Case Number:	Petition 520 of 2014
Date Delivered:	11 Mar 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Isaac Lenaola
Citation:	John Harun Mwau v Linus Gitahi & 13 others [2016] eKLR
Advocates:	Mr. Ngatia for Applicant Mr. Mwangi for 1st – 3rd Respondent Mr. Moimbo for 4th – 14th Respondents
Case Summary:	**A court cannot grant interlocutory orders that had the effect of disposing off a substantive dispute.** **John Harun Mwau v Linus Gitahi & 13 Others** **Petition No.520 Of 2014** **High Court of Kenya at Nairobi** **Isaac Lenaola** **March 11, 2016** **Reported by Njeri Githang'a** The Petitioner sought orders compelling the Respondents to provide him with information in terms of article 35 of the Constitution of Kenya, 2010 pending the determination of the Petition. It was submitted that the Petitioner's rights to be

free from violation of his reputation, integrity, vilification (article 28) on the right to human dignity, privacy (article 31), right to life (article 26) and to be free from mental and or psychological torture had been and continued to be infringed while the Petition awaited determination.

To enforce the abovementioned rights, the Applicant therefore decided to seek an order in terms of article 35 for information pertaining to 1.1 tonnes of cocaine allegedly impounded in December 2004. The request was essentially premised on the grounds that first, to vindicate the alleged violation of his fundamental rights and second, to facilitate the immediate arrest and prosecution of the culprits in the interest of the general public.

It was his submission that the broadcast in issue had raised the perception, in the eyes of the broader international community, that the 4th to 11th Respondents were incapable of performing their Constitutional duties. That, he argued, posed a threat to his right to life because it opened him up for the possibility of international prosecution. The Applicant also deponed that it was in the interests of justice for the orders prayed for to be granted so that the office of the Director, Directorate of Criminal Investigations (6th Respondent) and the Office of the Director of Public Prosecution (11th Respondent) could begin their investigative and prosecutorial processes promptly against the real culprits in the drug scandal. He further stated that while the Petition was pending determination, there was continued violation of his rights through unabated publication in the media and that the orders sought were meant to assist him in prosecuting the Petition herein.

The Applicant argued that the orders sought in the Application were not determinative of the Petition. Among the prayers sought in the main Petition included;

"(c) A declaration whether, under article 35 of the Constitution, the Petitioner is entitled to information regarding the actual person who impounded the 1.1 tons of cocaine valued at Kshs 5.3 Billion.

(d) A declaration whether, under article 35 of the Constitution, the Petitioner is entitled to access information as to the location of the alleged depot, its land reference number and registered proprietor.

(e) A declaration whether, under article 35 of the Constitution, the Petitioner is entitled to information and details in respect of the alleged container including serial number, shipping line that owns said container, the shipper, the consignee, dates when the said container arrived at Mombasa and Malindi and who was the container's clearing and forwarding agent.

. . .

(g) A declaration whether, under article 35 of the Constitution, the Petitioner is entitled to information from the 4th to 13th Respondent whether, in December 2004, the Police or any other law enforcement agencies, seized 1.1 tons of cocaine valued at Kshs 5.3 Billion and another 1.1415 tons of cocaine valued at Kshs 6.4 Billion."

The 1st, 2nd and 3rd Respondents on the other hand submitted that the orders sought had a final effect, and could not be granted at an interlocutory stage and also that the said orders were also practically the exact orders sought in the Petition in prayers (a) to (f).

