

# The Right to Information as a Tool for/in Public Interest Litigation: An East African Perspective

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## I. Introduction

The right to information relates to the entitlement of citizens and in some instances non-citizens to obtain information from governments and other bodies that hold information as custodians for the public. Initially considered as a mere third generation right, the right to information has in the last few years evolved as one of the most important fundamental right and freedom largely because of its centrality in the enforcement of all other rights. As early as 1946, the UN recognized the right to information as a *fundamental human right and...the touchstone of all freedoms to which the UN is consecrated*.<sup>1</sup>

Beyond the role of the right to information in the defense of all other rights, fully fledged access to information in possession of government facilitates citizens' participation in the affairs of their governments. This promotes transparency and accountability which are key in achieving a corruption free society. In addition, the right to information promotes sound environmental governance by empowering the public with information on the environment and making them part of environmental decision making processes.

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<sup>1</sup> See GA Res. 59(1), 65th plenary meeting, December 14, 1946

## II. Legal framework for the Right to Information

### A. Regional and International Law

The right to information is protected as part of the right to freedom of expression under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil Political Rights (ICCPR).<sup>2</sup> In both documents, every person has a right to *seek* and *receive* information under the general rubric of the right to freedom of expression.<sup>3</sup> The right to information is also recognized in a number of non-binding international instruments such as the Rio Declaration on the Environment and Development.<sup>4</sup> Principle 10 of the Declaration recognizes the importance of access to environmental information including information on hazardous materials and activities. States are therefore enjoined to make this information widely available in order to encourage public awareness and participation in decisions that affect the environment.

At regional level, the African Charter on Human and Peoples Rights (ACHPR) guarantees every individual a right to receive information.<sup>5</sup> Pursuant to this provision, a number of African states recognize and protect the right to information in their constitutions and other national legislations.<sup>6</sup> Most recently the African Union endorsed a Model Law on Access to Information for Africa.<sup>7</sup> The model law reflects further commitment of African states and is expected to act as a bench mark for the protection of the right to information on the continent.

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<sup>2</sup> See Universal Declaration of Human Rights GA Resolution 217A (III), U.N. Doc A/810 at 71 (1948). See also International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966), 999 U.N.T.S. 171.

<sup>3</sup> See Article 19 UDHR and Article 19 ICCPR.

<sup>4</sup> The Rio Declaration on Environment and Development, June 1992.

<sup>5</sup> See Article 9, Rights African Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>6</sup> As of June 2014, a total of fourteen African Countries had Access to Information laws in place. These include S. Africa, Angola, Uganda, Zimbabwe, Liberia, Sierra Leone, Niger, Nigeria, Ivory Coast, Ethiopia, Tunisia, Namibia, Rwanda and Guinea. See <http://www.freedominfo.org/regions/africa>.

<sup>7</sup> Model law on Access to Information for Africa, 2012. Available on <http://www.achpr.org/instruments/access-information/>

## B. National laws

At national level, there are often two main approaches towards the recognition and protection of the right to information. A number of countries protect the right to information in their national constitutions either as an express right or as a right to *seek and receive* information. In the case of East Africa, only Uganda, Rwanda and Kenya contain an express provision on the right to information in their national constitutions.<sup>8</sup> The Tanzanian constitution on the other hand provides for a right to *seek and receive* information.<sup>9</sup> The Burundi Constitution hand does not make any specific reference to the right to information. Nonetheless the UDHR and ACHPR are considered part and parcel of the Constitution.<sup>10</sup> To this extent it can be argued that the right to information is impliedly recognized and protected.

Beyond constitutional recognition, some states have passed access to information specific legislations.<sup>11</sup> In East Africa, Uganda and Rwanda have access to information laws while Kenya and Tanzania have developed bills on the right to information.<sup>12</sup> In some countries, the right to information is also reflected in a number of sector laws especially those to do with the environment.

