



**Ahmed v County Government of Mandera & 2 others (Petition
04B of 2022) [2024] KEHC 6885 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION 04B OF 2022**

JN ONYIEGO, J

MAY 24, 2024

BETWEEN

JAMALDIN HAJI ADAN AHMED PETITIONER

AND

THE COUNTY GOVERNMENT OF MANDERA 1ST RESPONDENT

**SULEIKHA HARUN COUNTY EXECUTIVE COMMITTEE MEMBER
FOR FINANCE AND ECONOMIC PLANNING MANDERA**

COUNTY 2ND RESPONDENT

ABDINUR MAALIM HUSSEIN COUNTY SECRETARY MANDERA

COUNTY 3RD RESPONDENT

JUDGMENT

1. The petitioner by a letter dated 21.11.2021 wrote to the respondents seeking for information in reference to the financial status of the 1st respondent. The petitioner desired to know all development projects approved and completed in all the seven sub counties, development fund received from the national treasury from the year 2017/2018 financial year to the time of the filing of this petition and all the pending bills of the 1st respondent.
2. He further sought to know the number of projects awarded to companies owned by youths, women and persons with disabilities as stipulated under the AGPO Act and all projects done in the new sub counties of Kiliwehiri and Arabia over the last Financial Year of 2019/2020.
3. That despite writing the said letter to the respondents, he failed to receive a response as the respondents verbally informed him that the information and documents sought were readily available and could be found on the 1st respondent's website. Dissatisfied with the said response, the petitioners moved to this court seeking orders compelling the respondents to provide and allow full access to the information sought.



Petition

4. The petition dated 23.02.2022 and filed by the firm of Kinaro & Associates Advocates was premised on the fact that the petitioner is a human rights activist hailing from Mandera County and previously served as a nominated member of County Assembly representing the youth in Mandera County Assembly. That by a letter dated 21.11.2021 directed to the respondents, he sought to have full disclosure on all development projects approved and completed in all the seven Sub Counties(Lafey, Mandera East, Mandera North, Banissa, Mandera West, Mandera South and Kutulo) starting from the financial year 2017/2018 to date; all projects done in the new sub counties of Kiliwehiri and Arabia during the financial year of 2019/2020; development funds received from the National Treasury starting from the year 2017/2018 financial year to date; all pending bills of Mandera County government and the status of the pending bills owed to the contractors and how many projects were awarded to companies owned by Youths, Women and Persons with disabilities as stipulated under the AGPO Act starting from the financial year 2017 – 2018 to the time of filing the petition.

The respondents' reply

5. Adan Kullow, the legal officer of the County Government of Mandera in his replying affidavit sworn on 20.05.2022 deponed that he was aware of the said letter dated 23.02.2022 through which the petitioner sought for information regarding accountability status of the Mandera County Government and full disclosure of projects as already listed elsewhere in this judgment.
6. That the same was duly received and the petitioner informed by the County secretary that the said information could be found on the Mandera County Government website <https://mandera.go.ke/>; He deponed that at no particular time did the petitioner get back to the County Secretary informing him that he did not access any of the documents he requested for. He deposed that section 6(5) of the [Access to Information Act](#) provides that a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.
7. He argued that the information for requested by the petitioner was readily available and within the public domain. That in further compliance with the Executive Order No. 2 of 2018, all public entities were mandated to maintain and continuously update information of all tenders awarded on the county website together with all county projects awarded to companies owned by youths, women and persons with disabilities as stipulated under the AGPO Act. That the same became effective from the financial year 2017 – 2018 to date and that the said information is still available on the county website.
8. It was urged that the petitioner did not demonstrate how he was likely to suffer as a result of non-disclosure of the information sought. That section 9 of the [Access to Information Act](#) provides that a public officer ought to make a decision regarding an application for access of documents within twenty-one days and upon its lapse, the application shall be deemed to have been rejected. That the petitioner was thus entitled to make an application to the Commission on Administrative Justice within thirty days from the notification requesting a review of the decision on the access to the information applied for as provided for under section 14(2) of the [Access to Information Act](#).
9. It was argued that the jurisdiction of this court was not appropriately moved as the petitioner could have moved the Commission instead and as such, he failed to exhaust the dispute mechanisms provided for under the [Access to Information Act](#). It was deposed that the petitioner's allegations that the respondent violated his rights are far-fetched. For the reasons aforesaid, it was prayed that the petition herein be struck out with costs to the respondents.



