



**Koech v Chelilim, Governor County Government of Uasin Gishu & 5 others;
Office of the Auditor-General & another (Interested Parties) (Petition
28 of 2025) [2025] KEHC 15552 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 28 OF 2025
RN NYAKUNDI, J
OCTOBER 31, 2025**

BETWEEN

KIPTOO KOECH PETITIONER

AND

**DR JONATHAN BII CHELILIM EGH, GOVERNOR COUNTY GOVERNMENT
OF UASIN GISHU 1ST RESPONDENT**

**MR MICAH KIPKOSGEI ROGONY, COUNTY EXECUTIVE COMMITTEE
MEMBER (CECM), FINANCE AND ECONOMIC PLANNING UASIN GISHU
COUNTY 2ND RESPONDENT**

**MR ELIUD KIPKORIR CHEMAGET, CHIEF OFFICER FINANCE, UASIN
GISHU COUNTY 3RD RESPONDENT**

**MR EDWARD SAWE, COUNTY EXECUTIVE COMMITTEE MEMBER
(CECM), HOUSING AND URBAN DEVELOPMENT, UASIN GISHU
COUNTY 4TH RESPONDENT**

**DR ABRAHAM KIPKEMBOI SEREM, COUNTY EXECUTIVE COMMITTEE
MEMBER (CECM) ROADS, TRANSPORT AND PUBLIC WORKS, UASIN
GISHU COUNTY 5TH RESPONDENT**

**MR SYLVESTER METTO, COUNTY ATTORNEY, UASIN GISHU COUNTY
GOVERNMENT AND CHIEF EXECUTIVE OFFICER ETHICS AND ANTI-
CORRUPTION COMMISSION (EACC) 6TH RESPONDENT**

AND

**THE OFFICE OF THE AUDITOR-GENERAL INTERESTED PARTY
PUBLIC PROCUREMENT REGULATORY AUTHORITY
(PPRA) INTERESTED PARTY**



RULING

1. What is pending before this court is the Petitioners' Notice of Motion dated 21st August 2025 which was filed alongside the Petition. The application seeks the following orders;
 1. Spent
 2. That pending the hearing and determination of this application and the Petition herein, this Honourable Court be pleased to issue a conservatory order restraining the 1st, 2nd and 3rd Respondents, their officers, agents and/or servants from approving, processing, authorising or disbursing any further payments whatsoever to ASAL Frontiers Limited and/or any other contractors under the Kenya Informal Settlements Improvement Project Phase II (KISIPII) in Uasin Gishu County.
 3. That pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a mandatory order directing the 1st, 2nd 3rd, 4th and 5th Respondents to furnish and disclose to the Petitioner all public records, documents and information requested in the Petitioner's letter dated 17th July 2025, relating to the receipt, utilisation, disbursement, procurement, contracting, implementation, supervision and payments under the Kshs. 1.3 Billion KISIP II Project in Uasin Gishu County.
 4. That the 1st Interested Party (Ethics and Anti-Corruption Commission) and the 2nd Interested Party (Office of the Auditor-General) be and are hereby directed to jointly undertake investigations and an audit of the utilisation of the KISIP II Project Funds and file a comprehensive report in Court within twenty-one (21) days of this order, or on or before the hearing of the Petition, to enable this Honourable Court determine the issues raised herein on merit.
 5. That the 3rd Interested Party, the Public Procurement Regulatory Authority (PPRA), be and is hereby directed to forthwith review all procurement processes undertaken in respect of the Kenya Informal Settlements Improvement Project Phase II (KISIPII) by the Uasin Gishu County Government, and to cause the said procuring entity to publish forthwith all tender notices, contract awards, and procurement documents relating to KISIP II on the Public Procurement Information Portal (PPIP) for public access and consumption, in strict compliance with Section 138 and 139 of the *Public Procurement and Asset Disposal Act*, 2015, Regulation 46 of the Public Procurement and Asset Disposal Regulations, 2020, and the Presidential Directive on Transparency in Government Procurement (Executive Circular No. 1 of 2018).
 6. That the costs of this application be provided for.
 7. That this Honourable Court be pleased to grant such further orders and/or relief as it may deem fit in the interests of justice.
2. The application is expressed to be brought under Articles 3, 22(1), 23(1), 159 & 258 of *the Constitution* of Kenya, 2010; Rules 3 and 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013; and all enabling provisions of the law)
3. The application is premised on the grounds on the face of it and the averments in the affidavit sworn by the Petitioner in support of the same. In his affidavit, he stated that on or about January 2023, the Kenya Informal Settlements Improvement Project Phase II (KISIP II) was formally rolled out by



the Government of Kenya through the State Department for Housing & Urban Development as a continuation of KISIP I, being funded by the World Bank (International Development Association IDA), Agence Franchise de Development (AFD), the European Union, and co-financed by the Government of Kenya, at an estimated cost of USD 165 Million equivalent. He annexed and marked as "KK-1" the World Bank/KISIP II donor implementation documentation. Further, that KISIP II was designed with four components namely:

- (i) integrated settlement planning and socio-economic inclusion;
- (ii) infrastructure upgrading;
- (iii) institutional capacity and policy development; and
- (iv) project management, monitoring and evaluation, with clear fiduciary guidelines that require counties to observe open tendering, record-keeping and public disclosure as per World Bank Procurement Regulations (IPF 2016).

4. The deponent averred that under the programme, Uasin Gishu County was allocated approximately Kshs 1.3 billion for improvement works in seven informal settlement areas in Eldoret, namely Mail! Nne, Mwanzo, Shauri, Kipkaren, KK, Segero, and Kasarani. The funds were meant for designs and construction of roads, storm-water drainage, pedestrian walkways, high-mast lighting, landscaping, sanitation infrastructure and associated amenities to be completed within twelve (12) months from commencement, failing which applicable clawback and audit mechanisms would be triggered under Section 201 of the PFM Act. He stated that on 17th July 2025, he issued a formal written demand to the 1st to 5th Respondents pursuant to Article 35, Sections 4, 8 & 9 of the [Access to Information Act, 2016](#), requesting full disclosure of documentation relating to the planning, procurement, contract awards, payments, certified progress reports, supervision files, financial statements and minutes of public and community participation, all pertaining to the KISIP II projects in Eldoret. He attached and marked as "KK-2" the Petitioner's demand letter dated 17th July 2025.
5. On 21st July 2025, the 6th Respondent, county Attorney responded vide a letter stating inter alia that he was required to "demonstrate how he had been personally affected or injured" by the matters raised, before they could furnish any documents, which response I verily believe was evasive, unlawful and contrary to Article 35 of [the Constitution](#). He attached and marked as "KK-3" the County Attorney's Response. He stated that he received a letter from the 6th Respondent and respondent to the same on 25th July 2025 clarifying that he was pursuing public interest litigation under articles 22(2)(c) and 258(2)(c) of [the Constitution](#). He then lodged a complaint with the Commission on Administrative Justice (Ombudsman) but no action has been taken to date.
6. He deponed that the Respondents, by another letter dated 6th August 2025, served on 18th August 2025 through one Kevin Bowen, alleged that he ought to provide "supporting documents" and further questioned whether he was a resident of Uasin Gishu County, despite acknowledging receipt of his demand letter which had his postal address; thereby purporting to shift the burden to him. He annexed and marked as "KK-6" the County Attorney's Letter dated 6th July 2025 and served on 18th August 2025.
7. On 12th August 2025, his advocates Messrs. Kesse & Kesse Advocates The deponent averred that as the Respondents continued to withhold information, public complaints and investigations by independent watchdogs began to emerge indicating that the KISIP II projects in Uasin Gishu had stalled in January 2025, notwithstanding that approximately 65% of the total contract sums had already been paid to contractors such as ASAL Frontiers Ltd, while independent inspection placed actual physical progress at barely 55%. He annexed and marked as "KK-8" bundle of press



and audit reports. Further, that on or about 8th January 2025, during a stakeholders' meeting, the Respondents through their Lead Consultant, Eng. Silas Aluora, publicly assured all stakeholders including grassroots leaders like myself that all provisions of the contract would be strictly followed to ensure delivery of quality work. He further requested stakeholders and the general public to remain interested and actively involved in the progress of the project, emphasizing that we are their eyes on the ground and it is vital that any issues or concerns surrounding the project be communicated promptly. He urged that it has since become clear that the said assurances were merely a public relations exercise because, despite these commitments, when he and others have sought information from the Respondents regarding the project, they have absolutely refused to disclose any details surrounding the same.

