



REPUBLIC OF KENYA



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**Wanzetse & 10 others v Kakamega Public Service Board (Constitutional Petition
E006 of 2024) [2025] KEELRC 896 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 896 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E006 OF 2024**

**DN NDERITU, J
MARCH 20, 2025**

BETWEEN

**FLORENCE WANZETSE 1ST PETITIONER
GERALD MZEE NJOHNY 2ND PETITIONER
JENIPHER OKUTOYI 3RD PETITIONER
CONSOLATA OWUOR MUNIAFU 4TH PETITIONER
HIROIDO KHATETE 5TH PETITIONER
KISIA OKWISA EUNICE 6TH PETITIONER
MUNZALA BRIAN 7TH PETITIONER
HENRY MUTANGE 8TH PETITIONER
VINCENT LIAKONGO MOLENJE 9TH PETITIONER
IBRAHIM KEYA MURUNGA 10TH PETITIONER
KENNEDY KORONG 11TH PETITIONER**

AND

KAKAMEGA PUBLIC SERVICE BOARD RESPONDENT

JUDGMENT

I. Introduction

1. The petitioners commenced these proceedings by way of a petition dated 23rd July, 2024 through Marisio Luchivya & Co. Advocates seeking the following reliefs –



- a. A declaration that the denial of the information sought was in violation of Articles 1,2,10,21,35 and 232 of the Constitution hence unconstitutional.
 - b. A declaration that the denial was a misapprehension of section 6(d) of the Access to Information Act regard being had to sec 59(1)(d) and 3 of the County Government Act and the foregoing provisions of the Constitution.
 - c. An order of Certiorari to bring into the court and quash the decision of the respondent to deny access to the sought information.
 - d. An order of mandamus compelling the respondent to supply the information sought in the letter dated 26th June, 2024.
 - e. General damages for violation of the petitioners' right under the statute and the Constitution.
2. The petition is said to be anchored on Sections 57, 59, & 59(3) of the County Governments Act, Section 6 of the Access to Information Act, Section 7 of the Fair Administrative Action Act, Articles 1(2) & (4), 2, 10(1) & (2), 19, 20, 21, 22, 23, 27, 35, 41, 73, and 232 of the Constitution.
 3. The petition is accompanied with an affidavit in support of the petition sworn by the 6th Petitioner on even date with several annexures thereto.
 4. The facts and the law relied upon are set out in the body of the petition.
 5. The respondent entered appearance through Derrick & Smith LLP and filed a replying affidavit sworn by Catherine Otenyo, the secretary and Chief Executive Officer, on 2nd October, 2024.
 6. On 28th October, 2024 the respondent filed a notice of preliminary objection (PO) of even date. The PO is based on the following grounds –
 - a. This petition grossly and manifestly fails to demonstrate how the referenced constitutional Articles have been violated thus failing to meet the threshold set to qualify for a constitutional petition before this honourable court as established in the Anarita Karimi Njeru case.
 - b. The petition is drafted in a manner that negates procedural and substantive rules when instituting a constitutional petition.
 - c. This petition is filed in the wrong forum hence this court lacks the jurisdiction to hear and determine this matter.
 7. When the matter came up in court for directions on 18th November, 2024, by consent of the parties, the court directed that the petition and the PO be canvassed simultaneously by way of written submissions.
 8. Counsel for the petitioners, Mr. Munyendo, filed his submissions on 22nd January, 2025. The counsel for the respondent, Mr. Bruno, filed on 3rd February, 2025.

II. The Petitioners' Case & Evidence

9. In summary, the petitioners were revenue officers and senior revenue officers in the respondent's department of finance and economic planning but before they cleared with the respondent upon the lapse of their three-year contracts, the respondent declared their positions vacant on 8th September, 2023.
10. It is pleaded that the petitioners were invited to apply for the declared vacancies and, upon applying, they participated in the interviews thereafter. It is pleaded that the recruitment process as handled by



the respondent contravened the provisions of Articles 10, 41, and 232 of *the Constitution*, and in a bid for the petitioners to promote their rights under Article 41 of *the Constitution* they through their advocates requested the respondent vide letter dated 26th June, 2024 for the following –