10. The court gave directions that the petition be canvassed by way of written submissions which all parties adhered to.

Petitioner's Submissions

11. The petitioner filed submissions dated 05.09.2023 thus submitting on four issues for determination;
- i. Whether the respondents' failure to provide information sought by the petitioner is a violation of the petitioner's right to access to information and the same contravened article 10 of the constitution.
 - ii. Whether the actions of the respondents contravened the principles of Leadership and Integrity and values and principles of Public Service.
 - iii. Whether the petitioner is entitled to general damages for breach of his constitutional rights.
12. In reference to the first issue, it was submitted that access to information to a citizen is a fundamental constitutional right which cannot be taken away. To buttress this position, reliance was placed in the case of *Mercy Nyawade v Banking Fraud Investigations Department & 2 Others* [2017] eKLR where the court held that offering citizens access to state –held information is 'one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability. That what must be borne in mind is that access to information disputes are concerned with a constitutional right.
13. That the state and its officers have a constitutional obligation without qualification to allow the citizens access information and they cannot be denied that right by the state and/or by the state officers.
14. Counsel contended that having in mind that the 2nd and 3rd respondents were state officers, they neglected their constitutional obligation to furnish the petitioner with the information sought and therefore, the said actions were contrary to Section 9 (4) of the Access to Information Act. Reliance to support the same was placed on the case of *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* [2016] eKLR where the court held that the right to access information should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interest including privacy.
15. It was urged that the allegation by the respondents that they informed the petitioner that the sought information was readily accessible on the public domain through Mandera County Government website was far from the truth as the same was not available in the said website.
16. That the annexed website print out marked as annexure AK4 and AK5, does not lead to the sought information as alleged. Further, that the allegation by the respondents that they informed the petitioner of the websites where the sought information could be found was false. Reliance was placed on the case of *Katiba Institute v Presidents Delivery Unit & 3 Others* [2017] eKLR where the court while discussing the right to access information referred to section 4 (1) (2) (3) (4) and (5) of the Access to Information Act and stated that:
- “The respondents were under both constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public...”
17. It was argued that there was no justifiable reason to limit the petitioner's right to access information. It was further contended that for accountability and openness purposes in the use of public finance pursuant to article 210 of the constitution, it was prudent in a democratic society that the County of Mandera furnish the petitioner with the information.



18. On the questions whether the petitioner was entitled to general damages for breach of his constitutional rights, the petitioner urged that having proved that indeed the petitioner's right to information was infringed, it was mete that this court awards him damages. He relied on the case of *Albanus Mwasia Mutua v Republic* [2006] eKLR where the court observed that at the end of the day, it is the duty of the court to enforce the provisions of *the constitution*, otherwise there would be no reason for having those provisions in the first place. He thus contended that Kes. 5,000,000/- was appropriate in the given situation.

