

HIGH COURT OF KENYA  
CONSTITUTIONAL AND  
JUDICIAL REVIEW DIVISION

09 DEC 2021

MOMBASA

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REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTION AND HUMAN RIGHTS DIVISION  
CONSTITUTIONAL PETITION NO. E032 OF 2021

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 (1),  
AND THE ENFORCEMENT OF THE CONSTITUTION UNDER ARTICLE 258 OF THE  
CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF CONTRAVENTIONS AND THREATENED CONTRAVENTIONS OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2(2), 3(1), 10(2), 19, 20, 21, 33,  
35, 201 AND 227 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4, 9, 20 AND 28 OF THE ACCESS TO INFORMATION ACT, 2016

AND

IN THE MATTER OF: DENIAL OF ACCESS TO INFORMATION PERTAINING TO THE CONTRACT  
BETWEEN KENYA GOVERNMENT, CHINA EXIM BANK, CHINA ROAD AND BRIDGE  
CORPORATION, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA  
DEVELOPMENT BANK AND AFRICA STAR RAILWAY COMPANY

BETWEEN

KHELEF KHALIFA.....1<sup>ST</sup> PETITIONER  
WANJIRU GIKONYO.....2<sup>ND</sup> PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT.....1<sup>ST</sup> RESPONDENT  
PRINCIPAL SECRETARY, NATIONAL TREASURY AND PLANNING.....2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT  
SOLOMON KITUNGU.....4<sup>TH</sup> RESPONDENT  
DR. JULIUS MUIA.....5<sup>TH</sup> RESPONDENT  
KATIBA INSTITUTE.....1<sup>ST</sup> INTERESTED PARTY  
THE COMMISSION ON ADMINISTRATIVE JUSTICE.....2<sup>ND</sup> INTERESTED PARTY

PETITIONERS' SUBMISSIONS

38. The purpose of Article 35 of the Constitution of Kenya is to exclude the  
perpetuation of the old system of administration, a system in which it was possible for  
government to escape accountability by refusing to disclose information even if it had

*bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives.'*... ..in Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission [2019] eKLR

My Lord, these are the Petitioners' submissions in support of the Petition filed herein seeking the following Orders;

- a) **THAT** a Declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the 1<sup>st</sup> Petitioner's request dated December 16, 2019 is a violation of the right to access to information.
- b) **THAT** a Declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the 1<sup>st</sup> Petitioner's request dated December 16, 2019 is a violation of Article 10 of the constitution and specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.
- c) **THAT** a declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) is a violation of the obligations imposed on the said Respondents by Chapter Six specifically Articles 73(1) and 75(1) of the Constitution and Section 3 of the Leadership and Integrity Act and Sections 8, 9 and 10 of the Public Officers Ethics Act.

- d) **THAT** a declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the 1<sup>st</sup> Petitioner's request is a violation of the principles of openness and accountability of public finance management, and impedes the ability of the petitioners and Kenyans to participate in financial matters as envisioned by Article 201 of the Constitution.
- e) **THAT** an Order be issued compelling the Respondents to forthwith provide, at the Respondents' cost, information sought by the 1<sup>st</sup> Petitioner in his letters to the Respondents dated December 16, 2019 and May 13, 2021.
- f) **THAT** an Order do issue that the 4<sup>th</sup> and 5<sup>th</sup> Respondents to pay compensation to the Petitioner for violation of his right of access to information under Article 35 of the Constitution.
- g) **THAT** an Order do issue to the Respondents to report to court on the status of compliance within a stipulated time period.
- h) **Costs of the Petition.**

The Petitioners wrote to the Respondents requesting for specific information in regard to certain contracts entered into by the Respondents on behalf of the people of Kenya and some foreign entities. In writing to the Respondents, the Petitioners equally lodged the request through the Commission on Administrative Justice which in some instances followed up with the agencies to ensure that the sought information be supplied.

My Lord, the Respondents have failed and or refused to supply the Petitioners with the information sought to date or even to respond to the correspondence requesting for information.

We must hasten to add that the information sought is relevant to the Petitioner since they relate to financial commitments made on behalf of the people of Kenya and that it is the same people of Kenya who are responsible for repaying the loans sourced from the sought contracts.

The Standard Gauge Railway (SGR) is the largest capital-intensive infrastructure project ever constructed in Kenya, costing taxpayers in excess of USD 4.5 billion. Despite this extraordinary expenditure of public funds, the SGR project has been undertaken with controversy and secrecy from its inception. To this day, fundamental information about the project's financing, tendering process, and construction has not been released to the public. Key contracts related to these aspects of the project remain secret. Procedures in the Public Procurement Act have been routinely disregarded.

