

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E361 OF 2024**  
**BETWEEN**

**DR.GATHUKIA  
KINYUA.....PETITIONER**

**VERSUS**

**KENYA HOSPITAL ASSOCIATION T/A NAIROBI  
HOSPITAL.....RESPONDENT/CROSS-  
PETITIONER**

**AND**

**REGISTRAR OF COMPANIES.....1<sup>ST</sup>  
INTERESTED PARTY**

**DATA PROTECTION COMMISSIONER.....2<sup>ND</sup>  
INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS .....3<sup>RD</sup>  
INTERESTED PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS....4<sup>TH</sup>  
INTERESTED PARTY**

**ATTORNEY GENERAL.....5<sup>TH</sup>  
INTERESTED PARTY**

**J U D G M E N T**

**Introduction**

1. The Petition dated 25<sup>th</sup> July 2021 is supported by the Petitioner’s affidavit in support of the even date and a further affidavit dated 12<sup>th</sup> September 2024.
2. The Petition assails the Respondent’s failure to provide requested information relating to the Admitting Staff

Association which the Petitioner avers violates his right under Article 35 of the Constitution.

3. For this reason, the Petitioner seeks the following reliefs:

- i. A declaration that the Petitioner's fundamental rights and freedom as enshrined under Articles 35 (1) (b) of the Constitution of Kenya 2010, have been contravened and Infringed upon by both the Respondent by their refusal to give the Petitioner the Information it requested vide the letter dated 28<sup>th</sup> June 2024.***
- ii. A compulsory order compelling the Respondent to release all the documents requested by the Petitioner in the letter dated 28<sup>th</sup> June 2024, to wit: List of Present and past officials of the Kenya Hospital Association; List of Present: Copies of Rules and Regulations of the Admitting Staff Association; List of present and past members of the Admitting Staff Association; list of present and past officials of the Admitting Staff Association; and copies any other documents ancillary to the a foregoing.***
- iii. Costs of this suit.***
- iv. Interests on (iii), above at Court rates until payment in full.***
- v. Any other relief this Court deems fit and just to grant.***

#### **Petitioner's Case**

4. The Petitioner states that the Respondent who trades as, the Nairobi Hospital has an association called **Admitting Staff Association established under Article 38 of the**

**Respondent's Articles Association.** He states that he is registered and a fully paid-up member of the Respondent and the Admitting Staff Association.

5. The Petitioner asserts that in the past, the Respondent has been involved in leadership wrangles as is apparent with several suits that it faces namely: **HCCOMM/E293/2024 Dr. Luka Musyimi Musau and Dr. Patrick Olang' Ragot and 2 Others vs The Nairobi Hospital and Kenya Hospital Association and 3 others** and **HCCOM/E300 of 2024 Dr. Edwin Kipng'eno Rono And Dr. Agnes Wanjiku Gachoki vs James Nyamongo and Medical Advisory Committee and 3 others.**
6. He is concerned that these wrangles will affect the affairs of the Nairobi Hospital which will eventually affect the quality of services.
7. The Petitioner depones that in a letter dated 28<sup>th</sup> June 2024 and a further follow up on 3<sup>rd</sup> July 2024, he wrote to the Respondent seeking information regarding its membership and that of the Admitting Staff Association. He claims however that these letters were never responded to by the Respondent, before this Petition was filed.
8. He emphasizes that the information sought does not relate to personal information but information that is entitled to be issued to any member of the Respondent.

9. Furthermore, he states that this is a representative suit as was filed on behalf of the Respondent's and Admitting Staff Association members.
10. The Petitioner asserts that despite his written requests as required by law, the Respondent has refused and denied to supply him with the requested information contrary to the dictates Article 35 of the Constitution and Section 4 of the Access to Information Act.

### **Respondent's Case**

11. The Respondent opposing the averments in the Petition filed its Answer to the Petition dated 22<sup>nd</sup> August 2024.
12. The Respondent avers that the Petitioner on 28<sup>th</sup> June 2024 wrote a demand letter through his advocates, Ngeresa, Masemgeli and Lungwe Advocates LLP seeking the requested documents.
13. The Respondent asserts that contrary to the Petitioner's allegations, it replied to the Petitioner's letter on 18<sup>th</sup> July 2024 in which it informed the Petitioner that it could not disclose the information sought as it is legally restricted to do so since the information contains personal details of past and current members. Instead, the Respondent states it advised the Petitioner on how to obtain the other relevant information.

14. It is alleged that the Petitioner wrote a further demand letter dated 23<sup>rd</sup> July 2024 through his new Counsel, Ahmednasir Abdullahi Advocates LLP requesting to inspect the register of members and obtain copies in line with Section 96 of the Companies Act. It is claimed that the Petitioner gave an ultimatum of 24 hours, failure to which he would lodge a complaint with the 4<sup>th</sup> Interested Party.
15. In a response of equal date, the Respondent informed the Petitioner that the requested information failed to meet the requirements of the cited Section 96 of the Companies Act as well as the Data Protection Act.
16. In light of this, the Respondent denies having violated the Petitioner's right to access Information.
17. The Respondent further states that the right to access information is limited as is subject to Article 31 of the Constitution, the Data Protection Act and Section 96 of the Companies Act. As such, the Respondent argues that Article 35 of the Constitution in the circumstances of this case is in conflict with Article 31 of the Constitution with reference to the privacy of its members.
18. To this end, the Respondent avers that the Petitioner has not demonstrated he deserves the orders sought.

### **Others Parties Case**

19. The other parties' response and submissions to the main Petition are not in the Court file or Court Online Platform (CTS).

### **The Cross - Petition**

20. The Respondent further filed a Cross - Petition dated 22<sup>nd</sup> August 2024, which is supported by the Respondent's affidavit in support sworn by its Company Secretary, Gilbert Nyamweya. The Respondent seeks the following relief:

- i. A Declaration be issued that the provisions of Section 96, 97 and 98 of the Companies Act are in conflict with Article 31 of the Constitution and are therefore invalid, null and void to the extent of the inconsistency.***
- ii. In alternative to prayer a above, A declaration be issued that the requests of the Respondent in the Cross - Petition, through his various lawyers, dated the 28<sup>th</sup> June 2024 and the 23<sup>rd</sup> July 2024, to inspect the register of the Cross- Petitioner's members and require copies are invalid and were not sought for a proper purpose within Section 96 of the Companies Act.***
- iii. A declaration be issued that the quest and means of the Respondent in the Cross - Petition, along with those of other third parties, including SC Ahmednasir's unnamed clients, to obtain, distribute, and use the Cross - Petitioner's members' information other than in accordance with the Data Protection Act is illegal.***

- iv. An order of permanent injunction be issued restraining the Respondent in the Cross Petition, whether by himself, his agents, and or all other persons, from collating, processing, and storing the Cross-Petitioner's members' personal data without the informed written consent of said members.**
- v. An order of permanent injunction be issued restraining the Respondent in the Cross - Petition, whether by himself, his agents, and or all other persons, from impersonating or otherwise falsely pretending to be officers of the Cross Petitioner, and from calling, texting, emailing, or otherwise contacting members of the Cross - Petitioner using personal data that has been illegally obtained from the Cross - Petitioner or otherwise.**
- vi. A mandatory injunction be issued directing the Interested Parties to take the necessary measures and steps, including undertaking and/or concluding commenced investigations in a timely manner, to ensure that the Cross-Petitioner's members' personal data, within the meaning of Section 2 of the Data Protection Act, is protected and that individuals who have caused any breach are prosecuted accordingly.**
- vii. Any other relief that this Court may deem fit and just to grant in the interest of justice.**
- viii. Costs of this Petition.**

21. He avers that the Respondent's register of members is maintained in line with the provisions of the Companies Act and its Articles of Association. This register is said to contain information relating to the members and their families which

is defined as personal data under Section 2 of the Data Protection Act.

22. He depones that Petitioner in the letter dated 28<sup>th</sup> June 2024 requested for the following information:

- a) *List of present and past officials of the Kenya Hospital Association;*
- b) *List of present and past members of the Kenya Hospital Association;*
- c) *Copies of Rules and Regulations of the Admitting Staff Association;*
- d) *List of present and past members of the Admitting Staff Association;*
- e) *List of present and past officials of the Admitting Staff Association; and*
- f) *Copies any other documents ancillary to the above.*

23. Reiterating, the contents of the Respondent's its Answer to the Petition, he stresses that the information sought failed to meet the requirements of Section 96 of the Companies Act and the Data Protection Act.

24. He depones that certain individuals and members, have made a concerted effort to illegally procure the Respondent's members personal data and that of the Admitting Staff Association. In view of this, the Respondent reported these attempts to the 2<sup>nd</sup> Interested Party and issued a warning notice to the members against such attempts.

25. He avers that following this warning notice, the Respondent received a demand letter from Senior Counsel, Ahmednasir Abdullahi on behalf of some unnamed members who had commenced requisition proceedings. In addition, it is alleged that the Senior Counsel threatened the Respondent's officers with actions such as a criminal prosecution should it fail to issue access to the sought information.
26. He further depones that despite the Respondent's efforts to protect this information, some of the Respondent's former staff members who had obtained this information illegally, continue to abuse this data and collate further personal data of members while pretending to be the Respondent's officers. He informs that this triggered a further warning notice dated 3<sup>rd</sup> July 2024.
27. He asserts that the Respondent stands the risk of losing its members trust in relation to the custody and maintenance of their personal data including its reputation if this Court does not intervene. He stresses that the Petitioner is guilty of violating Article 31 of the Constitution by illegally procuring personal data relating to the Respondent's members and the Admitting Staff Association. Further that they violated Articles 2, 3 and 10 by impersonating the Respondent's officers using false identities and continuing to abuse the same without the said members written consent.
28. He as well states that Section 96, 97 and 98 of the Companies Act is in conflict with Article 31 of the

Constitution and Sections 25, 26, 30 and 32 of the Data Protection Act. While this right can be limited, he argues that such a limitation can only be done in accordance with the law and to the extent that it is reasonable and justifiable in an open and democratic society. Equally, that the limitation should ensure the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others. In light of this, he asserts that the limitation placed on the right to privacy by Sections 96, 97 and 98 of the Companies Act does not meet the test of proportionality set under Article 24 of the Constitution.

