



REPUBLIC OF KENYA



**Bogongo v Cabinet Secretary National Treasury and Planning & another (Petition E255 of 2021)  
[2023] KEHC 22253 (KLR) (Constitutional and Human Rights) (28 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 22253 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E255 OF 2021**

**M THANDE, J**

**AUGUST 28, 2023**

**BETWEEN**

**BENJAMIN BOGONGO ..... PETITIONER**

**AND**

**CABINET SECRETARY NATIONAL TREASURY AND PLANNING .... 1<sup>ST</sup>  
RESPONDENT**

**CENTRAL BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**Failure to table a statutory instrument before the Clerk of the relevant House of Parliament within 7 days leads to the statutory instrument ceasing to have effect.**

*The Banking (Credit Reference Bureau) Regulations, 2020 made by the Central Bank of Kenya were null and void for non-compliance with section 11 of the Statutory Instruments Act that required the tabling a statutory instrument before the Clerk of the relevant House of Parliament within 7 days.*

Reported by John Ribia

**Statutory instruments** – enactment of statutory instruments – regulations - requirement to table a statutory instrument (regulations) before the Clerk of the relevant House of Parliament within 7 days - whether failure to table a statutory instrument before the Clerk of the relevant House of Parliament within 7 days would lead to the statutory instrument ceasing to have effect - whether the ceasing of a statutory instruments for failure to table it before the Clerk of the relevant House of Parliament within 7 days would prejudice to any act done under the statutory instrument, before it became void – Statutory Instruments Act (Cap 2A) section 11; Credit Reference Bureau Regulation 2020 (Amendment) regulations 28(4), and 32(4).

**Constitutional Law** – national values and principles of governance – public participation – principles – public participation requirements in enactment of statutory instruments – amendment of a statutory instrument by a House of Parliament after public participation had been conducted - whether the Credit Reference Bureau Regulations, 2020 were subjected to public participation – Constitution of Kenya, 2010 article 10.



## **Brief facts**

The petitioner alleged that the Credit Reference Bureau Regulation 2020 (Amendment) (impugned regulations/CRB Regulations) were void as they were not subjected to public participation. It was the petitioner's contention that the impugned Regulations were not in the Draft CRB Regulations, 2019 nor were they in the matrix on comments received from stakeholders on the said Draft CRB Regulations. The petitioner further contended that the impugned Regulations were not among the issues subjected to public participation, yet some of the stakeholders made comments on other issues.

The petitioner submitted that the 1st respondent contravened section 11(1) of the Statutory Instruments Act. That the impugned Regulations were received by the Clerk of the National Assembly well beyond the statutory period of 7 sitting days.

## **Issues**

- i. Whether the Credit Reference Bureau Regulations were subjected to public participation.
- ii. Whether every time a change was introduced to a Bill or Statutory Instrument, the same must be referred back for public participation.
- iii. Whether failure to table a statutory instrument before the Clerk of the relevant House of Parliament within 7 days would lead to the statutory instrument ceasing to have effect.
- iv. Whether the ceasing of a statutory instruments for failure to table it before the Clerk of the relevant House of Parliament within 7 days would prejudice to any act done under the statutory instrument, before it became void.

## **Held**

1. A party claiming that the Constitution had been violated must state with precision the exact provisions violated and the manner in which it had been violated. The petitioner had set out with a reasonable degree of precision that of which he complained of, the provisions infringed and the manner of infringement, to form the basis of an inquiry by the court.
2. Public participation was a constitutional imperative, which played a central role in legislative, policy and executive functions of Government. It informed stakeholders and the public of what was intended and affords them an opportunity to express, and had their views taken into account.
3. CBK engaged stakeholders extensively by calling for comments on what they wished to be included in the revision of the Credit Reference Bureau Regulations (CRB Regulations), 2013 and received 136 proposals. the comments and feedback were incorporated in the Draft CRB Regulations, 2019. The matrix on the proposed review of the CRB Regulations, 2013 and 2019 was indicative of a robust public participation exercise and stakeholder engagement involving Commercial Banks, Saccos, Microfinance Banks, Credit Reference Bureaus, Kenya Bankers Association, Association of Microfinance Institutions and individuals.
4. The constitutional imperative of public participation was met when an invitation to stakeholders was made and views were received and considered. The public participation exercise was real and not a mere formality and was purposive and meaningful. The notice issued was reasonable and accorded the relevant stakeholders a reasonable opportunity to engage.
5. An allegation of lack of public participation did not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case. The mode, degree, scope and extent of public participation was to be determined on a case to case basis. There must be *inter alia* clarity of the subject matter and simplicity of the process for the public to understand. The stakeholders had an opportunity to see and interrogate the Regulations. Further they understood what the Regulations provided and their import and were clear in their minds as to what they wanted included or excluded in the Regulations under review. The essence of public participation therefore was to ensure that the views of stakeholders and affected persons were taken into account in the legislative process and that due process was followed.



