REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. E 032 OF 2021

KHELIF KHALIFA.....….....…1st PETITIONER

WANJIRU GIKONYO…….....2nd PETITIONER

vs

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT.....1stRESPONDENT

PRINCIPAL SECRETARY, NATIONAL TREASURY & PLANNING…….2nd RESPONDENT

ATTORNEY GENERAL.....3rdRESPONDENT

SOLOMON KITUNGU.....4rd RESPONDENT

DR. JULIUS MUIA……..5th RESPONDENT

KATIBA INSTITUTE……1st INTERESTED PARTY

THE COMMISSION ON ADMINISTRATIVE JUSTICE……2nd INTERESTED PARTY

JUDGMENT

1. By a Petition dated **21st** June 2021, the Petitioners herein, Khelif Khalifa and Wanjiru Gokonyo implore this court to issue a raft of orders, namely: -
    a) *A declaration 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 1st Petitioner's request dated 16th December 2019 is a violation of the right to access to information.*
    b) *A declaration 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 1st 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) *A declaration 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) *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 1st 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) *An order compelling the Respondents to forthwith provide, at the Respondents' cost, information sought by the 1st Petitioner in his letters to the Respondents dated December 16, 2019 and May 13, 2021.*

f) *An order do issue that the 4th and 5th Respondents to pay compensation to the Petitioner for violation of his right of access to information under Article 35 of the Constitution.*

g) *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.*

i) *Such further Order or Orders as may be just and appropriate.*

2. The Petitioners' contestation as I glean it from the Petition is that despite the extraordinary expenditure incurred in the construction of the Standard Gauge Railway (the SGR) to the tune of USD **4.5** Billion, the SGR project was undertaken with controversy and secrecy. They aver that fundamental information about the project's financing, tendering process, and construction has not been released to the public. They contend that key contracts related to aspects of the project remain secret and legal procurement procedures were routinely disregarded. Further, they state that 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.

3. Also, they aver that the High Court in Petition **159** of 2018 & **201** of 2019 (Consolidated) stated that where a public body exercises its powers in a manner that transcends its statutory powers or has significant effect on the stakeholders or the public, it ought to be subjected to public participation. They aver that the SGR Take or Pay Agreement which was the

subject matter of the Petition, no public participation was carried out and therefore the directives emanating from the agreement were found to be constitutionally infirm and a violation of article **47** of the Constitution.

4. They state that they understand 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, that the National Treasury began loan repayments in January 2019 to the tune of Kshs. **74** billion to date which is expected to increase to Kshs. **111** billion after a second loan becomes due in January 2021. (Now past). Also, they aver that 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.

5. They aver that according to government statistics, the SGR has operated at a financial loss since its inception, so, its operations are not generating funds to help pay back the loans that financed its construction as planned, and, it is not publicly known what the consequences of a default in loan repayment would be according to the agreement between Kenya and China. Their concern is that such a heavy capital-intensive project with wide-ranging impact on the public purse and citizens livelihoods was undertaken with no public participation and insufficient information on the implications on the public purse and other assets.

6. They aver that the **1st** Petitioner wrote to each of the Respondents requesting : -
    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*

7. The Petitioners are aggrieved that the Respondents have not complied with the above request and they have failed to cite a valid exception or reason for their refusal to produce the documents. They state that to the extent the Respondents have failed to avail the requested information, they are in violation of Articles **10, 27** and **35** of the Constitution.

8. The Petition is opposed vide grounds of opposition dated **11th** August 2021 stating: - that the Petition is defective and lacks factual basis for want of supporting documents; that no request for information has been availed contrary to Rule **11** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; that the Petitioners have not exhausted the available dispute resolution mechanisms.

9. In addition, the Respondents filed the Replying affidavit of Dr. Eng. Joseph Njoroge CBS, the Principal Secretary, State Department for Transport dated **22nd** December 2021. (the **1st** Respondent). He averred that: -the Petition is *res judicata* because the same issues were determined in Constitutional Petition No. **159** of 2018, William Ramogi & others v Ministry of Transport & others & MUHURI; (Muhuri **1st** Interested Party) in which the **1st** and **2nd** Respondents herein were parties while the Petitioner was an Interested Party; that the documents and agreements for the SGR were the subject matter in the said case.

10. Other highlights in the said affidavit are: - that the Petitioners as Interested Parties in the said case annexed various documents on feasibility studies on procurement of the SGR in support of their averments while the Kenya Railways Corporation (KRC) produced the

Environmental Impact Assessments; and, that the effect of SGR on the livelihood of citizens, the issue of public participation were determined in the said suit. Further, that the **1st** Petitioner, who is the Chairperson of the Board of Directors of MUHURI swore the affidavit dated **6th** November 2018 on behalf of the **1st** and **2nd** Interested Parties in the said Petition, and the constitutionality of the subject agreements was determined in the said case.

11. On the alleged secrecy, he averred that the **1st** Respondent disclosed in the said suit the rationale for obtaining the loan and explained that the National Government took a sovereign loan from exit Bank and the Take or Pay Agreement was geared to support the repayments to the Exim Bank to help in the Project Management, Finance and Administration, and the rationale of Government constructing the SGR was to alleviate the socio-economic wellbeing of the nation. He averred that the court agreed that there was a legitimate government interest to be achieved.

