



**Bii & another v National Government Affirmative Action Board & 4 others (Constitutional Petition E009 of 2024) [2026] KEHC 6367 (KLR) (6 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6367 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CONSTITUTIONAL PETITION E009 OF 2024**

**JK NG'ARNG'AR, J**

**MAY 6, 2026**

**IN THE MATTER OF: ARTICLES 1(1), 1(2), 3(1), 10, 21, 22, 23, 159, 258(1) & (2), 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATIONS OF ARTICLES 10 (1) (2), 21(1) (3), 35(1) AND 232(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013 AND IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012**

**AND**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT (NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUND REGULATIONS 2016)**

**BETWEEN**

**STANLEY BII ..... 1<sup>ST</sup> PETITIONER**

**WILITER CHESANG KIRUI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NATIONAL GOVERNMENT AFFIRMATIVE ACTION BOARD .... 1<sup>ST</sup> RESPONDENT**

**NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUND BOMET COUNTY COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY CO-ORDINATOR, BOMET COUNTY NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUND (NGAAF) . 3<sup>RD</sup> RESPONDENT**

**AND**



HON LINET CHEPKORIR ..... 1<sup>ST</sup> INTERESTED PARTY

REAL GATES KIMASE CENTRAL GROUP ..... 2<sup>ND</sup> INTERESTED PARTY

## JUDGMENT

1. Through the Petition dated 26<sup>th</sup> September 2024, the Petitioners sought the following reliefs that: -
  - I. A Declaration that the Respondent's failure to respond to the Petitioners demand letter dated 1<sup>st</sup> November 2023 violated Article 35 of *the Constitution* as read together with the *Access to Information Act*.
  - II. A Declaration that the Respondents failure to act on the Petitioners' Application for supply of information violated Article 10 of *the Constitution* specifically the principles of good governance, transparency, integrity and accountability.
  - III. An order of Mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to avail the information sought by the Petitioners.
  - IV. An award for general damages resulting from the violation of the Petitioners' fundamental rights and freedoms.
  - V. Costs of the Petition and interest thereon at court rates.
  - VI. Any other relief and or further relief that the court deems fit and just to grant in the circumstances.

### The Petitioners' case

2. The Petitioners stated that vulnerable groups and suppliers in Bomet County had complained of the use and disbursements of Bomet NGAAF money.
3. It was the Petitioner's case that on 1<sup>st</sup> November 2023 in exercise of their constitutional right of access to information guaranteed under Article 35 of *the Constitution*, they sent a Demand Letter to the 2<sup>nd</sup> Respondent seeking information on the Bomet County National Government Affirmative Action Fund. That they sought to be supplied information on the entire amount of NGAAF money received by NGAAF Bomet County Committee for the financial year 2023/2024 and the record of expenditure and the accompanying bank statements.
4. The Petitioners stated that the 3<sup>rd</sup> Respondent being the custodian of all the records and equipment of NGAAF Bomet County ignored and refused to respond to their Demand Letter. That while waiting for the response, the Petitioners learnt that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents upon submission of proposals for approval to the NGAAF National Office, received an approval for the utilization of Kenya Shillings Three Million Eight Hundred and One Thousand Six Hundred and Forty-Eight and Sixteen Cents (Kshs 3,801,648.16/=) for the second quarter of the 2023/2024 financial year. The Petitioners further stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had submitted to the NGAAF CEO an approval for the disbursement of Kenya Shillings Three Million Nine Hundred and Thirteen Thousand Five Hundred and Seventy-Eight and Fourteen Cents (Kshs 3,913,578.14) for the third quarter of the 2023/2024 financial year.
5. It was the Petitioners' case that they believed that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were perpetuating pilferage of public funds through disbursing the approved NGAAF funds in utter disregard to the



rules and procedures set out in the [Public Finance Management Act](#) (2012) as well as the Public Finance Management (National Government Affirmative Action Fund) Regulations, 2016. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were using personal bank accounts to disburse the money and were disbursing less amounts of money than those approved.

