



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.407 OF 2015

JOHN MANG'URU KABIRI1ST PETITIONER
PETER NJUGUNA MWANGI.....2ND PETITIONER
JAMES GACHERU KARIUKI.....3RD PETITIONER
JOHN NGUGI MUIGAL.....4TH PETITIONER

-VERSUS-

THE COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT
THE NATIONAL LAND COMMISSION.....2ND RESPONDENT
THE DISTRICT LAND REGISTRAR KIAMBU.....3RD RESPONDENT
THE CHAIRMAN SUB-COUNTY LAND CONTROL BOARD
LIMURU SUB COUNTY.....4TH RESPONDENT
THE DIRECTOR OF SURVEY KENYA.....5TH RESPONDENT
MUCHENDU NJUGUNA, SAMMY GITHORE AND
KAMAU MBUGUA (herein sued as Chairman,
Secretary and treasurer respectively of
LIMURU PYRETHRUM GROWERS
CO-OPERATIVE LIMITED.....6TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT

JUDGMENT

INTRODUCTION

1. In the amended petition dated 25th April 2015, the petitioners herein, who describe themselves as male adults working for gain in Kiambu County, sued the respondents herein seeking the following orders:

1. That the 1st, 2nd, 3rd, 6th and 7th respondents be ordered to forthwith furnish the applicant's with the following information in relation to the former LR No. 11128/R and /or LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre i.e. in whose custody are:

- a) 12 no. light industries plots.....measuring 1.33 acres.
- b) 12 no. of commercial plotsmeasuring 1.33 acres
- c) 6 no. of nursery school plotsmeasuring 3.00 acres
- d) 14 no. playing fieldsmeasuring 4.22 acres
- e) 1 no. public water tank plotmeasuring 0.1 acres
- f) 3 no. of parking space plots.....measuring 0.15 acres
- g) 3 no. church plotsmeasuring 0.15 acres
- h) Riparian reserve and open spaces.....measuring 35.42 acres.
- i) Cattle dip.....measuring 0.11 acres.

2. That the 1st, 2nd, 4th and 6th respondents be ordered to forthwith furnish the applicant's with the following information in relation to the former LR No. 11128/R and /or LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre i.e.

a. A certified true copy of the letter written by the then central authority and currently the National Liaison Committee addressed to the Limuru Pyrethrum Growers Co-operative Society Limited directing on how the land LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre was to be sub-divided.

b. A certified true copy of the letter written by Limuru Pyrethrum Growers Co-operative Society Limited accepting the conditions set out by the Central authority in relation to subdivision of the parcel of land LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre

3. That the 1st, 2nd, 3rd, 4th, 6th and 7th respondents be ordered to forthwith furnish the applicant's with the following information in relation to the former LR No. 11128/R and /or LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre i.e.

a. Who appeared for the Republic of Kenya before the Land Control Board at Limuru to transfer any of the plots in prayer (2) hereinabove?

b. Is any alienation of the plots in prayer 2 herein above regular, procedural, legal or constitutional?

4. That the 3rd, and 5th respondents be ordered to forthwith furnish the applicant's with the following information in relation to the former LR No. 11128/R and /or LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre i.e.

a. Certified true copies of green cards for all the parcels of land known as Tigoni/Mabroukie exceeding no. 2456

b. The consents upon which their offices registered the numbers aforesaid in sub paragraph (a) herein above.

5. That the 5th respondent be ordered to forthwith furnish the applicant's with the following information in relation to the former LR No. 11128/R and /or LR No. 237/10 aka (karanjee farm) South East Limuru Trading Centre i.e.

a. The original map of the plots as directed by the Liaison Committee (central authority)

b. All other subsequent amended map(s) and the authorities for the amendments.

6. Any other or further order(s) and/or writ(s) or direction(s) the Honourable court may deem fit to grant.

2. In the said amended petition, the petitioners claim that they requested for information from the respondents regarding the sub-division of LR No. 11128 and /or LR No. 237/10 East of Limuru Trading Centre (**hereinafter "the suit land"**) for the purposes of enforcing a right to education and clean and healthy environment but that the respondents did not avail the said information to them thereby precipitating the filing of this petition which is expressed to have been filed under the provisions of Article 35 of the Constitution and is supported by the 1st petitioners supplementary affidavit dated 23rd February 2016.

The Petitioners' case.

