



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CONSTITUTIONAL PETITION NO. 1 OF 2020**

**IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23(3), 27, 35, 40 AND 47 OF THE**

**CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 19 OF THE SIXTH SCHEDULE OF**

**THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015**

**AND**

**IN THE MATTER OF THE RIGHT TO INFORMATION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**(SUPERVISORY JURISDICTION AND PROTECTION OF**

**FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)**

**HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**ONGIRI HARUN OSINDE.....PETITIONER**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

## **INTRODUCTION**

1. The Petitioner commenced this suit by way of Petition dated 3<sup>rd</sup> March 2021 seeking the following reliefs;

a) A declaration do issue that the Petitioner has a right to information and records in the Respondent's custody with respect to land parcel No. KISII MUNICIPALITY/BLOCK1/590.

b) The 1<sup>st</sup> Respondent be and is hereby directed to forthwith furnish the Petitioner with all records with respect to land parcel No. KISII MUNICIPALITY/BLOCK1/590.

c) Any other/ further orders be issue as may be expedient

d) Costs of this Petition be borne by the Respondents jointly and severally.

2. It is the Petitioner's case that he is the registered owner of L.R NO. KISII MUNICIPALITY/BLOCK1/590 hereinafter referred to as the suit property. The Petitioner avers that he conducted an official search whereupon he discovered that the suit property was also registered in the name of another person without his knowledge. He also established that the said person has charged the property to the bank as security for a loan. The Petitioner then wrote to the Land Registrar, Kisii County to confirm the lawful owner of the suit property but the Land Registrar was unable to supply him with the said information. He then sought information and records from the 1<sup>st</sup> Respondent to no avail. The Petitioner therefore fears that if the loan is not repaid the suit property may be sold by the bank to recover the outstanding loan.

3. Despite being served with the Petition the Land Registrar has not filed any response. When the matter came up for hearing on 30.9.2020, counsel for the Respondents requested for time to file her documents but none were filed. The Court then directed that the Petition be canvassed by way of written submissions and the Petitioner filed his submissions on 26<sup>th</sup> November 2020.

#### PETITIONER'S SUBMISSIONS.

4. Learned counsel for the Petitioner has submitted that the 1<sup>st</sup> Respondent being a public body is bound by article 35 (1) of the Constitution of Kenya 2010 to disclose the information sought by the Petitioner to enable him secure his proprietary rights over the suit property. Counsel has also relied on section 4 of the Access to Information Act which provides that every citizen has a constitutional right to seek and have information from state offices and organs. He referred to the cases of **Katiba Institute v President's Delivery Unit & 3 Others (2017) eKLR** and **Mercy Nyawade v Banking Fraud Investigations Department & 2 Others (2017) eKLR** for the proposition that citizens should have access to information held by state officers upon request. He urged the court to give effect to the principles of good governance enshrined in the Constitution.

#### ISSUES FOR DETERMINATION

5. I have considered the Petition, Supporting Affidavit and the Petitioner's submissions. This is a straight forward matter where the singular issue for determination is whether the Petitioner is entitled to a declaration that he should be furnished with all the records with respect to L.R No. KISII MUNICIPALITY/BLOCK1/590.

#### ANALYSIS AND DETERMINATION

7. Article 35 of the Constitution of Kenya 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.*

8. In the case of **Republic v Cabinet Secretary Ministry of Information and Communication and 10 Others Ex-parte Adrian Kamotho Njenga (2015) eKLR** Justice Odunga observed as follows

*"Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the State. I therefore agree with the position encapsulated in **The Public's Right to Know: Principles on Freedom of Information Legislation – Article 19** at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information. Where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. I also endorse the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalized industries and public corporations, non-departmental bodies or quasi-non-governmental organizations, judicial bodies, and private bodies which carry out public functions".*

9. The rationale for the right to access information was explained by **Majanja, J** in **Nelson O. Kadison vs. The Advocates Complaints Commission & Another NBI HC Petition No. 549 of 2013** as follows:

*"The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the 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."*

10. I associate myself with the above decisions. In the instant case the Petitioner has in his affidavit in support of the Petition demonstrated that he wrote to the Land Registrar, Kisii County requesting for documents pertaining to the suit property.

11. In a letter dated 2<sup>nd</sup> May, 2017 addressed to the National Land Commission and copied the Chief Land Registrar and the Petitioner the Land Registrar stated as follows:

*“The Land Registry which is the custodian of all land records in Kisii County is unable to determine the authenticity of the registers of the above-captioned property since the said property is registered under two different individuals namely; Ongiri Harun Osinde registered on 29.7.2015 and Certificate of Lease issued on 7.4.2016, and Job Bosire registered on 11.8.2011 and Certificate of Lease issued on the same date. However, Job Bosire has charged the property four times in the years 2013, 2014, 2015 and 2016 respectively and obtained over Kshs. 20,000,000 to the Cooperative Bank of Kenya”*

*Kindly guide the bearer of the letter and guide us on the way forward”.*

The said letter did not elicit any response. This is what prompted the Petitioner to institute this suit.

12. It is counsel’s contention that the 1<sup>st</sup> Respondent’s refusal to furnish the Petitioner with the information sought offends section 9 of the Access to Information Act which stipulates that information sought be provided to the Applicant within 21 days. He maintains that no decision has been communicated to him nor has the 1<sup>st</sup> Respondent given any reasons why he has failed to disclose the information sought as provided by section 6 of the Act. He is of the view that the 1<sup>st</sup> Respondent’s conduct offends article 47 of the Constitution on fair administrative action.

13. Counsel has relied on the case of **Mercy Nyawade v Banking Fraud Investigations Department & 2 others (2017) eKLR** where the court held that the burden of establishing that refusal of access to information is justified rests on the state or any party refusing access. The position was clearly expressed by the Constitutional Court of South Africa in **President of the Republic of South Africa & Others v M&G Mega Limited** where it was held that:

*“The imposition of the evidentiary 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 is with the holder of the information not the requester”*

14. There is no doubt that the information sought by the Petitioner is in the custody of the 1<sup>st</sup> Respondent and refusal to furnish the said information to the Petitioner amounts to a denial of the Petitioner’s right to information which is enshrined in Article 35 of the Constitution of Kenya.

15. Accordingly, the orders which commend themselves to me and which I hereby grant are as follows:

- a) A declaration is hereby issued that the Petitioner has a right to information and records in the Respondent’s custody with respect to Land Parcel NO. KISII MUNICIPALITY/BLOCK1/590.
- b) The 1<sup>st</sup> Respondent be and is hereby directed to furnish the Petitioner with all records with respect to Land Parcel NO. KISII MUNICIPALITY/BLOCK1/590 within 21 days.
- c) The costs of this Petition shall be borne by the Respondents jointly and severally.

**DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE**