



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**PETITION NO 4 OF 2017**

**IN THE MATTER OF : ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES  
2,10,19,20,21,22,23,27,35,40(1), 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA.**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 67**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT**

**AND**

**IN THE MATTER OF: MATHENGETA FARMERS COMPANY LIMITED**

**AND**

**IN THE MATTER OF: THE PETITION OF DISHON MUTHAMA NZINA & 26 OTHERS**

**BETWEEN**

DISHON MUTHAMA NZINA.....1<sup>ST</sup> PETITIONER  
JOSEPH NJOROGE WAWERU.....2<sup>ND</sup> PETITIONER  
SAMUEL M. MUNGUTI.....3<sup>RD</sup> PETITIONER  
VERONICAH WANGARI KARANJA.....4<sup>TH</sup> PETITIONER  
PHILIP MAKAU MULWA.....5<sup>TH</sup> PETITIONER  
SAMUEL KIMANI NDUBU.....6<sup>TH</sup> PETITIONER  
PHELIS NDUNGE KITUUNGO.....7<sup>TH</sup> PETITIONER  
MBATHA MUEMA.....8<sup>TH</sup> PETITIONER  
LUCY WAITHERA KINYENI.....9<sup>TH</sup> PETITIONER  
MUTUKU KIKONDE.....10<sup>TH</sup> PETITIONER  
GRACE MBOKA.....11<sup>TH</sup> PETITIONER  
NG'ANG'A MUTAHL.....12<sup>TH</sup> PETITIONER

JOHN MUCHINA NGUGI.....	13 <sup>TH</sup> PETITIONER
MARY WANJIRU WAKABA.....	14 <sup>TH</sup> PETITIONER
BETH WANJIKU WAKABA.....	15 <sup>TH</sup> PETITIONER
SAMUEL KAMAU CHOMBA.....	16 <sup>TH</sup> PETITIONER
MARY NDUNGE.....	17 <sup>TH</sup> PETITIONER
LITHA MWELU KAHILIRO.....	18 <sup>TH</sup> PETITIONER
MUKII MUTUKU.....	19 <sup>TH</sup> PETITIONER
HANNAH WAITHERA.....	20 <sup>TH</sup> PETITIONER
SIMON MWANGI GATERE.....	21 <sup>ST</sup> PETITIONER
JOSEPH MUSKA MATHA.....	22 <sup>ND</sup> PETITIONER
SIMON NDUNGU.....	23 <sup>RD</sup> PETITIONER
WILSON KATHINI KABUTI .....	24 <sup>TH</sup> PETITIONER
TERESIA NJERI NDUNG’U.....	25 <sup>TH</sup> PETITIONER
MILICAH MUTHONI NDUNG’U.....	26 <sup>TH</sup> PETITIONER
JOSEPH NJUGUNA.....	27 <sup>TH</sup> PETITIONER

**VERSUS**

THE HONOURABLE ATTORNEY GENERAL.....	1 <sup>ST</sup> RESPONDENT
REGISTRAR OF TITLES.....	2 <sup>ND</sup> RESPONDENT
THE CHIEF LAND REGISTRAR.....	3 <sup>RD</sup> RESPONDENT
NATIONAL LAND COMMISSION.....	4 <sup>TH</sup> RESPONDENT
THE CHIEF REGISTRAR OF COMPANIES.....	5 <sup>TH</sup> RESPONDENT

**AND**

FRANCIS NGIGI.....	1 <sup>ST</sup> INTERESTED PARTY
DANIEL MWAURA.....	2 <sup>ND</sup> INTERESTED PARTY
JACOB MUTUA.....	3 <sup>RD</sup> INTERESTED PARTY

**RULING**

1. This ruling is in respect to the notice of motion dated 30/7/18 by the petitioners /Applicants seeking the following orders;

a. That pending the hearing and determination of the petition the office of the Company Registrar be compelled pursuant to the demand dated 14/7/2014 by the petitioners to produce a copy of the register of members of the defunct Mathengeta Farmers Limited as at the 17/2/89.

b. Spent

c. Spent

d. Costs of the application be provided for.