3. The petitioners' claim is that they formally sought to be furnished with information relating to the suit land so as to enable them enforce a right to education under Articles 43(1)(g) and 53(1)(b) of the Constitution and a right to a clean and healthy environment under Article 42 of the Constitution.

4. The petitioner contended that the central authority in the then Ministry of Lands required the setting aside of playing fields measuring 4.22 acres, Riparian reserve and open spaces measuring 35.42 acres one public water tank plot measuring 0.1 acres and 3 parking space plots measuring 0.15 acres as a condition of approval of sub-division of the suit land.

5. In respect to the right to education the petitioners stated that it required the information in order to enforce the public interest for the children at Karanjee Farm and adjoining areas by enforcing approved division of the suit land where the central authority in the Ministry of Lands had required 3 primary school plots measuring 23.39 acres and 6 nursery school plots measuring 3.00 acres as a condition for the approval. The petitioners state that contrary to the said requirements of the lands ministry central authority, the parcels of land were fraudulently alienated without provisions for the schools thereby denying the children in the said area the right to education which has been violated, infringed and threatened with continued violation.

6. Neither the original petition, nor the amended petition were accompanied by any supporting affidavit, but in a supplementary affidavit, sworn by the 1st petitioner dated 23rd February 2016 in response to the respondents replying affidavits and grounds of opposition, he avers that the petitioners sought information through a letter dated 28th July 2015 (annexture “JKMa”) addressed to the 3rd, 4th and 5th respondent. He further avers that the documents sought are in respect to land transferred to the state by way of surrender and are held by the county government in trust for the residents of the county. He avers that the parcels of land in question are only administered by the 2nd respondent on behalf of the 1st respondent pursuant to the provisions of Article 62(2) of the Constitution.

1st respondent’s case

7. On 25th January 2016 the 1st respondent filed grounds of opposition to the petition in which it listed the following grounds:

1. That the petition filed herein offends the principles of law as the prayers sought against the respondent are the subject matter of High Court Civil Suit 49 of 2012.

2. That petition is therefore *sub judice* and should be struck out as it is an abuse of the court process.

8. The 1st respondent further opposed the petition through the replying affidavit of its Chief Officer, Lands Housing and Physical Planning **Mr. David K. Gatimu**, who deposes that under Article 62 of the Constitution, all public land listed by the petitioners in their petition vest and are held in trust, by the County Government and are administered by the 2nd respondent in which case, only the 2nd respondent has records relating to the public land.

9. He further avers that a reading of the petition shows that the petitioners already have the information that they seek from the 1st respondent in view of the fact that he makes reference to the said document by their reference numbers and the dates that the letters sought were allegedly written. He denies the allegation that a letter allegedly written by the central authority in the Ministry of Lands would have emanated from the 1st respondent or the defunct local authorities.

10. He further states that the 1st respondent would not be in a position to provide the documentation sought by the petitioners as it was neither the author nor the recipient of the said documents. He avers that the 1st respondent is not the custodian of the minutes of the land control board and would therefore not be in a position to produce the said minutes. He contends that the petition does not meet the threshold for the granting of the orders sought.

11. In the written submissions filed on 3rd April, 2018, the 1st respondent argues that the instant petition offends the doctrine of *res sub judice* as there exists a similar suit being HCCC 49 of 2012 wherein the 1st petitioner demands the production of the same documents and that the parties to the said suit are the same as the parties herein. The 1st respondent relied on the decision in the case of **Kiama Wangai v John N. Mugambi & Another (2012) e KLR**, and sought the dismissal of this petition for being *sub judice*.

12. The 1st respondent also referred to the 6th respondents replying affidavit and argued that the said relying affidavit had provided an elaborate explanation on all the existing public utility plots and argued that all the information sought by the petitioners had been availed to them through the said replying affidavit.

2nd respondent’s case.

13. The 2nd respondent opposed the petition through the replying affidavit of its Principal Land and Administration Officer, **Mr Silas K. Mburugu**, dated 6th November 2015 who deposes that the 2nd respondent succeeded the office of the Commissioner of Lands and inherited all its assets and liabilities.

