



**Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E003 OF 2022  
JM MATIVO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**COMMISSION FOR HUMAN RIGHTS & JUSTICE (CHRJ) ..... 1<sup>ST</sup> PETITIONER**

**GENESIS FOR HUMAN RIGHTS COMMISSION ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF DEVOLUTION ASAL'S  
AREA ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER, MEDICAL SERVICES COUNTY GOVERNMENT OF  
MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**Factors to consider when determining whether a public body had failed to supply information sought under the right of access to information.**

*The instant petition sought among others; an order compelling the 1st and 2nd respondents to avail all information pertaining to certain tenders. The court held that a litigant inviting the court to find that a respondent had failed to supply information sought had to prove that the request was made and that despite the request, the respondent had failed, refused or declined to supply the information. The court further held that when a statute expressly stated that the exhaustion of internal remedies was an indispensable condition precedent before launching an application to a court, then that condition had to first be fulfilled. The court highlighted some factors to consider for exemption from the obligation to exhaust any internal remedy. The court also pointed out that article 35 on the right to access information was not absolute.*

Reported by Kakai Toili

***Constitutional Law*** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to access information - what were the factors to consider in determining whether a public body had failed



to supply information sought - Constitution of Kenya, 2010, article 35; Access to Information Act, 2016, sections 8, 9(1) and 9(6).

**Constitutional Law** - constitutional petitions - enforcement of fundamental rights and freedoms - institution of constitutional petitions - institution of constitutional petitions before exhausting internal statutory remedies - whether a party could institute a court action before exhausting internal statutory remedies which were not mandatory - what were the factors to consider for exemption from the obligation to exhaust any internal remedy - Access to Information Act, 2016, section 14; Fair Administrative Action, 2015, sections 2 and 9.

**Constitutional Law** - fundamental rights and freedoms - limitation of fundamental rights and freedoms - limitation of the right to access information - factors to consider when determining whether a law or regulation or decision that limited rights was justified - whether the right to access information could be ousted by the Public Procurement and Asset Disposal Act and the Access to Information Act which prohibited disclosure of certain information - Public Procurement and Asset Disposal, 2015, section 67; Access to Information Act, 2016, section 6(1)(e).

### **Brief facts**

The petitioners filed the petition seeking among others; an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to avail and or furnish all information and documents requested by them. The petitioners claimed that there had been conflict of interests in the award and performance of tenders in the medical services department in the County Government of Mombasa (3<sup>rd</sup> respondent) and that there were procurement malpractices happening at the 1<sup>st</sup> respondents watch.

The petitioners averred that there was no public participation and that the 3<sup>rd</sup> respondent was managed in secrecy and financial mismanagement, thus unless the documents requested were supplied they would not unearth the irregularities/mismanagement. The petitioners further contended that they sought to be supplied with: tender advertisements; bill of quantities; list of bidders and quotation; evaluation report by the tender technical committees; tender committee minutes; statement of the value of each tender awarded; contract agreements; letters of award; and statement of actual total payment for each tender.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition and stated that the 1<sup>st</sup> respondent was not the accounting officer of the Coast General Hospital; that the petition was defective; that the petitioners had not complied with the provisions of the (the Act); that the petitioners had not complied with the Public Procurement and Asset Disposal, 2015 (); and that the information sought was protected under section 67 of the .

### **Issues**

- i. What were the factors to consider in determining whether a public body had failed to supply information sought?
- ii. Whether a party could institute a court action before exhausting internal statutory remedies which were not mandatory.
- iii. What were the factors to consider for exemption from the obligation to exhaust any internal remedy.
- iv. Whether the right to access information could be ousted by the Public Procurement and Asset Disposal Act and the Access to Information Act which prohibited disclosure of certain information.
- v. What were the factors to consider in determining whether a law or regulation or decision that limited rights was justified?

### **Relevant provisions of the Law**

#### **Access to Information Act, 2016**

#### **Section 6 - Limitation of right of access to information**

*(1) Pursuant to Article 24 of, the right of access to information under Article 35 of 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

## **Public Procurement and Asset Disposal, 2015**

### **Section 67 - Confidentiality**

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following —

- (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
- (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;
- (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
- (d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

- (a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
- (b) the disclosure is for the purpose of law enforcement;
- (c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;
- (d) the disclosure is pursuant to a court order; or
- (e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

### **Held**

1. The petitioners had not demonstrated that the request for information was ever made to the respondents. A litigant inviting the court to find that a respondent had failed to supply information sought under article 35 of the Constitution of Kenya, 2010 (Constitution) had to prove that the request for information was made and that despite the request, the respondent had failed, refused or declined to supply the information. That test had not been met in the instant case.

