



Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling)

Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR

Neutral citation: [2017] KESC 45 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS
PRESIDENTIAL ELECTION PETITION 4 OF 2017
DK MARAGA, CJ & P, PM MWILU, DCJ & VP, JB
OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
DECEMBER 11, 2017**

BETWEEN

NJONJO MUE 1ST PETITIONER

KHELEF KHALIFA 2ND PETITIONER

AND

CHAIRPERSON OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND RESPONDENT

HE UHURU MUIGAI KENYATTA 3RD RESPONDENT

NATIONAL SUPER ALLIANCE COALITION 4TH RESPONDENT

(Being an Application by the 3rd Respondent pursuant to Article 50 of the Constitution, Section 12(1), 24 and 31 of the Supreme Court Act, Rule 9 and 17 of the Supreme Court (Presidential Election Rules), 2017 and all other enabling provisions of the law)

Evidence obtained in a manner inconsistent with the Bill of Rights is to be excluded from any trial If the admission of that evidence would render the trial unfair or detrimental to the administration of justice.

Reported by Felix Okiri



Constitutional Law – *fundamental rights and freedoms- enforcement of fundamental rights and freedoms- right to information – whether the right to information was absolute - what was the extent of the disclosure of the information held by a public entity - whether a person had to prove entitlement to the right of information - what was the balance between the rights to privacy and protection of property guaranteed under articles 31 and 40 of the Constitution vis a vis rights to access of information as guaranteed under article 35 of the Constitution - Constitution of Kenya, 2010 articles 24(1), 31, 35 & 40 ; Access to Information Act, sections 3 & 6; Independent Electoral and Boundaries Commission Act, section 27.*

Law of Evidence – *admissibility of evidence- admissibility of illegally obtained evidence – admissibility of illegally obtained evidence under common law vis a vis constitutional law - whether memos obtained unlawfully could be admitted in court as evidence - whether illegally obtained evidence was admissible - what was the probative value of illegally obtained evidence?*

Brief facts

The instant application sought to expunge from the record various identified internal communications between members of the 2nd respondent (Independent Electoral and Boundaries Commission). The 3rd respondent's (H. E. Uhuru Muigai Kenyatta) position was that the said memos were obtained unlawfully, contrary to section 27 of the Independent Electoral and Boundaries Commission Act, and that article 50(4) of the Constitution also required that such evidence be excluded.

The petitioners (Njonjo Mue and Khelef Khalifa) contended that the said memos were obtained legally and that in any event, article 50(4) of the Constitution gave an exception under which any such evidence could be relied upon by the court. Furthermore, they argued that the memos, apart from being in the public domain, formed an integral part upon which their petition was grounded and their presence on the record would assist the court in making a fair determination

Issues

- i. Admissibility of the evidence under common vis a vis constitutional law.
- ii. What was the extent of the disclosure of the information held by a public entity and under what circumstances could a person be denied right to information?
- iii. Whether a person had to prove entitlement to the right of information and what was the threshold of proof of entitlement to that right?
- iv. What were the procedures provided in law on how a person could access information held by the State or State organs.
- v. Whether evidence ought to be obtained in accordance with the provisions of both the Constitution and the law.
- vi. What was the applicable test in both civil and criminal cases in considering whether evidence was admissible.
- vii. What was the place of illegally obtained evidence in terms of admissibility and its probative value?
- viii. What was the balance between the rights to privacy and protection of property guaranteed under articles 31 and 40 of the Constitution vis a vis rights to access of information as guaranteed under article 35 of the Constitution.

Relevant provisions of the Law

Independent Electoral and Boundaries Commission Act

Section 27

Management of information

1. *The Commission shall publish and publicize all important information within its mandate affecting the nation.*
2. *A request for information in the public interest by a citizen—*



1. shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and
2. may be subject to confidentiality requirements of the Commission.

(3) Subject to article 35 of the Constitution, the Commission may decline to give information to an applicant where

- (a) the request is unreasonable in the circumstances;
- (b) the information requested is at a deliberative stage by the Commission;
- (c) failure of payment of the prescribed fee; or
- (d) the applicant fails to satisfy any confidentiality requirements by the Commission.

