



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 203 OF 2018

LEMPAA VINCENT SUYIANKA.....PETITIONER

VERSUS

THE COMMISSION ON ADMINISTRATIVE OF JUSTICE SELECTION PANEL....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. This petition relates to petitioner's demand for information from the 1st respondent concerning an advertisement for vacancies in the positions of chairperson and members of the Commission of Administrative Justice (CAJ) inviting interested and qualified persons who satisfy the provisions of the Constitution to apply for the said vacant positions.
2. The petitioner herein describes himself as a male adult of sound mind and an advocate of the High Court of Kenya while the 1st respondent is the selection panel for the appointment of members of CAJ which is a commission established pursuant to Section 3 as read with the First Schedule of the Commission on Administrative Action, Act 2011.
3. The 2nd respondent is the holder of the office of the Attorney General of the Republic of Kenya established under Article 156 of the Constitution vested with the authority to defend any suit against the National Government.
4. The petitioner was an applicant for the position of the member of the CAJ following an advertisement by the 1st respondent made on 4th May 2018 in which the 1st respondent published 15 names out of the 388 applicants it had shortlisted.
5. Upon failing to make it to the list of short listed candidates published on 22nd May 2018, the petitioner on the same date, 22nd May 2018, wrote to the 1st respondent seeking the following information:
 - i. *The criteria applied in short listing applicants for the position of Members of The Chairperson and Members of the Commission on Administrative of Justice and if possible, the marking scheme or the score criteria leading to short listing and qualification of candidate.*
 - ii. *The reasons why 15 out of the 388 published applicants were not short listed.*
 - iii. *The minutes of the sitting that arrived at the decision that I should not be shortlisted.*
6. The petitioner's case is that he did not receive any response from the 1st respondent on the information sought thereby prompting him to file the instant petition in which he seeks remedies for the violation of his right to access to information under Article 35(1) (3) (b) of the Constitution, right to fair administrative action under Article 47 and for contravention of Articles 1, 10, 27, 88(2) and 232 of the Constitution.
7. The petition is supported by the petitioner's affidavit and he seeks the following orders.

I. A declaration be issued that the failure by the respondent to provide information sought under Article 35(1) (a) and also publicize the information in accordance of Article 35(3) on the basis of the petitioners' request dated 22nd May 2016 is a violation of the Right to Access to Information.

II. A declaration that to the extent that the 1st respondent has failed to provide the petitioner with the information sought under Article 35(1) and so publicize that information in accordance with Article 35(3), the 1st respondent's action amounts to violation of Article 47(1) and (2) of the Constitution and the Fair Administrative Action Act.

III. A declaration that the criteria used to shortlist applicants for the position of Chairperson and Member was unconstitutional because it provided applicants clearances from private companies like credit reference bureau contrary to the dicta of this court in Trusted Society of Human Rights Alliance and 3 Others vs Judicial Service Commission & Another [2016] eKLR and therefore barring meritorious candidates for the positions of member from being shortlisted.

IV. A declaration that the criteria used was unconstitutional because it failed to have basic principles of the constitutional including gender equality and inclusion of persons with disability contrary to Article 27 and 54 of the Constitution.

V. A declaration that the 1st respondent carried out the process of short listing in violation of the values and principles of leadership set out in Article 10, in that process is not transparent, it is unaccountable, it is not in accord with human rights, including the protection of marginalized and vulnerable groups. In sum criteria is arbitrary, unreasonable, irrational and unconstitutional.

VI. An order compelling the respondent to provide the petitioner with the information requested vide his letter dated 22nd May 2018.

VII. An order compelling the respondent to interview all the applicants who applied for the position of the chairperson of the Independent Electoral and Boundaries commission.

VIII. An order compelling the respondent to interview the petitioner herein for the positions of member of Independent Electoral and Boundaries commission.

