



Commission for Human Rights and Justice v Kenya Fishing Industries Corporation; Nyaberi & another (Interested Parties) (Petition 013 of 2024) [2025] KEELRC 377 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 377 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 013 OF 2024
M MBARŪ, J
FEBRUARY 13, 2025

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE PETITIONER

AND

KENYA FISHING INDUSTRIES CORPORATION RESPONDENT

AND

DR MILKA O NYABERI INTERESTED PARTY

PUBLIC SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition and amended the petition seeking orders;
 1. A declaration that the failure by the respondents to provide the information sought under article 35(1) based on the petitioner's request made on 27/8/2024 vide a letter dated 24/5/2024 is a violation of the petitioner's right to access information.
 2. A declaration that the failure by the respondent to provide the information sought under Article 35(1) (a) based on the petitioner's request made on 27/8/2024 vide a letter dated 24/5/2024 is a violation of Article 10 of *the constitution* specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.
 3. An order of mandamus be issued compelling the respondent to forthwith provide at their cost the information sought by the petitioner vide its request made on 27/8/2024 vide a letter dated 24/5/2024.



- 2 The petitioner is a non-governmental organization, a public-spirited organization and a human rights defender. The respondent is a state corporation duly established under the [State Corporations Act](#). The 1st interested party is a male adult. The 2nd interested party is a constitutional commission established under Article 234 of [the Constitution](#).
- 3 The petition states that the appointment of a state corporation's chief executive officer (CEO) is central to its corporate governance. The respondent, as a public entity, allows the petitioner the requisite capacity under Article 22 of [the Constitution](#) to petition the court on issues relating to the respondent's governance.
- 4 It has come to the notice of the petitioner that the 1st interested party, who is the current CEO of the respondent, has been holding that position in an acting capacity for over 6 months, the minimum time allowed under the law. Section 34(3) of the Public Service Act is in mandatory terms that;
- An officer may be appointed in an acting capacity for a period of at least 30 days but not exceeding six months.
- 5 The petitioner, by request made on 27 August 2024 through a letter dated 24 May 2024 under the right of access to information, wrote to the respondent seeking the following information and documents;
- a. When was the acting CEO employed by the corporation and his letter of appointment;
 - b. His last salary slip before his appointment in an acting capacity;
 - c. For how long had the CEO been acting in that position? His letter of appointment as the acting CEO;
 - d. The acting CEO's current salary slip;
 - e. The acting CEO's allowances in his former and current position;
 - f. How many times has the term of the corporation CEO been extended in an acting capacity? Letter(s) extending his term beyond the 6 months allowed by the law?
 - g. Minutes approving the appointment of the current holder to act as the corporation CEO;
 - h. Any yearly appraisals and evaluation of the acting CEO;
 - i. Any advertisements and interviews for the appointment of the substantive CEO;
 - j. Whether there have been any other employees who have been appointed in an acting capacity?
 - k. If the answer to the above is in the affirmative, have their appointments been confirmed?
 - l. The Corporations' Human Resource Policy and Procedure Manual;
 - m. Any other necessary document.
- 6 The respondent has not responded to the request for documents nor any information supplied. The information sought by the petitioner will not undermine national security, nor is it exempted under Section 6(a) and (b) and Section 6(2)(j) of the [Access to Information Act](#). Article 35(1)(a) of [the Constitution](#) grants every citizen, including the petitioner, the right to seek and have information from a state or state organ.
- 7 The orders sought are premised under Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 48, 73, 156, 159, 232, and 259 of [the Constitution](#).