### **Petitioner's Case**

29. The Petitioner in opposition to the Respondent's Cross-Petition filed his Relying Affidavit sworn on 12<sup>th</sup> September 2024.
30. To commence with, he asserts that he does not know the contents of the Respondent's members register as alleged. He informs that the Respondent's response to its correspondence was received via email on 26<sup>th</sup> July 2024, after the Petition had been filed. He states that his correspondence dated 23<sup>rd</sup> July 2024 requesting the information was written on his behalf and other members hence this Petition is a representative suit.
31. He recaps that the information he seeks is limited to information that he would ordinarily be entitled to as the Respondent's member and it is not personal data as alleged.

32. He additionally avers that he is a stranger to the allegation that the Respondent's members' information was illegally obtained on the contrary he avers that he is procuring the sought information legally.
33. He adds that he has no control over Senior Counsel, Ahmednasir Abdullahi and thus his inclusion in the matter is irrelevant. He additionally faults the Respondent for alluding to the protection of private information yet proceeds to annex copies of private emails which are private and confidential. In his view, none of the Respondent's rights have been violated as alleged and thus the orders sought should not be granted.

### **3<sup>rd</sup> Interested Party's Case**

34. The 3<sup>rd</sup> Interested Party in response to the Cross - Petition filed Grounds of Opposition dated 4<sup>th</sup> November 2024:
- i. The Petition lacks clarity and precision in setting out the declarations in relation to the 3<sup>rd</sup> Interested party.*
  - ii. The orders sought are therefore untenable as against the 3<sup>rd</sup> Interested Party as the Petitioners have not shown how the 3<sup>rd</sup> Interested Party has a duty in the matters raised.*
  - iii. The 3<sup>rd</sup> Interested Party is a substantive participant and cannot therefore move the Court unless enjoined as a Respondent.*
  - iv. The 3<sup>rd</sup> Interested Party is not aware of the matters alleged in the Petition as they do not fall within his constitutional mandate hence the Petitioners ought to direct their inquiry to the proper officers.*

- v. *There is no inquiry file pending before the 3<sup>rd</sup> Interested Party in respect of the Petitioners or the issues raised in the Petition as the 3<sup>rd</sup> Interested Party is not seized of the matter at all.*
- vi. *The 3<sup>rd</sup> Interested Party has not received any formal complaint from the Petitioner to enable him direct the 4<sup>th</sup> Interested Party under Article 157(4) of the Constitution.*
- vii. *The Petitioners Petition is bad in law and devoid of any merits. The same form a classical description of an abuse of the due process of this Court and should be dismissed with costs.*

### **Other Parties Case**

- 35. The other parties' response to the Cross - Petition are not in the file or Court Online Platform (CTS).

### **Petitioners' Submissions**

- 36. The Petitioner in view of both Petitions, filed submissions dated 25<sup>th</sup> February 2025 through NML Advocates LLP. Counsel underscored the key issues as: *whether Sections 96, 97 and 98 of the Companies Act are in conflict with Article 31 of the Constitution, whether the request by the Petitioner in the letter dated 28<sup>th</sup> June 2024 is merited, whether a permanent injunction should issue against the Respondent Petitioner as sought in the Cross-Petition and whether a mandatory injunction should issue against the Interested Parties as sought in the Petition.*
- 37. On the first issue, Counsel submitted that the impugned Sections allow a public company to keep its register of

members and its index of members open for inspection by either a member of the company without charge; or any other person on payment of the fee. Section 98 further makes it an offence punishable by a fine or conviction if a company refuses to allow such inspection.

38. According to Counsel, the Respondent is not a public company but one limited by guarantee as such Section 96 of the Companies Act is not applicable in the circumstances of this case. Counsel noted that the Respondent was also being contradictory, as sought to rely on these Sections whilst arguing that they are inconsistent with the Constitution. It is argued that this argument was solely raised to defeat the Petitioner's quest to receive the sought information.
39. Nonetheless, Counsel argued that the impugned sections are not in contravention of Article 31 of the Constitution as alleged. This is because this Article protects information relating to their family or private affairs. Counsel submitted that the information in these registers is the names and addresses of members, date on which the person was registered a member and the date on which the person ceased to be a member.
40. On the second issue, Counsel submitted that the request for information is merited as it was made pursuant to Article 35 of the Constitution by the Petitioner as a member of the Respondent and the Admitting Staff Association. Counsel noted that the Petitioner only seeks information on the

names of members of the Respondent and the Admitting Staff Association.

