

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC PETITION NO. 17 OF 2017

IN THE MATTER OF ARTICLES 22 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 35 (1) (a) & (b) and 40 of the CONSTITUTION

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011

BETWEEN

PETER GITHIRI WAHOME.....PETITIONER

-VERSUS-

LAND REGISTRAR, KAJIADO COUNTY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

Introduction

1. Before this court for determination is a Constitutional Petition brought pursuant to **Articles 22(1)** and **23(1)** of the Constitution of Kenya, 2010, wherein the Petitioner, **Peter Githiri Wahome**, alleges violation and threatened violation of his fundamental rights and freedoms under **Articles 35(1)(a) & (b)** and **40** of the Constitution. The Petition is further anchored on the provisions of the **Environment and Land Court Act, 2011**, and seeks redress in relation to the alleged failure and/or refusal by the 1st Respondent to supply information and records pertaining to land parcel **Kajiado/Kaputiei North/4977**.

2. The 1st Respondent, the **Land Registrar, Kajiado County**, is sued in his official capacity as the officer responsible for the maintenance and custody of land registers and documents under the **Land Registration Act, No. 3 of 2012**, including the duty to make such information accessible to the public. The 2nd Respondent, the **Attorney General**, is sued as the principal legal adviser to the Government pursuant to **Article 156(4)(a) & (b)** of the Constitution, and as the representative of the State and the Ministry of Lands in all court proceedings.
3. The Petitioner avers that he is the registered proprietor of land parcel **Kajiado/Kaputiei North/4977**, measuring approximately 5 acres, (hereinafter referred to as ‘the suit property’) being a subdivision of **Kajiado/Kaputiei North/1835**, originally owned by his brother, and acquired through a contribution arrangement and subsequent subdivision undertaken in 1998. He contends that although he was registered as proprietor on **7th November 1998**, he has never been issued with a title deed.
4. The Petition is principally premised on the allegation that the 1st Respondent failed, refused or neglected to provide the Petitioner with an abstract of title, entries in the land register, and a certified cadastral map relating to the said property, despite various written requests made in November and December 2016. According to the Petitioner, the 1st Respondent communicated that the **green card for parcel Kajiado/Kaputiei North/4977** was missing from the binder, thereby rendering it impossible to supply the requested information. The Petitioner asserts that this omission contravenes both the Constitution and the Land Registration Act.
5. The Petitioner asserts that the denial of access to information violates his rights under **Article 35**, while the inability to verify and confirm particulars relating to his land threatens his constitutionally protected right to property under **Article 40**. He further states that the absence of

a proper register exposes his land to potential fraud and prevents prospective purchasers from confirming ownership, thereby frustrating his ability to freely transact with the property.

6. As a result of the foregoing, the Petitioner instituted the present Petition seeking the following reliefs verbatim:

a) **A declaration that the denial of information by the 1st Respondent contravened the Petitioner's rights under Article 35 (1) (a) and (b) of the Constitution.**

b) **A declaration that the Respondents have contravened the Petitioner's rights to property, in relation to KJD/KAPUTIEI NORTH/4977 through the denial of particulars of registration of the same.**

c) **An order of mandamus do issue to compel the 1st Respondent to supply to the Petitioner an abstract of title and cadastral map in respect of KJD/KAPUTIEI NORTH/4977.**

d) **In the alternative, a mandatory injunction do issue to the 1st Respondent to supply to the Petitioner an abstract of title and cadastral map in respect of KJD/KAPUTIEI NORTH/4977.**

e) **An order that the 1st Respondent do issue to the Petitioner the title deed in respect of KJD/KAPUTIEI NORTH/4977.**

f) **Costs of this suit.**

7. The Petition is supported by the sworn **Supporting Affidavit of Peter Githiri Wahome** sworn on 15th June 2017, in which the Petitioner reiterates the contents of the Petition and further deposes that he is the registered proprietor of two parcels of land namely **Kajiado/Kaputiei North/1836** measuring 10 acres and **Kajiado/Kaputiei North/4977**, measuring approximately 5 acres. He avers that the acquisition of these parcels arose from a joint purchase arrangement

undertaken in 1992 involving himself, his brother **Shadrack Wang'ombe Wahome**, and two other acquaintances, each contributing Kshs. 70,000 towards the purchase price of a 40-acre parcel at the rate of Kshs. 7,000 per acre.

8. The Petitioner avers that while he and the two acquaintances paid their respective contributions in full, his brother was only able to raise Kshs. 35,000. Consequently, an arrangement was made under which the Petitioner paid the balance of Kshs. 35,000 on behalf of his brother, on the understanding that the latter would subsequently transfer to him half of his 10-acres' entitlement. The Petitioner states that following payment of the purchase price, the four purchasers were on **18th July 1997** registered as proprietors of 10 acres each, and title deeds were duly issued.
9. The Petitioner further states that on **7th November 1998**, his brother caused parcel **Kajiado/Kaputiei North/1835** to be subdivided into two equal portions, namely **Kajiado/Kaputiei North/4976** and **Kajiado/Kaputiei North/4977**, and transferred the latter, measuring 5 acres to him pursuant to their prior arrangement. He avers that although the transfer was registered, he was never issued with a title deed for the parcel of land **Kajiado/Kaputiei North/4977**.
10. The Petitioner further deposes that on **25th November 2016**, through his advocates, he applied to the 1st Respondent for a certified extract of the land register and a copy of the cadastral map in respect of **Kajiado/Kaputiei North/4977**. He asserts that the 1st Respondent, instead of supplying the information, demanded that he provides reasons for requiring the register. Upon being furnished with such reasons on **28th November 2016**, the 1st Respondent allegedly refused to supply the requested documents, stating that the **green card** relating to the parcel was **missing from the binder**.

11. The Petitioner contends that the 1st Respondent's explanation is irrational and untenable in light of the statutory obligations imposed on the office by **section 9 of the Land Registration Act**, which requires the Land Registrar to maintain a complete and accurate land register and to replace lost or damaged registers where necessary. He deposes that the 1st Respondent's failure to provide him a certified extract of the land register and a copy of the cadastral map in respect of **Kajiado/Kaputiei North/4977** amounts to a breach of his statutory duty and is amenable to an order of **mandamus**.
12. The Petitioner further avers that he is apprehensive of potential fraud being perpetrated in respect of the parcel owing to the absence of a verifiable and accessible land register. He asserts that the 1st Respondent's conduct has infringed his constitutional right to **access to information** under **Article 35(1)(a) & (b)** and threatens his right to **property** guaranteed under **Article 40** of the Constitution, particularly because prospective purchasers cannot verify entries relating to the said parcel.
13. The Petitioner therefore maintains that this Court, by virtue of **Article 23(3)** of the Constitution, has jurisdiction to grant him the reliefs sought, including declaration of violation of rights, order of mandamus, mandatory injunction, and consequential orders compelling issuance of a title deed in his favour.
14. The 1st and 2nd Respondents entered appearance and opposed the Petition through **Grounds of Opposition dated 20th July 2017**, wherein they contend that the Petition is an abuse of the court process and raises no constitutional issues capable of invoking the jurisdiction of this Court. They assert that the matters complained of are purely civil in nature and ought to have been ventilated in an ordinary civil claim where witnesses would be called and examined. The Respondents further state that the Petitioner has not demonstrated any violation of his

constitutional rights and has not furnished evidence of ownership of the suit property, thereby rendering allegations of breach of Article 40 untenable. The Respondents accordingly urge the Court to dismiss the Petition with costs.

