



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 73 OF 2014

**IN THE MATTER OF THE CENTRAL BANK OF KENYA TENDER NO. CBK/46/2011-2012
FOR SUPPLY, INSTALLATION AND COMMISSIONING OF AN INTEGRATED SECURITY
MANAGEMENT SYSTEM [ISMS]**

AND

**IN THE MATTER OF ARTICLES 2, 20, 22, 23, 25, 27, 28, 29, 50, 79, 80, 156, 157, 160, 231, 245
AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF SECTIONS 26, 27, 98 AND 100 OF THE PUBLIC PROCUREMENT AND
DISPOSAL ACT, 2005**

AND

IN THE MATTER OF SECTION 13 OF THE CENTRAL BANK OF KENYA ACT, CAP 491

AND

**IN THE MATTER OF SECTIONS 11 & 12 OF THE ETHICS & ANTI-CORRUPTION
COMMISSION ACT, 2011**

AND

**IN THE MATTER OF SECTIONS 4, 5, 6 AND 23 OF THE OFFICE OF THE PUBLIC
PROSECUTIONS ACT, 2013**

AND

**IN THE MATTER OF SECTIONS 8, 10 AND 24 OF THE NATIONAL POLICE SERVICE ACT,
2011**

BETWEEN

AND

1. THE ETHIC & ANTI-CORRUPTION COMMISSION [EACC]
2. DIRECTOR OF PUBLIC PROSECUTIONS [DPP]
3. THE INSPCTOR GENERAL OF THE NATIONAL POLICE SERVICE [IG NPS]

4. THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
[AG].....RESPONDENTS

RULING

1. On Wednesday, April 23, 2014, an article appeared in the “*Daily Nation Newspaper*” under the title “*Graft team protests over CBK boss case*” (hereinafter referred to as the said article).
2. It is this article which has provoked the application the subject of this ruling.
3. The application itself is by way of a Motion on Notice dated 2nd May 2014 expressed to be brought pursuant to Rule 19 of the ***Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules, 2013*** (popularly known as the ***Mutungu Rules***) and Article 35(1) and (2) of the Constitution. It seeks substantially an order that the Ethics & Anti-Corruption Commission, the 1st Respondent be compelled to produce copies of all correspondence it has exchanged with the Chief Justice in respect of this case. It also seeks the usual order for provision of the costs.
4. The application was based on the grounds outlined on the body of the Motion and was supported by an affidavit sworn by the Petitioner on 2nd May, 2014.
5. According to the Petitioner, the said article alleged inter alia that the 1st Respondent had entered into correspondence with the Chief Justice over this case and according to his legal counsel the said publication in its ordinary meaning and innuendo is understood to mean that on 14th February, 2014, this file was moved from the **Hon. Lady Justice Mumbi Ngugi** to the **Hon. Mr Justice David Majanja** abruptly and at the last minute yet it ought not to have been heard by the latter Judge and that the conservatory orders ought not to have been issued. Further that the 1st Respondent is comfortable with this matter being handled by **Hon. Lady Justice Mumbi Ngugi** and not **Hon. Mr Justice David Majanja**.
6. Based on the same advice, the Petitioner believed that the said publication amounts to contempt of court as the words in their plain and ordinary meaning are likely to interfere with the fair determination of justice in this Petition as it has prejudged the issues herein and has made conclusions on the integrity of the two judges that have handled the matter.
7. To enable the Petitioner institute contempt proceedings against both the 1st Respondent and the said media house, the Petitioner instructed his lawyer to get copies of the material correspondence referred to in the publication to which the 1st Respondent responded.
8. In the petitioner’s view, the said publication is intended to and has undermined his rights before this Court and has given false and misleading information on both the material tender, the pleading filed in court and what transpired on 14th February, 2014 hence it is only a full and complete disclosure of all the correspondence exchanged between the 1st Respondent and the Chief Justice that will enable him enforce his rights.

1st Respondent’s Case

9. In reply to the application the 1st respondent filed a replying affidavit sworn by **Yassin Aila**, its acting Deputy Director Corporate Communications on 15th May, 2014.
10. According to him, the 1st Respondent is established as body corporate under the Ethics and Anti-Corruption Act, No. 22 of 2011 and is the legal successor to the **Kenya Anti-Corruption Commission** (hereinafter referred to as the defunct Commission) which was established under the ***Anti-Corruption and Economic Crimes Act, 2003***.

