

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
ATI REVIEW APPLICATION NO. CAJ/KSM/ATI/P. E/040/4/25-AO

FORUM FOR CIVIC PARTICIPATION IN GOVERNANCE (FCPG) T/A

ODHIAMBO OYOKOAPPLICANT

VERSUS

KILIMO HAKIKA LIMITED.....RESPONDENT

RULING

A. FACTUAL BACKGROUND

1. The Commission on Administrative Justice (Office of the Ombudsman) (hereinafter referred as *the Commission*) is established under Article 59(4) of the Constitution, and its constitutive Act; The Commission on Administrative Justice Act, 2011 (CAJ Act) with the mandate to enforce administrative justice in the public sector by addressing all forms of maladministration. The Commission has a further mandate of oversight and enforcement of the right of access to information as guaranteed by Article 35 of the Constitution, through the Access to Information Act, 2016 (hereinafter referred to as *the Act*).
2. In the performance of its mandate, the Commission is guided by the following legislation: -
 - i. The Constitution;
 - ii. The Commission on Administrative Justice Act, 2011 and the attendant Regulations of 2013;
 - iii. Access to Information Act, 2016 and the attendant regulations of 2023
 - iv. The Fair Administrative Action Act, 2015;
 - v. The Public Service (Values & Principles) Act, 2015.
3. Article 35 of the Constitution guarantees the right of every citizen to access:

- a) Information held by the State; and**
- b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.**

The importance of access to information to a country's citizenry is premised on the fact that all sovereign power belongs to the people and all State information is held by public entities in trust for the people. Article 1 of the Constitution expressly provides that all sovereign power belongs to the people and should only be exercised in accordance with the Constitution. It further provides that the power may be exercised directly by the people or through their democratically elected representatives.

- 4. Access to information equips citizens with the requisite knowledge about government policies, procedures and decisions thereby enabling them to meaningfully participate in public affairs. In addition, informed citizens are able to scrutinize the actions and decisions of duty bearers thereby promoting the principles of good governance. This ultimately engenders an open government, efficient delivery of services and adherence to the rule of law. It further strengthens public trust in institutions thereby building back strong institutions for the public good and sustainable development.

B. FACTS OF THE REVIEW APPLICATION

- 5. On 19th June 2025, the Commission received an application through a letter dated 19th June 2025 from the applicant. The Application sought to review the respondent's inadequate response to a request for information made to them on 6th June 2025. The requested information related to alleged ongoing construction of a fish production facility in the precincts of Rongo Town. The Application was to access the following Information:
 - a) The nature, purpose, scope and intent of the facility/project.
 - b) The Change of use for the land where the facility is due to be constructed including the public notice and Form PPA1.
 - c) The compliance, licencing, permits and authorisation of the project / facility by the County and National Governments and any other relevant regulatory organ.
 - d) Whether there was public participation undertaken on the project by the relevant licencing or authorization authority.
 - e) The Environmental and social Impact and Assessment Reports.

6. Section 9(4) of the Access to Information Act, 2016 requires a Respondent's Information Access Officer to communicate the decision on whether the request for information was approved or declined to the requester within 21 days of receipt of the request. The Respondent issued a response dated 17th June 2025. The response was framed around the requested sets of information being;

a. Nature and status of the project

The respondent stated that no construction activities were -being undertaken at the site. The Respondent indicated that the proposed project was a fish feed production designed to enhance access to high-quality aquaculture inputs and contribute to the local economy through employment and value chain development.

b. Request for permits, Licences and change of user documentation

The Respondent indicated that all statutory processes preceding the submission of the Environmental Impact Assessment (EIA) report, including requests for licenses, requisite approvals, and relevant permits, had been undertaken in full compliance with applicable national and county regulations, including planning, zoning, and community consultation protocols. The respondent further stated that the land was located in a commercial site and that Kilimo Hakika had not violated any law in seeking relevant permits, licenses, and approvals.

c. Access to requested information

In relation to compliance licenses, permits, and the Environmental and Social Impact Assessment, the Respondent asserted that these were not proprietary to Kilimo Hakika Limited but are issued and regulated by designated government agencies such as NEMA, the County Government's Physical Planning Department, and other national regulators. Thus, the Respondent advised the Applicant to engage the respective public offices in order to ensure accuracy, completeness, and authenticity.

7. Following receipt of the response dated 17th June 2025, the Applicant was dissatisfied with the Respondent's response and lodged his request for review with the Commission through a letter dated 19th June 2025 and received by the Commission on the same date.
8. Upon receipt of the request for review, the Commission issued an initial letter dated 30th June 2025 Ref: CAJ/KSM/ATI/P. E/040/4/25-AO to the Respondent, notifying it of the application and requested for an institutional report in accordance with section 22(3) of the Act.
9. Vide a letter dated 17th July 2025 Ref: KH/A001/2025 the Respondent reiterated that there was no active construction taking place on the site. The Respondent informed the Commission that *the only process initiated by it was public participation which was conducted in full compliance with laws and regulations as a requirement for obtaining a NEMA license before commencing any construction or project. The Respondent stated categorically that the said process had not been completed. Thus, the Respondent asserted that, no permits or approvals -had been granted by NEMA, the National or County Government's Physical Planning or any other regulatory body in respect of construction activities hence the Respondent was unable to provide any of the requested documents as none existed.*
10. The Applicant being aggrieved by the response dated 17th July 2025, issued a rejoinder of even date, whereby he stated that the Respondent was not truthful to state that 'there is no ongoing construction' at the site. The Applicant attached photographs showing materials at the site being. The photographs demonstrated that sand and ballast was placed on the site. Further, the Applicant in his rejoinder stated that the Respondent failed to present the 'Public Participation' report that it had alluded to, which the Applicant had requested in his initial letter. The Applicant stated that the two responses by the Respondent as contained in letters dated 17th June 2025 and 17th July 2025 were contradictory in so far as licences and approvals were concerned.