(4) The right of access to information under article 35 of the Constitution shall be limited to the nature and extent specified under this section.

(5) Every member and employee of the Commission shall sign a confidentiality agreement.”

The Constitution of Kenya, 2010

Article 24(1)

A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

1. the nature of the right or fundamental freedom;
2. the importance of the purpose of the limitation;
3. the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and
4. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Article 35

(1) Every citizen has the right of access to:

1. Information held by the State; and
2. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(3) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

Article 50(4)

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

Access to Information Act (Act No. 31 of 2016)

Section 3

“(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
(d) provide a framework to facilitate public education on the right to access information under this Act.

Section 6

(1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to:

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

Held

1. In order to give effect to the rights under article 35 of the Constitution, Parliament enacted the Access to Information Act which provided for the modalities of obtaining any information held by the State or another person. Section 3 was relevant to the instant application as it stipulated the objectives of the Act. Section 6(1) on the other hand provided the extent of the disclosure of the information held by an entity.
2. Article 35(1)(a) and (b) of the Constitution, read with section 3 of the Access to Information Act granted all citizens the right to access information held by the State, or public agencies including bodies such as the 2nd respondent. The right to information implied the entitlement by the citizen to information, but it also imposed a duty on the State with regard to provision of information.
3. The right of access to information was however not absolute and there were circumstances in which a person was denied particular information. Specifically, procedures were provided in a law on how a person ought to access information held by another person and particularly a State organ or entity. Section 8 of the Access to Information Act provided that a person could apply in writing, or where one was unable to write, could apply orally to an information officer who was to put the request in written form.
4. Any such request for information was to be processed within 21 days. Furthermore, section 27(2) of the Independent Electoral and Boundaries Commission Act specified the person to whom such a request was to be addressed to and further provided circumstances when the Commission could withhold any information sought. One such circumstance was where the information sought related to a matter under deliberation and therefore no conclusive findings had been made by the Commission.
5. The rights of access to information relevant to the matter before the court were limited by operation of law, in the instant case, being the procedures for access of any information under section 27(2) of the Independent Electoral and Boundaries Commission Act, as read together with sections 6(1) of the Access to Information Act. The Constitution, further set limitations on rights including the right to access to information.



6. In common law, the applicable test in both civil and in criminal cases in considering whether evidence was admissible was whether it was relevant to the matters in issue. If it was relevant, it was admissible and the court was not concerned with how it was obtained. It mattered not how one obtained the evidence. Even where it was stolen, the evidence was still admissible. The common law did not reject relevant evidence on the ground that it had been obtained illegally. So far as civil cases were concerned, the court had no discretion; the evidence was relevant and admissible. The court could reject it on the ground that it may have been unlawfully obtained in the beginning. The above position applied generally including to election petitions which were matters *sui generis*.
7. The 3rd respondent relied on article 50(4) of the Constitution and urged that evidence obtained in a manner that violated any right or fundamental freedom in the Bill of Rights was to be excluded as the admission of that evidence had the possibility of rendering the trial unfair, or detrimental to the administration of justice. Evidence ought to have been obtained in accordance with the provisions of both the Constitution and of the law. Obtaining evidence and indeed, as was in the instant case, seizing the same without first obtaining appropriate warrants violated constitutional norms. The right to property as well as the right to privacy stood violated.
8. Article 50(4) of the Constitution provided that evidence obtained in a manner that violated any right in the Bill of Rights had to be excluded if the admission of that evidence had the impact of rendering the trial unfair or otherwise detrimental to the administration of justice. However, not all evidence illegally obtained led to some form of prejudice and therefore occasioning automatic termination of a criminal trial. Such an approach negated and diluted, invariably, the words of the Constitution emphasized above. It had to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, it had to be shown that the admission of such evidence could render the trial unfair or be detrimental to the administration of justice. That was the correct interpretation of the issue at hand generally.
9. The Constitution provided for the right of access to information which had been operationalized through two pieces of legislation, the Independent Electoral and Boundaries Commission Act and the Access to Information Act. The information held by the State or State organs, unless for very exceptional circumstances, had to be freely shared with the public. However, such information was to flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.
10. A duty had been imposed upon the citizens to follow the prescribed procedure whenever they required access to any such information. That duty could not be abrogated or derogated from, as any such derogation could lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It was a two way channel where the right had to be balanced with the obligation to follow due process.
11. The petitioners, using the above test, did not show how they were able to obtain the internal memos showing communication between employees of the 2nd respondent. Further, it had been alleged that those memos had only been shown in part, and taken out of context to advance the petitioners' case against the 1st and 2nd respondents, and to an extent, the 3rd respondent. No serious answer had been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only rendered it inadmissible but also impacted on the probative value of such information.
12. There had been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd respondent was guaranteed under the Constitution and section 27 of the IEBC Act. That was because the limitation imposed by both article 50(4) and section 27 of the IEBC Act aforesaid squarely applied to the matter before court.
13. There had to be a balance between the petitioners' rights to access of information as guaranteed under article 35 of the Constitution, against those of the 1st and 2nd respondents' rights to privacy and