- 8 To support the petition, the petitioner filed the Affidavit of Julius Ogogoh, the executive director of the petitioner. The petition is filed under the provisions of Article 22 of *the Constitution*, and upon seeking the information necessary from the respondent, there is no response necessitating these proceedings. As a public body, the respondent is required under Article 35 of *the Constitution* to disclose the information sought by the petitioner in terms of Section 4 of the *Access to Information Act*.
- 9 The 1st respondent attended and agreed to respond to the petition but failed to comply.
- 10 The 1st interested party did not attend in these proceedings.
- 11 The second interested party attended and opted not to file a response or written submissions but to abide by the judgment's outcome.
- 12 The petitioner submitted that Article 35(1) (a) of *the Constitution* gives every citizen the right to information. The right to access information is inviolable as protected under *the Constitution* and as held in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR and the case of *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* [2016] eKLR. *The Constitution* does not impose any conditions precedent to the disclosure of information by the state.
- 13 The court should interpret the right under Article 35(1) of *the Constitution* to protect overriding public and private interests, including privacy. The only exceptions should be when there is a risk of substantial harm to the protected interest and that harm is greater than the overall public interest in having access to information. The burden is on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.
- 14 In this case, the respondent has not offered any responses or given the information required by the petitioner under the principles outlined in *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* [2016] eKLR and *Nairobi Law Monthly Ltd v Kenya Electricity Generating Company* [2013] eKLR.
- 15 The fact that the respondent's board chairperson to whom the request for information was made has his term expired, is not sufficient reason for the respondent to fail to provide the information required by the petitioner. The right under Article 35 of *the Constitution* is not conditional to the presence of such office.
- 16 Persons charged with a statutory duty should exercise them fairly. In *Fleur Investments Limited v Commissioner of Domestic Taxes & Another* [2018] eKLR, the court held that the court could not sit back and watch constitutional violations. The court held that in the case of *Okiya Omtatah Okioti v Parliamentary Service Commission & Another* [2021] eKLR. In contrast, the Commission on Administration of Justice has a mandate to make recommendations to a public officer; it only bids when provided for in *the Constitution*.
- 17 The records sought by the petitioner relate to the employment particulars of the 1st interested party. The court is properly seized of the matter, and the orders sought should be issued, with the respondent bearing the costs.

Determination

- 18 Without any responses or submissions by the respondent and interested parties, save for the 2nd interested party who opted to abide by the court orders, the court is only left with the pleadings filed by the petitioner. The petition is not opposed in any material way.



- 19 The petitioner sought information from the respondent under the provisions of Article 35(1) of *the Constitution* through its request on 27 August 2024, through a letter dated 24 May 2024. The information requested relates to the position held by the 1st interested as the acting CEO of the respondent. The case is that he was appointed acting CEO under Section 34(3) of the Public Service Act, which only allows for an acting position for not more than 6 months.
- 20 Despite the petitioner's request for information when the acting position as CEO by the 1st interested party commenced and the current status, the respondent has declined to provide such information, leading to these proceedings. The petitioner is seeking an Order of mandamus compelling the respondent to provide, at their costs, the information sought through a request made on 27 August 2024 through a letter dated 24 May 2024.
21. Article 35 of *the Constitution* provides that;
- 1) "Every citizen has the right of access to—
 - a) Information held by the State; and
 - b) Information held by another person and required to exercise or protect any right or fundamental freedom.
- 22 From these provisions of *the Constitution*, information held by the state is accessible to citizens, and information should be available on request. Thus, once a citizen requests access to information, the information should be available as this is an essential right for the proper and democratic conduct of government affairs. Access to information becomes a foundational human right that enables citizens to participate in that governance.
- 23 Therefore, for citizens to protect their other rights, the right to access information becomes critical for meaningful and effective participation in their country's democratic governance.
- 24 In the case of *Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others* [2013] eKLR, the Court held that;
- ...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information. Still, it also imposes a duty on the State to provide information. Thus, the State has a duty not only to proactively publish information in the public interest, I believe is the import of Article 35(3) of *the Constitution* of Kenya, which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State... The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.
- 25 In the case of *Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission* [2016] eKLR, the Court held that;
- Article 35(1) (a) of *the Constitution* does not impose any conditions precedent to the disclosure of information by the state. I, therefore, agree with the position encapsulated in



The Public's Right to Know: Principles on Freedom of Information Legislation – Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies must disclose information and every member of the public has corresponding right to receive information. Further, the exercise of this right should not require individuals to demonstrate a specific interest in the information.