6. The petitioner's complaint of lack of public participation was limited to regulation 28(4) and 32(4) of the Credit Reference Bureau Regulations 2020 (Amendment). The impugned Regulations were informed by the petition filed in the Senate decrying the financial burden on fresh graduates in obtaining various clearance certificates, including that from Credit Reference Bureaus, when applying for a job. The Senate committee on labour and social welfare that considered the petition represented the people that were bound to be most affected by the Regulations in question. The issue of the cost of clearance certificates, had been raised by the Credit Information Sharing Association of Kenya. The Senate considered the views of the petitioners therein favourably and made a recommendation to the 1<sup>st</sup> respondent accordingly, in the public interest. The aim was clearly to cushion first time job applicants from the high cost associated with job applications. Regulations 28(4) and 32(4) were thus introduced in the Regulations, pursuant to the recommendation by the Senate in response to a petition by key stakeholders. There could not therefore be a more significant aspect of public participation than the expression of views in a petition to the Senate and the taking into account of those views.
7. The Credit Information Sharing Association of Kenya addressed the issue of clearance certificates and stated that they should be restricted to employers and government agencies which had no access to credit reports. There had been complaints that clearance certificates were expensive yet banks that had access to credit reports also required the certificates from customers. There must not be a deliberate to keep out any stakeholder and the petitioner herein had not demonstrated any such attempt.
8. During parliamentary debate on legislation including subsidiary legislation, changes can be made on the floor of the House. It could not be the law that every time a change was introduced, the Bill or Statutory Instrument in question must be referred back for public participation. If that were the case, then enactment of laws would be an endless process and this was not what was contemplated by the makers of the Constitution.
9. There was sufficient stakeholder engagement in the process of promulgation of the impugned Regulations. The contention by the petitioner that the process through which regulations 28(4) and 32(4) were included in the regulations is in violation of for want of public participation, is therefore devoid of merit.
10. The CRB Regulations fell within the definition of statutory instruments under section 2 of the Statutory Instruments Act. Section 11(1) of the Statutory Instruments Act placed an obligation on every line cabinet secretary to ensure that a copy of a statutory instrument was, within 7 sitting days after publication, transmitted to the responsible Clerk for tabling before the relevant House of Parliament. The 1<sup>st</sup> respondent ought to have transmitted the Regulations to the Clerk of the National Assembly within 7 sitting days after April 8, 2020, the date of publication. Given that the National Assembly sat on Tuesday, Wednesday and Thursday, the Regulations ought to have been transmitted to the National Assembly on or before April 23, 2023. The Statutory Instruments Register -2020 however showed that the Regulations were received by the Clerk on May 5, 2023 after the stipulated period.
11. Section 11(4) of the Statutory Instruments Act provided that if a copy of a statutory instrument that was required to be laid before the relevant House of Parliament was not so laid in accordance with section 11(1), the statutory instrument shall cease to have effect but without prejudice to any act done under the statutory instrument, before it became void. Section 11 was couched in mandatory terms. Failure to comply with the said provision renders a statutory instrument procedural defective and the same could not stand. Section 11(4) declared as void, statutory instruments not laid before the relevant House of Parliament in accordance with Section 11.
12. The phrase "in accordance with this section" as used in section 11(4) of the Statutory Instruments Act meant that a statutory instrument must be transmitted to the responsible Clerk for tabling before the relevant House of Parliament within 7 sitting days after publication. Any tabling after the stipulated



- period would not be in accordance with the said section. Such breach of the will render the statutory instrument void on the 8th day, saving only, any act done thereunder before the said 8<sup>th</sup> day.
13. The court was bound by the legislative imperative and must declare that the Regulations in question were null and void for non-compliance with the timelines stipulated in section 11(1) of the Statutory Instruments Act. Had Parliament intended that a Cabinet Secretary responsible for a regulation-making authority submits a statutory instrument to the Clerk of the relevant House at their convenience or whenever they deemed fit, then no timelines would have been set. Parliament was however deliberate, and did stipulate 7 sitting days after the publication of a statutory instrument as the time within which such statutory instrument was to be transmitted to the responsible Clerk for tabling before the relevant House of Parliament. By dint of section 11(4), the entire Credit Reference Bureau Regulations, 2020, a statutory instrument within the meaning of section 2 of the Statutory Instruments Act became void by operation of law and ceased to have effect on the last date by which they ought to have been transmitted to the Clerk of the National Assembly for tabling before the House.
  14. CBK was well within its mandate to formulate and publish the CRB Regulations. State agencies must be given the space to discharge their constitutional mandate without interference from courts. Where it was demonstrated that there had been breach of the Constitution or of the law, courts must not condone an illegality and must step in to safeguard the Constitution and the law.
  15. The principle of presumption of legality, which in any event was not a finding of legality, could not save the CRB Regulations, given the clear violation of the law by the 1<sup>st</sup> respondent.

*Petition partly allowed.*

#### **Orders**

- i. *Declaration issued that the Banking (Credit Reference Bureau) Regulations, 2020 made by the 1<sup>st</sup> respondent were null and void for non-compliance with section 11 of the Statutory Instruments Act.*
- ii. *A permanent injunction was issued restraining the respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the Banking (Credit Reference Bureau) Regulations, 2020.*
- iii. *No award of costs.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); KLR 154 - (Mentioned)
2. *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health, Tobacco Control Board, Attorney General, Kenya Tobacco Control Alliance, Consumer Information Network & Mastermind Tobacco (K) Limited* Civil Appeal 112 of 2016; [2017] KECA 763 (KLR) - (Mentioned)
3. *Kenya Transport Association Limited v Cabinet Secretary Transport & Infrastructure, National Transport & Safety Authority & Dalcom Enterprises & 14 others* Petition 16 of 2014; [2014] KEHC 5373 (KLR) - (Mentioned)
4. *Khaemba Henry Wanyama v Standard Chartered Bank (K) Ltd & Edward Otieno t/a Dosawii Enterprises* Civil Suit 335 of 2013; [2014] KEHC 4804 (KLR) - (Mentioned)
5. *Kiambu County Government & 3 others v Robert N. Gakuru & others* Civil Application 97 of 2014; [2014] KECA 157 (KLR) - (Mentioned)
6. *Law Society of Kenya v Attorney General & 2 others* Civil Appeal 96 of 2014; [2019] KECA 344 (KLR) - (Mentioned)



