



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 11 OF 2021

**IN THE MATTER OF APPLICATION UNDER ARTICLE 10, 19, 20, 22, 23, 25, 27, 28, 29, 35, 47, 50, 53 AND 258 OF THE
CONSTITUTION OF KENYA (2010)**

AND

IN THE MATTER OF THE CHILDREN’S ACT SECTION 3, 4, 5, 6, 7, 8, 9

AND

IN THE MATTER OF BASIC EDUCATION ACT SECTION 4, 36, 55, 56, 58, 59 AND 61

AND

IN THE MATTER OF THE BOARD OF MANAGEMENT OF EBEREGE PRIMARY SCHOOL

AND

IN THE MATTER OF CONSTRUCTION OF A MODEL CENTER OF EXCELLENCE AT EBEREGE PRIMARY SCHOOL

BETWEEN

**NEHEMIAH STONE BIC MISIANI (Suing on his own behalf
and on behalf of the general public).....PETITIONER**

AND

**THE BOARD OF MANAGEMENT –
EBEREGE PRIMARY SCHOOL.....1ST RESPONDENT
KISII COUNTY EDUCATION DIRECTOR.....2ND RESPONDENT**

RULING

1. The petitioners herein filed a petition together with a notice of motion application dated 28th May 2021 and later amended on 5th July 2021 and filed on 8th July 2021. Their application moved the Court for orders:

1. THAT the matter be certified urgent and heard on priority basis.
2. THAT the 1st respondent be restrained from allowing the Contractor or its agents from carrying away any school materials from the school or in any way vandalizing the school until this application is heard and determined.

3. THAT the applicant, Mr. NEHEMIAH STONE BIC MISIANI be issued with the following by the 1st Respondent:

- i. Certified copies of ALL Bank Statements of Eberege Primary School for the period January, 2015 to May 2021.
- ii. BOM Minutes relating to the surrender of Eberege Nursery School land and the subsequent displacement of the Nursery School children.

4. That the Applicant, Mr. NEHEMIAH STINE BIC MISIANI meets the costs of making the copies in (3) above.

2. The application is based on the grounds set out therein and an affidavit sworn on the date of the application by the Applicant.

3. The Applicant avers that he is an alumnus of Eberege Primary School ('school') and a member of Botaranda community. He states that the school is a public school that was established by the Seventh Day Adventist Church to enhance the community's quality of life through education. The applicant avers that the 2nd respondent has failed to perform its duties as outlined in **the Basic Education Act No 14 of 2013**. The applicant alleged that the Chairman of the 1st respondent was not nominated and elected according to **section 56 (4) of the Basic Education Act No 14 of 2013**. Similarly, the members of the 1st respondent were also not nominated as required by **section 56 (1) (a) of the Basic Education Act No 14 of 2013**.

4. He further alleges that the school head teacher and the deputy head teacher were handpicked by the Chairman of the Board and the Contractor in total disregard of the Provisions of the **Basic Education Act** to facilitate fraudulent activities.

5. The applicant states that although the school is a public institution its operations are shrouded in secrecy and thus there is lack of transparency and accountability. He avers that the 1st respondent is colluding with the contractor to defraud the school by acting as conduit in receiving NG-CDF funds and releasing it to the Contractor when it knows that the contractor has no intention of completing the project. He explained that the project commenced in 2015/2016 however its only 20% complete yet the CDF/NG-CDF has released more than 65% of the total allocated funds.

6. He further averred that on 2nd May 2021 the 1st respondent colluded with the contractor to carry away building materials that were in the school. He advanced that the actions of the 1st respondent led to the uproar from members of the community. He also alleged that the 1st respondent has refused to account for money that were contributed by the members of the 'Omogachieri Diaspora' group. The applicant claims that the 1st respondent has also failed to issue receipts to parents for school fees and neglected to process the school's title deed.

7. The Respondent opposed the application through an affidavit sworn on 18th June 2021 and 21st July 2021 by Gideon Omweri. The Respondent's starting point is that the petition and application are frivolous, mischievous and an abuse of court process hence the same should be dismissed. According to the Respondents, the applicant is neither a parent nor a stakeholder hence his application seeking to be supplied with bank statements should be disallowed as the statements are confidential.

8. The Respondents deny ever paying the contractor without the authorization from the NG-CDF. The respondent states that they received Kshs 12,000,000/- that was utilized in the construction of the ongoing three storey class room. Although the project ought to be in the final stages, the contractor failed to fulfill his part of the contract and the 1st respondent notified the area Constituency Development Fund Office. Thereafter the sub-county works officer did an evaluation of the project and recommended that the contractor refund Kshs 3,500,000/- to the school for work that was not done. Gideon Omweri explained that on 2nd May 2021 the said contractor illegally took some of the school's construction materials for his own use.

9. It was averred that the school and nursery are in one block and are clean and free from jiggers. The respondents alleged that the Board members were nominated and elected in accordance to **section 56 (4) of the Basic Education Act** and they proceeded to elect their own chairperson.