12. Additionally, Dr. Eng. Joseph Njoroge deposed that the Respondents upon receiving the request for information responded to the letters and explained that the information sought relates to contracts between the two governments; that the agreements have non-disclosure clauses; that the information falls under section **6(1) &(2**) of the Access to Information Act;[1] that the Petitioners have failed to establish the necessity of the documents; that if granted the orders will endanger national security; that the information is protected under section **3(6) (7)** of the State Secrets Act;[2] and, lastly, that the Petitioners have not exhausted available dispute resolution mechanism under the Access to Information Act.[3] The rest of the affidavit discloses matters of law as opposed to issues of fact. I will consider them while analysing submissions.

13. The **1st** Interested Party did not file a Response to the Petition, but it filed submissions.

14. The **2nd** Interested Party filed the Replying affidavit of Leonard Ngaluma dated **14th** December 2021, its secretary. The substance of his affidavit is that the Commission received a letter dated **17th** April, 2020 from the Managing Director, KRC stating that the information requested by the Petitioners are projects between the Government of the

[1] Act No. 31 of 2016.
[2] Cap 187, Laws of Kenya.
[3] Act No. 31 of 2016.

People's Republic of China and the Government of Kenya. Further, the letter stated that the KRC's role in the contract was solely implementation of the contracts and the contracts were in the custody of the Office of the Hon. Attorney General. He also averred that the letter stated that the agreements had non-disclosure clauses and disclosure of the same would be in breach of the contractual terms.

15. Also, he averred that the Commission wrote to the Hon. Attorney General and copied the Commission seeking to be facilitated with the information and upon further consideration, the Commission wrote to the Solicitor General vide a letter dated **26th** June, 2020 forwarding the aforementioned request by the **1st** Petitioner seeking its action. He averred that the Commission received a response from the Deputy Solicitor General vide a letter dated **28th** August, 2020 stating that the Office of the Attorney General & Department of Justice was not the custodian of project documents, andthat the requested documents could not be availed as the same would be in breach of the agreements and might cause serious legal and financial repercussions. Mr. Ngaluma deposed that as the Commission was still pursuing the issue, the Petitioners instituted this Petition. Lastly, he averred that the Commission is guided by sections **14, 20, 21** and **22** of the Access to Information Act.

16. The parties filed written submissions which they highlighted in court. The Petitioners submitted that the Respondent's failure to provide the information is a breach of Articles **35** and **47** of the Constitution. They argued that the Respondents have not cited a valid exemption. They submitted that the information sought does not qualify as privileged information under the Act because it relates to commercial contracts signed by the Republic of Kenya on behalf of its citizens with third party foreign entities and the funding will be borne by the Kenyan tax payer. They submitted that the national values and principles under Article **10** of the Constitution include transparency and accountability and cited *George Bala v Attorney General*[4] in support of the proposition that constitutional interpretation must be interpreted and applied not in a mechanical manner but must be guided by the spirit and the soul of the Constitution as ingrained in the national values and principles of governance espoused in Article **10** and the preamble.

[4] 238 of 2016.

17. The Petitioners submitted that the Respondents have a constitutional obligation to act in a transparent and accountable manner in the execution of their mandates. They relied on *Famy Care Limited v Public Procurement Administrative Review Board & another Petition*[5] which held that: -"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."

18. The Petitioners also cited *President of Republic of South Africa v M & G Media* which underscored that the constitutional right to access information held by the state holding that it gives effect to "accountability, responsiveness and openness" as founding values of constitutional democracy. They submitted that the onus is on the Respondent to demonstrate that the information sought is confidential and protected. They submitted that no evidence was led to demonstrate how the information sought is security protected under the Access to information Act and relied on *Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission*[6] which held that access to information disputes are concerned with constitutional rights and the design of the act is that information must be disclosed unless it is exempted from disclosure under one or more construed exemptions and the burden of proving the exemption lies on the person holding the documents.

19. The Petitioners also cited *Zebedeo John Opore v The Independent Electoral and Boundaries Commission*[7] which held that to satisfy the requirements set out under Article **24**, the respondent must demonstrate that the limitation imposed on the constitutional right is <u>"fair, reasonable, necessary and justifiable</u> in a democratic society based on <u>openness, justice, human dignity, equality and freedom and that it falls within the exceptions provided in section **6** of the act.</u>

[5] [2012] e KLR.
[6] [2019] e KLR.
[7] [2017] e KLR.

20. Additionally, the Petitioners submitted that the information sought relates to commercial contracts entered into between the Kenyan state, on behalf of the people and other foreign entities, so, it is imprudent for the Respondents to argue that sharing of the information would impede their commercial interests since the public are sovereign and the primary funders of the contract. They submitted that the third parties in the agreements are not more sovereign than the people of Kenya. To buttress their arguments, they cited *Mary Nyawade v Banking Fraud Investigation Department & 2 others*[8] which held that (a) the information relates to legitimate interests protected by the law; (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**.** They reiterated that the Respondents have not shown how the information sought will impede the commercial interests of third parties nor did they disclose the third parties and the nature of commercial interests.

21. The Petitioners submitted that this suit is not pre-mature because they exhausted all the laid down procedures before lodging the petition. They argued that the **4th** and **5th** Respondents who are information officers in their departments have an obligation to comply with requests because section **22** of the National Government Coordination Act[9] only exempts a public officer from any action, claim or demand for ***actions done in good faith*** for the purpose of executing the functions of the office.

22. They argued that the **4th** and **5th** Respondent were not acting in good faith when they refused to supply the information because their refusal offends Article **10** of the Constitution and Access to Information Act. They relied on *Republic v Principal Secretary, Ministry of Interior and Coordination of Government & another Ex-Parte Lucy Nduta Ng'ang'a*[10] for the holding that the operative words in section **22** is good faith which shields the officers from personal liability. They urged the court to find that they did not act in good faith.

