



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL PETITION NO 468 OF 2017**

**KATIBA INSTITUTE.....PETITIONER**

**VERSUS**

**PRESIDENTS DELIVERY UNIT.....1<sup>ST</sup> RESPONDENT**

**ANDREW WAKAHU.....2<sup>ND</sup> RESPONDENT**

**NZIOKA WAITA.....3<sup>RD</sup> RESPONDENT**

**JOSEPH KINYUA.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner, Katiba Institute, is a registered Constitutional research Policy and Litigation Institute established to further the implementation of the 2010 Constitution, and to generally seek the development of a culture of Constitutionalism in Kenya.

2. The 1<sup>st</sup> respondent, the Presidential Delivery Unit, is described in this petition as the centre of Government functions whose primary duty is to improve coordination of National Government flagship programs, monitor, evaluate and report on timely fulfillment of projects of the Government in development priorities.

3. The 2<sup>nd</sup> respondent, Andrew Wakahiu, is secretary in the 1<sup>st</sup> respondent's office and a State Officer, while the 3<sup>rd</sup> respondent, Nzioka Waita, is a State Officer and Deputy Chief of Staff and Deputy Head of Public Service. The 4<sup>th</sup> respondent, Joseph Kinyua, is also a State Officer and the Chief of Staff and Head of Public Service. They have all been sued in their respective capacities.

4. In a Petition dated 20<sup>th</sup> September 2017 and filed in Court on 21<sup>st</sup> September 2017, the petitioner states that on diverse dates during this year 2017, the 1<sup>st</sup> respondent published advertisements in the media, through billboards and in business messaging or tags # gok. DELIVERS and # JUBILEE DELIVERS.

5. The petitioner states that on 17<sup>th</sup> August 2017 in pursuit of its right of to access information, wrote to the 1<sup>st</sup> respondent seeking information on how many advertisements had been published, through what media, schedules and dates when it was done, copies of the documents advertised, total cost incurred and the relevant government accounting office(r) and the individual or government agency that met the cost. The information sought was to cover the period 25<sup>th</sup> May to 16<sup>th</sup> August 2017.

6. The Petitioner further states that the request was founded on Articles 1, 10, 19(1) 21(1) and 35(1) of the Constitution as well as Access to information Act, 2016. The petitioner also relied on the fair Administrative Action Act, 2015 which obliges Public Officers to act expeditiously, efficiently, lawfully, reasonably and in a procedurally fair manner.

7. The petitioner further cited Article 129 of the Constitution which requires that executive authority be exercised in a manner compatible with the principle of service to the people of Kenya and their well-being and benefits and the principles of leadership and integrity under sections 9 and 10 of the Public Officers Act, as well as section 23 of Leadership and Integrity Act which requires political neutrality on the part of state officers.

8. The petitioner further cited section 14(2) of the Elections Offences Act which prohibits government from advertising in print or electronic media or by way of banners or hoardings in public places its achievements during election period. The petitioner avers that the respondents refused and or failed to supply the information sought under Article 35(1) and have failed to observe Article 10 of the Constitution, more so the values and principles of the rule of law, participation of the people, human Rights, good governance, transparency and accountability. The petitioner therefore states that the respondents violated the Constitution and Sought the following reliefs:-

**1) A declaration that the failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide information sought under Article 35(1) and also to publicize the information in accordance with Article 35(3) on the basis of the petitioner's request dated August 17<sup>th</sup> 2017 is a violation of the right to access information.**

**2) A declaration that the failure by the 1<sup>st</sup> respondent to provide information sought under Article 35(1)(a) and also publicize the information in accordance with Article 35(3) on the basis of the petitioner's request dated August 17<sup>th</sup> 2017 is a violation of Article 10 of the Constitution specifically the values of the role of law, participations of the people, human rights good governance transparency and accountability.**

**3) A declaration that failure by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to provide information sought under Article 35(1)(a) and also to publish 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.**

**4) An order of mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to forthwith provide at the respondents lost, information sought by the petitioner in their letter to the respondents dated August 17, 2017.**

**5) Costs of the petition assessed at Ksh500,000/-.**

**6) Such further orders the court may deem just and appropriate to grant.**

## **Response**

9. The respondents did not file a formal response to the petition. They had filed an application dated 5<sup>th</sup> October 2017 seeking to set aside interim conservatory order granted on 2<sup>nd</sup> October 2017, which both parties agreed to treat as a response to the petition for purposes of quick disposal of this matter.

