



Kenya Commerce Exchange Service Bureau Limited (Kenex v Central Bank of Kenya (Constitutional Petition E181 of 2021) [2022] KEHC 13189 (KLR) (Constitutional and Judicial Review) (30 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND JUDICIAL REVIEW
CONSTITUTIONAL PETITION E181 OF 2021**

HI ONG'UDI, J

SEPTEMBER 30, 2022

BETWEEN

**KENYA COMMERCE EXCHANGE SERVICE BUREAU LIMITED
(KENEX PETITIONER**

AND

CENTRAL BANK OF KENYA RESPONDENT

JUDGMENT

1. The petition dated May 24, 2021 was filed under article 22(1) of the Constitution for the alleged violation of articles 10, 40, 47 and 73 of the Constitution.
2. It seeks orders that: -
 - a) The following declarations be issued against the respondent to the effect that:
 - i. The petitioner is not governed by the Central Bank of Kenya Act, the Banking Act or the National Payment Act as it is not a financial institution or payment service provider to be supervised by the respondent;
 - ii. The actions and decisions of the respondent and its officers in respect of the purported directions and decisions contained in the circular dated May 17, 2021 are null and void and ultra vires the Central Bank of Kenya Act as there are no powers to instigate the breach of contract between the petitioner and its various banking clients;



- iii. The actions of the respondents are oppressive, arbitrary and unconstitutional as the intended action to force all the petitioners' bank clients to breach their contract with the petitioner will contravene article 40(3) of the Constitution that deplores the deprivation of property of any description and cause to lose its investment in Kenya; and
 - iv) The respondent and its director of banking services, Michael Eganza and any other officers of the respondent are in breach of articles 10(2) and 73(a) and (b) of the Constitution and section 7 of the Leadership and Integrity Act by failing to serve the people in an equitable, inclusive, accountable and transparent manner and failing to uphold the rule of law which amounts to abuse of power through intimidation, disregard for property rights and the right to fair administrative action.
- b) An order of certiorari removing into this court for purposes of quashing the decision of the respondent communicated in the circular dated May 17, 2021 requiring banks to stop using third-party bureaus and submitting their SWIFT connectivity business continuity plan to the respondent for review and approval.
 - c) An order of prohibition directed at the respondent, their employees, servants or agents from implementing the directive given by the respondent in the circular dated May 17, 2021 or any future letter or directive pertaining to the petitioner's contracts regarding swift services with its banking clients.
 - d) A permanent injunction restraining the respondent, its directors, servants, agents or otherwise howsoever from interfering with the petitioner's contracts with its banking clients regarding swift services and in any manner whatsoever engaging with any of the petitioner's bank clients with a view to causing them breach their contract with the petitioner.
 - e) Exemplary damages for abuse of office.
 - f) Costs on a full indemnity basis and for two advocates.

The Petitioner's case

- 3. The crux of this petition, as supported by the averments in the petitioner's affidavit sworn on May 24, 2021 by Prakasam Vasu, the managing director is the respondent's circular dated May 17, 2021. This circular directed banks to connect directly to the SWIFT system without involving the petitioner. According to the petitioner this directive breached its constitutional rights.
- 4. He avers that the petitioner is an authorized service bureau, for the Society for Worldwide Interbank Financial Telecommunications (SWIFT). It has been the only bureau of this kind in Kenya since 2002. He depones that the petitioner's service is a messaging network that the financial institutions use to securely transmit information and instructions through a standardized system of codes. He adds that SWIFT is not a legally regulated service across the world. The reason being that it is not a payment service provider, and its operations are overseen by a collaboration of central banks comprising of the G-10 countries with the lead overseer being the National Bank of Belgium (NBB). This is under the SWIFT shared infrastructure programme terms and conditions 2021.