23. On *res judicata*, they submitted in Petition **159** of 2018, the issue was the compulsory loading of containers onto the SGR train services and transfer of port services to Nairobi while the instant Petition is purely on request for information and access to information under Article **35** of the Constitution. They cited *Republic v Registrar of Societies - Kenya*

[8] Petition No. 143 of 2017.
[9] Act No. 1 of 2013.
[10] [2021] e KLR.

& 2 others Ex-Parte Moses Kirima & 2 others [11]which followed *Lotta v Tanaki*[12] which held that for *res judicata* to apply, the following conditions must be present:- (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.

24. On their part, the Respondents submitted that this Petition is *res judicata* because issues in this Petition were substantially in issue in Petition No. **159** of 2018, that the parties are the same, and, that the agreements and documents implicated in the **2** cases are the same. They submitted that the court in the said case: - (i) determined effect of the SGR on the livelihood of citizens; (ii) held that the Take or Pay Agreement as well as the National Integrated Transport Policy were purposely created by the national government under the big four agenda to improve the socio-economic wellbeing of Kenyans; and, (iii) the issue of public participation was determined. They argued that the **1st** Petitioner in these proceedings swore an affidavit in the said case and that the constitutionality of the agreements was also determined. (Cited *John Florence Maritime Services Limited & another v Cabinet Secretary & another v Cabinet Secretary, Transport and Infrastructure & 3 others*[13]*).*

25. The Respondents also submitted that the **3rd** and **4th** Respondents are public officers and by dint of section **22** of the National Government Coordination Act[14] they cannot be held personally liable, and in any event, their actions were validated by Petition **159** of 2018. They relied on *Victor Mabachi, David Oliwa & another v Nutun Bates Ltd*.[15] Further, they submitted the KRC replied to the request drawing the Petitioners attention to the non-disclosure clause and cited section **6 (1) (2)** of Access to Information Act. They submitted that the Petitioners have not met the tests set in the Supreme Court of Canada in *Ontario (Public Safety and Safety) v Criminal Lawyers' Association*[16] which are: - (a) the Petitioners

[11][2017] e KLR.
[12] [2003] 2 EA 556.
[13] [20231] e KLR.
[14]Act No. 1 of 2013.
[15] [2013] e KLR.
[16] 2010 SCC 23, [201] 1 SCR 815.

must prove the necessity; (b) demonstrate that there are no countervailing considerations inconsistent with the production; (c) whether the documents will impact on proper functioning of the government; (d) whether the government action infringes rights. They argued that the Petitioners have not established the above tests.

26. Additionally, the Respondents argued that the disclosure sought if permitted will offend section **3(6)** & **(7)** of the Official Secrets Act[17] and section **6 (1)** & **(2)** of the Access to Information Act. Lastly, the Respondents submitted that the Petitioners failed to exhaust the available dispute resolution mechanism and cited *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another*[18]which held that courts will step in if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute. They also relied on *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties)*[19] in which the court in dismissing a suit seeking production of documents cited *Samuel Macharia & another v Kenya Commercial Bank Limited & 2 others*[20]which held that a court of law can only exercise jurisdiction as conferred by the Constitution.

27. The **1st** Interested Party submitted that the the Petitioners exhausted the dispute resolution mechanism provided under the Act before filing this court. It argued that under section **9(6)** of the Act, since the Respondents failed to reply to the Petitioners request, the application for information is deemed to have been rejected. It argued that the Petitioners then wrote to the **2nd** Interested Party who also severally requesting for the documents in writing. It submitted that an applicant whose right to access to information is denied is entitled to approach the court under Article **22** and cited *Katiba Institute v Presidents Delivery Unit & 3 others*[21]which held that the Act does not make mandatory for an applicant to first go to the Commission on Administration of Justice before approaching the High Court.

28. The **1st** Interested Party also cited *Charles Apudo Obare & another v Clerk, County Assembly of Siaya & another*[22]and *Dock Workers Union of Kenya v Kenya Ports Authority;*

[17] Cap 187, Laws of Kenya.
[18] [2020] e KLR.
[19] [2021} 3 KLR.
[20] [2012] e KLR.
[21] [2017] e KLR.
[22] [2020] e KLR.

Portside Freight Terminals Limited & Another (Interested Parties)[23]which held that if an applicant has been denied access to information, they must exhaust the remedy provided under Section **14** of the Access to Information Act, which is seek a review from the Commission of Administration of Justice. It argued that the said cases are distinguishable from the instant case and that this court is not bound by the said decisions.

29. Additionally, the **1st** Interested Party urged the court if it were to find that Section **14(1)** of the Act is mandatory to find that the **1st** Petitioner followed the necessary procedure under Section **14(1)** of the Act. It argued that after the **1st** Respondent refused to reply, the **1st** Petitioner wrote to the **2nd** Interested Party to request for assistance and the **2nd** Interested Party wrote requesting for a Response thereby complying with the procedure set out in section **22** of the Act. Additionally, the **s**Interested Party urged the court if it were to find that it was a pre-requisite that the Petitioners exhaust the remedy under Section **22** as argued by the Respondents, it is imperative that the court analyses all facts on a case-by-case basis to determine whether petitioners can be exempted from the said section**.**

30. Also, the **1st** Interested Party submitted that section **4(3)** of the Act requires that "access to information held by a public entity or a private body *shall be provided expeditiously at a reasonable cost*" and argued that the Petitioner followed the law in seeking information before coming to this court. It distinguished *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & Another*[24] because the Petitioner therein never approached the Commission to review the decision but he instead directly approached the High Court to seek a remedy.