## III. Exploring the link between ATI and PIL

Public interest litigation refers to legal tools which allow individuals, groups and communities to challenge government decisions and activities in a court of law for the enforcement of the public interest.<sup>13</sup> This kind of litigation has also been defined as *any litigation conducted for the benefit of public or for removal of some public grievance.*<sup>14</sup> In the famous Tanzanian case of *Rev. Christopher Mtikila v. Attorney General*, Lugakingira J (as he then was) described public interest litigation as *a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or a section of the society.*<sup>15</sup> The court went on to state in that case that the *condition which must be fulfilled before public interest litigation is entertained by the Court is that the court should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation.*<sup>16</sup>

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<sup>8</sup> See Article 41, 34 and 35 of the Uganda, Rwanda and Kenya Constitutions respectively.

<sup>9</sup> See Article 18, Constitution of Tanzania.

<sup>10</sup> See 19, Constitution of Burundi 2005.

<sup>11</sup> See Note 6

<sup>12</sup> See Uganda Access to Information Act, 2005. See also the Rwanda Freedom of Information Act

<sup>13</sup> Christoph Swarte, Profiles of Tools and Tactics for Environmental Main Streaming, FIELD,

<sup>14</sup> Pritam Kumar Ghosh, Judicial Activism and Public Interest Litigation in India, 2013 GJLS Vol.1, No.1. Available on

<sup>15</sup> See *Rev. Christopher Mtikila v. Attorney General* [H.C.C.S No. 5 of 1993],

<sup>16</sup> *Id.*

Public interest litigation therefore involves approaching court to obtain a remedy that benefits the public as a whole or greater sections of it. In most cases, the affected individual or community may not be in position to bring such an action in their own capacity. In this case, it is important that the rules of standing i.e. *Locus Standi* be relaxed to allow any other person than the one affected to bring a case before a court of law challenging violations of rights of the affected communities.<sup>17</sup> Relaxation of rules of standing is therefore an extremely important aspect of public interest litigation and makes us each other's keeper.<sup>18</sup>

The Constitutions of the Republic of Uganda, Tanzania and Kenya all contain provisions that permit any person to bring a matter in the public interest in the defence of human rights. For example under Article 30 (3) of the Tanzanian Constitution any person who alleges a violation of any of the rights in the Constitution may institute proceedings for redress in the High Court. Similarly the Constitution of Uganda makes provision for a number of fundamental rights and freedoms.<sup>19</sup> Article 50 of the same Constitution permits any person who claims that a fundamental or right or freedom guaranteed under the Constitution has been infringed or threatened to apply to a competent court for redress. The Kenyan Constitution has also got numerous human rights guarantees.<sup>20</sup> Article 22 of the same Constitution grants every person the right to institute court proceedings where a fundamental right is denied, violated or threatened. The three Constitutions therefore permit any person to bring a public interest litigation case where fundamental rights and freedoms are infringed upon or threatened. It does not matter whether that persons individual rights have been threatened. A person here refers to both natural and legal persons therefore associations and NGO's can institute cases in the public interest.<sup>21</sup>

Once the hurdle of establishing legal standing is overcome, petitioners in a public interest matter have the more pressing challenge of proving the impugned violations. As earlier indicated, the affected population is often unable to afford litigation and petitioners are usually third parties concerned over the plight of the affected communities. Information is therefore key in building a credible case yet it is often not readily available and in many cases is

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<sup>17</sup> See Phillip Karugaba, 'Public Interest Litigation in Uganda, Practice and Procedure: Shipwrecks and Seamarks,' A paper Presented at the Judicial Symposium on Environmental Law for Judges of the Supreme Court and Court of Appeal, 11th – 13th September, Imperial Botanical Beach Hotel. Also available on [http://greenwatch.or.ug/pdf/news/SHIPWRECKS\\_AND\\_SEAMARKS.pdf](http://greenwatch.or.ug/pdf/news/SHIPWRECKS_AND_SEAMARKS.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> See Chapter 4, Constitution of the Republic of Uganda, 1995 (As Amended)

<sup>20</sup> See Chapter 4, Constitution of the Republic of Kenya, 2010.

