



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

Petition No.127 Of 2019

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PREAMBLE OF THE CONSTITUTION AND

ARTICLES 1,2,3,10,19,20,21,22,23,25(c) 35,46(b), 48,50(2)(e), 73,75(c),

159, 165(3) (d), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE RIGHT TO ACCESS TO JUSTICE AND FAIR HEARING

AND

IN THE MATTER OF THE RIGHT TO ACCESS INFORMATION AND CONSUMER RIGHTS

AND

IN THE MATTER OF THE VIOLATION OF THE RIGHT TO ACCESS JUSTICE,

FAIR HEARING, ACCESS TO INFORMATION AND CONSUMER RIGHTS

AND

IN THE MATTER OF THE CALENDAR FOR JUDGES AND MAGISTRATES COLLOQUIUM,

WORKSHOPS, SEMINARS, TRAINING AND THE JUDICIAL SERVICE WEEK

AND

IN THE MATTER OF DISRUPTION OF THE NORMAL WORKINGS OF THE COURTS

AND

IN THE MATTER OF ABUSE OF OFFICE BY THE RESPONDENTS

BETWEEN

ODIRA ELVIS W. NANDA.....PETITIONER

AND

**THE HON. CHIEF JUSTICE & THE PRESIDENT OF THE SUPREME
COURT OF KENYA.....1ST RESPONDENT**
THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

AND

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY
THE HON. ATTORNEY GENERAL.....2ND INTERESTED PARTY

JUDGMENT

Petitioner's Case

1. The petitioner through a petition dated 22nd January 2019 and filed on 22nd January seeks the following orders:-
 - a. A declaration that the omission and or refusal by the respondents to release the calendar for Judges and Magistrates' colloquiums, workshops, seminars, trainings and the judicial week for the year as stated above are unconstitutional and it is in violation of the rights and freedoms of the petitioner, his clients and other litigants under Article 35,46(b), 48 and 50(2) (e) of the Constitution of Kenya.
 - b. A declaration that the whole yearly calendar for the Judges and Magistrates colloquium, workshops, seminars, training and the judicial service week should be made accessible to every citizen early enough before the commencement of the 1st term of court sittings every New Year as captured in Article 35 of the Constitution of Kenya.
 - c. An order against the 1st and 2nd respondents compelling them to release the calendar for Judges and Magistrates colloquium, workshops, seminars, trainings and the judicial service week for the year 2019 forthwith and the same be circulated to all judicial officers.
 - d. A declaration that the refusal by the respondents to release the calendar for Judges and Magistrates colloquium, workshops, seminars, trainings and the judicial service week for the year at the earliest is an attack against the functional and judicial independence of the judiciary.
 - e. A declaration that the respondents are escapist and moribund.
 - f. The petitioner be paid costs of this petition.
2. The petition is supported by the affidavit by Odera Elvis W. Nanda sworn on 22nd January 2019 in which the petitioner has made several averments.
3. It is petitioners contention that the respondents have the mandate and are administratively responsible for the planning, preparation, circulation and coordination of the calendar for the Judges and Magistrates colloquium, workshops, seminars, training and the judicial service weeks. That in the previous years, Judges and Magistrates, have been giving dates in court and in the registry or settling matters before them. The dates given depend on the convenience of the courts diary and convenience of all parties to the suit before the court. The practice has hence become the norm over the years.
4. That all the advocates including of the petitioner have been contended to rely on those dates fixed in open court and/or the court registry as may be directed by the court so as to keep their clients; who are key stakeholder in the administration of justice system, informed to enable them to plan their engagement and also to enable the advocates to plan their engagements.
5. It is further petitioner's contention that when the courts and the registry fix these days, they are not always aware of the Respondents' schedule for the Judges and Magistrates colloquium, workshops, seminars, training and the judicial service weeks. The reason is said to be because the Respondents do not release the calendar for these events. That when these events arise, the same come as emergencies, that cause disruption in the court's diary, consequently undermining the system of administration of justice in Kenya. It is further argued by the petitioner that the chaos that is caused by these disruptions leads to cases being heard by fluke unless it is an election petition or a high profile case which the Respondents ordinarily fast-track. It is further stated that Judges and Magistrates can never reasonably foresee whether they would be sitting on particular dates or there would be a judicial emergency in the name of these events as created by the Respondents.
6. It is further averred by the petitioner that the Respondents know that the courts sit for about 150 days a year but nonetheless they continue to monopolize the calendar for these events to the detriment of all advocates, their clients and members of the public, including the petitioner. The petitioner therefore urges the actions of the Respondents have made the right to access information, the right to access to justice, the

right to have cases begin and conclude cases without unreasonable delay and the right of consciousness to have information necessary for them to gain full benefit from the services offered by the judiciary unattainable and fallacious.

