

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 278 OF 2011**

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 33 (1) (a), 34  
(1), 35 (1) (b), 258, 259 and 40 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA, 2010

BETWEEN

NAIROBI LAW MONTHLY COMPANY LIMITED.....PETITIONER

AND

KENYA ELECTRICITY GENERATING COMPANY.....1<sup>ST</sup> RESPONDENT

EDWARD NJOROGE.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

AND

INTERNATIONAL COMMISSION  
OF JURISTS (KENYA) LIMITED.....1<sup>ST</sup> INTERESTED PARTY

KENYA REVENUE AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY

TRANSPARENCY INTERNATIONAL.....1<sup>ST</sup> AMICUS CURIAE

ARTICLE 19 .....2<sup>ND</sup> AMICUS CURIAE

**JUDGMENT**

**Introduction**

1. This petition concerns a demand for information by the petitioner from the 1<sup>st</sup> and 2<sup>nd</sup> respondents regarding certain contracts entered into by the 1<sup>st</sup> respondent and other companies for the purpose of drilling geothermal wells.
2. The petitioner is a limited liability company incorporated under the Companies Act, Chapter 486 of the Laws of Kenya. It is the publisher of the *Nairobi Law Monthly*, a magazine that deals with topical legal issues. In the six months preceding the filing of this petition, the petitioner was

investigating a series of transactions undertaken by the 1<sup>st</sup> respondent and in the October 2011 edition of its magazine, the petitioner published a report implicating the 1<sup>st</sup> and 2<sup>nd</sup> respondents in corrupt dealings. The respondents denied the allegations carried in the story and as a result, the petitioner wrote to the 1<sup>st</sup> respondent demanding information on the issues arising out of the published article.

3. The 1<sup>st</sup> respondent resisted this demand, and consequently the petitioner filed this petition, expressed to be brought under the provisions of **Articles 19, 20, 21, 22, 23, 33 (1) (a), 34 (1), 35 (1) (b), 258, 259 and 40** of the Constitution and supported by the affidavit of **Ahmednasir Abdullahi** sworn on 25<sup>th</sup> November 2011 seeking orders that:

- a. There be a declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 33 (1) (a), 34 (1), 35 (1) (b) of the Constitution of Kenya 2010, have been contravened and infringed upon by both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by their refusal to give the Petitioner the information it requested or release all documents regarding contracts entered into with Green Energy AS of Norway, Great Wall Drilling Company of China, Simba Energy Limited, Symba Energy Limited, Hindustan Turbo and Max Watt Limited;*
- b. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of its fundamental human rights by the Respondents herein as provided for under Articles 33 (1) (a), 34 (1), 35 (1) (b) of the Constitution of Kenya, 2010;*
- c. The court to assess the quantum of damages and compensation to be paid by the Respondents;*

- d. A compulsory order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to release all the documents, including pre-contract negotiations, contracts, board minutes and resolutions, emails, letters, study reports, proposals, consultancy reports, articles and memorandums of association relating to contracts entered into with Green Energy AS of Norway, Great Wall Drilling Company of China, Simba energy Limited, Symba Energy Limited, Hindustan Turbo and Max Watt Limited.**
- e. General damages, exemplary damages and aggrieved damages under Article 23(3) of the constitution of Kenya 2010 for the unconstitutional conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents;**
- f. An injunction ordering directing the Respondents whether by themselves, their agents and employees pending the hearing and final determination of the petition herein to list, record, tabulate and make copies of all documents, emails, letters, memos, Board minutes, Board papers, Tender minutes, legal opinion, log of study tours, reports, money transfers, cheques, RTGs, payment, draft reports, study reports, consultancy reports, telephone logs relating to the negotiations and concluding of contacts between the 1st respondent and Green Energy AS of Norway, Great Wall Drilling Company of China, Simba Energy Limited, Symba Energy Limited, Hindustan Turbo and Max Watt Limited, their subsidiaries, associates and agents and then transmit and hand over the same to the Petitioner; and**
- g. Costs of this petition.**

### **The Petitioner's Case**

4. The petitioner contends that by the failure or refusal to release the information that it seeks, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are in violation of

its rights as guaranteed under Article 35 which entitles it to access information, Article 33 (1) which provides for freedom of expression and Article 34 which provides for freedom of the media. The petitioner describes what it terms as grand corruption on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and states that from the documents in its possession, it has enough information to convict the 2<sup>nd</sup> respondent on criminal charges, and that full access to the information it seeks would be enough to unearth a scheme as large as the Anglo Leasing scheme.