- i. Advert declaring their positions vacant;
 - ii. The list of applicants;
 - iii. The list of shortlisted applicants;
 - iv. The list of persons who attend interviews;
 - v. The ranking list /results from the interview;
 - vi. The list of persons now occupying the positions advertised;
 - vii. The results of the suitability tests; and
 - viii. List of vacant positions.
11. Vide a letter dated 5th July, 2024, the respondent replied to the request for the above information and supplied the counsel for the petitioners with – (i) advert that declared vacant the positions of senior revenue officers, revenue officers, and revenue clerks; (ii) the shortlisted applicants for the positions of revenue officers and revenue officers; and, (iii) a list/indents of the vacant positions of senior revenue officers and revenue officers. The respondent declined to provide the other requested documents citing section 6 (1)(d) of the *Access to Information Act*, 2016 (“the Act”) namely – (i)the list of applicants; (ii)the list of persons who attended interviews; (iii)the ranking list/results for the interviews; and, (iv)the list of persons now occupying the positions advertised.
12. The petitioners pleaded that they are aware that certain results for certain positions were withheld after the interviews. It is pleaded that the failure by the respondent to supply all the requested documents that were relevant to the petitioners’ intended action was in violation of *the Constitution*.

III. The Respondent’s Case & Evidence

13. In its replying affidavit, the respondent states that the petition has no constitutional basis and should be declared nugatory. It is deponed that the petition does not comprehensively state how the quoted Articles of the Constitutional have been violated and the nature of the injury that may be occasioned as a result of the alleged infringement. It is deponed that the petition offends the precise, comprehensive, and elegant draftsmanship of a constitutional petition leaving the respondent unable to precisely respond to the same. It is stated that the petition falls short of the constitutional threshold enunciated in *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272.
14. It is further stated that the court lacks jurisdiction to entertain the petition in the first instance as Section 20(1) of the Act confers on the Commission of Administrative Justice the oversight and enforcement powers under the act for disputes arising under Article 35 of *the Constitution*.
15. It is conceded that the petitioners had been engaged on three-year contracts from 15th July, 2020 and that upon the lapse of their contracts the respondent, in its 92nd meeting held on 24th July, 2023, extended the contracts of 23 senior revenue officers and revenue officers for three months from 1st July, 2023 to 30th September, 2023 for those officers who had scored 70% and above of the set targets.
16. It is further deponed that the 9th petitioner, Vincent Liakonga Molenje, failed to attain the reserved 70% performance threshold and thus his contract was not extended.



17. It is deponed that the respondent declared a vacancy for 13 senior revenue officers and 26 revenue officers to be filled through competitive recruitment vide the advertisement of 8th September, 2023. It is deponed that the names of the shortlisted applicants were posted on the website of Kakamega County on 29th September, 2023.
18. It is stated that serving revenue officers were erroneously left out of the shortlist but, upon making complains to the respondent, they were considered for the interviews conducted from 4th to 6th October, 2023.
19. It is deponed that while the respondent authenticated the academic and professional certificates for the interviewed candidates in line with the Public Service Commission Directive Ref: PC/ADM/13(45) dated 19th October, 2023, it was discovered that the 6th petitioner and 8th petitioners had forged their CPA certificates and were thus unqualified for appointment.
20. It is deponed that the board, in its 981st meeting on 19th October, 2023, approved the appointment of the suitable candidates, a position communicated to the chief officer of public service on 28th November, 2023.
21. It is deponed that thereafter, the respondent received a letter Ref: CG/CPSB/IR/LM/VOL.III/ (21) dated 5th July, 2024 from the firm of Oscar Wachilonga & Associates Advocates on behalf of the petitioners seeking for the documents outlined above.
22. It is stated that the respondent did not conduct a suitability interview, and it declined to provide some of the documents in compliance with section 6(d) of the Act on privacy.
23. It is deponed that contrary to the petitioners' insinuation that the recruitment was irregular, the respondent applied sound approach based on various criteria such as, regional representation, age consideration, inclusion of persons living with disabilities, qualifications, gender, representation of the youth, academic and professional qualifications, and inclusion of minorities and marginalized communities.
24. It is deponed that the respondent in the advertisement of 11th September, 2023 indicated that it was an equal opportunity employer and that only shortlisted candidates would be contacted. It is deponed that the petitioners have not demonstrated how denial of the information sought amounted to unfair labour practice under Article 41 of *the Constitution*, as they had ceased to be employees of the respondent.
25. It is deponed that the recruitment was done in accord with the provisions of Articles 10 and 232 of *the Constitution* and all information as allowed by the law was availed and supplied to the petitioners. It is deponed that based on the provisions of Article 35 of *the constitution* as read with Section 6(1)(d) & 6 of the Act, the information that was not supplied to the petitioners was information that could not be availed to the public due to privacy and confidentiality.
26. It is deponed that Article 1 of *the Constitution* and Section 59(1)(d) & 3 of the *County Governments Act* do not demand of the respondent to make public reports of its functions on recruitment or accessible to the public. It is deponed that there is no constitutional violation was committed in partially denying the petitioners the requested information as the information that was supplied to them was adequate and in conformity with the rights guaranteed under Article 35 of *the Constitution*.