5. He deposes that the petitioner provides a gateway to the SWIFT network and services through the KENEX infrastructure and the proprietary SWIFT alliance access/Gateway software. In this way its role is to extend connectivity to banks to enable them send messages without connecting to SWIFT directly. He deposed that the petitioner is not permitted to send or receive messages or process payments or other messages on behalf of the banks or access the same. In effect, it is not able to distinguish between types of messages sent by banks or their purpose. The messages are therefore managed through a switch managed by SWIFT in their system in Europe.
6. To qualify as a bureau the petitioner is required each year has to meet the certification requirements set out by SWIFT. He deposes that since the SWIFT service is not regulated under any law, the National Bank of Belgium formulated the areas of focus which the bureaus of this kind have to be compliant with at all times. The petitioner has had to maintain the standards set by SWIFT in service delivery since its inception, and it is also ISO Certified (ISO27001/2013).
7. He deposes that in a letter dated January 24, 2018, the respondent directed the petitioner to submit an application to it for regulation under the National Payment Systems Act. In response vide a letter dated January 25, 2018 the petitioner let the respondent know that it was not a payment services provider. Despite this, the respondent sent further correspondence on September 10, 2019 reiterating its earlier message to which the petitioner responded vide a letter dated October 8, 2019.
8. He deposes further that in the absence of a regulatory framework for SWIFT and owing to the role it plays in the financial services, it offered to enter into a co-operation agreement with the respondent there was never a response to the proposal. What followed was a circular to the banks dated May 17, 2021. It related to their connectivity to SWIFT and their back up for business continuity with an aim of supporting the banking and payment systems' stability. Referring to the third parties that connect to SWIFT indirectly, the respondent noted that there had been several incidents of disruption in transmission of payment messages which meant that the system lacked effective business continuity and was further not regulated.
9. He further deposed that on May 17, 2021 the respondent directed banks to migrate from the petitioner's bureau and connect directly to the SWIFT. In addition the banks were required to effect the SWIFT Business Continuity Plan (BCP) and submit confirmation of the connectivity for approval by the respondent. In response to the circular the petitioner wrote to the banks and respondent on May 21, 2021 confirming that it met all the requirements.
10. He avers that according to the respondent's Prudential Guidelines 2013, financial institutions regulated by the respondent are at liberty to choose providers for infrastructure such as SWIFT. Further that the respondent's directive was contrary to its guidelines and beyond its supervisory mandate.

He deposes that the petitioner filed this petition against the respondent for the reason that its actions will prejudice its trade, as it will lose revenue and have to retrench nearly half of its employees. Moreover, it will force the banks to terminate their contracts with it essentially violating its rights under articles 10, 40, 47 and 73 of the Constitution.
11. The petitioner filed a further affidavit dated November 4, 2021 in response to the respondent's replying affidavit of October 19, 2020. In it the petitioner reiterated the contents of its supporting affidavit and maintained its arguments.



The respondent's case

12. The respondent filed a replying affidavit dated October 19, 2021 sworn by Kennedy Kaunda Abuga, it's general counsel.

He deposes that the respondent is not a party to any contract between the petitioner and the alleged banks with reference to their SWIFT connectivity through the petitioner. As such any claim in respect of termination of the said agreements is a contractual dispute between the petitioner and the banks.
13. He deposes that in view of the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272, the petitioner should not only cite provisions of the Constitution but must state the particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court.
14. He avers that the respondent is mandated under the *Banking Act* to license and regulate banks, financial institutions and mortgage finance companies and mortgage refinancing in Kenya. Additionally in exercising its powers under the enabling laws it strives to ensure compliance with international law and international best practices in the banking and financial sector. Under section 33(4) of the *Banking Act* the respondent is to issue guidelines to institutions, in respect of conduct of business and the maintenance of stability and efficiency of the banking and the financial system.
15. He further deposes that under section 17 of the *National Payment Services Act*, the respondent is mandated to formulate and implement policies that best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems. It follows that SWIFT services are subject to it's oversight since the services relate to payments and banking services. Furthermore under section 19 of the *National Payment Services Act*, the respondent may regulate and supervise any payment system. This includes requiring participants of any payment system to provide it with such reports, returns or other information as may be prescribed.
16. He deposes that by a letter dated January 24, 2018, the respondent invited the petitioner for a meeting to discuss the issue of its regulation as a payment service provider in line with the *National Payment Services Act*. In its response dated January 25, 2018 the petitioner denied being a payment service provider within the meaning of the act. The respondent engaged the petitioner in further correspondence and had meetings with it in an effort to acquaint itself with the petitioner's role and operations under SWIFT.
17. He deposes that following the petitioner's contribution in their engagement, the respondent contacted SWIFT and had a meeting with it on June 27, 2018. Besides this the respondent vide a letter dated July 4, 2018 requested SWIFT to provide additional information on its end to end processes and explain its operational and administrative relationship with the petitioner. SWIFT responded vide a letter dated July 12, 2018, and declined to provide the information sought. The denial was based on the fact that such information would depend on the services provided by the petitioner. Additionally, SWIFT made known that the issue of how the petitioner and each of its customers access and use the SWIFT messaging services control is done by a bilateral agreement to which it was not a party.
18. In light of SWIFT's response, the respondent by a letter dated July 24, 2018 requested the petitioner once again provide it with documents relating to its end to end transaction process flow as well as its risk management framework. The petitioner recorded its response in a letter dated July 31, 2018, and attended another meeting with the respondent on January 18, 2019. This was followed up by another letter by the respondent dated January 21, 2019. The contents were on the same issues. Over and above