14. He further avers that the petitioners sued the 2nd respondent as the 6th defendant in HCCC No. 49 of 2012 regarding the subdivision of the suit land and called for the production of the same documents that they seek in the instant petition. He contends that the prayers sought in the petition are therefore *sub judice* in view of the proceedings in the said HCCC No. 49 of 2012 and reiterates that these proceedings are an abuse of the court’s process. He states that the documents sought are public documents which can be accessed upon making an application in the prescribed format and upon payment of the requisite government fees. The 2nd respondent maintains that the petitioners have not demonstrated that they made a formal application in the prescribed form for the said documents and have been denied access to them.

6th respondent case.

15. The 6th respondent opposed the petition through the replying affidavit of its Chairman, **Mr. Muchendu Njuguna** sworn on 23rd February 2016 who avers that the petitioners are not members of the 6th respondent cooperative society is therefore at a loss as to what interests the petitioners have on the 6th respondent's private property. He attached annexure "MN1" to his replying affidavit to demonstrate that none of the petitioners is a member of the 6th respondent society. He further states that at no time have the petitioners ever made a request to the society for the information sought in the petition and that the petitioner annexure "JMK2" was neither addressed to the 6th respondent or copied or received by the 6th respondent. He further avers that the suit property was purchased by the 6th respondent from Mabroukie Tea Company Ltd in the year 1965 for their personal development and that in the year 1982 the society members agreed to subdivide the property to each of its members for their own use.

16. He explains that the suit land was sub divided into about 2,700 plots measuring 50 x 100 feet which were subsequently sold to the members who then agreed to retain some of the plots for public utility such as cattle dips, churches, light industries, commercial plots, cemetery, water tank, play ground, bore hole etc. He listed the plots retained for public utility as follows

I. TIGONI/MABROUKIE BLOC 1/1730- WATER TANK- 0.0450 HA (LIMURU PYRETHRUM) TRUST

II. TIGONI/MABROUKIE BLOC 1/2535- CEMETRY- 1.473 HA (LIMURU PYRETHRUM) TRUST

III. TIGONI/MABROUKIE BLOC 1/2615- PLAYGROUND- 0.178 HA (LIMURU PYRETHRUM) TRUST

IV. TIGONI/MABROUKIE BLOC 1948- BOREHOLE – 0.045 HA (LIMURU PYRETHRUM) TRUST

V. TIGONI/MABROUKIE BLOC 1/2616- CATTLE DIP – 0.098 HA (LIMURU PYRETHRUM) TRUST

VI. TIGONI/MABROUKIE BLOC 1/804- NURSERY SCHOOL – 0.0499 HA (LIMURU PYRETHRUM) TRUST(ARCHDIOCESE NAIROBI ST JOSEPH PARISH LIMURU TRUSTEE)

VII. TIGONI/MABROUKIE BLOC 1/803- SCHOOL – 2.471 HA

(ARCHDIOCESE NAIROBI (ST JOSEPH PARISH LIMURU TRUSTEE)

VIII. TIGONI/MABROUKIE BLOC 1/806- CHURCH- 0.0494 CATHOLIC (TRUSTEE)

IX. TIGONI/MABROUKIE 1/554- METHODIST CHURCH (TRUSTEE) - 0.0596 HA.

X. TIGONI/MABROUKIE BLOC 1/552- NURSERY SCHOOL – 0.1500 HA(METHODIST CHURCH TRUSTEE)

XI. TIGONI/MABROUKIE BLOC 1/384 - SCHOOL – 2.672 HA(METHODIST CHURCH TRUSTEE)

XII. TIGONI/MABROUKIE BLOC 1/2383- NURSERY SCHOOL – 0.0512(JITAHINDI WOMEN MULTI-PURPOSE CO-OP TRUSTEE)

XIII. TIGONI/MABROUKIE BLOC 1/2384- SCHOOL – 2.747 HA (PRESBYTERIAN FOUNDATION (P.C.E.A.) TRUSTEE.

XIV. TIGONI/MABROUKIE BLOC 1/2381-CHURCH–0.0501 HA (PRESBYTERIAN FOUNDATION (P.C.E.A.) TRUSTEE.

17. He also attached copies of all the search certificates in respect of the above listed plots to his replying affidavit as annexure "MN3". He further explained that he was unable to produce the original title deeds to the suit land because it had been surrendered to the land registrar upon the sub-division of the suit land into smaller plots. He maintained that the 6th respondent was not in breach of the provisions of Article 35 of the Constitution.