IX. General damages.

X. Costs and interests thereof of this petition.

XI. Such further, other and consequential orders as this Honourable Court may deem fit to make.

8. At this juncture, it is worthy to note that this petition is identical to petition No. 204 of 2018 wherein the same petitioner sued the Selection Panel, National Gender & Equality Commission after failing to make it to the shortlist of members of the said commission and similarly sought the same information which he claims was not given to him. At the hearing of this petition, parties agreed that the decision in this case applies to petition 204 of 2018.

The petitioner's case.

9. The petitioner contends that the failure and/or refusal by the 1st respondent to provide the information that he sought was a violation of his rights as guaranteed under Article 35 of the Constitution which entitles him to access to information and Article 33 which relates to freedom of expression and includes freedom to seek, receive or impart information or ideas.

10. In highlighting the importance of the right to access to information the petitioner relied on several court decision including the case of Nairobi Law Monthly Ltd Vs The Kenya Electricity Generation Company & 2 Others [2013] eKLR in which Justice Mumbi Ngugi held, *inter alia*, that the right to information is at, the core of the exercise and enjoyment of all other rights by citizens .

11. The petitioner also cited the case of Trusted Society of Human Rights Alliance and 3 Others vs Judicial Service Commission & Another [2016] eKLR wherein the court observed that the exercise of the right to information should not require individuals to demonstrate a specific interest in the information and that public bodies have an obligation to disclose information to the public. It was the petitioner's case that the right to access information can only be subject to a narrow, carefully tailored system of exception to protect overriding public interests, including privacy.

12. He added that in the Kenyan context, justification for refusal to disclose information has to be evaluated on the requirements stipulated in Article 24 of the Constitution. For this argument, the applicant relied on the case of Nelson O.Kadison vs Advocates Complaints Commission & Another [2013] e KLR wherein the court found that a state is obliged to provide information held unless there are supervening reasons consistent with Article 24 of the constitution. The petitioner contended that the 1st respondent had no justification for failing to provide the information sought and was therefore in breach of Article 232 which provides for the values and principles of public service.

13. He further contended that the breach of his constitutional rights and freedoms calls for compensation on an aggravated scale. He relied on the decision in John Gakuo Vs County Government of Nairobi [2018] eKLR in which the Court of Appeal held that the appellants were entitled to compensation for violation of their right to fair administrative action.

The respondent's case.

14. The respondents filed Grounds of Opposition to the petition and listed the following grounds:-

1. That the petition is speculative and full of fear and only raises hypothetical questions.

2. That the petitioner has prematurely run to court to enforce rights under Article 35 of the Constitution without giving the 1st respondent adequate notice to provide reasons.

3. That the presumption of constitutionality can only be rebutted at and upon the full hearing of the petitions herein. Consequently the prayers for conservatory and or interim orders sought by the petitioner are premature and cannot be granted.

4. That the petition is frivolous to the extent that it purports to seek orders forcing he imposing on the 1st respondent for interview without first interrogating the reasons for failure to be shortlisted which is tantamount to interference with the doctrine of separation of powers.

5. That the petitioner has not demonstrated to court any breach of either the Constitution or any law on the part of the respondents

15. At the hearing of the petition, **Mr. Sekwe**, learned counsel for the state submitted that while it is true that the petitioner wrote a letter seeking information from the 1st respondent on 22nd May 2018, no sooner had the 1st respondent acted on the said letter than the petitioner filed this petition in court on 24th May 2018 thereby denying the 1st respondent an opportunity to respond to it.

16. According to the respondents' counsel, it was not possible to furnish the petitioner with all the information that he had asked for within 2 days considering the fact that the 1st respondent had received applications from more than 400 candidates for the same position of member of the Commission of Administrative Justice and had to fill the vacancies within the stipulated time frame. For this argument, counsel cited the case of **Andrew Okiya Omtatah Okoiti –vs- Attorney General & 2 Others [2011] eKLR** where it was held:

“ I agree that the short listing stage is a very critical one in the recruitment process and the highest degree of transparency ought to be exhibited. The JCS exercises discretion in short listing the applicants. However, the parameters of exercise of that discretion by the JSC has been defined by Regulation 13. The JSC cannot be accused of having abused its discretion unless the petitioner demonstrates otherwise by way of an affidavit sworn by one who alleges that he/she had met all the stipulated requirements applied and was not short listed.