IV. Submissions

27. Counsel for the petitioners submitted globally in support of the petition to the effect that the respondent as a public office is mandated under Article 1 of *the Constitution*, Sections 59(3) and 68 of the *County Governments Act* to maintain records which may be inspected by any person.
28. It is submitted that Article 10 of *the Constitution* obligates the respondent to ensure transparency in all processes and thus the respondent cannot disguise under Section 6(d) of the Act to deny the petitioners information that concerns a public office.
29. Citing the Supreme Court in *Legal Advice Centre T/A Kituo Sheria & 33 Others v Cabinet Secretary Ministry of Education & 7 Others* (2021) eKLR it is submitted that unless for good reason(s), the right to access information needed for advancement and or for protection of a right should not be impeded and in case of denial the same must be justified with a reasonable and fair reason within the limitations set under the Act. It is submitted that the vacancies in issue are in the public service and there is no evidence to show that the individuals involved would in any way be endangered if the information requested was supplied.
30. Citing *Mukhisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (1969) eKLR, it is submitted that the 1st to 4th grounds in the PO touch on the merit of the petition and hence the same should be dealt with after analyzing the facts as set out in the petition.
31. It is further submitted that the constitutional articles outlined in the petition are relevant for the interpretation of *the Constitution* and the petitioners have demonstrated that the denial of information sought based on Section 6(1)(d) of the Act, falls short of the required mandate of the respondent under Sections 59(1) and 68 of the *County Governments Act* and Article 232 of *the Constitution*.
32. Citing *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2014) eKLR, it is submitted that the petition is unambiguous and the articles quoted fail to link the grievance(s) with the cited legal provisions.
33. On the other hand, the respondent's counsel submitted on six issues – Whether the respondent violated the petitioners' constitutional right to access information under Article 35 of *the Constitution*; Whether the recruitment process conducted by the respondent was irregular, unfair, and unconstitutional; Whether the Employment and Labour Relations Court has jurisdiction to hear and determine the petition; Whether the respondent's preliminary objection is meritorious; and, Whether the petitioner is entitled to the reliefs sought.
34. On whether the petition meets the constitutional threshold pronounced in the *Anarita Karimi* case (supra) and affirmed in *Mumo Matemu* case (supra), it is submitted that the petitioners have failed to plead with reasonable precision how their rights under Articles 10,21,23, & 35 of *the Constitution* have been violated. It is submitted that the petitioners have merely generalized the allegations without pinning them to the cited articles, and thus the petition ought to be dismissed for lack of particulars and precision.
35. On whether the court has jurisdiction to determine the petition, it is submitted that the petition before the court relates to access to information under Article 35 of *the Constitution* and thus falls within the purview of the Commission of Administrative Justice (CAJ or the Commission) by dint of Section 14 of the Act.
36. The court is urged to down its tools for without jurisdiction it should not take one or more step as it was held in the *Owners of Motor vessel "Lilian s' v Caltex Oil(Kenya)Ltd* (1989) eKLR.