2. Request for information was provided under section 8 of the Act. The petitioners' letter was dated December 15, 2021 and the petition was filed on January 31, 2022. In terms of section 9(1) of the Act, the respondents were supposed to decide whether to grant or refuse the request within a reasonable time but in any event within



21 days after receiving the request. The requester had to be notified of the outcome and the next step that he or she could take.

3. If the public officer failed to give a decision on a proper request within 21 days, and no extension had been sought, the public officer was, for the purposes of the Act, regarded as having refused the request as provided under section 9(6). The word “deemed” used in section 9(6) was sometimes used in a statute in order to create a legal fiction. Often it was used in order to extend the denotation of a word or term to a thing or situation it would not in ordinary parlance denote.

4. If at all the request was made *vide* the improperly addressed letter (which was disputed), then the petitioners did not exhaust the mechanism provided under section 22 of the Act. At common law, the existence of internal remedies was not a bar to approach a court for appropriate relief after an administrative decision had been taken.

5. When a statute expressly stated that the exhaustion of internal remedies was an indispensable condition precedent before launching an application to a court then that condition had to first be fulfilled. Section 14 of the Act provided for review of a decision. The word deployed in section 14(1) was “may” which was not mandatory. However, there was nothing before the court to show that the petitioner made any effort to invoke the said procedure. In any event, the grant or refusal to provide the information was an administrative action within the meaning of section 2 of the Fair Administrative Action Act (the FAA Act).

6. Section 9(2) of the FAA Act provided that the High Court or a subordinate court under subsection (1) should not review an administrative action or decision under that Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law were first exhausted.

7. The word “shall” when used in a statutory provision imported a form of command or mandate. It was not permissive, it was mandatory. The word “shall” in its ordinary meaning was a word of command which was normally given a compulsory meaning as it was intended to denote obligation. A proper construction of sections 9(2) and (3) of the FAA Act led to the conclusion that they were couched in mandatory terms. The only way out was the exception provided by section 9(4). Two requirements flowed from section 9(4);

1. the applicant had to demonstrate exceptional circumstances. No exceptional circumstances were alluded to or proved in the instant case.
2. On application by the applicant, the court could exempt the person from the obligation. The person seeking exemption had to satisfy the court that there were exceptional circumstances and that it was in the interest of justice that the exemption be given.

Section 9(4) postulated an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to the court.

8. The petitioners ought to have exhausted the mechanism provided under the Access to Information Act before approaching the court. The petition offended the doctrine of exhaustion of remedies.

9. The right of access to information held by the State was guaranteed by article 35(1) of the Constitution. The Access to Information Act enacted to give effect to article 35 provided a framework for public entities and private bodies to proactively disclose information that they held and to provide information on request in line with the constitutional principles. Section 4 of the Act provided that access to information held by a public entity or a private body would be provided expeditiously at a reasonable cost. The wording of section 4(4) which provided that the Act would be interpreted and applied on the basis of a duty to disclose and non-disclosure would be permitted only in circumstances exempted under section 6 of the Act.

10. A reading of section 6 of the Act revealed that there were reasonable and justifiable limitations on the right of access to information. However, the burden of establishing that the refusal of access to information was justified rested on the State or any other party refusing access. In order to discharge its burden under section 6, the State had to provide evidence that the record in question fell within the description of the statutory exemption it sought to claim. The proper approach to the question whether the State had discharged its burden



under section 6 was therefore to ask whether the State had put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld fell within the exemptions claimed.

11. The documents (information) sought related to a public procurement process. Article 277(1) of the Constitution provided that when a State organ or any other public entity contracted for goods or services, it should do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. The national legislation prescribing the framework within which procurement policy had to be implemented was the PPAD Act and the Public Procurement and Disposal Regulations, 2006.

12. Section 67 of the PPAD Act contained a confidentiality clause. Section 67 in peremptory terms prohibited disclosure during or after procurement proceedings of the following information, namely;

1. information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
2. information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;
3. information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
4. the contents of tenders, proposals or quotations.