<sup>21</sup> *Id.* See also *Greenwatch Uganda Limited v. Attorney General and Uganda Electricity Transmission Company Ltd (UETCL)*, HCCS No. 139 of 2001 (High Court) (unreported), See also *Legal and Human Rights Centre, Lawyers Environmental Action Team & The National Organisation for Legal Assistance v. Attorney General*, Misc. Civil Cause No. 77 of 2005 (The *Takrima* provisions case).

concentrated either in arms of government or the parties that are sought to be challenged. In such situations, the right to information plays a very crucial role in obtaining these relevant pieces of information hence becoming an important tool for public interest litigation.

#### **IV. Experiences from East Africa**

This part explores the link between the right to information and public interest litigation by borrowing from experiences with in the three East African countries that practice the common law system i.e. Kenya, Uganda and Tanzania.

##### **A. Enforcement of Environmental Justice/Right to a clean and healthy environment**

The right to a clean and healthy environment is recognized in the Constitutions of Uganda and Kenya.<sup>22</sup> By its nature, the right is collective and enjoyable by the community as a whole. Access to environmental information is vital in the enforcement of the right to a clean and healthy environment and environmental justice generally.<sup>23</sup> Before an act that endangers the environment is challenged, the petitioner must have the full facts of the violation lest his/her public interest case be dismissed. Access to environmental information has been critical in a number of public interest cases.

In *Greenwatch v. Attorney General and Uganda Electricity Transmission Company Ltd (UETCL)*,<sup>24</sup> the petitioners an NGO and company limited by guarantee committed to environmental protection unsuccessfully approached the government of Uganda for details of the Power Purchase Agreement (PPA) entered into between AES Nile power and the then defunct Uganda Electricity Board (UEB). They approached the High Court on grounds that the government was under obligation to release information in its possession to citizens pursuant to Article 41 of the Constitution. In their defence the state contended that the PPA was a compressive document with a lot of technical and commercial details of the sponsor and was therefore confidential. Further, the 1<sup>st</sup> respondent argued that they were not parties to the PPA and were therefore not a proper party.

On their part, the 2<sup>nd</sup> respondent UETCL, a successor of UEB argued that they were a limited liability company and not a government organ within the meaning of Article 41 of the Constitution. Both respondents also contended that the applicant was not a Ugandan citizen

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<sup>22</sup> See Article 42, Constitution of Kenya and Article 39, Constitution of Uganda.

<sup>23</sup> See Principle 10, Rio Declaration. See also Rose Mwebaza, 'Access to Information, Public Participation and Justice in Environmental Decision Making in Uganda', 9 *East Afr. J. Peace & Hum. Rts* 37 (2003).

<sup>24</sup> *Id.*

yet the enjoyment of the right of access to information was limited to citizens. The court was faced with two main issues here, first; whether the PPA was a public document and therefore accessible to citizens under Article 41 and secondly whether the petitioner was a citizen within the meaning of Article 41 of the Constitution.

In its finding, the High Court of Uganda observed that the PPA was part of the Implementation Agreement signed by the Minister of Energy on behalf of the Uganda government. Since the Implementation agreement itself a public document was so intertwined with the PPA, the latter was also a public document. Further it was stated that it was immaterial whether the government is a party to the PPA or not. It was sufficient that the government was *in possession* of the PPA as was the case since it had already been established that the PPA was part of the Implementation Plan which the government had admitted to being in possession of. The court also expressed the view that a company/NGO was capable of being a Ugandan citizen under Article 41 of the Constitution if it was incorporated in Uganda and its shareholders were Ugandans. For that matter a company could enforce rights under the bill of rights unless the particular right is exclusively limited to natural persons. Finally the court stated that a limited liability company may be a state agency depending on the circumstances. In the instant case UEB which entered into the agreement with AES power was a government agency and so was its successor- the 2<sup>nd</sup> respondent.

Although the petitioners were denied the information on grounds that they had failed to prove nationality of Greenwatch, the case illustrates the powerful value of the right to information in the enforcement of environmental justice. In this case the sought PPA contained information critical to sustainable use of the environment and it is only when in possession that the effect of activities of the respondents could be effectively monitored.

