4. The petitioner be awarded costs of the suit.

5. Such further and other orders and reliefs as the Honourable Court deems fit to grant.

8. The Petitioner also filed written submissions and a List of Authorities both evenly dated 5th November, 2020. The Petitioner prays that the Petition be allowed as prayed.

The Response:

9. The Petition is opposed. The Respondent filed a Reply to Petition dated 27th January, 2020 and a Replying Affidavit sworn by the Respondent on 27th January, 2020, as well.

10. The Respondent posits that her refusal to release the documents sought for by the Petitioner is on the basis of Section 6(1)(b) of the Access to Information Act which provision limits the right of access to information.

11. The Respondent vehemently contends that the Petitioner wants to use her as an instrument to defeat the cause of justice in the guise of seeking disclosure of information. The Respondent deponed that the Petitioner differed with its Counsel in the arbitral proceedings leading to the withdrawal of the Counsel.

12. The Petitioner then filed *Nairobi High Court Civil Case No. 38 of 2019 (O.S.)* (hereinafter referred to as '**the Civil Suit**') against its former Advocates, Messrs. Steve & Andrew Advocates. The suit is still pending. The Civil Suit is on the Petitioner's quest for its former Advocates to release some files and documents to the Petitioner. The Advocates used the alleged files and documents in defending the arbitral proceedings. The Advocates have since laid a *lien* over the files and documents on account of their legal fees. They also filed a counterclaim.

13. Having encountered some difficulties in the civil suit, the Petitioner then filed the Petition subject of this judgment. The Respondent, therefore, sees the Petition as an attempt to defeat the due process of the law by circumventing the Civil suit.

14. The Respondent sought the reliance of *ELC No. 937 of 2013 (O.S) Booth Excursions vs. Dumbeya Nelson Muturi t/a Nelson Harun & Company Advocates (2014) eKLR* and *John Mang'uru Kabiri & Others vs. The County Government of Kiambu & Others (2018) eKLR* on her position that the refusal is justified.

15. The Respondent also took issue with the propriety of the Petition. She contends that the Petition is incurably defective as it is supported by the affidavit of Clemence Mwakio without a valid resolution of the Petitioner's Board of Directors.

16. The Respondent prays that the Petition be dismissed with costs.

Issues for Determination:

17. Having carefully considered the material presented before Court by the parties including the submissions and the decisions referred to, I discern the following issues for determination: -

i. Whether the Petition is incurably defective on account of lack of a resolution by the Petitioner's Board of Directors authorizing Clemence Mwakio to institute the Petition.

ii. Whether the Respondent is justified in not releasing the documents requested for by the Petitioner.

18. I will deal with the issues in *seriatim*.

i. Whether the Petition is incurably defective on account of lack of a resolution by the Petitioner's Board of Directors authorizing Clemence Mwakio to institute the Petition.

19. It is the Respondent's contention that the said Clemence Mwakio (hereinafter referred to as '**Clemence**') is not a Director of the Petitioner. As such, Clemence could only institute the Petition on the strength of the Petitioner's express authority through a Board resolution.

20. The Respondent took issue with the authority annexed as Exhibit 'CW-1' in the Supporting Affidavit sworn by Clemence. According to the Respondent, the document in issue falls way below the expected legal threshold.

21. It is submitted that under *Order 4 Rule 1* of the Civil Procedure Rules, 2010 the Petition ought to be supported by an affidavit of an officer of the Petitioner under its company seal. It is argued that Clemence was appointed as a representative of the Petitioner but is not an officer of the Petitioner hence not competent to swear the supporting affidavit.

22. It is further argued that the authority exhibited is not a Board resolution hence it contravenes Order 4 Rule 4 of the Civil Procedure Rules. The Respondent contends that the authority only allowed Clemence to represent the Petitioner in cases already filed in Courts and Tribunals

but it did not authorize Clemence to swear any affidavits on behalf of the Petitioner in the Petition in this matter.

23. From the authority, it is submitted that, it is clear that the Petitioner is acting in person and as such the firm of Messrs. Ataka Kimori & Okoth Advocates has no authority to represent the Petitioner.

24. The Respondent referred to the High Court in *Steel Formers Limited vs. SGS (Kenya) Limited & Another (2014) eKLR* and in *Kenya Commercial Bank Limited vs. Stage Coach Management Limited (2014) eKLR* for the position that any suit filed by a company must be authorized by the company under seal, where that is not done, the suit must fail.