The Court of Appeal in Civil Appeal 13 of 2015 affirmed that the SGR project was procured in violation of article 227(1) of the Constitution and sections 6(1) and 29 of the Public Procurement and Disposal Act, 2005.

The Petitioners understands from limited public information on the project that financing of the SGR was largely obtained through a concessional and commercial loan by the China Exim Bank. The National Treasury began loan repayments in January 2019 to the tune of Kshs 74bn to date. This is expected to increase to Kshs 111bn after a second loan becomes due in January 2021. Further, the SGR is operated by Africa Star Railway Company Limited, a private company, which is paid operating costs in excess of 1 billion per month.

According to government statistics, the SGR has operated at a financial loss since its inception. Thus its operations are not generating funds to help pay back the loans that financed its construction, as planned. It is not publicly known what the consequences of a default in loan repayment would be according to the agreement between Kenya and China.

It is against this background that the Petitioners wrote to the Respondents requesting for the following information;

- a. Agreements entered between the government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the Standard Gauge Railway (SGR), including:
  - i. All contracts for the carrying out of feasibility studies relating the construction, operation and servicing of the SGR;
  - ii. Any and all documents relating to expression of interest for the financing, construction, management, operation and servicing of SGR prepared by the GOK or state/public agency or a third party on behalf of the GOK;
  - iii. Contracts and or Memorandum of Understanding (MOU) between GOK and any third party relating to the financing, construction, management, provision of operating stock, operation and maintenance/servicing of SGR.
  - iv. All agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the SGR.
  - v. Any concessions, agreements and or MOU relating to the operation of the SGR including (i) Take or Pay Agreement between Kenya Railways and Kenya Ports Authority and (ii) Agreement with Africa Star Railway Operation Company Ltd.



b. All documents considering relating to the viability, economic, social, cultural and environmental impacts, including:

- i. Feasibility studies
- ii. Strategic Environmental Assessment
- iii. Environmental Social Impact Assessment
- iv. Cultural Heritage Assessment

The Respondents have not complied with this request and have failed to cite a valid exception to producing the documents or provide a valid reason for their impugned decisions for not providing the documents or carrying out the project in violation of Articles 35 and 47 of the Constitution.

**a) Whether the Petitioners have met the threshold for the issuance of the information sought?**

My Lord, it is our submission that the Petitioners herein have met the threshold for the issuance of the information sought from the Respondents. The Petitioners are natural citizens of the Republic of Kenya. They have made a written request for information from the Respondents, the same has been duly served upon them. The information sought is in the custody of the Respondents and the Petitioners have undertaken to pay any administrative fees that may be needed to process the information.

My Lord, in light of the steps and measures taken by the Petitioners herein, they qualify to be issued with the information sought as guaranteed under Article 35 of the Constitution. The information is in the custody of the Respondents, and it is information that is held in public trust. The contracts sought to be implemented are funded by tax payers including the Petitioners and they are therefore entitled to access the said information.

**b) Whether the information sought is protected information?**

My Lord, it is our submission that the information sought by the Petitioners do not qualify as privileged information under the Access to Information Act. The Respondents in their reply have sought to argue that the information sought herein may prejudice national security and further that it may impede the economic interests of third parties. Nothing could be further from the truth.

The information sought herein relate to commercial contracts signed by the Republic of Kenya on behalf of its citizens with third party foreign entities. The said contracts are for commercial activities affecting the people of Kenya. The funding of the said contracts are to be borne by the Kenyan tax payer. It is therefore only prudent that the said tax payer be informed and notified of the full extent of his commitment and the nature of loans they are funding.

Article 10 of the Constitution sets out the national principles of governance to include amongst others transparency and accountability. These national principles are binding on the State and its organs including the Respondents. If the Respondents are to adhere to the principle of transparency and accountability then they have an obligation to proactively share with the public commitments and contracts made on their behalf in regard to commercial ventures entered into on behalf of the State.

In *George Bala v Attorney General* 238 of 2016 the Court held that:

***“Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and inter alia Article 10 of the Constitution.”***

The Respondents have a constitutional obligation to act in a transparent and accountable manner to the Petitioners and the people of Kenya in the execution of their respective mandates. The positions they hold are a public trust and they owe it to the public to report

and explain how the donated public trust is exercised more so when there are heavy commercial undertakings that have been pursued on behalf of the people. We must remember that the said commercial undertakings are underwritten by the sovereign who are the general public presently vested with the responsibility to repay for the loans.