6. The Petitioners stated that the 2<sup>nd</sup> Interested Party had been approved to receive Kenya Shillings Three Hundred Thousand (Kshs 300,000/=) after initially requisitioning Kenya Shillings Five Hundred Thousand (Kshs 500,000/=). That the 2<sup>nd</sup> Interested Party only received Kenya Shillings One Hundred and Fifty Thousand (Kshs 150,000/=), an amount which was disbursed by a personal bank deposit by an unknown individual known as Bethwel. The Petitioners further stated that they invoked Articles 22 and 258 of [the Constitution](#) of Kenya to defend the values and principles of [the Constitution](#) including good governance, transparency and accountability.
7. Through their written submissions dated 12<sup>th</sup> November 2025, the Petitioners submitted that they made a lawful and specific written demand dated 1<sup>st</sup> November 2023 for information and the Respondents ignored and failed to reply to the same. That Article 35(3) of [the Constitution](#) of Kenya placed a constitutional obligation on public entities to proactively publish important information affecting the public. The Petitioners further submitted that the Respondents' silence amounted to a denial of their right to access information. They relied on *Mutia & another v Attorney General & 3 others*; *KNCHR & 2 others (Interested Parties) [2024] KEHC*, Kenya Human Rights Commission & another v Attorney General & another [2024] KEHC 15702 et.al. That the Respondents' claim that they did not receive the letter was untenable because even in the absence of the demand letter, the Respondents were required by section 5 of the [Access to Information Act](#) to proactively disclose all public information.
8. It was the Petitioners' submission that the Respondents' conduct of disbursing NGAAF fund through personal accounts and underpaying approved allocations amounted to gross violation of [the Constitution](#) of Kenya. They relied on section 10 of the [Public Finance Management Act](#), section 7 of the NGAAF Act and *Trusted Society of Human Rights Alliance v Cabinet Secretary, Devolution & Planning & 3 others (2017) eKLR*.
9. The Petitioners submitted that the Respondents' actions fell below the constitutional threshold of good governance. That the Respondents acted in bad faith and violated Article 10 of [the Constitution](#) of Kenya. They relied on *Kituo cha Sheria v Central Bank of Kenya & 8 others (2014) eKLR*.
10. It was the Petitioners' submission that the standard of proof in Constitutional Petitions was on a balance of probabilities and they had established a prima facie case showing the violation of their constitutional rights.

## Response

11. The Respondents filed Grounds of Opposition and a Replying Affidavit both dated 2<sup>nd</sup> December 2024. They stated that this court did not have the jurisdiction to determine this matter. That section 3 of the [Commission on Administrative Justice Act](#) established a Commission known as Commission on Administrative Justice. The Respondent further stated that section 20(1) of the [Access to Information Act](#) granted the Commission on Administrative Justice the powers of oversight and enforcement of the Act.
12. It was the Respondents' case that section 23 of the [Access to Information Act](#) granted the Commission on Administrative Justice the powers to investigate, issue summons and orders in relation to access of information. That the Commission on Administrative Justice was authorized to order any lawful



remedy in response to any infringement of rights. It was the Respondents' further case that the Petitioners had not exhausted the legal mechanisms available to them in addressing their concerns.