15. The Respondents further filed a **Replying Affidavit sworn on 20th July 2017 by Nyandoro D. Nyambaso**, the District Land Registrar, Kajiado, who deposes that he is conversant with the facts of the matter and duly authorized to swear the affidavit on behalf of the Respondents. He states that the land records held at the Kajiado Land Registry indicate that **Land Parcel Kajiado/Kaputiei North/1835**, measuring approximately 4.04 hectares, is registered in the name of **Shadrack Wang'ombe Wahome**, and that the title deed was issued on **8th July 1997**.
16. The Land Registrar avers that contrary to the Petitioner's assertions, **Land Parcel Kajiado/Kaputiei North/1835 has never been subdivided**, as reflected in the green card maintained at the registry. He further states that **Land Parcel Kajiado/Kaputiei North/1836**, also measuring 4.04 hectares, is registered in the name of the Petitioner, and a title deed was likewise issued to him on 8th July 1997. He maintains that the registry has **no record whatsoever** of parcels **Kajiado/Kaputiei North/4976** or **Kajiado/Kaputiei North/4977**, the parcels described by the Petitioner as resulting from the alleged subdivision of parcel **Kajiado/Kaputiei North/1835**.
17. The Land Registrar deposes that while the Registrar is under a statutory duty to maintain and keep land records and make them accessible to the public, such duty extends only to the supply of information that is actually available in the registry. He asserts that the Registrar cannot manufacture information or create records that do not exist merely to satisfy the request of an applicant. The Registrar therefore contends that the Petitioner's claim is baseless, given that the alleged subdivisions and resultant parcels do not exist in the official register.

18. The Respondents further aver that the mutation forms annexed to the Petition as evidence of subdivision were **never registered**, and that a close examination reveals that they lack the requisite registry date stamp and payment receipts to confirm presentation for registration. Accordingly, the Respondents maintain that the alleged subdivision of **Kajiado/Kaputiei North/1835** was never legally or formally undertaken, and the purported parcels **Kajiado/Kaputiei North/4976 and 4977** have no legal existence in the land register.
19. The Land Registrar also states that his office was not party to any private arrangement or agreement between the Petitioner and his brother concerning subdivision or transfer of land. He asserts that since parcels 4976 and 4977 do not exist in law, no transfer could lawfully have been effected to the Petitioner, and the claim that the 1st Respondent is withholding a non-existent green card is unfounded.
20. The Respondents therefore contend that, based on legal advice from the State Counsel which the deponent believes to be true, the Petition is frivolous, devoid of merit, and constitutes an abuse of court process. They maintain that the Petitioner has not satisfied the legal threshold for the grant of constitutional reliefs or the remedy of mandamus sought. They accordingly pray that the Petition be dismissed with costs.
21. In further response to the issues raised by the Respondents, the Plaintiff filed a Further Affidavit sworn by **Josphat Kioko**, a process server of this Honourable Court and a conveyancing clerk attached to the firm of M/s Kamau Kuria & Company Advocates. In the said affidavit, Mr. Kioko deposes that on 25th November 2016, he was instructed by the Petitioner's advocates to attend the Kajiado Lands Registry and conduct an official search in respect of property known as **KJD/KAPUTIENI-NORTH/1836**. He avers that upon presenting the duly completed search application to the Land Registrar, one **Mr. Nyandoro D. Nyambaso**, the Registrar endorsed on

his copy the words: “*Kindly give reasons why you need the land register.*” He annexes the said endorsed application as evidence of this encounter.

22. Mr. Kioko further states that on 2nd December 2016, he collected from the Petitioner’s advocates two copies of a letter dated 28th November 2016 addressed to the said Land Registrar, which he was instructed to serve upon the land Registrar. He deposes that upon attending the Lands Registry at about 10:00 a.m. on the same day, he was repeatedly denied audience by the Registrar throughout the day and only managed to serve him at approximately 6:00 p.m. He later learnt that the Registrar subsequently responded to the said letter indicating that the green card relating to the suit property was missing from the binder.

23. The deponent asserts that, based on his personal interactions at the Kajiado Land registry, the Land Registrar declined to provide the requested information when he attended the office, and that the averments now contained in the Registrar’s Replying Affidavit are false and intended to mislead the Court, as they contradict the position taken by the Registrar during his visits.

Analysis of Evidence

24. Having carefully considered the Petition, the affidavits filed, the oral highlights, and the documentary evidence placed before the Court, the issues emerging from the evidence can now be analyzed.