protection of property also guaranteed under articles 31 and 40 of the Constitution. If access was in the instance, obtained through the laid down procedure under section 27 of the Independent Electoral and Boundaries Commission Act, and section 6(1) of the Access to Information Act, then the rights of both the petitioners and the respondents would have been protected, by dint of the applicable laws that set out the limitations for access of any such information.

14. The petitioners had been unable to establish that the internal memos obtained from the 2nd respondent were to be used in the protection of fundamental rights or freedoms, or that without such information; they would be unjustly prejudiced. Information could only be required for the exercise or protection of a right if it was of assistance in the exercise or protection of the right. Therefore, in order to make out a case for access to information, an applicant had to state what the right that he wished to exercise or protect was, what information was required and how that information would to assist him in exercising or protecting that right. The threshold requirement of 'assistance' had thus been established as: where the requester could not show that the information would have been of assistance for the stated purpose, access to that information was to be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' was not to be enough.
15. It had to be established that the public interest that the petitioners sought to advance was not an infringement on the respondents' rights, and that the acts of the petitioners could have been justifiably upheld in an open and democratic society. However, by violating the provisions of the same Constitution that they lauded in their objection, the petitioners not only violated the provisions of sections 27 of the Independent Electoral and Boundaries Commission Act, but also breached the provisions of articles 24(1) and 35(1) of the Constitution and in the circumstances, their use of the internal memos did not advance the interests of justice.

Application allowed.

Orders

- i. *The following documents were expunged from the record:*
 1. *The Internal Memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Mr. Ezra Chiloba marked NM-3 annexed to the affidavit of Njonjo Mue.*
 2. *The Internal memo dated October 9, 2017 from a former commissioner of the 2nd respondent, Ms. Roseylne Akombe to the 1st respondent marked NM-10 annexed to the Affidavit of Njonjo Mue sworn on November 5, 2017.*
 3. *The Internal Memo dated October 14, 2017 from the Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS and CECs of the 2nd respondent marked as NM-12 annexed to the affidavit of Njonjo Mue sworn November 5, 2017.*
 4. *Internal Memo dated October 16, 2017 from a former commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.*
 5. *The Internal Memo dated October 16, 2017 from a former commissioner of the 2nd respondent, Ms. Roselyn Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar sworn on November 5, 2017.*
- i. *No orders as to costs.*

Citations

Cases

Kenya

1. *Njonya, Timothy v Attorney General & another* Petition 479 of 2013; [2014] eKLR - (Explained)
2. *Okoth, David Ogollav Chief Magistrate Court, Kibera & 2 others* Petition 5 of 2015; [2016] KEHC 4483 (KLR) - (Explained)



3. *Ombija, Nicholas Randa Owano v Judges and Magistrates Vetting Board* Civil Appeal 281 of 2015; [2015] KECA 129 (KLR) - (Distinguished)

South Africa

Unitas Hospital v Van Wvk & another (231/05) (2006) ZASCA 34; 2006 (4) SA 436 (SCA) ; [2006] 4 All SA 231 - (Explained)