25. The Petitioner is of the contrary position. It refers to the annexure CW-1 to the Supplementary Affidavit and submit that the annexure ratifies the institution of the legal proceedings against the Respondent and also ratifies the authorization to Clemence to sign affidavits.

26. The High Court decision in *Peeraj General Trading & Contracting Company Limited & Another vs. Mumias Sugar Company Limited (2016) eKLR* was referred to for the proposition that a Board resolution can ratify actions commenced by a company without the authority of the company.

27. I have carefully considered the two documents referred to as CW-1 in the Supporting Affidavit and the Supplementary Affidavit sworn by Clemence respectively.

28. CW-1 in the Supporting Affidavit is dated 10th December, 2018. It relates to matters which were by then already filed in Courts and Tribunals and where the Petitioner was a party and acting in person. In those matters, Clemence was authorized to appear and represent the Petitioner. The authority did not extend to matters which were yet to be filed by or against the Petitioner.

29. The Petition in this case was filed on 16th October, 2019. The Petitioner relied on CW-1 in the Supporting Affidavit as the basis of Clemence swearing the affidavit on behalf of the Petitioner. As said, that could not legally hold as the authority was limited aforesaid. For clarity, Clemence did not have the requisite authority to swear the Affidavit in support of the Petition.

30. With such state of affairs, it is for this Court to ascertain whether CW-1 in the Supplementary Affidavit ratifies the filing of the Petition and cures the anomaly.

31. The High Court has since rendered itself on the issue. There are two rival positions on the matter. One position posits that a Board resolution sanctioning the commencement of a suit in favour of a company is mandatory and must be filed together with the pleadings. The other position is that even in instances where there is no Board resolution at the inception of a suit by a company, still such action can be remedied by a resolution which ratifies the institution of the suit.

32. The Court of Appeal in ***Nairobi Civil Appeal 246 of 2013, Arthi Highway Developers Limited -vs- West End Butchery Limited & 6 others [2015] eKLR*** agreed with the High Court in Civil Case 222 of 2012, *Fubeco China Fushun -vs- Naiposha Company Limited & 11 others [2014] eKLR* where the Learned Judge of the High Court stated thus: -

Let me be emphatic on this issue that, I am aware of ample decisions of the court, and I can cite an example; the case of *BUGERE COFEE GROWERS LTS v SEBADUKA & OTHERS (1970) EA 147* where the court held that a company authorizes the commencement of proceedings by resolution of the company or by way of minutes of its board of directors. However, I find a lot of persuasion in the thread of thinking in the Ugandan case of *UNITED ASSURANCE CO. LTD v ATTORNEY GENERAL: SCCA NO.1 of 1998* where the Supreme Court of Uganda held that it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company. In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application. That fact is not denied and I am surprised the person laying the objection is the Plaintiff and not the Defendant Company. The Plaintiff has also not presented any material or affidavit from the other directors denying the authority of Caroline Wairimu Kimemia as a director in the Defendant Company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the Defendant.

33. In ***High Civil Case 192 of 2015, Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [2016] eKLR*** the Court, in addressing the issue as to whether a resolution of a company must be filed with the pleadings, was of the considered view that, the resolution need not be filed contemporaneously with a Plaint as there is no such requirement in law. The Learned Judge observed as follows: -

I associate myself with the viewpoint taken by Kimaru, J in ***Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR*** that such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit. Accordingly, it is my finding that there is indeed on record credible evidence that the deponent, Pramit Verma, was duly authorized by the Plaintiffs to swear affidavits on their behalf.

34. I fully associate myself with the above view. To me, there is no prejudice a party suffers if the resolution is availed before or at the hearing. There is no necessity in law that the resolution must be filed together with the pleadings. Looking at it differently, to require the filing of a resolution alongside the pleading is to elevate procedural technicalities above substantive justice. That goes against the grain in Article 159(2)(d) of the Constitution. (See the Supreme Court in ***Telcom Kenya Limited v. John Ochanda and 996 Others [2015] eKLR*** and ***Dhanjal Investments Limited v Kenindia Assurance Company Limited [2016] eKLR***).

35. In this case the resolution by the Petitioner was filed through annexure CW-1 of the Supplementary Affidavit. The resolution ratified the filing of the Petition in this matter among others.

36. Deriving from the foregoing, this Court hereby finds and hold that although the Petition was instituted without the resolution of the Petitioner, the Petitioner itself, in a resolution dated 28th September, 2020 ratified the institution of the suit.

37. The Petition is, therefore, properly before Court and the objection is overruled. The issue is answered in the negative.