25. The Petitioner adopted his 29-paragraphs affidavit sworn on 15th June 2017 in support of the Petition, as well as his Further Affidavit sworn on 14th October 2017. He produced the bundle of documents annexed to his supporting affidavit as exhibits in support of his case. The Petitioner’s narrative was materially corroborated by the Further Affidavit of Mr. Josphat Kioko, a process server and conveyancing clerk, who set out the sequence of events surrounding his attempts to obtain information from the 1st Respondent’s office, including the initial refusal by the Land

Registrar to provide a land register extract and the later explanation that the green card for Kajiado/Kaputiei North/4977 was “missing from the binder.”

26. The Petitioner, his two friends, and his brother jointly purchased four parcels of land, each purchaser being registered individually as proprietor of his respective 10 acres parcel. The Petitioner became the registered owner of Kajiado/Kaputiei North/1836, while his brother, Shadrack Wang’ombe Wahome, became the registered owner of Kajiado/Kaputiei North/1835.
27. The Petitioner testified that his brother Shadrack only able to pay Kshs. 35,000, being half of the purchase price required of each buyer. Consequently, the Petitioner paid that other half on his behalf, on the understanding that the property would be subdivided equally, and that Shadrack would transfer 5 acres to him. In effect, Shadrack held 5 acres in trust for the Petitioner.
28. The Petitioner produced mutation forms (pages 5–8 of his bundle) showing that Kajiado/Kaputiei North/1835 was subdivided into two equal portions, and that new parcel numbers 4976 and 4977 were created. The Petitioner further produced executed transfer forms (pages 13–15), showing that Shadrack transferred parcel Kajiado/Kaputiei North/4977 to him.
29. The Petitioner pointed out that the Land Registrar, Mr. Nyandoro, in his letter dated 15th December 2016, had acknowledged that a land register had indeed been opened for parcel Kajiado/Kaputiei North/4977, but that the green card and parcel file were missing.
30. The Further Affidavit of Mr. Kioko avers that he attended the Kajiado Lands Registry to conduct an official search when the Land Registrar endorsed his application demanding reasons for the request, but later declined to provide the requested register, eventually issuing a letter indicating that the green card was missing.
31. Conversely, the Respondents contested the Petitioner’s case, primarily asserting that there is **no record** of parcels **Kajiado/Kaputiei 4976 and 4977**, and that **Kajiado/Kaputiei North/1835**

has never been subdivided. They argued that the mutation forms relied upon by the Petitioner were never registered, lacked a booking date, bore no official stamp, and were unsupported by payment receipts or entries in the land register. They further denied any obligation to produce information that is allegedly not in existence.

Analysis of Submissions

32. In his written submissions, the Petitioner contends that the acts and omissions of the 1st Respondent, the Land Registrar Kajiado, amounted to a clear violation of his constitutionally guaranteed rights. The Petitioner submits that the Respondents' refusal and/or failure to supply information relating to the land register, abstract of title, parcel file, and cadastral map for land parcel Kajiado/Kaputiei North/4977 was unlawful, unreasonable and unconstitutional, and that such non-disclosure further infringed his right to property in respect of the said parcel.
33. Counsel for the Petitioner anchored the Petition principally on the Constitution of Kenya, 2010. He invoked Articles 22(1), 23(1) and (3), and 165(3)(b) to submit that this Court has the jurisdiction and obligation to enforce the Bill of Rights and to grant "appropriate relief," including declarations, injunctions and orders of mandamus. He submitted that Article 35(1)(a) and (b) expressly grants every citizen the right of access to information held by the State, or by another person where such information is required for the exercise or protection of any right, and that this right is unqualified and cannot be withheld on account of motive or reason. The Petitioner further cited Article 40 on the protection of the right to property, arguing that by denying him access to registration particulars of parcel 4977, the Respondents effectively obstructed and diminished his proprietary rights. Articles 10 and 232 of the Constitution were also relied upon to underscore that the conduct of the Land Registrar fell short of the national values of transparency, accountability and good governance, and the values and principles of

public service including efficient, responsive and accountable service delivery. The Petitioner further relied on Article 24(1) and (3) to argue that no lawful justification was advanced by the Respondents to demonstrate that the limitation of his right to information was reasonable or justifiable.