11. In the discharge of its functions the 1st Respondent routinely handles confidential information and is prohibited by law from disclosing the same to unauthorised persons including the media unless the information is being disseminated to the public in discharge of the functions of the 1st respondent and pursuant to statutory provisions. However the 1st Respondent's officers are bared by section 33 of the *Anti-Corruption and Economic Crimes Act*, 2003 from divulging information relating to ongoing investigations unless lawfully authorised.
12. He however deposed that the 1st Respondent was not the source of the said article and no evidence was adduced to demonstrate that any of the 1st Respondent's officers was the source thereof or was responsible for the same. Since the 1st Respondent is not the publisher of the *Nation*, it cannot be compelled to produce any documents or other material that may have been relied on by the publishers of the *Nation* in the said article and no valid reason was advanced why the said information was not demanded from the Chief Justice and the *Nation*. Based on advice from his legal counsel he believed that the applicant has not demonstrated that the information sought is necessary for the protection of his fundamental rights and that the 1st Respondent cannot be accused of contempt based on a publication by *Nation*, a separate corporate entity yet it is not a party to these proceedings.

2nd Respondents' Case

13. In opposition to the application, the following grounds of opposition were filed on behalf of the 2nd Respondent:
1. **That the constitutional provision, to wit, Article 35 of the Constitution, forming the basis of the said Application is not pleaded in the petition.**
 2. **That the application does not demonstrate violation or breach of constitutional provision and in particular Articles (sic) 35 of Constitution.**
 3. **That determination of the Application will result to making an inquiry affecting the main alleged contemnor, to wit, Nation Media Group Limited, which is not a party to this petition.**
 4. **That correspondences in a court case are public documents which can be accessed by perusals of court file and extracting copies thereof.**
 5. **That the application is an afterthought intended to delay and procrastinate expeditious disposal of the petition and therefore an abuse of the process of the court.**

Petitioner's Submissions

14. It was submitted on behalf of the Petitioner that in seeking the production of the said correspondence the Petitioner wants to ascertain and be satisfied that his rights to a fair and impartial hearing before the Court under Article 50 of the Constitution, his right to be represented by a lawyer of his choice and his right to appear before an independent Judge have not been violated and that the 1st Respondent is not abusing its mandate to extort blackmail and intimidate the judiciary and is not forum shopping for judges to be handling cases involving them. Further that the outcome of this Petition is not already contrived by the 1st Respondent and whether or not the 1st Respondent and the Daily Nation committed contempt of Court.
15. Citing Article 19 *International Covenant on Civil and Political Rights* as held by the 102nd Session of the UN Human Rights Committee, it was submitted that the said Article, which provides that everyone has a right to freedom of expression which include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in print, in the form of art, or through any other media of choice, is obligatory with respect to information held by Governments or public bodies. That right, it was submitted is hinged on the assumption that such information is subject to disclosure and the mere fact that the disclosure may embarrass the public entity is no excuse for refusal; hence the right of information is the general rule.
16. This position, it was further submitted, is captured in Article 35 of our Constitution.
17. In our jurisdiction, it was submitted that the Courts have held that Kenya is bound by international

treaties and conventions and its Constitution in respect of the right to disclose information to a citizen; that the duty to disclose information is obligatory; that Article 24 of the Constitution does not limit the application of Article 34; that to deny disclosure is violation of the citizen's rights. In support of this line of submissions, the Applicant relied on **Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others NBI HC Petition No. 278 of 2011**, **Nelson O Kadison vs. The Advocates Complaints & Another NBI HC Petition No. 549 of 2013**, **Kibet Ronoh Underson vs. The Returning Officer, Emukura Dikirr Constituency & Others Kisii HC Petition No. 1 of 2013**, **People's Union for Civil Liberties & Anor. vs. Union of India Supreme Court of India Writ Petition No. 161 of 2004** and **Steffans Conrad Brummer vs. Minister for Social Development & Others Constitutional Court of South Africa Case No. CCT 25/09**.