41. Counsel even reasoned that the Respondent can provide the information as requested and redact information that is private in nature. It was noted in addition that the Data Protection Act, is clear that data information should be processed in accordance with the right to privacy of the data subject. Despite this, Counsel contended that the Respondent was quick to dismiss the Petitioner's request to access the information in essence violating the Petitioner's right under Article 35 of the Constitution.
42. To buttress this point reliance was placed in **Katiba Institute v Presidents Delivery Unit & 3 others [2017] KEHC 2183 (KLR)** where the Court noted as follows:

*"It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information."*
43. Counsel in the next issue submitted that the Order for a permanent injunction sought by the Respondent in the Cross - Petition should not be granted. Counsel submitted that in both the response and Cross-Petition, the Petitioner was not mentioned as one of the parties in the purported illegal and un-procedural acquisition of the information. It was observed that there was no evidence connecting the Petitioner to the persons who allegedly had access to the Respondent's information. Considering this, Counsel submitted that the

Respondent had not established any prima facie case against the Petitioner to warrant issuance of this Order.

44. Reliance was placed in the Court of Appeal decision in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)** where it was held that:

*“There is no scope to confuse between an interlocutory and permanent orders of injunction and since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since Giella case (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:*

*In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

- i. establish his case only at a prima facie level,*
- ii. demonstrate irreparable injury if a temporary injunction is not granted, and*
- iii. ally any doubts as to (b) by showing that the balance of convenience is in his favour.”*

45. On the final issue, Counsel submitted that the Respondent had not met the threshold for grant of a mandatory injunction as there are no special or exceptional circumstances and none had been proven in this case. Moreover, it was submitted that the Respondent had not proved that the Interested Parties had failed in carrying out their mandate.

46. Reliance was placed in **Malier Unissa Karim v Edward Oluoch Odumbe [2015] eKLR** where it was held that:

*“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd v Washington Okeyo [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-*

*“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application.”*

### **Respondent’s Submissions**

47. In relation to the Petition and Cross-Petition, the Respondent filed submissions dated 28<sup>th</sup> February 2025 through Mongeri Kinyanjui and Company Advocates. Counsel set out the issues as: *whether the provisions of Section 96, 97 and 98 of the Companies are in conflict with Article 31 of the Constitution; whether the Petitioner is entitled to the information sought and whether the Petitioner’s request to inspect the register of the Respondent’s members and require copies meets the proper purpose test within Section 96 of the Companies Act.*

48. Counsel on an introductory note, stated that prying into personal data without sufficient justification offends the right to privacy. It was argued that in this matter, the impugned Sections do exactly that as require companies to divulge its members' information to the public. Counsel stressed that these provisions do not also restrict what purposes are acceptable neither define what may be termed as invasive requests. Counsel reasoned thus that a law that unnecessarily, unreasonably, and unjustifiably compels disclosure of personal information, violates Article 31 of the Constitution and thus cannot stand.
49. Counsel submitted that this is in error and likened this case to **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR** where it was held that section 194 of the Penal Code was is unconstitutional and invalid for offending Article 33 of the Constitution based on, among other things, the principle of proportionality set by Article 24 of the Constitution.
50. Equal dependence was placed in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and **Nubian Rights Forum & Ors v. AG (2020) eKLR**.
51. Moving on, Counsel submitted that the Petitioner was not entitled to the sought information. Counsel stressed that the right to access to information can be limited in line with Article 24 of the Constitution and any other law. In this case, Counsel submitted that the Data Protection Act under Section 6 affirms that the right of access to information

under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to, among other things, involve the unwarranted invasion of the privacy of an individual.

52. Counsel submitted that in this matter, the information sought contains the name, address, telephone number, e-mail address, member number, dates of registration and of resignation members. In this regard, Counsel stated that this information cannot be divulged without these parties' consent.
53. Counsel further argued that the Respondent being a registered Data Processor and Data Controller must comply with Section 25 of the Data Protection Act. Likewise, Counsel stated that whilst Section 96 of the Companies Act imposes an obligation to allow register inspection, that obligation is not absolute.
54. On the final issue, Counsel submitted that guided by Section 96 (3) of the Companies Act, the Respondent had the discretion once the information was requested, to accept or decline to issue the information based on the guidelines set out under this provision. According to Counsel, the disclosure framework under Section 96 of the Companies Act does not give an unfettered right to member information, especially where privacy or misuse is a concern. As such, Counsel argued that Section 96 must be read in light of these limits.

55. Counsel in fact submitted that the Court in **Burry & Knight Ltd v. Knight [2014] EWCA Civ 604** affirmed that companies might refuse to disclose member registers if the request is not for a proper purpose. Like dependence was placed in **Burberry Group PLC v Fox-Davies [2015] EWHC 222 (Ch)**.

