



Esendi & 2 others v Attorney General & another (Constitutional Petition E009 of 2024) [2024] KEHC 6050 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6050 (KLR)

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

RE ABURILI, J

MAY 28, 2024

IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 12, 19, 20, 21, 22, 24, 28, 35, 43, 47 AND 245 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE APPLICATION OF SECTIONS 4 AND 6 OF THE ACCESS TO INFORMATION ACT

AND

IN THE MATTER OF THE DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INTERPRETATION, ENFORCEMENT AND PROTECTION OF THE BILL OF RIGHTS UNDER ARTICLE 19, 20, 22, 23, 24, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA

BETWEEN

LINDA AMAGOVE ESENDI 1ST PETITIONER

LINDA AMAGOVE ESENDI (SUING AS NEXT FRIENDS OF ZJN) 2ND PETITIONER

LINDA AMAGOVE ESENDI (SUING AS NEXT FRIENDS OF TJB) 3RD PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT



RULING

1. On 13th May 2024, the Petitioners herein filed the Petition dated 6th May 2024 simultaneous with the application dated the same day.
2. In the Petition, the Petitioners seek for a declaration that the acts and or omission of the 2nd Respondent National Police Service are inconsistent with the Constitution and other relevant law; that the court be pleased to issue a writ of mandamus directing the 2nd Respondent to supply the Petitioners with the information on the benefit due and amounts claimable; costs of the suit; any other relief that the court may deem just.
3. In the main body of the petition, it is pleaded that the 1st Petitioner is the mother and next friend to ZJN and TJB who are minors and that she is the widow to the deceased police officer CIP Caleb Owino Natha who died while still in the service.
4. That the 1st Petitioner has written to the National Police Service asking for information on the next of kin and the benefits payable to her and her children but that despite her supplying the National Police Service with all the relevant information required vide letter of 24th November 2023, the National Police Service have refused to furnish her with the said information hence this Petition and the application which was brought under certificate of urgency.
5. In the application dated 6th May 2024, the Petitioners pray for an injunction to be issued instructing the Respondents who are the Attorney General and the National Police Service Commission to give information on the next of kin and benefits due to the Petitioners and a temporary injunction to issue instructing the Respondents not to process the benefits due to anyone pending hearing and determination of the petition.
6. The court handled the matter under certificate of urgency on 14th April 2024 and directed the Applicant to serve the Respondents for inter partes oral hearing on 27th May, 2024, noting that the matter involves children as petitioners hence the need to fast track the same.
7. At the oral hearing, despite the Respondents having been served with the pleadings, no appearance was made. Ms. Khisa counsel for the Applicant/Petitioner was allowed to argue the application and she did make oral submissions, reiterating the prayers sought. When the court asked her on what legislation implements Article 35 of the Constitution, she stated that it was the Data Protection Act!
8. That said, I have considered the petition as filed and the application for interlocutory orders.
9. Article 35 of the Constitution guarantees every citizen the right to access information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom. Further, (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the Nation.



10. To implement Article 35 of *the Constitution*, Parliament enacted in 2016 the *Access to Information Act* No. 31 of 2016 which legislation was assented to on 31st August 2016 and it commenced or took effect on 21st September 2016. The preamble or long title to the Act is as follows:
- “An Act of Parliament to give effect to Article 35 of *the Constitution*; to confer on the commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.
11. Under Section 3 of the Act on the object and purposes of the Act, it is provided that the same are to:-
- a. give effect to the right of access to information by citizens as provided for 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. ...
 - d.
 - e. ...
 - f. ...
12. Section 4 under Part II on the Right to Information provides that:
- (d) 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 and where that information is required for the exercise or protection of any right or fundamental freedom.
- (7) 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 are the person’s reasons for seeking access.
- (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
13. Section 5 of the Act is on Disclosure of information by Public entities.
14. Section 7 provides for designation of information access officer who is the Chief Executive officer of a public entity.
15. Under Section 8, the person seeking to access information is given a procedure on how to access that information by applying in writing. A public entity may also prescribe a form for making an application to access information and a public officer shall process the application expeditiously and make a decision within 21 days of receipt of the application except where it involves life or liberty of a person in which event, the public entity must supply the information within 48 hours of receipt of the application.



16. Section 11 provides that where a decision is taken to provide the information sought, 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, that the information will be contained in an edited copy where applicable. Under paragraph (f), an appeal may be made to the Commission in respect of the amount of fees required or the form of access proposed to be provided where the public entity refuses to grant access to information sought, then the applicant may apply in writing to the commission of Administrative Justice, requesting for review of any of the decisions of the entity. See Section 14 (1) (a) of [Access to Information Act](#).
17. The Commission has 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. See Section 21 of the [Access to Information Act](#).
18. Section 22 gives a person wishing to lodge a complaint under the Act to do so orally or in writing to the Secretary of the Commission or such other person as may be authorized by the Commission.
19. In the instant case, the 1st Petitioner/ Applicant laments that the National Police Service Commission has refused to supply her with information regarding who the next of kin are of the late Chief Inspector of Police Caleb Owino Natha and the benefits that are due.
20. That is information which is held by the NPSC which is a public entity and therefore by virtue of the [Access to Information Act](#), the Applicant is entitled to lodge a complaint with the Commission on Administrative Action, upon which the Commission will investigate as that is within its mandate and functions.
21. It follows that the applicant approached this court prematurely without exhausting the procedure established under the [Access to Information Act](#).
22. I hasten to add that it is not every dispute that must be resolved by the courts since [the Constitution](#) and the law has created other avenues for resolving such disputes and in such instances, the court becomes the port of last resort.
23. The Commission has immense powers under Section 23 of the [Access to Information Act](#) including:
 1. 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.
 2. Question any person in respect of any subject matter under investigation before the commission.
 3. Require any person to disclose any information within such person's knowledge relevant to any investigation by the commission.
24. Further, the Commission has power to order for release of the information withheld unlawfully or give any other lawful remedy or redress.
25. It is the order of the Commission that may be enforced by the High Court through an ex parte Chamber Summons under Section 23 (5) of the [Access to Information Act](#).
26. I reiterate that there exists an established elaborate procedure for requiring information which is held by a public or private entity and a petition to this Court is not one of them.



27. To bypass the elaborate procedure articulated in the *Access to Information Act* is to flout the Constitutional provisions under Article 159 (2) (c) of *the Constitution* which mandates this court to promote alternative forms of dispute resolution mechanisms.
28. In addition, Section 7 of the *Fair Administrative Action Act* grants the right to apply for review of the administrative action or decision to the court or a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
29. Section 9 of the *Fair Administrative Action Act* bars parties from filing in court proceedings except with leave of the court, matters or disputes which they ought to have lodged before the other bodies established by law.
30. In this case, the Commission on Administrative Action is the relevant body under the *Access to Information Act*.
31. Therefore, for the reasons that the Applicant/Petitioner has not exhausted the remedies set out under the *Access to Information Act*, I invoke Section 9(3) of the *Fair Administrative Action Act* and direct the Applicant to exhaust those remedies first before approaching this Court as stipulated in section 23 (5) of the *Access to Information Act*.
32. Accordingly, the application and the Petition dated 6th May 2024 are found to be prematurely filed before this court and are hereby struck out with no orders as to costs and this file is closed.
33. Ruling to be uploaded in the e-portal.
34. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MAY, 2024

R. E. ABURILI

JUDGE