18. It was contended that the 1st Respondent in its replying affidavit by **Yassin Aila** completely misunderstood and misapprehended the import and meaning of Article 35 of the Constitution; that the said affidavit does not change the burden of why the 1st Respondent cannot comply with a mandatory provision of the Constitution; that any objections by the other respondents is misplaced and misdirected; that the Petitioner's rights under Article 35 are not subject to the goodwill or charity or benevolence of the Respondents; and that the Petitioner has discharged his burden relating to the reliefs sought.
19. According to **Mr Kipkorir**, learned counsel for the Petitioner, the right of disclosure of information is a right developed in international law and is part of the ***International Covenant on Civil and Political Rights*** which is enshrined in Article 35 of the Constitution and it is as old as the history of creation in the Bible. That right, it was submitted has two distinct parts. First, it is a right to citizens, who is a Kenyan human being. Under Article 35(1)(a) of the Constitution every citizen has a right to information held by the State unconditionally and no reasons are required. Under Article 35(1)(b) the right to information from any other person is subject to exercising one's rights. According to learned counsel, that other body in the Article refers to any other bodies such as NGO's, Trade Unions and Co-operative Societies. However, whereas the word citizen has been defined in judicial authorities, the phrase "other bodies" has not been defined.
20. Since the right is both contained in the Constitution and in international conventions, Article 2 binds us to the Treaties, Traditions and Customs and Kenya being a member of the United Nation is bound by the ***International Covenant on Civil and Political Rights*** (hereinafter referred to as the Covenant) which is therefore part of our law. Under that Convention the State can only refuse to divulge information on legitimate grounds provided for in a statute. Secondly, the refusal must meet the substantial harm test that it will cause harm and thirdly, that the non-disclosure must override public interests.
21. In his submission, although the 1st Respondent relied on section 33 of the ***Anti-Corruption and Economic Crimes Act***, 2003, that section only applies to investigations and correspondences in question are not part of the investigations but relate to ongoing court case. He submitted that in the **Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others** case (supra) the right to information was reaffirmed a right which can neither be derogated from or abridged and the only reason why the application was dismissed was because *Nairobi Law Monthly* was a corporate entity. In the case of **Nelson O Kadison vs. The Advocates Complaints & Another** (supra) the request was vague but the Court held that the Law Society of Kenya was a State organ and directed the Petitioner to make a specific request and directed the Advocates Complaint Commission to respond thereto. In the case of **Kibet Ronoh Underson vs. The Returning Officer, Emukura Dikirr Constituency & Others** (supra), the IEBC was ordered to give information to the Petitioner while similarly in **People's Union for Civil Liberties & Anor. vs. Union of India** (supra) it was held that the right to information belongs a voter and cannot be taken away by statutes. On the case of **Steffans Conrad Brummer vs. Minister for Social Development & Others** (supra), it was submitted that the Court held that the time limitation cannot take away the said right.
22. It was counsel's position that the replying affidavit has not discharged the onus on the 1st respondent who is the author of the questioned correspondences and that Article 35 cannot be subjected to the aforesaid section or the Act. In counsel's view the Respondents have misunderstood the law in respect of the application and that though the burden is not on the applicant, the applicant has shown that the refusal to disclose is not justifiable.