31. Further reliance was placed on *Kenya Revenue Authority &2 others v Darasa Investments Ltd*[25] in which the Court of Appeal held that the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy. It also cited the African Commission on Human and Peoples' Rights judgment in *Dawda K Jawara v Gambia*[26] which held that a remedy is considered available if the Petitioner can pursue it without impediment, it is deemed

[23] [2021] e KLR.
[24] [2020] e KLR.
[25] [2018] eKLR.
[26] (2000) AHRLR 107, ACHPR (2000).

effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint in its totality.

32. The **1st** Interested Party urged the court to consider that the Petitioners have waited for **1** year and **6** months for the information to be supplied. It also submitted that prayers **(c), (d), (e), (f)** and **(g)** fall within this court's jurisdiction under Article **165(3)** and therefore this court can hear and determine the case. To fortify its argument, it argued that this court has jurisdiction to protect and promote of the Bill of Rights and the Constitution. (Citing *Judicial Service Commission v. Speaker of the National Assembly & 8 Others*[27]).

33. The **1st** Interested Party submitted that Article **35(1)** enshrines that every person has the right to access information held by the State. (Citing the Supreme Court in *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others*[28]). It submitted that Article **35(3)** provides proactive disclosure of information by the State to the public without requiring a citizen to follow the procedure laid down in the Act to request for information. It cited *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others*[29] which held that the right to access information under Article **35 (3)** provides for the state's duty to pro-actively disclose information in the public interest as well as to provide open access to information held by the State.

34. Additionally, the **1st** Interested Party relied on *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission*[30] which stated that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. It was submitted that the Constitution envisages two scenarios where a citizen enjoys the right of access information: through requesting for information following the procedures in the law and through proactive disclosure of important information that affects the State.

[27] [2014] e KLR.
[28] [2017] e KLR.
[29] [2013] e KLR.
[30] [2016] e KLR.

35. It submitted that section **5** of the Act provides for information that must be proactively disclosed by public entities and that the information sought is important and falls within the ambit of section **5** of the Act because the project is shrouded in secrecy and could potentially have caused Kenyans further public debt.

36. Further, the **1st** Interested Party submitted that Article **35** can only be limited under Article **24** and cited *Karen Kandie v Alassane Ba and another*[31] in which the Supreme Court described the applicable test for evaluating limitation of rights under Article **24** as 'a reasonable and justifiable test' to be undertaken on a case-by-case basis. It submitted that the factors to be considered under Article **24(1)** are not exhaustive and cited *Mary Nyawade v Banking Fraud Investigation Department & 2 others*[32]which held that the grounds for the exception to disclose information should be clearly and narrowly defined otherwise it is too easy to broaden exceptions and withhold important information, and that the presumption is always in favour of disclosure, unless the information meets a so-called three-part test, deduced from international law:- (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.

37. In relation to Article **24(3),** the **1st** Interested Party referred to *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[33] in which the Court of Appeal stated that courts have a duty as 'the guardians of the right of the individual to *carry out a careful examination of the reasons that have been given for the limitation*. Further reliance was placed on *Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others*[34]in which the High Court held that under Article **24(3)** of the Constitution and Principle **4** of the Global Principles on National Security and the Right to Information (Tshwane Principles), the burden on justifying the limitation on the right to access information rests on the person resisting disclosure.

38. Regarding the Respondents reliance on Section **3 (6)** and **(7)** of the Official Secrets Act, the **1st** Interested Party submitted that section **29** of the Act provides for consequential

[31] S.C Petition No. 2 of 2015; [2017] e KLR
[32] [2017] e KLR.
[33] Civil Appeal No. 22 of 2015; [2016] e KLR.
[34] Petition 104 of 2019, [2021] KEHC 390 (KLR).

amendments and identifies laws that have been amended to be in conformity with the Article **35** as read with Section **4** of the Schedule which expressly provides for consequential amendments to the Official Secrets Act. It submitted that the Official Secrets Act must be read in conformity with the right to access information under Article **35.**

39. Regarding the attempt to rely of section **6 (1) (2)** of the Act, the **1st** Interested Party relied on *Mary Nyawade v Banking Fraud Investigation Department & 2 others*[35] in which the High Court held that 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*. It submitted that the Respondents cannot purport to limit information beyond what is provided in section **6(1)** of the Act. It submitted that the Respondents have only replicated the exceptions under the act without providing evidence.

40. Regarding the attempt to use national security as a reason, the **1st** Interested Party submitted that national security is defined in Article **238 (1)** as *the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests* and argued that it is not sufficient for a public authority to assert that there is a risk of harm but that the authority should offer reasons to support its assertions.

41. It argued that the government cannot enter into a non-disclosure contract in public contracts that touch on the public assets and impact on the rights of Kenyans and later rely on the defence that the breach of terms of the agreement with foreign nations will harm the ability of the government to manage the economy which is not a justifiable limitation under Section **6(1)** and **(2)** of the Act.