13. Disclosure would be refused if releasing the information would cause harm to the commercial or financial interests of the business of the public entity or a third party. Such interests included trade secrets of the business or a third party; financial, commercial, scientific or technical information of the business or a third party which, if disclosed, was likely to cause harm to the commercial or financial interest(s) of the body or third party; or information supplied in confidence by a third party and where disclosure of such information could reasonably be expected to put the business at a disadvantage in contractual or other negotiations, or prejudice the business in commercial competitions.

14. The only exemption permitted under section 67 of the PPAD was if the information sought related to the information listed in section 67(3) and section 6(1)(e) of the Access to Information Act. The petitioners' advocates argument that sections 67 and 6(1)(e) could not oust the right to information under article 35 of the Constitution was legally frail. It ignored the fact that article 35 right was not absolute. It could be limited by law provided that the law passed an article 24 of the Constitution analysis test.

15. The reason given had to not only be lawful, that was, they should fall within the statutory exemptions, but the reason(s) had to meet the article 24 of the Constitution analysis test in that it had to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

16. A common way of determining whether a law or a regulation or decision that limited rights was justified was by asking whether the law was proportionate. The test of proportionality had been established to the following:-

1. whether the legislation (or other Government action) establishing the right's limitation pursued a legitimate objective of sufficient importance to warrant limiting a right;
2. whether the means in service of the objective rationally connected (suitable) to the objective;
3. whether the means in service of the objective were necessary, that was, minimally impairing of the limited right, taking into account alternative means of achieving the same objective;
4. whether the beneficial effects of the limitation on the right outweighed the deleterious effects of the limitation in short, whether there was a fair balance between the public interest and the private right.

17. A reading of sections 6(3) of the Access to Information Act and section 67(3) of the PPAD Act showed that any request for access to information would be refused to protect the commercial records of a third party in terms of an agreement. The information could be refused on the following grounds:-

1. trade secrets of the business or a third party;





2. financial, commercial, scientific or technical information of the business or a third party which, if disclosed, was likely to cause harm to the commercial or financial interest(s) of the body or third party; or
  3. information supplied in confidence by a third party and where disclosure of such information could reasonably be expected to put the business at a disadvantage in contractual or other negotiations, or prejudice the business in commercial competitions;
  4. protecting confidential information in terms of an agreement; and
  5. if disclosure would amount to breach of a duty of confidence owed to a third party in terms of an agreement or contract.
18. From a reading of the list of the documents/information sought by the petitioners, the requested information fell squarely within the ambit contemplated by section 6(3) of the Access to Information Act and section 67(3) of the PPAD Act. Releasing that information would be a clear breach of sections 6(3) and 67(3).

*Petition dismissed.*

### **Orders**

*No orders as to costs.*

### **Citations**

#### **Cases**

1. Geoffrey Muthinja Kabiru & Another v Samuel Munga Henry & 1756 others (Civil Appeal 10 of 2015; [2015] eKLR) — Mentioned
2. Katiba Institute v Presidents Delivery Unit & 3 Others (Constitutional Petition 468 of 2017; [2017] KEHC 2183 (KLR)) — Explained
3. Kenya Pharmaceuticals Assurance & Another v Nairobi City County and 46 other County Governments & another (Constitutional Petition 97 of 2016; [2017] eKLR) — Mentioned
4. Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others (Petition 104 of 2019; [2021] KEHC 390 (KLR)) — Mentioned
5. Mary Nyawade Banking Fraud Investigations Department & 2 others (Petition 143 of 2017; [2017] eKLR) — Mentioned
6. Mumo Matemu v Trusted Society of Human Rights Alliance & Others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
7. Nairobi Law Monthly Limited v Kenya Electricity Generating Company & 2 others (Petition 278 of 2011; [2013] KEHC 3686 (KLR)) — Mentioned
8. R. v. Norfolk County Council
9. Speaker of the National Assembly v James Njenga Karume (Civil Application 92 of 1992; [1992] KECA 13 (KLR)) — Mentioned
10. Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission & Attorney General (Petition 314 of 2016; [2016] KEHC 3581 (KLR)) — Mentioned
11. Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors ((2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC) — Mentioned
12. Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others (2014 (5) SA 138 (CC) para 115.) [21] — Mentioned
13. Nichol & another v Registrar of Pension Funds & others (2008 (1) SA 383 (SCA) para 15) — Mentioned
14. President of the Republic of South Africa & Others vs M & G Media Limited (CCT 03/11 {2011} ZACC 32) — Mentioned
15. Rosenthal, S v Rosenthal (1980 (1) SA 65 (AD)) — Mentioned
16. S v Rosenthal (1980 (1) SA 65 (AD) at 75F - 76A) — Explained
17. Canada (AG) v Khawaja (2007, FCA 388, {2008} 4 FCR 3 at para 8) — Mentioned