Issues

i. Whether the right to information under article 35 of the Constitution of Kenya, 2010 could be enforced by means of an interlocutory application.
ii. Applicable principles in the enforcement of the right to information under article 35 of

the Constitution of Kenya, 2010.

iii. Whether a court could grant interlocutory orders that had the effect of disposing off a substantive dispute.

iv. What were the standards for granting an interlocutory order*?*

Constitutional law-*fundamental rights and freedoms-right to information-enforcement of the right- applicable principles in the enforcement of the right to information under article 35 of the Constitution of Kenya, 2010- whether the right to information under article 35 of the Constitution of Kenya, 2010 could be enforced by means of an interlocutory application- Constitution of Kenya, 2010, article 35*

Constitutional law*-Constitutional petitions -interlocutory applications- nature of interlocutory applications-standards for granting an interlocutory order-whether a court could grant interlocutory orders that had the effect of disposing off a substantive dispute- Constitution of Kenya, 2010, article 23 (3)*

Relevant provisions of the Law

Constitution of Kenya, 2010,

Article 35

35(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 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.

Promotion of Access to Information Act (PAIA)-South Africa

Section 7(1) of the Promotion of Access to Information Act (PAIA), a legislation enacted to give effect to Section 32 of the Constitution, provides:

1. *"This Act does not apply to a record of a public body or a private body if?*
2. *a. That record is requested for the purpose of criminal or civil proceedings;*
3. *b. So requested after the commencement of such criminal or civil proceedings, as the case may be; and*

c. The production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

Held

1. Article 35 of the Constitution of Kenya 2010, was couched in very similar terms to section 32 of the South African Constitution. However, the South African Constitution also had a provision directing Parliament to enact legislation to give effect to the right to information enshrined in section 32(1) thereof. Such a provision was however absent in the Kenyan Constitution but despite the absence thereof, the Kenyan National Assembly had in the pipeline, the Access to Information Bill, 2015 which was intended to give effect to article 35 of the Constitution of Kenya, 2010. The Courts had in any event interpreted article 35 of the Constitution of Kenya, 2010 in several cases and the principles applicable to its enforcement had crystallised.

2. Article 35 of the Constitution of Kenya, 2010 required that the information required by any person should be first requested and be denied for the enforcement or protection of another right. The logical set-up of the article therefore contemplated a situation wherein a party requested information, in full-blown judicial proceedings, which would be used for the enforcement or protection of another fundamental right in separate proceedings. From that logic, the request for information would precede the protection and the enforcement of another right.
3. Article 35 of the Constitution of Kenya, 2010 rights were substantive rights that had to be proved, not in interlocutory proceedings, but in a substantive hearing on the merits. To do otherwise would mean that article 35 processes were merely facilitative of a hearing to prove the alleged violation of other rights in the bill of rights by invocation of article 35(2) of the Constitution of Kenya, 2010.
4. The word ‘required’ implied that the information should be such that, without it, the other rights could not be enforced or protected. Therefore the right to information could not be enforced simultaneously with or after proceedings for the enforcement or protection of other rights had been instituted. At the stage of the proceedings, it was not clear which other right the Applicant wanted to enforce or protect other than the right to information itself. The Application therefore brought to the fore the puzzle where an Applicant wished to have final substantive orders under the bill of rights at the interlocutory stage of pending substantive proceedings for enforcement of the same right.
5. By attempting to enforce the right at that stage of the proceedings, the Applicant had thereby subjected himself to rules applicable to interlocutory applications. In addition to satisfying the ordinary balance of probabilities test therefore, he had to satisfy tests peculiar to interlocutory

applications under article 23(3) of the Constitution of Kenya, 2010 and in fact, that reduced the status of the right to information (which was a substantive right) to that of a procedural right and a mere stepping stone to the realization of other rights when it was meant to be a right in itself, a position that was untenable.