8. The deponent stated that on or about 5th August 2025, after persistent public outcry and upon his demand for accountability, the Respondents rushed to the project site in Eldoret and publicly declared that the project would commence immediately. Despite this declaration, the Respondents failed to provide any timelines or justification for the stalling of works, and to date have not offered any credible explanation. Their refusal to disclose information, despite repeated demands, renders such assurances untrustworthy and purely cosmetic. He annexed and marked "KK-10" a copy of the press report dated 5th August 2025 evidencing the said site visit and pronouncements.
9. He urged that as highlighted in several published articles, including the Office of the Auditor-General's 2024 reports on stalled KISIP projects and newspaper features such as "Counties Sink Billions into Stalled Projects", contractors were reportedly demanding an additional Kshs 500 million, yet preliminary works had not been completed, thus raising serious red-flags of misappropriation and prompting public outcry. Further, that during an official tour by the President to Eldoret, the KBC media falsely aired claims that the KISIP II projects were complete and successful in Eldoret. He stated that the Respondents' conduct constitutes a refusal to comply with Sections 8, 9 and 14 of the [Access to Information Act](#) and that under Section 23 thereof, it is an offence to knowingly deny access to information in the absence of lawful excuse.
10. The deponent stated that the 1st and 2nd Interested Parties are the competent agencies mandated under Articles 79 and 229 of [the Constitution](#) to investigate, audit, and report on the use of public funds, hence the orders sought against them. Further, the 3rd Interested Party is the statutory body established under Section 8 of the [Public Procurement and Asset Disposal Act](#), 2015, mandated to regulate and oversee public procurement. Section 138 and 139 of the Act, together with Regulation 46 of the Public Procurement and Asset Disposal Regulations, 2020, require procuring entities to publish all tender notices and contract awards on the Public Procurement Information Portal (PPIP). He urged that Executive Circular No. 1 of 2018 (Presidential Directive on Transparency in Public Procurement) directed all public procuring entities to ensure that all procurement contracts are published on the PPIP to promote transparency and public oversight.
11. The deponent averred that the Uasin Gishu County Government, being the procuring entity for KISIP II, has failed to publish tender notices, awards, and procurement documents on the PPIP, thereby violating the above legal provisions and it is therefore just and necessary that this Honourable Court directs the 3rd Interested Party (PPRA) to review the entire procurement process for KISIP II, and to compel the Uasin Gishu County Government to immediately publish all relevant procurement documents on the PPIP in compliance with the law. He maintained that unless this Court intervenes urgently and grants conservatory and mandatory reliefs, the Respondents are likely to continue unlawfully disbursing public funds, to the irreparable loss of the Kenyan taxpayer and in breach of [the Constitution](#).



1st – 6th Respondents’ replying Affidavit

12. In response to the application, the 6th Respondent filed an Affidavit sworn by Philip Meli the County Secretary & Head of Public Service Uasin Gishu County, on behalf of the 1st – 6th Respondents. He urged that the right of access to information is guaranteed under Article 35 of *the Constitution* of Kenya. He laid out the sequence of correspondences as follows; on 17th July 2025, the Petitioner wrote to the 1st, 3rd and 4th Respondents demanding for disclosure of project documents, utilization reports on Kes 1.3 Billion KISIP II funds and suspension of payments to Asal Frontiers Limited and other contractors. He annexed and marked as “PK-1” a copy of the Petitioner’s letter; On 21st July 2025, the 6th Respondent responded to the Petitioner’s demand asking for particularization of the demand and the documents desired. He annexed and marked as “PK-2” a copy of the 6th Respondent’s response; On 25th July 2025, the Petitioner wrote back to the 6th Respondent notifying it of its intention to commence legal proceedings within 7 days of the letter. He annexed and marked as “PK-3” a copy of the Petitioner’s letter; On 6th August 2025, the 6th Respondent responded to the Petitioner asking him to specify what information he needed and to disclose his identity. He annexed and marked as “PK-4” a copy of the 6th Respondent’s response; On 12th August 2025 and without responding to the 6th Respondent, the Petitioner wrote to the Commission on Administrative Justice lodging his complaint on alleged refusal by the county Government of Uasin Gishu to disclose project documents.
13. The deponent averred that the Petitioner in his complaint/application for review to the Commission copied the Respondents. He annexed and marked as “PK-5” a copy of the Petitioner’s application for review. Further, that the Petitioner’s review is pending before the Commission which has not rendered itself on the review nor issued any orders to the Respondents. He urged that the Petitioner has filed a petition while his review is pending and the petition is not only premature but also sub judice. He further stated that a person seeking information should exhaust or satisfy the laid down mechanism in law before approaching the courts. The Petitioner having elected to exercise the remedy of review by the Commission ought to allow the Commission to render itself before moving to court. The Petition violates the doctrine of exhaustion of remedies.
14. He prayed that the application be dismissed with costs.

