



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.440 OF 2019**

**IN THE MATTER OF ARTICLES 10, 19, 20,22,23,35, 38, 47,  
258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ENFORCEMENT OF THE FUNDAMENTAL RIGHTS ENSHRINED  
UDNER ARTICLES 10, 35,38,81,82 AND 83 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 4(3) AND 6(1) OF THE ELECTIONS ACT  
AND ELECTIONS (REGISTRATION OF VOTERS) REGULATION 2012**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTOINS ACT**

**BETWEEN**

**ORANGE DEMOCRATIC MOVEMENT PARTY (ODM).....PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....RESPONDENT**

**JUDGMENT**

**Petitioners Case**

1. The petitioner through a petition for enforcement of Fundamental Rights brought pursuant to Article 35, 38, 81, 82 and 83 of the Constitution of Kenya and Sections 4(3) and 6(1) of the Elections Act and Elections (Registration of Voters) Regulations 2012 and the Fair Administrative Actions Act seeks the following reliefs:-

- a) A declaration that the Respondent has a duty to supply voters in Kibra Constituency and the public at large with the Kibra Constituency voters' register containing all the information prescribed in Form A of the Schedule to the Elections (Registration of Voters) Regulations 2012 in all polling stations and in the public online portal.
- b) An order of mandamus compelling the Respondent to supply voters in Kibra Constituency and the public at large with the voters' register containing all the information prescribed in Form A of the Schedule to the Elections (Registration of Voters) Regulations 2012 in all polling stations and in the public online portal.
- c) In the alternative, an order of mandamus compelling the Respondent to publish the Kibra Constituency voters' register containing the names, National ID and Passport numbers, telephone numbers and their respective polling stations and centers in all polling stations and in the public online portal.

d) Any other orders and reliefs as the court may deem fit

e) Costs of the Petition.

2. The petitioners petition is supported by supporting affidavit by Edwin Sifuna sworn on 4<sup>th</sup> November 2019.

3. The petitioners case is that on 20<sup>th</sup> September 2019, the petitioner's Executive Director requested the Respondent in writing, to supply them with updated voter's register for Kibra Constituency but did not receive any response and on 30<sup>th</sup> September 2019, a reminder was sent but the same was not similarly responded to. That on 2<sup>nd</sup> October 2019 through M/s Rachier & Amolo Advocates LL.P the petitioner sought supply of updated Voter's Register for Kibra Constituency and once again no response was received resulting to a further reminder of 30<sup>th</sup> September 2019 to which no response was made.

4. The petitioner contend, that on 2<sup>nd</sup> October 2019 through M/s Rachier & Amolo Advocates LL.P, another reminder was issued to the Respondent for the same information whereby through a letter of 3<sup>rd</sup> October 2019 the Respondent offered to supply the petitioner with a copy of the register upon payment of Kshs. 15,000/- to which the petitioner complied but was supplied with a copy of outdated and "truncated register of voters" used in 2017 General Elections. Once again through a letter dated 17<sup>th</sup> October 2019, M/s Rachier and Amolo Advocates LL.P sought to be supplied with the updated register of voters since 2017 General Election including *inter-alia*; the National ID/Passport numbers, polling stations and phone numbers of the registered voters. The letter did not elicit any response but instead the respondent supplied the petitioner with a "voters' Register" containing "truncated identification" information of persons listed in the said "register". That on 31<sup>st</sup> October 2019, vide a press release signed by the chairman, the Respondent justified its truncation of identification information on the confidentiality and privacy rights of voters.

5. It is petitioners contention, that the Respondent's purported justification is without legal basis and is antithetical to the spirit and express letter of the Constitution and the Elections Act which were designed to ensure transparency, verifiability and accountability of the electoral process and of electoral officers. The petitioner further contend the truncation of the voter information is particularly unfounded under the applicable laws and otherwise violates express and/or unqualified provisions of the Elections Act, that entitle voters to verify **ALL** their particulars as captured in the said register as more particularly mirrored in "Form A" of the schedule to the Elections (Registration of voters) Regulation 2012.