United Kingdom

1. *Helliwell v Piggot-Sims* [1980] FSR 356 - (Explained)
2. *Regina v Leatham* (1861) 8 Cox CC 498 - (Explained)

United States

Olmstead v United States, 277 US 438(1928) - (Explained)

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) sections 3; 6 (1); 8 - (Interpreted)
2. Constitution of Kenya articles 24, 31, 35, 40, 50(4) - (Interpreted)
3. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 27 - (Interpreted)

Advocates

None mentioned

RULING

A. Introduction

1. This is an application by way of notice of motion dated November 11, 2017 and filed on November 13, 2017 by the 3rd respondent seeking orders to expunge from the petition the following documents and/or annexures:
 - (a) Internal Memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Ezra Chiloba marked NM-3 annexed to the affidavit of Njonjo Mue.
 - (b) Internal memo dated October 9, 2017 from the former Commissioner, Ms Akombe to the 1st respondent marked NM-10 annexed to the affidavit of Njonjo Mue.
 - (c) Internal Memo dated October 14, 2017 from Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS and CECs marked as NM-12 annexed to the affidavit of Njonjo Mue.
 - (d) Internal Memo dated October 16, 2017 from former Commissioner, Ms Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue.
 - (e) Internal Memo dated October 16, 2017 from former Commissioner, Ms. Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar.
2. The application is anchored on the main ground that the petitioners substantially rely on a number of internal memos exchanged between members of the 2nd respondent and that the said correspondences were obtained unlawfully and illegally contrary to section 27 of the *Independent Electoral and Boundaries Commission Act* and as such, they should not be relied upon by the court in making its determination. The 3rd respondent also contends that on September 7, 2017, the 2nd respondent issued



a clarification confirming that the contents of the memo were not discussed or sanctioned by it and that it only came to know about them from the media and so they raise matters yet to be resolved by IEBC.

3. The 3rd respondent further contends that by a letter dated September 21, 2017 addressed to the 1st respondent, the Jubilee Party requested the Commission to take urgent measures on the issue of the management of information by the Commission and that shortly thereafter, the 1st respondent dismissed his Personal Assistant for unlawfully leaking information emanating from his office thus confirming that the memos are still the subject of internal discussions within the IEBC. Furthermore, the 3rd respondent questions the authenticity of the said documents and contends that they are of no evidential value.
4. The application was further supported by the affidavit of Mr Raphael Tuju, who in reiterating the grounds adduced in the application, deposed to that the petitioners seek to rely on memos that were illegally obtained and which have not been authenticated.

The 1st & 2nd Respondents' Response

5. On their part, the 1st and 2nd respondents urge that the correspondence on record has been selectively introduced hence inconclusive as to the issues raised. Further, it is their contention that section 27 of the *IEBC Act* has been breached and the petitioners have not explained how they came to be in possession of the impugned memos. That there is no record that they made a request for the same to be supplied to them and that the request had been unlawfully denied. In the event, they agree that the application is merited and the memos should be struck off the record.

The Petitioners' Response

6. The application is opposed by the petitioners. They urge that no prejudice would be suffered by the 3rd respondent should the said memos remain on record. It is also their position that the memos form an integral part upon which their petition is grounded and their presence on the record would assist the court in making a fair determination of the contested issues.
7. The petitioners further contend that the said memos were obtained legally and that in any event, article 50(4) of the *Constitution* gives an exception under which any such evidence may be relied upon by the court. Furthermore, they argue that the said documents are in the public domain and are in wide circulation. In addition, they contend that the constitutional principles of openness and transparency, override any procedural obligation placed upon a party who wishes to obtain documents held by a public entity. Consequently, the petitioners urge the court to dismiss the 3rd respondent's application and retain the impugned internal memos on the record.