Interested Parties’ Grounds of Opposition

15. The 1st Interested Party filed a Grounds of Opposition dated 28th September 2025 premised on the following grounds;
 1. That the mandate of EACC as provided in *the Constitution* of Kenya 2010, the *Ethics and Anti-Corruption Commission Act* and the *Leadership and Integrity Act* is to investigate allegations in respect to corruption, economic crimes, matters related to chapter six of *the Constitution* and make recommendations to the Director of Public Prosecution pursuant to Section 35 of the *Anti-corruption and Economic Crimes Act*, 2003.
 2. That the order sought in the application and Petition herein that the 1st Interested Party be directed to undertake investigations and audit the utilization of the KISIP II project funds and thereafter file a comprehensive report in Court, threatens to encroach upon the Independence of the 1st Interested party contrary to the provisions of Article 79 of *the Constitution*.
 3. That the 1st Interested party is an Independent Constitutional Commission which is not subject to control or direction by any person or authority, as enshrined in the provisions of



Article 249(2)(b) and Article 79 of the Constitution of Kenya except where there are clear circumstances of Constitutional violations, abuse of power and in this case there are none.

4. That the Petitioner has not reported the alleged Constitutional violations to the Commission through any formal complaint and in the absence of such a report, the petitioner cannot legitimately seek to invoke the Jurisdiction of this Honourable Court to compel the Commission to undertake investigations. Accordingly, the Petitioner's request is premature, procedurally flawed and untenable.
5. That the order as sought is frivolous, vexatious, without merit, and an abuse of the Court process and should be dismissed with costs to the 1st Interested Party.

Applicants' Further supporting affidavit

16. The Petitioner filed a further supporting affidavit dated 9th October 2025 in response to the replying affidavit. He deponed that the grounds of by the 1st Interested Party is misconceived, premature, and contrary to the overriding public interest in transparency and accountability under Articles 10, 35, and 201 of the Constitution. Further, that the orders sought do not usurp the EACC's role but seek to enforce it in the public interest, particularly where there is prima facie evidence of misuse of Kshs 1.3 billion in donor-funded resources, as evidenced by public reports of overpayments and stalled works. That Section 11(1)(a) of the EACC Act mandates the Commission to "investigate and initiate investigations into any alleged corruption or economic crime." He stated that the phrase "initiate investigations" is permissive and discretionary, allowing the Commission to act on its own motion based on information from any source including credible evidence presented in a formal court petition. Section 11(1)(e) further empowers the Commission to "receive and investigate complaints."
17. He stated that to insist on a private, formal complaint while ignoring detailed, verified allegations presented in a public court document, allegations that have already been subject to demand letters, rebuttals, and a complaint to the Ombudsman constitutes a wilful neglect of its duty and a waste of public resources.
18. In response to Ground 2, he stated that the direction for a joint investigation and audit does not threaten the EACC's independence under Article 79 but facilitates co-ordinated action as permitted under Section 11 (1) (d) of the EACC Act, 2011.
19. In response to Ground 3, he stated that the EACC's independence under Article 249(2)(b) is not absolute but subject to the Constitution and the law. Where there are clear violations of rights, as here with the refusal to disclose information under Article 35, the court may intervene.
20. In response to Ground 4, he urged that the assertion that no formal complaint was made is factually incorrect and overlooks both the nature of public interest litigation under Article 22(2)(c) and the prior engagement with the appropriate oversight body. The Petition itself constitutes a formal invocation of the EACC's oversight role, and no personal injury is required. Further, that he lodged a formal application for review with the Commission on Administrative Justice (Ombudsman) under Section 14 of the Access to Information Act, 2016, prior to tiling this Petition. The Ombudsman's letter dated 19th September 2025 (annexed as "KK-1") confirmed that the Respondents' refusal was unsatisfactory and directs compliance, thereby validating his request and demonstrating that all administrative remedies were exhausted.
21. In response to Ground 5, he stated that the Petition is not an abuse of the court process but a legitimate invocation of constitutional jurisdiction to prevent ongoing violations and protect public funds. The



Petition seeks orders for transparency, not punitive or administrative actions that would prejudice any lawful process.