5. The petitioner contends further that any documentation or information in the possession of the respondents is held in trust for the Kenyan public; that it has a constitutional right to access the information that it is seeking; that the continued refusal of the respondents to provide the information is a violation of the constitutional provisions cited; and that if the respondents supply the information sought, it would enable the petitioner publish more stories and promote accurate reporting and limit publication of false and potentially defamatory statements in subsequent editions.
6. The petitioner further argues that there are no reasons given by the respondents for refusing to disclose the information which would meet the threshold of limitation provided for in Article 24 of the Constitution. It submits, in the alternative, that even though the respondents can show that there would be some kind of harm in such disclosure, there ought to be disclosure nonetheless since, when weighed against the public interest, the benefits of disclosure are greater than the harm. The petitioner takes the position that in a democratic society, the free flow of

information is critical, and it is only when the public interest is served should the flow of information be limited.

7. It is also the petitioner's contention that by its failure to release the information sought and thereby violating the petitioner's rights under Article 33, 34(1) and 35(1)(b), the respondents are in breach of Article 2 on the supremacy of the Constitution as well as Article 10 which contains the national values and principles of governance that include good governance, integrity, transparency and accountability and are binding on all persons and all State organs.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents oppose the petition by way of a Replying Affidavit sworn by **Mr. Edward Njoroge**, the chief executive officer of the 1<sup>st</sup> respondent, on 22<sup>nd</sup> December 2011. They maintain that they have not contravened any of the petitioner's constitutional rights and take issue with the allegations of corruption, which they state they intend to challenge in High Court Civil Case Number 536 of 2011, a suit they have filed against the petitioner for defamation.
9. The respondents take the position that since the 1<sup>st</sup> respondent is a publicly listed company, any disclosure of information can only be made as is envisaged under the State Corporations Act, the Companies Act, the Capital Markets Authority Act and any other rules or regulations made thereunder. They concede that the 1<sup>st</sup> respondent does hold information for the benefit of its owners, the public, but maintain that disclosure of such information must be based on the provisions of the Companies Act and the Capital Markets Authority Act, which are not inconsistent with

the provisions of the Constitution. Moreover, they submit that while a large stake of the 1<sup>st</sup> respondent may be owned by the government, it is in no way a part of the government, it is a publicly listed company, and its disclosure of information would not be made under the constitutional provisions on access to information, but as envisaged under statutory provisions governing its operations.

10. The respondents also challenge the petitioner's claim of entitlement to enforce the right to information under Article 35(1)(b), asserting that while it may be a legal person under the law as defined in Article 258 of the Constitution, it is not a 'citizen' who can seek enforcement of the right to information under Article 35 of the Constitution.

### **The 3<sup>rd</sup> Respondent's Case**

11. The Attorney General, who is the 3<sup>rd</sup> respondent, opposes the petition by way of grounds of opposition dated 20<sup>th</sup> April 2012. He argues that the right to information sought to be enforced by the petitioner is not an absolute right but is limited by the guarantee of privacy for other parties, and that no constitutional rights of the petitioner have been infringed to warrant an award of damages or compensation.

### **The 1<sup>st</sup> Interested Party's Case**

12. In supporting the petition, the 1<sup>st</sup> Interested Party, the International Commission of Jurists Kenya Chapter (ICJ) argues that access to information must inform and underpin the implementation of the Constitution; that the petitioner, as a corporate citizen, has a right to seek enforcement of the right to information; that the 1<sup>st</sup> respondent is a public entity by virtue of being substantially owned and receiving

significant support from the government; and that it is therefore a public authority for the purposes of enforcement of the right to information. ICJ further contends that the public interest which the petitioner seeks to protect demands that the respondents provide the information sought, unless there are compelling reasons that would require that the information not be disclosed.

### **The 2<sup>nd</sup> Interested Party's Case**

13. The Kenya Revenue Authority (KRA) was admitted to these proceedings as a 2<sup>nd</sup> Interested Party on 9<sup>th</sup> February 2012 following its application to be so enjoined. It states that its application was necessitated by the fact that the petitioner had sought information regarding the recruitment processes for KRA Commissioners, matters which had been the subject of **High Court Petition No. 11 of 2011-Consumer Federation of Kenya –vs- KRA & Others**. KRA therefore deemed it necessary to be enjoined in these proceedings in which it is seeking an interpretation by the court of the parametres and contextual applicability of Article 35 of the Constitution.
14. In resisting the request for information and opposing this petition, KRA asks the court to provide an interpretation of Article 35 of the Constitution. In the Replying Affidavit of **Ms. Juliet Kamande** sworn on 14<sup>th</sup> June 2012, the deponent makes various representations on the recruitment process for the Commissioners which she avers have all since been dealt with in the said High Court Petition Number 11 of 2011.
15. With regard to the matters now before the court, however, KRA takes the view that the petitioner is a legal person, not a citizen who can enjoy the

right to access to information, and that KRA is a non-state entity to which Article 35 of the Constitution does not extend. It argues further that the rights under Article 35 are subject to limitations under Article 24, and that the petitioner cannot assert its rights under Article 35 against individuals. It submits that the petitioner as a media house is not entitled to special treatment with regard to access to information, and that there is no obligation on public servants and non-state entities such as the 2<sup>nd</sup> Interested Party to supply information to the petitioner.