Summary of the parties' submissions

18. During the highlighting of the petitioners written submissions, the 1st petitioner informed the court that the petitioners had dropped prayer number 3 of the petition. He submitted that the 1st respondent, as the planning authority could not deny being in possession of the information that they had asked for while the 2nd and 6th respondents had not denied being in possession of the two letters sought in prayer 2(a) and (b) of the amended petition. He maintained that the 5th respondent was the custodian of the maps sought under prayer 5(a) and (b) of the petition. He argued that the sub judice rule is not applicable in this case as it has been brought under Article 35 of the Constitution.

19. In his oral submissions before the court **Mr. Ranja** learned counsel for the 1st respondent submitted the case was sub judice HCCC 49 of 2012 and the mere fact that the petition was amended to include claims of enforcement of right to education and clean environment did not change the facts of the case in view of the fact that the petitioners had not shown how they intended to enforce those rights. He argued that allowing the petitioners' petition to access the documents would go against the provisions of Article 50 of the Constitution on the right to a fair hearing and not to self incriminate in view of the fact that the petitioners intended to use the said documents against the 1st respondent in another pending case being HCCC 49/2012. He further argued that the petitioners were hiding behind this petition in order to facilitate a

similar civil case that was still pending before the High Court.

20. **Mr. Wahome** learned counsel for the 2nd respondent submitted that under Section 6 (2)(h), of the Access to Information Act, a public body is not obliged to give information when such information would damage the public body on actual or contemplated legal proceedings. He added that the 2nd respondent is the 6th defendant in civil suit No. 49/2012 in which the petitioners equally seek the same information. He further submitted that Section 6(5) of the Access to Information Act precludes a public entity from the obligation to supply information if the requested information is reasonable accessible by other means by other means. He maintained that the information sought in prayer (1) of the petition can easily be obtained through certificates of official search upon the petitioners' request and the payment of the requisite fees. He added that the petitioners had not demonstrated that they had formally applied for the searches or that the information sought in prayer 2, 4, and 5 of the amended petition were in possession of the 2nd respondent.

21. Mr. Wambua, learned counsel for the 6th respondent referred to the decision in the case of **Andrew Omtata Okoiti vs. Attorney General & 3 Others [2011] eKLR** wherein Musinga J. (ahw) held:

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant’s application is rather premature.”

22. He maintained that the information sought by the petitioners had not been requested for and that the petitioners had not shown which rights they wished to protect. He added that all the information that the petitioner required was contained in the certificates of official search which he had availed before the court.

23. In a rejoinder the petitioners argued that they filed the petition before coming into force of the Access to Information Act and therefore any lapse to the said Act should not be visited on them.

Determination

24. I have considered the pleadings, submissions by counsel and authorities cited. Three main issues arise for determination in this petition, namely:-

- 1) ***Whether the petition is sub judice***
- 2) ***Whether the respondents violated the petitioner’s right of access to information***
- 3) ***Whether the respondents should be compelled to give information.***

Sub judice

25. The principle of sub judice is defined in **Section 6 of the Civil Procedure Act** as follows:-

“No Court shall proceed with the trial of any suit or proceeding on in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed” emphasis added

The term ‘sub-judice’ is defined in ***BLACK’S LAW DICTIONARY 9TH EDITION*** as:

“Before the Court or Judge for determination”

In the landmark case of **Henderson v Henderson [1843] 67 ER 313**, res judicata is described as:

“...where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not(except under special circumstances) permit the same parties to open the same subject of litigations in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

In **Attorney General & Another ET vs [2012] e KLR** it was held:

“ The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of

action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs NBK & Others [2001] EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.” In that case the court quoted Kuloba J, (as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated : If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata...”

In **Bernard Mugo Ndegwa v James Githae & 2 Others[2010] e KLR** it was held that the applicant alleging res judicata must show that;

- a) *That the matter in issue is identical in both suits;*
- b) *The parties in the suit are substantially the same;*
- c) *There is concurrence of jurisdiction of the court;*
- d) *The subject matter is the same; and*
- e) *That there is a final determination as far as the previous decision is concerned.*

Applying the above principles to the instant petition, it was not disputed by the parties that there is another suit before the High Court being HCCC 49/2012 between the same parties and over the same subject matter. A perusal of the plaint filed in the said High Court suit shows that at paragraph 21 the plaintiffs state as follows:

“21. The plaintiff in pursuance and/or under the provisions of Article 35 of the Constitution of Kenya 2010 shall be seeking the production in court of the following:-