The 1st and 2nd Respondents Case

7. The 1st and 2nd Respondents are opposed to the petition and in doing so, they filed a response to the petitioner dated 31st January 2019 and subsequently filed a notice of preliminary averring the petition is fatally defective, bad in law and an abuse of the process of the court, secondly the petitioner is on a fishing expedition and lastly the petition does not raise any sufficient cause of action.

8. It is submitted by 1st and 2nd Respondents that to the extent that the petition seeks a declaration that the Respondents refusal to release the calendar is unconstitutional, that the calendar should be made accessible to every citizen early enough, that the Respondents be compelled to release the calendar and that the same be circulated to all judicial officers and finally; that the refusal by the Respondents to release the calendar is an attack against the functional and judicial independence of the judiciary; it is the Respondents contention that the petition filed herein does not raise any or any reasonable cause of action and the same should be dismissed with cost.

9. The Respondents contend and admit receiving the petitioner's advocate letter dated 2nd January 2019 in which the petitioner demanded that:-

"Therefore in realization of other clients' Constitutional right to access information and justice, we demand that you furnish us, within 7 days of this letter, with the annual calendar for the colloquium of Judges and Magistrates programs for all workshops, seminars and training for Judicial Officers and the annual program for the service week for the year 2019. We also request that such details be made available and accessible in all judicial stations at the beginning of every year henceforth."

10. The Respondents response is that Hon. Justice Kathurima M'Inoti, **EBS**, Judge of Appeal and Director of Judiciary Training Institute responded to the petitioner's letter vide his letter dated 17th January 2019, endorsing a copy of the Judiciary Training Master calendar for the year 2019 and explained in detail the process through which the Training Master Calendar is drafted including public participation of all stakeholders including the Law Society of Kenya. The learned Judge in his letter of reply reminded the petitioner both the constitutional and statutory obligations of the second Respondents with regard to Judges and Magistrates continuous professional Development and explained the challenges faced in the implementation of the Judiciary Training Master calendar.

11. The learned Judge in his reply proceeded to explain in detail the steps taken by 1st Respondent in ensuring that Judicial Education does not undermine the constitutional rights and values of all the court users. He went on to explain that the perceived inconvenience caused by short notices issued when Judges and Magistrates attend the colloquium, workshops and trainings, was caused by *"unforeseen or intervening events such as abrupt budgetary cuts, which sometimes force the judiciary to defer schedule trainings to new dates"* and that in such cases the concerned Judges and Magistrates are notified in advance and requested to notify litigants in good time of the rescheduled dates so as to cause minimum inconvenience or disruption of the court work.

The 1st Interested Party Case

12. The Law Society of Kenya, the 1st interested party in this petition filed a Replying Affidavit by Mercy K. Wambua, the Chief Executive Officer of the 1st interested party sworn on 21st March 2019.

13. The 1st interested party urges that the constitutional rights of litigants to access justice, to have fair hearings, to access to information, consumer rights and fair administrative action have been and continue to be trodden on by the Respondents.

14. It is interested party contention that the respondents are administratively responsible for the planning, preparation, circulation and coordination of the calendar for the Judges and Magistrates colloquium, workshops, seminars, training and the Judicial service weeks. The 1st interested party supports the petition urging that abrupt and short notice with no reasonable excuse causes disruption in court's diaries and undermines administration of justice and access to justice.

The 2nd interested party's Case

15. The 2nd interested party did not file any response to the petition and opted not to file any submissions also.

Analysis and Determination

16. I have considered the petition, affidavit in support, the 1st and 2nd Respondents response, the 1st interested party Replying affidavit; the written submissions by 1st and 2nd Respondents and submissions by the petitioner and interested party and from the above the issues arising for considerations are as follows:-

a. Whether the petitioner has met the conditions requisite for granting orders sought?

b. Whether petitioner is entitled to be granted prayers sought herein?

A. Whether the petitioner has met the conditions requisite for granting orders sought?

17. In the instant petition the petitioner claim is for access to information and seeks the Respondents be compelled to release the information sought from them. The claim for access of information held by state and/or information held by another person and required for the exercise or protection of any right or fundamental freedom is guaranteed by **Article 35 of the Constitution** whereby it is provided as follows:-

"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."