### **Submissions by the Amicus Curiae**

16. Transparency International and Article 19 were enjoined to these proceedings as Amici Curiae. They have filed extensive submissions on the legal obligations arising out of the right to information and international best practices and standards with regard to access to information which I shall advert to later in this judgment.

### **Issues for Determination**

17. This petition is expressed to be brought for alleged violation of the petitioner's constitutional rights under rights under Articles **19, 20, 21, 22, 23, 33 (1) (a), 34 (1), 35 (1) (b), 258, 259** and **40**. Articles 19-23 contain the general provisions relating to the Bill of Rights, including the rules of standing and the powers of the court in dealing with a matter alleging violation of constitutional rights. Articles 258 and 259 also contain general provisions: Article 258 echoing the provisions of Article 22, while Article 259 contains provisions with regard to the construction of the Constitution. At Article 40, the Constitution guarantees to everyone the right to property, and given the nature of this matter, this Article has no relevance to the matters now before me.

18. The petitioner has also alleged violation of Articles 2 and 10 of the Constitution. Article 2 of the Constitution provides that the Constitution is the supreme law of the land and binds all persons and all state organs at all levels of government. Article 10 of the Constitution sets out the national values and principles of governance, and provides that these national values and principles bind all State organs, State officers, public officers and all persons. There is, I think, no dispute about the binding nature of the Constitution in general and these provisions in particular. Such conduct as the respondents or any other party may engage in that would be contrary to these provisions of the Constitution would clearly be unconstitutional.
19. However, as this is a petition alleging violation of constitutional rights, it is incumbent on the petitioner, in order to succeed, to demonstrate, with a reasonable degree of precision, the provisions of the Constitution which have been violated with regard to it, and the manner of such violation. See in this regard the decisions in **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**.
20. From the respective pleadings and submissions of the parties to this petition, I take the view that in order to succeed, the petitioner must demonstrate a violation of its rights under Articles **33 (1) (a)**, **34 (1)**, and **35 (1) (b)** of the Constitution. Article **33(1) (a)** of the Constitution provides as follows:
- 33. (1) Every person has the right to freedom of expression, which includes—***

***(a) freedom to seek, receive or impart information or ideas;***

21. At Article 34, the Constitution makes provision for the freedom of the media by providing as follows:

***34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).***

22. Article **35 (1) (b)** which, from the pleadings and submissions before me is the linchpin of the petitioner's case, is in the following terms:

***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.***

23. The petitioner alleges that there has been a violation of its constitutional rights under the above provisions of the Constitution as a consequence of the failure by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to furnish it with the information it alleges is necessary for it to publish articles in its publication on corrupt dealings in the 1<sup>st</sup> respondent. It had also made a demand for provision by the 2<sup>nd</sup> Interested Party with information pertaining to the selection of Commissions to the 2<sup>nd</sup> Interested Party. The primary issue for determination then is **whether, in failing or refusing to avail the information demanded by the petitioner, the respondents (and by extension the 2<sup>nd</sup> Interested Party) are thereby violating any of the petitioner's constitutional rights** under the above sections.

24. In determining this primary issue, I believe that I would need to address my mind first to three collateral questions. The first question relates to the circumstances under which the obligation to provide information under Article 35 in general, but particularly Article 35(1)(b), will arise. The second question is whether the respondent has a constitutional obligation, either under Article 35 (1) (a) or (b), to provide information to a citizen. Finally, I will need to determine who is a 'citizen' and therefore entitled to seek information under Article 35, and in that regard, whether the petitioner is a citizen for the purposes of Article 35 of the Constitution.

### **The Right to Information**

25. Before dealing with these questions, however, I believe it is important to set out the legal principles and standards that one would need to bear in mind with regard to the right to information as guaranteed under Article 35 of the Constitution.