- a) **Original maps for the subdivision of the former L.R. No. 237/10 East of Limuru Township within Municipal Council of Limuru from the 7th defendant.**
- b) **All green cards opened by the 12th defendant herein upon the sub division of the former L.R. 237/10 East of Limuru Township within the Municipal Council of Limuru.**
- c) **All Minutes held by the Limuru Land Control Board effective 29th June, 1983 to date.**
- d) **A letter from the Central Authority Ref. No. 71541/173 dated 9th August, 1984 together with its reply from Limuru Pyrethrum Growers Co-op. Society Ltd. Which documents are in the possession of the Commissioner of Lands, the 6th defendant herein.**
- e) **The Minutes of the meeting of Works, Markets and Housing committee of the 2nd defendant herein held on 25th August, 2005 for the smooth and expedient disposal of this suit.**
- f) **All the minutes of the Plots repossession committee of the 2nd defendant herein.**
- g) **An abstract from the Njambini Police station OB No. 10/21/11/2010 from the 10th defendant herein.”**

26. In a bid to overcome the conditions set by the *sub judice* rule, the petitioners argued that the *sub judice* rule is not applicable in this case as it has been brought under Article 35 of the Constitution. It is noteworthy that the instant petition was filed in the year 2015 after the HCCC 49/2012 and it was also not disputed that the said suit is still pending hearing and determination and according to the respondents, the petitioners filed this petition specifically to enable them obtain documents which they would then use in the pending civil suit. I am therefore satisfied that this Petition is sub-judice in view of the pendency of the High Court Civil suit No. 49 of 2012 in which substantially the same issues have been raised. This petition is therefore clearly an abuse of the process of this Court and the law enjoins me to make appropriate orders to bring such abuse of process to an end. I am guided by the decision of Olao J. in the case of **Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & another [2016] eKLR** wherein the learned Judge stated:-

“I hold the view that a Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words “or proceeding” in Section 6 of the Civil Procedure Act. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised. While this Court affirms the petitioner’s right to approach it to enforce a Constitutional right, it must also be made clear that this Court has a duty to ensure that its process is not abused.”

27. My above findings that the petition is res judicata would have been sufficient to determine this suit but I am still minded to determine the other issues of whether the *respondents violated the petitioner’s right of access to information and whether the respondents should be compelled to avail the information.*

28. The petitioners claimed that they sought information through letter dated 28th July, 2015 addressed to the 3rd, 4th and 5th respondents which was marked as annexure “**JMKa**” and another letter marked “**JMK2**”. The letters are said to have been delivered to the respondents but that no response was received from them thus necessitating the filing of this petition. The petitioners contended that the respondents have violated Article 35 of the Constitution. The respondents on the other hand held the position that they did not violate the petitioner’s right to access information. The 1st respondent contended that all the information sought by the petitioners were contained in the 6th respondents replying affidavit while the 2nd respondent argued that the information sought were public documents which the petitioners could access by making the necessary application in the prescribed format and upon payment of the requisite fees. The 2nd respondent’s case was that the petitioners were not entitled to the orders sought in this petition as they had not demonstrated that they had sought the said documents, paid the requisite fees and were still denied the same. The 6th respondent denied having received any letter from the petitioners requesting for any information.

29. The right to access information is a right that the individual citizens have to access information held by public authorities acting on behalf of the state. This is an important right as it underpins the values of good governance, integrity, transparency, accountability and other values set out in Article 10 of the Constitution for the proper and democratic conduct of government affairs by enabling citizens to participate in governance. It therefore follows that successful and effective public participation in governance largely depends on the citizen’s ability to access information held by public authorities because where citizens do not know what is happening in their government and or if the goings on are hidden from them, they may not be able to take meaningful part in their country’s governance. In that regard, therefore, the right to access information becomes a foundational human right upon which other rights must flow.

30. The importance of the right to access information was fully appreciated by the drafters of our Constitution through the inclusion of Article 35 to the Constitution to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. Article 35 of the Constitution provides that;

1) “Every citizen has the right of access to—

a) information held by the State; and

b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

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

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

31. A reading of **Article 35** shows that the right of access contains three key elements. The first is the entitlement to information from the state or to information held by another person required for exercise or protection of a fundamental right and freedom. The second element contained in **Article 35(2)** is the right to correction or deletion of untrue or misleading information that affects a person. **Article 35(3)** is the third element which imposes on the State the obligation on the State to publish and publicise important information.