that, the respondent in its letter dated September 10, 2019 informed the petitioner that it did not seek to apply provisions of the act and regulations that do not apply to it but only those that did.

19. He deposes that the petitioner through a letter dated October 18, 2019 maintained that it did not fall under the purview of the *National Payment System Act* and declined to comply with the respondent's directions as set out in the letter dated of September 10, 2019. In its place the petitioner sought to have a cooperation agreement and regular meetings to brief the respondent on its operations. Essentially, he deposes that according to the definition of "payment service provider" under the Act the petitioner falls squarely under it and thus cannot disqualify itself from it's provisions. This is since being a SWIFT bureau, it stores messages for a limited period of 120 days to assist banks connected through it in its functions of storing such messages.
20. He deposes that in February 2020, the respondent noted failure of SWIFT messages for the Real Time Gross Settlement (RTGS) system of nine institutions connected to SWIFT through the petitioner. The respondent in a letter to the petitioner dated February 24, 2020 sought for a detailed report on the root cause of the problem and the measures put in place to ensure such disruptions did not recur. In it's mandate of establishing, regulating and supervising an efficient and effective payment, clearing and settlement system the respondent had noted that third parties providing connectivity to SWIFT to institutions lacked an effective business continuity plan since they are not regulated. This had made it impossible to ensure effectiveness and adequacy of such third parties business continuity plan. In effect this poses a risk in the national payment system.
21. Finally he deposes that the respondent in issuing the letter dated May 17, 2021 was only discharging its constitutional mandate. It simply required the banks to develop and put in place effective SWIFT connectivity (BCP) so as to maintain confidence in the national payment system. Further that what the petitioner seeks amounts to interference with the respondent's constitutional mandate.

The Petitioner's submissions

22. The firm of Rilani advocates on behalf of the petitioner filed written submissions and a list of authorities dated November 5, 2021, supplementary submissions dated November 3, 2021 in response to the respondent's submissions. Counsel identifies the following as the issues for determination:
 - i. Whether the constitutional petition herein is competent.
 - ii. Whether the petitioner is a payment service provider under the *National payment systems Act*.
 - iii. Whether the petitioner's right to fair administrative action was violated by the respondent.
 - iv. Whether the petitioner's right to property was violated by the respondent
 - v. Whether the respondent and its officers are liable for abuse of power and arrogation of duty under the common law tort of public misfeasance.
 - vi. Whether the respondent through its officers have violated and acted in breach of chapter 6 of the *Constitution*.
23. Counsel on the first issue submits that the petition raises substantial issues on the violation of rights and fundamental freedoms under article 10, 35, 40, 47 and 73 of the *Constitution*. As such counsel notes that it is only the High Court that has the jurisdiction to determine issues as regards violation of fundamental rights as held in the case of:



- i. [John Juma & 2 others v Patrick Libanda & another; Zedekiah Orera & 4 others \(Interested Parties\)](#) [2018] eKLR.
 - ii. (ii) [Leonard Otieno v Airtel Kenya Limited](#) [2018] eKLR.
24. He similarly submits that the petitioner has pleaded and set out with a degree of precision the rights that have been infringed and the manner in which they have been infringed thus satisfying the threshold in [Anarita Karimi Njeru](#) (supra) and [Harriet Muihaki Muchiri v Crescent Tech Limited](#) (2021) eKLR.
 25. On the second issue, he refers to the definition set out under section 2 of the [National Payment System Act](#) that the petitioner is a service bureau that only provides a gateway to SWIFT network. This means therefore that their role is limited to extending connectivity to banks to enable them send messages without essentially connecting to SWIFT directly. It follows that the petitioner is not permitted to send or receive messages or process payments or other messages on behalf of banks. It is therefore not a payment service provider under the [National Payment System Act](#).
 26. On the third issue, he submits that the respondent's actions show disrespect for the rule of law and a violation of article 47 of the [Constitution](#) as observed in the case of [Judicial Service Commission v Mbalu Mutava & another](#) [2015] eKLR. Counsel argues that the respondent in directing all banks to move to another provider effectively causing the petitioner's clients to terminate their contracts with the petitioner was illegal and an outright abuse of power. Further, that the entire process was tainted with procedural impropriety, unfairness, breach of the rules of natural justice, bias and so an illegality. What is more is more that the respondent acted contrary to its provision under, part iv clause 4.1.5 of the Prudential Guidelines.
 27. According to counsel, the respondent under its mandate is not entitled to procure service providers on behalf of institutions, negotiating for rates on their behalf and marketing such service providers to institutions it regulates nor is it entitled to compel the institutions to use specified service providers. As such, its decision was in excess of its powers and thus ought to be quashed.
 28. To support this argument he relied on the case of [Republic v Communications Authority of Kenya Ex parte Information Communication Technology Association of Kenya](#) (ICTAK) [2021] eKLR where it was noted that acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Similar reliance was placed on the cases of: [Council of Civil Service Unions v Minister for the Civil Service](#) [1985] AC 374; [Githu Muigai & another v Law Society of Kenya & another](#) [2015] eKLR; and [Republic v Registration of societies & 5 others ex-parte Uhuru Kenyatta & 6 others](#) [2007] eKLR, among others.
 29. Counsel additionally submits that the respondent breached the rules of natural justice by condemning the petitioner unheard by not affording it the reasonable opportunity of presenting its case. While relying on the case of [Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co Ltd & another Ex parte Kenya Power and lighting Company](#) (2019) eKLR he argues that the procedural fairness contemplated by article 47 and the [Fair Administrative Action Act](#) demands a right to be heard before any decision affecting a party's right is made.
 30. On the issue of breach of the rule of law and social values and legitimate expectation, Counsel relied on the cases of [Republic v Non-Governmental Organizations Coordination Board Ex-Parte Evans Kidero Foundation](#) [2017] eKLR; and [Accounting Officer Kenya Ports Authority \(Ex Parte\) v Public Procurement Administrative Review Board & 3 others \(Interested parties\)](#) [2019] eKLR among many others.



31. On the fourth issue, he submitted that the respondent's circular dated May 17, 2021 had the effect of forcing all the petitioner's bank clients to breach their contract with it, leading to it being arbitrarily deprived of its property contrary to article 40(3) of the Constitution. To support this argument counsel relied on the Court of Appeal decision in Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others (2019) eKLR where it was held that article 40 of the Constitution provides for the protection of the right to property and forbids Parliament and the State from arbitrarily depriving a person of his or her property.
32. On the fifth issue, he observed that the respondent's actions were in violation of the Constitution and were tainted with disregard for the rule of law. That the respondent and its officers violated article 73 of the Constitution by denying the petitioner business through its circular dated May 17, 2021.
33. Counsel further submitted that the respondent acted dishonestly and in bad faith by not giving the petitioner any notice of its decision requesting banks to abandon 3rd party bureaus in violation of article 73(2)(c) of the Constitution and the rule of law. To support this argument he relied on
 - (i) Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] eKLR;
 - (ii) Republic v Fazul Mahamed & 3 others ExParte Okiya Omtatah Okoiti [2018] eKLR; where it was observed that justice should not only be fair but it should appear to be fair.
34. Counsel submitted that the respondent's officers are guilty of the common law tort of public misfeasance. To buttress this point reliance was placed on Home Talk Developments (Pty) Ltd and others v EkurhuJeni Metropolitan Municipality (225/2016) [2017] ZASCA 77; among others.
He urged the court to find that the respondent and its officers acted contrary to the law, in all its deeds as enumerated above.