26. It is, I believe, beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognised expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution. Article 19 of the **Universal Declaration of Human Rights (UDHR)** adopted by the United Nations in 1948 provides 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.'*

27. Similarly, Article 19 (2) of the **International Covenant on Civil and Political Rights (ICCPR)**, adopted by the United Nations in 1966, provides 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, regardless of frontiers, either orally, in writing or in print in the form of art, or through any other media of his choice.’***

28. The right to freedom of information has also been recognized in regional treaties to which Kenya is a party. Article 9 of the African Charter on Human and People's Rights (The (Banjul Charter) states that:

***‘Every individual shall have the right to receive information.’***

29. While Kenya has recognised the importance of the right to information and underpinned it in the Constitution, Parliament is yet to enact legislation governing this right and the circumstances under which it can be enforced. States parties to the ICCPR have an obligation to give effect to the rights contained in Article 19 in domestic legislation, and the enactment of such legislation in Kenya is long overdue.

30. However, judicial precedents from other jurisdictions which have enacted Freedom of Information legislation and international standards are instructive on the manner in which the issue of freedom of information is to be considered.

31. First, as the petitioner, ICJ and the Amici Curiae have submitted, the right to information is critical to and closely interlinked with the freedom of

expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution. As the Constitutional Court of South Africa observed in the case of **Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC)** relied on by the petitioner:

*‘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.’*

32. In **General Comment No. 34 (CCPR /C/GC/34)** on the provisions of Article 19 of the ICCPR, the Human Rights Committee also emphasises the close inter-linkage between the right to access information and the enjoyment of other rights. It observes at Paragraph 2 and 3 as follows:

2. *‘Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.’*

3. *‘Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.’*

33. The Committee then goes on to state at paragraph 18, with regard to the right of access to information, as follows:

*‘Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information*

*includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output.'*

34. The second 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.
35. A third consideration is the nature and form of information that should be availed by the State, and the extent to which information should be disclosed. Such issues are dealt with, in other jurisdictions, by way of Freedom of Information legislation, which Kenya is yet to enact. However, there are certain international standards which offer a guide on the nature of the information to be provided, and the extent to which disclosure should go.

36. The recognized international standards or principles on freedom of information, which should be included in legislation 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.
37. It is, however, recognized that there may be need to restrict access to some information, and some exceptions to the information that can be disclosed. In this regard, Article 19(3) of ICCPR provides that:

***'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:***

***(a) For respect of the rights or reputations of others;***

***(b) For the protection of national security or of public order (order public), or of public health or morals.'***

38. The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be clear, narrow and subject to strict 'harm' and 'public interest' tests, and to the rights and interests of others.

39. In considering restrictions or exceptions to the right to information in Kenya, regard must be had to the express provisions of Article 24 of the Constitution:

**24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

40. Finally, in order to facilitate the right of access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

41. With regard to the standards and considerations set out above, which are not by any means exhaustive, our Constitution has certain in-built limitations to the exercise of the right to freedom of information. As I shall analyze in detail later in this judgment, the right to freedom of

information is limited, under Article 35, to ‘citizens.’ Under Article 35(1)(a), ‘citizens’ are entitled as of right to information held by the State, while information held by ‘another person’ is limited by Article 35(1)(b) to those instances where the citizen shows that the information is ***‘required for the exercise or protection of a fundamental right or freedom’***.

### **Application of Article 35**

42. I now turn to consider the three collateral questions set out in paragraph 24 above necessary for determination of the primary issue in this matter. The first question relates to the circumstances under which Article 35(1) (b) becomes operational. An interpretation of Article 35 (1) provides for two distinct scenarios. The first is that Article 35 (1) (a) gives every ***citizen***, as of right, access to information held by the State.
43. While the entitlement of the citizen to information held by the State under Article 35(1)(a) is indisputable, what is a matter of contestation in this case is what the term ‘State’ means and includes.
44. The respondent has contended that it can only be obliged to disclose information under the provisions of the State Corporations Act, the Companies Act and the Capital Markets Authority Act. It maintains that even though the State has a 70% shareholding in it, it is not the ‘State’ for purposes of Article 35. A similar argument is made by the 2<sup>nd</sup> Interested Party, which contends that Article 35(1)(a) does not apply to non-State entities such as itself and the 1<sup>st</sup> respondent.

45. I believe, however, that this contention by the 1<sup>st</sup> respondent is not supported by the Constitution or the law. Article 260 of the Constitution defines the term 'State' as

***'the collectivity of offices, organs and other entities, comprising the government of the Republic of Kenya.'***

46. In the instant case, it is common ground that 70% of the 1<sup>st</sup> respondent is government owned. It is a state corporation within the meaning of Section 2 of the State Corporations Act, Cap 466 of the Laws of Kenya which, in the interpretation section, defines a 'State Corporation as:

***(c) a bank or a financial institution licensed under the Banking Act or other company incorporated under the Companies Act, the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation.*** (Emphasis added)