6. In South Africa, provisions of section 7(1) of the Promotion of Access to Information Act (PAIA), a legislation enacted to give effect to section 32 of the South African Constitution avoided situations wherein a party moved the Court for an application in terms of article 35 of the Constitution of Kenya, 2010 (an equivalent of Section 32 of the South African Constitution) pending criminal or civil proceedings in which the information was sought to be used. In Kenya, there was no legislation, as yet, fleshing out article 35 of the Constitution of Kenya, 2010 to salvage the situation but there was a Bill in the pipeline. Therefore it was in the hands of individual litigants to exercise a good choice on how and when to enforce their article 35 of the Constitution of Kenya, 2010 rights. If one opted for a separate Petition in terms of article 35, the same was decided under normal rules and on a substantive basis. However, if one opted to enforce article 35 of the Constitution of Kenya, 2010 by means of an interlocutory application, which was not the correct approach, different and stringent principles would apply to the application.
7. If article 35 of the Constitution of Kenya, 2010 could be enforced by means of an interlocutory application, the Applicant would have to satisfy the standard for granting interlocutory orders. In such kinds of applications an applicant must prove *inter alia*, urgency, irreparable harm and that a disposal of the application would not result in determination of the substantive issues. The Applicant had not met that standard as there was clearly no urgency in the matter because while he alleged that he could be investigated and prosecuted, the Respondents had made it clear that

	they did not know anything about the alleged 1.1 tonnes of cocaine and that there were no investigations or prosecutions related to the Applicant. The status quo had been in place since December 2004. Moreover, what he sought in the Application was essentially what he prayed for in paragraphs (c), (d), (e) and (g) of the Petition. 8. It was clear from the prayers that, in the Petition, the Applicant urged the Court to make a determination on whether he was entitled to have access to certain information in terms of article 35 of the Constitution of Kenya, 2010 yet, a declaration could not precede a determination. If the Court were to grant the Application, it would have disposed of the Petition. 9. Interim orders were not suitable if by their grant, they finally determine the substantive dispute. The Courts had to be wary of prejudgment of the substantive merits. The Application could therefore not be granted as framed and all the issues raised in it would have to be disposed of, finally, in the Petition. *Application dismissed*
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	application dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.520 OF 2014

BETWEEN

JOHN HARUN MWAU.....PETITIONER/APPLICANT

AND

LINUS GITAHI.....1st RESPONDENT

NATIONAL MEDIA GROUP LTD.....2ND RESPONDENT

SMRITI VIDYARTHI MOHINDRA.....3rd RESPONDENT

GIDEON MUOKI KIMILU.....4th RESPONDENT

THE DIRECTOR, DIRECTORATE OF

CRIMINAL INVESTIGATIONS.....5th RESPONDENT

THE OFFICER IN CHARGE, ANTI-NARCOTICS UNIT.....6th RESPONDENT

NATIONAL AUTHORITY FOR CAMPAIGN AGAINST

ALCOHOL AND DRUG ABUSE.....7th RESPONDENT

THE CHAIRMAN OF NACADA.....8th RESPONDENT

THE CHIEF EXECUTIVE OFFICER OF NACADA.....9th RESPONDENT

THE INSPECTOR GENERAL OF

NATIONAL POLICE SERVICE.....10th RESPONDENT

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS.....11th RESPONDENT

THE HON. ATTORNEY GENERAL.....12th RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

INTERIOR AND CO-ORDINATION OF GOVERNMENT.....13th RESPONDENT

THE CABINET SECRETARY OF MINISTRY OF FOREIGN

AFFAIRS AND INTERNATIONAL TRADE.....14th RESPONDENT

RULING

Introduction

[1] On the 27th of October 2014 the Petitioner filed a Petition in this Court seeking several orders against the 1st to the 14th Respondents. His grievances arise from a TV broadcast by the Nation Media Group Ltd (2nd Respondent) aired on the 29th of August 2004 at its news 9 o' clock news bulletin. For clarity's sake, the news item is partly reproduced hereunder:

". . . **For years the government has struggled to contain the drug menace failing to capture the real kingpins. In December 2004, 1.1 tons of cocaine valued at 5.3 billion shillings was impounded in Malindi, the incident attracted the attention of the United States government which slapped sanctions on Kilome MP John Harun Mwau. The US believed that the depot and container belong to Mwau."**

[2] The Petition is based on the above factual exposition and the Petitioner in the Petition aforesaid prayed for the following orders *inter alia*:

"(a) A declaration that the 1st to 3rd Respondents herein have violated the Petitioner's rights to access to information regarding their allegations that the Petitioner could be involved in drug trafficking.