34. Beyond the constitutional text, the Petitioner placed reliance on various statutory provisions. Section 4 of the Access to Information Act, 2016 was cited for the proposition that every citizen has the right to access information held by the State, that such access cannot be hindered by the reason for seeking the information, and that disclosure must be prompt and at reasonable cost. The Petitioner further relied on Section 10 of the Land Registration Act, which imposes a duty upon the Land Registrar to maintain the register and all documents required to be kept under the Act. He submitted that the disappearance of the green card and register relating to parcel 4977, coupled with the inconsistent communications from the 1st Respondent's office, constituted a dereliction of this statutory duty. Section 112 of the Evidence Act was also invoked to argue that where a fact is especially within the knowledge of a party, the burden of proving that fact lies upon that party. Accordingly, the Respondents bore the burden to account for the missing land records. The Petitioner also referred to Legal Notice No. 117 of 2013, Rule 20, which permits the hearing of constitutional petitions by way of affidavit evidence, written submissions or oral evidence, and submitted that his case had been properly supported by documentary and affidavit evidence.
35. The Petitioner supplemented his arguments with international principles, in particular Principle 26(1) of the *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, which affirms the right of access to information held by public and private bodies as a cornerstone of democratic governance.

36. Case law was cited in support of the Petition. On the nature and scope of the Court’s remedial jurisdiction under Article 23(3), the Petitioner relied on the Privy Council decisions in *Ramanoop v Attorney-General of Trinidad and Tobago (2004) 1 LRC* and *Gairy v Attorney-General of Grenada (2001) 4 LRC* 670. Both authorities were cited in support of the principle that where constitutional rights are violated, the Court is empowered to “fashion the remedy” or even “invent new ones” to secure the effective protection and vindication of those rights. Locally, the Petitioner relied on *Onqiri Harun Osinde v Chief Land Registrar & another [2021] KEHC 5104 (KLR)*, where similar constitutional remedies relating to land records were granted.

37. On the issue of land records, the Torrens system and the indefeasibility of title, the Petitioner cited *Elizabeth Wambui Githinji v KURA & 27 others (Civil Appeal No. 156 of 2013)* for the proposition that the State, through its land officers, is the legal custodian of all land records. He further invoked the classical authorities of *Breskvar v Wall (1971) 126 CLR* and *Gibbs v Messer (1891) AC 248*, where the courts explained that the Torrens system is a regime of title by registration which confers certainty and protects persons dealing with registered proprietors from the burden of investigating past transactions. According to the Petitioner, the disappearance of the parcel file and the denial of information by the Land Registrar amounted to an impermissible dismantling of the integrity of the registration system. He also relied on *Mass Construction Limited v Abdul Waheed Sheikh & 6 others (Court of Appeal E789 of 2023)*, where the Court lamented the “shameful betrayal of the State by corrupt land officers” in enabling fraudulent dealings with land. The Petitioner argued that the circumstances of this case fell squarely within that category of official misconduct. He further cited *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR* on the constitutional right to property under Article 40.

38. On the right to access information under Article 35, the Petitioner relied on *Mpuru Aburi v Meru County Public Service Board & 4 others [2021] eKLR*, where the Court affirmed that information held by the State must be availed to citizens promptly and without the need to justify the request. He also cited *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company Ltd & 2 Others [2013] eKLR*, where the Court held that the right to information is essential for enforcement of constitutional rights and that a court may order production of information where a public body has refused to supply it. Other comparative authorities included *Brummer v Minister for Social Development & Others [2009] ZACC 21*, where the South African Constitutional Court underscored the importance of access to information in enhancing transparency and administrative justice. The Petitioner also relied on *Narok ELC Petition No. 380 of 2017 Sandiko & 2 others v Attorney General & 6 others; Saoli & 67 others (Interested Parties) [2022] KEELC 2482 (KLR)*, which elaborated that the right of access to information is indispensable in facilitating democratic governance and protecting other rights. Further reliance was placed on *Mercy Nyawade v Banking Fraud Investigations Department & 2 others [2017] KEHC 9108 (KLR)*, which held that once denial of information is alleged, it is the State that must justify non-disclosure and may only withhold information in circumstances permitted by law.
39. On the protection of property rights under Article 40, the Petitioner cited *Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ)*, where the Supreme Court held that private property may not be appropriated by the State except through unlawful compulsory acquisition, and that the issuance of titles to third parties over a proprietor's land amounted to a violation of Article 40. He further relied on *Attorney General v Kituo cha Sheria & 7 others*