37. It is submitted that based on Section 20(1) & (3) of the Act, any complaint arising from a claim for access to information or denial thereof shall be pursued through the designated oversight body before approaching court.
38. On whether the petitioners' rights have been violated, it is submitted that the right to access information is not absolute but limited where it could infringe on the rights of third parties.
39. It is submitted that the petitioners are not amenable to protection under Article 41 of the Constitution as their contracts had lapsed and thus legitimate expectation for renewal of those contracts does not arise. Counsel cited Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) Eklr in that regard.
40. It is submitted that the petition has failed to articulate how the rights of the petitioners were violated or the injury suffered by the petitioners.
41. It is further submitted that per the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the petition is not properly signed by the petitioners or their representatives an omission that renders the same incompetent.
42. It is submitted that the issues raised by the petitioners are administrative and thus ought to have been adjudicated through a judicial review process. Counsel cited Republic v Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR in that regard.
43. Citing a plethora of decisions – Judicial Service Commission v Gladys Boss Shollei & Another (2014) eKLR; Samson Gwer & 5 Others V Kenya Medical Research Institute & 3 Others (2020) eKLR; and John Harun Mwau & 3 Others V Attorney General & 2 Others (2012) eKLR – it is submitted that the recruitment exercise carried out by the respondent was in line with Articles 10 & 232 of the Constitution.
44. It is submitted that the petitioners' contention that the respondent is mandated to report to individual members of the public is unfounded. It is submitted that the right to information is not absolute and the respondent is only mandated to provide information within the permissible confines of the law. It is submitted that the petitioners have not proven how the respondent's actions have violated their rights.
45. It is further submitted that judicial review orders of certiorari, mandamus, and general damages cannot be granted in a constitutional petition that is not proven and they can only be granted with the discretion of the court where irrationality, illegality, or procedural impropriety is demonstrated. Counsel cited See Kenya National Examinations Council v Republic Exparte Geoffrey Githinji Njoroge & 9 others (1997) eKLR; & Gitobu Imanyara & 2 others v Attorney General (2016) eKLR).
46. The court is urged to find that the petitioners have not demonstrated a violation of their constitutional rights to warrant an award of the reliefs sought and proceed to dismiss the petition with costs.

V. Issues For Determination

47. The court has carefully and dutifully gone through the petition and the supporting affidavit and the annexures thereto by the petitioners, and the replying affidavit and PO by the respondent. The contents of the said records have been summarized in a part dedicated to the same herein above. The court has also read and summarized the submissions by the counsel for both parties in the foregoing paragraphs of this judgment.
48. In the considered view of the court the following issues commend themselves to the court for determination –



- a. Whether the court's jurisdiction was invoked prematurely?
- b. Whether the petition meets the threshold of a constitutional petition.
- c. Whether the doctrine of constitutional avoidance is applicable in this case
- d. Are the petitioners entitled to the reliefs/remedies sought?
- e. What are the appropriate orders for the court to make?
- f. Costs.

VI. Jurisdiction

49. As per the sentiments of Nyarangi J in *Owners Of The Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) 1 –

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

50. The respondent in the PO raises an objection to this court's jurisdiction. That in an issue that must be determined before delving further into the merits or otherwise of the petition.
51. The respondent contends that under Section 20(1) & (3) of the Act any complaint arising from a claim for access to information must be pursued through the designated oversight body (the CAJ) before any party approaching the court. The petitioners did not respond to this issue.
52. The Act was enacted by Parliament to give effect to Article 35 of *the Constitution* and to confer to the CAJ the oversight and enforcement functions and powers and for connected purposes. Article 35 provides that every citizen has a right of access to information held by the state, information held by another person, that is required for the exercise or protection of any right or fundamental freedom.
53. Section 3 of the Act provides the object and purpose of the Act to include inter alia, giving effect to the right of access to information by citizens, providing 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, providing a framework to facilitate access to information held by private bodies in compliance with any right protected by *the Constitution* and any other law, promoting 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.
54. Section 4 of the Act under Part II on the Right to Information provides that –

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 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 the person's reasons are 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.