(ii) Whether the Respondent is justified in not releasing the documents requested for by the Petitioner:

38. There are some undisputed facts in this matter. They include the fact that the Petitioner was initially represented by Messrs. Steve & Andrew Advocates in the arbitral proceedings; that the Petitioner instituted the Civil suit in a bid to recover the file and documents from its erstwhile Advocates; that the Civil suit is still pending; that the arbitral proceedings are, as well, still current; that the arbitrator (who is the Respondent herein) is in custody of some documents relating to the arbitral proceedings; that the Petitioner has requested for documents from the Respondent; that the Respondent has declined the Petitioner's request for documents; among others.

39. The Petitioner contends that the Respondent's refusal to release the documents requested is both unconstitutional and unlawful. It is argued that Article 35(1)(b) of the Constitution as read together with Section 4(1)(b) of Access to Information Act gives the Petitioner a constitutional right of access to the documents sought from the Respondent vide the letters dated 2nd May, 2019 and 23rd September, 2019. Further, under Section 11 of the Access to Information Act, the Respondent had 15 days from the date when she received the request for information to comply or otherwise communicate valid reasons for non-compliance. The Respondent did neither.

40. The Petitioner submits that even though under Section 4(2) of the Access to Information Act the Petitioner was not under any obligation to justify the reasons for requesting the documents requested, the Petitioner has nevertheless justified the basis upon which it made the requests to the Respondent. The Petitioner made it clear that it required the documents sought to enable it exercise its right to fair hearing and access to justice in prosecuting the arbitral proceedings, in prosecuting this Petition, as well as in prosecution of the Civil suit and *High Court Misc. Application No. 652 of 2019* which application seeks the removal of the Respondent from the arbitral proceedings on grounds of misconduct.

41. It is further submitted by the Petitioner that the Respondent cannot take refuge in the pendency of the Civil suit since she is not a party thereto and that the orders in the Civil suit are irrelevant for the purposes of the compliance required of the Respondent. According to the Petitioner, it made the request for the documents on 2nd May, 2019 long before the order in the Civil suit was made.

42. The Petitioner posits that the Respondent's defiance is borne out of sheer malice as the Petitioner also offered in the request letters dated 2nd May, 2019 and 23rd September, 2019 to meet the cost of generating the copies of the documents. The Respondent's further malice is manifested in the fact that on 7th October, 2019, the Petitioner requested the Respondent to stay the arbitral proceedings pending acquisition of the documents by the Petitioner where the Respondent refused and ordered that matter do proceed as scheduled on 9th October, 2019. However, the High Court in *Misc. Application No. 652 of 2019* stayed the proceedings before the Respondent.

43. It is the Petitioner's firm submission that the burden of proof lies on the Respondent to justify her refusal to provide the documents sought. That, the Respondent has not discharged that burden. The Respondent has not denied that she has the documents sought and her continued refusal to release the documents impede on the Petitioner's right of access to justice and to fair hearing.

44. The Petitioner relied on several decisions in support of the foregoing. They are *Transet Limited & Another vs SA Metal Machinery Company (Pty) Ltd* (147/2005) [2005] ZASCA, President of the Republic of South Africa and Others v M & G Media Ltd (CCT 03/11) [2011] ZACC 32, *Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission* [2019] eKLR, *Zebedeo John Opore v The Independent Electoral and Boundaries Commission* [2017] eKLR, *Edwin Harold Dayan Dande & 3 others v British American Investments Co (K) Ltd & another* [2019] eKLR, *Dry Associates v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011* (Unreported), *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR and *Juma & Another v Attorney General 2003 eKLR*.

45. **Article 35(1)** of the Constitution provides as follows: -

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.

46. The right of access to information under Article 35 of the Constitution is not among the rights enumerated under Article 25 of the Constitution which rights cannot be limited in anyway whatsoever. That being the case, any limitation to the right of access to information must comply with the requirements set out in Article 24 of the Constitution.

47. Article 24 of the Constitution provides as follows: -

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into

account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

- (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
- (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31—Privacy;
- (b) Article 36—Freedom of association;
- (c) Article 37—Assembly, demonstration, picketing and petition;
- (d) Article 41—Labour relations;
- (e) Article 43—Economic and social rights; and
- (f) Article 49—Rights of arrested persons.

48. There are, therefore, two conditions that must be met before a right or fundamental freedom may be limited. They are: -

i. There must be a law in place on the limitation;

ii. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those enumerated in Article 24 of the Constitution.

49. Therefore, for a party to succeed in demonstrating that a limitation under Article 24 of the Constitution cannot hold, that party must prove two ingredients. The *first* one is that no law on the impugned limitation has been passed. The *second* one is that, even though there is a law on the limitation, the limitation does not conform to the other requirements of Article 24 of the Constitution.

