



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omondi & another v Attorney General & 2 others; EtheKon & 7  
others (Interested Parties) (Constitutional Petition E269 of 2025)  
[2025] KEHC 9451 (KLR) (Constitutional and Human Rights) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9451 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E269 OF 2025  
RE ABURILI, JM CHIGITI & AB MWAMUYE, JJ  
JUNE 24, 2025**

**BETWEEN**

**KELVIN ROY OMONDI ..... 1<sup>ST</sup> PETITIONER  
BONIFACE MWANGI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
HEAD OF PUBLIC SERVICE ..... 2<sup>ND</sup> RESPONDENT  
THE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ERASTUS EDUNG ETHEKON ..... INTERESTED PARTY  
ANNE NJERI NDERITU ..... INTERESTED PARTY  
MOSES ALUTALALA MUKHWANA ..... INTERESTED PARTY  
MARY KAREN SOROBIT ..... INTERESTED PARTY  
HASSAN NOOR HASSAN ..... INTERESTED PARTY  
FRANCIS ODHIAMBO ADUOL ..... INTERESTED PARTY  
FAHIMA ARAPHAT ABDALLAH ..... INTERESTED PARTY  
JUSTUS MUTUNGA MUTUKU ..... INTERESTED PARTY**



## RULING

1. When this matter came up for highlighting of the parties' written submissions on 23<sup>rd</sup> June 2025, the Petitioners informed the court that they had filed a Notice to Produce dated 15<sup>th</sup> June 2025 under Section 69 of *Evidence Act* Cap 80 Laws of Kenya wherein they were seeking the following information:
  - a. The Final Report of the IEBC Selection Panel presented to the President;
  - b. Recommendations and score sheets of all shortlisted candidates as per the List dated 25<sup>th</sup> March 2025; and
  - c. Transmittal Letter to the President dated 6<sup>th</sup> May 2025 together with all enclosures therein.
2. The Petitioners had also filed an application by way of a Notice of Motion under Articles 10 and 35 of *the Constitution* of Kenya, 2010, Sections 4,8, 9(1), 28(3)(c) and (d) of the *Access to Information Act*, Cap 7M., Laws of Kenya, Section 69 of the *Evidence Act*, Regulation 15 of the Access to Information (General) Regulations, 2023 and all other enabling provisions of the law.
3. The Application seeks the following orders:
  - 1 ...spent.
  2. That this Honourable Court be pleased to issue an order compelling the 1st, 2nd and 3rd Respondents to supply the Petitioners, within 24 hours of the order, with a complete set of the IEBC Selection Panel's Final Report, including the raw score sheets by each panelist, cumulative scores for all shortlisted and interviewed candidates, the panelists' recommendations and the transmittal Letter to the President dated 6 May 2025 together with all enclosures therein.
  3. That this Honourable Court be pleased to grant leave to the Petitioners and any other parties to reply or to otherwise canvass any legal question arising from the production or non-production of the IEBC Selection Panel's Final Report, including the raw score sheets by each panelist, cumulative scores for all shortlisted and interviewed candidates, the panelists' recommendations and the transmittal Letter to the President dated 6 May 2025 together with all enclosures therein.
  4. Those costs of this application be in the cause.
4. The petitioners' counsel led by Paul Muite SC submitted that the supervisory role of the National Assembly is critical. That in this case, records of the IEBC Selection Panel deposited with the National Assembly are available. That the petitioners need to know the scores of each of the nominee. That from the information, the proposed Chair stated when he was being interviewed that he did not even apply but was told by some people in a cyber cafe that he was suitable.
5. That the proposed Chairperson served as County Attorney of Turkana County when the Chief of Staff of State House, Mr. Nanok was the Governor of Turkana County. That during Mr. Nanok's tenure as Governor, the Auditor General's reports show that monies were allocated to the County Government of Turkana but they could not be accounted for therefore the Chairman nominee cannot be entrusted with being the Chairman of IEBC.
6. The respondents and the interested parties opposed the Notice to produce and the application for discovery. They contended that, a party cannot apply for discovery after pleadings had closed and