10. The gist of the response as can be discerned from the grounds supporting the motion, is that the provisions of Article 35 of the Constitution are only justiciable in respect to citizens who are natural persons but not the petitioner, a juristic person. It was also stated that the petition is pre mature since Access to information Act confers oversight and enforcement role on the commission of Administrative justice (CAJ) It was further stated that the information sought by the petitioner is available at the Auditor General and Parliament which are constitutionally mandated to oversight public expenditure.

11. The respondents finally stated that the information sought is exempted under section 6(1)(a) and 6(2) (j) of the Act. These responses were substantially reiterated in the affidavit of the 2<sup>nd</sup> respondent sworn on 5<sup>th</sup> October 2017 and particularly at paragraphs 3, 4 and 6.

### **Petitioner's submission**

12. Mr. Waikwa, learned counsel for the petitioner, submitted that although the petitioner made a request for information by letter dated 17<sup>th</sup> August 2017, no response was received from the respondents or information supplied. Counsel submitted that Article 35 (1) (a) of the Constitution grants a citizen the right to seek and have information from a State or State organ. Counsel contended that even after the petition was filed and served no information has been supplied as required to date.

13. Learned Counsel argued that Article 35(1)(a) of the Constitution is clear that every citizen has a right to information, that the 1<sup>st</sup> respondent as a public body is bound by Article 35(1)(a) to disclose information sought in terms of section 4 of Access to information Act, 2016.

14. Counsel submitted that section 9 of the Act gives a time line of 21 days within which to give information, but the days lapsed before information was given and has not been given to date. Mr. Waikwa contended that the respondents' conduct violated Articles 10, 33 and 35 of the Constitution. In learned Counsel's view, Article 10 has the minimum standard on how public officers should conduct themselves but they have violated the Article by failing to disclose the information.

15. Counsel relied on the decisions in ***Nairobi Law Monthly Ltd v Kenya Electricity Generating Company*** [2013] eKLR paragraphs 26, 34 and 36, and ***Trusted Society of Human Rights Alliance & 13 others v Judicial Service Commission*** [2016]eKLR (paragraph 270). Learned Counsel referred to section 32 of the South African Constitution which is similar to our Article 35 and in that regard, relied to the decision in ***President of Republic of South Africa v M & G Media CCT 03/11*** (paragraph 10) 3 and ***Brummer v Minister for Social Development & others CCT 25/09 2009 ZACC 21*** paragraphs 62 – 63 emphasizing on the openness in government's operations and principles of access to information.

16. Learned Counsel made further reference to ***Article 19 of the Universal Declaration of Human Rights***, ***Article 19(2) of International Convention on Civil and Political Rights*** and ***Article 9 of the African Charter for Human and Peoples Rights***. He also relied on Articles 2(4) and 2(5) of the Constitution to support his submissions.

17. On why the respondents should meet costs of the petition, learned counsel relied on the case of ***Bio Watch CCT 86/08/2009 ZACC 14***( paragraph 21) on the explanation by ***justice Sachs*** that people are entitled to costs should they succeed.

### **Respondent's submissions**

18. Mr. Ogosso, learned counsel for the respondents, on his part submitted that the right to access

information under Article 35(1) of the Constitution is limited to citizens and that this right is not available to juristic persons like the petitioner. Counsel relied on the decision in **Nairobi Law Monthly (supra)** in support of this submission.

19. Mr. Ogosso further contended that the information sought is exempt under section 6(a), (b) and 6(2)(j) of Access to information Act. Counsel submitted that the information sought had already been made public to the Auditor General who then reports to the National Assembly. In Counsel's view, the two organs have the Constitutional mandate to Oversee and Supervise Public Expenditure.