Was the JSC bound to notify the applicants who were not short listed the ground(s) for their failure and afford them an opportunity to respond before interviews are conducted? There is no such requirement in the Act or the Regulations made thereunder. Whereas it would have been good practice to inform each unsuccessful applicant of the reason for disqualification, it must be remembered that time was of the essence in the recruitment exercise. In the case of the Supreme Court, it has to be constituted by 27th August 2011.”

17. Counsel submitted that the petitioner was fully aware of the fact that he did not qualify for the position he had applied for due to the lack of requisite documents such as the Kenya Revenue Authority and Ethics and Anticorruption Commission clearance certificates thereby not complying with Chapter 6 of the Constitution eligibility criteria.

18. Counsel further submitted that the petitioner is not entitled to an award of damages as he has not proved that his rights were violated or that any law was breached in the recruitment process. Counsel maintained that the prayers sought in the petition had been overtaken by events in view of the fact that all the advertised positions had been filled.

Analysis and Determination

19. Upon considering the pleadings filed herein, the parties submissions and the authorities cited, I note that the main issues for determination are as follows:

a) Whether the failure to communicate by the 1st respondents breached the petitioner's constitutional rights and freedoms under Articles 35 and 47 of the Constitution.

b) Whether the petitioner is entitled to the orders prayed for in the petition.

20. It was not in dispute that the petitioner wrote a letter dated 22nd May 2018 seeking information from the 1st respondent. It was also not in dispute that this petition was filed on 24th May 2018 before the 1st respondent replied to the said letter seeking for information.

21. The petitioner contended that failure to reply to his letter amounted to violation of his rights under Articles 35 and 47 of the Constitution. On their part, the respondents contended that the petitioner rushed to this court before they could make a response to the said letter and that the petitioner did not demonstrate that they breached any law or requirements during the short listing of the job applicants.

22. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance and is therefore a primary right upon which other rights flow. In the instant case, the information was required for the purposes of confirming the criteria used in shortlisting candidates for the advertised positions in the Commission.

23. The importance of the right to information was fully recognized by the drafters of our Constitution when they included Article 35 to the Constitution so as to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. Article 2 of the Constitution provides that the Constitution is the supreme law of the land and binds all persons and all state organs at all levels of government. Article 10 of the Constitution sets out the national values and principles of governance and provides that these national values and principles bind all state organs, State officers, public officers and all persons.

24. From the pleadings and submissions of the parties to this petition, I take the view that in order to succeed, the petitioners needed to demonstrate with a reasonable degree of precision, the alleged violation of their rights under Articles **35, 38 and 83** of the Constitution. See in this regard the decisions in **in Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012.**

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 public and publicise any important information affecting the nation.

25. For purposes of actualizing Article 35, Parliament enacted Access to information Act 2016 (hereinafter “**the Act**”). 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 to 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)

26. It is noteworthy that Article 35 does not place any limitation to the right to access information and this means 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.

27. Under Section 5 of the Act, a public entity should facilitate access to information held by it, while Section 8 provides that 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. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding the reason why the citizen wants to access information. 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.

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“ 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 important 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.....

29. 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) 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 of 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. The importance of the right to access information as a founding value of constitutional democracy was dealt with by the Constitutional Court of South Africa 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 realization 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.”

31. The right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of **Brunner v Minister for Social Development & Others** (supra) where the court stated:

“[62] 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.”

[63] 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 impart information or ideas.”