(b) A declaration that the 1st to 3rd Respondents' allegations that the Petitioner would have been involved with the alleged 1.1 tons of cocaine valued at Kshs 5.3 Billion impounded in Malindi in a depot and in a container allegedly believed by the United States Government to belong to the Petitioner, is false.

(c) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to information regarding the actual person who impounded the 1.1 tons of cocaine valued at Kshs 5.3 Billion.

(d) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to access information as to the location of the alleged depot, its land reference number and registered proprietor.

(e) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to information and details in respect of the alleged container including serial number, shipping line that owns said container, the shipper, the consignee, dates when the said container arrived at Mombasa and Malindi and who was the container's clearing and forwarding agent.

(f) A declaration whether, in December 2004, 1.1 tons of cocaine valued at Kshs 5.3 Billion was impounded in Malindi at a depot and in a container the United States Government, including the 1st to 3rd Respondents herein, believe belongs to the Petitioner.

(g) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to information from the 4th to 13th Respondent whether, in December 2004, the Police or any other law enforcement agencies, seized 1.1 tons of cocaine valued at Kshs 5.3 Billion and another 1.1415 tons of cocaine valued at Kshs 6.4 Billion."

[3] I have chosen to reproduce only prayers (a) to (g) because of their relevance to the present Application dated 27th October 2014 and in which the Petitioner sought orders compelling the Respondents to provide him with information in terms of **Article 35** of the Kenyan **Constitution**, **2010** pending the determination of the Petition.

[4] In determining the above issue(s) I propose to first set out the submissions by the Parties, the applicable legislative framework and then the determination of the pertinent issue.

The Applicant's Case

[5] The Applicant submits that his rights to be free from violation of his reputation, integrity, vilification **(Article 28 (on the right to human dignity)),** privacy **(Article 31),** right to life **(Article 26)** and to be free from mental and or psychological torture have been and continue to be infringed while the Petition awaits determination. To enforce the abovementioned rights, the Applicant therefore decided to seek an order in terms of **Article 35** for information pertaining to the 1.1 tonnes of cocaine allegedly impounded in December 2004. The request is essentially premised on two grounds. First, to vindicate the alleged violation of the above fundamental rights and second, to facilitate the immediate arrest and prosecution of the culprits in the interests of the general public.

[6] It is his submission in the above regard that the broadcast in issue has raised the perception, in the eyes of the broader international community, that the 4th to 11th Respondents are incapable of performing their constitutional duties. This, he argues, poses a threat to his right to life because it opens him up for the possibility of international prosecution. In the Further Affidavit dated 7th May 2015, the Applicant also deponed that it is in the interests of justice for the orders prayed for to be granted so that the office of the Director, Directorate of Criminal Investigations (6th Respondent) and the Office of the Director of Public Prosecution (11th Respondent) may begin their investigative and prosecutorial processes promptly against the real culprits in the drug scandal. He further stated that while the Petition is pending determination, there is continued violation of his rights through unabated publication in the media and that the orders sought are meant to assist him in prosecuting the Petition herein.

[7] The Applicant further submits that the 1st to 3rd Respondents have misunderstood the basis of his Application to be dispositive of the Petition and that in his mind, the requirements for the application of **Article 35** have been satisfied. That the 1st to 3rd Respondents in that regard fit the ambit of "other persons" stipulated in **Article 35(1)(b)** as read with **Article 260** of the **Constitution** and that the information is sought for the enforcement of his fundamental rights as is the expectation of **Article 35**. He also submits that despite repeated requests for information through letters, the 1st to 3rd Respondents never responded to him and that such inaction should be considered to be deliberate and relies on the case of **Petition no 73 of 2014 Prof Njuguna Ndungu v Ethics and Corruption Commission eKLR** where the Court reiterated that the information sought under **Article 35** must have been initially sought and refused and that fundamental rights must have been violated for **Article 35** rights to be enforceable. The Applicant adds that no legitimate reason was proffered by the 1st to 3rd Respondents for their failure to provide the information he sought and that the scale of justice tilts towards granting the orders prayed for.