22. In response to the replying affidavit, the deponent urged that the respondent had not provided proof that he is duly authorized to swear the affidavit on behalf of the 1 to 6 Respondents. Further, that the said County Secretary, Mr. Philip Meli, is not joined as a Respondent or party to these proceedings, and therefore lacks locus standi to depone on behalf of the named Respondents. he stated that the Respondent's Replying Affidavit annexures PK-1 to PK-5 are irregularly exhibited as they only bear handwritten markings without the mandatory Commissioner for Oaths exhibit stamp or seal, contrary to Rule 9 of the Oaths and Statutory Declarations Rules (Cap. 15). Accordingly, the said annexures PK-1 to PK-5 are defective and ought to be expunged from the record or rejected for want of proper exhibition, rendering the entire Replying Affidavit defective and incompetent for want of properly exhibited evidence.
23. He acknowledged that the Petitioner lodged a review with the Commission on Administrative Justice, and that it is pending determination. This confirms that the review process was initiated as required under the [Access to Information Act](#). He denied the allegation on his failure to exhaust remedies and urged that the Ombudsman has already issued directions which the Respondents ignored, amounting to exhaustion of remedies.
24. The deponent stated that the principles governing conservatory/interim or protective orders are well established. The applicant must ordinarily establish;
- (a) a prima facie case or a serious issue to be tried;
 - (b) that the applicant would suffer irreparable harm which cannot be adequately compensated by damages if the order is not granted;
 - (c) that the balance of convenience favours granting the order; and
- SUBPARA (d)
- that the order is necessary to prevent the ends of justice from being defeated. He urged that the present matter meets the relevant thresholds for interlocutory relief as there is a serious issue to be tried. He urged the court to allow the application as prayed.

1st – 6th Respondents Submissions

25. The 1st – 6th Respondents filed submissions dated 22nd October 2025. Counsel submitted that at the time of filing the Petition, the Petitioner had a pending application for review before the Commission on Administrative Justice lodged through its letter dated 12th August 2025 and marked as 'PK-5' in the Respondents' Replying Affidavit dated 8th October 2025. It is apparent that the Petitioner filed the Petition 9 days after the it had lodged the application for review before the Commission on Administrative Justice and during which time the application for review was pending determination. The pendency of the review at the time of filing the petition is confirmed by the Commission's letter dated 19th September 2025 to the Respondents and annexed to the Petitioner's further affidavit dated 9th October 2025. He cited Section 14 of the [Access to Information Act](#) and urged that the act has provided for a remedy and the procedure to be followed in the event an application for access to information is rejected. A person aggrieved by the decision of the Commission may then appeal to the High Court within 21 days of the decision. The Jurisdiction of the High Court may therefore only be invoked by a party aggrieved by the decision of the Commission. He additionally cited Section 23 (3) of the [Access to Information Act](#) and submitted that the law is that the court may only exercise jurisdiction conferred upon it by [the Constitution](#), statute or both. He cited the case of Samuel Kamau Macharia



& another v Kenya Commercial Bank Limited & 2 others t and the case of Erick Okioma & Others v Mutahi Kagwe Cabinet Secretary for Health eKLR 2023 and submitted that the present petition is prematurely before this court which court does not have original jurisdiction to deal with matters relating to access to information.