42. It also submitted that an analysis of Article **24(1)(a)-(e)** of the Constitution shows that the Respondents have not shown that the limitations to the right to access to information is justifiable in an open and democratic society. It submitted that they have failed to show: -

[35] [2017] e KLR.

the importance of purpose/objective of limitation is justifiable and whether the limitation is rationally connected to the purpose; the nature and extent of the limitation is acceptable; and the adopted limitation on the enjoyment of the right is the least restrictive possible. It cited section **4 (2)** of the Act and *Edwin Harold Dayan Dande & 3 others v British American Investments Co (K) Ltd & another*[36]in support of the proposition that where a party cites commercial interest as a reason for declining to allow access, it must be clear but not a mere conjecture.

43. The **1st** Interested Party also cited *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission*[37] which held that the right to access to information and receiving of information "should not require individuals to demonstrate a specific interest in the information. It urged the court should it find that the requested documents fall under the exemptions under section **6(1)** and **(2)** of the Act to hold that Section **6(4)** provides that a court has the power to determine whether a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests.

44. It argued that in determining what the public interest is under Section **6(4),** Section **6(6)** provides that the principles to be considered, namely:—(a) promote accountability of public entities to the public; (b) ensure that the expenditure of public funds is subject to effective oversight; (c) promote informed debate on issues of public interest; (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

45. The **1st** Interested Party urged the court if it were to find the exemptions in Section **6(1)** and **(2)** apply, to hold that public interest considerations (such as ensuring the expenditure of public funds is subject to oversight, promotion of accountability of public entities, promotion of informed debate on issues of public interest and ensuring that statutory authorities with regulatory responsibilities is adequately discharging its functions) outweighs the harm to the protected interests. It submitted that the State cannot protect

[36] [2019] e KLR.
[37] [2016] e KLR.

foreign commercial interests at the expense of the public interest in an open and democratic society as this will be an unjustifiable limitation on the right of access to information under Article 24.

46. Further, the **1st** Interested Party submitted that the failure to disclose is a violation of the principles of openness and accountability of public finance management and impedes the ability of the Petitioners and other Kenyans to participate in financial matters envisioned in Article **201**. It argued that access to information is a violation of other constitutional provisions such as the principles of public finance management. (Citing *President of Republic of South Africa v M & G Media*[38]).

47. As for the remedies, the **1st** Interested Party cited Article **23(3)** and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others Petition*[39] and argued that the court can issue other appropriate reliefs outside those listed in Article **23.** Additionally, it cited *June Seventeenth Enterprises Ltd (Suing on its own behalf & on behalf of & in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) v Kenya Airports Authority & 4 others*[40] which held that the court's discretion to issue an appropriate remedy under Article **23(3)** is dependent on the facts of each case and the remedy must be tailor made to vindicate the right and to fulfil the promise of the Constitution. It cited *Mitubell Welfare Society v the Attorney General and Others*[41] and urged the court to issue a structural interdict. Further reliance was placed on *Youth Initiative for Human Rights v Serbia*[42] which held that national authorities should take active steps to address the culture of secrecy.

48. The **2nd** Interested Party cited section **14** of the Act and *High Court Case of Coast Legal Aid & Resource Foundation (CLARF) v Coast Water Board Services & 2 others*[43] which underscored the need for an applicant under Article **35** to exhaust the available dispute resolution mechanism. It replicated the steps it undertook upon receiving the complaint as enumerated in its replying affidavit and submitted that while the Commission was in the

[38] CCT 03/11.
[39] Nos. 14, 14A, 14B and 14C of 2014; [2014] e KLR (CCK).
[40] [2014] e KLR.
[41] [2021] e KLR.
[42] Application No 48135/06.
[43] [2021] e K.LR.

process of reviewing the complaint, the **1st** Petitioner instituted these proceedings hence barring the Commission from further investigating this matter as provided by Section **21 (2)** of the Act as read with section **30 (c)** of the Commission on Administrative Justice Act.

49. It submitted that section **30** of the Commission on Administrative Justice Act expressly lists the complaints that cannot be handled and/or investigated by the Commission, and, that, the Commission is expected to observe the rule of law and promote constitutional values. It cited Republic *v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees*[44] in support of the proposition that its jurisdiction was ousted when the Petitioners approached the court on the same issue.

50. Also, the **2nd** Interested Party submitted that the Act has provided mechanisms of resolving complaints and cited *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)*[45]which held that the exhaustion doctrine 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.

51. The **2nd** Interested Party also cited *R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others*[46] which held that the 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 and argued that this accords with Article **159**. It submitted that sections **21** and **23** of the Act has provided mechanisms in the manner the aggrieved party can lodge a complaint and appeal to the High Court in cases where an order of the Commission is not satisfactory to the Party. It submitted that even though the Commission is mandated to address such issues, it is to be noted that the Petitioners have raised several allegations and remedies against the Respondents that are not within its administrative functions.

[44] [2015] e KLR.
[45] [2020] e KLR.
[46] [2017] e KLR

52. In determining this Petition, I will first address the one of the hurdles raised by the Respondents in their bid to upset the Petition which is *res judicata*. It is trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

53. In the words of **Somervell L.J**, [47]*res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[48]

54. The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

55. Granted, *res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[49] This is because a judicial decision made by a court

[47] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.
[48] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.
[49]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine*.[50] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[51]

56. The doctrine of *res judicata* is provided for in Section **7** of the Civil Procedure Act.[52] The scheme of Section **7** therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. 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.[53]