## **B. Enforcement of Civil Political Rights**

As observed above, the right to information is key in defence of all other rights including civil political rights. This was affirmed in the Ugandan case of *Major General Tinyefuza v. Attorney General*.<sup>25</sup>

The Petitioner in this case was a senior army officer who sought to resign from the army but his request was denied by the army authority. He approached the Constitutional Court contending among others that the acts of the army authority infringed his constitutional rights and freedom not to be required to perform forced labor. In support of his case he sought to rely on radio messages relayed to him and other members of the high command directing him

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<sup>25</sup> Constitutional Petition No.1 of 1997 (Supreme Court) (unreported)

to remain in service. The respondents in turn averred that the said messages were inadmissible since the petitioner had not sought permission to use them in court from the head of department under the Evidence Act.

*Section 121* (now 122) of the Act that required any person seeking to use any unpublished records of government in evidence to seek authorization of the officer at the head of department. The Constitutional Court being the court of first instance found for the petitioner stating among others that he was **entitled to access and use** the said radio messages in support of his case under *Article 41* of the Constitution. The Court stated further that *Section 121* was inconsistent with exercise of this constitutional right. The finding of the Constitutional Court was confirmed on appeal to the Supreme Court.

The right to information was in this case important in guaranteeing the petitioner a right to a fair hearing.

### **C. Enforcement of Economic Social and Cultural Rights**

For many years economic, social and cultural rights were considered second generation rights and therefore not enforceable at the same rhythm with civil political rights. In the last few years however, there is increased recognition of the fundamental importance of these rights. A number of African countries are moving towards judicial enforcement of a broad array of social economic rights.<sup>26</sup> This has seen a rise in the number of public interest litigation cases seeking to enforce these rights. The right to information is often an important tool in these cases.

In the *Centre for Health, Human Rights and Development (CEHURD), Michael Mubangiꝑi and Jennifer Musimenta v. ED, Mulago National Referral Hospital and the AG*,<sup>27</sup> the petitioners challenged the negligent acts of staff of the first respondent that led to the death of one of the twin babies of the second and third petitioners. In support of the main suit, the petitioners sought to rely on details contained in documents relating to the birth and death of children born at the hospital. This information was denied by the first respondent and the petitioners lodged an application to the court seeking to access these documents.

In her ruling, Mugambe J found that the petitioners had a right to access the sought information and ordered the release of all relevant documents including; the mortuary record,

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<sup>26</sup> See Christopher Mbazira, *Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and People's Rights: Twenty Years of Redundancy, Progression and Significant Strides*, Rutgers School of Law Journal.

<sup>27</sup> See HCCS No. 212 of 2013

hospital and registry of children delivered, patients files, list of health workers on duty, antenatal and delivery records; and a copy of DNA results.

This ruling is very key in not only proving the said negligent acts of staff but in uplifting the right to health generally. The deteriorating state of health facilities in the country reflects lack of commitment of the leadership in promoting and protecting the fundamental right to health. It is therefore important that government is challenged to fulfill its obligations in regards to the right to health. This challenge can only be possible where the right to information is enforceable. The lack of government commitment can only be demonstrated by reference to budget allocations, number of death in hospitals, number of staff and their competences and accountability for funds received among others. In absence of this information it is almost impossible to challenge the state for its inability to guarantee the right to health for its citizens.

#### **D. Accountability and the Fight against Corruption**

Corruption remains a major challenge across East Africa. According to the 2013 Corruption perception index, out of 177 countries assessed, Rwanda ranked highest in East Africa at 49.<sup>28</sup> Tanzania ranked 111, Kenya ranked 136 and Uganda ranked 140.<sup>29</sup> While a number of efforts have been made to end corruption, these rankings confirm that the vice is instead growing stronger. The right to information provides an important tool in fighting corruption by among others fostering transparency and accountability. Additionally, the right to information is central in the prosecution and litigation of corruption cases most of which are in the public interest considering the sporadic effect of the vice. Information helps expose the corrupt and their dealings. For these reasons, both the UN Convention against Corruption and the African Union Convention on Preventing and Combating Corruption obligate state parties to provide information to their citizens as part of efforts to eliminate corruption.<sup>30</sup>