Respondents' submissions

19. The respondents filed submissions dated 10.11.2023. Three issues were listed for submissions to wit:
- i. Whether the petitioner is suited to bring a suit against the 2nd and 3rd respondents in the instant proceedings.
 - ii. Whether the respondents have correctly invoked the exemption to the right to access to information under section 6(5) of the *Access to Information Act*.
 - iii. Whether the 1st respondent should be compelled to provide the information sought.
20. On the first issue, the respondents argued that the petitioner was not suited to bring the suit herein against the 2nd and 3rd respondents in their personal capacities. That the 2nd and 3rd respondents are protected from personal liability for actions done in good faith in the execution of their mandate pursuant to section 22 of the *National Government Co-ordination Act* 2013. It was argued that the petitioner did not establish that the 2nd and 3rd respondent acted in bad faith in the conduct of their duties by failing to supply the information sought since it was available elsewhere. To that end, support was placed on the case of *Khalifa & Another Principal Secretary, Ministry of Transport & 4 Others Constitutional Petition E032 of 2019* [2022] KEHC 368(KLR) where the court held that bad faith is serious allegation which attracts a heavy burden of proof. The allegation that the 4th and 5th respondents acted other than in good faith in declining to divulge the information sought is a serious allegation and not one lightly to be made.
21. It was urged that the 2nd and 3rd respondents have since left the positions held with the 1st respondent following the general election and therefore new individuals have since been appointed. That the suit against them should thus be dismissed with costs.
22. On the second issue, it was submitted that in line with article 24 (2) (b) of *the constitution*, the respondents' obligation to provide the petitioner with access to the desired information is limited under section 6(5) of the *Access to Information Act*. That the county website is accessible to all members of the public and the residents of Mandera County including the petitioner.
23. In the same breadth, counsel argued that the sought information could easily be further found from other sources such as parliament, the office of the Auditor General as well as the National Treasury all of which have public websites and available to all persons, including the petitioner. The respondent submitted that in the said website, therein were development plans which detailed and set out all the projects approved and budgeted for by the 1st respondent in each financial year were available.
24. That in line with the former president's directions under Executive Order No. 2 of 2018 as well as its obligations under article 35(3) of *the constitution*, the 1st respondent established and continues to maintain an official website to which all information touching on the 1st respondent's actions are published and publicized.



25. It was further contended that, the information sought having been available and accessible to the petitioner through other means, as was communicated to him, the respondents were not under any obligation to provide the petitioner with the information sought. Further, that the petitioner failed to return to the respondents when he found that the said information in the website was not sufficient to meet his request.
26. Lastly, it was contended that the information sought by the petitioner is exempted under section 6(5) of the *Access to Information Act*. The respondent continued that the information sought had been publicly accessible to the petitioner and the same did not constitute information held or kept by the respondent within the meaning of article 35(1) of *the constitution*. This court was therefore urged to dismiss the petition herein with costs.

Analysis and Determination

27. I have considered the pleadings herein, submissions by counsel and authorities cited. The only issue for determination is whether the respondents violated the petitioner's right of access to information.
28. The crux of the matter herein is anchored on the right to access public information by the petitioner from the county Government of Mandera through a letter dated 17th August 2017.
29. The petitioner contended that by failing to furnish the sought information, the respondents violated Articles 10, 35, 73, 75 and 232 of *the Constitution* and section 96(1) of the County Government Act 2012. The respondents on the other hand hold the position that they did not violate the petitioner's right to access information. The respondents further contended that the information sought is and has always been available in the 1st respondent's website hence there was no breach caused.
30. It is trite that every individual has a right to access information held by public authorities and/ or from the persons acting on behalf of the state. There is no doubt that this is an important tool through which citizens exercise their right of involvement in the proper and democratic conduct of government affairs. [See articles 35 of *the constitution*.]
31. Article 35 of *the Constitution* provides that;
- 1) "Every citizen has the right of access to—
 - a) information held by the State; and
 - b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - 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.
32. *The Constitution* is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of *the Constitution* does not in any way place conditions for accessing information.
33. For purposes of actualizing Article 35, parliament enacted *Access to Information Act* 2016. Section 4 of the Act which is material to this petition provides for the procedure to access information. The section provides;



- 1) “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.
 - 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 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.
 - 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.
34. It is important to note that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking that very information. This reinforces the fact that Article 35 does not in any way limit the right to access information.
35. On the other hand, section 5 of the Act further provides that a public entity should facilitate access to information held by it. Under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. The Act is also sufficiently clear that the same should be given without delay and at no fee, notwithstanding why the citizen wants to access information. Section 9 states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information in question and whether it will provide access to the information.
36. In the case of *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others* [2013] eKLR the Court outlined what the state should bear in mind when considering a request to access information.;

“34. The...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...”