47. Further, the respondents have conceded that the 1<sup>st</sup> respondent is subject to the provisions of the Public Procurement and Disposal Act No, 3 of 2005, which refers to State Corporations as 'public entities' at section 3. In addition, the **Public Procurement and Disposal Regulations 2006**, which the 1<sup>st</sup> respondent acknowledges it is subject to, **are** explicit with regard to what the 'public entity' referred to in Section 3 of the Act is. Regulation 3 defines a 'public entity as follows:

***'For the purposes of section 3 of the Public Procurement and Disposal Act, public entity shall include-***

***(a) any body that uses public assets in any form of contractual undertaking including public private partnerships;***

***(b) a company owned by a public entity to carry out functions that would have otherwise been performed by the public entity; and***

***(c) any body in which the Government has a controlling interest.*** (Emphasis added)

48. The respondents also concede that they are bound by Article 10 of the Constitution, which contains the national values and principles of governance and is binding on;

***‘all State organs, State officers, public officers and all persons whenever any of them—***

***(a)...***

***(b)....***

***(c) makes or implements public policy decisions.***

49. Article 260 of the Constitution defines the public service as ***‘the collectivity of the individuals, other than State officers, performing a function within a State organ.*** At Article 232, the Constitution provides the principles and values of public service, one of these being ***‘transparency and provision to the public of timely, accurate information.***

50. The 1<sup>st</sup> respondent, in which the State has a 70% stake, and which is subject to the provisions of the State Corporations Act, is a State corporation or public entity and as such is bound by these principles of public service by virtue of Article 232 (2) which states that:

***(2) The values and principles of public service apply to public service in—***

***(a) all State organs in both levels of government; and***

***(b) all State corporations.***

51. Similar considerations apply with regard to the 2<sup>nd</sup> Interested Party established under the provisions of the Kenya Revenue Authority Act, Cap 496 Laws of Kenya. Section 20 thereof exempts the KRA from the provisions of the State Corporations Act, but in my view, this does not remove it, as a statutory body, from the ambit of the Constitution and its provisions with regard to the right of access to information by citizens.
52. Taking the constitutional and statutory provisions set out above into account, it is not possible, in my view, for either the 1<sup>st</sup> respondent or the 2<sup>nd</sup> Interested Party to argue that they are not bound by the constitutional provisions in Article 35(1)(a) to provide information to citizens. As State organs or public entities as described above, they have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a). It is indeed correct, as submitted by the 1<sup>st</sup> respondent, that they have a duty under the relevant legislation with regard to the information and reports that they should provide. However, they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens. I therefore find and hold that the 1<sup>st</sup> respondent and the 2<sup>nd</sup> Interested Party have an obligation to provide information to citizens as required under Article 35(1)(a).

### **Extent of Duty to Disclose**

53. As indicated above, in the absence of legislation setting out the parameters for access to information, we would have to fall back on

international standards with regard to the provision of information. Such standards require, among other things, maximum disclosure and limited exceptions, and it would be incumbent on the respondent to show reasons, based on the harm or public interest considerations, why it should not provide such information as is requested for by a citizen.

54. As correctly submitted by the 1<sup>st</sup> Interested Party and the Amici Curiae, the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.

#### **Access to Information Under Article 35(1)(b)**

55. Having found that the 1<sup>st</sup> respondent is a State entity and bound under the provisions of Article 35(1)(a) to provide information to a citizen, it may not have been necessary to consider the implications of the right to information under the provisions of Article 35(1)(b). However, the petitioner has hinged its claim on this provision as well as Articles 33 and 34 of the Constitution, and indeed seeks damages for violation of its rights under these Articles. It is therefore necessary to consider whether, if the 1<sup>st</sup> respondent were not a state entity, it would be obligated to provide information to a citizen under Article 35(1)(b) where such information is required for the exercise or protection of a fundamental right or freedom.

56. Article 35 (1) (b) states that '**Every citizen has the right of access to- (b) information held by another person and required for the exercise or protection of any fundamental right or freedom.**' In my view, in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required **for the exercise or protection of another right.**
57. In this case, the petitioner alleges that it is entitled to access information held by the 1<sup>st</sup> respondent in order to exercise its rights under Articles 33(1) and 34(1) of the Constitution.
58. The petitioner needs to show that it requires the information from the respondents '**for the exercise or protection of another right,**' in this case its rights to freedom of expression and of the media. Our courts have not yet had occasion to interpret the phrase '**for the exercise or protection of another right.**' However, the Constitutional Court of South Africa, in interpreting a similar provision of the Constitution of South Africa, has ruled that the information sought in an application for disclosure of information must be such as is required for the protection or exercise of another fundamental right. This was the principle that it applied in the case of **Shabalala and 5 Others v Attorney General of the Transvaal and the Commissioner of South African Police CCT/23/94 [1995]**. The applicants, who had been charged with murder, sought information in the possession of the Police on the basis that it was required for the exercise of their right to a fair trial. The court made an order that denial of information contained in a police docket