57. The Respondents did not attach the pleadings filed in the two consolidated Petitions. However, a reading of the judgement delivered in the consolidated Petitions shows that Petition No. **150** of 2018 challenged a clause in an Agreement dated **30th** September, 2014 between the KPA and KRC. The offending contractual clause obligates the KPA to consign to the KRC as a carrier a set volume of freight and or other cargo pursuant to commencement of the operations of the SGR to the KRC's Inland Container Depot (ICD) at Embakasi. The Petitioners in the said case found the contractual clause violative of various constitutional provisions including their fundamental rights contained in the Bill of Rights. They sought the following prayers: -

    a. *A declaration that the Agreement dated 30th September, 2014, between the 3rd and 4th Respondent threatens and/or contravenes the social and economic rights of the Petitioners and the residents of Mombasa County under Article 43 of the Constitution.*
    b. *An order that the 3rd Respondent's administrative decision requiring shippers, consignors, consignees, clearing and forwarding agents and owners of goods to deliver and collect freight and cargo from the 3rd Respondent's Embakasi ICD is unfair and contravenes the economic and social rights of the residents and business community of Mombasa County and is thus unconstitutional.*

[50] Ibid.
[51] Ibid.
[52] Cap 21,Laws of Kenya.
[53] See **Lotta vs. Tanaki {2003} 2 EA 556.**

c. *A declaration that the 3rd Respondent's operation vide its Embakasi ICD and/or other existing ICD threaten and or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition and is thus unconstitutional; in the alternative, that an ICD be established within a reasonable radius from the port of Mombasa within a geographical area of Mombasa County in order to secure the source of livelihood of the people of Mombasa County and surrounding Coastal Counties arising from the port activities and functions.*

d. *An order that the Mombasa Port services be assigned to the National Government and County Government of Mombasa in accordance with Paragraph 5(e) of Part 2 of the Fourth Schedule to the Constitution and particularly that the management and operations of the Port with respect to County transport harbour functions is a function of the Mombasa County Government.*

e. *An order for enforcement and implementation of County transport harbour functions by the 3rd Interested Party.*

f. *An order that the Respondents' actions complained of herein contravene Articles 6, 10, 43(1), 47, 55, 174 and 186 of the Constitution.*

g. *Costs of the Petition.*

h. *Any further relief or orders that this honourable Court may deem just and fit to grant.*

58. Consolidated with the above Petition was Mombasa High Court Petition No. **201** of 2019. This Petition challenged two directives issued by the KPA directed at the members of the Kenya Transporters Association Limited with regard to the consignment of cargo and location of clearance depot for cargo arriving at the Port of Mombasa. It was filed by the association of all transporters who were aggrieved by the two directives seeking: -

a. *A declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo from the Port of Mombasa to as destination of their choice.*

b. *A declaration that the directives issued on 15th March, 2019 and 3rd August, 2019 are in violation of Articles 1, 2(4), 10, 21, 22, 23, 43, 46, 47 & 174 of the Constitution of Kenya, 2010.*

c. *A declaration that the directives are in violation of sections 21 and 24 of the Competition Act No. 12 of 2010 and the Consumer Protection Act No. 46 of 2012.*

d. *A declaration that the directives infringe the social-economic rights of the residents of Mombasa and Kenya in general.*

e. *An order of certiorari quashing the directives.*

f. A declaration that the 2nd Respondent has acted unlawfully and contrary to the Constitution of Kenya, 2010 in that he has deliberately violated Articles 1, 10, 28 and 47 of the Constitution.

g. A declaration that the 5th Respondent has acted unlawfully in the following instances: -

i. Completely ignoring to act on the issues raised by the Petitioner vide the Petitioner's letter dated 15th August, 2019 with regard to the monopolistic tendencies with regard to the transportation of containers from the Port of Mombasa to other destinations.

ii. That the 5th Respondent be directed through an order of mandamus to take immediate action to demolish the monopolistic tendency with regard to the transportation of containers from the Port of Mombasa to other destinations in Kenya which is now monopolized by the 4th Respondent consequent to the unlawful directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 21st August, 2019.

h. General damages to be awarded to the members of the Petitioner against the Respondents jointly and severally.

i. Costs of the Petition.

j. Such orders and directions as the honourable Court may deem fit.

59. A reading of the tests for *res judicata* discussed above, and a reading of the subject matter, the facts and the issues for determination disclosed in this Petition and a reading of the subject matter, the facts and issues determined in the consolidated Petitions leaves no doubt that the subject matter and the issues raised and determined in the consolidated Petitions are manifestly different from the issues in this case. It follows that the Respondents' attempt to rely on the doctrine of *res judicata* is misdirected and in applicable in this case.

60. I now turn to the other ground cited by the Respondents. They argued that the suit against the **4th** and **5th** Respondents is unsustainable because section **22** of the National Government Co-ordination Act[54] protects public officers from personal liability. The section reads: -

22. Protection from personal liability

Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand.

[54] Act No. 1 of 2013.

61. As was held in *R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* [55]no statute ever allows anyone on whom it confers a power to exercise such a power arbitrarily, capriciously or in bad faith. Bad faith has been defined rarely, but an Australian case defined it as ‘‘a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker.”[56] Even though "Bad faith" has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. Justice Southin in *MacMillan Bloedel Ltd. v Galiano Island Trust Committee*[57] articulated the concept of bad faith as follows: -

> *“The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. <u>And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact</u>.”(Emphasis added)*

62. The Supreme Court of Canada in *Chaput v Romain*[58] described the "honest belief" distinction as follows: -

> *“What is required in order to bring the defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did.”*

63. The contrast is with an act of such a nature that it is wholly unauthorized and where there exists no colour for supposing that it could have been an authorized one. In such a case there can be no question of good faith or honest motive. The words "good faith" must be read in the context in which they are found. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply.