B. Analysis

8. We have been urged to expunge from the record various identified internal communications between members of the 2nd respondent. The 3rd respondent's position is that the said memos were obtained unlawfully, contrary to section 27 of the *Independent Electoral and Boundaries Commission Act*, and that article 50(4) of the *Constitution* also requires that such evidence be excluded.
9. In that regard, section 27 of the *Independent Electoral and Boundaries Commission Act* provides as follows:

“ Management of information



- (1) The Commission shall publish and publicize all important information within its mandate affecting the nation.
- (2) A request for information in the public interest by a citizen—
 - (a) shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and
 - (b) may be subject to confidentiality requirements of the Commission.
- (3) Subject to article 35 of the Constitution, the Commission may decline to give information to an applicant where—
 - (a) the request is unreasonable in the circumstances;
 - (b) the information requested is at a deliberative stage by the Commission;
 - (c) failure of payment of the prescribed fee; or
 - (d) the applicant fails to satisfy any confidentiality requirements by the Commission.
- (4) The right of access to information under article 35 of the Constitution shall be limited to the nature and extent specified under this section.
- (5) Every member and employee of the Commission shall sign a confidentiality agreement.” (Emphasis added)

10. On the other hand, the rights of access to information is provided for under article 35 of the Constitution in the following terms:

- “(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.
- (3) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (4) The State shall publish and publicise any important information affecting the nation.”

11. In order to give effect to the rights under article 35, Parliament enacted the Access to Information Act (Act No 31 of 2016) providing for the modalities of obtaining any information held by the State or



another person. section 3 is relevant to the present application as it stipulates the objectives of the Act as follows:

- “(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.”

12. Section 6(1) on the other hand provides the extent of the disclosure of the information held by an entity as follows:

“Limitation of right of access to information

- (1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to:
 - (a) undermine the national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;



- (h) damage a public entity's position in any actual or contemplated legal proceedings; or
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.” (Emphasis added)

13. Article 35(1)(a) and (b) of the *Constitution*, read with section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the court in Petition No 479 of 2013 *Rev Timothy Njoya v Attorney General & Another*; [2014] eKLR, it was held;

“A plain reading of section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd respondent. In *Nairobi Law Monthly v Kengen (supra)* the court dealt with the applicability of the right to information as follows;

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, 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”.

14. This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.

16. Section 8 of the *Access to Information Act* in the above context thus provides that a person may apply in writing, or where one is unable to write, may apply orally to an information officer who shall then put the request in written form and any such request for information must be processed within 21 days. Furthermore, section 27(2) of the *Independent Electoral and Boundaries Commission Act* specifies the person to whom such a request should be addressed to and further provides circumstances when the Commission may withhold any information sought. One such circumstance is where the information sought relates to a matter under deliberation and therefore no conclusive findings have been made by the Commission.

16. The rights of access to information relevant to the matter before us is therefore from the foregoing, limited by operation of law, in this instance, being the procedures for access of any information under section 27(2) of the *Independent Electoral and Boundaries Commission Act*, as read together with sections 6(1) of the *Access to Information Act*. article 24(1) of the *Constitution*, further sets limitations on rights including necessarily the right to access to information. It provides thus:

“A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-



- (a) the nature of the right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and
 - (d) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.” (Emphasis added)
17. Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person ‘unlawfully’ or ‘improperly’ obtains any information held by an entity? Can a court of law admit such evidence?
18. In answer to that question, we note that in Civil Appeal No 281 of 2015 [*Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Boar*](#); [2015] eKLR it was held;
- “What does the law state regarding illegally obtained evidence? In the case of *Karuma, Son of Kaniu v The Queen* [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that
- “the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained”.
- In that case, the Privy Council decision was supported by the decision in [*Reg v Leatham*](#) (1861) 8 Cox CCC 498 which was referred to in the judgment. In *Re Leatham (supra)*, it was said
- “it matters not how you get it if you steal it even, it would be admissible in evidence”.
- In [*Olmstead v United States*](#) (1928) 277 US 438 the Supreme court of the United States of America opined that
- “the common law did not reject relevant evidence on the ground that it had been obtained illegally.”
- In [*Helliwell v Piggot-Sims*](#) [1980] FSR 356 it was held that “so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning.”
19. The above position applies generally including to election petitions which are matters sui generis. But we further note that the 3rd respondent relies on article 50(4) of the [*Constitution*](#) and urges that evidence



obtained in a manner that violates any right or fundamental freedom in the Bill of Rights should be excluded. The said provision reads-

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.” (Emphasis added).