20. Learned Counsel went on to submit that under Article 35(3) as read with Articles 10 and 232 of the Constitution, the state is under a constitutional obligation to publish and publicize any important information affecting the nation and, in his view that is what the 1<sup>st</sup> respondent is doing. Counsel further contended that the petition is premature since under Access to Information Act, **C.A.J** is the body with enforcement and oversight functions, hence the petitioner could have approached **C.A.J** before coming to Court.

21. Mr. Ogosso further argued that the Court should weigh the right of a non-citizen against that of the general public in view of Article 35(1)(a). In counsel's view, the balance should tilt in favour of the general public against that of a non-citizen.

22. Regarding costs, counsel submitted that costs are at the discretion of the Court and, if granted, should be left to the taxing officer

#### **Petitioner's rejoinder.**

23. In a short rejoinder, Mr. Waikwa submitted that the judgment in **Nairobi law monthly(supra)** was delivered in 2013 relying on a decision by **Majanja J** made in 2012 on Juristic person's right of access to information. Counsel pointed out that Section 2 of Access to information Act is clear on the fact that a citizen includes juristic person. Counsel contended that the right to information is a constitutional right and referred to the case of **Gatiru Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]eKLR**. He argued that by extending the definition of a citizen in the Act, Parliament intended juristic Persons to access information.

24. Learned Counsel submitted that exemptions in section 6 can only apply where there is evidence that the information will undermine national security. He however contended that no response had been given by the respondents when information was sought that the information was exempted. He argued that the respondents cannot hide behind parliament and the Auditor General's office to justify failure to give information.

#### **Determination**

25. I have considered the pleadings, submissions by counsel and authorities cited. Two issues arise for determination in this petition, namely :-

***(1) Whether the respondents violated the petitioner's right of access to information***

***(2) Whether the respondents should be compelled to give information.***

26. The petitioner sought information through letter dated 17<sup>th</sup> August 2017. The letter is said to have been delivered but no response was received from the respondents. This forced the petitioner to file this

petition and even as at the time of hearing the petition no response had been received from the respondents.

27. The petitioner has contended that the respondents have violated Articles 10, 33 and 35 of the Constitution and section 4, 9 and 21 of the Access to information Act. The respondents on the other hand hold the position that they did not violate the petitioner's right to access information. The respondents also contended that the information sought is limited by section 6 of Access to Information Act.

28. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

29. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access.

30. In that regard, Article 35 of the Constitution provides that;

**1) "Every citizen has the right of access to—**

**a) information held by the State; and**

**b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**

**2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**

**3) The State shall publish and publicise any important information affecting the nation.**

31. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

32. For purposes of actualizing Article 35, parliament enacted Access to Information Act 2016. Section 4 of the Act which is material, to this petition provides for the procedure to access information. The section provides;

**1) "Subject to this Act and any other written law, every citizen has the right of access to**

**information held by—**

**a) the State; and**

**b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.**

**2) Subject to this Act, every citizen's right to access information is not affected by—**

**a) any reason the person gives for seeking access; or**

**b) the public entity's belief as to what are the person's reasons for seeking access.**

**3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.**

**4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.**

**5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (emphasis)**

32. It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information.

33. On the other hand, section 5 of the Act further provides that a public entity should facilitate access to information held by it. Under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding why the citizen wants to access information. Section 9 makes states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.

34. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the Constitution and is protected by the same Constitution. In the case of **Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others** (supra) the Court stated of what the state should bear in mind when considering the request to access information.;

***“34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...***

**36. *The recognized international standards or principles on freedom of information,... include***

**maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."**

35. The Court then went on to state at paragraph 56;

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

36. In the case of **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission** [2016]eKLR, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

**"[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public's Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2* 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 and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information".**

37. The importance of the right to access information as a founding value of constitutional democracy was dealt with by the Constitutional Court of South African in the case of **President of Republic of South Africa v M & G Media** (supra) where the Court stated that:-

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

38. The right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of **Brummer v Minister for Social Development & Others** (supra) where the Court stated ;

