



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 510 OF 2013**

**BETWEEN**

**ROSE OF SHARON ACADEMY LIMITED.....1ST PETITIONER**

**LINKSOFT TELECOM NETWORK LTD.....2ND PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2ND RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners, Rose of Sharon Academy Ltd and Linksoft Telecom Network Ltd have filed this Petition alleging a violation of the right of access to information as provided for under **Article 35** of the **Constitution**. In their Petition dated 28th October 2013, they therefore seek the following orders;

- “(a) A declaration that the 1st and 2nd Respondents' refusal to supply the Petitioners with information relating to whether there is in existence a Gazette Notice by which the parcel of land known as L.R. No.3591/25 (Original No.3591/3/7) was declared agricultural land amounts to a violation of the Petitioners' rights under Article 35 of the Constitution.**
- (b) An order compelling the 1st and 2nd Respondents to supply the Petitioners with information on whether there is indeed a Gazette Notice declaring that the property known as L.R. No.3591/25 (original No.3591/3/7) is agricultural land within such time as this Honourable Court will assign or fix.**
- (c) If the answer to (b) above is in the affirmative, this Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents to supply the Petitioners with details of the Gazette Notice and a copy thereof within such time as this Honourable Court may assign or fix.**
- (d) Damages for breach of the Petitioners' Constitutional rights.**

(e) Such other orders as this Honourable Court shall deem just.

(f) Costs of the suit.”

### **Factual background**

2. The facts giving rise to this Petition are set out in the Affidavit of Antony Githinji Wahome sworn on 28th October 2013 in support of the Petition and are summarised herebelow.

3. Apparently on 1st December 2003, the 1st Petitioner entered into a contract for sale of land with Dellian Langata Ltd (hereinafter “the Vendor”) under which the Vendor agreed to sell all that parcel of land known as L.R No. 3591/25 (Original number 3591/3/7) situated in the Karen area of Nairobi (hereinafter “the Property”) for a consideration of Kshs.27 Million. That it was a term of the said contract that the Vendor would procure and obtain all the consents and approvals required to secure registration of the property in favor of the 1st Petitioner and in turn the 1st Petitioner would pay the amounts stated in the agreement in the manner and times set out therein. Upon entering into the contract aforesaid, the 1st Petitioner requested the vendor to transfer the property to its nominee, Linksoft Telecom Network Ltd, the 2nd Petitioner.

4. The Petitioners now claim that they performed their obligations under the agreement and forwarded the balance of the purchase price to the Vendor's advocates but the Vendor declined to execute the transfer in favour of the 2nd Petitioner and instead claimed that the transaction was void for all purposes allegedly because the consent of the Land Control Board was not sought and obtained within the period set out under **Section 8** of the **Land Control Act**. The Petitioners reiterate that in the agreement, the obligation of obtaining all consents, including that of the Land Board, was the obligation of the Vendor. And in any case, by the time the vendor forwarded the 1st Petitioner's application for the consent, the time contemplated under the Land Control Act had lapsed.

5. Being aggrieved by the position taken by the Vendor, the Petitioners then instituted proceedings in **ELC No. 679 of 2006**, in which they sought an order of specific performance and prayed for an order that the Court should extend the time within which the application for the Land Board Consent ought to be lodged and deem the consent given on 26th October 2004 as having been validly obtained.

6. The Vendor also initiated separate proceedings in **ELC No. 917 of 2007**, in which it sought an order to compel the Petitioners to return the completion documents forwarded to their advocates pursuant to their professional undertaking. The two suits were subsequently consolidated and are pending determination.

### **The Petitioners' case.**

7. The Petitioners case is straight forward and is as follows;

8. That there is a dispute pending before the Environment and Land Division of the High Court to wit, **ELC No. 679 of 2006** consolidated with **ELC No. 917 of 2007** where the Petitioners are asserting their right to ownership of the suit property. That an issue has arisen in that suit as to whether the suit property was agricultural land in respect of which Land Control Board consent ought to have been sought. That when parties sought to inquire the correct position from the Commissioner of Lands, he issued three contradictory letters. In two of the letters, the position was that the suit property was not within a controlled area whereas in one of them, it was asserted that the property was agricultural land.

9. The Petitioners claim that vide a letter dated 27th September 2013 and 10th October 2013, they requested the Respondents to confirm whether the suit property was declared to be under or subject to the provisions of the **Land Act** and to furnish the Petitioner with a copy of the Gazette Notice containing the said declaration. The Respondent failed to provide the Petitioners with the said information which it required for purposes of protecting its fundamental rights in the civil suit being **ELC No. 679 of 2006** consolidated with **ELC No. 917 of 2007**. The Petitioners thus claim that the failure by the Respondents to supply them with the information requested amounts to a breach of their rights to information under

**Article 35(1) of the Constitution.** They rely on the case of **Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 Others (2013) e KLR** where Mumbi J. held that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. They also rely on the South African Constitutional Court case of **Cape Metropolitan Council v Metro Inspection Services Western Cape and Others (10/99) (2001) ZASCA 56** where it was held that an applicant must state what right it is that he wishes to exercise or protect, what information is required and how that information would assist him in exercising or protecting that right.