[2017] eKLR in support of the principle that rights have inherent value and that their protection is a duty, not a favour, owed by the State to its citizens.

40. Regarding mandamus, the Petitioner cited *Shah v Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543*, and *Republic v Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996*, for the settled position that mandamus lies to compel the performance of a public duty that has been unlawfully withheld, provided the applicant has a legal right to its performance.
41. Additional authorities included *Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)*, where the Supreme Court examined the relationship between denial of information and the impairment of constitutional rights, and *Maneka Gandhi v Union of India & Another (1977) SC 597*, a landmark Indian Supreme Court decision cited for its exposition on the values of fairness, non-arbitrariness, and due process in administrative conduct. The Petitioner also referred to *Standard Resource Group v Attorney General & Others, High Court Petition No. 342 of 2016*, in support of the argument that public officers bear a duty to avail documents in their custody whenever those documents affect a citizen's rights.
42. In conclusion, the Petitioner urged this Court to find that the Respondents' failure to provide the requested information was unlawful and unconstitutional, that the disappearance of key land records constituted an unjustifiable derogation from his rights under Articles 35 and 40, and that the circumstances of the case fully justify the grant of the declaratory, mandatory and coercive reliefs sought.
43. The Respondents, in their submissions, oppose the Petition and urge the Court to find that the proceedings are misconceived, premature, and an abuse of the court process. According to them,

the reliefs sought are incapable of enforcement within the constitutional framework invoked by the Petitioner, and the Petition fails both procedurally and substantively.

44. Counsel for the Respondents submits that the gravamen of the Petitioner's complaint revolves around the alleged loss or unavailability of land records relating to parcel **KJD/KAPUTIEI NORTH/4977**, and the corresponding prayer that the 1st Respondent be compelled to provide an abstract of title, cadastral map, and eventually issue a title deed in favour of the Petitioner. It is their position that the 1st Respondent is merely the custodian of land records as provided under the Land Registration Act and cannot be compelled, through a constitutional petition, to generate, reconstruct, or manufacture documents that do not exist in the parcel file or the register.
45. In that regard, the Respondents argue that the Petitioner's documents—comprising the sale agreement, letters from the Land Control Board, or copies of alleged mutation forms—do not, either individually or collectively, amount to conclusive proof of ownership. The Respondents maintain that under the Torrens system of registration, it is the register itself—not ancillary documents—that constitutes the source of title; therefore, in the absence of a valid register or green card, the Petitioner cannot seek declaratory or constitutional reliefs.
46. The Respondents further submit that the Petition improperly seeks to rely on **Article 35** of the Constitution without complying with the **Access to Information Act, 2016**, which operationalizes that right. They particularly invoke **Section 14** of the Act, which obligates an aggrieved person to seek a review before the **Commission on Administrative Justice** (the Ombudsman) where access to information has been denied. Relying on this provision, they argue that the Petitioner's claim under Article 35 is premature, and that the constitutional jurisdiction of this Court cannot be invoked before exhaustion of the statutory mechanism.