26. He urged that the Petition is an abuse of process and should be dismissed with costs to the Respondents.

1st Interested Party's submissions

27. The 1st interested party filed submissions dated 28th October 2025. He stated that by virtue of Article 79 of *the Constitution*, the *Ethics and Anti-Corruption Commission Act* establishes the 1st interested party as an independent commission mandated to ensure compliance with and enforcement of the leadership and integrity Chapter (CHAPTER SIX) of *the Constitution*. Further, that under section 11(1)(d) and section 13(10) of the act, the Commission is empowered to;
- a. Investigate any matter that, in its opinion, raises issues of corruption, bribery or economic crimes
 - b. Undertake investigations either on its own initiative or pursuant to a complaint made by any person
28. He urged that the Commission's investigative powers are not to be invoked whimsically or at the direction of any person or authority unless there is a formal complaint or credible information disclosing the commission of an economic crime or corruption. In the present instance, the Petitioner has not lodged any report or complaint to the Commission, and there is no evidence of a pending inquiry that would warrant this Court's supervisory intervention.
29. Counsel submitted that the independence of the 1st Interested Party is Constitutionally entrenched under Article 249(2) of *the Constitution*, which provides that:- the Commissions and the holders of independent offices are subject only to *the Constitution* and the law, and are independent and not subject to direction or control by any person or authority. The same principle is reinforced under Section 28 of the EACC Act, which stipulates that the Commission shall not be under the direction or control of any person or authority in the exercise of its mandates. That the rationale for such independence was elaborated in Mohamed Okashi Mohamed versus Ethics and Anti-Corruption Commission & 2 others ACEC Petition E004 of 2020 (eKLR). He further submitted that compelling the Commission to commence investigations and to conclude them within a fixed timeline, without the existence of a formal complaint or internal resolution to investigate, amounts to judicial overreach and a violation of Article 249(2) and 252 of *the Constitution*. The process of investigation is technical, meticulous, and evidence driven. It requires the Commission to exercise professional discretion. Forcing the Commission to undertake investigations and submit a report within 21 days, as prayed by the Petitioner, not only undermines this discretion but also risks rushed and incomplete investigations, which may prejudice both the integrity of the inquiry and the public interest it seeks to serve.
30. He cited the case of Rose Owira & 23 Others v Attorney General & Another; Kenya National Commission on Human Rights & 4 Others (Interested Parties) [2020] eKLR and submitted that the Court's supervisory jurisdiction under Article 165(6) and (7) of *the Constitution* does not extend to managing the functions of independent commissions or substituting their discretion with judicial directives. The honourable Court may only intervene where there is demonstrable proof that the Commission has acted in contravention of *the Constitution* or failed to act altogether despite a proper complaint being lodged before it. In the absence of such demonstration in the present case, the orders sought by the Petitioner are premature, unconstitutional, and untenable.



31. He prayed the court dismiss the application with costs.

Analysis & determination

32. This is a constitutional petition requiring constitutional interpretation which have been shaped by several guiding principles and land mark cases. The foundational principles on constitutional interpretation can be traced back to Article 259 which asserts as follows:

1. This constitution shall be interpreted in a manner that (a) Promotes its purpose values and principles (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights (c) Permits the development of the law and (d) contribute to good governance.
2. If there is a conflict between different language versions of this constitution, the English language version prevails
3. Every provisions of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore, among other things
 - (a) a function or power conferred by this constitution on an office may be performed or exercised a occasion requires, by the person holing the office
 - (b) any reference in this constitution to a state or other public office or officer, or a person holding such an office includes a reference to the person acting in or otherwise performing the functions of the office at any particular times
 - (c) a reference in this constitution to an office, State organ or locality named in this constitution shall be read with any formal alteration necessary to make it applicable in the circumstances and
 - (d) a reference in this constitution to an office, body or organisation is if the office body or organization has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

33. One of the approaches adopted in constitutional interpretation is pragmatism. The term “Pragmatism” in discussion of constitutional matters agree that it is an “umbrella term” that covers different views about law. Our interest here do not involve all that pragmatism can mean can mean and has meant or what the proper use of the term might be. We are not rejecting every idea associated with “Pragmatism.” One of these ideas perhaps the leading one, is legal instrumentalism that law generally is instituted to serve social purposes and that it should be interpreted in that way. One understanding of this general idea is that *the constitution* is what it says it is and instrument of ends like justice the general welfare and national security and that it should be interpreted to facilitate these ends. (See Steven D. Smith the pursuit of Pragmatisms. Yale law jornal 100 (1990) 409 409-11)

34. The Kenyan constitution, principles of interpretation also involve purposive and liberal interpretation to construe it as a dynamic document, interpreted broadly to address societal changes. This approach has expanded the rights in Chapter 4 on the Bill of Rights. The threshold for the legality and legitimacy of the decision-making process by any member of the legislature executive or the Judiciary in every sphere is guided by the provisions of Article 10 on National values and principles of governance which entrenches the following principles:

- (a) Applies or interprets this constitution
- (b) enacts, applies or interprets any law or