7. *Meme, Julius v Republic & another* Miscellaneous Criminal Application 495 of 2003; [2004] KEHC 2623 (KLR); [2004] 1 KLR 637 - (Mentioned)
8. *Muhu Holdings Limited v James Muhu Kangari* Environment & Land Case 112 of 2017; [2017] KEELC 1753 (KLR) - (Mentioned)
9. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Mentioned)
10. *Ramogi William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Mentioned)
11. *Sagini, George Ndemo v Attorney General & 3 others* Petition 176 of 2016; [2017] KEHC 9183 (KLR) - (Mentioned)
12. *Tom Dola, Samuel Dola & Pauline Dola v Chairman, National Land Commission, National Land Commission, Chief Land Registrar, County Land Registrar (Kisumu), Attorney General & Basin Development Authority* Civil Appeal 17 of 2017; [2020] KECA 432 (KLR) - (Mentioned)

### **South Africa**

*Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others* CCT 86/08 [2010] ZACC 5; 2010 (6) BCLR 520 - (Applied)

### **Texts**

Woolf, JW., (Ed) (1995), *De Smith Woolf and Jowell Judicial Review of Administrative Action* London: Sweet & Maxwell Ltd 5th Edn pp 567, 568

### **Statutes**

#### **Kenya**

1. Banking (Credit Reference Bureau) Regulations, 2020 (cap 488 Sub Leg) sections 28(4); 32(4) - (Interpreted)
2. Banking Act (cap 488) sections 31(3)(b); 33(4) - (Interpreted)
3. Central Bank of Kenya Act (cap 491) section 57(1)- (Interpreted)
4. Constitution of Kenya articles 1, 10, 26, 27, 28, 40, 43, 231(3)- (Interpreted)
5. Employment and Labour Relations Court Act (cap 8E) section 9- (Interpreted)
6. Microfinance Act (cap 493C) In general - (Cited)
7. Sacco Societies Act (cap 490B) In general- (Cited)
8. Statutory Instruments Act (cap 2A) section 11(1)(4)(5)- (Interpreted)
9. Supreme Court Act (cap 9B) section 3 - (Interpreted)

### **Advocates**

None mentioned

## **JUDGMENT**

1. The petitioner filed a Petition dated 5.7.21, seeking the following reliefs:
  - a. A declaration that the processes through which the section 28(4) and 32(4) *Credit Reference Bureau Regulation 2020 (Amendment) Regulation* was passed is in violation of the *Constitution*, in that:
    - i. It failed to meet the Constitutional requirements of public participation
 The effect of all the above actions is to render the said law illegal and null and void *ab initio*.



- b. A declaration that sections 28(4) of [Credit Reference Bureau Regulation 2020 \(Amendment\)](#) is unconstitutional, null and void for infringing the rights to equality, dignity, socio-economic rights and non-discrimination.
  - c. A declaration that sections 28(4) of [Credit Reference Bureau Regulation 2020 \(Amendment\)](#) unconstitutional, null and void for being otherwise unreasonable and unjustifiable in an open democratic society based on human dignity and a free market.
  - d. An order for compensation for damages and loss occasioned to service providers if any.
  - e. A declaration that sections 28(4) is a threat to social economic rights and is void to the extent of its inconsistency with the [Constitution](#).
  - f. A permanent injunction restraining the respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the impugned sections.
  - g. Costs of the suit.
  - h. Any other or further orders that the honourable court may deem fit to grant.
2. It is the petitioner's case as set out in the Petition and in his affidavit sworn on even date, that regulations 28(4) and 32(4) (which he erroneously refers to as sections), of what he refers to as the [Credit Reference Bureau Regulations](#) of 2020 but are in fact the [Banking \(Credit Reference Bureau\) Regulations, 2020](#) (the Regulations), were not in the Draft Regulations 2019 that were presented and subjected to public participation. The petitioner thus contends that the impugned Regulations are unlawful and unconstitutional and therefore invalid, null and void *ab initio* for violation of articles 1, 10, 26, 27, 28, 40 and 43 of [the Constitution](#).
  3. In opposition to the Petition, the 1<sup>st</sup> respondent filed grounds of opposition dated 11.11.21. The grounds in summary are that the Petition does not meet the minimum principles set out under the [Anarita Karimi](#) case as it does not disclose adequate particulars in support of the alleged violations of the [Constitution](#) and the law; that the Petition is scandalous, frivolous, vexatious and an abuse of the judicial process in that it is general, speculative and does not disclose adequate particulars in support of the alleged violations of the [Constitution](#) and other quoted laws and a real dispute capable of resolution by this court; that the Regulations enjoy a general presumption of constitutional validity, which presumption has not been rebutted by the Petitioners; that the Petition does not disclose any legal and justifiable claim against the 1<sup>st</sup> respondent. Accordingly, the Petition is incurably defective, misconceived and a proper candidate for dismissal.
  4. The 1<sup>st</sup> respondent also filed a replying affidavit sworn on 23.9.21 by Dr. Julius Monzi Mui, the Principal Secretary of the National Treasury. He averred that due legal process and public participation was followed in the process of the enactment of regulations 28(4) and 32(4) of the Regulations. He further deposed that the proposals received during the call for comments were to the extent possible, incorporated into the draft [Credit Reference Bureau Regulations 2019](#) which were then exposed to further stakeholder and public comments in May/June 2019. Additionally, the Senate received a petition concerning the financial strain and hardship visited upon fresh graduates by the requirement of clearance certificates required by Public Services Boards during the application of jobs in Kenya. The requirement for clearance including that of the Credit Reference Bureau sets back fresh graduates over Kshs 6,000/= in the job application process. The Senate proceeded to engage the various heads of boards in charge of issuing the clearance certificates as stakeholders on this matter. Following this engagement, the impugned regulations 28(4) and 32(4) were incorporated into the