1st Respondent's Submissions

23. On behalf of the 1st Respondent, it was submitted that whereas the right to information from the State by the citizens is an important norm in a democratic society, it does not however mean that the right is exercised whimsically and without good cause being shown by the person demanding the information. It was submitted that Article 35(1)(a) and (b) have to be read together in order to understand the circumstances under which a person is entitled to information held by the State. The right to information should be for purposes of exercising or protecting any right or fundamental freedom.
24. It was therefore submitted that a person seeking for information from the State organ or other person must demonstrate that his/her rights have been or are about to be breached and that the information is necessary for protection of such right which the Petitioner has not demonstrated. To the contrary the Petitioner and his counsel are doubtful whether any of his rights have been breached and not sure whether any contempt of court may have been committed hence the Court cannot come to his aid because he has not discharged the onus of proof. It was submitted based on **Charles Omanga & 8 Others vs. Attorney General and Another [2004] eKLR** that sub-article 1(b) being a limitation on a person's right is not applicable to enforcement or exercise of any other rights under the law generally. It was submitted that contempt of court is not one of the fundamental rights in the bill of rights since in such a case it is the court which is primarily offended.
25. It was further submitted that the Petitioner has failed to demonstrate that the 1st Respondent is the source of the information that was published in the *Nation Newspapers* since the cover story alludes to correspondences between the office of the Chief Justice and the Respondents hence there are three parties involved, the *Daily Nation*, The 1st Respondent and the Chief Justice yet no attempt has been made to seek the same from either the Chief Justice or *the Nation*. It was therefore submitted that the Petitioner did not exhaust his efforts to get the alleged correspondences before coming to court. In support of his submission, the 1st Respondent relied on **Charles Omanga & 8 Others vs. Attorney General and Another** (supra) and **Andrew Omutata Okoiti vs. Attorney General & 2 Others** and submitted that this application is brought in bad faith to delay the expeditious hearing of the petition and to vex and paint the 1st Respondent in bad light in these proceedings thereby prejudice its rights to a fair hearing.
26. According to the 1st Respondent, its officers are barred by section 33 of the ***Anti-Corruption and Economic Crimes Act, 2003*** from divulging information about ongoing investigation.
27. It was further submitted that since the Petition herein does not include an order for documents, the correspondences being sought have no bearing on the orders being sought in the petition since a party cannot seek orders in an interlocutory application that have no basis in the substantive suit. In respect to this submission the 1st Respondent relied on **East African Portland Company Limited vs. Capital Markets Authority & 4 Others [2014] eKLR** and submitted that there is no indication that what the applicant is seeking is required as evidential material in support of the prayers in the Petition.
28. According to the 1st Respondent since the orders being sought by the Applicant are founded on a publication made by the *Daily Nation*, this makes the publishers of the said ***Daily Nation*** necessary parties since adverse submissions are likely to be made against them without them protecting their rights to a hearing.
29. In his submission on behalf of the 1st Respondent, **Mr Murei**, learned counsel, submitted that it had not been established that he 1st Respondent provided some correspondence to *Nation* hence the application ought not to be granted.
30. He further contended that the application is not a proper interlocutory application but a Petition. However the Court was now moving from the Petition to the right to information hence the application ought to have been made in separate proceedings in which the *Daily Nation* is a party as the integrity of the *Daily Nation* has been brought into question.
31. It was further contended that the application to bring contempt of court proceedings does not fall under Article 35 of the Constitution since that Article is meant to enable a party protect its fundamental rights. However the right to punish for contempt belongs to the Court in the public interest. According to him the Petitioner has not established the basis for invoking Article 35.

32. On the issue whether the proceedings have been compromised the Court was urged to look at the record. To learned counsel this application is a mere sideshow as the issue raised have now been dealt with as the matter is neither being heard by **Hon. Lady Justice Mumbi Ngugi** nor **Hon. Mr Justice David Majanja**.
33. The 1st Respondent wondered why the application has not been made against the Daily Nation or the **Hon. The Chief Justice** hence in its view the application is only meant to paint the 1st Respondent in bad light.

2nd Respondent's Submissions

34. On behalf of the 2nd Respondent, **Mr Ashimosi**, learned counsel submitted that Article 35 of the Constitution is not pleaded in the petition and is therefore foreign to the application. His contention was that the application not being an interlocutory application, the application cannot be grounded on the said Article.
35. He further submitted that the Petitioner has not demonstrated breach of Article 35 of the Constitution. He also submitted that inquiring and making a determination in this application comment has to be made about the *Nation Media* which is not a party to these proceedings. In his view the correspondences sought being public documents ought to be found in the court file and yet it has not been demonstrated that the Court file has been perused and they are not available. To him the application is an afterthought meant to derail the hearing of the petition and is hence an abuse of the court process and should be dismissed.

Determinations

36. Article 35 of the Constitution of Kenya 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 publicise any important information affecting the nation.

37. This provision is a reflection of Article 19 (2) and (3) of the *International Covenant on Civil and Political Rights* which provides:

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - a. *for respect of the rights or reputations of others;*
 - b. *for the protection of national security or of public order, or of public health or morals.*

38. Similar provisions appear in Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the African Charter on Human and People's Rights (The Banjul Charter).

39. Article 2(5) and (6) of the Constitution provide:

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

40. Whereas legal scholars are in agreement on the applicability of the rules on international law as automatically forming part of the law of Kenya, there is no such uniformity of agreement when it comes to treaties and conventions. While some scholars argue that once the treaties and conventions are ratified they automatically form part of the law of Kenya, others argue that the use of the phrase “*under this Constitution*” as read with the provisions of Article 94(5) of the Constitution which provides that “*no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation*” means that even where ratified, the said treaties and conventions must still be domesticated in order for them to acquire the force of law in this country. In other words, according to this school of thought, with respect to treaties and conventions we are still a dualist state.
41. Since the promulgation of the Constitution, Parliament has passed ***Treaty Making and Ratification Act*** No. 45 of 2012 which seems to empower Parliament to approve a Treaty ratified by the Cabinet. However it is important to point out that the said Act only applies to treaties concluded after the commencement of the said Act.
42. In this case however, there is no serious issue as Article 19 of the Covenant is covered under our Constitution. Accordingly, the controversy surrounding Article 2(5) and (6) will have to await determination on another day.
43. 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. Where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. I also endorse the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions.
44. The rationale for right to access information was explained by **Majanja, J** in **Nelson O Kadison vs. The Advocates Complaints & Another** (supra) as follows:

“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.”

