



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 549 OF 2013**

**BETWEEN**

**NELSON O. KADISON ..... PETITIONER**

**AND**

**THE ADVOCATES COMPLAINTS**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before me is a petition arising from the refusal by the Advocates Complaints Commission (“the Commission”) to give the petitioner certain information pertaining to Mr Mathew Oseko, Advocate. By a letter dated 14<sup>th</sup> October 2013, the petitioner wrote to the Commission requesting information concerning complaints made against the Advocate on the ground that such information was necessary to challenge the appointment of Mr Oseko to public office in Homa Bay County on account of integrity.
2. The Commission through its secretary, by a letter dated 23<sup>rd</sup> October 2013, responded in part as follows, “*I wish to inform you that the matter has been duly considered in light of the lawyer-client relationship. I have noted that you are not the complainant in the alleged complaints against the advocate. In the circumstances, I regret to inform you that it would be contrary to [the] the principle of lawyer-client confidentiality to proceed as requested.*”

**Petitioner’s Case**

3. The petitioner, by the petition dated 15<sup>th</sup> November 2013, has now moved the court for a declaration that his right of access to information under **Article 35(1)(a)** and **(b)** of the Constitution has been violated. He also seeks an order of mandamus to compel the respondents to issue, avail and supply to him certified copies of the complaints, past and pending, lodged against Mr Oseko on account of the fact that such refusal contravenes **Article 35(1) (a)** and **(b)**.

## Respondents Case

4. The respondents oppose the petition on the grounds set out in the replying affidavit of James Odhia Marenga, the Commission Secretary, sworn on 2<sup>nd</sup> December 2013 where he reiterates the reasons for declining to honour the petitioner's request.
5. The respondents argue that the right of access to information is not absolute as it is circumscribed by the right to privacy of communication of third parties protected by **Article 31(1)(d)** of the Constitution and the need to protect the reputation of others recognised in **Article 33(3)** of the Constitution. Furthermore, they urge that such a limitation is within the scope of **Article 24** of the Constitution as it is reasonable to protect the advocate/client relationship.

## Analysis and Determination

6. **Article 35(1)** of the Constitution provides as follows;

*35. (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.*

Under **Article 260**, State is defined as follows; ““State” when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.”

7. I find that the Advocates Complaints Commission, being a statutory body established under the **Advocates Act (Chapter 16 of the Laws of Kenya)** falls within the meaning of “State” and is therefore obliged to provide information held by it under **Article 35(1)(a)** unless there are supervening reasons consistent with **Article 24** of the Constitution. I would hasten to add that the only qualification for a person to exercise the right under that provision is for the person to be a “citizen” as was held in the case of **Famy Care Limited v Public Procurement Administrative Review Board and Another Nairobi Petition No. 43 of 2012 [2012] eKLR**. Hence the reason proffered by the Commission that the petitioner was not a complaint cannot be the basis for refusal to provide information under **Article 35(1)(a)**. Furthermore, since the information is held by the State, there is no need to demonstrate the purpose for which the information is sought as required by **Article 35(1)(b)** as the Commission is not “another person” but an agency of the State.
8. The issue for determination then is whether the reason given by the Commission for refusal to furnish the information sought by the petitioner is consistent with the provisions of **Article 24** of the Constitution. **Article 24(1)** deals with limitation under the Bill of Rights and it provides as follows;

*24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

*(a) the nature of the right or fundamental freedom;*

*(b) the importance of the purpose of the limitation;*

*(c) the nature and extent of the limitation;*

*(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any*

*individual does not prejudice the rights and fundamental freedoms of others; and*

*(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

9. The reason asserted by the Commission for refusing to provide the information is based in the advocate/client privilege. The advocate/ client privilege is one of the incidents of the retainer between the advocate and client and binds the advocate not to disclose information reposed in him or her during the period of the retainer. This nature of this privilege is set out in **section 134(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which provides as follows: ***“No advocate shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment...”*** (See also *King Woolen Mills & Another v Kaplan & Stratton Advocates* (1993) KLR 273).
10. Given the nature of the advocate/client relationship I have briefly outlined, the reason asserted by the Commission cannot be the basis for refusal to grant the request for information. The filing of a complaint to the public body by the client constitutes a waiver by that client of the privilege. The advocate/client privilege is for the benefit of the client and cannot be asserted by a third party, in this case the Commission nor can such privilege be used to shield the Commission from its legal obligation flowing from **Article 35(1)(a)**.
11. The importance of the right to access to information cannot be overemphasized and as the court observed in the case of *Famy Care Limited v Public Procurement Administrative Review Board & another (Supra)*, “[16] *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.*”
12. Public complaint bodies exist to protect members of the public and are intended to enhance good governance. It is in the public interest that complaint procedures and processes remain open and transparent in so far as is possible consistent with the national values and principles enshrined in **Article 10** of the Constitution. Access to information relating to public complaints against people seeking state of public office is especially significant because **Chapter 6** of the Constitution, which deals with leadership and integrity, is one of the pillars of the Constitution and the right of access to information is pivotal to its effectiveness.
13. On the other hand, it must be borne in mind that complaint bodies receive many frivolous and malicious complaints which are intended to hurt the subject of the complaint and third parties. There is therefore a need to protect the dignity, reputation and integrity of third parties as the due process takes its course. Thus, there is a need for some level of confidentiality of information before adjudication and determination of the complaint.
14. I therefore find that a blanket refusal to provide information of any kind in relation to the subject matter totally negates the right to access to information and is therefore disproportionate to meeting the need to protect the rights of third parties. In my view, the Commission ought to consider whether it is possible that some of the information relating to the complaints could have been provided, for example, the number of complaints, whether they have been determined and the result thereof. The Commission could also consider whether to give the applicant redacted information in order to protect the third parties. Such an approach would be consistent with giving effect to the right while taking into account the rights of third parties as required by **Article 24** of

the Constitution.

**Disposition**

15. All in all, I find that the petitioner's right to access to information under **Article 35(1)(a)** has been violated and that the reason proffered by the Commission does not fall within the provisions of **Article 24** as it is neither reasonable nor justifiable in an open and democratic society.

16. I decline to order to the Commission to avail and supply to the petitioner all the documents requested as I have not had the opportunity to assess them to determine whether they should all be released unconditionally bearing in mind the need to protect third parties. Furthermore, the Commission is entitled to exercise its judgment and discretion in light of the constitutional provisions I have cited and to determine the extent to which it shall release the documents sought while giving reasons for such refusal.

**17. I therefore direct the Advocates Complaints Commission to re-consider its decision contained in its letter dated 23<sup>rd</sup> October 2013 and deal with the petitioner's request for information in accordance with the principles I have set out above within seven (7) days from the date hereof.**

18. In the circumstances, each party shall bear its own costs.

**DELIVERED and DATED at NAIROBI this 2<sup>nd</sup> day of December 2013**

**D.S. MAJANJA**

**JUDGE**

Mr Odhiambo instructed by Tom Mboya and Company Advocates for the petitioner.

Mr Awino, Litigation Counsel, instructed by the State Law Officer for the respondents.