The Respondent's submissions

35. The respondent through the firm of TripleOKLaw filed written submissions dated November 16, 2021. Counsel identified the issues for determination as:
 - i. Whether the petitioner falls under the ambit of the respondent and the regulation of National Payment Systems.
 - ii. Whether the respondent violated the constitutional rights of the petitioner.
 - iii. Whether the petitioner sufficiently detailed the alleged breaches of constitutional rights.
 - iv. Whether the petitioner is entitled to issuance of the orders prayed.
36. Counsel on the first issue submitted that section 4A of the Central Bank of Kenya Act confers upon the respondent wide powers to regulate clearing, payment and settlement systems. This mandate is realized by the National Payment Systems Act under section 2 which defines a payment system to mean a system or arrangement that enables payments to be effected between a payer and a beneficiary, or facilitates the circulation of money and includes any instruments and procedures that relate to the system.
37. Further, under section 13 the Act provides that a person proposing to transact the business of a payment service provider shall, before commencing such business, apply to the bank for authorization. Under Regulation 4 (1) of the National payment systems regulations a person who wishes to be authorized as a payment service provider, shall, before commencing such business, apply to the respondent for authorization.



38. Counsel submitted that the respondent has power under section 33 of the advice and *Banking Act* to give / make recommendations to an institution with regard to the conduct of its business generally in the following instances:
- i) Where a business of an institution is being conducted in a manner contrary to or not in compliance with the requirements of the act or in any manner detrimental to the best interests of its depositors or members of the public.
39. Counsel thus submitted that the respondent has broad powers as regards the regulation of payment of service providers and its also empowered to issue directives in instances where there is a threat or systemic risk. In view of this he argues that the petitioner falls within the regulatory and supervisory scope of the respondent. This is since the petitioner plays a critical role in Kenya's payment system connecting most of the local banks to SWIFT. Owing to the nature of its operations, it thus qualifies as a payment service provider and so should be regulated by the respondent.
40. He observed that the petitioner had acknowledged in its letter dated January 25, 2018 that SWIFT stores messages for a limited period of 120 days to assist banks in their connectivity which falls within the definition of a payment service provider as per the Act. He thus submitted that the fact that SWIFT bureaus including the petitioner are audited and regulated by SWIFT, its policies and procedural frameworks do not bar the petitioner from being further regulated by the respondent at a national level.
41. Counsel further noted that the petitioner in its letter dated January 25, 2018 stated that as per its policies it could only divulge confidential information to the central banks of the countries where the banks are domiciled. He thus argued that this fact revealed that the central banks of the individual countries through which the petitioner provides connectivity enforce some type of regulation on the activities of the petitioner and the respective banks. This he submits is similar to what the respondent is doing.
42. To support this argument counsel cited the Supreme Court case of *Alnasbir Popat & 7 others v Capital Markets Authority* [2020] eKLR where it was appreciated that courts must ensure that bodies seeking to perform their public duty are not unduly hampered in their work and that the purpose of the legislature, if it be the source of their jurisdiction, is respected and realized as it has been expressed.
43. Supplementary support was placed on the case of *Susan Wambui Kiguru and others v Attorney General and another* (2012) eKLR, *Richardson and David Limited v Kenya Deposit Insurance Corporation & another* [2015] eKLR. For the reasons stated above counsel noted that the petitioner is a payment service provider within the meaning of the Act.
44. On the second issue he submitted that the respondent did not act in breach of the petitioner's rights nor violate any constitutional provisions. Further that although the petitioner made allegations of violation of its rights it did not disclose the manner in which the respondent violated the said rights nor acted ultra vires whilst exercising its mandate and acting within its powers.
45. On the third issue, counsel argued that the respondent did not in any way violate article 47 of the *Constitution* or the *Fair Administrative Act* as alleged. He referred to the various correspondences between them which were initiated by the respondent. It is counsel's submission that the respondent did not at any time direct the banks to terminate their contracts with the petitioner but simply asked them to put in place a backup following the petitioner's system failure.
46. He noted that the respondent is not privy to any contract on SWIFT connectivity between the petitioner and the banks and so cannot direct the latter to terminate the said contracts. To support this argument counsel cited the case of *Savings & Loan (K) Limited v Kanvenje Karangaita Gakombe*



Ɖ another [2015] eKLR where it was held that the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract.