2. The grounds upon which the application is brought are that the petitioners through a letter dated 14/7/2014 requested for a list of the registered members of the company as at 17/2/1989 which request was neglected/ ignored by the 5<sup>th</sup> Respondent. That persons who were not members of the defunct Company were issued with titles through fraud perpetrated by the Directors of the Company. That some list of persons had been shared with the Thika Law Courts vide a letter received on 29/9/1998 in which it could not be explained from the original title that the numbers were derived from.

3. The application is further supported by the affidavit of Dishon Muthama Nzina being one of the shareholders of the defunct Mathengeta Farmers Company and duly authorized by the other petitioners. He states that along with the joint petitioners they filed a petition on 23/10/2017 alleging infringement of their property rights through fraudulent allocation of land by the former Directors of the above stated Company. That they wrote to the 2<sup>nd</sup> Respondent with a copy to the 5<sup>th</sup> Respondent requesting for the list of registered members of the defunct Mathengeta Farmers Company Limited which list is crucial in establishing the fraudulent allocations/land claims and have not received any response to date nor was the information provided. That the list of members would be instrumental to the petitioners as it would show the members of the defunct Company in view of the fraudulent allocations of the suit land to non members. That sometimes in 1998 a letter by the Land Registrar Murang'a listed parcel numbers whose origin could not be ascertained in regard to MAKUYU/KAMBITI/BLOCK II. That MAKUYU/KAMBITI/BLOCK II was vested in the Company.

4. The application was opposed through the replying affidavit of Joyce Koech, an Assistant Registrar with the 5<sup>th</sup> Respondent who deposed that the letter of the Applicants dated 14/7/2018 was not received by their office. That the Applicants failed to follow the prescribed procedure for obtaining certified copies from its organization. That they indeed have a file of the Mathengeta Farmers Company Limited in custody and upon perusal of the same she found that they only hold a list of its members as at the year 1985 and there was no list of members as at 17/2/1989 as requested by the Applicants. That this honourable Court would not issue orders to compel the 5<sup>th</sup> respondent to produce what it does not have in its records and custody.

5. The application was canvassed through written submissions which I have read and considered.

6. The Applicants submit that the right of every citizen to access information held by any public body is protected and guaranteed both by the Constitution of Kenya and Statute. That the right of all citizens to access information held by the state is guaranteed under Article 35 of the Constitution thereof and the substantive law on the process to be followed by any citizen who is desirous of accessing any information held by the state is to be found under the Access to Information Act No. 31 of 2016. That the 5<sup>th</sup> Respondent ignored and or failed to respond to the Applicants' letter dated 14/7/2018 and has not offered any response to date and they dispute the 5<sup>th</sup> respondent's averment that the letter was not received by them because the letter bears a stamp from their office. The information being requested from the 5<sup>th</sup> respondent is crucial to the petitioner's evidence in the instant petition. That indeed the 5<sup>th</sup> respondent has admitted in its replying affidavit to be in possession of a list of the registered members of that company as at the year 1985 which the Applicants submit will be sufficient to further their cause.

7. The 5<sup>th</sup> respondent in its submissions reiterated that the letter by the Applicants was not received at their offices and thus according to them the Applicants failed to follow the process prescribed towards obtaining copies the list they required. It denies that it ignored the Applicants request as alleged. As stated in its replying affidavit they do not hold a record of list of members of the company at the date that Applicants had apparently requested for they submit that they cannot be compelled to produce that which they do not have in their custody in so doing the honourable Court will be issuing orders in vain.

#### **Analysis and Determination**

8. That right to access to information held by the state is enshrined under Article 35 of the Constitution of Kenya as follows;

“(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”

9. Pursuant to Art 35 of the Constitution, Parliament enacted the Access to Information Act No. 31 of 2016 which at its preamble is stated at its preamble as;

“AN ACT of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes”.

10. The relevant provisions of the Act are reproduced here for emphasis only;

Section 4;

(1) Subject To This Act And Any Other Written Law, Every Citizen Has The Right Of Access To Information Held By—

(A) The State; And

(B) Another Person And Where That Information Is Required For The Exercise Or Protection Of Any Right Or Fundamental Freedom.

