



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 172 OF 2020

REPUBLIC.....APPLICANT

VERSUS

DR. SAM NTHENYA, CHIEF EXECUTIVE OFFICER,

NAIROBI WOMEN'S HOSPITAL.....1<sup>ST</sup> RESPONDENT

NAIROBI WOMEN'S HOSPITAL.....2<sup>ND</sup> RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

CHRISTINE NZULA.....EX PARTE APPLICANT

JUDGMENT

1. The exparte applicant moved this court vide the Notice of Motion dated 24<sup>th</sup> January 2020 which was filed under Section 23(2) and (5) of the Access to Information Act, 2016, Articles 22 and 35 of the Constitution and under Rule 2, 4(1) and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

2. The application seeks the following orders:

*i. Spent;*

*ii. That the applicant be granted leave to enforce the order issued by the Commission on Administrative Justice on 6<sup>th</sup> September 2019 as a decree of this Honourable Court;*

*iii. That the grant of leave do operate as a decree of this Honourable Court in place for the order issued by the Commission on Administrative Justice on 6<sup>th</sup> September 2019;*

*iv. That the Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances; and*

*v. That the costs for the application be provided for.*

3. The application is supported by the following grounds:

*i. That the applicant pursuant to Article 35 of the Constitution sought information as espoused in her supporting affidavit from the respondents which she did not receive.*

*ii. That by virtue of Section 14 of the Access to Information Act, she proceeded to apply to the interested party to review the respondents decision.*

iii. That the interested party granted orders pursuant to Section 23(2)(a) of the Access to Information Act against the respondents ordering it to facilitate the information and comply within 7 days. They were further informed that they had an opportunity to appeal to the High Court within 21 days of the orders being issued.

iv. Further that where no appeal was filed, the party who the order is made out in favour of would under Section 23(5) of the Access to Information Act apply ex-parte by summons to the High Court for leave to enforce such order as a decree.

v. This application is accordingly grounded on the need to realize enforcement of her rights under Article 35 and 43(1) of the Constitution failure to which the respondents will continue violating her rights.

4. A summary of the ex parte applicant's affidavit dated 24<sup>th</sup> January, 2020 is that she was a patient of the respondents for pre-natal and post-natal care. She underwent a caesarean operation on 17<sup>th</sup> May, 2018 and delivered a pre-term baby. The baby was transferred to the intensive care unit where she eventually died. The petitioner was later discharged on 21<sup>st</sup> May, 2018.

5. The ex parte applicant depones that efforts to get information on her medical record from the respondents in relation to her pregnancy have been futile. The first request was by her letter dated 21<sup>st</sup> November 2018 (CN-1). She received a response asking her to personally request and go for the information and go for it in person (letter dated 22<sup>nd</sup> January, 2019 CN-2). She visited the facility on 19<sup>th</sup> February, 2019 but was asked to return after five days.

6. Several telephone conversations and meetings were held between her, the respondents' staff and her counsel when she was finally told the records could not be traced. Her counsel requested the respondents to put that in writing vide the letter dated 11<sup>th</sup> June, 2019 (annexture CN-3). The respondents did not act on this.

7. Following the respondents lack of commitment to this issue, it was referred to the Commission on Administrative Justice for action (Interested Party). Action was taken by the interested party but still there was no compliance by the respondents (annexture CN4-6).

8. On 6<sup>th</sup> September, 2019 the interested party issued orders under section 23(2)(a) of the Access to information Act 2016 directing the 1<sup>st</sup> respondent to release to the ex parte applicant the required information within seven (7) days of the date of issuance (annextures CN-7). The ex parte applicant depones that the respondents have to date not furnished her with the required information.

9. In her further affidavit she deponed that the respondents grounds of opposition have failed to address the reason for their continued infringement of her right to information. Further that the interested party's mandate to entertain complaints on enforcement of the Access to Information Act is provided for under chapter 15 of the Constitution.