- Regulations published in a Gazette Notice and submitted to the National Assembly and were fully approved in accordance with the [Statutory Instruments Act](#). Accordingly, the process through which the impugned regulations were incorporated met the threshold of public participation under article 10 of the [Constitution](#).
5. It is the 1<sup>st</sup> Respondent's further contention that the impugned Regulations were intended to serve the public interest by cushioning first time job applicants from the cost associated with obtaining clearance certificate as well as preventing arbitrary increase in charges by credit reference bureaus. Further that the Petitioner has not demonstrated that the impugned Regulations are unconstitutional. Further the only stakeholders who issue clearances certificates are Criminal Investigation Department, Higher Education Loans Board, Kenya Revenue Authority, Ethics and Anti- Corruption Commission, Credit Reference Bureau are government institutions. The Petitioner has thus not demonstrated the public interest that he is representing and seeks to safeguard, or any loss that has been occasioned, or will be occasioned to the public by the implementation of the provisions. He urged that the Petition be dismissed with costs.
  6. The Petitioner filed reply to the 1<sup>st</sup> respondent's grounds of opposition dated 14.12.21. He contends that the grounds of opposition are incompetent and ought to be struck out as the same have not been filed on the e-filing portal and have not been made within reasonable promptitude; that the Petition meets the threshold in the Anarita Karimi Njeru case; that the contention that to establish whether the Petition is scandalous, frivolous, vexatious and abuse of the judicial process would require probing by way of evidence, as demonstrated in [Henry Wanyama Khaemba vs. Standard Chartered Bank Ltd & another](#) [2014]eKLR and [Mubu Holdings Ltd vs. James Mubu Kangari](#) [2017] eKLR; that the sneaking in of the impugned Regulations is a violation to the [Constitution](#) as demonstrated in the Petition and in effect an egregious affront of the [Constitution](#) necessitating this Petition; that the grounds of opposition are not merited and should be disallowed with costs.
  7. The 2<sup>nd</sup> respondent Central Bank of Kenya (CBK) opposed the Petition vide a filed replying affidavit sworn on 14.9.21 by Kennedy Kaunda Abuga, its General Counsel. He stated that in exercise of its statutory mandate under section 57(1) of the [CBK Act](#) as read with sections 31(3) (b) and 33(4) of the [Banking Act](#), CBK decided to review the Credit Reference Bureau Regulations, 2013. CBK thus called for and received comments from Commercial Banks, Saccos, Microfinance Banks, Credit Reference Bureaus, Kenya Bankers Association, Association of Microfinance Institutions. The comments which were to be received by 17.6.19. In July, 2019, CBK considered each comment and proposals and incorporated those it agreed with in the Draft Credit Reference Bureau Regulations, 2019 and gave reasons for those not agreed with.
  8. It was further averred that CBK met with the Senate following the petition filed therein which made recommendations that the initial or first time CRB clearance be issued free, to assist first-time job seekers in the public interest, that the minimum threshold for listing with CRBs be fixed at Kshs. 1000/= and that CBK retains the power to approve and review fees and charges by CRBs for services rendered. CBK incorporated the recommendations in the impugned Regulations. Thereafter, CBK forwarded the revised Draft CRB Regulations, 2019 to the Cabinet Secretary, National Treasury on 20.1.2020 for further action. On 8.4.21, the Regulations were promulgated as the Credit Reference Bureau Regulations, 2020 *vide* Legal Notice No. 55 of 8<sup>th</sup> April 2021 published in the Kenya Gazette Supplement No. 42 (Legislative supplement No. 28). Upon promulgation, CBK promptly brought this to the attention of all stakeholders and members of the public in a press release of 14.4.2020 and undertook to work with all stakeholders to ensure that the Customer Information Sharing Mechanism (CIS) works for and with Kenyans. It is the 2<sup>nd</sup> Respondent's further contention that in accordance with the provisions of Section 11(1) of the [Statutory Instruments Act](#), the Cabinet



Secretary transmitted the Regulations to the Clerk of the National Assembly for tabling before the National Assembly. The same were approved on 28.10.2020. Accordingly, the said Regulations went through the complete legislative framework envisaged under Article 94 as read with the provisions of the CBK Act, the Banking Act, the Microfinance Act, 2006, the Sacco Societies Act, 2008 and the Statutory Instruments Act.

9. Additionally, it was deposed that the petitioner has not shown how the Regulations contravene the right to property under Article 40 of the Constitution as alleged and that in any event that right is not absolute. Further, other than citing articles 26, 27, 28 and 43 of the Constitution, the petitioner has not explained how the same were violated by the respondents. Also, that no credit reference bureau has lodged any complaint or claim with the CBK in respect of the impugned Regulations hence the allegations are farfetched. He urged the court to dismiss the Petition.
10. In a supplementary affidavit sworn on 6.10.21, the petitioner reiterated his earlier averments, that the impugned Regulations were not subjected to public participation. Further that neither the Senate nor the National Assembly conducted public participation. Similarly, the 1<sup>st</sup> respondent did not consult parties that would be directly or indirectly affected by the regulations in accordance with Section 5 of the Statutory Instruments Act. He averred that the Statutory Instruments register of the National Assembly shows that the Regulations were received on 5.5.2020, which was 31 days late, contrary to Section 11 of the Statutory Instruments Act. As such, by dint of Section 11(4), the impugned Regulations are void for want of compliance with the Statutory Instruments Act. Further that the operations of the Criminal Investigation Department, Higher Education Loans Board, Kenya Revenue Authority, Ethics and Anti- Corruption Commission are government entities whose operations are supported by the government through budget allocation. On the contrary, credit reference bureaus are privately owned companies which fund their activities through the proceeds of their business.
11. The court has duly considered the rival pleadings as well as submissions which were highlighted by the parties' respective counsel. The following issues arise for determination:
  - i. Whether the Petition meets the threshold of a constitutional petition.
  - ii. Whether the impugned regulations 28(4) and 32(4) were subjected to public participation.
  - iii. Whether the 1<sup>st</sup> Respondent contravened the provisions of section 11 of the Statutory Instruments Act, 2013.
  - iv. Whether regulation 28(4) of the CRB regulations 2020 violates articles 27 and 40 of the Constitution.
  - v. Whether an order should issue for compensation for damages and loss occasioned to service providers if any.