- 26 Inherently, Article 35 of *the Constitution*'s rights implicates Article 47 of *the Constitution* in fair administrative action. That every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where a citizen seeks information from a public body, this should be provided within the right to access to the information within the right to fair administrative action as held in *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR; that;

Article 47(1) marks an important and transformative development of administrative justice, for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action reflects some of the national values in Article 10, such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

- 27 Under Articles 35 and 47 of *the Constitution*, the Respondent is obliged to allow the Petitioner access to the information sought and, where it is not possible, to give them reasons therein.

- 28 In the Affidavit of Ogongoh and the petitioner's letter to the respondent dated 24 May 2024, he avers that it has come to the attention of the petitioner that the current holder of the position of CEO of the respondent has been holding the position in an acting capacity for over 6 months which is the maximum period allowed by the law. Section 43 of the *Public Service Commission Act* provides that;

- (1) Acting appointments shall be —
 - (a) made by the lawful appointing authority and
 - (b) subject to the prescribed regulations and procedures which apply to appointments.
- (2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.
- (3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.
- (4) A public officer may be assigned to perform duties vested in another public officer during a temporary absence of the other public officer.
- (5) An acting appointment under subsection (4) shall—
 - (a) be in favour of a public officer who is duly qualified and competent to perform the duty; and



- (b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned.
- (6) The Commission shall, whenever it comes to its attention that an authorised officer has purportedly made an acting appointment or assignment in contravention of the provisions of this section, take corrective action.
- 29 The principles under Section 34 of the [Public Service Commission Act](#) thus addressed, the respondent being a state corporation, are bound. An officer appointed in an acting capacity can only hold the acting role for not more than 6 months, and such office should not be held to undermine the expeditious appointment or deployment of a competent substantive holder of such position otherwise held in an acting role.
- 30 Ultimately, the 2nd interested party, the Public Service Commission, should address such a matter and take corrective action. Such a mandate is vested in the 2nd interested party in Article 234 of [the Constitution](#), as held in *Consumer Federation of Kenya (COFEK) v National Social Security Fund Board of Trustees & 2 others* [2022] eKLR.
- 31 The respondent has failed to render such information despite the Petitioner’s plea for providing information through a letter dated 24 May 2024. This violates the Petitioner’s rights under Articles 35 and 47 of [the Constitution](#).
- 32 The information sought by the petitioner assessed is justified save for personal information and data of the 1st interested party under;
- a. ...
 - b. His last salary slip before his appointment in an acting capacity;
 - c. ...
 - d. The acting CEO’s current salary slip;
 - e. The acting CEO’s allowances in his former and current position;
 - f. ...
 - g. ...
 - h. Any yearly appraisals and evaluation of the acting CEO;
 - i. ...
 - j. ...
 - k. ...
 - l. ...
 - m. ...
- 33 The information sought by the petitioner shall be provided save for the above-listed items under clauses (b), (d), (e), and (h) of the letter dated 24 May 2024.
- a. Accordingly, the petition is allowed, and the following orders are hereby issued;



- b. A declaration that the failure by the respondents to provide the information sought under article 35(1) based on the petitioner's request made on 27/8/2024 vide a letter dated 24/5/2024 is a violation of the petitioner's right to access information.
- c. An Order of Mandamus directing the Respondent to disclose to the Petitioner information sought through its requests made on 27 August 2024 and 24 May 2024 save for items (b), (d), (e), and (h) of the letter dated 24 May 2024.
- d. The 2nd interested party has a mandate to attend, address, and undertake corrective action within the respondent's entity as appropriate.
- e. The respondent is to meet costs due to the petition in these proceedings.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