36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester



should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

37. The Court then went on to state at paragraph 56 as follows;

“[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a)... they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens.”

38. In the same breadth, the Constitutional Court of South African in the case of *President of Republic of South Africa v M & G Media Ltd* [998/2013] [2014] ZASCA 124 also dealt with the issue of access to information where the Court stated that: -

“[10]. The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

39. The respondents in their responses and submissions contended that the petitioner having sued the 2nd and 3rd respondents in their personal capacities and who were no longer employees of the 1st respondent, they had no capacity to deliver the sought information.

40. Indeed, Order 1 Rule 9 of the Civil Procedure Rules, 2010 provides that: -

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

41. It therefore follows that the claim by the petitioner remains valid despite the fact that the 2nd and 3rd respondents are no longer employees of the 1st respondent. [Also see *Alice Omedi t/a Joyce Wanjiku Njuguna v Equator Bottlers Limited* [2022] eKLR].

42. The above notwithstanding, the suit herein squarely demands the sought information from the 1st respondent through its actors who were listed as the 2nd and 3rd respondents. It therefore follows that the suit by the petitioner is still valid and proper before this court as the information sought could be delivered by the institution through its agents not necessarily the 2nd and 3rd respondents who were no longer in office.

43. Having perused the petition and my attention is drawn to the response by the respondents wherein it was urged that in line with the former president’s directions under Executive Order No. 2 of 2018 as well as its obligations under article 35(3) of *the constitution*, the 1st respondent established and continues to maintain an official website to which all information touching on the 1st respondent’s actions are published and publicized.



44. Additionally, that the information having been available and accessible to the petitioner through other means, as was communicated to him, the respondents were therefore not under any obligation to provide the petitioner with the information sought. The respondent blamed the petitioner for his failure to return and report when he found that the said information in the website was not sufficient to meet his request.
45. It is trite that some policy initiatives require approval by the legislative branch, but executive orders have significant influence over the internal affairs of government, deciding how and to what degree legislation will be enforced, dealing with emergencies, waging wars, and in general fine-tuning policy choices in the implementation of the broader statutes. The Executive Order No.2 of 2018 directed all procurement entities to submit reports on public procurement and asset disposal transactions to the Public Procurement and Asset Disposal Regulatory Authority within timelines prescribed by the Public Procurement Law.
46. Section 6(1) (5) provides that:
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:
 2. ...
 3. ...
 4. ...
 5. a public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.
47. It therefore follows that if the information sought by a requester is already available, then there is no obligation upon the entity in question to provide the information sought.
48. The petitioner in his submissions urged that the annexed website print out marked as annexure AK4 and AK5, did not lead him to the information that he had sought. Further, that the allegation by the respondents that they informed the petitioner of the websites where the sought information could be found was false. Going by this explanation, and even for a moment assuming that the said links could not open; a question that lingers in the court's mind is that, by virtue of the existence of the said official websites, was not the sought information already in the public domain hence within the petitioner's reach?
49. The above notwithstanding, the respondent urged that the petitioner having found that the said information that he sought if at all was not sufficient, he had an obligation to go back and report the same to the respondent. From the pleadings before the court, it is not clear why the petitioner did not submit on the said allegation as it was his burden to prove that indeed, the respondent did not make available the information that he required even after going through the alleged information available in the respondent's official website.
50. A reading of section 6 (1) (5) of *Access to Information Act* and the fact that the sought information by the petitioner was readily available and within the public domain, I am of the considered view that the petition herein is in want of merit and the same cannot stand. The information sought was quite massive to be supplied individually if each citizen were to request for it hence the essence of maintaining a web site.



51. Why would any-one seek for massive information starting from 2017 to date yet he has been there. I am convinced that the request for access to the information sought was not made in good faith. The petitioner should utilize the public information website to access the sought information. In a nut shell, I do not find merit in the petition herein hence the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MAY 2024

J.N.ONYIEGO

JUDGE