[8] In his written submissions dated 6 August 2015, the Applicant's counsel stated that the 11th

Respondent has the power, under **Article 157(4)** to direct the National Police Service (10th Respondent) to investigate criminal conduct related to drugs and narcotics. It is on this basis that he submits that the 11th Respondent should have the information the Applicant seeks and by a Replying Affidavit dated 17th December 2014, the National Authority for Campaign Against Drug Abuse (NACADA) was admitted to be a public office and the 8th and 9th Respondents are public officials under the **National Authority for the Campaign Against Alcohol and Drug Abuse Act (Cap 121B).** He bases this conclusion on **Article 260**, in that the office allegedly receives funds from the State and that it is bound by the principles in **Article 10** for its operations. He also avers that the officers of NACADA are appointed by the 13th Respondent (Cabinet Secretary, Ministry of Interior and Co-ordination of Government) and that the powers of the 7th, 8th and 9th Respondents under the **NACADA Act** are not limited to educational functions only. Instead, they include powers relating to search, seizure of narcotic drugs from any premises and destruction thereof. He further avers that the mere fact that NACADA was not aware of the allegations made in the offending broadcast means that it is not performing its statutory duties under the provisions of **NACADA Act 2012**. That the evidence of Dr William Okedi in his Replying Affidavit aforesaid and relating to **Section 3** of the **NACADA Act** was made in bad faith and that given all the Respondents' duties to make periodic reports and collect data on drugs and alcohol abuse countrywide, it is impossible that they may not have knowledge or information relating to the events of December 2004 when the 1.1 tons of cocaine was impounded.

[9] The Applicant has also submitted that the doctrine of issue estoppel does not apply in this case since the instant Application is different from **Petition 233A of 2011** in which he was a party. That the doctrine of issue estoppel like that of *res judicata* only arises where the cause of action is the same, between the same parties and was previously decided with finality. Distinguishing the present Application from **Petition 233A of 2011**, therefore he submits that the 1st to 3rd Respondents were not parties in the latter case and that the present Application does not involve a determination of rights with finality. In short, he argues that the doctrines of issue estoppel and *res judicata* do not arise in the instant Application because the 1st to 3rd respondents were not parties to **Petition 233A of 2011**. He submits further that the Respondents did not bother to highlight the similarities between the two cases or distinguish them and their contentions must therefore fail.

[10] The Applicant also specifically argues that the orders sought in the present Application are not determinative of the Petition and that the test to be applied should be whether the Petition would be disposed of finally if the orders sought in this Application were granted. If the answer is in the negative, then the Application is purely interlocutory and should be granted and in that regard he submits that this case presents exceptional circumstances in which if the orders sought are not granted, injustice would occur and that granting the orders sought in the Application will assist the Court in the determination of his Petition and reach a fair outcome without any harm being occasioned to the Respondents. That granting the orders sought in this Application, pending the determination of the Petition, would not prejudice any of the parties involved and that if the 1st to 3rd Respondents are not ordered to provide the information sought, the Applicant would be prejudiced because he continues to suffer trauma and that any criminal prosecution related thereto will be jeopardised because the impounded cocaine may have disappeared by the time the Petition is determined.

[11] For the above reasons, the Petitioner/Applicant prays that the orders elsewhere reproduced above should be granted.