18. The importance of this right has been explained by the constitutional court of South Africa in **Brunner vs Minister for Social Development and others (2009) ZACC 21**, where the court said....

"Access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights...."

19. Access to Information Act, No. 31 of 2016 was enacted to give effect to Article 35 of the Constitution. It provides a framework for public entities and private bodies to positively disclose information that they hold and to provide information on request in line with constitutional principles. **Section 4 of the Access to Information Act No. 31 of 2016** provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. The wording of the subsection (4) provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under **Section 6 of Access to Information Act No. 31 of 2016**.

20. Article 1 of the Constitution of Kenya 2010 provides that all sovereign power belong to the people of Kenya and that the sovereign power is delegated to the Judiciary among other organs. That delegated power ought to be exercised in accordance with the constitution. **Article 10 of the Constitution** further provides for the national values and principles that are to govern all state organs and public officers whenever they apply or interpret the constitution; enact; apply or interpret any law and make or implement public policy decisions. Some of the values and principles listed include good governance, integrity, transparency and accountability; which principles rather than setting the ceiling set the bare minimum of what is expected. In view of the aforesaid this court is called upon to determine whether the alleged sporadic events fall short of what the people of Kenya aspired when engraving this Article as part of their grand norm.

21. In **Okiya Omtata Okoiti vs Commissioner General, Kenya Revenue Authority & 2 others (2018) eKLR**, the court addressing its mind to Article 10 of the Constitution of Kenya 2010 observed that:-

"Kenyans were very clear in their intentions when they entrenched Article 10 in the Constitution. They were singularly desirous of insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 10 be enforced in the spirit in which they included it in the Constitution. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must adhere to Article 10 of the Constitution. In order to justify their exclusion in matters failing under Article 10, the burden is indeed heavy on the person desiring to do so considering that Article 10 is one of the provisions protected under Article 255 of the Constitution whose amendment can only be achieved by way of a referendum."

22. This court is further called upon to determine what position the right of all citizens stand when the Respondents are flexing their muscle by throwing the dates of those events anyhow though aware that judicial time is scarce and precious. The purpose and principles of this constitution shall be protected and promoted. In view of the aforesaid the court is under obligation to promote the spirit, purport and object of the Bill of right whenever interpreting any legislation and when developing any law.

23. The right to access information is no doubt the foundation of this petition. It is indeed a right of any individual to access information. In the case of **Attorney General vs Kituo cha Sheria & 7 others (2017) eKLR** the court had the following to say:-

"The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."

24. Under Article 159(2) (e) in exercising judicial authority the courts and tribunals shall be guided by the following principles:-

a.

b.

c.

d.

e. The purpose and principles of this Constitution shall be protected and promoted.

In view of the aforesaid the court is under obligation to promote the spirit, purport and objects of the Bill of rights whenever interpreting any legislation and when developing any law.

25. The right to access information is no doubt the foundation of the petition. It is indeed a right of any individual to access information held by public authorities acting on behalf of the state for there to be proper, effective and efficient administration of justice. This right is necessary and vital in any constitutional and democratic state.

26. In the instant petition, the petitioner alleges the Respondents have become a hindrance in the actualization of this right and that they have refused to be transparent in their dealings and have chosen to rule the people of Kenya. It is petitioner's submission that citizen of Kenya need to access the calendar for judiciary events so that they can participate in judicial affairs effectively and efficiently. That though they have delegated judicial power they need to be protected from those to whom they have delegated their power. I find that it is correct to say that without information citizens cannot participate in the administration of justice since they cannot foresee with certainty when their matters will be heard and determined.

27. It is further petitioner's argument that it is really sad and depressing that during this constitutional dispensation citizens and even judicial officers do not know what is happening in the client's diary since the scheduling of these events by the Respondents are hidden until the very last minute. That such act it is urged prevents any participation in administration of justice.

28. I find that the right to access information is a fundamental human right upon which other rights such as access to justice; fair hearing and fair administration must flow. I further find that for citizens to protect their constitutional rights, the right to access information is critical and cannot be taken lightly or wished away by any one. Such right is a foundation store for transparent, responsible and accountable administration of justice. This in turn builds on the integrity of courts and judiciary as a whole. The constitution recognizes access to information as a constitutional right and only the same constitution can limit that access. In **Katiba Institute vs Presidents Delivering Unit & 3 others 2017 eKLR** where the court quoted **Brunner vs Minister for Social Development & Others CCT 25/09 2009 ZACC** in paragraph 38 and stated that:-

"The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.