#### **Whether the Petition meets the threshold of a constitutional petition.**

12. The 1<sup>st</sup> Respondent urged that the Petition be dismissed as it did not meet the threshold of a constitutional petition and has failed to demonstrate how the impugned Regulations violate Articles 1, 10, 24, 26, 27, 28, 40 and 43 of the Constitution. The Petitioner has not demonstrated how the 1<sup>st</sup> Respondent has infringed upon his rights.



13. It is well settled that a party claiming that *the Constitution* has been violated must state with precision the exact provisions violated and the manner in which they have been violated. This was the holding in the case of *Anarita Karimi Njeru v Republic [1979]* eKLR, where the Court stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

14. And in the case of *Julius Meme v Republic & another [2004]* eKLR, Rawal, Njagi, and Ojwang, JJ (as they then were) considered the threshold issue and stated:

The threshold issue is whether or not this constitutional reference was rightly made. Learned counsel Dr Githu Muigai has unequivocally submitted that the constitutional reference, at one remove, raises nonconstitutional questions one notch too high; and at another remove engages this very Court in a purely academic exercise. He cited in support of his contention the very relevant case, *Anarita Karimi Njeru v Republic (No 1) [1979] KLR 154*. The High Court in that case did set out considerations which should guide parties as they seek to file a constitutional reference in the High court. In the words of Trevelyan and Hancox, JJ (at p 156).

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

We are in agreement and adopt this principle as the basis upon which all constitutional references must be founded.

15. I have carefully looked at the Petition. The petitioner alleges that the impugned Regulations violate the provisions of article 10 of the *Constitution* as they were not subjected to public participation. He further alleges violation of the right to property under Article 40 of small and medium enterprises in that they will be forced to forego the fees for issuance of clearance certificate. Further that the right of equality under article 27(3) has also been violated as issuance of other clearance certificates by other entities is charged. There is also the allegation of non-compliance with Section 11 of the *Statutory Instruments Act*.
16. After considering the foregoing, I am persuaded that the petitioner has set out with a reasonable degree of precision that of which he complains, the provisions infringed and the manner of infringement, to form the basis of an inquiry by this court. Indeed, the respondents have been able to respond to the claims made by the petitioner in the Petition. Accordingly, the contention that the Petition does not meet the threshold for a constitutional petition is not merited.

### **Whether the impugned Regulations 28(4) and 32(4) were subjected to public participation**

17. The provisions of which the petitioner complains, are regulations 28(4) and 32(4) of the Regulations which are reproduced hereunder:

28(4) A bureau shall not, in the first instance, charge any fee in respect of a clearance certificate issued to a person for any purpose.



32(4) The Central Bank may review downwards any approved fees or charges if, in its opinion, the circumstances render it necessary.

18. It is the Petitioner's contention that the impugned Regulations were not in the Draft CRB Regulations, 2019 nor were they in the matrix on comments received from stakeholders on the said Draft CRB Regulations. The petitioner further contends that the impugned Regulations were not among the issues subjected to public participation, yet some of the stakeholders made comments on other issues. According to the Petitioner, the impugned Regulations were sneaked into the published Regulations, 2020, thereby making the process lack transparency, accountability and inclusivity. The public and other stakeholders were not granted any opportunity to air their views. Thus, failure by the Respondents to facilitate public participation violated article 10(2) of the Constitution and renders the impugned Regulations unconstitutional null and void.
19. CBK denied the contention by the Petitioner and submitted that in exercise of its constitutional and statutory mandate, under section 57(1) of the Central Bank Act, as read together with sections 31(3) (b) and 33(4) of the Banking Act, it decided in 2018, to review the CRB Regulations, 2013 and called for and received 136 comments from stakeholders. These stakeholders included commercial banks, saccos, micro-finance banks, credit reference bureaus, Kenya Bankers Association and Association of Micro Finance Institutions.
20. Public participation has been entrenched in our Constitution as one of the national values and principles of governance. Article 10 of the Constitution as follows:
  - (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them--
    - (a) applies or interprets this Constitution;
    - (b) enacts, applies or interprets any law; or
    - (c) makes or implements public policy decisions.
  - 2) The national values and principles of governance include--
    - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
    - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
    - (c) good governance, integrity, transparency and accountability; and;
    - (d) sustainable development.
21. The national values and principles of governance stipulated in the above provision are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation is a constitutional imperative, which plays a central role in legislative, policy and executive functions of Government. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views taken into account.



22. In the oft cited South African case of *Poverty Alleviation Network & Others vs President of the Republic of South Africa & 19 Others* CCT 86/08 [2010] ZACC 5, the Court captured the essence of public participation thus:

Engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

23. Similarly, in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, a 5-Judge bench of this court had this to say about public participation:

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others* eKLR while referring to the South African decision in *Doctors for Life International vs Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them.