*“is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial ....”*

59. Similarly, in **Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others (10/99) [2001] ZASCA 56** the court held that:

*“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information . . . an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”(Emphasis added)*

60. This proposition was also adopted in **Unitas Hospital v Van Wyk and Another (231/05) [2006] ZASCA 34**, where the South African Court of Appeal stated that:

*“[17] The threshold requirement of ‘assistance’ has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of ‘assistance’ will not be enough.”*

61. The petitioner has contended that the refusal to supply the requested information has violated its freedom of expression and of the media. Article 33 of the Constitution of Kenya stipulates that freedom of expression includes the *freedom to seek, receive or impart information or ideas*. It must however be noted that the petitioner seeks access to the information from the respondent in order to publish more articles as part of its investigative series. In **Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009**, Brümmer, a journalist, appealed to the Constitutional Court of South Africa for an order to allow the hearing of his application for information under the Promotion of Access to Information Act, 2000, which had become time barred, Ngcobo, J stated in part that:

*‘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. As the present case illustrates, Mr Brümmer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.’*

62. As submitted by the petitioner, the right to information gives effect to the national values and principles of governance contained in Article 10 of the Constitution, and in particular, good governance, integrity, transparency and accountability. The nexus between these values and the right to information was made in ***M & G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another (2011 (5) SA 163 (GSJ))***. In this case, the applicants (a company that owned a newspaper, the editor and a journalist) applied for information regarding the tendering process from the organising committee of the 2010 FIFA World Cup. The Committee declined to give the information and the applicants then approached the Gauteng High Court for an order to set aside the decision of the committee refusing to provide the newspaper with the information sought. Morison AJ judge observed that:

***“Refusing access to these records would enable the organiser of this event to keep from the public eye documents which may disclose evidence of corruption, graft and incompetence in the organisation of the World Cup, or which may disclose that there has been no such malfeasance. It will make it impossible for any enquiry into those matters to be undertaken. This apparently is what the LOC wants.*”**

***418 This would be inconsistent with the principles of transparency and accountability which underpin our Constitution, and which are given effect in the right of access to information, contained in the Constitution and in PAIA.”***

63. In ***Prabha Dutt v Union of India (1982) 1 SCC AIR 1982 SC*** the Supreme Court of India, while deciding an application made by a journalist to interview a prisoner sentenced to death, stated that:

***“the constitutional right to freedom of speech and expression conferred by Article 19 (1) (a) of the Constitution, which includes the freedom of press, is not an absolute right; nor indeed does it confer any right on the press to have an unrestricted access to means of information... The press is entitled to exercise its freedom of speech and expression by publishing a matter which does not violate the rights of other citizens and which does not violate the sovereignty and integrity of India.”***

64. What emerges from these decisions is that the press is entitled to exercise its freedom of expression and of the media, and that orders will be made for access to information by journalists. There is, however, a recognition that freedom of expression and of the media will have some limitations, even while acknowledging the important role that the media plays in fostering a free and democratic society.
65. Ultimately, though, in considering the phrase ***‘for the exercise or protection of another fundamental right or freedom’*** and the question of the alleged violation of the petitioner’s rights under Article 35(1)(b), I must do so within our context and in accordance with the constitutional provisions in question.
66. The petitioner has strongly urged the court to find that the respondents have violated not only its rights under Article 35 (1)(b), but also its rights under Articles 33 and 34 of the Constitution by failing or refusing to provide it with the information that it seeks. If I understand its contentions properly, the failure or refusal by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide the information it seeks has prevented it from publishing more articles in its magazine about the alleged corrupt dealings in the 1<sup>st</sup>

respondent, and this is what has led to the violation of its constitutional rights under Articles 33 and 34.

67. While acknowledging the linkage between the right to access information and the right to freedom of expression and of the media, I must, respectfully, disagree with the petitioner on this point. An interpretation of Article 35(1)(b) as urged by the petitioner implies that **'another person'**, other than the State, has an obligation to give a journalist or media outlet whatever information (s)he or it demands in order to exercise the freedoms under Articles 33 and 34. Put differently, such a reading implies, not just the negative obligation not to interfere with the exercise by the media of its freedoms under these two Articles, but a positive obligation on everyone to give it whatever information it seeks in order to enable it publish stories and information.
68. If this interpretation were to be accepted, it would totally blur the distinction so clearly intended by the Constitution in making the two distinct provisions in Article 35(1). It would imply that a journalist or media house is entitled not only to all information held by the State as provided in Article 35(1)(a), but also to information from any other person as of right, in order to exercise freedom of expression and of the media.
69. In my view, this would be an improper interpretation of the Constitution. Article 259(1)(a) requires that the Constitution should be interpreted in a manner that **'promotes its purposes, values and principles.'** To interpret the provision in the manner advanced by the petitioner would lead to an invasion and violation of the rights of others guaranteed by the same Constitution, and as this court observed in **John Harun Mwau & Others –**

vs- The Attorney General and Others High Court Petition No. 65 of 2011, relying on the decision in *Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General* Nairobi Petition No 16 of 2011 (Unreported) where the Court, quoting other decisions, stated that:

***“In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation. In the Ugandan case of Tinyefuza v The Attorney General Constitutional Appeal No. 1 of 1997, the Court held as follows;***

***“the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.”***

70. I agree also with the principle enunciated by the United States Supreme Court in *Smith Dakota v. North Carolina* 192 v 268 [1940] as follows:

***“it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered above but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument”.***

71. The intention in Article 35(1) was clearly to create two distinct situations with regard to the right of access to information: one in which the citizen was entitled as of right to information held by the State; the other in which a citizen could access information from another, a private person, for the exercise or promotion of another right or freedom.

72. I believe this interpretation accords with the position in other jurisdictions such as South Africa. Commenting on Section 32(1)(a) of the Constitution of South Africa which contains provisions similar to Article 35(1)(a), **Iain Currie & Johan De Waal** in the **Bill of Rights Handbook, 5<sup>th</sup> Edition** observe at page 694 that the section:

*'makes public-sector information available on a 'right to know' basis, meaning that members of the public are entitled to it, unless there are good reasons for withholding it. Information in public hands is, after all, the public's information and should be accessible to the public, unless disclosure will cause harm to legitimate government interests or the rights of others. Unless one intends to dissolve the distinction between the public and private spheres, private-sector information must be treated differently. The Constitution makes information in private hands available on a 'need to know' basis, meaning that a requester is only entitled to such information if the request can be justified by providing reasons why the information is required. The reasons recognised by s 32(1)(b) of the Constitution as sufficient justification for imposing duties of transparency on the private sector are that the information is required for the exercise or protection of any right.'*(Emphasis added.)

73. In my view therefore, the denial of information by the respondents is not a violation of the rights of the petitioner under Articles 33, 34 and 35(1)(b) of the Constitution. To hold otherwise would be to give the media a special status that elevates it above other entities in the state. As **Currie and De Waal** pose in their book **'The Bill of Rights Handbook,** (supra), pages 364 to 365:

***'Does the specific protection of press freedom as a component of freedom of expression warrant giving special***

*status to the press? For example, special status may give the press and media greater protection than everyone else against subpoenas compelling disclosure of their sources of information, or greater protection against prior restraints such as interdicts aimed at stopping a particular publication and more extensive access to information held by the state and private persons.*

*These questions have been debated in the United States as an issue of interpretation of the First Amendment which provides that 'Congress shall make no law ... abridging the freedom of speech, or of the press'. Is there any significance to be attached to the singling out of press freedom, or are 'freedom of speech' and 'freedom of the press' merely synonyms? The Supreme Court has on the whole taken the view that the press is not entitled to any special rights or protections under the First Amendment. Chief Justice Burger, in a concurring opinion in *First National Bank of Boston v Bellotti*, held that the specific reference to the press in the First Amendment does not give the press more rights than other speakers. This was because, first, there was no evidence that the framers intended to give a privileged position to the press. Secondly, it was unacceptable to single out and confer a special status on a limited group of people, particularly when that group is difficult to define.'*

74. With regard to the position in South Africa, Currie and De Waal observe as follows:

*'In South Africa, in *Holomisa v Argus Newspapers* Cameron J recognised the special role of the press in a constitutional democracy but stated that this does not mean that journalists must enjoy special constitutional immunity beyond that accorded to ordinary citizens. Cameron J*

*described the idea of 'press exceptionalism' not only as unconvincing but also as dangerous.'*

75. These are sentiments that I agree with. While the importance of the media in promoting transparency, accountability and good governance in a free and democratic state cannot be over-emphasised, a balance has to be struck with the rights of others. This cannot be done where the media asserts, as of right, an entitlement to information from '**another person**' other than the State or State entities as a prerequisite for exercise of freedom of expression and freedom of the media under Articles 33 and 34 of the Constitution. The petitioner can therefore not allege that it requires information from the respondents under Article 35(1)(b) for the protection of its rights under Articles 33 and 34 of the Constitution, and I therefore find and hold that there has been no violation of the petitioner's rights under Articles 33, 34 and 35(1)(b) of the Constitution by the respondents.