Apart from this, access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or import information or ideas."

29. In the case of **Trusted Society of Human Rights Alliance & 3 others vs Judicial Service Commission [2016] eKLR**, the court reaffirmed the position that the Constitution does not limit the right to access information when it stated:-

"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 corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information."

30. In the instant petition, the petitioner wrote a letter dated 2nd January 2019 to the 1st Respondent requesting release of the 2019 calendar for Judges and Magistrate's colloquium, workshops, seminars, training and judicial service week. The petitioner letter was received on 9th January 2019, a reply was made on 17th January 2019 by Judiciary Training Institute ("*marked OEN 1(a) and (b)*") which the petitioner received on 24th January 2019 and by which time the petition had been filed. The petitioner demand letter (**OEN 12**) sought the information to be furnished to them within 7 days of the letter and that such details be made available and accessible in all judicial stations at the beginning of every year hence forth.

31. The 1st and 2nd Respondents in response urge that the letter dated 2nd January 2019 did not state that the information sought or the failure to furnish the requisite information would culminate into filing of a suit; that the letter was not even addressed neither was it copied to the Judicial Service Commission, the 2nd Respondent herein. The Chief Justice forwarded the letter to the Director, Judiciary Training Institute, whose core mandate is to run continuing Judicial Education and Training to respond to the concerns raised therein. On 17th January 2019, Hon. Justice Kathurima M'Inoti, **EBS**, Judge of Court of Appeal, the Director for **J.T.I** responded to the letter dated 2nd January 2019; that the learned Judge informed the petitioners advocate that the letter under reply had failed to identify the specific cases and dates when the matters had been adjourned due to unscheduled training of Judges and Magistrates to enable the Director verify, confirm or respond to the Petitioners complaint; the Director however, informed the Petitioner's advocate that Judicial training and education was not conducted in a haphazard or emergency manner as alleged as it was preceded by a training planning co-ordination meeting of stakeholders in which the Law Society of Kenya to which the Petitioner's advocate serves as a Council member was invited but has never honoured the invitation; that the Director explained that such meetings culminate in the preparation and adoption by the Judicial Service Commission for a Training Master Calendar that forms the basis of continuing Professional Development for the entire financial year; that the Director emphasized that as all other human endeavours, it was sometimes not possible to strictly adhere to the training master calendar due to unforeseen or intervening events such as abrupt budgetary cuts, forcing the judiciary to defer scheduled trainings to new dates in which case the concerned judges and magistrates were notified in advance so that they too could notify the litigants in good time to minimize inconvenience or disruption of court work; that the Director reminded the Petitioner that under Article 172 of the Constitution sections 4 and 47 of the Judicial Service Act and Section 81 of the Advocates Continuous Professional Development is a requirement of any professional or public body; that the Director

informed the Petitioner's advocate that the Respondents had publicly directed that judicial education and training should be undertaken in such a manner as not to undermine the Constitutional rights and values and that the Chief Justice had directed that henceforth all trainings of Judges and Magistrates must be conducted through the Judiciary Training Institute; that the Learned Judge then attached a copy of the current Judiciary Training Master Calendar for the Petitioner's information and expressed his willingness to provide any other information that the Petitioner may require.

32. The petitioner's letter of 2nd January 2019 was not addressed to **JSC** or **JTI** but the Chief Justice. The letter did not indicate that failure to furnish the information would result into filing a petition. The delay in getting the information sought is argued was due to the letter not being addressed to the right parties. The petitioner got information from the respondents and if the petitioner had not received all the information he wanted, the petitioner should have sought more information from the Director of **JTI**, if he found the contents of the letter dated 17/1/2019 had not addressed any of the issues raised in his letter of 2nd January 2019. The petitioner is a member of the Law Society of Kenya, and as such had an opportunity of discussing this matter during the meetings of the Law Society of Kenya Council which then would have raised the issues with the office of the Chief Justice before filing this petition. The petitioner was through the letter dated 17th January 2019 furnished with the information sought through his letter of 2nd January 2019. The petitioner has access to the whole yearly calendar for the Judges and Magistrates colloquium, workshops, seminars, training and Judicial service for 2019. The request for such information in this petition does not raise any reasonable cause of action. I find the petition to be unnecessary, premature, vexatious and a waste of the limited precious judicial resources and time.