47. Counsel contended that the respondent did not deprive the petitioner of its property but rather issued the directive dated May 17, 2021 as a preemptive measure in the exercise of its mandate. He submitted that the petitioner's rights are derogable and may be reasonably limited if the enjoyment of these rights by the greater public is at risk as appreciated by the court in the cases of:-
- (i) Judicial Service Commission (*supra*).
 - (ii) Richard Dickson Ogendo Ɖ 2 others v Attorney General Ɖ 5 others [2014] eKLR.
48. Turning to the third issue counsel submitted that the petitioner had not sufficiently pleaded with clarity and precision the constitutional provisions allegedly violated, as set out in Mumo Matemu v Trusted Society of Human Rights Alliance Ɖ 5 others [2013] eKLR and Elisabeth Kurer Heier Ɖ anor vs County Government of Kilifi Ɖ 4 others [2020] eKLR. He stressed that the petition failed to meet the set standard as the allegations on constitutional infringement were imprecise, generalized and failed to give proper notice of the nature of the claim being made. He made reference to the Court of Appeal case of Musa Ogaro Osoro v Wilfred N Gutwa (Director of Human Resource) Ɖ 3 others [2021] eKLR where it was emphasized that clear, concise and precise pleadings are necessary in a constitutional petition, in order to determine the constitutional violations.
49. Lastly counsel submitted that the petitioner is seeking to interfere with and curtail the discharge of the respondent's constitutional and statutory mandate. Further that granting of the orders sought would result in risks as experienced on 20th and February 22, 2020. He thus urged this court to dismiss the petition.

Analysis and Determination

50. Having carefully considered the pleadings, submissions, and cited authorities herein I find the following issues to arise for determination:
- i. Whether the petitioner is a payment service provider under the National Payment Systems Act.
 - ii. Whether the respondent violated the petitioner's rights under articles 10, 40, 47 and 73 of the Constitution.
 - iii. Whether the petitioner is entitled to the reliefs sought.

Issue No (i) Whether the petitioner is a Payment Service Provider under the National payment systems Act

51. The premise of this case as can be discerned from the pleadings is the respondent's circular dated May 17, 2021. The petitioner contends that the issuance of this circular to the banks who are its clients ended up violating its constitutional rights under articles 10, 40, 47 and 73 of the Constitution. The respondent opposed the petitioner's assertion arguing that its actions were well in line with its mandate as stipulated under its enabling laws and specifically the National Payments System Act.
52. The petitioner's contention is that its operations are not governed by the laws of Kenya and neither is it governed by the respondent's enabling laws. It's argument throughout is that it is not a financial institution or a payment service provider within the meaning of the National Payments System Act. It



has stressed that it specializes in providing software solutions for banks in Kenya and around the world by facilitating connectivity to the Society for Worldwide Interbank Financial Telecommunications (SWIFT) as one of the third party authorized service bureaus.