47. This submission is fortified by reliance on the well-established principle in *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*, where the Court of Appeal emphasized that where a statute provides a dispute-resolution mechanism, the same must be strictly followed. The Respondents submit that this principle has since been consistently applied, including in *Samson K. Rote & another v IEBC & another [2023] eKLR*, and *Ngetich v Judicial Service Commission & another [2021] eKLR*, the latter expressly holding that claims under Article 35 must first be channeled through the Access to Information Act, including the appellate mechanism before the CAJ.
48. To further reinforce the argument on the existence of an adequate alternative remedy, the Respondents invoke **Section 107 of the Land Registration Act, 2012**, which grants the Registrar statutory powers to rectify the register and issue new titles where the original has been lost, destroyed, or is unavailable. It is therefore their submission that the Petitioner ought to have invoked this administrative and statutory mechanism instead of approaching the Court through a constitutional petition.
49. Concerning the orders of mandamus and mandatory injunction sought by the Petitioner, the Respondents submit that such remedies are inappropriate in the circumstances. They contend that mandamus cannot issue where a statute provides an alternative, convenient, beneficial, and effectual remedy. For this proposition, they rely on *Republic v Commissioner of Lands Ex parte Lake Flowers Limited [2002] 1 EA 240*, where the Court held that mandamus is a remedy of last resort and cannot be invoked where a statutory process exists for achieving the desired outcome. Additionally, they cite the Court of Appeal's exposition in *Republic v Kenya National Examinations Council Ex parte Gathenji & Others (Civil Appeal No. 266 of 1996)*, where the Court held that mandamus compels the performance of a plainly defined duty and cannot dictate

the manner of its performance where discretion is vested in a public officer. The Respondents assert that Section 107 of the Land Registration Act vests discretion in the Registrar on how to deal with lost or missing records, hence the Court cannot compel the Registrar to act in a specific manner.

50. The Respondents further submit that the Petition raises a contested issue of ownership which, in their view, constitutes a dispute of fact that cannot be resolved within a constitutional petition. They maintain that the constitutional jurisdiction of this Court is not meant to supplant the procedures laid out in statute for the adjudication of land ownership disputes or rectification of the register.

51. Finally, they argue that the Petitioner has not demonstrated any violation of **Article 35** or **Article 40**, since the Respondents cannot be held responsible for missing records and the Petitioner has not shown that the alleged denial of information was deliberate, malicious, or unconstitutional. They argue that the right to information is not absolute and is subject to reasonable restrictions under the Access to Information Act, including the exemption provision under **Section 13(2)(c)**, which the Respondents allude to as potentially applicable. On the strength of the above arguments, the Respondents urge this Court to dismiss the Petition with costs.

Issues for Determination

52. Based on the pleadings, evidence, and submissions in **ELC Petition No. 17 of 2017**, the sole issue that arises for determination by this Court is whether the Petitioner has made a case to warrant the grant of the reliefs sought.

Analysis and Determination

53. **The Constitution of Kenya** guarantees under **Article 35** that:

“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.”

54. The Petitioner’s evidence establishes that he made a clear request to the 1st Respondent for access to the land register, parcel file, and cadastral map relating to Kajiado/Kaputiei North 4977. His own affidavit, together with that of Mr. Kioko, demonstrates that the Registrar’s office declined to provide the documents, demanded reasons for the request, and later claimed the relevant “green card” was missing.

55. **The Access to Information Act, 2016, in Section 4**, echoes the constitutional guarantee by stating:

“Subject to this Act and any other written law, every citizen has the right of access to information held by ... the State; and ... another person and where that information is required for the exercise or protection of any right or fundamental freedom.”

56. The Petitioner has cited the decision in **Mpuru Aburi v Meru County Public Service Board & 4 Others [2021] KEHC 9259**, where the High Court held that once a citizen places a request to access information, the information should be availed to the citizen without delay. Stressing that Article 35 does not in any way place conditions for accessing information. He argues that the Registrar’s refusal, is without lawful basis and is incompatible with that duty.

57. **Article 35** is operationalized through the Access to Information Act, 2016. The said Act at **Sections 8 &9** specifies the steps to be taken to obtain access to information, which are follows:

“8. (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and

sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.

(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

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

(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.

(3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if — (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or (b)

consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating —

(a) whether or not the public entity or private body holds the information sought;

(b) whether the request for information is approved:

(c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

(d) if the request is declined, a statement about how the requester may appeal to the Commission"

Further 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.”