The 1st, 2nd and 3rd Respondents' case

[12] In their Written Submissions dated 9th April 2015 by, the 1st, 2nd and 3rd Respondents submit that this Application should be dismissed with costs for the following reasons. First, that the orders sought

have a final effect, and cannot be granted at an interlocutory stage. That the said orders are also "practically the exact orders" sought in the Petition in prayers (a) to (f). On this contention, they rely on **Kenya Railways Corporation v Thomas M. Nguti & 6 Others [2003] eKLR** and further relying on **East African Portland Cement Company Limited vs Attorney General and Another 2013 eKLR,** they submit that the Applicant has not demonstrated that the Application warrants urgent determination and that the Application in any event offends the doctrine of issue estoppel because the issues raised have been or ought to have been raised in **Petition No.233A of 2011**. Furthermore, they submit that the Application is improperly before the Court because the claim is one of libel which cannot find its way to the Courts through constitutional channels. Lastly, they submit that there is no legal basis for this Court to grant the Application which instead ought to be dismissed as lacking in merit.

The 4th,5th,6th,10th,12th,13th and 14th Respondents' case

[13] The above Respondents' case is premised on the Affidavits of Dr Hamisi Massa, an Assistant Inspector General of the National Police Service in charge of the Anti-Narcotics Drugs Police Unit, the 6th Respondent and that of Gideon Mukoi Kimilu, a Senior Assistant Inspector General of the National Police Service and currently the Deputy Director of the Criminal Investigations Directorate and the 5th Respondent. They have therein set the factual background to the issues in contest as follows: That two simultaneous seizures of cocaine were made on 14th December 2004. One was in Embakasi area of Nairobi and the other was in Casuarina area in Malindi and it was found to be 304 kilograms of cocaine with an estimated value of Kshs 1.702 billion .The cocaine was seized and was concealed in a container, serial number MAEU 5650860 and the other seizure of 837.5 kilograms of cocaine with a street value of Kshs.4.69 billion was also made and cumulatively, the tonnes of cocaine were 1.1415 kilogrammes valued at Kshs.6.4 billion.

[14] The above Respondents submit further that the above information is within public knowledge and was also the subject of **Nairobi Criminal Case number 1365 of 2004, Republic vs David Mugo Kiragu and Others** and that police file in that case was **CR. 141/1220/04**. That the statements, exhibits, documents and the Judgment in that case are all public documents and available for copying and perusal upon payments of a nominal fee by anyone including the Applicant and they dismiss as speculation and of concern, the allegation that 1.1 tonnes of cocaine with an estimated value of 5.3 billion was impounded. They submit in that regard that none of their records or information confirm this allegation and in short that no investigation or prosecution on the alleged impounded tonnes of cocaine ever occurred. However, they submit that to the extent that the Application also relates to the 1.1415 tonnes of cocaine of an estimated value Kshs.6.4 billion that was impounded, they submit that such information was provided to the Applicant through sworn affidavits of both Dr Massa and Mr Kimilu.

[15] They further argue that they are not constitutionally obliged to investigate, arrest and prosecute everyone without credible evidence to provide the factual basis for such actions and they submit that, without any reports by the 1st to 3rd Respondents about the Petitioner's involvement in the 1.1 tonnes of cocaine, they are not in a position to provide any relevant information.

[16] For the above reasons, they seek dismissal of the Application.

Determination

[17] Under the **Kenyan Constitution**, the right to information is enshrined in **Article 35**. The Article reads:

"35(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 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."

[18] The provision is couched in very similar terms to **Section 32** of the **South African Constitution**. However, the **South African Constitution** also has a provision directing Parliament to enact legislation to give effect to the right to information enshrined in S**ection 32(1)** thereof. Such a provision is absent in the Kenyan Constitution but despite the absence thereof, the Kenyan National Assembly has in the pipeline, the **Access to Information Bill, 2015** which is intended to give effect to **Article 35** of the **Constitution**. Later on, I will say a little about the effect of the absence of a comprehensive legislation giving effect to **Article 35**, only to the extent relevant to the instant Application. Our courts have in any event interpreted **Article 35** in several cases and the principles applicable to its enforcement are now crystallised. This shall become clear shortly.