18. R v Oakes ([1986] 1 SCR 103 [69]–[70]) — Explained
19. Bill v. East and West India Dock Co — Mentioned
20. Muller v Dalgety & Co. Ltd ([1909] HCA 67; (1909) CLR 693 at 696) — Mentioned

#### **Statutes**

1. Access to Information Act, 2015 (No 31 of 2015) — Section 2; Section 6; Section 7(1); Section 8; Section 9; Section 10; Section 14; Section 22; Section 23 — Cited
2. Constitution of Kenya, 2010 — Article 24; Article 27; Article 35; Article 47; Article 201; Article 227; Article 277(1); Article 159 — Interpreted
3. Fair Administrative Action Act, 2015 (No 4 of 2015) — Section 2; Section 9(2) — Interpreted
4. Public Finance Management Act, 2012 (No 18 of 2012) — Section 121 — Interpreted
5. Public Officers Ethics Act, 2003 (No 4 of 2003) — In general — Cited
6. Public Procurement and Disposal Act, 2015 (No 33 of 2015) — Section 67; Section 68; Section 167; Section 176(1)(f) — Interpreted

#### **Texts**

1. G Huscroft, B Miller and G Webber (2014), Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press,)
2. Hoexter C: (2011), Administrative Law in South Africa (Juta, 2nd Ed)

#### **International Instruments**

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — Article 9(1)
2. International Covenant on Civil and Political Rights (ICCPR), 1966 — Article 19(2)
3. Universal Declaration of Human Rights (UNDHR), 1948 — Article 19

#### **Advocates**

None mentioned

## **JUDGMENT**

1. By their Petition dated January 21, 2022, the petitioners pray for: -
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have violated the petitioner's rights under article 35 of the Constitution and article 201 of the Constitution.
  - b. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to avail and or furnish all the information and documents requested by the petitioner as listed in paragraph 12 of the petition.
  - c. Such other and or further relief this honourable court may deem fit and just to grant.
  - d. The costs of this petition to be provided for.
2. The grounds in support of the petition are that :- (a) the 2<sup>nd</sup> respondent awarded tenders to Baus Taka Enterprises Limited; Better Hours Investment Limited; Hekis Investment Limited; and Netrick Business Selection; (b) the said companies are linked to the 1<sup>st</sup> respondent's family members, relatives and friends; (c) there has been blatant conflict of interests in the award and performance of tenders in the medical services department in the County Government of Mombasa; (d) there are procurement malpractices happening at the 1<sup>st</sup> respondents watch; (e) among the questionable tenders is a tender for construction of a housing for microwave at portreiz Sub County Hospital initially valued at Kshs 18,000,000/= which was varied to Kshs 23,000,000/=.