10. The respondents filed the following grounds of opposition dated 9<sup>th</sup> October 2020:

***i. That the applicant is not entitled to the orders sought as the application is defective and lacks merit.***

***ii. That the Commission on Administration Justice does not have jurisdiction to enforce constitutional provisions as provided under the Access to Information Act 2016 as the same offends Article 23(1) and Article 165 (3)(b) of the Constitution.***

***iii. That the Commission on Administration of Justice is neither a subordinate court nor a tribunal as provided under Article 169 of the Constitution hence does not sit as a quasi-judicial body and therefore its orders are not capable of being enforced by the High Court. Hence Sections 23 of the Access to information Act ought to be declared invalid, null and void to that extent.***

***iv. That the Commission on Administration to Justice is not provided under Article 248(2) of the Constitution hence cannot conduct Commission functions as provided under Article 252 of the Constitution.***

***v. That the applicant's application is misconceived, mischievous, in bad faith, is frivolous and vexatious.***

11. The respondents further filed a replying affidavit by Dr. Fredrick M. Kairithia dated 22<sup>nd</sup> October, 2020. His averments are a re-enforcement of the grounds of opposition filed. He avers that the interested party is not a tribunal, subordinate court or commission to enforce Constitutional provisions. He however admits that the ex parte applicant was admitted at the 2<sup>nd</sup> respondent's facility as claimed.

12. According to him the admission was on 16<sup>th</sup> May, 2019. He also averred that the applicant was admitted with severe pregnancy complications and a caesarian section with a BTL was conducted on her by the 2<sup>nd</sup> respondent's doctor. The deponent confirms that the 2<sup>nd</sup> respondent received the Petitioner's request for her medical information. That the same could not be honored as her file could not be traced. For that reason he claims there can be no enforcement of the interested party's orders. The deponent annexed a medical report (FMK-1) detailing all he remembered about this case.

13. The applicant filed written submissions dated 22<sup>nd</sup> March 2021 through Mr. Timothy Wafula advocate. Learned Counsel submits that the issues for determination are whether the interested party had jurisdiction to make its orders dated 6<sup>th</sup> September 2019 and whether the applicant is entitled to the orders sought.

14. It is counsel's submission that the interested party properly exercised its jurisdiction in making the decision, since it is vested with the necessary powers as a commission within the meaning of Chapter 15 of the Constitution. Furthermore, that it is empowered under Section

8(m) of the Commission on Administrative Justice Act to perform any function empowered by the Constitution and the law. It is accordingly submitted that the interested party was well within its mandate as specified under Section 20 of the Access to Information Act.

15. He further submits that Section 21(1)(a) of the Access to Information Act empowers the interested party to investigate any complaint alluding to violation of the provisions of the Act and where an infringement is found to order the release of any information withheld unlawfully as seen under Section 23(2)(a) of the Act. To buttress this point reliance was placed on the case of **Republic v Isaiah Kubai & another; Commission on Administrative Justice(Interested Party) Ex-Parte Duncan Muthusi(2019)eKLR** where it was determined that:

*“...the Court returns that the interested party(Commission on Administrative Justice) has jurisdiction under the Access to Information Act,2016 to make such orders as appropriate under section 23(2) against both public entities and private bodies and with respect of access to information held by such entities and bodies.”*

16. On the second issue, Learned counsel submits that the exparte applicant’s application was correctly made before the interested party as she followed the procedure set out under the Access to Information Act. Failure by the respondents to make an appeal to the High Court on the interested party’s orders dated 6<sup>th</sup> September 2019 in turn paved way for her to petition the High Court for leave. He submits that the applicant is properly before this Court and accordingly should be granted the orders sought. To support this argument counsel relied on the case of **Savraj Singh Chana v Diamond Trust Bank(Kenya)Limited & another (2020)eKLR** where it was held that:

*“I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree...”*

17. The respondents filed written submissions dated 18<sup>th</sup> October, 2021 through Ngira advocates. Learned counsel has identified three (3) issues for determination namely:

- i) Whether the interested party is a quasi-judicial body making orders capable of being enforced by this honourable court.
- ii) Whether the interested party has jurisdiction to make constitutional orders to be enforced by the High court.
- iii) Whether the exparte applicant should be granted the orders sought.