6. The Petitioner contend, that the Respondent's refusal to supply the information sought by the petitioner is an outright breach of law and in bad faith and unless remedied forthwith, may facilitate fraud and/or other illegalities against the people of Kibra Constituency by *inter-alia*; denying persons with legitimate expectation to vote the right to do so, and/or permitting persons not qualified or entitled to vote in Kibra Constituency, an opportunity to do so. It is petitioners contention further that unless the orders sought are granted, it will be impossible to verify the eligibility of the people who will be voting in Kibra on 7<sup>th</sup> November 2019 and in particular whether they are infact registered at only one registration centre and whether they are citizens of Kenya entitled to vote amongst others.

7. It is further petitioners contention, that by logical extrapolation, the information contained in the register of voters is supposed to mirror the details in Form A in the schedule to the Elections (Registration of Voters) Regulation 2012 for legitimate purpose of ensuring the same is verifiable and that only person eligible to vote are infact registered and that their particulars are accurately captured to ensure they exercise their right to vote on election date.

8. The particulars required to be supplied in Form A is the National I/D or passport number of the applicant. That given the names are generally identical and therefore incapable of identifying persons with certainty (i.e probabilistic), National ID or Passport numbers provide the only unique means of identifying individual in the most determination and/or certain way. It is further contended, the "registering of voters" is incomplete and is clearly intended to facilitate the very mischief that regulations 13, 13A, 22 and 27 of the Elections (Regulation of Voters) Regulation 2012 were meant to stymie.

9. Article 38 of the Constitution of Kenya it is contended by the petitioner entitles the constituents of Kibra Constituency to free and fair election, that include the right of every person eligible to vote, without hindrance occasioned by fraud and/or negligent omissions and, that person who would otherwise be ineligible to vote, if any, are weeded out of the register. It is urged the reason for respondents refusal to supply petitioner with complete register is pretextual and in bad faith. That it is defeatist, that the Respondent seek to deny the people of Kibra Constituency the right to exercise their political rights in the pretext of protecting their privacy. It is urged, that the prejudice, if any, that would be occasioned in providing the said particulars is far outweighed by the prejudice that would be occasioned in denying them their constitutional right to vote and/or permitting the legible persons, if any to vote. It is further contended by the petitioner, that from the incomplete "register of voters" the petitioner has been able to sample out names of persons who though eligible and previously registered to vote were missing from the register under unclear circumstances and/or contrary to the relevant provisions for the updating/revision of the register of voters. The petitioner contends, that it is in the interest of transparency, accountability, certainty and fairness, that the complete register of voters containing **ALL** the prescribed information in Form A of the schedule to the Elections (Registration of Voters) Regulation 2012 be made public in Kibra Constituency register of voters in all polling stations and in an online portal.

#### **Respondent's Case**

10. The Respondent filed a Replying affidavit by Salome Oyugi, Acting Director Legal and Public Affairs, Officer of the Respondent sworn on 5<sup>th</sup> November 2019. It is deponed, that at the time of declaring the position vacant and publication of gazette notice for the by-election in Kibra Constituency there were new enrolments and transfer of voters in the said constituency just like the rest of constituencies in the country and urging, that Kibra Constituency has registered voters as at October 2019 numbering 118, 658.

11. The Respondent contend, that in preparation for Kibra Constituency by-election the commission embarked on the process of facilitating the voters registered during CVR to participate in the upcoming by-election immediately after receiving the notice of vacancy from the

Speaker of National Assembly. That the process entails uploading of CVR data to the server, performing deduplication, production of the preliminary Register of voters, send the preliminary register of voters to the Registration Officers for quality assurance where voters are invited to verify and ascertain their details. The Register of voters is then revised and submitted for approval by the Commission and thereafter certified through publication in the Kenya Gazette.

12. The Respondent contend, that on 9<sup>th</sup> October 2019, the Commission held a meeting with officials of the petitioner at the Commission's Headquarters in Nairobi, in which the petitioner's officials raised a number of issues with respect to register of voters in Kibra Constituency in which it was agreed that the Commission would avail the Kibra Register of voters to the petitioners as requested.

13. The Respondent in response to petitioner's contention of sending letters dated 20<sup>th</sup> September 2019; 30<sup>th</sup> September 2019 and 2<sup>nd</sup> October 2019 requesting for updated register of voters for Kibra Constituency; states that on 9<sup>th</sup> October 2019, the petitioner collected the 2017 certified registers of voters of Kibra Constituency and list of 333 newly registered voters and 50 inward transfers. That on 24<sup>th</sup> October 2019 the petitioner collected the updated register of voters totaling to 118,658 as per annexure "S04". That on 25<sup>th</sup> October 2019 it is alleged the Commission shared with all political parties the Gazette Notice No. 10055 carried under Vol. CXXI-No 145 published on 25<sup>th</sup> October 2019 certifying that revision of the Register of voters for Kibra Constituency had been completed "S05".