24. And in *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017]eKLR, the Court of Appeal stated the following regarding public participation:

It is clear that since the promulgation of the *Constitution of Kenya 2010*, the concept of public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that permeates the *Constitution* and in accordance with article 1(4) of the *Constitution* is exercised at both national and county levels.

25. The appellant in that case moved to the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019]eKLR which upheld the decision of the Court of Appeal. The Supreme Court had this to say about public participation:

- (95) Indeed the High Court, Odunga J, in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR, in which case the Learned Judge extensively borrowed from the South African jurisprudence in *Doctors for Life International vs. Speaker of the National Assembly and Others*, illuminated the law of public participation. He emphasized on the seriousness with which public participation should be undertaken:

“75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation



to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forums as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

- (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- (i) As a constitutional principle under article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:



- a. clarity of the subject matter for the public to understand;
- b. structures and processes (medium of engagement) of participation that are clear and simple;
- c. opportunity for balanced influence from the public in general;
- d. commitment to the process;
- e. inclusive and effective representation;
- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

26. The record shows that CBK engaged stakeholders extensively by calling for comments on what they wished to be included in the revision of the CRB Regulations, 2013 and received 136 proposals. CBK stated that the comments and feedback were incorporated in the Draft CRB Regulations, 2019, which is not disputed. The record further shows that in May 2019, the 2nd Respondent invited members of the public and all stakeholders to give their comments on the Draft CRB Regulations, 2019 which were to be received by 17.6.19. All submitted comments and proposals were considered in July 2019 and incorporated or rejected with reasons. The matrix on the proposed review of the CRB Regulations, 2013 and 2019 is indicative of a robust public participation exercise and stakeholder engagement involving Commercial Banks, Saccos, Microfinance Banks, Credit Reference Bureaus, Kenya Bankers Association, Association of Microfinance Institutions and individuals.
27. Further, the constitutional imperative of public participation is met when an invitation to stakeholders is made and views are received and considered. Looking at the record, I am satisfied that CBK ensured and facilitated public participation using reasonable means. The public participation exercise was real and not a mere formality and was purposive and meaningful. The notice issued was reasonable and accorded the relevant stakeholders a reasonable opportunity to engage. None of this is denied by the Petitioner.
28. Among the principles pronounced by the Supreme Court in the *British American Tobacco Kenya case (supra)* is that an allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case. The mode, degree, scope and extent of public participation is to be determined on a case to case basis. Further that there must be inter alia clarity of the subject matter and simplicity of the process for the public to understand. From the comments in the matrix exhibited, it is quite evident that the stakeholders had an opportunity to see and interrogate the Regulations. Further they understood what the Regulations provided and their import and were clear in their minds as to what they wanted included or excluded in the Regulations under review.
29. The essence of public participation therefore is to ensure that the views of stakeholders and affected persons are taken into account in the legislative process and that due process is followed. In the case of *Law Society of Kenya v Attorney General & 2 others* [2019]eKLR, the Court of Appeal speaking to the imperative of stakeholder consultations stated:

Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen. We believe that the principle behind the amendments is what must be interrogated.



The 1st respondent is not possessed of an unfettered or carte blanche leeway to table legislation that is detrimental to the people of Kenya or a section of the citizenry. It must follow due process which includes consultation with stakeholders. The Constitution establishes that mechanism to enable the Legislature make laws that are reasonable, having sought and obtained the views of the people. That is the essence of an accountable limited Government and the shift from the supremacy of Parliament to the Sovereignty of the people birthed by the 2010 Constitution.

30. The petitioner's complaint of lack of public participation is limited to Regulation 28(4) and 32(4). As submitted by CBK, the impugned Regulations were informed by the petition filed in the Senate decrying the financial burden on fresh graduates in obtaining various clearance certificates, including that from Credit Reference Bureaus, when applying for a job. The Senate committee on labour and social welfare that considered the petition represents the people that were bound to be most affected by the Regulations in question. Notably, this issue of the cost of clearance certificates, had been raised by the Credit Information Sharing Association of Kenya. The Senate considered the views of the petitioners therein favourably and made a recommendation to the 1<sup>st</sup> respondent accordingly, in the public interest. The aim was clearly to cushion first time job applicants from the high cost associated with job applications. Regulations 28(4) and 32(4) were thus introduced in the Regulations, pursuant to the recommendation by the Senate in response to a petition by key stakeholders. There cannot therefore be a more significant aspect of public participation than the expression of views in a petition to the Senate and the taking into account of those views.
31. Further, the Credit Information Sharing Association of Kenya addressed the issue of clearance certificates and stated that they should be restricted to employers and government agencies which have no access to credit reports. It went on to state that there have been complaints that clearance certificates are expensive yet banks that have access to credit reports also require the certificates from customers.
32. Additionally, there must not be a deliberate to keep out any stakeholder and the petitioner herein has not demonstrated any such attempt. In this regard I associate with the holding in the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015]eKLR where a 3 judge bench stated in part:

Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

33. It must also be noted that during parliamentary debate on legislation including subsidiary legislation, changes can be made on the floor of the House. It cannot be the law that every time a change is introduced, the bill or statutory instrument in question must be referred back for public participation. If that were the case, then enactment of laws would be an endless process and this is clearly not what was contemplated by the makers of the Constitution. It has also been submitted that the National Assembly has passed the Employment (Amendment Bill)2019 which seeks to amend section 9 of the



Employment Act to waive clearances for prospective job applicants and should only be required at the time of making an offer of employment.