45. I also wish to defer to the decision of **Ngcobo, J** in **Steffans Conrad Brummer vs. Minister for Social Development & Others** (supra) where the learned Judge expressed himself as follows:

“...section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public

administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”...Apart from this, access to information is fundamental to the realisation 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. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.”

46. In Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others Nairobi HCCC (Civil Division) No. 513 of 2011 this Court pronounced itself as follows:

“Freedom of expression is one of the fundamental freedoms pertaining to the citizens as a human being. Freedom of the press is a special freedom within the scope of freedom of expression. The freedom of press is considered as the right to investigate and publish freely. It covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it. Freedom of expression and freedom to impart and disseminate opinions and ideas is a right recognised internationally and is protected not only by all democratic states but by International instruments as well. What constitutes freedom of expression, it is generally accepted, entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without interference by public authority and regardless of frontiers. This recognition underpins the important role played by the media in the development of a society. It is difficult to imagine a right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over-emphasised. Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. When men govern themselves it is they and no one else who must pass judgement upon unwisdom and unfairness and danger, and that means that unwise ideas must have a hearing as well as wise ones, fair as well as unfair, dangerous as well as safe. These conflicting views must be expressed, not because they are valid, because they are relevant. To be afraid of ideas, any idea, is to be unfit for self-government. Freedom of expression is recognised and protected by many international conventions and declarations as well as national Constitutions. The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable. Democracy is a fundamental constitutional value and principle in this Country. Kenya like many other countries in the world have chosen the path of democratic governance and hence the importance of the freedom of expression as being the cornerstone of every society that is democratically governed. Having chosen the path of democratic governance we have a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such people do

not prejudice the rights and freedoms of others or public interest. As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others there would be no harm done. Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with *Rousseau's* version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'être* of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. The Preamble to the Constitution, as already stated declares that the people of Kenya aspire for a government based on democracy and in fact the entire Constitution reflects a commitment by the people of Kenya to establish a free and democratic society. The breadth and importance of the right of free speech is inherent in the concept of a democratic and plurist society. Our 2010 Constitution has ushered into this country a new constitutional order whose one of the objectives is to build democracy. No society can build democracy and strong institutions to defend that democracy if there is no free flow of information even if some of that information is false. Democracy by its very nature comes at a price." See also *Obbo and Another vs. Attorney General [2004] 1 EA 265 (Scu)*.

47. However, the key words in Article 35(1)(a) is "***held by the State***". The "State" is defined in Article 260 of the Constitution as "*the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution*". That the 1st Respondent is a state organ is not in dispute. Accordingly, it is under the obligation to furnish a citizen with information held by it under the said provision. However, before the Court can order that the information be furnished, it is my view that the applicant ought to adduce evidence showing that the information sought by the applicant is in possession of the Respondent. In ***Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others*** case (supra), **Mumbi, J** held that "*in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right.*" Although **Mumbi, J's** comments were directed at Article 35(1)(b), it is my view that the first part of the learner's Judge's pronouncement that the applicant must prove that the information is held by the person from whom it is claimed applies both to the State and to another person.
48. Once the information is proved to be in possession of the Respondent, it is my view that the burden shifts to the Respondent to show why the said information ought not to be disclosed to the applicant. In other words a basis ought to be laid for the State to be directed to furnish the required information and that basis in my view is provided by the Constitution itself that the State is holding the information. As stated in General Comments on the Covenant, it is for the State party to demonstrate the legal basis for any restrictions imposed on the freedom of expression and if with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.
49. I associate myself with the holding of **Mumbi, J** in ***Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others*** case (supra) that "*the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.*"
50. In this case I am not satisfied that the 1st Respondent has shown any legitimate justification for

denying the Applicant the right of access to information. I agree with the Applicant that section 33 of the *Anti-Corruption and Economic Crimes Act* only applies to investigations and it has not been shown that the correspondences sought were made in the course of investigations. That defence does not therefore avail the 1st Respondent.