ANALYSIS AND DETERMINATION

10. I have considered the application which is the subject of this ruling, the response thereto, the submissions made on behalf of the parties hereto and the authorities cited.

11. The applicant in his submissions **abandoned** the prayers sought in his application and urged the court to deliberate on the sole issue: *whether he has proved a case to be issued with certified copies of bank statements for the school between the period of January 2015 to 10th May 2021.*

12. The applicant submitted that he is a stakeholder by virtue of being an alumnus of the school.

13. However, the respondent on the other hand have challenged the jurisdiction of this court and I will now turn to consider whether this court have the jurisdiction to entertain this instant application and/or petition. The respondent submitted that the applicant invoked the jurisdiction of this court prematurely. They relied on **section 49 of the Constituency Development Fund Act of 2013 (CDF Act)** which provides as follows:

1. All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.

2.

3. Disputes of civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to the court.

4. Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where the parties fail to jointly agree on an arbitrator, the Cabinet Secretary may appoint an arbitrator whose costs shall be jointly borne by the parties.

14. The respondent argued that jurisdiction of this court ought to have been considered after the applicant referred the dispute to arbitration. According to the respondent this court does not have original jurisdiction to determine the matter.

15. The application before me solely seeks access to information that is held by the school. The applicant has no issues with the CDF Board or its management of the fund.

16. The dispute raised by the petition is with the Board of Management of the School. Section 1 of the fourth Schedule of the Basic Education Act No 14 of 2013 provides that “*the Board of Management* shall be a body corporate with perpetual succession and a common seal, and shall in their corporate names, be capable of-

a. suing and being sued;

b. taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

c. borrowing, lending and granting money;

d. entering into contracts; and

e. doing or performing all other or things for the proper performance of its functions under this Act which may lawfully be done or performed by body corporate.”

17. The dispute therefore does not fall within the provisions of section 49 of the Constituency Development Fund Act of 2013. On the contrary the issue of the right of access to information is protected under Article 35 of the Constitution of Kenya 2010 and provisions in the Access to Information Act, 2016.

18. Article 35 of the Constitution 2010 provides;

“(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.”

19. The right to information is one of the rights that underpin the ideals of good governance, integrity, transparency, and accountability all which cannot be implemented without access to information. (See *Famy Care Limited v Public Procurement Administrative Review Board & another Nairobi Petition No. 43 of 2012 [2012] eKLR*).

20. Section 5 of the Access to Information Act, 2016 provides as follows:

5. (1) Subject to section 6, a public entity shall —

(a) facilitate access to information held by such entity and which information may include —

(i) the particulars of its organization, functions and duties; (ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) salary scales of its officers by grade;

(v) the norms set by it for the discharge of its functions;

(vi) guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; and

(vii) a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person;

(b) during the year commencing on first January next following the first publication of information under paragraph (a) and during each succeeding year, cause to be published statements updating the information contained in the previous statement or statements published under that paragraph;

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;

(d) provide to any person the reasons for any decision taken by it in relation to that person;

(e) upon signing any contract, publish on its website or through other suitable media the following particulars in respect of the contract entered into-

(i) the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference;

(ii) the contract sum;

(iii) the name of the service provider, contractor or individual to whom the contract has been granted; and

(iv) the periods within which the contract shall be completed.

(2) Information shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used.

(3) At a minimum, the material referred to in subsection (1) shall be made available —

(a) for inspection by any person without charge;

(b) by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made; and

(c) on the internet, provided that the materials are held by the authority in electronic form.

(4) Subsection (1) (a) shall come into operation twelve months after the commencement of this Act.

21. In my view, the matter raised by this application falls squarely within the provisions of **the Access to Information Act, 2016**. Therefore, any person interested in receiving information from the state such as the applicant herein, is required to make an application to access such information as provided by **section 8 (1) of the Access to Information Act, 2016**. **Section 8 (1) of the access to Information Act, 2016** provides that the application 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.

22. The applicant in this case has failed to demonstrate that he asked to be supplied with information regarding the contract sum or the periods within which the contract is expected to be completed and was denied said information.

23. Instead, he now seeks to have the school's bank statements which do not fall under **section 5 of the Access to Information Act, 2016**. Having failed to follow the laid down procedure under **the Access to Information Act, 2016**, the applicant's rights cannot be said to have been violated.

24. In **Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** stated: -

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

25. The applicant submitted that the information sought was intended help him to prove that the 1st respondent mismanaged the school.

However, it is not in dispute that he failed to follow the laid down procedure in **the Access to Information Act, 2016**. This court will not disregard the provisions in **the Access to Information Act, 2016** to merely assist the applicant to seek facts and information he intends to use to prove the very case that he is arguing before the court.

26. For the above reasons and having come to the above conclusion, I find the instant application to be without merit and accordingly dismiss the same. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF NOVEMBER, 2021

R. E. OUGO

JUDGE

In the presence of:

Petitioner/Applicant In Person

Miss Chepkurui For the Respondent

Ms. Rael Court Assistant