14. The Respondent contention is, that the updated register of voters is available for inspection by any voter at the various polling stations. That the Returning Officer issued a notice to encourage all voters to come out in large numbers and verify their names in the Register, that was affixed at all polling stations ("S07"). That the register is affixed in each of the 183 polling stations in Kibra Constituency for the purposes of inspection and verification by the voters "S08". It is further contended by the Respondent, that it has provided two voter educators in each ward who traverse the ward for the purpose of informing voters of the availability of the register for purpose of inspection and verification.

15. The Respondent further contend, that the Register of voters availed to the ODM party contain the names of the voters, identification numbers (*truncated*), polling station, number and voter registration number. The Respondent refutes the petitioner's contention that it failed to avail a complete register and states it acted within the law. It claims, that it provided redacted details of the identification numbers of the voters in order to protect the confidentiality of their personal details urging, that this has been the practice since 2010 and is aimed at balancing the right of information of third parties *vis-a-vie* the right of the voter to privacy of their personal identification details, which detail can be used for notorious purposes and, that the details provided by the Commission have to be kept in compliance with the constitution and the law.

16. It is contended by the Respondent, that under Article 35 on the right to access of information the same right is limited under Article 24 of the Constitution, where there is need to ensure, that the enjoyment of right and fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others and, that the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

17. The Respondent further contend, that section 27 (3) and (4) of the Independent Electoral and Boundaries Act 201 provides that subject to Article 35 of the Constitution the Commission may decline to give information to an applicant where *inter-alia*:-

- a) **The request is unreasonable in the circumstances;**
- b) **The information requested is at a deliberative stage by the Commission; and**
- c) **The applicant fails to satisfy any confidentiality requirements by the Commission.**

18. The petitioner contends the right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under section 27 of the IEBC Act 2011. It is further contended the Commission is further guided by the provisions under the Access to Information Act, 2016. Section 6(1) (d) and Article 24 of the Constitution, as regards the right of access to information under Article 35 of the Constitution, which it is urged is limited in respect of information where disclosure is likely to:-

**"(d) Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made**

**(i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession."**

19. The Respondent urges, that it is against these principles, that the Commission has established mechanisms to ensure confidentiality in management of the information provided in the register of voters and thus in availing the Register of voters, hence the Commission therefore cannot avail all the particulars requested, as by availing such information to all and sundry the Commission contend the information may result in a voter not registering for their right to vote for fear of invasion of privacy and jeopardize the integrity of the election. It is further urged what the petitioner is seeking are private details of all the voters of Kibra which voters belong to different political affiliations. That the public interest in this matter tilts in favour of the Respondent as Kshs. 60 million of tax papers monies have already been spent and the court granting orders at this late stage will have ramification on conduct of the elections scheduled for 7<sup>th</sup> November 2019. Further the Respondent contend the petitioner has not annexed any affidavit of a registered voter who has failed to register and/or has been denied verification of their particulars from the register of voters.

### **Analysis and Determination**

20. I have very carefully perused the petition, the Respondent's Replying affidavit, and I have further considered the counsel rival oral submissions and from the above two issues arises for consideration being as follows:

a) What is the electoral system envisaged as per Constitution of Kenya?

b) Whether the Respondent was justified to refuse the petitioner access to information sought as guaranteed by Article 35 of the Constitution of Kenya 2010?

**A) What is the electoral system envisaged as per Constitution of Kenya?**

21. This petition is brought pursuant Bill of Rights and more specifically Article 23 of the Constitution, which provides that the High Court has jurisdiction, in accordance with Article 165, of the Constitution to hear and determine application for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights.

22. The petition herein is for enforcement of the fundamental rights enshrined under Articles 10, 35,38,81,82 and 83 of the Constitution of Kenya 2010.

23. **Article 10 of the Constitution of Kenya** provides for National Values and principles of governance. **Article 10(2) (c) of the Constitution** provides what comprises National values and principles of governance as follows:-

"(c) **Good governance, integrity, transparency and accountability.**"

24. **Article 35** provides, that every citizen has the right of access to information held by state and information held by another person and required for the exercise or protection of any right or fundamental freedom. It is provided that the state shall publish and publicize any important information affecting the nation.