### **2<sup>nd</sup> Interested Party's Submissions**

56. The 2<sup>nd</sup> Interested Party filed submissions dated 28<sup>th</sup> April 2025 through Ngeri, Omiti and Bush Advocates LLP who sought to discuss these issues: *whether the Petitioner has breached the right to privacy of the members of the Cross-Petitioner, whether the High Court has the power to grant the prayers sought in the Cross-Petition, particularly Prayer (j) directed at the Interested Parties including the ODPC and whether the provisions of Sections 96, 97 and 98 of the Companies Act are in conflict with Article 31 of the Constitution.*
57. On the first issue, Counsel submitted that for the Respondent's claim to succeed, it must demonstrate that, the data in question falls under personal data, that processing of the personal data was not in compliance with the Data Protection Act, that there was unauthorized access and use of the personal data and that there was actual or potential harm to the data subject resulting from the data breach.

58. In this matter, Counsel first affirmed that the list of past and present officials and members qualifies as personal data. Relying on the Respondent's averments that this data was illegally obtained, Counsel stressed that this was contrary to the dictates of the Act with potential harm being multifaceted.
59. To support this case, Counsel relied in **Financial Mail (Pty) Ltd vs. Sage Holdings 61993 2 SA 451 (A) 462F** where it was observed that:
- “Breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another; or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged in the light of contemporary *bani mores* and the general sense of justice of the community as perceived by the court.”*
60. Comparable dependence was placed in **JMK & Another v Standard Group Limited & Another [2015] eKLR, Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR, Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others [2018] eKLR** and **Coalition for Restoration of Democracy (CORD) & 2 Others v Republic & 10 Others [2015] eKLR**.
61. On the next issue, Counsel submitted that this relief is not tenable. Counsel informed that the Respondent lodged a complaint with the 2<sup>nd</sup> Interested Party on 2<sup>nd</sup> August 2024 and soon after filed the instant Cross-Petition seeking a similar relief.

62. Counsel emphasized that the Data Protection Act and the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 provide an elaborate procedure for handling complaints lodged as the 2<sup>nd</sup> Interested Party's mandate gives effect to Article 31(c) and (d) of the Constitution. Counsel noted that the Respondent instead of regularizing the complaint, proceeded to file this Petition snubbing the procedure set out in the Act and its appellate mechanism. Counsel added that the sought relief falls within the jurisdiction of the 2<sup>nd</sup> Interested Party but the Respondent failed to exhaust the same.

63. Dependence was placed in **Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others(2015) eKLR** where it was held that:

*“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”*

64. Equal dependence was placed in **Okiya Omtatah Okiiti & Another vs Kenya Power and Lightning Company Limited (KPLC) & 4 others [2020] eKLR, Kenya**

**National Examination Council v Republic; Teachers Service Commission (Interested Party) (Civil Appeal E867 of 2022) [2024] KECA 1180 (KLR) and Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR.**

65. On the third issue, Counsel opposing the Respondent's argument submitted that the Data Protection Act provides for the lawful processing of personal data. Counsel observed that the impugned Sections require public disclosure of certain company information and details which may include details that can violate Article 31 of the Constitution. It was noted however that this right is not absolute and can be limited in line with the law. In sum, Counsel submitted that, the requirement in the impugned Section for individuals requesting company information to specify their intent underscores the need to balance these rights.
66. To buttress this point reliance was placed in **R vs Oakes [1986] 1 SCR 103 [69]- [70]**, where it was held that:

*“a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and*

*democratic society before it can be characterized as sufficiently important.*

- b. Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'*

### **3<sup>rd</sup> Interested Party's Submissions**

67. Principal Prosecution Counsel, Edna Ntobo filed submissions dated 28<sup>th</sup> February 2025 and outlined the issues for determination as: *whether the 3<sup>rd</sup> Interested Party has a duty in the matters raised and whether the Petitioners have met the required threshold for grant of the orders sought.*
68. Counsel submitted that the 3<sup>rd</sup> Interested Party's mandate flows from Article 157 of the Constitution. Counsel contended that the cross-Petition does not identify any reasonable cause of action against the 3<sup>rd</sup> Interested Party and neither demonstrates any breach on its part against the Respondent.
69. Reliance was placed in **William and Others v Spautz [1993] 2 LRC 659 at 667** held that:

*“It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercise, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for stay, unless once again the interests of justice demand it.”*

70. Additional reliance was placed in **Leonard Otieno v Airtel Kenya Limited [2018] eKLR.**
71. Counsel also submitted that the Respondent has not set out with precision the manner in which the 3<sup>rd</sup> Interested Party had infringed its fundamental rights and freedoms as espoused in **Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154** and **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR.**
72. In light of this, Counsel submitted that the Respondent had not met the required threshold for grant of the sought orders. Furthermore, Counsel relying in **Apollo Mboya v Attorney General & 3 others; Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR** submitted that that the Respondent referred to various human rights reports, newspaper articles and statistics in his Petition however the same were held to be inadmissible in absence of the makers in Court or being enjoined as parties.