51. Having found that the 1st Respondent is a State organ the issue of the necessity to prove that the information is required for the exercise or protection of any fundamental right or freedom which is requirement under Article 35(1)(b) is inapplicable.
52. In this case the applicant relies on the article published by the Daily Nation on 23rd April, 2014. Apart from that there is no evidence that the information sought emanated from the 1st Respondent. In my view, it would have been useful for the Applicant if the publishers of the Nation Newspapers had been joined into these proceedings even if limited only for the purposes of the application. On my part I do not see any bar to a person being joined to legal proceedings even if the joinder is only limited for the purposes of determining an interlocutory matter since that interlocutory matter is the matter in controversy in the interlocutory application and if the presence of a person is necessary for the determination of that particular issue, that person ought to be joined.
53. The difficulty in resolving a matter where the source of information is a newspaper without the Newspaper being joined to the proceedings was appreciated by this Court in **Phinehas Nyagah vs. Gitobu Imanyara [2013] EKLK** in which this Court pronounced itself as follows:

“The defamatory material must be shown to have been published by the defendant. In this case, no attempt at all has been made to prove that the material was in actual fact published by the defendant herein. In fact one of the issues as drafted by the plaintiff was whether the defendant called a press conference on 25th September 2009 and made the false and malicious defamatory words against the plaintiff. This issue was a reflection of paragraph 3 of the statement of defence wherein it was pleaded that “the defendant denies the contents of paragraph 3 of the plaint and specifically denies that he called a press conference and uttered any defamatory words with intent to injure the plaintiff’s reputation”. By this express denial the plaintiff was put on notice that he had to prove that the publication was done by the defendant and this was recognised in the draft issues filed on his behalf. As was held by Ringera, J (as he then was) in *Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001*:

“In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.

In this case, the plaintiff admitted that he was not present at the time of the release of the said press statement. The plaintiff chose not to call anyone from “the Star” publication to shed light on where the offending story emanated. In the absence of evidence attributing the statement to the defendant the mere fact that the same was published by the Star newspaper does not meet the threshold of proof on a balance of probabilities that the publication was in actual fact done at the behest of the defendant. In my view the defendant had no obligation to adduce evidence if the evidence adduced did not point to him as the person who authored the offending material. In my view the plaintiff ought to have called the reporter to shed light on the source of the publication since the plaintiff could not positively aver that the alleged press conference in actual fact took place.”

54. It is therefore my view that the Applicant has failed to prove a crucial condition for the grant of the orders that he is seeking and that is that the information sought is held by the 1st Respondent.
55. Apart from that it is now trite that before an applicant seeks orders from the Court compelling the Respondent to give him access to certain information, he must show that the said information was requested for. As was held in **Charles Omanga & 8 Others vs. Attorney General and Another** (supra):

“This case concerns Article 35(1). The petitioner argues that this provision is self-propelling and that a person is entitled to apply to the court directly for such information to be given. In my view, this is the wrong approach. 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.” In *Andrew Omtatah Okoiti v Attorney General and 2 Others* (Supra), Musinga J., stated that, “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.” There may well be circumstances where the Court may be required to make an order in the first instance but I think the Court should not exercise coercive power before the State organ, institution or body is given an opportunity to meet its constitutional obligation to provide the information. The right to information is not an absolute right. Each institution or person is entitled to assert any limitations consistent with Article 24 of the Constitution.”

56. In the instant case, whereas a request was made to the 1st Respondent there is no evidence that a similar request was made to the Hon. The Chief Justice who was alleged in the said article to be the co-correspondent. The information sought if the article was correct could either be obtained from the 1st Respondent or the Chief Justice. Without seeking the same from the Chief Justice and as the applicant did not contend that there was any compelling reason for not seeking the same, I must hold that the instant application was prematurely made.

57. For the foregoing reasons I find no merit in the Motion on Notice dated 2nd May 2014 which I hereby dismiss with costs to the Respondents.

Dated at Nairobi this 10th day of June 2014

G V ODUNGA

JUDGE

In the presence of:

Mr Donald Kipkorir and Mr Cecil Miller for the Petitioner

Mr Murei for the 1st Respondent

Mr Ashimosi for the 2nd Respondent

Mr Kamunya for the 3rd and 4th Respondents

Cc Kevin