13. The Respondents stated that the Petitioners had not tabled evidence showing that they filed a complaint before the Commission on Administrative Justice. The Petitioners stated that the Petitioners did not send them the Demand Letter dated 1<sup>st</sup> November 2023 and therefore the Petition was unmerited.
14. It was the Respondents' case that section 6 of the *Access to Information Act* limited the right of access to information whose disclosure may damage a public entity's position in any legal proceedings. That the Petitioners sought to use the information to file complaints against them before the Ethics and Anti-Corruption Commission and the Director of Criminal Investigations.
15. Through their written submissions dated 15<sup>th</sup> November 2025, the Respondents submitted that the Petitioners had not met the threshold for a Constitutional Petition particularly how the lack of response to the demand letter violated their constitutional rights. They relied on *Makokha v Commissioner General of Prisons & 3 others* (Petition 46 of 2019) [2022] KEHC 12339 (KLR).
16. It was the Respondents submission that the Petitioners had not satisfied the doctrine of exhaustion. That section 23(2) of the *Access to Information Act* authorized the Commission on Administrative Justice to issue remedies of infringement of rights under the Act. They relied on *Bernard Murage v Fineserve Africa Limited & 3 others* (2015) eKLR and *Omari v Kenyatta University Teaching Referral and Research Hospital & another* (Petition E198 of 2025) [2025] KEHC 4809 (KLR) (Constitutional and Human Rights) (23 April 2025). It was the Respondents' further submission that invoking the court to address an administrative action was an abuse of the court process as the Petitioners had not exhausted all the avenues prior to filing the Petition.
17. The Respondents submitted that any person who sought information would do so under the provisions of section 8 of the *Access to Information Act*. That the Petitioners were duty bound to follow the said procedure contained in section 8 of the *Access to Information Act*. They relied on *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR.
18. It was the Respondents' submission that the Petitioners had not submitted any evidence to show that they served and the Respondents received the demand letter dated 1<sup>st</sup> November 2023.
19. I have gone through and considered the Petition dated 26<sup>th</sup> September 2024, the Respondents' Grounds of Opposition and Replying Affidavit both dated 2<sup>nd</sup> December 2024, the Petitioners' written submissions dated 12<sup>th</sup> November 2025 and the Respondents' written submissions dated 15<sup>th</sup> November 2025. I sieve two issues for my determination as follows: -
  - i. Whether the Petition offended the doctrine of exhaustion.
  - ii. Whether the Petitioners were entitled to the reliefs sought.

**i. Whether the Petition offended the doctrine of exhaustion.**

20. It was the Respondents' case that the Petition offended the doctrine of exhaustion as the Petitioners had not exhausted the remedies available to them under the *Access to Information Act*.
21. The Doctrine of Exhaustion is defined in Black's Law Dictionary 10<sup>th</sup> Edition as follows: -

The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain



- comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.
22. The Respondents stated that the Commission on Administrative Justice was mandated by the [Access to Information Act](#) to deal with the issues that the Petitioners raised. The Petitioners contended that they sought information from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in regards to the disbursement of NGAAF funds within Bomet County for the financial year 2023-2024. The Petitioners further stated that they did so by dint of Article 35 of [the Constitution](#) of Kenya.
23. Article 35 of [the Constitution](#) of Kenya provides: -
- (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.
24. It was not in doubt that the 2<sup>nd</sup> Respondent was a public body and it goes without saying that the Petitioners sought information from the said public body. The Act of Parliament which gave effect to Article 35 of [the Constitution](#) of Kenya was the [Access to Information Act](#) which was described 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
25. The Commission on Administrative Justice was established by section 3 of the [Access to Information Act](#) which provided: -
- The object and purpose of this Act is to—
- (a) give effect to the right of access to information by citizens as provided under Article 35 of [the Constitution](#);
  - (b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;
  - (c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by [the Constitution](#) and any other law;
  - (d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;
  - (e) provide for the protection of persons who disclose information of public interest in good faith; and
  - (f) provide a framework to facilitate public education on the right to access information under this Act.
26. For the purpose of this Petition, section 21 (1) (a) of the [Access to Information Act](#) provides: -



The functions of the Commission shall be to investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions of this Act.