- submissions already filed. That the Rules of procedure guarantee equal protection of the law, such that a case cannot be changed at the last minute.
7. They argued that in such instance no fair hearing can be achieved. They maintained that the request to produce and discovery of information sought is a legal impossibility and that in any event, the documents sought were available before the petition was filed. They submitted that the National Assembly is not the secretariat of the IEBC Selection Panel which latter is not a party to this petition and that the secretariat for the IEBC Selection Panel was the Parliamentary Service Commission which is not a party to the petition. That the Parliamentary Service Commission is independent of the National Assembly, with the secretariat being headed by the Clerk to the Senate, not Clerk of the National Assembly.
  8. We have considered the application for discovery and the Notice to produce and the respective parties' arguments for and against. The issue for determination is whether the prayers sought are available to the petitioners.
  9. Under the First Schedule to the IEBC Act, the procedure for appointment of chairperson and members of the commission starts with the establishment of the secretariat hosting the IEBC Selection Panel. The Schedule stipulates as follows:
    - (6) The Parliamentary Service Commission shall provide the secretariat services and facilities required by the IEBC Selection Panel in the performance of its functions.
  10. The question therefore is whether this Court should compel the parties named in the application and in the Notice to Produce, to supply to the petitioners, the information sought.
    - a. The Notice of Production to the National Assembly
  11. While section 6 of the First Schedule to the IEBC Act states that Parliamentary Service Commission shall provide secretariat services to the IEBC IEBC Selection Panel, the Parliamentary Service Commission is not a party to these proceedings.
  12. On the other hand, the National Assembly and the Parliamentary Service Commission are two and distinct constitutional entities.
  13. Further, Article 95 of *the Constitution* provides for the Role of the National Assembly, while the role of The Parliamentary Service Commission is set out in Article 127. The two entities have distinct roles and functions.
  14. Although the Speaker of the National Assembly is the Chairman of the Parliamentary Service Commission, the Secretary and head of the Parliamentary Service Commission Secretariat is the Clerk of the Senate, who is not a party to these proceedings.
  15. On the other hand, the IEBC Selection Panel was a statutory body and structure that was created with a limited mandate that did its work in selecting the commissioners.
  16. Mrima J in *Okoitji v Attorney General & 5 others (Constitutional Petition E364 of 2020)* [2021] KEHC 439 (KLR) (Constitutional and Human Rights) (29 November 2021) (Judgment) made a finding that the Parliamentary Service Commission is distinct from Parliament and stated as follows:

“Whereas the PSC’s main role was to provide services and facilities to ensure the efficient and effective functioning of Parliament, that did not make it subordinate to Parliament. PSC



remained independent and was only subject to the Constitution and the law. Whereas PSC and Parliament were interdependent, they were distinct constitutional entities.”

17. The National Assembly pursuant to paragraph 3(5) of the First Schedule of the IEBC Act only receives the list of nominees and it can therefore not be expected to produce documents that it is not mandated by law to receive and or have custody of.
18. Additionally, in order to secure the information that is being sought, the Petitioners should have invoked Article 35 of the Constitution and its implementing Act, the Access to Information Act. This accords with the doctrine of exhaustion.
19. We observe that the petitioners requested for the information on 9<sup>th</sup> May 2025 and on the 13<sup>th</sup> May, 2025, they filed the Petition in court four days later, before they could receive the information sought. Section 9(1) of the Access to Information Act provides that the request for information must accord the concerned public office a maximum of 21 days from the date of receipt of the application, to make a decision on the application, unless the information sought concerns the life and liberty of a person in which case, the maximum period is 48 hours. That is not the case here.
20. Further, in ground 9 of the Notice of Motion dated 13<sup>th</sup> May 2025 seeking interim conservatory orders, the Petitioners stated that the selection is not based on merit, as some of the candidates did not achieve high scores in the interviews. The petitioners therefore seemed to require the information as being critical to the petition. They however did not pursue that prayer at the interlocutory stage.
21. We note that the application seeking to compel supply of the information was made on 15<sup>th</sup> June 2025 after the pretrial directions were given on 9<sup>th</sup> June 2025, with the petition ready for highlighting of submissions on 23<sup>rd</sup> June, 2025.
22. Even though the 21 days’ Notice contemplated in section 9(1) of the Access to Information Act had now lapsed when the application for discovery was filed in court, the Act at section 14 provides that the aggrieved applicant would then move the Commission on Administrative Justice for review of the decision or where there is no such decision forthcoming, within 30 days of such decision or no decision.
23. In our humble view, the 24 hour ultimatum sought in the application for discovery does not accord with the statutory timelines under sections 9 and 14 of the Access to Information Act, noting that the petition was slated for hearing on 23.6.25.
  - b. The Notice for Production to the Attorney General
24. The Notice to produce is dated 15<sup>th</sup> June, 2025. It was issued to the Attorney General, the Head of public Service and the Clerk of the National Assembly.
25. We observe that the Attorney General is not a member of the IEBC Selection Panel under the IEBC Act and neither does the office of the Attorney General participate in the conduct of the recruitment of the IEBC Commissioners. It follows, therefore, that the Attorney General cannot be compelled to produce documents which are not contemplated to be in her custody, in the first place.
26. Our finding and holding is buttressed by the persuasive holding in *Federation of Women Lawyers-Kenya & 28 others v Attorney General & 8 others* [2015] eKLR, where Lenaola J (as he then was) stated:

“

“26. Although parties did not address me on the issue it seems to me Article 35 rights are substantive rights that must be proved, not in interlocutory



proceedings, but in a substantive hearing on the merits. To do otherwise would mean that Article 35 processes are merely facilitative of a hearing to prove the alleged violation of other rights in the Bill of Rights by invocation of Article 35(2) of *the Constitution*. At face value, I see no merit in such a proposition. I digress.