In *Famy Care Ltd v. Public Procurement Administrative Review Board & Anor*<sup>31</sup> the petitioner participated in an international tender for the supply of family planning products floated by the government of Kenya through the Kenya Medical Supply Agency (KEMSA). Aggrieved by the process, the petitioner sought to challenge the procurement and to enforce a number

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<sup>28</sup> See Corruption Perception Index, Transparency International. Available on <http://www.transparency.org/cpi2013/results>

<sup>29</sup> *Id.*

<sup>30</sup> See Article 3, UN Convention Against Corruption, GA Resolution 58/4 of 2003. Available on <https://www.unodc.org/unodc/en/treaties/CAC/index.html>. See also Article 9 African Union Convention on Preventing and Combating Corruption Adopted at the 2<sup>nd</sup> Session of the Assembly of the Union, Maputo, July 2003. Available on <http://www.au.int/en/content/african-union-convention-preventing-and-combating-corruption>.

<sup>31</sup> High Court Petition No. 23 of 2012.



of rights enshrined in the Constitution including Article 35 on the right to information. In an action brought before the high court of Kenya, the petitioner sought for orders to access information contained in evaluation reports and minutes of the technical and tender committees.

The respondents raised a preliminary objection on grounds that that the petitioner was a foreign citizen incorporated in India. They could not therefore benefit from the provisions of Article 35 since this restricted the right to information to Kenyan citizens.

The court agreed with the respondents stating among others that by their nature, the petitioners did not fit within the definition of citizen contained in Chapter III of the Constitution. On this basis the petitioner's prayers were dismissed.

In *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & Ors*<sup>32</sup> the petitioner published a report implicating officials of the first respondent in corrupt dealings. This was disputed by the respondents upon which the petitioners sought for more information regarding the respondents' dealings with a number of drilling companies as well as contracts concluded. Their request was denied on the basis that; the respondent was not a public body to which the right to information applies and secondly that the applicants not being natural persons were not entitled to exercise the right to information under the constitution.

The petitioners challenged the actions of the respondents contending among others that under Article 35 of the Constitution they were entitled to information in possession of a public body. Further, the petitioners argued that the denial of information constituted an unreasonable restriction on the right to freedom of expression.

In finding for the respondents, the court relied on earlier decision of *Famy Care Ltd V. Public Procurement Administrative Review Board & Anor*. The court stated that unlike other rights in the bill of rights, the right to information under the Kenyan Constitution was restricted to citizens. The petitioners being a juristic and not natural persons were not citizens within the meaning of Article 35.

It is hereby respectfully submitted that the court took a restrictive approach considering well established common law principles that recognize the principle of corporate citizenship. Under common law, a corporation may be a citizen of the country where it is incorporated and conducts its principle business.<sup>33</sup> A corporation may also be a citizen of a country from where the dominant shareholders reside.<sup>34</sup> Indeed not far from Kenya, a Ugandan court considering Article 41 of the Ugandan Constitution on the right to information which is in

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<sup>32</sup> High Court of Kenya, Petition No 278 of 2011

<sup>33</sup> See Greenwatch case *Supra*

<sup>34</sup> *Id.*

*pari materia* with Article 35 of the Kenyan Constitution found that the right extends to corporate citizens like the petitioner if it could be proved that all its members were Ugandans.<sup>35</sup>

## **Conclusions and Recommendations**

The right to information has over the last few years gained traction as one of the most significant rights and freedoms. It is critical in the defence of other rights and is a good tenet of good governance, rule of law and democracy to the extent that it facilitates citizen participation in public affairs. This in turn promotes transparency and accountability. For its growing significance and associated benefits, a number of African countries now recognize the right to information in possession of government either in their national constitutions or in access to information specific laws or both. This recognition has greatly improved legal enforcement of the right and is beginning to influence transparency trends in these countries.

Over and above, the right to information has emerged as an important tool for public interest litigation in cases involving enforcement of fundamental rights and freedoms. Public interest litigation aims to benefit the public as a whole and highly depends on timely access to critical information which is often in possession of a dominant party.

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<sup>35</sup> See *Greenwatch v. AG Supra*