In the case of **Famy Care Limited v Public Procurement Administrative Review Board & another** Petition No. 43 of 2012 [2012] eKLR, the court held;

*“[16] The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.*

*[17] The right of access to information is also recognised in international instruments to which Kenya is party. The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples' Rights which provides, “Every individual shall have the right to receive information.” The Commission noted that right of access to information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”*

The importance of the right to access information as a founding value of constitutional democracy was also dealt with by the Constitutional Court of South Africa in the case of **President of Republic of South Africa v M & g Media** where the court stated that:-



*“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 realization 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.”*

My Lord, it is our submission that the onus is on the Respondent to demonstrate that the information sought is confidential and protected. The same cannot be made security concern just by a mere assertion of the same. There must be tangible demonstration how the nature of information sought would jeopardise or impede national security.

My Lord, the Respondents have not demonstrated how the sought information qualifies for such protection. No evidence was led to demonstrate how the information sought is security protected under the Access to information Act. We urge the Honourable Court to reject the assertion and find that the information sought is shareable with the public.

In the case of **Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission [2019] eKLR** the Court held that;

*‘50. In this petition it must be borne in mind that access to information disputes are concerned with constitutional right. The scheme of the Access to Information Act is such that information must be disclosed unless it is exempted from disclosure under one or more construed exemptions. The holder of the information bears the onus of establishing that the refusal of access to the record is justified under the Act for the court to uphold the refusal.’*

In Constitutional petition **Zebedeo John Opore v The Independent Electoral and Boundaries Commission [2017] eKLR**, the Court held;

*'The right of access to information is not absolute, but to satisfy the requirements set out under article 24 of the Constitution, the respondent must demonstrate that the limitation imposed on the constitutional right is "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and that it falls within the exceptions provided in section 6 of the act."' In my view, the Respondent did not satisfy this constitutional test nor did they establish that the refusal falls within the exceptions in section 6. The Respondents only made a reliance of section 6 without offering evidence to discharge the burden. What must be borne in mind is that access to information disputes are concerned with a constitutional right. In addition, the scheme of the act is such that information must be disclosed unless it is exempted from disclosure under one or more narrowly-construed exemptions. And what is more, the holder of information bears the onus of establishing that the refusal of access to the record is justified under the act. A declaration be and is hereby issued that the Respondent has violated the petitioners Rights under Article 35 (1) (a) and (b) of the Constitution and Section 4 (1) (b) of the Access to Information Act No. 31 of 2016.*

**c) Whether the information sought would impede commercial interest of third parties hence protected?**

My Lord, it is our submission that the information sought relates to commercial contracts entered into between the Kenyan state, on behalf of the people and other foreign entities. It would be imprudent of the Respondents to argue that sharing of the said information to the principal financiers, the people of Kenya, would impede their commercial interests. The Kenyan people are the primary funders of the contract, they are the ultimate sovereign. They are entitled to know what engagements the Respondents have entered into on their behalf.

Mere sweeping statements that the information sought will impede the commercial interests of third parties cannot hold. In any event those third parties are not sovereign more than the

people of Kenya. The Respondents are in office to serve the people of Kenya and not foreign interests. That is their primary calling and they cannot undermine constitutional principles and dictates to serve foreign interests.

In the case of **Mary Nyawade in Banking Fraud Investigation Department & 2 others the Petition No. 143 of 2017**; Hon. Justice John M. Mativo dealing with petitioner's claim for access to information and the respondents refusal, stated under paragraph 57 thus:-

- "(a) The information relates to legitimate interests protected by the law, and**
- (b) Disclosure of the information threatens to cause substantial harm to that interest, and**
- (c) The harm to the interest is greater than the public interest in receiving the information."**

Again, the Respondents have not demonstrated how the information sought will impede the commercial interests of third parties. They have not disclosed even who those third parties are, the nature of commercial interests they are engaging in that will be impeded vide a disclosure of the information. We urge the court to so find.

**d) Whether the Application before the Honourable Court is made prematurely?**

My Lord it is our submission that the Application herein is not prematurely made and that the Applicant has exhausted all the laid down procedures before lodging the petition herein. It is not disputed that a request for information was made to the Respondents and service of the same physically and electronically made to them. The Petitioners thereafter served the request on the 2<sup>nd</sup> Interested Party who made follow ups for the release of the information sought by the Petitioners. Only one entity, Kenya Railways responded to the enquiry by the 2<sup>nd</sup> Interested Party. The other entities failed and or refused to make a response or engage with the 2<sup>nd</sup> Interested Party.

In light of the failure by the Respondents to heed to the enquiry by the 2<sup>nd</sup> Interested Party on the information sought, the Petitioners were left with no alternative but to lodge these proceedings before the Honourable Court for redress. They have met the exhaustion principle and the inaction by the Respondents leave them with no option but to pursue the present proceedings before the Honourable Court. There can be no wrong without an effective remedy and the Honourable Court is an effective platform to litigate and actualise violations of Article 35 of the Constitution by rogue Respondents.