20. The courts have extensively interrogated the provision of article 50(4) and made conclusive determinations on the same. In Petition No 5 of 2015 *David Ogolla Okoth v Chief Magistrate court, Kibera & 2 others*; [2016] eKLR for example, the court pronounced as follows:

“It is true evidence ought to be obtained in accordance with the provisions of both the *Constitution* and of the law. Obtaining evidence and indeed, as in this particular case, seizing the same without first obtaining appropriate warrants violates constitutional norms. The right to property as well as the right to privacy will be violated. ... In such instances, article 50(4) provides...

[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”

21. The learned Judge further opined:

“I do not however agree with the position adopted by the petitioner which is seemingly an unqualified one that all evidence not properly obtained lead to some form of prejudice and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the *Constitution* emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice.”

22. Again that is the correct interpretation of the issue at of hand generally but in the instant matter, the *Constitution* provides for the right of access to information which has been operationalized through two pieces of legislation, the *Independent Electoral and Boundaries Commission Act* and the *Access to Information Act*. We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

23. Further, 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, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the *Constitution* and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.

24. The petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the petitioners’ case against the 1st and 2nd respondents, and to an extent, the 3rd respondent. No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of



such information. This is the point of divergence between the instant matter, and the case of *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* (*supra*). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd respondent is guaranteed under the *Constitution* and section 27 of the *IEBC Act*. This is because the limitation imposed by both article 50(4) and section 27 aforesaid squarely apply to the matter before us.

25. The court also has to find a balance between the petitioners' rights to access of information as guaranteed under article 35 of the *Constitution*, against those of the 1st and 2nd respondents' rights to privacy and protection of property also guaranteed under articles 31 and 40 of the *Constitution*. If access was in the instance, obtained through the laid down procedure under section 27 of the *Independent Electoral and Boundaries Commission Act*, and section 6(1) of the *Access to Information Act*, then the rights of both the petitioners and the respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information. The petitioners have further been unable to establish that the internal memos obtained from the 2nd respondent would be used in the protection of fundamental rights or freedoms, or that without such information, they would be unjustly prejudiced. Thus in *Rev Timothy Njoya v Attorney General & another* (*supra*) at para 44, the court held as follows;

“In *Cape Metropolitan Council v Metro Inspection Services Western Cape & others* (2001) ZASCA 56 the court stated as follows;

“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.(Emphasis added)”

The same position was adopted in *Unitas Hospital v Van Wvk & another* (231/05) (2006) ZASCA 34 where the court expressed itself as follows;

“[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough.”

26. From the foregoing it has to be established that the public interest that the petitioners seek to advance would not infringe on the respondents' rights, and that the acts of the petitioners would justifiably be upheld in an open and democratic society. However, by violating the provisions of the same *Constitution* that they laud in their objection, the petitioners not only violated the provisions of sections 27 of the *Independent Electoral and Boundaries Commission Act*, but also breached the provisions of articles 24(1) and 35(1) of the *Constitution* and in the circumstances, their use of the internal memos would not advance the interests of justice.

C. Finding

27. In view of our findings above and having deliberated on the contested issues, our final orders in the notice of motion dated November 11, 2017 shall be as follows:



- (i) The following documents are expunged from the record:
- (a) The Internal Memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Mr Ezra Chiloba marked NM-3 annexed to the affidavit of Njonjo Mue.
 - (b) The Internal memo dated October 9, 2017 from a former Commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked NM-10 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.
 - (c) The Internal Memo dated October 14, 2017 from the Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS and CECs of the 2nd respondent marked as NM-12 annexed to the affidavit of Njonjo Mue sworn November 5, 2017.
 - (d) Internal Memo dated October 16, 2017 from a former Commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.
 - (e) The Internal Memo dated October 16, 2017 from a former Commissioner of the 2nd respondent, Ms Roselyn Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar sworn on November 5, 2017.
- (ii) There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2017

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

N. S. NDUNG’U

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA



JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR,

SUPREME court OF KENYA