## **Analysis and Determination**

73. It is my considered view that the issues that arise for determination are:

*i. The Petition*

- a) Whether the Petition offends the doctrine of exhaustion of remedies*
- b) Whether the Petitioner is entitled to the relief sought.*

*ii. The Cross - Petition*

- a) Whether Sections 96, 97 and 98 of the Companies Act is in contravention of Article 31 of the Constitution.*
- b) Whether the Cross-Petition offends the doctrine of constitutional avoidance*
- c) Whether the Petitioner violated the provisions of the Data Protection Act in the circumstances of this case.*
- d) Whether the Respondent is entitled to the relief sought in the Cross-Petition.*

74. The heart of the Petition rotates around alleged violation of the of access information held by the Respondent in breach of Article 35 (1) (b) of the Constitution. Having carefully read the Petition, it was apparent to me that there is a fundamental issue of concern which I had to address myself to, that is whether the Court has jurisdiction to entertain the

Petition in the light of the doctrine of exhaustion of remedies. It is trite law that jurisdiction can neither be conferred by the consent of the parties or even by the Court through interpretation.

75. The exhaustion doctrine as I properly understand it; is an acknowledgement by the court that where there exists other institutions or mechanisms that have been put place by the law to facilitate dispute resolution, that dispute settlement machinery must be exhausted before a party can approach the court for a judicial relief. **Black’s Law Dictionary 10<sup>th</sup> Edition** explains what “**exhaustion of remedies**” means as follows:

*“The doctrine that if an administrative remedy is provided by statute, a claimant must seek relief from the administrative body before judicial relief is available. The doctrine purpose is to maintain continuity between courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary - also termed **exhaustion of remedies doctrine, exhaustion of administrative remedies; exhaustion doctrine**”*

76. The doctrine allows the parties to exhaust the available administrative remedies before approaching the court for the remedy if it can be shown that alternative forums have been created by law to deal with such situations.
77. This principle is constitutionally underpinned in Article 159 (1) of the Constitution which recognizes and encourages the

use of alternative dispute resolution mechanisms in settlement of disputes.

78. The Supreme Court in **Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR)** judicially reaffirmed this principle by stating thus:

***“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”***

***[118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.***

***[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with***

***the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”***

79. The definitive question that needs to be answered therefore is whether the instant petition violates the doctrine of exhaustion of remedies.
80. In this regard, I will consider the Constitution and the Access to Information Act No. 31 of 2016 as it is directly relevant to this matter.
81. Article 35 of Constitution provides:

**Access to information**

***(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.**

82. To facilitate the enjoyment of the right of access to Information, Parliament enacted the Access to Information Act No. 31 of 2016. The preamble to the Act states that it is **“An Act of Parliament to give effect to Article 35 of the Constitution; to confer to the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes”**

The objectives of the Act are enumerated in Section 3 as follows:

- a) *Give effect to the right of Access to Information by Citizen under Article 35 of the Constitution.*
- b) *Provide framework for public and entities and provide bodies to proactively disclose information that they hold and to provide information on request in the wit the constitutional principles*
- c) *Provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law*
- d) *Promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information*
- e) *Provide for the protection of persons who disclose information of public interest in good faith; and*

f) *Provide framework to facilitate public education on the right to access information under the Act.*

83. Section 9(1) of the Act provides when an application for information is made, a decision regarding that request has to be made to the requester of the information as soon as possible but later than **21 days.**

**S. 9 (1) Subject to Section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty- one days of receipt of the application.**

84. The response will determine if the applicant can invoke the provisions of section 14 thereof. This is because depending on the response, it will inform if the applicant will in writing to apply to the Commission on Administrative Justice to have decision made by the custodian of the information in regard to the request for access to information reviewed.

85. Under **Section 23 (2)** the Commission on Administrative Justice may, if satisfied that there had been an infringement of the provisions of the Act, make the following orders-

- a) *The release of any information withheld unlawfully*
- b) *Recommendation for payment of compensation*
- c) *Any lawful remedy or redress*

***Under section 23 (3), A person who is not satisfied with an order made by the Commission under sub-section 2 may appeal***

**to the High Court within twenty-one days from the date the order was made.**

**86. Section 14:**

- (1) *Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information;*
  - (a) *a decision refusing to grant access to the information applied for;*
  - (b) *a decision granting access to information in edited form;*
  - (c) *a decision purporting to grant access, but not actually granting the access in accordance with an application;*
  - (d) *a decision to defer providing the access to information;*
  - (e) *a decision relating to imposition of a fee or the amount of the fee;*
  - (f) *a decision relating to the remission of a prescribed application fee;*
  - (g) *a decision to grant access to information only to a specified person; or*
  - (h) *a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under Section 13.*
- (2) *An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.*