3. They contend that document(s) relating to the installation of CCTV Cameras at Technical University of Mombasa (Isolation Centre) at Kshs 2,817,600/= awarded to one of the foresaid companies have been kept under lock and key with the help of the 1<sup>st</sup> respondent, and, that there has been a public outcry triggered by misappropriated funds meant for the renovation for the Covid-19 Isolation Centre at a price of Kshs 3,134,450/= awarded to a company associated with the 1<sup>st</sup> respondent's family member.
4. They claim that all the recent contracts funded through the county medical services have been done with utmost secrecy and lack of accountability and in total disregard of the procedures and guidelines relating to tender processes. They aver that the said companies among them Better Hours Investments, Mombasa Investments Ltd and Construction limited have dominantly and frequently emerged as beneficiaries of tenders from the Ministry of health in Mombasa County facilitated by the 1<sup>st</sup> respondent.
5. They allege that the 1<sup>st</sup> respondent has been in breach of ethics and Integrity particularly the provisions of the Public Officers Ethics Act<sup>1</sup> and the Public Procurement and Disposal Act<sup>2</sup> (the PPAD Act), that there was no public participation and the County Government is managed in secrecy and financial mismanagement, so unless the said documents are supplied, they will not unearth the said irregularities/mismanagement. Further, they contend that they bring this petition in public interest and they require the said documents to file a suit challenging the procurement at the medical services department in the County Government of Mombasa. In particular, they seek to be supplied with: - (i) Tender advertisements; (ii) Bill of quantities; (iii) List of bidders and quotation; (iv) Evaluation report by the tender technical committees; (v) Tender Committee Minutes; (vi) Statement of the value of each tender awarded; (vii) Contract agreements; (viii) Letters of award; and (ix) Statement of actual total payment for each tender. They aver that the acts complained of above constitute breach of articles 27, 35 and 201 of the Constitution.
6. The petition is opposed. On record is a replying affidavit filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents dated February 28, 2022 sworn by a one Jimmy Waliaula, the 2<sup>nd</sup> respondent's acting County Attorney. The salient points are: - (i) that the 1<sup>st</sup> respondent is not the accounting officer of the Coast General Hospital; (ii) that the petition is defective; (iii) that the petitioners have not complied with the provisions of the Access to Information Act;<sup>3</sup> (iv) that the Petitioners have not complied with the PPAD Act; (v) that the information sought is protected under section 67 of the PPAD Act.
7. On March 7, 2022, the petitioner's counsel withdrew the case against the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
8. In her submissions, the petitioners' counsel cited section 2 of the Access to Information Act which defines information to include all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production. She also cited article 35 of the Constitution, article 19 of the Universal Declaration of Human Rights; article 19(2) of the International Convention on Civil and Political Rights and article 9(1) of the African Charter on Human and People's Rights all of which guarantee the right to access information. She replicated the limitation clause in article 24 of the Constitution and section 6 of the Access to information Act and argued that the test for determining limitation of fundamental rights was set out in Legal Advice Centre

<sup>1</sup> Act No 4 of 2003.

<sup>2</sup> Act No 33 of 2015.

<sup>3</sup> Act No 31 of 2015.





*t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others*.<sup>4</sup>She emphasised that the burden of justifying the limitation rests upon the person resisting the disclosure and submitted that the Petitioners seek the information regardless of section 6 of the *Access to Information Act* and section 67 of the *PPAD Act*.

9. She argued that the respondents ought to be guided by the provisions of article 227 of the *Constitution*, section 3 of the PPAD Act and section 102 and 121 of the *Public Finance Management Act*.<sup>5</sup>She cited section 91(1), 96, 97, 98 and 68 of the *PPAD Act* and argued that the respondents are under a duty to provide the information sought, so they should not hide behind section 67 of the *PPAD Act* or section 6 of the *Access to Information Act* because access to information promotes accountability in public entities and protection of public interests citing *Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others* (supra) and *Katiba Institute v Presidents Delivery Unit & 3 others*.<sup>6</sup>
10. She submitted that it is the duty of state and its organs to publish information in the public interest and also to provide open access to information. She cited *Nairobi Law Monthly Limited v Kenya Electricity Generating Company & 2 others*<sup>7</sup> which accentuated the principles of maximum disclosure; duty to publish; process to facilitate access; costs; right of appeal; limited scope of exceptions; promotion of open government and protection of whistle blowers. She submitted that the exceptions limiting access to information should only apply where there is a risk of substantial harm to the protected interest and where the harm protected is greater than the overall public interest. She relied on *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission*.<sup>8</sup> Citing section 167 of the *PPAD Act*, she argued that the petitioners' hands were tied because they were not aware of the occurrence of the breach. Lastly, she cited *Mary Nyawade Banking Fraud Investigations Department & 2 others*<sup>9</sup> which held that exceptions to disclose information should be clearly and narrowly defined. (Citing *Canada (AG) v Khawaja*<sup>10</sup>).
11. The 1<sup>st</sup> and 2<sup>nd</sup> respondents cited section 8 of the *Access to Information Act* and argued that once an application is made under the said section the information is processed in accordance with section 9 of the act which provides that: - "subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event within 21 days of receipt of the application." Buoyed by the above provisions, he submitted that the Petitioner approached this court without exhausting the procedure stipulated under the Act and in particular section 14 of the Act. He cited *Mumo Matemu v Trusted Society of Human Rights & others*<sup>11</sup> in support of the proposition that courts must defer to the other branches where the constitutional design so ordains. He submitted that this court has no jurisdiction to entertain this matter in its original jurisdiction except where the matter is brought under section 23 of the *Access to Information Act*.