27. Section 22 of the [Access to Information Act](#) provides the modalities of making a complaint to the Commission to wit: -

- (1) A person wishing to lodge a complaint under this Act shall do so orally or in writing to the secretary or such other person as may be duly authorized by the Commission for that purpose.
- (2) A complaint lodged under subsection (1) shall be in such form and contain such particulars as the Commission may, from time to time, prescribe.
- (3) Upon receipt of a complaint under subsection (1), the Commission may—
  - (a) call for information or a report regarding such complaint from the public entity or any other body within such reasonable time as may be specified by the Commission and—
    - (i) if the information or report called for is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report; and
    - (ii) if on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by the public entity, the Commission shall, in writing, inform the complainant accordingly and take no further action; or
  - (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

28. The powers of the Commission on Administrative Justice are contained in section 23 of the [Access to Information Act](#) to wit: -

- (1) In the performance of its functions under this Act, the Commission shall have the power to—
  - (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
  - (b) question any person in respect of any subject matter under investigation before the Commission; and
  - (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
- (2) The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
  - (a) the release of any information withheld unlawfully;
  - (b) a recommendation for the payment of compensation; or
  - (c) any other lawful remedy or redress.
- (3) 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.....  
(Emphasis mine)



29. From the above, it is clear that the [Access to Information Act](#) gave life to the contents of Article 35 of [the Constitution](#) which guaranteed a citizen's access to information. The mechanisms for accessing the said information have been laid out elaborately above. In my view, the Petitioners had a right to access information from the 2<sup>nd</sup> Respondent but they had to do so within the confines of the [Access to Information Act](#). They had to present a complaint to the Commission on Administrative Justice and could only invoke this court's jurisdiction when they were aggrieved by the Commission's decision and wished to appeal it. The demand letter attached to the Petition as "SBWCK-001" was addressed to the 3<sup>rd</sup> Respondent and not the Commission on Administrative Justice. The sum total of the above is that the Petitioners did not follow the laid down procedure as encapsulated in the [Access to Information Act](#).
30. It has often been held in various authorities that where there exists an alternative mode of dispute resolution, a party should exhaust such processes before approaching a court of law. In the case of Joseph C. Kiptoo & Another vs Kericho Water and Sewerage Company (2016) eKLR, Mumbi J. (as she then was) held: -
- "It has been stated time and again that where an Act of Parliament provides for a mechanism for resolution of disputes, that mechanism must be strictly followed."
31. Similarly, in the case of The Speaker of the National Assembly vs Karume (2008) 1KLR (E.P) 425, the Court of Appeal held that: -
- "In our view there is considerable merit that where there is a clear procedure for the redress of any particular grievance prescribed in [the Constitution](#) or an Act of Parliament, the procedure should be strictly followed."
32. Further, the Court of Appeal in Muthinja & another v Henry & 1756 others [2015] KECA 304 (KLR) held: -
- ".....It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose 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 of courts. This accords with Article 159 of [the Constitution](#) which commands Courts to encourage alternative means of dispute resolution."
33. However, there are exceptions to the doctrine of exhaustion. Section 9 of the [Fair Administrative Action Act](#) provides: -
- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of [the Constitution](#).
  - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.



- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
  - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
  - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
34. I have keenly gone through the pleadings and it is my finding that the Petitioners failed to demonstrate the exceptional circumstance that would be an exception to the doctrine of exhaustion.
35. In the final analysis, the *Access to Information Act* provided the means of obtaining information from a public body and the remedy available in the event of a breach. This Court's jurisdiction is to be invoked if an aggrieved Party wishes to appeal the decision of the Commission on Administrative Justice as envisioned under section 23(3) of the *Access to Information Act*. It is my finding therefore that the Petition dated 26<sup>th</sup> September 2024 is premature and is struck out.
36. Each Party to bear its own costs.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 6<sup>TH</sup> DAY OF MAY, 2026.**

.....

**HON. JULIUS K. NG'ARNG'AR**

**JUDGE**

Judgment Delivered in the presence of;

Susan/Siele Court Assistant

Chepkemoi for Respondents present holding brief for Ojwang

N/A for Petitioners