#### **Whether The Petitioner is a 'Citizen' for the Purposes of Enforcement of Article 35 of The Constitution**

76. The respondents have argued that the petitioner, not being a natural person but a juristic person, is not a 'citizen' for the purposes of Article 35 and is therefore not entitled to seek enforcement of its provisions. They have urged the court to be guided by the decision of Majanja, J in **Famy Care Limited –vs- Public Procurement Administrative Review Board & Another High Court Petition No. 43 of 2012** in which the Learned Judge had occasion to consider the provisions of this Article. In declining to issue the orders sought by the petitioner, a limited liability company incorporated in India, Justice Majanja took the view that the right to information under Article 35 is limited in that it can only be enforced by

natural persons. At paragraph 18 of the judgment, the court stated as follows:

***“The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to ‘every person’ or ‘a person’ or ‘all persons’ this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term ‘person’ and ‘citizen’ as applied in Article 35.*”**

77. Justice Majanja went on to observe, at Paragraph 22 of the judgment, that:

***“Though the term “citizen” is not defined in Article 260, citizenship is dealt with under Chapter Three of the Constitution, Articles 12 to 18. The purport and effect of these provisions is that citizenship is in reference to natural persons..... A juridical person is neither born nor married as contemplated by these Articles. Similarly, the provisions on citizenship by registration and dual citizenship set out in Articles 15 and 16 of the Constitution negative an intention to define a citizen as including a juridical person.”*”**

78. The learned judge therefore reached the conclusion that:

***“A reading of the Constitution and an examination of words “person” and “citizen” within the Constitution can only lead to one conclusion: That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution.”*”**

79. The petitioner has asked the court to depart from the decision of Majanja, J and attempted to distinguish the Famy Care Ltd case from the present one because the applicant in that case, Famy Care Ltd, was incorporated in India and the shareholders and directors were all non-citizens, while the petitioner is a Kenyan company with Kenyan shareholders. The petitioner sought support in this regard from the decision of the Supreme Court of the United States in **Pembina Consolidated Silver Mining and Milling Company –v-Pennsylvania 125 U.S 181; 8 S Ct. 737;31 L. Ed. 650; 1888 U.S. LEXIS 1926** and contended that a corporation is a ‘citizen’ for the purposes of Article 35.

80. However, my reading of the decision of the Supreme Court in Pembina shows that it accords with the decision of Majanja J in **Famy Care Ltd**. In interpreting the clause of the United States Constitution that the *‘citizens of each State shall be entitled to all privileges and immunities of citizens in the several states,’* the Supreme Court observed that *‘Corporations are not citizens within the meaning of that clause.’* Later on in the judgment, the Supreme Court cited its decision in **Paul v. Virginia** where it had held that:

*‘..corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed...’*

81. While it is true that the petitioner is a Kenyan company and its directors and shareholders are Kenyan citizens, the petitioner itself is a legal person created under the provisions of the Companies Act. As a legal

‘person’, it may enjoy the rights conferred by Article 35 (2), which are conferred on all ‘persons’ but it is not a ‘citizen’ that may have a right of access to information as contemplated under Article 35 (1). In my view, the petitioner is a company with Kenyan nationality, but not Kenyan citizenship. See the case of ***State Trading Corporation of India v Commercial Tax Officer 1963 AIR 1811*** in which the special bench was confronted with the question as to whether a corporation incorporated under the Indian Companies Act was a citizen within the meaning of the Indian Constitution. The majority opinion of the bench was that ***‘the fact that corporations are regarded in some circumstances as possessing nationality does not make them citizens.’***

82. I therefore fully agree with the decision of Majanja J in **Famy Care Limited** that a body corporate or a company is not a citizen for the purposes of Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article.

### **Conclusion**

83. In light of my findings above on the three collateral questions that this petition raises, my finding on the primary issue in this petition is that there has been no violation of the petitioner’s rights under any of the provisions of the Constitution that it relied on.
84. However, this petition succeeds to the extent that I have found that the 1<sup>st</sup> respondent has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the respondent, and the respondent, unless it can

show reasons related to a legitimate aim for not disclosing such information, is under a constitutional obligation to provide the information sought.

85. With regard to costs, this petition relates to an important issue of great public interest, and in the circumstances, I make no order as to costs.

86. I am deeply indebted to the respective Counsel for the parties and the Amici Curiae for their very extensive and detailed submissions and authorities. If I have not made reference to them in this judgment, it is not because they were not useful to the court.

**Dated, Delivered and Signed at Nairobi this 13<sup>th</sup> day of May 2013**

**MUMBI NGUGI  
JUDGE**

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