[19] With that background in mind, the issues for determination, as I see them are:

a. Whether the Applicant's rights under **Article 35** right can be enforced pending the determination of the Petition.

b. Whether the Applicant has satisfied the standard for granting an interlocutory order.

Whether the Applicant's Article 35 rights can be effectively enforceable pending the determination of the Petition.

[20] **Article 35** requires that the information required by any person should be first requested and be denied for the enforcement or protection of another right. The logical set-up of the Article therefore contemplates a situation wherein a party requests information, in full-blown judicial proceedings, which would be used for the enforcement or protection of another fundamental right in separate proceedings. From this, logic tells me that the request for information should precede the protection and the enforcement of another right. That is why this Court observed as follows in **Federation of Women Lawyers-Kenya & 28 Others v Attorney General & 8 Others [2015] eKLR** :

"Although parties did not address me on the issue, it seems to me that Article 35 rights are substantive rights that must be proved, not in interlocutory proceedings, but in a substantive hearing on the merits. To do otherwise would mean that Article 35 processes are merely facilitative of a hearing to prove the alleged violation of other rights in the Bill of Rights by invocation of Article 35(2) of the Constitution. At face value, I see no merit in such a proposition."

The above proposition is both logical and practical and as will appear below, this approach is followed in South Africa.

[21] Further to the above and to add to the dicta in **Federation of Women Lawyers** (*supra*), the word "required" implies that the information should be such that, without it, the other rights may not be

enforced or protected. If the above is the correct interpretation, it does not follow that the right to information should be enforced simultaneously with or after proceedings for the enforcement or protection of other rights have been instituted. At this stage of the proceedings, it is not clear which other right the Applicant wants to enforce or protect other than the right to information itself. This Application therefore brings to the fore this conundrum and where an Applicant wishes to have final substantive orders under the Bill of Rights at the interlocutory stage of pending substantive proceedings for enforcement of the same right.

[22] It is also my view that, by attempting to enforce the right at this stage of the proceedings, the Applicant has thereby subjected himself to rules applicable to interlocutory applications. In addition to satisfying the ordinary balance of probabilities test therefore, he will have to satisfy tests peculiar to interlocutory applications under **Article 23(3)** of the **Constitution** and in fact, this reduces the status of the right to information (which is a substantive right) to that of a procedural right and a mere stepping stone to the realisation of other rights when it is meant to be a right in itself, a position I find untenable.

[23] In South Africa, the Legislature must have had the wisdom of foreseeing this anomaly arising because **Section 7(1)** of the **Promotion of Access to Information Act (PAIA)**, a legislation enacted to give effect to **Section 32** of the **Constitution**, provides:

“This Act does not apply to a record of a public body or a private body if"

a. **That record is requested for the purpose of criminal or civil proceedings;**

b. **So requested after the commencement of such criminal or civil proceedings, as the case may be; and**

c. **The production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.” (Emphasis added.)**

[24] In my view, this was a wise move by the Legislature to avoid situations like the present one wherein a party moves the Court for an application in terms of **Article 35** (an equivalent of **Section 32** of the **South African Constitution**) pending criminal or civil proceedings in which the information is sought to be used. Indeed, Jafta J in **PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC)** had this to say about when **PAIA** can be invoked in criminal and civil proceedings:

“[D]epending on the stage of the proceedings . . . PAIA would apply before the trial date is set.”

[25] This sequence is not insignificant and as I stated above in Kenya, there is no legislation, as yet, fleshing out **Article 35** to salvage the situation but there is a Bill in the pipeline. Presently, therefore it is in the hands of individual litigants to exercise a good choice on how and when to enforce their **Article 35** rights. If one opts for a separate Petition in terms of **Article 35**, the same is decided under normal rules and on a substantive basis. However, if one opts to enforce **Article 35** by means of an interlocutory application, which I believe is not the correct approach, different and stringent principles find application. That is my finding on the question above but suppose I am wrong in this approach and that the correct position is that **Article 35** may be enforced by means of an interlocutory application. In that case, the question would then be, whether the Applicant in this instance has satisfied the standard for granting interlocutory orders.