18. On the first issue he submits that by virtue of Article 169 of the Constitution the interested party is neither a tribunal nor a court of law and as a consequence cannot grant orders to be enforced by the High Court. It is their argument that Section 8 of the Commission on Administrative Justice Act only empowers the interested party to investigate public bodies and give recommendations not orders.

19. Moving on to the second issue, he submits that section 8 and 26 of the Commission on Administrative Justice Act must be read together. He submits that this section only applies to complaints within the public sector. It is his argument that they do not fall within the meaning of Article 260 of the Constitution by virtue of the 3<sup>rd</sup> respondent being a private company. It is his contention in light of this that the respondents are not subject to the interested party’s mandate within the meaning of Sections 8 and 26 of the Act.

20. Counsel submits that the mandate of the interested party to make decisions is limited to recommendations as stipulated under Section 41 of the Commission on Administrative Justice Act. In support reliance was placed on the **Matter of the National Land Commission, Advisory Opinion Reference 2 of 2014;(2015)eKLR** where the words *recommend, advise, research, investigate, encourage, assess, monitor* and *oversight* were defined to mean actions that provide a facilitative role rather than a primary one. He further relied on the case of **Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (2021)eKLR** where it was held that:

*“although CAJ had the powers to investigate the 3<sup>rd</sup> respondent’s claim, it could not compel the manner in which such recommendations, findings or reports could be implemented.”*

21. He has submitted that the High Court under Article 165 (3) (b) of the Constitution has jurisdiction to determine questions on the whether or not a fundamental right or freedom has been infringed. Further that Section 8 of the Magistrate’s Act grants the Magistrate Courts power to hear and determine claims of violations of human rights. It is their contention that the applicant circumvented the system by making an application to the interested party instead of the Courts.

22. On the third issue, Counsel submits that since the interested party does not have jurisdiction to give orders, the orders as prayed by the applicant ought not to be granted. He contends that there was no proof of service of the letter of the order by the interested party as averred by the petitioner to merit enforcement by this court. It is their case therefore that the application should be dismissed with costs.

### **Analysis and Determination**

23. Having duly considered the Notice of Motion, the affidavits, grounds of opposition submissions and authorities cited, I find the following to be issues for determination:

- i. Whether the interested party had jurisdiction to issue the orders dated 6<sup>th</sup> September 2019;and
- ii. Whether the petitioner is entitled to the reliefs sought.

**Whether the interested party had jurisdiction to issue the orders dated 6<sup>th</sup> September 2019**

24. The jurisdiction of the interested party to make orders under Section 23(2) of the Access to Information Act, 2016 is contested by the respondents. They argue that orders made by the interested party form part of recommendations which they cannot be compelled to adhere to. Further it is their argument that only the High Court or Magistrates Courts under Article 165 (3) (d) of the Constitution and Section 8 of the Magistrate's Act have jurisdiction to issue orders with regards to enforcement of human rights. The petitioner on the other hand opposes these arguments stating that the interested party has jurisdiction to make the orders in line with the Constitution and the Commission on Administrative Justice Act, No.23 of 2011.

25. The interested party's mandate is established under Article 59 of the Constitution. This Article provides as follows:

*(1) There is established the Kenya National Human Rights and Equality Commission.*

*(2) The functions of the Commission are—*

*(a) to promote respect for human rights and develop a culture of human rights in the Republic;*

*(b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;*

*(c) to promote the protection, and observance of human rights in public and private institutions;*

*(d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;*

*(e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;*

*(f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;*

*(g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;*

*(h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;*

*(i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;*

*(j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and*

*(k) to perform any other functions prescribed by legislation.*

*(3) Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

*(4) Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.*

*(5) If Parliament enacts legislation restructuring the Commission under clause (4)—*

*(c) that legislation shall assign each function of the Commission specified in this Article to one or the other of the successor commissions;*

*(b) each of the successor commissions shall have powers equivalent to the powers of the Commission under this Article; and*

*(c) each successor commission shall be a commission within the meaning of Chapter Fifteen, and shall have the status and powers of a commission under that Chapter. Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.*