55. Under Section 8 of the Act, the person seeking to access information is provided with a procedure on how to apply in writing to access that information. A public entity may also prescribe a form for making an application to access information whereby a public officer shall process the application expeditiously and make a decision within 21 days of receipt of the application, except where it involves the life or liberty of a person in which event, the public entity must supply the information within 48 hours of receipt of the application.
56. Section 11 of the Act provides that where a decision is taken to provide the information sought, the access officer shall send to the applicant a written response within 14 working days of receipt of the application advising the applicant among others that the application has been granted and that the information will be contained in an edited copy where applicable.
57. Section 14(1) of the Act provides that –
- (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.
58. By dint of section 21 of the Act, CAJ has the functions of investigating on its initiative or upon a complaint made by any person or group of persons, violations of the provisions of the Act.
59. Section 22 of the Act provides that a person wishing to lodge a complaint under the Act may do so orally or in writing to the Secretary of the Commission or such other person as may be authorized by the Commission.
60. In the instant case, the petitioners, through a letter by their counsel dated 26th June, 2024(EK-3) requested for –
- i. Advert declaring their positions vacant;
 - ii. The list of applicants;
 - iii. The list of shortlisted applicants;
 - iv. The list of persons who attend interviews;
 - v. The ranking list /results from the interview;
 - vi. The list of persons now occupying the positions advertised;
 - vii. The results of the suitability tests; and
 - viii. List of vacant positions.



61. In response, vide a letter dated 5th July, 2024, the respondent provided the counsel for the petitioners with the Advert that declared vacancies in the positions of senior revenue officer, revenue officer, and revenue clerks; the shortlisted applicants for the positions of revenue officers and revenue officers; and, a list /indents of the vacant positions of senior revenue officers and revenue officers. The respondent, however, declined to provide the other requested information citing Section 6 1(d) of the Act. The withheld information concerned the list of applicants; the list of persons who attended interviews; the ranking list/results of the interviews; and, the list of persons now occupying the positions advertised.
62. The petitioners lament that the withheld documents relate to a public office and therefore the respondent was obligated by the Act to avail the same failing which the petitioners' right to information was violated. The petitioners filed the present petition stating that their rights to access information were violated.
63. The Court of Appeal defined with clarity the doctrine of exhaustion in *Speaker of the National Assembly -vs- James Njenga Karume (1992) e KLR (Kwach, Cocker and Muli JJA)* where the court held that –
- In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
61. Further, the Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR)* held that –
- It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked.
65. Section 21(1)(f) of the Act provides for the functions of the Commission which shall be to —
- f) hear and determine complaints and review decisions arising from violations of the right to access to information.
66. Further, the Commission has immense powers under Section 23 of the Act including –
- a. Issuance of summons or order requiring attendance of any person and the production of any document or record relevant to its investigation before the Commission.
- b. Question any person in respect of any subject matter under investigation before the Commission.
- c. Require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
67. Further, the Commission has the power to order the release of the information withheld unlawfully or give any other lawful remedy or redress.
68. A person who is dissatisfied with an order made by the Commission may appeal to the High Court within 21 days from the date the order is made and where no appeal is filed, the order of the Commission may be enforced by the High Court through an *exparte* chamber summons under Section 23 (5) of the Act.
69. The Employment and Labour Relations Court is established under Article 162(2) (a) of *the Constitution* as a superior court of record with the status of the High Court. It exercises jurisdiction throughout Kenya for the purpose of hearing and determining employment and labour relations



disputes and the furtherance, securing, and maintenance of good employment and labour relations in Kenya.

70. The court holds that where there exists an established and elaborate procedure for access to information that is held by a public or private entity, a petition to this Court should be a port of last resort. Bypassing or ignoring the elaborate procedure articulated in the *Access to Information Act* flies on the face of the Constitutional provisions under Article 159 (2) (c) of *the Constitution* which mandates courts to promote alternative forms of dispute resolution mechanisms.
71. Accordingly, the court upholds the objection by the respondent that this petition dated 23rd July, 2024 has been prematurely filed before the court. For the foregoing reasons the petition is hereby struck out.
72. Having found that the court's jurisdiction was invoked prematurely there is no need for the court to delve into the other issues raised as such an exercise could be merely academic.

V. Orders

73. The court makes the following orders –
 - a. The petition herein was filed in court prematurely and is hereby struck out.
 - b. There is no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 20TH DAY OF MARCH, 2025.

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DAVID NDERITU

JUDGE