Whether the Applicant has satisfied the standard for granting of an interlocutory order.

[26] This question can only be answered by applying legal principles applicable to interlocutory applications. The principles are trite and in the interest of space and time, I will only refer to three cases in the context of the application before me. In **East African Portland Cement Company Limited vs Attorney General and Another 2013 eKLR** the Court had this to say about interlocutory orders:

"Interim orders are granted where the Court, exercising its discretion is satisfied that they are necessary due to the urgency and nature of the circumstances. They are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits." (Emphasis added.)

[27] Further in **Kanini Kega vs Okoa Kenya Movement and 6 Others [2014] eKLR** the Court expressed itself as follows on interim orders:

"[T]he applicant in these kinds of cases has to show that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. In order to satisfy the Court that the failure to grant the conservatory orders sought would prejudice him, the Petitioner ought to have shown that in all probability as opposed to mere possibility, by the time the petition is heard and determined the initiative would have gone beyond the reach of this Court."

[28] The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** said this as regards interlocutory orders in constitutional Petitions:

The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. (Emphasis added.)

The Court went on to state that interlocutory injunctions are:

"Linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay." (Emphasis added.)

[29] What is discernible from the above statements is that in these kinds of applications an applicant must prove *inter alia*, urgency, irreparable harm and that a disposal of the application would not result in determination of the substantive issues. Has the Applicant met this standard" I am afraid not. There is clearly no urgency in this matter because while he alleges that he may be investigated and prosecuted, I fail to see how this could happen when the Respondents had made it clear that they do not know anything about the alleged 1.1 tonnes of cocaine and that there are no investigations or prosecutions related to the Applicant. The status quo had been in place since December 2004. Moreover, what he seeks in this Application is essentially what he prayed for in paragraphs (c), (d), (e) and (g) of the Petition. Although the Prayers were reproduced elsewhere above, I do so here again for clarity:

"(c) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to information regarding the actual person who impounded the 1.1 tons of cocaine valued at Kshs 5.3 Billion.

(d) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to access information as to the location of the alleged depot, its land reference number and registered proprietor.

(e) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to information and details in respect of the alleged container including serial number, shipping line that owns said container, the shipper, the consignee, dates when the said container arrived at Mombasa and Malindi and who was the container's clearing and forwarding agent.

. . .

(g) A declaration whether, under Article 35 of the Constitution, the Petitioner is entitled to information from the 4th to 13th Respondent whether, in December 2004, the Police or any other law enforcement agencies, seized 1.1 tons of cocaine valued at Kshs 5.3 Billion and another 1.1415 tons of cocaine valued at Kshs 6.4 Billion."

[30] It is clear from the prayers reproduced above that, in the Petition, the Applicant urges this Court to make a determination on whether he is entitled to have access to certain information in terms of **Article 35** yet, a declaration cannot precede a determination. How then can he seek the information in the interim, which he has urged the Court to make a determination of in the Petition" There is only one undesirable eventuality; if the Court were to grant this Application, it would have disposed of the Petition. In this regard, I can do no more than quote what Rika J said in **East African Portland case** (*supra*). That:

"Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits."

[31] The *dictum* is apposite and I should say no more on the question above.

[32] In view of the above exposition, the Application cannot be granted as framed and all the issues raised in it will have to be disposed of, finally, in the Petition.

Disposition

[33] Having so held, it follows that the Application dated 27th October 2014 must and is hereby dismissed. Costs thereof will abide the outcome of the Petition.

[34] Lastly, I apologise to the Parties for the delay in finalising this Ruling owing to a heavy workload on the part of this Court.

[35] Orders accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Ngatia for Applicant

Mr. Mwangi for 1st – 3rd Respondent

Mr. Moimbo for 4th – 14th Respondents

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 8/4/2016 for directions.

Proceedings to be supplied.

ISAAC LENAOLA

JUDGE