26. According to this Article, the interested party is part of the Kenya National Human Rights and Equality Commission as a successor commission. Furthermore the interested party's mandate is established under the Commission on Administrative Justice Act, No.23 of 2011. A reading of the preamble divulges as follows:

*An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the*

*Commission on Administrative Justice, and for connected purposes.*

27. The functions of the interested party are provided under Section 8 of the said Act as follows:

- a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;*
- b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;*
- c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;*
- d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;*
- e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;*
- f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;*
- g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;*
- h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;*
- i) publish periodic reports on the status of administrative justice in Kenya;*
- j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;*
- k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;*
- l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and*
- m) perform such other functions as may be prescribed by the Constitution and any other written law.*

28. Section 26 of the Act while donating more powers to the interested party discloses that it enjoys the powers under Article 252 of the Constitution which are essentially those granted to Constitutional Commissions. The powers under Article 252 are:

*(1) Each commission, and each holder of an independent office--*

- a) may conduct investigations on its own initiative or on a complaint made by a member of the public;*
- b) has the powers necessary for conciliation, mediation and negotiation;*
- c) shall recruit its own staff; and*
- d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.*

*(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2).*

*(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations--*

- (a) the Kenya National Human Rights and Equality Commission;*
- (b)....*

29. Article 35(1) of the Constitution 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.*

*(3) The State shall publish and publicise any important information affecting the nation.*

30. The access to Information Act No.31 of 2016 gives effect to Article 35 of the Constitution. Under the Access to information Act the interested party is empowered with the function and power to enforce its provisions. This is because it is the oversight authority as provided under Section 20(1) of the Act. The functions of the interested party under section 21 of the said Act are:

*(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

*a) investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions of this Act;*

*b) request for and receive reports from public entities with respect to the implementation of this Act and of the Act relating to data protection and to assess and act on those reports with a view to assessing and evaluating the use and disclosure of information and the protection of personal data;*

*c) develop and facilitate public education awareness and develop programmes on right to access to information and right to protection of personal data;*

*d) work with public entities to promote the right to access to information and work with other regulatory bodies on promotion and compliance with data protection measures in terms of legislation;*

*e) monitor state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data;*

*f) hear and determine complaints and review decisions arising from violations of the right to access to information;*

*g) promote protection of data as provided for under this Act or the Constitution; and*

*h) perform such other functions as the Commission may consider necessary for the promotion of access to information and promotion of data protection.*

31. The interested party while performing its functions is also empowered under Section 23(1) of the Access to Information Act to:

*a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;*

*b) question any person in respect of any subject matter under investigation before the Commission; and*

*c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.*

32. Where the interested party is satisfied that there has been an infringement of the provisions of the Act, it is permitted under Section 23(2) to order as follows:

*a) the release of any information withheld unlawfully;*

*b) a recommendation for the payment of compensation; or*

*c) any other lawful remedy or redress.*

33. This Section continues to state as follows:

*(3) A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.*

*(4) An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.*

*(5) If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High*

*Court to the like effect.*

34. My interpretation of the above provisions first of all is that by virtue of Article 59(5)(c) of the Constitution the interested party is a Commission within the meaning of Chapter Fifteen of the Constitution and has the status and powers of a Commission. Furthermore that the interested party is the body mandated to receive complaints on the refusal by a public body to issue information as dictated by Article 35 of the Constitution. In essence it is reasonable to state that a person seeking this information should first exhaust or satisfy the laid down mechanism in law before approaching the court.