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[55] {1999} 1 EA 245.
[56] *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (NAFK v Minister of Immigration (2003) 130 F.C. 210, [24]).
[57] {1995} B.C.J. 1763.
[58] {1955} S.C.R. 834.

64. Bad faith is a serious allegation which attracts a heavy burden of proof.[59] 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. This view resonates with observations made in several cases world over, that "proof of bad faith necessitates proof of extreme circumstances."[60]

65. It is likewise unsurprising that courts have shrunk from attempting a comprehensive exposition of what is and is not countenanced by the formula "a bona fide attempt to exercise a power." Rather the burden of the formula has been illustrated by examples as in the observations. The following examples though not conclusive may suffice. It must be established that: - (i) there was no *bona fide* attempt by the public officer to exercise the power; (ii) the exercise of that power must relate to the subject matter of the Act; and, (iii) the decisions taken were reasonably capable of reference to the power given to the public officer. In this this case, the Petitioners were required to demonstrate the absence of these three tests. I am afraid, other than citing alleged breach of Articles of the Constitution, there was no attempt to surmount the high threshold required to establish bad faith to justify impleading the **4th** and **5th** Respondents in their personal capacities. Their inclusion in this Petition was unwarranted.

66. The other ground argued by the Respondents is that 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 has been taken. C Hoexter[61] 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 any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether."*

[59] *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587)
[60] see eg *Dan v Federal Commissioner of Taxation* 2000 ATC 4350 at 4356 affirmed in *Kordan*'s case.
[61] Hoexter C: Administrative Law in South Africa, 2 nd Ed. Juta 2011.

67. 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. Had Parliament desired the mechanism provided therein to be mandatory, it would have done so in clear terms. In any event, in the instant case, the Commission wrote to the Respondents and by the time this matter was filed in court, which is one year and six months, no reply had been received.

68. In my view, the Access to Information Act entails those public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in Article **35** is to subordinate the organs of State to a new regimen of openness and fair dealing with the public.[62]

69. Two of the objects of the Act must be emphasized. Firstly, the Act seeks to establish voluntary and mandatory mechanisms or procedures to give effect to the right to access to information in a manner which enables persons to obtain access to records of public and private bodies swiftly, inexpensively and effortlessly as soon as reasonably possible. Secondly, it seeks to promote transparency, accountability and effective governance of all public and private bodies.

70. It is common ground that a proper request was directed at Respondents. In terms of section **9** 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.

[62] Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T). Section 23 of the Interim Constitution dealt with access to information.

71. 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*: -[63]

> *"The word "deemed" may be used in either sense, but it is more commonly used for the purpose of creating what James L.J. and Lord Cairns L.C. 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."*

72. 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,[64]Trollip 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."*

73. 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. The Respondents cannot fail to reply within the period provided by the law, then fail to reply to the request by the **2nd** Interested Party for **1** year and **6** months and purport to use the doctrine of exhaustion to cover their omission. This court would be going against the letter and spirit of the Constitution if it were to be persuaded by the Respondents argument that the Petitioners failed to exhaust the statutory dispute resolution mechanism under such circumstances. It would amount to condoning an illegality.

[63] See Muller v Dalgety & Co. Ltd [1909] HCA 67; (1909) CLR 693 at 696.
[64] S v Rosenthal 1980 (1) SA 65 (AD) at 75F – 76A

74. I now turn to the Respondents attempt to shield them with section **3 (6)** & **(7)** of the Official Secrets Act[65] which provides: -

6. Production of data

(1) Where it appears to the Cabinet Secretary that it is in national interest to do so, the Cabinet Secretary may, apply to the High Court for an order, requiring any person who owns or controls any telecommunications apparatus used for the sending or receipt of any data to or *from any place outside Kenya, to produce to the Cabinet Secretary or any person named in the order, the original or transcripts of all such data and all other documents relating to such data.*

(2) Any person who fails to comply with a request made under subsection (1) shall be guilty of an offence and liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year, or to both.

75. The right of access to information held by the state is guaranteed by Article **35(1)** of the Constitution which provides: - (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 was enacted to give effect to Article **35**. It 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.

76. The Respondents argument ignores the provisions of section **29** of the Access to Information Act which provides for consequential amendments. It provides that the written laws identified in the Schedule are amended in the manner identified therein. Specifically, paragraph **4 (1)** of the Schedule provides in peremptory terms that the provisions of Official Secrets Act shall apply **subject to Article 35 of the Constitution**. It reads: -

Official Secrets Act

4.(1) This paragraph amends the Official Secrets Act (Cap. 187).

(2) Section 3 of the Official Secrets Act is amended by inserting the following new subsection immediately after subsection (7)— (8) The provisions of this section shall apply subject to Article 35 of the Constitution and the law relating to access to information.

77. Even if section **29** and paragraph 4 of the schedule cited above did not exist, the drafters of the Constitution were aware of the need for all the existing laws as at **27th** August 2010 to

[65] Cap 187, Laws of Kenya.

be read in a manner that ensures they all conform with the Constitution. Section **7** of the Sixth Schedule to the Constitution on Transitional and Consequential Provisions provides:

> - *(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*

78. All law must conform to the constitutional edifice. It follows that the provisions of Sections **3 (6) & (7)** of the Official Secrets Act must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[66] *"All statutes must be interpreted through the prism of the Bill of Rights.* This statement is true of decisions made by statutory bodies and State organs declining to divulge information to members of the public. The governing statute and the resultant decision must be interpreted through the prism of Articles **35** and **47** of the Constitution.