**"[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate**

*information.”*

**[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”**

39. The above principles regarding the right to access information are also founded on International instruments. Article 19 of the **Universal Declaration of Human Rights** is clear that **“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”**. Article 19(2) of **International Convention on Civil and Political Rights** also makes the right to information imperative when it states that **“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”** And finally, Article 9(1) of **Africa Charter on Human and Peoples Rights** states that **“every individual has the right to receive information.”**

40. These international instruments were ratified by Kenya and by virtue of Article 2(5) of the Constitution, general rules of international law and any treaties or conventions ratified by Kenya form part of the law of this country. Arising from the jurisprudence above and the law, the state has constitutional obligation, without qualification, to allow citizens access information and they cannot be denied that right by the state.

41. The respondents in their responses and submissions contended, first, that the petitioner is not a citizen being a **juristic** person and, therefore, cannot access information under Article 35(1) (a) of the Constitution contending that this right is limited to citizens only. Reliance was placed on the decision in the case of **Nairobi Law Monthly Limited v Kenya Electricity Generation Company and 2 others** (supra). And second, that the information is limited by virtue of section 6(1) (a) and 6(2) (j) of Access to information Act.

42. In the case of **Nairobi Law Monthly Ltd v Kenya Electricity Generating Company Ltd & 2 Others** (supra), the Court stated that the right to access information was only available to citizens and in arriving at that conclusion, the Court relied on the decision by **Majanja J**, in the case of **Famy Care Limited –v- Public Procurement Administrative Review Board & Another** (High Court Petition No. 43 of 2012).

43. It is noteworthy, however, that both decisions by **Mumbi Ngugi J** and **Majanja J** in the above cases came before the enactment of Access to Information Act, in 2016. Section 2 of the Act defines a citizen as **“any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens.”** From the above definition, a juristic person whose director(s) is a citizen, is considered a citizen for purpose of exercising the right to access to information under Article 35(1)(a) of the Constitution as read with section 4 of Access to information the Act.

44. I have perused the petition and the supporting affidavit sworn on 20<sup>th</sup> September 2017 and filed in court on 21<sup>st</sup> September 2017. The deponent of that affidavit **Waikwa Wanyoike** describes himself at paragraph 2 of the affidavit as the **Executive director of the petitioner** (Katiba Institute). During the hearing Mr. Waikwa Wanyoike who also represented the petitioner in this petition, did also state, referring to his affidavit, that he is a director of the petitioner.

45. The respondents on their part have not controverted the averment in the affidavit that learned



counsel is a citizen and director of the petitioner. That being the case, the petitioner though a juristic person, is a citizen for purposes of Article 35(1)(a) as read with section 4 of Access to information Act and was entitled to seek and have information as a citizen.

46. Regarding the contention that the information sought is limited by section 6(1)(a) and 6(2)(1) of Access to information Act, I must state that it was up to the respondents to show how the information sought affected state security and therefore, falls within section 6 of the Act. From the letter dated 17<sup>th</sup> August 2017, the information sought is about dates, nature of advertisements and copies thereof, the cost of advertisements and who meets that cost.

47. That, in my view, cannot be information that affects state security. How would for instance dates when advertisements were done, nature and copies of advertisements, cost of advertisements and who meets the cost of those advertisements affect state security" It is strite law that where a party alleges, like the respondents have done, that information sought affects state security, it is the duty of that person to show to the satisfaction of the Court that indeed that is the case. It is not enough for a party to merely allege without showing how, that disclosure of information will affect state security.

48. This is even greater a responsibility given the nature of the Constitutional obligation the state, state officers or public bodies have for disclosure. This is so because as observed in **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission** (supra), **the exercise of this right should not require individuals to demonstrate a specific interest in the information.** And **where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings.** Access to Information Act is also absolutely clear that information should be disclosed free of charge, the reason for seeking information notwithstanding.

49. In the present petition, although the letter seeking information was written on 17<sup>th</sup> August 2017 and delivered immediately thereafter, no response was received from the respondents, either giving access to information, or declining to disclosure and giving reasons for that. Section 9 of the Act states in no uncertain terms that the state or state organs should give information within 21 days or respond to the request within that period. This clear legal provision notwithstanding, no access to information was given or reason given; either that the respondents did not have the information or that they would not disclose the information and give justification for it.