25. **Article 38 of the Constitution** deals with political rights. Article 38(2) of the Constitution provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for:-

"a) **Any elective public body or office established under this constitution.**

b) **Any office of any political party of which the citizen is a member."**

26. Article 81 of the Constitution lays down the general principles for electoral system. Article 81(e) (iv) (v) of the Constitution provides that the electoral system shall comply with the following principles:-

(e) free and fair elections, which are;

"i) .....

ii) .....

iii) .....

iv) **Transparent and**

vi) **Administered in an impartial, neutral, efficient, accurate and accountable manner."**

27. **Article 82 of the Constitution** deals with legislation of elections; under Article 82(2) of the constitution it provides legislation required by Clause (1) (d) shall ensure that voting at every election is:-

"a) **Simple**

b) **Transparent and ....."**

28. **Article 83 of the Constitution** deals with Registration as a voter. Article 83(1) (2) of the Constitution provides; a person qualifies for registration as a voter at elections or referenda if the person:-

a) **Is an adult citizen;**

b) **Is not declared to be of unsound mind and;**

c) **Had not been convicted of an election offence during the proceeding five years.**

2) **A citizen who qualifies for registration as a voter shall be registered at only one registration centre.**

29. The Constitution of Kenya is clear, that citizen are required to participate in an election that is free, fair, simple, transparent, accurate and verifiable, and in determining whether the election is free and fair there is need to allow verification of the Register of voters by the voters

and allow them to raise issues of concern for action to be taken before election period or date. The electoral system envisage as per Constitution of Kenya should embrace the provisions of Articles 10, 35, 38, 81, 82 and 83 of the Constitution.

**B) Whether the Respondent was justified to refuse the petitioner access to information as guaranteed by Article 35 of the Constitution of Kenya 2010?**

30. In the instant petition the petitioner sought access to information, thus Register of voters to which the respondent refused justifying its truncation of identification information on the basis of confidentiality and privacy right of the voters. The right of access to information held by the state or public body is guaranteed by **Article 35 of the Constitution of Kenya 2010** which 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 publicize any important information affecting the nation."**

31. Access to Information Act was enacted to give effect to Article 35 of the Constitution. It provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.

32. Section 4 provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which 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 which provides that:-

**Limitation of right of access to information**

(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

*(a) undermine the national security of Kenya;*

*(b) impede the due process of law;*

*(c) endanger the safety, health or life of any person;*

*(d) Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;*

*(e) Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;*

*(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;*

*(g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;*

*(h) Damage a public entity's position in any actual or contemplated legal proceedings; or*

*(i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.*

(2) For purposes of subsection (1)(a), information relating to national security includes—

*a) military strategy, covert operations, doctrine, capability, capacity or deployment;*

*b) foreign government information with implications on national security;*

*c) intelligence activities, sources, capabilities, methods or cryptology;*

*d) foreign relations;*

e) scientific, technology or economic matters relating to national security;

f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;

g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;

h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;

i) cabinet deliberations and records;

j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;

k) information that is referred to as classified information in the Kenya Defence Forces Act; and

l) any other information whose unauthorized disclosure would prejudice national security.

(3) Subsection (1)(d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

(4) Despite anything contained in subsections (1) and (2), a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.

(5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.

(6) In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—

(a) Promote accountability of public entities to the public;

b) Ensure that the expenditure of public funds is subject to effective oversight;

(c) Promote informed debate on issues of public interest;

(d) Keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and

(e) Ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

(7) Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if the information has been held for a period exceeding thirty years.

**33.** This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.

**34.** In peremptory terms, the constitution imposes an obligation to courts to promote the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* the S.A. constitutional court observed:

*"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law". In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."*

**35.** In line with the dictates of the constitution, this court will reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to information.

**36.** The Respondents in refusing to comply with the petitioner's request urges, that it provided redacted details of the identification numbers of the voters in order to protect the confidentiality of their personal details and the right of the voter to privacy of their personal identification

details, which details can be used for nefarious proposes. This case in my view raises one important issue; namely; how the state or the public body discharges the burden, under Article 24 of the Constitution of Kenya 2010 and Section 6 of the Access to Information Act, of establishing that its refusal to grant access to information in the Register of voters is justified. What should the state or the public body do to demonstrate that the refusal falls within the exception under Section 6 of the Access to Information Act?