79. There are not two systems of law regulating access to information held by public bodies, each operating in its own field. Rather, there is only one system of law regulating the right to access information shaped by the Constitution which is the supreme law, and all law, including the Official Secreta Act derives its force from the Constitution and is subject to constitutional control.

80. The entrenchment of the right to access information as a fundamental right should, as a constitutional principle expand the scope of the right. *First*, parties, who were once denied access to information on the basis of the now obsolete provisions of the Official Secrets Act cited by the Respondents on the mere allegation of "state secret dichotomy," should now access information only subject to the exemptions enumerated at section **6 (1)** & **(2)** of the Access to Information Act. *Second*, the right to access information held by the State is now constitutionally guaranteed, so, it can only be limited if the decision or law limiting the right passes an article **24** analysis test. *Third*, Article **23(3)** of the Constitution lists remedies available from this court in the event of breach or rights.

81. As I stated in *Mary Nyawade v Banking Fraud Investigation Department & 2 others*[67] the proper approach it to adopt constitutional construction which exemplifies fundamental

[66] *Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]
[67] Petition No. 143 of 2017.

rights and protection. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[68]As was held in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*[69]: —

> *"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."*

82. By now it is manifest clear that the Respondents' attempt to hide behind the provisions of sections **3(6)** & **(7)** of the Official Secrets Act flies on the face of Article **35**, section **29** of the Access to Information Act and Paragraph **4** of the Schedule to the said act and falls to be rejected.

83. I now turn to the nub of this dispute, which is whether the refusal to divulge the information falls within the permissible exemptions under the Act. The Respondents argued that the contract contain non-disclosure clauses, that the disclosure will endanger state security, and that the information sought is privileged.

84. A reading of the provisions of Access to Information Act leaves no doubt that the act was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of the sections casts the exercise of this right in peremptory terms – the requester ―must be given access to the information so long as the request does not fall within the exceptions in section **6** of the act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

[68] Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ
[69] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

85. 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.

86. 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 vs M & G Media Limited* [70]:-

> *"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."*

87. 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.

88. Any restriction on information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. To establish that a restriction on access to information is necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national

[70] CCT 03/11 {2011} ZACC 32 Heard on : 17th May 2011 Decided on : 29th November 2011.

security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.

89. A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

90. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

91. The other ground cited is that the contracts contain-non disclosure clauses. Disclosure will be refused if releasing that information would cause harm to the commercial or financial interests of the business. Such interests in my view 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.

92. Guidance can be obtained from *Transnet Ltd and Another v SA Metal Machinery Co*[71] where the court made a decision on a request for information relating to tender documents, after the tender had been issued. The requested records were made available; however,

[71] (147/2005) [2005] ZASCA 113; [2006] 1 All SA 352 (SCA); 2006 (4) BCLR 473 (SCA) (29 November 2005)

some parts of the requested documents were omitted and the reason given by the public body was that the record contains commercial information of a third party. The court held that the confidentiality of the information did not apply because the tender had been awarded and tender documents were therefore public documents. The court further held that releasing the records would not prejudice the company. The court addressed the issue of the probability of harm. Noting that the tender document was already a public document, releasing the document could not reasonably be expected to harm or disadvantage the company in any way. This finding applies to the instant case because the SGR project was concluded. I see no prejudice at all to the parties to the contract. In considering the right to obtain information, the public interest in knowing the information should be a primary consideration.

93. The recitation of the statutory language of the exemptions claimed (as has happened in this case) is not sufficient for the state to show that the information sought falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the state.[72] The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. In the minimum, in reverence to Articles **3(1), 10, 35,** and **47** of the Constitution, the Respondents ought to have availed recanted documents but clearly highlighting the clauses falling within the permissible exemptions, and leave to the court to determine whether or not to uphold the exemptions. This recognises that access to information held by the state is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.

94. Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the state has discharged its burden under section **6**. If it does not, and the state has not given any indication that it is unable to discharge its burden because to do so would require it to reveal

[72] Ibid

the very information for which protection from disclosure is sought, then the state has only itself to blame.

95. The failure to take a decision, in the context of the Act, migrates into a refusal of the request. The culture of justification permeates the Act. The mere request for information held by a public body obliges the public officer to produce it or justify withholding it. Public bodies have a constitutional duty to give people access to information so that they can exercise their rights. When they try to subvert a person's constitutional right by being unresponsive and playing possum their conduct should be deprecated. In conclusion, I find and hold that this Petition succeeds. I allow it and issue the following orders: -

    a) *A declaration be and is hereby 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 1st Petitioner's request dated 16th December 2019 is a violation of the right to access to information.*

    b) *A declaration be and is hereby 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 1st Petitioner's request dated December 16, 2019 is a violation of Article 10 of the constitution.*

    c) *An order compelling the Respondents to forthwith provide, at the Respondents' cost, information sought by the 1st Petitioner in his letters to the Respondents dated December 16, 2019 and May 13, 2021.*

    d) *No orders as to costs.*

Orders accordingly

Signed, delivered and dated at Mombasa this **13th** day of **May** 2022

Digitally signed by Justice John M. Mativo
DN: cn=Justice John M. Mativo, o=The Judiciary, ou=Judge, email=jm_mativo@yahoo.com, c=KE
Date: 2022.05.13 09:37:06 +03'00'

John M. Mativo

Judge