32. The Constitution is therefore clear that information held by the state is accessible by citizens upon request which means that once a citizen places a request to access information, the information should be availed to the citizen without delay. Contrary to the respondents’ assertion that the petitioners needed to show that they required the information to protect or enforce another right, Article 35 of the Constitution does not place any conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

33. In order to actualize Article 35, parliament enacted Access to Information Act 2016. Section 4 of the Act, which is material to this petition, provides for the procedure to access information. The section provides;

1) “Subject to this Act and any other written law, every citizen has the right of access to information held by—

a) the State; and

b) Another person and where that information is required for the exercise or protection of any right or fundamental freedom.

2) Subject to this Act, every citizen's right to access information is not affected by—

a) any reason the person gives for seeking access; or

b) the public entity's belief as to what are the person's reasons for seeking access.

3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4) This 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.

5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (Emphasis)

34. From the above provisions, it is clear 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.

35. On the other hand, section 5 of the Act further provides that a public entity should facilitate access to information held by it. Under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. Section 4 (3) of the Act is also sufficiently clear that the information should be given without delay and at a reasonable cost. Section 9 states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.

36. In the case of Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others (supra) the Court stated of what the state should bear in mind when considering the request to access information.;

“34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...”

The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

The Court then went on to state at paragraph 56;

“[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1) (a).... they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens.”

37. In the case of Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

“[270] 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”.

38. The importance of the right to access information as a founding value of constitutional democracy was dealt with by the Constitutional Court of South African in the case of President of Republic of South Africa v M & G Media (supra) where the Court stated that:-

“[10]. The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

39. Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, ***“that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”*** [Emphasis mine] How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported), the court stated that, ***“[43] I am not inclined to grant the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.”***

40. In the instant case, the 2nd respondent’s position was that the documents sought by the petitioners were public documents that they could access upon making an application in the prescribed form and upon paying the requisite government fees. Apart from showing that they had written a letter addressed to the 1st, 2nd and 3rd respondents requesting for certain documents, the petitioners were silent on whether they had formally applied to be supplied with the said documents by paying the requisite fees. In that regard therefore, I do not think that this court

should exercise its coercive power to compel the state organ to supply the documents to the petitioners who have not complied with the procedure for obtaining the said documents. The right to information is not an absolute right as each institution or person is entitled to assert any limitations consistent with **Article 24** of the Constitution. Section 6(5) of the Access to Information Act precludes a public entity from the obligation to supply information if the requested information is reasonable accessible by other means by other means. The said section stipulates as follows:-

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

41. Having regard to the aforesaid principles I now turn to consider the prayers sought by the petitioners which I had highlighted at the beginning of this judgment. I note that the petitioners did not show that they wrote any letter(s) requesting for any information from the 6th and 7th respondents and under those circumstances I am not inclined to grant any orders against the said respondents. I am guided by the decision in the case of ***Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported)***, where the court stated that,

“[43] I am not inclined to grant the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a preemptory order made should the circumstances justify such an order.”

42. Turning to the prayers sought against the 1st, 2nd, 3rd and 4th respondents, I find that the information sought by the petitioners in prayers 1 and 4 of the petition have already been supplied through the 6th respondent's replying affidavit wherein copies of all the search certificates in respect plots arising from the subdivision of the suit land were attached as annexure “MN3”. I find that prayer no. 2 of the petition is vague and untenable as the letters sought have not been identified or shown to be in the custody of the respondents. Lastly, in respect to prayer 5, I find that the said maps may be obtained by the petitioners from the relevant government offices upon the making of a formal request in the prescribed form and upon the payment of the requisite fees.

Conclusion

43. From my evaluation and analysis of the facts and evidence presented in this petition, and submissions by counsel for the parties and bearing in mind precedent and the law, I come to the inescapable conclusion that the petitioners have not proved that their right of access to information has been violated. The above finding, coupled with my earlier finding that the petition offends the *sub judice* principle, make me conclude that the instant petition is unmerited and I therefore dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 18th day of September 2018.

W. A. OKWANY

JUDGE

In the presence of:

1st Petitioner

Miss Sanait for the 1st respondent

Miss Nambisia for the 2nd respondent

Mr Okello for the 3rd and 4th respondent

Court Assistant - Kombo