



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO. 16 OF 2019
IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT CAP 26 LAWS OF KENYA
IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

MOSES CHEROGONY SANG.....APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE COUNTY CRIMINAL INVESTIGATIONS OFFICER, NAKURU.....2ND RESPONDENT

THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER, NAKURU.....3RD RESPONDENT

HON. THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. Pursuant to leave granted by the court on the 22nd day of July 2019, the applicant sought an order of mandamus directed to the 1st to 3rd respondent to supply the applicant with copies of statements, documents, exhibits, and reports that constitute the Nakuru DCI Enquiry file No. 11 of 2017.

2. In response, the respondents filed grounds of opposition dated 21st June 2021; grounds filed are that the applicant has raised constitutional issues outside of fair Administrative Action which cannot be properly addressed by way of judicial review i.e a Right to Information in the Constitution and Victims Protection Act; further that the applicant has not exhausted all remedies that are available in law and especially the access to information.

3. This matter proceeded by way of written submissions.

APPLICANT'S SUBMISSIONS

4. The applicant submitted that he made a complaint to the 1st Respondent's office on 3/4/ 2017 against **Henry Lamisi chemos, Michael Ochieng Alosa, Esther Awour, and Charles Karanja** in regards to fraudulent transactions over titles to land parcel Number Nakuru Municipality Block 15/626 and 627. He submitted that investigations were commenced and upon conclusion, it was established that several offenses had been committed and the file was forwarded to the director of public prosecution for further recommendations but the DPP failed to approve the charges and the file was kept in abeyance awaiting the outcome of Nakuru ELC No. 128 of 2012 and 129 of 2012 over the subject property.

5. The applicant submitted that he was aggrieved by the decision of the DPP and requested copies of the statements, documents, exhibits, and reports for his further action but the respondents failed to supply the documents necessitating the filing of this application.

6. The applicant submitted that this application meets the threshold of granting an order of mandamus as he is entitled to the right to

information under **article 35 of the constitution** which right has been infringed and urged this court to allow this application.

RESPONDENTS SUBMISSIONS

7. The respondent restated grounds of opposition and cited the case of **Republic versus Paul Kihara Kariuki, Attorney General and 2 others Exparte Law society of Kenya {2020}eKLR** where in paragraph 3, the judge stated as follows:-

“...a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. when determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values [Justice Langa in Minister of safety & security vs Luiters,(2007) 28 ILJ 133(CC)...”

8. The respondent further submitted that the applicant has not exhausted the procedure available for realizing the right to information found in the Access to Information Act; that Access to Information Act stipulates that a refusal to provide such information, to be applied to the commission as set out in **Section 14 of the Access to Information Act in 14(a) & (d)** provide that an applicant may apply in writing to the commission for review of a decision refusing to grant access to information applied for and decision to defer providing access to information and section 23 gives powers to the commissioner to issue a summons or other orders requiring the attendance of any person before the commission and production of any document or record relevant to any investigation by the commission and under subsection 2, the commission if satisfied has the power to order the release of any information withheld unlawfully

9. **Section 23(3)** provide that a person not satisfied with the decision of the commission may appeal to the High Court within 21 days from the date the order was made .

10. The respondent submitted that it is clear how the right under Article 35 of the constitution is to be enforced and submitted that the applicant has not exhausted that remedy.

11. The respondent cited the case of **Reuben Mwangela M’telekwa**(suing as the legal representative of the estate of **M’telekwa M’mucheke Naituri alias Mítelekwa Mucheke**) **v paul Kigea Nabea & 2 others [2019]eKLR** where the court allowed preliminary objection on the ground that the applicant had not exhausted other available remedies.

12. The respondent further cited the case of **Paragon Electronic Limited v Njeri Kariuki[2021]eKLR** where the court in paragraph 75 stated as follows:-

“This court, therefore, finds and hold that the petitioner did not exhaust the remedy provided for in section 14 of the Access to Information Act before invoking the jurisdiction of this court.”

ANALYSIS AND DETERMINATION

13. I have considered the application and the submissions filed and what I consider to be an issue is whether the applicant has demonstrated that he has met the threshold for grant of an order of mandamus. The respondent's counsel has submitted that the applicant did not follow the right procedure in seeking the information as per prayer of the application dated 22nd July 2019.

14. There is no doubt that **Article 35 of the constitution** gives the right of access to information. Pursuant to **Article 35 of the constitution**, parliament enacted the Access to Information Act. **Section 4 of the Act** provide as follows:-

“ Right to information (1) Subject to this Act and any other written law, every citizen has the right of access to information held by— (a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom. (2) Subject to this Act, every citizen's right to access information is not affected by— (a) any reason the person gives for seeking access; or (b) the public entity's belief as to what are the person's reasons for seeking access.”

15. **Section 14 of the Access to Information Act** provide for review of decisions by the Commission provide as follows:-

“(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;

...

(d) a decision to defer providing the access to information;

(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.’

16. **Section 8 of the Act** provides for the processing of the application. It provides that a public officer shall decide on an application as

soon as possible, but in any event, within twenty-one days of receipt of the application.

17. I note from averments by the applicant in paragraphs 13 and 14 that he wrote a letter dated 8th July 2019, seeking information outlined in prayer 1 of the application. He further stated that he visited their offices on 17th July 2019 requesting the said documents.

18. The state counsel quoted **section 14 of the Act** which provides for the procedure of access to the information upon refusal. However, in the instant case, there is no communication as to whether the information has been denied.

19. **Section 8 of the Act** is couched in mandatory terms. It says the officer who is referred by the Act as access officer shall make a decision. There is no decision upon which the applicant was expected to apply to the commissioner for review. No where on the grounds of in opposition of the application have the respondents indicated that they refused to give the information nor delay in giving the information or inaction on their part.

20. In my view, no decision was made by the respondents upon which the applicant would have applied for review as provided by Section 14 of the Access to information Act. No reason has been advanced to deny the applicant information sought. I find the application herein merited.

21. FINAL ORDERS

1. I hereby issue an order of mandamus directing the 1st to 3rd respondents to supply the applicant copies of statements, documents, exhibits, and reports that constitute Nakuru DCI Enquiry File No.11 of 2017.

2. No orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 4TH DAY OF NOVEMBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Langat for exparte/applicant

Wanjeri holding brief for A.G. for respondent