**e) Whether the action against the 4<sup>th</sup> and 5<sup>th</sup> Respondent in their names is feasible?**

My Lord it is not disputed that the 4<sup>th</sup> and 5<sup>th</sup> Respondents are the respective information officers in their departments. They have an obligation to comply with requests for information and where they fail to comply personal consequences may accrue to them.

The 4<sup>th</sup> and 5<sup>th</sup> Respondents have cited Section 22 of the National Government Coordination Act to argue that they are exempted from any legal proceedings in the performance of the functions of their office.

My Lord, it is our submission that Section 22 of the Act only exempts a public officer from any action, claim or demand only for ***actions done in good faith*** for the purpose of executing the functions of the office.

It is our submissions that the, the 4<sup>th</sup> and 5<sup>th</sup> Respondent were not acting in good faith when they refused and or failed to respect the Petitioners' right to access to information. They violated the Petitioner's right to information, equal benefit of the law and also breached Article 10 of the Constitution. Such an act of violation of the Constitution cannot be said to be an act in good faith. They were further in breach of the Access to Information Act. To demonstrate their lack of good faith, they refused and even failed to respond to the request of information lodged by the Petitioners. This was in violation of the right to fair administrative action and the Fair Administrative Action Act that requires public officers to respond to all correspondences sent to them. A person who breaches a plethora of laws in execution of his

duties cannot be said to be acting in good faith in the performance of the functions of that office so as to claim the protective clothing of Section 22 of the Act.

In the case of **Republic v Principal Secretary, Ministry of Interior and Coordination of Government & another Ex-Parte Lucy Nduta Ng'ang'a** [2021] Eklr the Court held that;

On determining on the issue of the personal liabilities of the Respondents, the Court in its determination stated as follows;

*'.....The Respondents have resorted to Section 8 of the Office of the Attorney-General Act and Section 22 of the National Government Co-ordination Act which shield the Respondents from personal liability where the thing complained of is done in good faith*

*The operative word in those provisions is good faith. The Supreme Court in Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR, while discussing immunity of judicial officers, stated the following:*

*Article 160(5) grants judicial officers immunity if they act in "good faith". What therefore, is 'good faith'? According to the Black's Law Dictionary, Ninth Edition at pg. 713, 'good faith' is defined as "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."*

We urge My Lord to adopt similar reasoning in finding that the immunity in Section 22 only applies to what is done in good faith. In the present case, the Respondents showed lack of good faith when they failed to even respond to the Petitioner's letter requesting for information. They were acting in breach of the Fair Administrative Action Act in failing to respond to correspondence and in breach of the right to access to information in failing to

provide the information sought or give reasons for not providing the information. This cannot qualify as good faith and to be protected under the law.

My Lord, it is further our submission that Section 22 of the National Government Coordination Act can only be used as a defence and not to be raised as a preliminary objection. The court has to assess the nature of evidence in the matter vis a vis the conduct of the officer concerned before a determination can be made whether the conduct complained of falls within the protection of Section 22 or not. We submit that in this particular case, taking into account the conduct of the 4<sup>th</sup> and 5<sup>th</sup> Respondents, they cannot qualify for protection under Section 22 of the Act.

**f) Whether this suit is res judicata Petition 159 of 2018?**

My Lord, the Respondents have asserted that the proceedings herein are res judicata Petition 159 of 2018. Nothing could be further from the truth. In Petition No. 159 of 2018 the parties were litigating against the compulsory loading of containers onto the SGR train services and transfer of port services to Nairobi. That was the cause of action. The cause of action in the present proceedings relate purely to a request for information and access to information under Article 35 of the Constitution.

The Parties in Petition 159 of 2018 did not challenge the right of access to information and no request had been made to access information that would warrant proceedings. In the present case the cause of action accrued when the Petitioners made a request for information and the same was denied and not responded to by the Respondents.

In the case of **Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others [2017] eKLR** where the judge cited the case of ; **Lotta vs. Tanaki [2003] 2 EA 556** where in determining if a matter is res judicata, it was held as follows:

***“ The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the***



*former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.*

We urge My Lord to be guided by the above holding and find that indeed the present proceedings are not res judicata and the Honourable Court can competently deal with them.

**Conclusion**

My Lord, based on the above submissions we humbly pray that you allow the Petition and grant the Orders sought therein.

DATED at Nairobi this.....10.....day of.....December.....2021

**OTIENO OGOLA & COMPANY ADVOCATES**  
**ADVOCATES FOR THE PETITIONERS**

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