<sup>4</sup> [2021] KEHC 390.

<sup>5</sup> Act No 18 of 2012.

<sup>6</sup> [2017] eKLR.

<sup>7</sup> [2013] eKLR.

<sup>8</sup> [2016] eKLR.

<sup>9</sup> [2017] eKLR.

<sup>10</sup> 2007, FCA 388, {2008} 4 FCR 3 at para 8.

<sup>11</sup> [2013] eKLR.



12. Also, counsel submitted that the information was sought from the wrong person which amounts to non-compliance with section 7(1) of the [Access to Information Act](#), and that the right sought to be limited is not absolute but it can be limited under article 24 of the [Constitution](#). He submitted that section 67 of the PPAD act provides instances where information cannot be disclosed and if the petitioners are aggrieved by a procurement process, they ought to have sought redress under section 167 of the [PPAD Act](#).
13. Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel submitted that the petition does not merit the reliefs sought and cited [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#)<sup>12</sup> which accentuated the need for exactitude in drafting pleadings. He also cited [Kenya Pharmaceuticals Assurance & another v Nairobi City County & 46 other County Governments & another](#)<sup>13</sup> in support of the proposition that pleadings must state all the material facts to establish a reasonable cause of action or defence.
14. For starters, the petitioners letter dated December 15, 2021 purporting to request for the alleged information is addressed to the Chief Health Officer, Medical Services, Coast Provincial General Hospital, PO Box 90231-80100, Mombasa. It is addressed to the attention of a One M/S Khadhs Soud Shikelly. Clearly, the letter was addressed to a particular person at the Coast General Hospital. Curiously, despite the 1<sup>st</sup> and 2<sup>nd</sup> respondents pointing out that the said letter was not addressed to them, the petitioners' counsel did not attempt to link the said addressee to the 1<sup>st</sup> and 2<sup>nd</sup> respondents or even explain the anomaly. Worse still, there is yet another unexplained anomaly. The court copy has an alteration by hand altering the addressee of the said letter. This unexplained alteration casts serious doubts on the veracity of the letter. This alteration considered in light of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' denial and the absence of an explanation by the petitioners casts serious doubts on the credibility of the letter and whether it was ever delivered to the respondents. Simply put, the petitioners have not demonstrated that the request for information was ever made to the respondents. On this ground alone, I will have difficulties in allowing this petition because a litigant inviting the court to find that a respondent has failed to supply information sought under article 35 of the [Constitution](#) must prove that the request for information was made and that despite the request, the respondent has failed, refused or declined to supply the information. This test has not been met in this case.
15. Even if I were to accept that the request for information was made to the respondents, the petitioners have yet another hurdle to surmount, which is failure to exhaust the mechanism provided under the [Access to Information Act](#). The question here is whether this suit offends the doctrine of exhaustion of remedies. Put differently, is this court divested of jurisdiction on account of the petitioners' failure to exhaust the remedies provided under the [Access to Information Act](#). Request for information is provided under section 8 of the [Access to Information Act](#). The petitioners letter is dated December 15, 2021. This petition was filed on January 31, 2022. Section 8 of the Act is to be read together with section 9(1) of the Act which provides:

9. Processing of application

- (1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application

<sup>12</sup> [2013] eKLR.

<sup>13</sup> [2017] eKLR.



16. In terms of section 9(1) of the Act, the respondents were supposed to decide whether to grant or refuse the request within a reasonable time but in any event within 21 days after receiving the request. The requester must be notified of the outcome and the next step that he or she may take. However, if the public officer fails to give a decision on a proper request within 21 days, and no extension has been sought, the public officer is, for the purposes of the Act, regarded as having refused the request as provided under section 9(6) of the Act. The words “deemed” used in section 9(6) of the act is sometimes used in a statute in order to create a legal fiction. As was held in *Muller v Dalgety & Co Ltd*:<sup>14</sup>

“The word “deemed” may be used in either sense, but it is more commonly used for the purpose of creating what James LJ and Lord Cairns LC called a “statutory fiction” (see *Bill v East and West India Dock Co*) (1), that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced. An instance of the use of the word in the other sense is to be found in the case *R v Norfolk County Council* (2), where it was held that in a clause beginning, “The following . . . shall be deemed to be,” the word imported an exclusive definition and not an extension of meaning.”