35. The court in the case of **Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties) [2021] eKLR** while emphasizing the jurisdiction of the interested party cited the decision in **Savraj Singh Chana**(supra) with approval and opined as follows:

*“29. Under section 23 of the Access to Information Act No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR, Korir J observed correctly in my view, as follows:*

*“It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.*

*The preamble of the Access to Information Act, 2016 clearly states that it is an “Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”*

*“It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-*

*“The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-*

- 1. the release of any information withheld unlawfully;*
- 2. a recommendation for the payment of compensation; or*
- 3. any other lawful remedy or redress.”*

*“A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.”*

*“I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice.”*

30. The Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, underlined the importance of courts and tribunals operating within their jurisdictional fields as follows:

*“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law.”*

36. The facts stated herein reveal that the ex parte applicant did make a complaint to the interested party vide a letter dated 21<sup>st</sup> November 2018. The interested party instructed the respondents to issue the information but this was not complied with. It therefore proceeded to exercise its power as stipulated under Section 23(2) of the Access to Information Act. In addition the interested party informed the respondents of their right to appeal as provided under Section 23(3) of the Act. The consequence of failing to appeal in essence allowed the applicant under Section 23(5) of the Act to apply to the High Court ex-parte for leave to enforce the order as a decree. This would thus be executed in the same manner as an order of the High Court.

37. I am persuaded to adopt the finding of the court in the case of **Republic v Isaiiah Kubai & another** (supra) where the court faced with a

similar scenario found as follows:

**“...Second, it is clear that the interested party made an order by the letter dated 30.07.2019 pursuant to section 23(2) (a) of the Access to Information Act, 2016 and the letter clearly states the determination by the interested party. The Court does not find any reason to doubt that the interested party made a determination and therefore an order as envisaged in the Act.**

**Third, the Court returns that the applicant has satisfied all the requirements under the Access to Information Act, 2016 to justify an order for leave as envisaged in section 23(5) of the Act. The claimant has shown that the interested party made the order, the order has not been complied with as per his Advocates’ letter of 05.08.2019, no appeal against the order was preferred on the part of the respondents, and the time prescribed to appeal has lapsed.**

**Forth, the Court returns that the interested party has jurisdiction under the Access to Information Act, 2016 to make such orders as appropriate under section 23(2) against both public entities and private bodies and with respect of access to information held by such entities and bodies. It is also true that Articles 35, 10 and 41 as invoked for the applicant apply to both public entities and private bodies. The sections of the Access to Information Act, 2016 as invoked and cited for the applicant are clear on that wide jurisdiction of the interested party over the public entities and private bodies.”**

38. It is my humble opinion following this analysis that the interested party did have the necessary jurisdiction to make the orders dated 6<sup>th</sup> September 2019. I say so because the power to receive complaints and action them by law is bestowed upon the interested party while the High Court is vested with appellate jurisdiction. It is noted interestingly that the respondents failed to exhaust this mechanism by lodging an appeal as prescribed by the Act which would have been the appropriate cause of action. The respondents have argued that being a private company they cannot be compelled to issue the information sought.

39. Section 14 (1) Access to information Act provides:

“14(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 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 for;
- (g) A decision to grant access to information only to a specific 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.”

40. The respondents are confirmed to be a private company and so fall under private bodies. Does that in itself exonerate them from complying with the provisions of the Commission on Administration of Justice Act (CAJA) and Access to Information Act? Section 14(1) of the Access to Information Act refers to both public and private entities. The 2<sup>nd</sup> respondent is a private medical facility which offers services to members of public. The ex parte applicant is one such member of the public. I therefore find that the respondents argument that they cannot be compelled to issue the information sought does not hold water as the right to access information is a sacrosanct right which applies to actions by both public and private bodies. The same is granted by Article 35 of the Constitution and enforced by the Access to Information Act while the CAJA plays the oversight role.

41. Counsel for the respondent in his submissions contends that the ex parte applicant did not produce any evidence showing that the respondents had been served with the interested party’s decision of 6<sup>th</sup> September, 2019. The record shows that this decision was conveyed through a letter dated 6<sup>th</sup> September, 2019 and addressed to the 1<sup>st</sup> respondent. It is attached to the supporting affidavit of the ex parte applicant and marked as annexure “CN-7”. This application was clearly served on the respondents who filed grounds of opposition and a replying affidavit. Nowhere in these two documents do the respondents deny having been served with the letter (CN-7). Their counsel cannot therefore be seen to be averring to a matter on their behalf. I find counsel’s submissions on this to be an afterthought which is not supported by the evidence on record.