50. Furthermore, the respondents' contention that the information sought is limited by section 6(1) (a) and 6(2)(j) of Access to Information Act cannot be accepted. The respondents did not demonstrate the rationale for this contention given the fact that Article 35 has no limitation to this right. They were also under duty to show that the purported limitation falls within the ambit of Article 24(1) of the Constitution and that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the importance of this right in the citizens' quest for public participation in the democratic governance of our country.

51. In that regard I agree with the observation in **Youth Initiative for Human Rights vs. Serbia** (Application no. 48135/06) quoted in **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission** (supra), that:

**"The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the**

**public authority seeking to deny access to show that the information falls within the scope of the system of exceptions... The access to information law should, to the extent of any inconsistency, prevail over other legislation... National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who willfully obstruct access to information...** (emphasis)

52. The respondents further contended that the petition is premature basing their argument on section 21 of the Act. Their take was that the petitioner should have first complained to the Commission on Administrative Justice (CAJ) before filing the petition. I have read the Act but could not trace a provision making a report to CAJ a condition precedent to triggering the jurisdiction of this Court to deal with petitions filed seeking to challenge violations of the right to access information under Article 35 of the constitution. This Court has unlimited jurisdiction under Article 165(3)(b) **to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.** The respondents' contention that the petition is premature is therefore unsustainable.

53. From the facts of this petition precedents and the law, it is uncontroverted that the petitioner sought information in exercise of its constitutional right under Article 35. It is also clear that even though the law requires the public entity to respond to the request within twenty one (21) days on whether or not it is in possession of the information and will or will disclose, the respondents ignored the law.

54. The respondents were under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public. This is an inviolable constitutional right and that is clear from the language of Article 35 of the Constitution, and any limitation must meet the constitutional test and only then can one raise limitation as a ground for non-disclosure.

55. The Court of Appeal addressed the issue of respecting constitutional rights in the case of **Attorney General v Kituo cha Sheria & 7 others [2017] eKLR** and stated;

***“The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”***

56. The above statement captures the essence of the petition before me that the respondents were under obligation to obey the law and allow the petitioner access information or where not possible give reasons for that. They failed in both instances thus violated the petitioner's rights under the Constitution and the law.

57. We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused.

58. From my evaluation and analysis of the facts and evidence in this petition, and submissions by counsel for the parties and bearing in mind precedent and the law, I come to the inescapable conclusion that the respondents violated the petitioner's right of access to information and that no effort was made to justify this violation. For that reason, I am equally satisfied that the petitioner has proved its case to the required standard and must succeed.

59. To that end I am guided by what the Court stated in the case of ***Tinyefuze v Attorney General of Uganda*** [1997] UGCC3 that; **“if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.”**

60. Consequently the petition dated 20<sup>th</sup> September 2017 is allowed and the following orders granted;

***a) A declaration is hereby issued that the failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide information sought under Article 35(1) and also to publicize the information in accordance with Article 35(3) on the basis of the petitioner’s request dated August 17<sup>th</sup> 2017 is a violation of the right to access information.***

***b) A declaration is hereby issued that the failure by the 1<sup>st</sup> respondent to provide information sought under Article 35(1) (a) and also publicize the information in accordance with Article 35(3) on the basis of the petitioner’s request dated August 17<sup>th</sup> 2017 is a violation of Article 10 of the Constitution specifically the values of the rule of law, participation of the people, human rights good governance transparency and accountability.***

***c) A declaration is hereby issued that failure by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to provide information sought under Article 35(1) (a) and also to publish 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) An order of mandamus is hereby issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to forthwith provide at the respondents cost, information sought by the petitioner in their letter to the respondents dated August 17, 2017.***

***e) Costs to the petitioner.***

Dated, Signed and Delivered at Nairobi this 8<sup>th</sup> Day of November 2017

**E C MWITA**

**JUDGE**



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