17. Often it is used in order to extend the denotation of a word or term to a thing or situation it would not in ordinary parlance denote. In *Rosenthal*,<sup>15</sup> Trollop JA explained it thus: -

“The words “shall be deemed” ... are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and also its effect, must be ascertained from its context and the ordinary canons of construction... In the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive.”

18. The meaning of section 9(6) standing alone is plain enough. If the information is not supplied within the period of 21 days provided in section 9(1), then the request is as good as refused. Here, I can safely state that if at all the request was made vide the improperly addressed letter (which is disputed), then the petitioners did not exhaust the mechanism provided under section 22 of the [Access to Information Act](#). At common law, the existence of internal remedies was not a bar to approach a court for appropriate relief after an administrative decision has been taken. C Hoexter<sup>16</sup> states: -

“The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted. There must be a clear legislative or contractual intention to that effect. Even then, there is no general principle at common law that an aggrieved person may not go to court ‘while there is hope of extra-judicial redress.’ In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make

<sup>14</sup> See *Muller v Dalgety & Co Ltd* [1909] HCA 67; (1909) CLR 693 at 696.

<sup>15</sup> *S v Rosenthal* 1980 (1) SA 65 (AD) at 75F – 76A

<sup>16</sup> *Hoexter C: Administrative Law in South Africa*, 2nd Ed Juta 2011.



any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether.”

19. When a statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent before launching an application to a court then that condition must first be fulfilled. Section 14 of the [Access to Information Act](#) provides for review of a decision in the following words: - (1) Subject to subsection (2), an applicant may apply in writing to the commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information — The word deployed in the above provision is “may” which is not mandatory. However, there is nothing before me to show that the petitioner made any effort to invoke the said procedure. In any event, the grant or refusal to provide the information is an administrative action within the meaning of section 2 of the [Fair Administrative Action Act](#)<sup>17</sup> (the [FAA Act](#).) Section 9(2) of the [FAA Act](#) (an act of Parliament enacted to operationalize article 47 of the [Constitution](#)) provides that the High court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that “the High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
20. The word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.<sup>18</sup> A proper construction of section 9(2) & (3) of the [FAA Act](#) leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section 9(4) which provides that: - “Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. No exceptional circumstances were alluded to or proved in this case.
21. The second requirement is that on application by the applicant, the court may exempt the person from the obligation. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the [Fair Administrative Action Act](#).<sup>19</sup> The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.<sup>20</sup> section 9(4) of the [FAA Act](#) postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to this court.
22. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency

<sup>17</sup> Act No 4 of 2015.

<sup>18</sup> See *Dr Arthur Nwankwo & anor vs Albaji Umaru Yaradua & ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

<sup>19</sup> Act No. 4 of 2015.

<sup>20</sup> See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]



itself or as stipulated by the governing statute. It was perhaps most felicitously stated by the Court of Appeal<sup>21</sup> in *Speaker of National Assembly v Karume*<sup>22</sup> in the following words: -

“Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

23. The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & another v Samuel Munga Henry & 1756 others*,<sup>23</sup> where it stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.”

24. The petitioners ought to have exhausted the mechanism provided under the *Access to Information Act* before approaching this court. This petition offends the doctrine of exhaustion of remedies. On this ground alone, the petitioners’ petition fails.

25. I now turn to yet another pertinent issue, which is whether this suit will surmount the exceptions provided under section 6(e) of the *Access to information Act* and the formidable barrier erected by section 67 of the *PPAD Act*. Granted, the right of access to information held by the state is guaranteed by article 35(1) of the *Constitution*: - (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. The *Access to Information Act* enacted to give effect to article 35 provides 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.

26. Section 4 provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the 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 of the Act which provides: -

6. 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;

<sup>21</sup> Ibid.

<sup>22</sup> [1992] KLR 21.

<sup>23</sup> [2015] eKLR.



- (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

27. A reading of section 6 reveals that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the republic; the economic interests and financial welfare of the republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law. However, the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. As was held in *President of the Republic of South Africa & others v M & G Media Limited*<sup>24</sup> :-

“The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the *Constitution*. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ... Hence ...the evidentiary burden rests with the holder of information and not with the requester.”

28. In order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.

<sup>24</sup> CCT 03/11 {2011} ZACC 32 Heard on: May 17, 2011 Decided on: November 29, 2011.