10. The Petitioners also urge the Court to award them damages in the event it is found that their right to information had been violated. They also sought costs of the Petition.

### **The Respondents' Case**

11. The Respondents neither filed a response to the Petition nor made written Submissions in respect thereof. In the circumstances I can do no better than reiterate my earlier sentiments in **Kariuki Gathitu v Attorney General Petition No. 1188 of 2003**, where I stated as follows;

**“It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of facts. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts, then the court can only but take it that those facts are actually uncontested, ... and I therefore accept all the facts as set out above to be true.”**

12. The same principle is applicable to the present case and having said so, I must now determine whether the facts as they are disclose any violation of the Petitioners' rights under **Article 35 of the Constitution.**

### **Determination**

13. **Article 35 of the Constitution** provides 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 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.* ”**

14. The normative content of these rights was aptly stated in my view, by Mumbi Ngugi J. in **The Nairobi Law Monthly Case (supra)** where she stated thus;

**“The recognised international standards or principles on freedom of information, which should be included in legislation 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.”**

15. I wholly agree and as can be seen from a plain reading of **Article 35(1)(a)**, a person seeking information from the State or a State agency must demonstrate that, the information is actually held by

the State or agency. The 1st Respondent, The National Land Commission is a Constitutional Commission established under **Article 67** of the **Constitution** and is charged, both under the Constitution and the **National Land Commission Act**, with the responsibility of, among others maintaining an effective land information management system at national and County level. The 2nd Respondent, The Chief Land Registrar is a public officer appointed under **Section 12** of the **Land Registration Act** and is charged with various responsibilities including making information in the land registry accessible to any person. In this regard I am satisfied that the information sought by the Petitioners is information held by the State and that which the Respondents, as State agencies may, in appropriate cases, be able to provide.

16. Having found that the Respondents are generally bound under the provisions of **Article 35(1)(a)** to provide information to citizens, it may not be necessary to consider the implications of the right to information under the provisions of **Article 35(1)(b)**. However, the Petitioner has hinged its claim on this provision and also seeks damages for violation of its rights under that Article. In this regard, Mumbi Ngugi J. stated as follows in *The Nairobi Law Monthly Case; (supra)*

**“The Petitioner needs to show that it requires the information from the Respondents 'for the exercise or protection of another right', in this case its rights to freedom of expression and of the media. Our Courts have not yet had occasion to interpret the phrase 'for the exercise or protection of another right'. However, the Constitutional Court of South Africa, in interpreting a similar provision of the Constitution of South Africa, has ruled that the information sought in an application for disclosure of information must be such as is required for the protection or exercise of another fundamental right. This was the principle that it applied in the case of Shabalala and 5 Others vs Attorney General of the Transvaal and the Commissioner of South African Police CCT/23/94 [1995]. The Applicants, who had been charged with murder, sought information in the possession of the Police on the basis that it was required for the exercise of their right to a fair trial. The Court made an order that denial of information contained in a police docket 'is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial ...'.”**

Similarly in *Cape Metropolitan Council v Metro Inspection Services Western Cape and Others (supra)* it was held that;

**“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information ...an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”**

This proposition was also adopted in *Unitas Hospital v Van Wyk and Another (231/05) (2006) ZASCA 34* where the Court stated that;

**“The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough”**

17. I agree and adopt the above expressions of the law as advanced by the learned judges. In applying the same to the instant case, the Petitioners contend that they have sought for the information in regard to whether the suit property is within a controlled area thus subject to the **Land Control Act**, since that information will be used for the purposes of securing their rights in *ELC No. 679 of 2006 consolidated with ELC No. 917 of 2007*. The information had been sought from the Commissioner of Lands and in his letter dated 8th June 2006, the Commissioner stated that the suit property was not within a controlled area and thus not administered under the Land Control Act. In the same letter he advised the Petitioners to apply for a map of the relevant area from the Director of Surveys which would be useful in determining

that fact. The same information was also contained in the letter dated 26th May 2008. However in another letter dated 24th January 2008, the suit property was alleged not to be within the jurisdiction of the Land Control Board and therefore no consent for any dealings with it was required.

18. Owing to the conflicting information above,, the Petitioners sought clarification from the Respondents as to whether the property falls within the provisions of the **Land Control Act** and if so they requested the latter to forward a copy of the Gazette Notice contemplated under **Section 2** of that **Act** by which the Minister may have declared the property to be a controlled area. The Respondents failed to respond hence the instant Petition. In the circumstances, are the Petitioners entitled to access to that information?

19. I have considered the matter and I do not think that this Court can compel the Respondents to provide the information the Petitioners seek. I say so because as can be seen elsewhere above, and information sought must be held by the State or a State organ and while it is clear to my mind that the Respondents are state organs, I am in doubt as to whether they have and can provide that information.