Lastly, it has been held that right to access information is not absolute and may be restricted in appropriate circumstances. In that regard, in *Nairobi Law Monthly vs Kengen* (supra) Ngugi J held as follows:

“It is however, recognized that there may be need to restrict access to some information, and some exceptions to the information that can be disclosed. In this regard, Article 19(3) of ICCPR provides that;

QUOTE{startQuote “}

The exercise for the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

For respect of the rights or reputations of others;

For the protection of national security or of public order (order public), or of public health or morals’.

The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be clear. Narrow and subject to strict “harm” and “public interest” tests, and to the rights and interests of others.

In considering restrictions or exceptions to the right to information in Kenya, regard must be had to the express provisions of Article 24 of *the Constitution*.”

I entirely agree with the learned judge and if I heard the Respondents correctly their claim was that some of the information sought cannot be granted because it would in essence violate the constitutional rights of third parties who had not consented to disclosure of the information in question. I must agree with the Respondent in that regard. I say so because as can be seen from the letter setting out the request for information reproduced elsewhere above, it is true that the Petitioners are inter alia seeking information relating to names and victims of gender based violence, persons living with HIV/AIDS, injured and murdered persons as well as information on persons whose properties were damaged and lost property during the relevant period. Such information is of a private nature and it cannot be produced without consent as that would in essence violate Article 31 of *the Constitution* and that is all to say on that subject.”

27. The Supreme Court in *Kenya Railways Corporation & 2 others v Okoiti & 3 others* [2023] KESC 38 (KLR) observed as follows:

“Article 35 of *the Constitution* of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The *Access to Information Act* No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency. In



Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others Nrb  
Petition No 25 of 2013 [2013] eKLR, the High Court stated as follows:

“However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. ... In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized.”

c. The Notice for Production to the Head of Public Service

28. As stated in the preceding section, we note that there is no nexus between the Head of Public Service, the second respondent herein and the IEBC Selection Panel, or the information sought by the petitioners. The Head of Public Service is neither a member of the Parliamentary Service Commission which provides secretariat services to the IEBC Selection Panel, nor is he the recipient of the report and the annexed documents emanating from the IEBC Selection Panel and transmitted to the appointing authority.
29. Accordingly, we find and hold that the head of Public Service cannot be expected to have custody of the information required to be supplied to the petitioners.
30. The court in the case of Republic v Communication Authority of Kenya; Safaricom Limited & 2 others (Interested Parties); Ex Parte Omikko Electronics Kenya [2019] KEHC 11697 (KLR) observed as follows:

“

“43. A clear reading of Article 35 of *the Constitution* and section 4 of the *Access to Information Act*[25] shows that the Respondent must hold the information sought. In fact, Article 35 provides every citizen has the right of access to— information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. The question that warrants consideration is whether it has been established that the Respondent holds the information sought for the ex parte applicant to lay its claim on the information.

.....

48. The architecture and design of Article 35 of *the Constitution* and section 4 of the *Access to Information Act* [27] is very clear. The Respondent must hold the information.”

d. The Notice for Production to the Clerk of the National Assembly

31. Article 127 (3) of *the Constitution* provides that the Clerk of the Senate shall be the Secretary to the parliamentary Service Commission.
32. In this Case, the petitioners have issued Notice to produce to the Clerk of the National Assembly. In our humble view, the Notice to produce issued to the latter is misplaced. It is issued to a party who has no authority or control of the Secretariat to the Parliamentary Service Commission.
33. On the whole, and for the foregoing reasons, it is this Court’s finding and we hold that the Petitioners’ application and Notice to Produce dated 15<sup>th</sup> June, 2025 cannot succeed. They are not only misplaced at this stage of the proceedings, but are also caught up by the doctrine of exhaustion.



34. In so holding we are guided by the case of Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 where the Court expressed itself in relevant part as follows:

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

23. ... Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

### **Disposition**

35. We find that applicants have not made out a case that would make this court to compel the respondents to supply the petitioners with a complete set of the IEBC IEBC Selection Panel’s report including the score sheet by each panelist, cumulative scores for all shortlisted and interviewed candidates, the panelists recommendations and the transmittal letter to the President dated 6<sup>th</sup> May, 2025, together with all enclosures therein within 24 hours of the order.

36. Having found that prayer No. 2 is not merited, it follows that prayer number 3 cannot issue.

37. For the above reasons, the application for discovery and the Notice to Produce dated June 15, 2025 as argued orally, are hereby disallowed.

38. We make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24<sup>TH</sup> DAY OF JUNE, 2025**

**R.E. ABURILI**

**JUDGE**

**J.M. CHIGITI (SC)**

**JUDGE**

**B. MWAMUYE**

**JUDGE**