- (c) makes or implements public policy decision
 - (2) The national values and principles of governance include:
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people
 - (b) human dignity equity, social justice, inclusiveness equally, human rights, non discrimination and protection of the marginalized
 - (c) human dignity equity, social justice, inclusiveness equity, human right non-discrimination and protection of the marginalised
 - (d) good governance, integrity, transparency and accountability and
 - (e) sustainable development.
35. It seems central to the conception of this petition that the Respondents action is being challenged in the manner the exercised power and perform their functions beyond that conferred by the law hence calling upon this court to examine and scrutinise the legality of their decisions. Why is this important? Legislation or conduct must be lawfully authorised by *the constitution* and the law. Which means in this petition the Respondents must act within the four corners of *the constitution* mandate and the specific laws governing the County Government on the aspects of Public Procurement relating to utilisation of Kshs 1.3 billion. There are a number of points to note about this. The first is that the court derives from the rule of law a general requirement that parliament and other constitutional actors must exercise their powers rationally. Rationally means non-arbitrariness, tested by seeking a rational connection between an action and the achievement of a legitimate purpose. This test is performed before testing for a violation of the Bill of rights
36. The Supreme Court in *Re Interim Independent Election Commission (2011) eKLR PARA (86)* thus The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human right based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
37. Given this background the court is being asked to consider the basis on which the Respondents power granted by the statute to bring into operation the procurement, receipt, utilization, disbursement, contracting, and implementation of the projects under Kshs 1.3 Billion KISIP II Project in Uasin Gishu County is constitutionally reviewable necessitating in the first instance grant of conservatory orders. It is a requirement of *the constitution* under the Rule of Law that exercise of Public Power by the first respondent and other functionaries should not arbitrary. The decisions made on procurement and implementation of the project must be rationally related to the purpose to which the power was given on such donor funds, otherwise they are infect arbitrary and consistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of Public Power by the 1st Respondent and other functionaries must at least comply with the statutory provision, if it does not it falls short of the standards demanded by constitution for such action.



38. The pre-dominant question here is on the access to information held by a Public Officer under Article 35 of *the constitution* as read with Section 4, 8, 9, and 14 of the *access to information Act*. The court in *Phumelela Gaming and Leisure Ltd v Grundligh and Others* (2006) ZACC 6 2007 (6) SA 350 (CC) 2006 (8) BCLR 883 (CC) this court observed “ A court is required to promote the spirit, purport and objects of the Bill of Rights” when interpreting any legislation, and when developing the common law or customary law. In this no court has a discretion. The duty applies to the interpretation of all legalisation and whenever a court embars on the exercise of developing the common law or common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects or the Bill of rights. The same applies to the development of the common law or customary law.
39. The whole prism of this petition can be summarised by the words borrowed from the dicta from the Supreme Court inter alia by the Supreme Court in *Munya v Kithinji & 2 Others* (Application 5 of 2014) (2014) (KESC 30 (KLR) 2 April 2014): “ Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that run sin tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.
40. What is of fundamental significance is that a separation of functions is recognised in *the constitution* classified as either the Executive, the legislature and the Judiciary and that each separate function is performed by separate branches of government. In other words the functions of making laws, executing the law and resolving disputes through the application of the law should be kept separate and in principle they should be performed by different institutions and persons. For purpose of this petition there are independent commission like the EACC established pursuant to Article 79 and 253 of *the constitution* of Kenya, The Director of Public prosecution under Article 157, the Auditor General, in Article 229 of the same constitution which does best immense powers on matters to do with procurement, utilization, execution and implementation of projects funded by either the National Government or donor funds. The doctrine of separation of powers is not a fixed or rigid constitutional doctrine and that it is given expression in many different forms and made subject to cheques and balances of many kinds. This independent commissions. Office of the Auditor General and the Director of Public Prosecution exercised their powers and functions and shall not be under the direction or control of any person or authority
41. The following issues arise for determination;
- A. Whether the prayer for conservatory orders is merited
 - B. Whether the court should issue orders to direct the respondents to disclose all public records and documents requested
 - C. Whether the court should direct the 1st and 3rd Interested parties as prayed

Whether the prayer for Conservatory orders is merited

42. The nature of Conservatory orders was discussed in Civil Application No. 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, the Supreme Court, at paragraph 86, as follows: -



- (86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.
43. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -
- A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.
44. In Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR the Court had the following to say about the nature of conservatory orders: -
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
45. The principles to be considered when granting conservatory orders were laid out in the case of Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR as: -
1. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 2. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 3. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 4. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

Whether there exists a prima facie case

46. In a ruling rendered on 8th February, 2021 in David Ndi & others v Attorney General & others [2021] eKLR, the Court had the following to say about a prima-facie case: -
- “The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it



has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.

47. What constitutes a prima-facie case was further dealt with by the Court of Appeal in *Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8*. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

“It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.”