37. It should be appreciated that offering citizens access to state-held or public body held information is one of the most effective ways of upholding the constitutional values of free, fair, transparency, openness, participation and accountability. Access to information is not only fundamental to a properly-functioning of participatory democracy. This also increases public confidence and ownership in government or public body and result in enhancing its legitimacy.

38. The purpose of Article 35 of the Constitution of Kenya is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives.

39. As is evident from the provisions of the act cited above, the act was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of the sections cited above casts the exercise of this right in peremptory terms – the requester must be given access to the information so long as the request does not fall within the exceptions in section 6 of the Act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

40. It is clear from section 6 of the Act, that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

41. The burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. This position was clearly expressed by the Constitutional Court of South African in **President of the Republic of South Africa & Others vs M & G Media Limited** where it was held that:-

*"The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of.....the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions.....Hence.....the evidentiary burden rests with the holder of information and not with the requester."*

42. Thus, the Respondents have a burden and a duty to demonstrate that the information sought falls within the exceptions under section 6 of the Act. It is not enough to allege it does, as has happened in this case, without discharging the evidential burden to the required standard.

43. The Limitation claimed by the Respondent must satisfy the provisions of Article 24 of the Constitution and must be reasonable and justifiable.

44. Although the right of access to information is not absolute, to satisfy the requirements set out under article 24 of the Constitution, the respondents must demonstrate that the limitation imposed on the constitutional right is *"fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and that it falls within the exceptions provided in section 6 of the Act."* What is wrong in this case is that the Respondent did not satisfy this constitutional test nor did it establish that the refusal falls within the exceptions in section 6. The Respondent only made a blanket reliance of section 6 without offering evidence to discharge the burden.

45. In order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.

46. In the case of **Mary Nyawade in Banking Fraud Investigation Department & 2 others the Petition No. 143 of 2017**; Hon. Justice John M. Mativo dealing with petitioner's claim for access to information and the respondents refusal, stated under paragraph 57 thus:-

**"(a) The information relates to legitimate interests protected by the law, and**

**(b) Disclosure of the information threatens to cause substantial harm to that interest, and**

**(c) The harm to the interest is greater than the public interest in receiving the information."**

47. The Registered voters during voting are required to identify themselves through their names and identification through I/D Card and/or passport but not solely by their names. It has now become normal for an individual seeking services in this country or visiting a number building in this country whether public or private to identify himself/herself by production of I/D Card or passport and recording his name, I/D or passport number and even telephone number. The name alone do not suffice. The Safaricom a service provider and/or Airtel a

service provider cannot serve anyone who has not given his full details including the I/D or passport number; as it is hard to identify any individual by mere name; more information in form of I/D Card or passport number is necessary to differentiate different individuals. The Registration of persons Act applies to all persons who are citizens of Kenya and who have attained the age of eighteen years or over or where no proof of age exists, are of the apparent age of eighteen years or over. The purpose of the Act is to make provisions for the registration of persons and for the issue of identify card, and for purposes connected therewith. It is for that reason I/D card/Passport is important for the purpose of ensuring transparency, accountability and integrity in all transactions.

48. The Respondent in giving Register of voters with voter's name but with incomplete ID/Passport number or what the respondent refer to as redacted details of identification number of the voters which is informed by the need to protect the confidentiality of their personal details or their privacy is incomplete for all purposes and intentions. The Respondent has not demonstrated how Article 31 of the Constitution of Kenya is violated by giving the voter's name and his/her ID/Passport number. It has not demonstrated such information relates to legitimate interest protected by the law; that disclosure of such information threaten to cause substantial harm to that interest and the harm to the interest is greater than the public interest in receiving the information.