33. On access to justice the petitioner refers to the case of **Apollo Mboya vs Attorney General & 2 others (2018) eKLR** where the court held:-

"Our Constitution is highly valued for its articulation. Such astute drafting is the fact that the Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law. Rule of Law includes the right to approach the Court. The right to approach the Court is amplified by Article 22 and 23 of the Constitution. Article 48 of the Constitution guarantees the right to access justice, while Article 258 grants every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention."

34. It is petitioner's averments that as a Nation, we have law to guide the relations in the society and that the law governs these relations by providing remedies which are majority accessible through the courts. That remedies can only serve their purpose as remedies when they are timely and capable of being realized, hence the need to facilitate the access to courts in a timely manner. In the constitutional dispensation, everyone is guaranteed access to competent court and to have the dispute resolved by application of the law and decided in a fair manner. It is urged that the Respondents have made it very expensive; in terms of money and time for the people of Kenya to access courts. It is further averred that advocates take dates for matters they have but only end up frustrated by being informed that judicial officers is out of station attending events and as such advocates are forced to take new dates which are not less than three months.

35. The petitioner appears to be out to blame the Respondents for every adjournment as he is alleging adjournments are without good cause. Many a times adjournments and need for a fresh hearing dates are caused by the advocates and their clients. The advocates who are not ready will have an excuse to adjourn the matter in anyway. Sickness may be faked as a reason or want of instructions or failure of payment of professional fees as a ground for seeking an adjournment. It is not justified to allege notices are not given as to why the cases cannot proceed and that notices given are not sufficient to enable counsel not to incur unnecessary costs. The events the petitioner is talking of are necessary and important because they facilitate a better administration of justice and are not always emergency as alleged because the Respondents has a year calendar that is strictly observed. I am not satisfied that the petitioner has demonstrated the respondents are out to frustrate access to justice as alluded to by the petitioner.

36. The petitioner on right to have cases begin and conclude without unreasonable delay as captured in Article 50(2) (e) of the Constitution and Article 25(c) of the Constitution urges this court is tasked with the constitutional duty to enforce fundamental rights under the constitution. It is contended that the Respondents are responsible for creating backlog of cases, when they surprise advocates and judicial officers with these events even after dates for matters have been fixed. That after causing backlog it is alleged they introduce the programme known a Judicial service week to clear the backlog.

37. In the instant petition the petitioner has not tendered any evidence to justify his allegation that backlog is caused by the Respondents as alluded to. The 1st interested party has averred that continuous training of judicial officers is important and **LSK** supports it, however the implementation of unscheduled training of judicial officers cause undue hardship to the parties. As regards the assertion that the notices are usually short I find that no evidence has been tendered before this court to demonstrate existence of any unscheduled trainings of judicial officers and how short the notices are. However I find that it is important for Respondents to always ensure there is proper planning of the trainings and sufficient notice as regards taking matters out is given in good time. Similarly delays and adjournments cannot be attributed to one side, as some adjournments are caused by advocates when they decide not to attend hearing, or cause adjournment by seeking court's recusal; or for other reason and as such the blame should not go to one side as the petitioner would like to blame the Respondents.

38. In most of the cases delays are on part of the litigants and their counsel leading to backlog, which they do not consider as serious. The Right to have case begin and concluded without unreasonable delay cannot in view of the above be totally blamed on one party, but all parties in a suit thus the Respondents, the Advocates and their clients as all are responsible for the delays.

39. From the facts of this case, the evidence and the law, I find the respondents have mandate and are administratively responsible for planning, preparation, circulation and coordination of the calendar for Judges and Magistrates colloquium, workshops, seminars, trainings and judicial service weeks, to avoid giving dates in court and registry setting matters for hearing only to have them taken out as the Judges and Magistrates are away on official duties. Whereas as emergencies may occur, causing disruption of court's diary, the respondents are required to give information whenever sought as provided under Article 35 of the constitution but it should be noted that in discharge of the 2nd Respondent's function it is under no control of any one or authority as doing so would amount to attack of its functional and judicial independence of the judiciary.

40. Having considered the petition, grounds in opposition and the law and authorities relied upon, I am satisfied the petition is not meritorious. The same is dismissed. On costs I note the petition is a public interest matter and that each party should bear its own costs.

Dated, signed and delivered at Nairobi this 5th day of March, 2020.

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J .A. MAKAU

JUDGE