C. ISSUES FOR DETERMINATION

11. Having carefully reviewed and analyzed all documents and information provided by the parties in the present application, the Commission frames the following four issues for determination as follows:
- i. **Whether the Respondent had in its custody/possession the information requested by the Applicant;**
 - ii. **Whether the information requested by the Applicant is in the custody/possession of the Respondent should be disclosed to the Applicant;**
 - iii. **Whether there is ongoing construction on the land / property.**

D. ANALYSIS

i. **Whether the Respondent had in its custody/possession the information requested by the Applicant**

12. The right to information in this instance is articulated under Article 35 (1) (a) and (b) of the Constitution with specific access to information held by the State and another person (Private entity). This is similarly reiterated in Section 4 of the Act, the right to information can only be exercised where the requested documents exist and are held by the Respondent.
13. The Applicant in his rejoinder dated 17th July 2025 indicated in clause 3 that there were apparent contradictions between the Respondent's letter dated 17th June 2025 and that of 17th July 2025. The basis of this position was that the Respondent in its letter of 17th July 2025 had indicated that "*all statutory processes preceding... have been undertaken*" which according to the Applicant contradicts its response of 17th July 2025 to wit "*we are therefore unable to provide any NEMA application forms, environmental impact assessments or related approvals as none exists*".
14. Upon careful consideration of the two responses by the Respondent, the Commission is of the view that the Respondent in its letter of 17th July 2025 states with clarity that it is still at the initial stage of public participation which is yet to be completed and as such, much of the required approvals have not yet been obtained. The Commission has also noted this explanation in the Respondent's initial letter of 17th June 2025. The Commission reiterates

that section 4 of ATI Act is quite clear that the right to information can only be exercised where the requested documents exist and are held by the Respondent.

15. The 'held test' was settled in *University of Newcastle upon Tyne vs. Information Commissioner & British Union for Abolition of Vivisection* [2011] UKUT 185 (AAC), [2011] 2 info LR 588, where the Upper Tribunal clarified that an authority 'holds' information if it is in its possession for its own purposes even if generated by third parties.

16. Pursuant to section 4 of ATI Act, the Commission concurs with the respondent that the NEMA applications, Environmental Impact Assessment (EIA) or related approvals if they do not exist, therefore the Commission cannot order such information to be availed.

17. In relation to the public participation reports, the Respondent stated in its responses that indeed the process of public participation had been initiated but the same has not been completed. Public participation is premised in law, specifically the provisions of Articles 10 (2) (b) (c) and 118 (b) of the Constitution for an effective, tangible and mandatory public participation. Lack of which, renders the process null and void. The Commission agrees with the Respondent that since the public participation process is not complete, then there is no obligation and or existing report which can be accessed at this time.

ii. Whether the information requested by the Applicant if in the custody/possession of the Respondent should be disclosed to the Applicant

18. The Commission having analyzed the issue of whether the Respondent holds the information requested and having returned a negative answer is of the considered view that the question of disclosure thereof has been rendered moot.

iii. Whether there is ongoing construction on the land/property

19. Before the Commission issues the final orders, the Applicant attached to his rejoinder letter some photographs of construction materials being sand

and ballast which was kept in a parcel of land to which he claims is the land where the respondent proposes to put up its project. This evidence was brought to the Commission's attention with the aim of persuading it to make a finding that construction is ongoing at the site. This issue as alleged by the applicant was refuted by the respondent in its letter dated 17th July 2025.

20. The Commission is of the view that the question as to whether construction is ongoing or not was not part of the initial request for information in the applicant's letter of 6th June 2025 and therefore falls outside the mandate of the Commission.

FINAL ORDERS

21. Having made a careful analysis of all the facts and information provided by the Parties herein, the Commission, pursuant to the powers granted by section 22(3)(a)(ii) of the Access to Information Act and Regulation 25(10) of the Access to Information (General) Regulations 2023 **DETERMINES:**

1. **THAT** information sought in numbers 1 and 2 of the Applicant's request for information dated 6th June 2025 was supplied by the respondent through its responses dated 17th June 2025 and 17th July 2025.
2. **THAT** the information sought in numbers 3, 4 and 5 of the Applicant's request for information dated 6th June 2025 is not held by the Respondent and thus no orders can be issued for disclosure thereof.
3. **THAT** the present application is dismissed and the file closed accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS...19th.. DAY OF...NOVEMBER.2025



DOROTHY JEMATOR
ACCESS TO INFORMATION COMMISSIONER