49. The petitioner has demonstrated the need for required Form A to be supplied, should contain the national I/D or passport number and given that the names are generally or may be identical and therefore incapable of identifying persons with certainty. I find for free and fair election to be had, national I/D or passport numbers provide the only unique means of identifying individual in most determination and/or certain way and more so when the currently supplied "register of voters" is incomplete. Such a register may facilitate the very mischief that regulations 13, 13A, 27 and 27A of the Elections (*Regulation of Voters*) Regulation 2012 were meant to stymie. The voters of Kibra Constituency are entitled to free and fair elections, that include the right of every person eligible to vote to do so without let or hindrance occasioned by fraud and/or negligent omissions, and as such nothing should be left to chance. I find that, the prejudice, if any that would be occasioned in providing the particulars sought far outweighed by the prejudice that would be occasioned in denying the people of Kibra Constituency their constitutional right to vote and/or permitting ineligible persons, if any to vote. I find and hold, that in the circumstances, and in the interest of transparency, accountability, certainty and fairness, that a complete register containing all the prescribed information in the Form A, of schedule to the Elections (*Registration of voters*) Regulation 2012 (save confidential information and which may be injurious to voters such as telephone numbers, home or property searched, possessions seized and information relating to their family or private affairs unnecessarily required or revealed or privacy of their communication which should not be infringed) be made public in the Kibra Constituency register of voters in all polling stations and in an online portal. Briefly the names of the Registered voters and their I/D or passport number should be in the Register of voters.

50. In this petition it must be borne in mind that access to information disputes are concerned with constitutional right. The scheme of the Access to Information Act is such that information must be disclosed unless it is exempted from disclosure under one or more construed exemptions. The holder of the information bears the onus of establishing that the refusal of access to the record is justified under the Act for the court to uphold the refusal. The Register of voters is a public document kept by the Respondent and the Respondent has not demonstrated justification to issue an incomplete Register of voters to the petitioner. It has not been demonstrated that the Register of voters falls with the any of the exception stipulated in section 6 of the Access to Information Act nor has it been shown the refusal was reasonable and justifiable in an open and democratic society to satisfy the provisions of Article 24 of the Constitution.

51. It has to be borne in mind that proceedings under Access to Information Act are different from ordinary civil proceedings in certain key aspects. Such disputes involve a constitutional right of access to information and are generally not purely private disputes-requesters, of information after act in public interest and the outcome of their disputes therefore impact the general wellbeing of our democratic policy.

52. In the instant petition and in particular under section 6(1) and 6(2) of the Elections Act, the Respondent is required to cause the register to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein. The Respondent avers that the updated register of voters is available for inspection by any voter at various polling stations; but I find that they did not controvert the petitioner's contention that they supplied incomplete Register of Voters. I therefore find that the Respondent is required to comply with the letter and spirit of the constitution, the relevant legislation and regulations and avail the relevant Register of voters and carry out its duty of opening the register for public inspection. What the Respondent is required to do is to ensure the register is open for inspection, whose purpose is to ensure members of public can rectify the particulars therein. The exercise in my view is not to open register for members of public to check on details or particulars of other voters. Further the opening of the register is not to seek particulars of other voters.

53. In view of my findings herein above, I find and hold that this petition succeeds. Accordingly, the petition is allowed and I proceed to enter judgment in favor of the petitioner as follows:-

**a) A declaration be and is hereby issued that the Respondent violated the petitioner's Right under Article 35(1) (a) and (b) of the Constitution and Section 4(1) (b) of the Access to Information Act No. 31 of 2016;**

**b) An order be and is Hereby issued compelling the Respondent to provide voters in Kibra Constituency and the public at large with Kibra Constituency voters' register containing all information prescribed in Form A of the schedule to Election (Regulation of Voters) Regulation 2012 in all polling stations and in the public online portal; save confidential information and which may be injurious to voters such as telephone numbers, home or property searched, possessions seized and information regarding to their family or private affairs unnecessarily required or revealed or the privacy of their communication which is protected under Article 31 of the Constitution of Kenya 2010;**

**c) An order of mandamus be and is HEREBY issued compelling the Respondent to publish the Kibra Constituency voters' register containing the names, National ID and Passport numbers, and their respective polling stations and centers in all polling stations and in the public online portal;**

**d) In the alternative to (b) above, an order of mandamus be and is HEREBY issued compelling the Respondent to publish the Kibra Constituency voters' register containing the names, National ID and Passport numbers and their respective polling stations and centers in all polling stations and in the public online portal;**

e) The petition was brought in public interest and I find in view of its nature it would be prudent to order each party to bear its own costs.

Dated, signed and delivered at Nairobi this 6<sup>th</sup> day of November, 2019.

.....

J .A. MAKAU

JUDGE