34. After carefully considering the process of promulgating the Regulations as described by the respondents, I am satisfied that there was sufficient stakeholder engagement in the process of promulgation of the impugned Regulations. The contention by the petitioner that the process through which regulations 28(4) and 32(4) were included in the regulations is in violation of the Constitution for want of public participation, is therefore devoid of merit

**Whether the 1<sup>st</sup> Respondent contravened the provisions of Section 11 of the Statutory Instruments Act, 2013**

35. The petitioner submitted that the 1<sup>st</sup> respondent contravened section 11(1) of the Statutory Instruments Act (SIA). It is the petitioner's contention that the Legal Notice No. 55 of 2020 containing the Regulations was published on 8.4.2020. Accordingly, the 1<sup>st</sup> respondent was required to transmit the Regulations to the Clerk of the National Assembly by 14.4.2020. However, the Statutory Instruments Register shows that the Regulations were received by the Clerk on 5.5.2020, well beyond the statutory period provided. The 1<sup>st</sup> respondent did not address this issue in its submissions. On its part, the 2<sup>nd</sup> respondent

36. Section 2 of the Statutory Instruments Act, 2013 (SIA) defines a statutory instrument as follows:

“statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

37. The Regulations fall within the definition of statutory instruments.

38. Section 11 of the Act requires the laying of statutory instruments before Parliament as follows:

1. Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.
2. Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under article 109 of the Constitution, all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.
3. The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.
4. If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect but without prejudice to any act done under the statutory instrument before it became void.

39. Section 11(1), of the Act places an obligation on every line cabinet secretary to ensure that a copy of a statutory instrument is, within 7 sitting days after publication, transmitted to the responsible Clerk for tabling before the relevant House of Parliament. Accordingly, the 1<sup>st</sup> Respondent herein ought to have transmitted the Regulations to the Clerk of the National Assembly within 7 sitting days after 8.4.2020,



the date of publication. Given that the National Assembly sits on Tuesday, Wednesday and Thursday, the Regulations ought to have been transmitted to the National Assembly on or before 23.4.23. The Statutory Instruments Register -2020 however shows that the Regulations were received by the Clerk on 5.5.23, after the stipulated period.

40. In the case of *Republic v Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 others exparte Kenya Country Bus Owners Association & 8 others [2014]* eKLR, Odunga, J. (as he then was) had the following to say regarding compliance with Section 11 of the *Statutory Instruments Act*:

58. The first and in my view the most important issue for determination is the issue of compliance or lack thereof with the provisions of section 11 of the *Statutory Instruments Act*. In Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others vs. Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR, this Court held:

“Section 11(4) of the *Statutory Instruments Act* clearly provides for the consequences for the failure to lay the instrument before the house within the stipulated period and the consequences are that ‘the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.’... Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory.

41. The learned Judge went on to state:

59. Therefore the failure to comply with the provisions of section 11 of the *Statutory Instruments Act* has the effect of rendering the instrument in question null and void and this position was clearly appreciated even by the Respondents.

42. Section 11(4) of the *Statutory Instruments Act* provides that if a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with section 11(1), the statutory instrument shall cease to have effect but without prejudice to any act done under the statutory instrument, before it became void. Section 11 is couched in mandatory terms. Failure to comply with the said provision renders a statutory instrument procedurally defective and the same cannot stand.

43. The court notes that the petitioner seeks the invalidation and nullification of regulation 28(4) of the Regulations only. He has however drawn to the attention of the court, the fact that the 1<sup>st</sup> respondent did not comply with the mandatory requirements of section 11 of the Act, namely to transmit the Regulations to the Clerk of the National Assembly within the stipulated time. Section 11(4) declares as void, statutory instruments not laid before the relevant House of Parliament in accordance with section 11.

44. In *Judicial Review of Administrative Action 5th Edition, Sweet and Maxwell, 1995, 5<sup>th</sup> Edition*, the Rt. Hon The Lord Woolf, Jeffrey Jowell stated as follows on failure to lay a statutory instrument before Parliament:

If however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. It is true that the laying requirements have generally been regarded as directory by both the courts and learned



commentators, but the wording of the 1946 Act is strong (“a copy of the instrument shall be so laid before the instrument comes into operation”) and there is a *dictum* to the effect that these words are to be read in their literal sense.

45. In the present case, the issue is not that the Regulations in question were not transmitted to the Clerk of the National Assembly, but that they were transmitted outside the time stipulated in the law. Is such a seemingly insignificant infraction fatal? The answer lies in the wording of section 11(4) which is instructive. It states:

If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect but without prejudice to any act done under the statutory instrument before it became void. (emphasis).

46. The phrase “in accordance with this section” in the above provision clearly means that a statutory instrument must be transmitted to the responsible Clerk for tabling before the relevant House of Parliament within 7 sitting days after publication. Any tabling after the stipulated period would not be in accordance with the said section. Such breach of the will render the statutory instrument void on the 8th day, saving only, any act done thereunder before the said 8<sup>th</sup> day.

47. In the case of *George Ndemo Sagini v Attorney General & 3 others* [2017]eKLR, Lenaola, J (as he then was) considered the consequences of failure to comply with the timelines set in section 11(1) of the *Statutory Instruments Act* and stated:

43. On a different issue, Odunga J. held in the case of *Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 Others v Cabinet Secretary For Transport & Infrastructure & 5 others* JR No 2 of 2014; [2014] eKLR, that the failure to comply with section 11 of the *Statutory Instruments Act* rendered the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 null and void and the court had no choice but to effect the legislative imperative and to declare that the Regulations were null and void. In particular, the court pronounced itself as follows:

“Section 11(4) of the *Statutory Instruments Act* clearly provides for the consequences for the failure to lay the instrument before the house within the stipulated period and the consequences are that ‘the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void’.”