**(ii) Whether the applicant is entitled to the reliefs sought**

42. A perusal of the evidence before this court reveals that the applicant wrote to the respondents vide a letter dated 21<sup>st</sup> November 2018 seeking to be furnished with her medical records in respect to her pregnancy term. It is stated that an in person visit to the facility bore no fruits as the information was not granted. She was instead informed that her file was lost. This fact was reiterated by the respondents in their letter dated 22<sup>nd</sup> January 2019 and in their meeting with the applicant on 25<sup>th</sup> May 2019. Sadly, no details were given for the alleged loss and

neither was a way forward intimated by the respondents, who declined to commit themselves in writing over the matter.

43. Further, Article 24 of the Constitution on limitation of fundamental rights and freedoms provides that:

*i. 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 the 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.*

44. The Court in the case of **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR** while discussing the right to access information referred to section 4(1)(2)(3)(4) and (5) of the Access to Information Act and stated thus:

***“It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information.”***

45. The Court went further to state as follows under paragraph 54:

***“54. The respondents were under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public. This is an inviolable constitutional right and that is clear from the language of Article 35 of the Constitution, and any limitation must meet the constitutional test and only then can one raise limitation as a ground for non-disclosure.”***

I find the circumstances in the above case not to be any different from the ones in the case of the applicant herein.

46. It is therefore not disputed that the respondents have failed to provide the information required for by the petitioner. This is indeed a violation of Article 35 of the Constitution. What then is their justification for this action?

47. The respondents in their replying affidavit have admitted to not availing the required information and further that the said information is unavailable as the ex parte applicant’s file has gone missing. Dr. Fredrick M. Kairithia in his replying affidavit annexed a medical report (FMK-1). He was the resident doctor (from the report) and attended to the petitioner upon her admission. In the report he has given details on how the petitioner was handled. At the end of the report he states:

***“I am available to respond to any other matters not addressed in good faith and to my best recollection.”***

48. In her sworn affidavit dated 24<sup>th</sup> January, 2020 the petitioner deponed that on diverse dates between 19<sup>th</sup> February, and 5<sup>th</sup> March, 2019 she held telephone conversations with the employees, representative and or agents of the 3<sup>rd</sup> respondent wherein she was informed that the information she requested for could not be traced. It was then that a meeting between her, her advocate and respondents’ representatives was held on 25<sup>th</sup> March, 2019. In the said meeting the 3<sup>rd</sup> respondent reiterated that it could not trace the requested information. It is not therefore a story that has emerged now. Even with the intervention by the interested party nothing substantive has come up. All there is before this court is the medical report (FMK-1) by the doctor who attended to the petitioner.

49. Given the circumstances of this case plus what the respondents have told the court, would the situation be made any better if this court

were to grant the leave sought for enforcement of the interested party's decision i.e. enforcing it in terms of a decree? Since the respondents have since February 2019 made it clear that the records are lost/missing, granting leave for enforcement of the interested party's decision will not make things any better. The respondents will be brought back here for non compliance. The court does not issue orders in vain.

50. I therefore decline to issue prayers (ii) and (iii) of the Notice of Motion dated 24<sup>th</sup> January, 2020.

51. I move to prayer No.(iv) which requests the court to grant such other or further relief as it may deem fit and necessary in the circumstances. Upon assessment of the material before me I find that the respondents failed to obey the law in issuing the applicant with the full information she sought. I however appreciate the fact that Dr. Fredrick M. Kairithia in his replying affidavit annexed a full medical report (FMK-1) showing the services rendered to the applicant at the facility. To my surprise the petitioner did not react to this report on whether it fully responded to what she wanted.

52. The doctor had indicated that he was available to answer to any issues which would be raised by the applicant and her team. In as much as the information given may not have fully answered the applicants inquiry, I find that her failure to react to the report was not fair to the respondents. That being the case, I find that there was partial violation of the applicant's right to access to information provided under Article 35 of the Constitution.

53. For this partial violation I find that the applicant is entitled to compensation. I award her KShs.1,000,000/- (KShs. one million). She is also awarded costs of the suit.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. Ong'udi**

**Judge of the High Court**