50. In this case, there is a law in place. It is the *Access to Information Act, No. 31 of 2016* (hereinafter referred to as '**the Access Act**').

51. The object and purpose of the Access Act is in *Section 3* thereof. It is to: -

- 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.

52. Section 4 of the Access Act provides for the right of every citizen to information. Section 6 provides for the limitation to the right of access to information. Section 6(1) provides as follows: -

Limitation of right of access to information:

1. 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.

53. Courts have variously dealt with the limitation of the right of access to information. In **Presidential Election Petition No. 4 of 2017, Njonjo Mue & Another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR**, the Supreme Court had the occasion to consider the limitations on the right of access to information. Before the Learned Judges was an application by H.E. Uhuru Muigai Kenyatta (then the 3rd Respondent) which sought to expunge from the record Internal Memos belonging and exchanged by members of Independent and Electoral and Boundaries Commission (IEBC) (then the 2nd Respondent).

54. It was the Respondents' case that the said Internal Memos were illegally obtained and were still the subject of internal discussions within the IEBC and as such, the Petitioners could not place any right to use them in the pretext of exercising right of access to information. It was further their case that the Petitioners could not explain how they came into possession of internal memos which under Section 27 of the IEBC Act, fell within information that the Commission was entitled to decline as it was still being used at a deliberative stage.

55. Upon weighing and balancing the Petitioners' right of access to information *vis-à-vis* that of the Commission to decline to divulge documents being used at deliberative stage, the Learned Judges made the following findings in the first instance: -

... that Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd Respondent.

56. In agreeing with the Respondents' claim that the Petitioners ought not to have accessed the impugned information, the Court went ahead and addressed the limitation of the right of access to information. The Court specifically referred to those instances where such information relates to a matter under deliberation by a person or entity and made following findings: -

[14] This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information.

[16] The rights of access to information relevant to the matter before us is therefore from the foregoing, limited by operation of law, in this instance, being the procedures for access of any information under Section 27(2) of the Independent Electoral and Boundaries Commission Act, as read together with Sections 6(1) of the Access to Information Act. Article 24(1) of the Constitution, further sets

limitations on rights including necessarily the right to access to information. It provides thus:

A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and

(d) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

57. The Court further spoke to the balance which Courts must strike while protecting litigants' right of access to information under Article 35 of the Constitution against the requirement of adherence to prescribed procedure while seeking such information. They observed as follows: -

..... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

[23] Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.

[24] The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information

58. In the end the Learned Judges stated that there is need to protect right to property if information being sought would violate that right. It expunged from the record the Internal Memos and stated that: -

[25] The Court also has to find a balance between the Petitioners' rights to access of information as guaranteed under Article 35 of the Constitution, against those of the 1st and 2nd Respondents' rights to privacy and protection of property also guaranteed under Articles 31 and 40 of the Constitution. If access was in the instance, obtained through the laid down procedure under Section 27 of the Independent Electoral and Boundaries Commission Act, and Section 6(1) of the Access to Information Act, then the rights of both the Petitioners and the Respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information.

59. In this matter, the reason why the Respondent declines to release the documents sought for by the Petitioner is hinged on Section 6(1)(b) of the Access Act. The Respondent contends that the Petitioner having already sought for the same documents in the civil suit, and which matter is still pending, then she ought to exercise restraint and give room for the civil suit to be determined. That, according to the Respondent, is a sure way of upholding the rule of law.

60. The Petitioner has not denied the pendency and the gist of the civil suit. It is, therefore, true that the information in form of the file and documents the Petitioner seeks in the civil suit is the same it is seeking in the Petition before this Court.

61. The Respondent has put her position clear. Indeed, if the Petition is allowed then the civil suit, in which the Advocates have filed a counter-claim, will be overtaken by events. The civil suit must have raised serious issues for consideration between the Petitioner and its erstwhile Advocates. Whereas the Petitioner has a right to the information on one hand, the Advocates on the other hand also have a right to their legal fees, as well. The interests of the Advocates are at risk. The release of the documents in this matter has a bearing and will significantly undermine the Court in the civil suit to give adequate and judicious consideration to the matter. It

is common ground that no final decision has been rendered in the civil suit and that the matter remains the subject of active consideration. It is these competing rights which the Court in the civil suit shall endeavour to deal with.