- (3) *The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.*
- (4) *The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under Section 22 of this Act or as prescribed by the Commission.*

87. In the present case, according to the affidavit in support of the Petition sworn by Dr. Gathukia Kinyua on 25<sup>th</sup> July, 2024; the sequence of events leading to the filing of this Petition as captured in the said affidavit from paragraph 8 is that his advocates wrote to the Respondents vide letter dated 28<sup>th</sup> June, 2024 seeking information regarding the membership of the Respondent and the Admitting Staff Association and also followed up with the email on 3<sup>rd</sup> July, 2024 (GK 4 and GK 5) respectively, which letters were not responded to.
88. Under Section 9 (6) of the Access to Information Act, where the applicant does not receive a response to an application within the period stated in sub-section (1), the application shall be deemed to have been rejected. The failure to receive a response thus implies that the Petitioner's application was rejected by the Respondent as neither the letter nor the email was responded to.
89. This state of affairs ought to have ignited the process Section 14(1) of the Act Access to Information Act. The Petitioner should have applied to the Commission on Administrative

Justice seeking to review the decision in relation to the request of access to information. The application was supposed to have been made within thirty (30) days or such period as the commission may allow from the date the decision was notified to the applicant as per Section 9(2). As already noted, the Commission on Administrative Justice has the power under section 23 (2) to order the release of information withheld unlawfully.

90. The Petitioner did not abide by this procedure required in enforcing the right of access to information before filing this Petition. The Petitioner is duty bound to apply this procedure under the Access to Information Act, and should only come to the High Court by way of seeking to adopt the decision of Commission on Administrative Justice or through an appeal against the decision of the Commission on the Administrative Justice.
91. The Petitioner did not avail to himself this statutory process to redress the grievances raised in this petition relating to access to Information that he was allegedly denied by the 1<sup>st</sup> Respondent. He instead moved to file this petition directly to this court.
92. Section 23 (3) of the Access to Information Act which makes it clear that the High Court intervention comes after the Commission on Administrative Justice has had the opportunity of addressing the complaint. This aligns with the principle laid down by Article 159(2) (c) of the Constitution

that behoves this court to promote alternative methods of dispute resolution.

93. I am persuaded that the Petitioner outrightly disregarded the express statutory processes for resolution of his grievances by hastily filing this Petition. There are no justifiable exceptions for assumption of jurisdiction by this Court in place of the administrative relief that was available to petitioner before the Commission on Administrative Justice.
94. The Petition is hereby dismissed. Each Party shall bear its own costs.

#### **Cross- Petition\_**

#### ***Whether Sections 96, 97 and 98 of the Companies Act is in contravention of Article 31 of the Constitution***

95. The Cross- Petitioner contended that Section 96, 97 and 98 of the Companies Act, 2015 does not meet the proportionality test set by Article 24 of the Constitution hence is an unjustifiable intrusion of Article 31 of the Constitution on the right to privacy and is therefore unconstitutional.
96. This assertion was hotly contested by the Respondents in the Cross- Petition and the Interested Parties. The 2<sup>nd</sup> Interested party in particular argued that Sections 96, 97 and 98 of the Companies Act, 2015 are meant to guarantee transparency and accountability within the corporate governance thereby serving the public interest. It was submitted that in fact,

Section 96 requires individuals requesting the Company for the information to specify the purpose and Section 97 requires that a Company may seek approval from the Court to refuse access thus ensuring there is judicial intervention where protection is genuinely deserved.

97. It is necessary that I set out verbatim the questioned sections of the Companies Act, 2015 for purposes of detailed analysis:

**96. Rights of persons to inspect register of members and require copies**

- (1) *A public company shall keep its register of members and its index of members (if any) open for inspection by—*
  - (a) *a member of the company without charge; and*
  - (b) *any other person on payment of the fee (if any) prescribed by the regulations for the purposes of this section.*
- (2) *On being requested to do so by a person and on receipt of the prescribed fee (if any), a public company shall issue to the person a copy of the company's register of members or such part of it as the person specifies.*
- (3) *If required to do so by the company, a person seeking to inspect the company's register of members, or a copy of the register or of any part of it, shall provide the company with the following information—*
  - (a) *in the case of a natural person, the person's name and address;*

- (b) *in the case of an organisation the name and address of the person responsible for making the application on behalf of the organisation;*
- (c) *the purpose for which the information is to be used; and*
- (e) *whether the information will be disclosed to any other person, and if so—*
  - (i) *if the person is a natural person, the person's name and address;*
  - (ii) *if the person is an organisation, the name and address of the person responsible for receiving the information on its behalf; and*
  - (iii) *the purpose for which the information is to be used by that person.*

**97. Consequences of company refusing inspection of its register or to provide copy of its register of members**

- (1) *Within five working days after receiving a request under [section 96](#), a company shall either—*
  - (a) *comply with the request or decline it by giving sufficient reasons in writing; or*(b)*apply to the Court.*
- (2) *If the company applies to the Court, it shall notify the person who made request and that person is entitled to be heard.*

**98. Offence to refuse inspection of register of members or to fail to provide copy (1)If a company—**

(a) refuses to allow an inspection required under Section 96; or

(b) fails to provide a copy required under that section, otherwise than in accordance with an order of the Court, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding seven hundred and fifty thousand shillings.

