



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.136 OF 2015**

**BETWEEN**

**OKIYA OMTATA OKOITI.....1<sup>ST</sup>**  
**PETITIONER**

**NYAKINA WYCLIFFE GISEBE.....2<sup>ND</sup>**  
**PETITIONER**

**AND**

**JOSEPH KIPCHIRCHIR BOINETT**

**(INSPECTOR GENERAL OF POLICE) .....1<sup>ST</sup>**  
**RESPONDENT**

**THE NATIONAL POLICE SERVICE COMMISSION.....2<sup>ND</sup>**  
**RESPONDENT**

**UHURU MUIGAI KENYATTA.....3<sup>RD</sup>**  
**RESPONDENT**

**GITHU MUIGAI.....4<sup>TH</sup>**  
**RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup>**  
**RESPONDENT**

**AND**

**THE INDEPENDENT POLICING**  
**OVERSIGHT AUTHORITY.....INTERESTED PARTY**

**RULING**

1. There are two Applications before me; the first is the Petitioners’ Application dated 10<sup>th</sup> April 2015 and the second is the Attorney General’s Application dated 18<sup>th</sup> September, 2015.

2. In their Application dated 10<sup>th</sup> April 2015, the Petitioners are seeking an order directed at the 1<sup>st</sup> Respondent requiring him to release to the Petitioners' the information they had requested for in their letter dated 10<sup>th</sup> April 2014. In that letter, they had specifically requested for the following documents;

(a) A copy of an executive order, or any written document, through which President Uhuru Kenyatta in accordance with **Article 135** of the **Constitution** instructed the 1<sup>st</sup> Respondent to proceed and admit for training 10,000 individuals whose recruitment into the National Police Service had been nullified by the High Court.

(b) A copy of a signal or any document through which the 1<sup>st</sup> Respondent complied with carried or out the directions/orders of the President.

(c) Any other documents or information relevant to the subject matter.

3. Mr. Okoiti Omtatah, the 1<sup>st</sup> Petitioner has further stated that the information sought would be necessary for the protection of constitutional rights and freedoms of the Petitioners and under **Articles 35, 46, 145 and 232** of the **Constitution**.

4. That despite the Petitioners' efforts to secure the information, they have failed to get the same hence the present Petition.

5. Mr. Omtatah the 1<sup>st</sup> Petitioner, in submissions added that under the provisions of **Article 35** of the **Constitution**, he and his Co-Petitioners are entitled to access the information they had requested for and relied on the decisions of *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 others (2013) eKLR*, *Famy Care Limited v Public Procurement Administrative Review Board and Others (2013) e KLR* and *Kituo cha Sheria and another v Central Bank of Kenya & 8 others (2014) e KLR* in support of that submission.

6. Further, that the 1<sup>st</sup> Respondent would not be prejudiced by the release of the information since it would be given in the context of important judicial proceedings.

7. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent oppose the application and Mr. Njoroge, learned State Attorney, argued that the Petitioners had not requested for the information in issue in good time to enable any or any adequate response and that the letter dated 10<sup>th</sup> April 2015 which supposedly sought the said information is dated the same day as the Petition. It is Mr. Njoroge's further contention that in fact the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents have never received the alleged letter from the 1<sup>st</sup> Petitioner and in his view, it would be fair that the person having the information must be given reasonable opportunity to respond to the request.

8. Mrs. Mwangi, representing the Interested Party, the Independent Policing Oversight Authority (IPOA), also contends that the Petitioners had failed to give the 1<sup>st</sup> Respondent any opportunity to respond to the contents of the letter dated 10<sup>th</sup> April 2015 before filing their Petition. That it is reasonable and acceptable to allow the person whom one requires information, ample time to respond to and avail the same as the required information may not be readily available. Furthermore, that the fact that the Petitioners wrote the letter and filed the Petition simultaneously indicates that they were not open to receiving the requested information. She added that the requested information is obsolete in any event and of no use since the directive in issue was not carried out.

9. The second application by the Attorney General, the 4<sup>th</sup> Respondent, is dated 18<sup>th</sup> September, 2015 and it seeks an order to strike out with costs to the Respondents, the Amended Petition dated 13<sup>th</sup> April 2015. In the alternative, it seeks an order to strike out the names of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from the present proceedings.

10. In that regard, Mr. Njoroge submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should not have been

enjoined in the Petition in their personal capacities and that their joinder is improper because no violation of the Constitution have been made against them as individual persons. It is his position therefore that the Petition is an abuse of the Court process as it does not disclose any cause of action against the said Respondents.

11. It is his further submission that the Petition has been overtaken by events and that the Petitioners have admitted that the Government never acted on the President's directive and instead denied admission of any recruits for training and whose admission had been nullified by this Court. Instead, that the Government had ordered a fresh recruitment and claims therefore that the Petition would not serve any useful purpose if it were to proceed to hearing and determination. He has therefore urged the Court to strike out the Petition for the above reasons.

12. On his part, Mr. Omtatah, in response, has submitted that the arguments made for striking out the Petition are mistaken and that personal liability under the Constitution is a matter of law. In any event, in the Petition he had indicated why he had enjoined each individual and the Respondents cannot therefore use any immunity as a licence for misconduct on their part.