58. Upon careful consideration of the applicable constitutional and statutory framework, as well as the binding precedents of the Superior courts, this Court opines that the Petitioner prematurely invoked the jurisdiction of this Court without exhausting the dispute-resolution procedures expressly provided for in the Access to Information *Act, 2016*.

59. *Article 35 of the Constitution* guarantees every citizen the right of access to information held by the State. However, that right is **not self-executing** in the sense that access must be sought in accordance with the statutory framework enacted to operationalize it. Section 8 of the Access to Information Act sets out the procedure for requesting information, while **Section 14** establishes the mechanism for review by the Commission on Administrative Justice (the Ombudsman) where access has been denied or unreasonably delayed.

60. The Supreme Court has now authoritatively pronounced itself on this exact point. In *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] KESC 45 (KLR)*, the Court emphasized that although Article 35 grants a constitutional right, information must still be sought **from the lawful custodian in the manner prescribed by law**, and citizens bear a corresponding duty to follow due process. At paragraphs 13–23, the Court stated:

“...information should flow from the custodian of such information to the recipients in a manner recognized under the law... a duty has also been imposed

upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from... It is a two-way channel where the right has to be balanced with the obligation to follow due process.”

61. This reasoning has been reaffirmed in the recent Supreme Court decision of *Aluochier v Senate & 2 Others [2025] KESC 59 (KLR)*, where the Court held that:

“...citizens should be able to access the information by first requesting for the information from the relevant State agency... The right to institute an action in court only crystallizes once a citizen has requested for the information from the State and the request has been denied or not provided.”

62. Critically, the Court emphasized that where denial occurs, the Access to Information Act provides a **statutory mechanism** and only after exhaustion of that mechanism may a party move to Court.

63. This position resonates squarely with the long-standing principle in *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*, where it was held that:

“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.”

64. The doctrine of exhaustion was comprehensively considered by a five-Judge Bench of the High Court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR (Constitutional Petition No. 159 of 2018 consolidated with Petition No. 201 of 2019)*. The Court explained the rationale of the doctrine as follows:

“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...”

65. This authoritative exposition affirms that the exhaustion doctrine is a constitutionally aligned rule that requires litigants to first utilize the specialized mechanisms created by statute before approaching the Court. It promotes administrative self-correction, conserves judicial resources, and allows the body expressly mandated by Parliament to handle such disputes in the first instance. The same position had earlier been emphasized in *R v Independent Electoral and Boundaries Commission Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR*, where the Court described the exhaustion doctrine as having “esteemed juridical lineage” in Kenya.

66. There exists a specific statutory framework for addressing disputes arising from requests for information, and a party aggrieved by such a decision is required to follow that mechanism. Had the Petitioner been dissatisfied with the 1st Respondent’s response, he was obligated to seek a review before the Commission on Administrative Justice prior to moving this Court. Consequently, the present Petition was instituted prematurely and in breach of the doctrine of exhaustion of administrative remedies. In the absence of evidence that the Petitioner invoked the

mechanisms under the Access to Information Act, this Court is constrained to find that the Petition offends the doctrine of exhaustion and is therefore premature.

67. Having found that the Petition offends the doctrine of exhaustion of remedies as established under the Access to Information Act No. 31 of 2016, this Court is satisfied that the Petition was instituted prematurely without recourse to the statutory mechanisms prescribed under the Access to Information Act, particularly the mandatory review process before the Commission on Administrative Justice.

68. In the absence of any demonstrated exceptional circumstances to justify bypassing the statutory procedure, the Court lacks jurisdiction to entertain the Petition in its present form. The proper course, therefore, is to decline the invitation to exercise constitutional jurisdiction at this stage.

69. Accordingly, the Petition dated 15th June 2017 is hereby **struck out** but with no orders as to costs.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 11th Day of December 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Nduta Kamau h/b for Dr. Kamau Kuria for the Petitioner

Ms. Ndundu for the Respondents

Court Assistant: Mpoeye

M.D. MWANGI

JUDGE

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