29. The documents (information) sought relates to a public procurement process. The starting point for an evaluating the constitutional validity of outcomes under the state procurement process is article 277 (1) of the *Constitution*. This article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The national legislation prescribing the framework within which procurement policy must be implemented is the *PPAD Act* and The Public Procurement and Disposal Regulations, 2006. Section 67 of the *PPAD Act* contains a confidentiality clause. It reads: -

67. Confidentiality

- (1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following —
  - (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
  - (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;
  - (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
  - (d) the contents of tenders, proposals or quotations.
- (2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.
- (3) This section does not prevent the disclosure of information if any of the following apply—
  - (a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
  - (b) the disclosure is for the purpose of law enforcement;
  - (c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;
  - (d) the disclosure is pursuant to a court order; or (e) the disclosure is made to the Authority or Review Board under this Act.
- (4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).
- (5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work



for a government entity or where the government holds shares, for a period of ten years.

30. The above provision in peremptory terms prohibits disclosure during or after procurement proceedings of the following information, namely; (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest; (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition; (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or (d) the contents of tenders, proposals or quotations.
31. Disclosure will be refused if releasing the information would cause harm to the commercial or financial interests of the business of the public entity or a third party. Such interests include trade secrets of the business or a third party; financial, commercial, scientific or technical information of the business or a third party which, if disclosed, is likely to cause harm to the commercial or financial interest(s) of the body or third party; or Information supplied in confidence by a third party and where disclosure of such information could reasonably be expected to put the business at a disadvantage in contractual or other negotiations, or prejudice the business in commercial competitions.
32. The only exemption permitted under the above provision is if the information sought relates to the information listed in section 67 (3) of the *PPAD Act* and section 6 (e) of the *Access to Information Act*. The petitioners' advocates argument that the above provisions cannot oust the right to information under article 35 of the *Constitution* is legally frail. It ignores the fact that article 35 right is not absolute. It can be limited by law provided that the law passes an article 24 analysis test.
33. It follows that the reason given must not only be lawful, that is, they must fall within the above statutory exemptions, but the reason(s) must meet the article 24 analysis test in that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
34. A common way of determining whether a law or a regulation or decision that limits rights is justified is by asking whether the law is proportionate. The test of proportionality has been established to the following:-Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?;Are the means in service of the objective rationally connected (suitable) to the objective?; Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?<sup>25</sup>

<sup>25</sup> G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:



35. It is worth borrowing the words of the Canadian Supreme Court in the case of *R v Oakes*<sup>26</sup> where Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.
- a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.<sup>27</sup>
  - b. Secondly, the means chosen for the law must be ‘reasonable and demonstrably justified’, which involves ‘a form of proportionality test’ with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance.’<sup>28</sup>
36. A reading of sections 6(3) of the [Access to Information Act](#) and section 67(3) of the [PPAD Act](#) shows that any request for access to information shall be refused to protect the commercial records of a third party in terms of an agreement. The information may be refused on the following grounds:- (i) Trade secrets of the business or a third party; (ii) Financial, commercial, scientific or technical information of the business or a third party which, if disclosed, is likely to cause harm to the commercial or financial interest(s) of the body or third party; or (iii) Information supplied in confidence by a third party and where disclosure of such information could reasonably be expected to put the business at a disadvantage in contractual or other negotiations, or prejudice the business in commercial competitions; (iv) Protecting confidential information in terms of an agreement; and (v) if disclosure will amount to breach of a duty of confidence owed to a third party in terms of an agreement or contract.
37. A reading of the list of the documents/information sought by the petitioners leaves no doubt that the requested information falls squarely within the ambit contemplated by section 6(3) of the [Access to Information Act](#) and section 67(3) of the PPAD Act. Releasing the said information will be a clear breach of the said provisions of the law. Flowing from the foregoing, the conclusion becomes inevitable that the petition dated January 21, 2022 is totally unmerited. I dismiss it with no orders as to costs.

Orders accordingly

<sup>26</sup> *R v Oakes* [1986] 1 SCR 103 [69]–[70].

<sup>27</sup> *R v Oakes* [1986] 1 SCR 103 [69]–[70].

<sup>28</sup> Ibid



**SIGNED AND DATED AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2022**

**JOHN M. MATIVO**

**JUDGE**

**SIGNED, DELIVERED AND DATED AT MOMBASA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**OLGA SEWE**

**JUDGE**