(2) Subject To This Act, Every Citizen's Right To Access Information Is Not Affected By—

(A) Any Reason The Person Gives For Seeking Access; Or

(B) The Public Entity's Belief As To What Are The Person's Reasons For Seeking Access.

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

(5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information Section 5;

Subject to section 6, a public entity shall—

(a) facilitate access to information held by such entity and which information may include—

(i) the particulars of its organization, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

11. Sections 7-13 provide the manner in which the information may be sought, how it will be processed by the public entity till the time the enquirer is handed over the information sought. The public entity is also obligated in law to state if it will not provide the information and for what reasons, which reasons must be reasonable and justifiable and in an open and democratic society.

12. The aforesaid Act makes the right to be absolute and not to be limited to the reasons given for seeking the requested information. The Act also requires the public entity to act on the request made expeditiously and the decision of the public officer to be communicated to the Applicant as soon as possible confirming availability of the information, if the request has been approved or not and reasons thereof.

13. The Applicant has exhibited a letter to the 5<sup>th</sup> respondent requesting for the list of members of the Mathengeta Farmers Company dated the 14/7/2014 with a stamp of the 5<sup>th</sup> respondent acknowledging receipt of the same on the 16/7/14 in line with the provisions of the right to access of information Act the same ought to have been attended to expeditiously. The 5<sup>th</sup> respondent claims to have not received that letter which is not believable in view of the stamp on the face of the letter aforesaid. Though it is noted that the information was requested before the enactment of the Access to information Act, nothing precluded the 5<sup>th</sup> Respondent from responding to the said request made through the letter dated the 17/7/14, given that the substantive law as enacted under Article 35 of the constitution was already in place.

14. The 5<sup>th</sup> Respondent concedes that they indeed have in custody a list of the registered members of the Mathengeta Farmers Company dating way back in 1985 in their custody. They have averred that they do not have any list of the members for the company for the period of 1989 because they were not filed with the Registrar of Companies.

15. The 5<sup>th</sup> respondent concedes that they are obliged to release copies of any public documents in their custody after the persons who are desirous of accessing such copies have complied with the procedure which entails making a request in writing specifying the documents needed and the same is lodged with the Registrar of Companies at the counter, upon receipt of the request the Registrar ascertains the existence for documents, makes an assessment of the fees payable which is advised to the Applicant then certified copies are issued upon making the required fees. Apart from the letter the Applicants have not demonstrated that their request was lodged at the Registrar of Companies, there is no evidence of follow up done by the Applicants to their request.

16. In all fairness the 5<sup>th</sup> Respondent would be expected to retain information on the Company on record when supplied by the Company through annual returns and financial and audited reports where applicable. The Petitioners have not demonstrated to the Court that they supplied such information to the 5<sup>th</sup> Respondent for the period upto and including the 17/2/1989.

17. That notwithstanding, the 5<sup>th</sup> respondent has indicated willingness to provide the documents without being compelled upon the Applicants adhering to the process. Orders for production may not be necessary. The Applicants have also stated in their submissions as follows;

“ the Respondent’s admission to be in possession of a list of members that albeit the one as at 1985 is sufficient to further the cause of the petitioners”.

In other words the Applicants are saying that they are acceptable to being provided with the list of members as at 1985, which list has been admitted to be in the custody of the 5<sup>th</sup> Respondent.

18. The Petitioners should comply with the procedures for request of information in the Office of the 5<sup>th</sup> Respondent and obtain the information that is disclosed and available with the 5<sup>th</sup> Respondent in respect to the list of members of the defunct Mathengeta Farmers Limited.

19. In the end I find no reason to grant the orders.

20. I make no orders as to costs.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF APRIL 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kirui HB for Ms Were for the 1<sup>st</sup> – 26<sup>th</sup> Petitioners

1<sup>st</sup> – 5<sup>th</sup> Respondents – Absent

Kuiyaki and Njeri, Court Assistants