13. From the above rival positions, two issues emerge for resolution; first, whether the Petitioners are entitled to the information sought and secondly, whether the amended Petition should be struck out as prayed.

#### The right to information

14. The right of access to information is provided for in **Article 35** of the **Constitution** which states as follows;

**“(1) Every citizen has the right of access to–**

**a) Information held by the state; and**

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

**(2) Every person has the right to 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.”**

15. The importance of the above right cannot be overemphasized and as the Court stated in **Famy Care Limited v Public Procurement Administrative Review Board & Another (supra)**;

**“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”**

The Court went on to state that;

**“The right of access to information is also recognized in international instruments to which Kenya is party. The Declaration of Principles of Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (32<sup>nd</sup> Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples' Rights which provides, “Every individual shall have the right to receive information.” The Commission noted that the right of access to information held by**

***public bodies and companies will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”***

16. Similarly, in *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & Others (supra)* the court held thus;

***“The right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution.”***

17. Access to information is therefore fundamental to the realization of the rights guaranteed in the Bill of Rights and for example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media as well as freedom to receive or impart information or ideas.

18. It is also worthy of note that the High Court has held in the past that for one to enforce the right of access to information, he must establish that he has sought the information and that access to such information has been denied. This principle was expressed as follows in *Nairobi Law Monthly v Kengen (supra)*;

***“Finally, in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.***

***However, this petition succeeds to the extent that I have found that the 1<sup>st</sup> respondent (Kenya Electricity Generating Company) has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a Constitutional obligation to provide the information sought” (Emphasis added).***

19. The above, in my view, is a correct exposition of the law and in the instant case, and from what is on the record, the Petitioners had requested for specific information vide their letter dated 10<sup>th</sup> April, 2015. This date is important in the determination of the issue now before me and I also note that in their Petition, the Petitioners produced the letter dated 10<sup>th</sup> April 2015 as Exhibit 000-1. I note that on its face, it is stamped by the 2<sup>nd</sup> Respondent as having been received on the same date.

20. If indeed the said letter was received on the same day as the Petition was filed, how can it be said that the Respondents had refused and/or failed to give the information requested of them? It is obvious to me that the Petitioners have jumped the gun whatever their enthusiasm for the information may be. In a nutshell, the right to the information sought cannot have crystallised under **Article 35** of the **Constitution**.

*Whether the Petition should be struck out*

21. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have asked the Court to strike out the Amended Petition on grounds that it does not disclose a cause of action against them individually and also because it has been overtaken by events. The Petitioners on the other hand strenuously urged the Court not to do so because in their view, the Amended Petition raises weighty issues on violation of the Constitution by the Respondents in their individual capacities and that a Petition for enforcement of fundamental rights and freedoms ought not to be summarily dismissed.

22. In that context, in civil law, the all encompassing principle is that striking out of pleadings is a drastic

action that must be employed by a Court of law as a last resort since its effect is to chase away a party from the seat of justice without hearing the merits of his case. This principle was succinctly captured by Madan J. in *D.T. Dobie & Company (Kenya) Limited v Muchina [1982] KLR 1* when he said;

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.***

Similarly, in *Dickson Karaba v John Ngata Kariuki and Another [2010] eKLR*, the Court stated that;

***“...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court... The court cannot also exercise inherent jurisdiction, when the exercise will lead to an injustice..”***

23. I agree with the above expositions of the law and more fundamentally, striking out of a Constitutional Petition should be done in the clearest of cases and where the Petition is itself an abuse of Court process, for example, where a Petitioner raises the same issues against the same parties as have already been determined by a Court of competent jurisdiction – See **Har Swarup v General Manager, C. Rly 1 1981 Cr. L. J. 1216: AIR 1981 S.C 1621.**

24. Can the above principle be applied to the present Petition? As I stated elsewhere above, it is argued that no cause of action has been established against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents individually and secondly, that because on 10<sup>th</sup> April 2015, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents directed the 10,000 recruits not to report for training, the impugned directive was rendered moot and so is the Petition.

25. In that context, I note that, in the Petition, the Petitioners claim that the 4<sup>th</sup> Respondent, in issuing the directive violated **Article 245(4)(c) of the Constitution**. They have therefore sought for an interpretation of the following questions;

(a) Whether it is a gross violation of the Constitution for the President to disobey Court orders and to disregard express provisions of the Constitution.

(b) Whether the 3<sup>rd</sup> Respondent should pay an exemplary fine to the State of an amount set by the Honourable Court.

26. Whatever the merits or otherwise of the impugned directive, the issues sought to be determined are not idle and certainly require interrogation subject to my earlier finding by this Court. I say so because the substantive issue in contest is not the impugned directive per se but whether in fact the disobedience of Court orders can be permitted measured against the obligation to abide by the Constitution. I am therefore not keen at this stage to strike out the Petition for the above reasons.

### **Conclusion**

27. From my findings above, the proper order to make is that both the Application dated 10<sup>th</sup> April 2015 and the one dated 18<sup>th</sup> September 2015 are dismissed. Costs shall abide the Petition.

28. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2017**

**E. CHACHA MWITA**

**JUDGE**