62. It is a cardinal expectation that everyone must uphold the Constitution and the law. Article 10 of the Constitution calls upon any one to uphold the national values and principles of governance. One of them is the *rule of law*. It is the same rule of law which Section 6(1)(b) of the Access Act seeks to uphold by providing that any information which impedes on this principle ought not to be disclosed. The facts in this Petition also brings into focus the provisions of Section 6(1)(e) and (f) of the Access Act.

63. Section 6(1)(b), (e) and (f) of the Access Act have not been declared unconstitutional. Even these proceedings do not in any way challenge those provisions. The provisions are hence deemed constitutional under the *doctrine of presumption of constitutionality of a statute*.

64. This Court, hence find and hold that, the Petitioner has not demonstrated that the circumstances of this case do not allow the applicability of the limitation as contemplated under the Constitution and the Access Act. Further, there is no evidence that the limitation as applied by the Respondent does not conform to the other requirements of Article 24 of the Constitution.

65. It can only be fair and reasonable that the parties in the civil suit are accorded an opportunity to ventilate all the issues raised therein, which some issues as disclosed, are similar to those in the Petition before this Court. It is least expected of a party to file multiple suits on the same issue. For whatever reason on the part of such a party, such a conduct can be simply summarized as a party on a fishing expedition and is a clear manifestation of forum shopping. Courts must guard against such tendencies.

66. In the unique circumstances of this matter, and upon taking all relevant considerations into account, I find that the Respondent is justified in not disclosing the information sought by the Petitioner on the basis of Article 24 of the Constitution and Section 6(1)(b), (e) and (f) of the Access Act.

67. There is also the provision of Section 14 of the Access Act. The provision states as follows: -

Review of decisions by the Commission

(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

- a) a decision refusing to grant access to the information applied for;
- b) a decision granting access to information in edited form;
- (c) a decision purporting to grant access, but not actually granting the access in accordance with an application;
- (d) a decision to defer providing the access to information;
- (e) a decision relating to imposition of a fee or the amount of the fee;
- (f) a decision relating to the remission of a prescribed application fee;
- (g) a decision to grant access to information only to a specified person; or
- (h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

68. Section 14 of the Access Act brings to the fore the **doctrine of Constitutional Avoidance** and the **doctrine of exhaustion**. Under Section 14(1)(a) of the Access Act, a party whose request for information has been declined has a recourse to seek a review of that decision from the Commission on Administrative Justice (hereinafter referred to as '**the Commission**').

69. The doctrine of constitutional avoidance was discussed in **Nairobi Constitutional Petition No. 254 of 2019, Kiroo wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR**. The Court expressed itself as follows: -

[105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

[106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

[256].The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

70. On the doctrine of exhaustion, a 5-Judge Bench in **Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with**

Constitutional Petition No. 201 of 2019 (2020) eKLR elaborately dealt with the said doctrine. The Court stated as follows: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in **R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR**, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

71. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra)*, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case (supra)*, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR*.

62. In the instant case, the Petitioners allege violation of their fundamental rights. **Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.**

72. In this case, therefore, even if the Petitioner did not institute the Civil suit, still it was obliged to engage the Commission. I say so because the dispute in this matter solely rests on the release of the documents and nothing more.

73. Having said so, and being alive to the legal position that statutory provisions ousting Court's jurisdiction must be construed restrictively, I find and hold that, the Petitioner has failed to demonstrate any of the exceptions to the doctrine of exhaustion.

74. This is one such case that, even if there would be any constitutional issues raised in the Petition, such issues ought to await the consideration of the matters before the Commission.

75. This Court, therefore, finds and hold that the Petitioner did not exhaust the remedy provided for in Section 14 of the Access Act before invoking the jurisdiction of this Court.

76. In the end, it is this Court's finding that the Respondent has ably and sufficiently demonstrated that she is entitled to decline the request by the Petitioner on the basis of Article 24 of the Constitution and Section 6(1)(b), (e) and (f) of the Access Act.

77. The issue is answered in the affirmative.

Disposition:

78. As I come to the end of this judgment, and from a holistic approach of the matters involving the Petitioner and the Respondent, it is prudent that the Petitioner focuses on the determination of the Civil suit first. The determination of the Civil suit has a significant bearing on the matters between the Petitioner and all the other parties.

79. Having said so and flowing from the findings and conclusions, the Petition dated 16th October, 2019 cannot be maintained.

80. The Petition be and is hereby dismissed with costs.

DELIVERED, DATED and SIGNED at NAIROBI this 4th day of March, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Ataka, Counsel for the Petitioner.

Miss. Gachinja, Counsel for the Respondent.

Elizabeth Wamboi – Court Assistant