44. I am persuaded by the reasoning in all the decisions above and in my view, section 11(4) does not give the court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It also follows that the requirement must be read in mandatory terms as opposed to being merely directory.

45. I must also add that section 11(4) of the *Statutory Instruments Act* clearly provides for the consequences for the failure to lay the instrument before the National Assembly within the stipulated period and the consequences are that the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.



48. I concur with the learned judges that the court is bound by the legislative imperative and must declare that the Regulations in question are null and void for non-compliance with the timelines stipulated in section 11(1) of the Act. Had Parliament intended that a Cabinet Secretary responsible for a regulation-making authority submits a statutory instrument to the Clerk of the relevant House at their convenience or whenever they deemed fit, then no timelines would have been set. Parliament was however deliberate, and did stipulate 7 sitting days after the publication of a statutory instrument as the time within which such statutory instrument is to be transmitted to the responsible Clerk for tabling before the relevant House of Parliament. In light of the foregoing, my finding is that by dint of section 11(4), the entire *Credit Reference Bureau Regulations, 2020*, a statutory instrument within the meaning of section 2 of the Act, became void by operation of law and ceased to have effect on the last date by which they ought to have been transmitted to the Clerk of the National Assembly for tabling before the House.

**Whether Regulation 28(4) of the CRB Regulations 2020 violated Articles 27 and 40 of the Constitution**

49. The court has found that the entire *Credit Reference Bureau Regulations* are void for want of compliance with Section 11(1) of the *Statutory Instruments Act*. By Operation of law, the Regulations ceased to have effect immediately after the last day they were to be transmitted to the Clerk of the National Assembly for tabling before the House. In light of this, the question whether regulation 28(4) violated articles 27 and 40 of the *Constitution* is moot and the court need not expend judicial time considering the same.

**Whether an order should issue of compensation for damages and loss occasioned to service providers if any**

50. The petitioner seeks an order of compensation for damages and loss occasioned to service providers if any. No submissions were however made in this regard. In any event, he did not name the service providers in respect of which he seeks the orders nor did he prove by way of evidence the damages or loss incurred. It would also appear that the Petitioner is uncertain as to whether any damages or loss was incurred and hence the use of the phrase “if any”. Additionally, the compensation contemplated in article 23 of the *Constitution* as a remedy, is only available to a claimant who proves denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under article 22, which is not the case herein. Without any proof, the orders sought cannot be granted.
51. CBK is established under article 231 of the *Constitution*. The mandate of CBK is to *inter alia* to formulate monetary policy, promote price stability, issue currency and perform other functions conferred on it by an Act of Parliament. Section 57(1) of the *Central Bank Act* provides that:

The Bank may make regulations, issue guidelines, circulars and directives for the purpose of giving effect to the provisions of this Act and generally for the better carrying out of the objects of the Bank under this Act.

52. Section 33(4) of the said Act, provides as follows:

The Central Bank may issue directions to institutions generally for the better carrying out of its functions under this Act and in particular, with respect to-

- a. the standards to be adhered to by an institution in the conduct of its business in Kenya or in any country where a branch or subsidiary of the institution is located; and



- b. guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system.

53. The foregoing provisions show that CBK was well within its mandate to formulate and publish the Regulations. It is well settled that State agencies must be given the space to discharge their constitutional mandate without interference from courts. Article 165(3)(d) of the Constitution confers upon this court the jurisdiction to determine any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Accordingly, where it is demonstrated that there has been breach of the Constitution or of the law, courts must not condone an illegality and must step in to safeguard the Constitution and the law. In this regard I am guided by the holding in case of Tom Dola & 2 others v Chairman, National Land Commission & 5 others [2020]eKLR where the Court of Appeal spoke to this issue and stated:

In Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR, this court emphasised, and we reiterate, that where the Constitution has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of the Constitution or the law. The court expressed itself thus:

“Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have.”

54. The Regulations were formulated and published by CBK, in line with its mandate. The court is aware that the independence of CBK is secured under article 231(3) of the Constitution, which provides that the Central Bank of Kenya shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions. After publication of the Regulations, the 1<sup>st</sup> respondent was required to ensure that the same are tabled before the National Assembly in accordance with the provisions of section 11 of the Statutory Instruments Act. Regrettably, the 1<sup>st</sup> respondent dropped the ball. It behoves all State organs, State officers, public officers and all persons, including the 1<sup>st</sup> respondent, to comply with the laws of this land; to simply do the right thing. The court has found that the 1<sup>st</sup> respondent acted in contravention of the express and mandatory provisions of section 11 of the Statutory Instruments Act and must therefore apply brakes on the Regulations. The principle of presumption of legality, which in any event is not a finding of legality, cannot save the Regulations, given the clear violation of the law by the 1<sup>st</sup> respondent.

55. Having held as above, the orders that commend themselves to the court are that the Petition is allowed in the following terms:



- i. A declaration is hereby issued that the Banking *(Credit Reference Bureau) Regulations, 2020* made by the 1<sup>st</sup> respondent are null and void for non-compliance with section 11 of the *Statutory Instruments Act*.
- ii. A permanent injunction is hereby issued restraining the respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the Banking *(Credit Reference Bureau) Regulations, 2020*.
- iii. The circumstances of this case do not call for an award of costs.

**DATED AND DELIVERED IN NAIROBI THIS 28<sup>TH</sup> DAY OF AUGUST 2023**

.....

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Petitioner

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent

.....Court Assistant