(2) If, after a company or any of its officers is convicted of an offence under subsection (1), the company continues to refuse to allow an inspection or to fail provide the required copy, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding seventy-five thousand shillings for each such offence.

98. In determining this issue, it is necessary that I apply myself to the relevant principles of Constitutional Interpretation. Considering what is impugned is the Constitutionality of the provisions set out in the foregoing vis-à-vis Article 31 of the Constitution, the Court has to examine both the purpose and effect of the impugned provision in relation to the Constitution provision. This principle was discussed in the case of **R vs Big M Drug Mart Ltd 1985 CR 295** as cited with approval in **Geoffrey Andare v Attorney General & 2 others [2016] KEHC 7592 (KLR)** as follows:

***“Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to***

**achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."**

99. Similarly, the Constitutional Court of Uganda in **Olum and another vs Attorney General [2002] 2 EA** noted as follows:

**"To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional..."**

100. Reading these provisions of the Companies Act, the question that comes to mind is what is the rationale behind these provisions? Looking at these provisions in totality, they basically facilitate the right of access to the register of members of the Companies by prescribing the manner of how that information can be applied for by an interested person and consequences for non-compliance.

101. The essence of ensuring such information is provided from a business view-point would be in my humble and simplistic view to promote openness so that any interested person has

the knowledge of who is behind the Company they are dealing with which inspires confidence and also thwarts possible mischief that could be hidden behind a faceless entity under the Company veil.

102. Even though Article 31 (c) of the Constitution protects the right to privacy by prohibiting unnecessary disclosure of the information relating to one's family or private affairs, it is not an absolute right. It can be legally limited if their valid reasons for such limitation. Looking at the provisions of the Company Act, the essence underlying them is to ensure there is openness by registered companies that are open to do business with the public and if the company believes the information is being sought for improper purpose, it can always seek judicial intervention and decline the request.
103. These provisions are thus well counter-balanced to provide access while at the same time giving the Company the leeway to resist improper disclosures such as those sought for improper motives.
104. I thus find that these limitations meet the test of proportionality envisaged by Article 24 of the Constitution. They are reasonable and justifiable in an open democratic society and are thus constitutional. The contention that the aforesaid provisions are inconsistent with the Constitution is therefore misconceived. It is rejected.

***Whether the Cross-Petition offends the doctrine of constitutional avoidance***

105. The doctrine of Constitutional avoidance is invoked to bar the Court from deciding a case on constitutional grounds if the matter can be adequately resolved by application of a Statute or other established legal principles. The Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] KESC 53 (KLR) explained the principle as follows:

***“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:***

***“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”***

***[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”***

106. Equally, in **Lugo v Director of Public Prosecutions** [2022] **KEHC 10574 (KLR)** the Court observed as follows:

***“Courts will not normally consider a constitutional question unless the existence of a***

**remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. Currie and de Waal opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author states: - When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”**

**11. An important and critical issue arises from the above statements by Currie and de Waal. It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of the Constitution until found to be inconsistent with it.**

**....**

**The exceptions to the application of the doctrine of constitutional avoidance are: -**

- i. where the constitutional violation is so clear and of direct relevance to the matter,**

- ii. in the absence of an apparent alternative form of ordinary relief and**
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”**

107. Similarly, in **C O D & another vs Nairobi City Water & Sewerage Co. Ltd (2015) eKLR** the Court held as follows:

- “14. The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3) (b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.**
- 15. The Constitution cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of the Constitution: See *Harrikissoon v A-G* [1979] 3 WLR 62. Where it is possible to decide any case or dispute , civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see *S***

***v Mhlungu[1995] 3 SA 867 (CC) and also  
Ashwander v Tennessee 297 US 288.”***

108. It is manifest that the Cross-Petitioners complaint could very well have been dealt with under the Provisions of Section 96, 97 and 98 of the Companies Act, 2015. It should have resisted the disclosure through seeking court intervention.

109. Further, if the information was already obtained unlawfully, the affected data subjects had a recourse to the Data Protection Act, 2019 which provides a mechanism for the breach of personal data.

110. It is thus evident that this Petition is misconceived and offends the doctrine of Constitutional avoidance hence cannot stand. I need not consider any other issue as this is a jurisdictional principle. I thus dismiss the Petition in its entirety. Each Party shall bear its own costs.

***Dated, signed and delivered virtually at Nairobi this 16<sup>th</sup>  
day of October, 2025.***

.....  
**L N MUGAMBI  
JUDGE**