48. A prima facie case was defined in *Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125* to mean: -

“.... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

49. In the affidavit in support of the application, the applicant has not offered a satisfactory explanation on the purpose of the said conservatory orders. At paragraph 30, he avers that the respondents are likely to disburse ‘public funds, to the irreparable loss to the taxpayer.’ However, the only document relevant to any funds whatsoever is the World Bank Donor Implementation document stating a project worth US\$ 176,656.20. The Applicant has not provided any proof of the alleged Kshs. 1.3 Billion that is to be disbursed. How then can the court issue conservatory orders on a process that has not been shown to exist? The court cannot issue orders in vain and in the absence of any proof of the said project, the only conclusion is that the prayer is premised on falsehoods. The subject matter of the conservatory orders sought is not clear and therefore, as the applicant has not established the state of affairs he wishes to remedy, it is my considered view that there is no prima facie case.

50. Having found that the applicant has failed to prove that there exists a prima facie case, I am bound by the decision of the Court of Appeal in *Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR* where, while dealing with what a prima facie case is, made reference to Lord Diplock in *American Cyanamid vs. Ethicon Limited (1975) AC 396*, the Judge stated thus: -

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.

51. I therefore find that prayer 1 is moot and fails.



Whether the Court should issue a mandatory order directing the furnishing of documents as per the Petitioners' letter

52. 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.

53. I have considered the correspondences tendered by the parties with regards to the requested information by the petitioner. On 17th July 2025, the Applicant requested information on KISIP II which elicited a response dated 21st July 2025 seeking clarification on the particulars of the documents and information. The applicant then issued the respondent with a demand letter on 25th July 2025. On 6th August 2025, the 6th respondent sought clarification once more and the Applicant opted to file a complaint with the Commission on Administrative Justice on 12th August 2025.

54. Section 14 of the *Access to Information Act* provides as follows;

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.



55. The applicant conceded that the Commission is yet to render its decision on the formal complaint. Therefore, as the matter is still pending before the CAJ, it would be premature for the court to intervene at this juncture.

56. Section 23(3) of the [Access to Information Act](#) provides as follows;

“A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.”

57. The issuance of the orders sought would be a violation of the doctrine of exhaustion. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring 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 the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of [the Constitution](#) and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

“This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before [the Constitution](#) of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

58. In Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated 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 fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring 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 the Courts. The Ex Parte



Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

59. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

"However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

"What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*)

60. It follows that the court cannot issue the orders as prayed in prayer 2 as the same would be in contravention of the doctrine of exhaustion and premature in the circumstances.

Whether the court can grant the orders directing the 1st 2nd and 3rd Interested Party to audit, conduct investigations and review the procurement processes undertaken in respect of KISIP II.

61. The 1st Interested party is the Ethics and Anti-Corruption Authority established under the *Ethics and Anti-Corruption Commission Act* and following Article 79 of *the Constitution*. The 2nd Interested party is the Office of the Auditor general, established under Article 229 of *the Constitution*. The 3rd Interested party is the Public Procurement and Regulatory Authority Board which is established by the *Public Procurement and Asset Disposal Act*. These are all independent offices that are not subject to control by any person or authority. Article 249(2) of *the Constitution* provides as follows;

- (2) The commissions and the holders of independent offices—
- a. are subject only to this Constitution and the law; and
 - b. are independent and not subject to direction or control by any person or authority.

62. The prayers sought by the applicants undermine the independence of the interested parties. The court cannot direct these parties in the manner sought by the applicants as the same would be an interference with their constitutional mandate. *Mativo, J in County Government of Kiambu & another v Senate & others* [2017] eKLR cited with approval the dictum in *Mumo Matemu v Trusted Society of Human Rights Alliance & 2 others* that:

"[Separation of powers] must mean that the Courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy, as well as accord the executive sufficient latitude to implement



legislative intent. Yet, as the respondents also concede Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...”

“In a jurisdiction such as ours in which *the Constitution* is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by [the] Standing Orders which have been given constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.”

63. The Applicant has not presented any evidence that any of the interested parties have committed an act or omission that resulted in the contravention of *the constitution*. In the premises, the court does not have the jurisdiction to direct the interested parties as prayed by the applicant.
64. For those reasons the Notice of Motion dated 21.8.2025 lacks merit and the same be dismissed with costs. The application is therefore dismissed in its entirety with costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2025.

.....

R. NYAKUNDI

JUDGE