32. Arising from the above jurisprudence and the law, the state has constitutional obligation, without qualification, to allow citizens access information and they cannot be denied that right by the state. As I have already stated in this judgment, the respondent’s response to the petition and request for information was that the petitioner rushed to court to file this petition barely two days from the date the request for information was made and that the time was of essence in the recruitment process of the members and chairperson of the CAJ.

33. While I find that it is not in doubt that the respondent was under an obligation, upon the request of a citizen, to provide information under Article 35(1) (a) of the Constitution, such information can only be supplied if the state holding the information is granted adequate time to respond to the request. As I have already stated in this judgment, the petitioner sought information from the respondent on 22nd May 2018 in respect to an interview /recruitment that was to take place on 25th May 2018. Clearly, the petitioner’s request did not meet the timeline of 21 days within which information ought to be provided according to the provisions of Section 9 of the Act. My take is that the law makers had a reason for making provisions for the 21 days period which is reasonable time within which the state can act on a request for information. In the circumstances of this case, I find that the 2 day period that the petitioner expected to be furnished with the information as too short/inadequate and was not in conformity with the law governing access to information. Needless to say, the petitioner filed this petition prematurely before the expiry of the 21 day period and the respondent cannot be held responsible for the fact that the request for information was subsequently overtaken by events following the successful recruitment of commissioners to fill the vacant positions. For the above reasons, I find that the petitioner did not prove that his right to access to information under Article 35 was violated.

34. Turning to the claim on violation of rights to fair and administrative action under Article 47 of the Constitution, I find that the petitioner did not demonstrate how the said rights were violated. The said Article stipulates as follows:

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, he person has the right to be given written reasons for the action.*
- 3. Parliament shall enact legislation to give effect to the rights in Clause (1) and the legislation shall –*
 - a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
 - b) Promote efficient administration.*

35. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made; the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

36. The importance of fair administrative action as a Constitutional right was stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

37. In this case, I find that there was no adverse action taken against the petitioner or any action that the respondents could have taken within the 2 days period that the petitioner expected to be furnished with information before the interviews could kick off so as to justify the petitioner’s claim that his right to fair administrative action was violated. While I appreciate that the highest level of transparency must be shown in the shortlisting of candidates for any public appointment, in this case, the 1st respondent was governed by rules and regulations in the conduct of the said exercise. The petitioner has not demonstrated that he met the entire requirement for the said appointment and was not shortlisted.

38. I am of the humble view that it would have been appropriate for the 1st respondent to inform every unsuccessful applicant of the reasons for his/her disqualification, however, in the circumstances of this case, I find that time was of essence and that there was no sufficient time to inform the more than 400 unsuccessful applicant of their fate before the actual interviews were conducted. It was not disputed that the positions sought to be filled namely: Chairpersons and members of the Commissions had to be done within a given time frame.

39. On the issue of whether the petitioner is entitled to the orders sought, I find that having failed to demonstrate that his rights under the Constitution were violated, I find that the petitioner is not entitled to any of the prayers sought in the petition. Moreover, the recruitment process having been finalized and the vacant positions in the commission filled, I find that the prayers sought in the petition have been overtaken by events. I therefore find that the petition as it stands currently is moot and the order that commends itself to me is the order to dismiss it with no orders as to costs. I hasten to add that at the prayers slot of the petition, the petitioner surprisingly appears to be referring to the Independent Electoral and Boundaries Commission as the Commission that he had sued in these proceedings. While this court cannot speculate on the reason for the reference to IEBC in this case, I can only clarify that the affected commission in this case is the CAJ.

40. Before closing the chapter on this judgment I wish to reiterate that the findings/judgment on this petition shall apply to Petition No. 204 of 2018 in view of the similarity of the two petitions and the parties’ consent that the judgment herein be adopted as the judgment in the twin suit. For avoidance of doubt, petition 204 of 2018 is similarly dismissed with no orders as to costs.

Order accordingly.

Dated, signed and delivered in open court at Nairobi this 8th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Sekwe for the respondent and holding brief for the petitioner

Court Assistant – Kombo