20. From the evidence on record, the Commissioner of Lands in the letter dated 8th June 2006, advised the Petitioners to apply for a map from the Director of Surveys which would be useful in determining the fact as to whether the suit property falls within the controlled area. The Petitioners did not yield to that advise or at least no evidence was tabled in Court to demonstrate that they applied for the map. In the letter dated 24th January 2008 the Commissioner of Lands referred to Boundary Plan No. 499/A/71 and on the basis of that Plan stated that the suit property was not within the controlled area. Boundary Plans are not prepared by the Commissioner of Lands but by the Survey Department.

21. The Survey Department in the larger Ministry of Lands implements the Government's policy of sustainable exploitation of land and its natural resources. It is composed of five divisions namely; Geodetic and Geographical Information System (GIS), Mapping, Administration, Cadastral, Land Adjudication and Hydrographic.

The functions of the department include; establishing and maintaining a national geodetic control network that covers the whole country to facilitate other surveys and research; to produce and maintain plans of property boundaries in support of land registration and to ensure security of land tenure; to produce and continuously update national topographical basic maps for the whole country at various scales for development planning and for production of other maps. Other functions are; to inspect and maintain national and international boundaries to prepare and publish the National Atlas of Kenya as a documentation of National Heritage and promotion of Nation's identity. It is also tasked with carrying out hydrographic surveys for safe navigation, exploration and exploitation of natural resources of rivers, lakes, seas and oceans, calibrating and maintaining survey equipment in order to ensure correct measurements, providing quality control and assurance of geographical data produced by other organizations and establishing and maintaining National Spatial Data Infrastructure (N.S.D.I). These functions are carried out within the provisions of the **Survey Act, Cap 299** Laws of Kenya.

22. The Petitioners for unclear reasons failed to obtain the relevant map and Boundary Plan No. 499/A/71 from the relevant body and which Plan would have been instrumental in determining the issue now before the Court. The Petitioners have also failed to request for all other relevant information from the Survey Department which I believe holds useful information in regard to this aspect of the Petition. That being the case, I am constrained to find that the Petitioners have jumped the gun in instituting this Petition and further, regarding the Respondents, when they received the demand for information, they gave it albeit with contradictions. They however referred the Petitioners to the relevant body for further information and I have said that it is unclear to me why the Petitioner did nothing in that regard until the filing of this Petition. How can it then be said that the Respondents denied the Petitioners access to the relevant information? - See **Nairobi Law Monthly (supra)** in that regard.

23. In addition, I also recall that the Petitioners are seeking for the Gazette Notices which may contain information with regard to gazettelement of the suit property as agricultural land as provided for under **Section 2** of the **Land Control Board Act. Section 2** thereof states as follows;

“1. ...

2. In this Act, unless the context otherwise requires - 'agricultural land' means-

(a) land that is not within-

(i) a municipality or a township; or

(ii) an area which was, on or at any time after 1st July, 1952 a township under the townships ordinance (now repealed); or

(iii) an area which was, on or at any time after the 1st July, 1952, a trading centre under the Trading Centres Ordinance (now repealed); or

(iv) a market

(b) land in the Nairobi area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose.”

24. While I agree with the Petitioners that in respect of land located within the Nairobi area generally, only by a notice in the Kenya Gazette can it be declared as agricultural land, I do not think that such a notice is information held by the State exclusively so that it must be compelled to provide it under **Article 35(1)(a)** of the **Constitution**. I say so because, the Kenya Gazette although the official publication of the Government is published for information to the general public. It normally contains notices of new legislation, notices required to be published by law or policy as well as other announcements that are published for general public information. **Article 260** of the **Constitution** provides; in that regard that 'Gazette means the Kenya gazette published by the authority of the National Government, or a supplement to the Kenya Gazette'. The probative and legal effect of the Gazette have been recognized by **Section 60** of the **Evidence Act (Cap 80)** which mandates Judicial Officers to take judicial notice of publications contained in the Gazette. The Gazette is thus the medium of communication between the Government and its citizens. A notice or information contained in the Gazette is therefore not held by the State but is published for general public consumption.

25. Even if I am wrong in my finding that the Kenya Gazette is a public document and that the Commissioner of Lands holds certain information which is then published in the Gazette, I have held elsewhere above that the Respondents are not the lawful custodians of the information sought.

26. Having disposed of the main issues in the Petition, I note that the Petition is uncontested. I also note that the information sought can easily be obtained without recourse to the present proceedings. In fact, I do not understand why the Petitioners did not simply summon the relevant officer to testify in the pending civil suits. I also do not understand why the Petitioners who are represented by Counsel have not since 2008 pursued the option of obtaining Boundary Plan No.499/A/71. If they had pursued any of the above options, the present proceedings would have been avoided.

27. In the circumstances, it is obvious that I do not see any merits in the Petition and the same is hereby dismissed. There shall be no orders as to costs.

28. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Miss Odari for Petitioner

No appearance for Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**