53. It explains that SWIFT is a messaging network that financial institutions use to securely transmit information and instructions through a standardized system of codes. This service enables banks to communicate financial information with other banks and financial business entities around the world in order to facilitate the transfer of funds from one bank to another.
54. The SWIFT corporate rules under clause 1.1 show that SWIFT is a global member-owned cooperative and the world's leading provider of secure financial messaging services. Clause 1.2 provides that this service is governed by the Belgian law. Further, Clause 1.3 states that due to SWIFT's important role as a provider of messaging services through provision of a smooth functioning worldwide financial system its oversight is overseen by the central banks of the G10 countries with the National bank of Belgium being the lead overseer.
55. Further the SWIFT Shared infrastructure programme terms and conditions 2021 govern the relationship between SWIFT and the service bureaus that offer shared infrastructure services. The terms and conditions hence set out the eligibility criteria for admission by SWIFT as a service bureau and its roles and responsibilities.
56. The respondent's argument in view of the petitioner's function in the SWIFT platform is that the service ought to be regulated under the [National Payment System Act](#) at a national level. An examination of the law is imperative to answer the question posed by the parties.
57. To begin with the purpose of the [National Payment System Act](#) in its preamble is to make provision for the regulation and supervision of payment systems, payment service providers and for connected purposes. section 2 of the [Act](#) defines a 'payment service provider' to mean:
 - i. a person, company or organisation acting as provider in relation to sending, receiving, storing or processing of payments or the provision of other services in relation to payment services through any electronic system;
 - ii. a person, company or organisation which owns, possesses, operates, manages or controls a public switched network for the provision of payment services; or
 - iii. any other person, company or organization that processes or stores data on behalf of such payment service providers or users of such payment services;
58. On interpretation of a statute the Court of Appeal in the case of [County Government of Nyeri & another v Cecilia Wangechi Ndungu](#) [2015] eKLR guided as follows:
 - “ 14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. [Halsbury's Laws of England](#), 4th Edition (Reissue), Butterworths, 1995, Vol 44(1), para 1372 provides:-

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an act is to ascertain the intention of parliament as expressed in the act, considering it as a whole in its context...”



15. The intention of a statute can be identified through a number of factors. In *Cusack v Harrow London Borough Council* [2013] 4 ALL ER 97, the Supreme Court observed:-

“Interpretation of any document ultimately involves identifying the intention of parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose...”

59. Guided by this principle, my interpretation of the above provision is that the wording of section 2 of the *Act* on who qualifies as a payment service provider does not strictly refer to one who sends or receives messages or processes payments or other messages on behalf of the banks as argued by the petitioner. In my view that is a narrow view and misconception of the law. Though the petitioner does not make the payments or send the messages, it cannot dissociate itself from the process since it is its platform through SWIFT that is used by the banks to send and store these messages or make payments. This clearly is the definition encompassed above. section 2(iii) is very clear on this.
60. It is reasonable to infer from the act that parliament’s intention in establishing the payment service provider was not exclusively for institutions making payments or sending and receiving such messages. Rather the aim was to incorporate systems of the whole process involving the payment system. This stems from the fact that section 2 of the *Act* defines a payment system as a system or arrangement that enables payments to be effected between a payer and a beneficiary or facilitate the circulation of money and include any instruments and procedures that relate to the system.
61. The petitioner has stated that its role in the process as deposed in its affidavit is to extend connectivity to banks to enable them send messages without connecting to SWIFT directly. In essence the petitioner is a facilitator in the banks payment system hence falling within the meaning of a payment service provider as provided under the *National payments system Act*.

Issue No. (ii). Whether the respondent violated the petitioner’s rights under articles 10, 40, 47 and 73 of the Constitution

62. The petitioner’s contention of constitutional rights violations is founded on the respondent’s circular dated May 17, 2021. I find it relevant to reproduce the circular’s contents verbatim for reference. The said circular provided as follows:

May 17, 2021

Connectivity to SWIFT and back-up for business continuity to support banking and payment systems stability

The Central Bank of Kenya (CBK) plays a critical role to safeguard the stability and proper functioning of Kenya’s financial system. In addition, the CBK is mandated with the responsibility of establishing, regulating and supervising an efficient and effective payment, clearing and settlement system. In this regard, commercial banks, microfinance banks and mortgage finance companies (“institutions”) regulated by CBK have a direct role in supporting stability through effective Business Continuity Planning (BCP).

As you are aware, your institution connects to SWIFT through a third party. In 2020, CBK noted several incidents of disruption in the transmission of payment messages from institutions that connect to SWIFT through third parties. Third-party connectivity channels that are not regulated and lack effective BCP pose risks to the payment system including:



- Failure of institutions to meet their payment and settlement obligations in a timely fashion as required, when third-party provider systems and channels fail;
- Disruption of transmission of payment messages interfering with timely clearing and settlement, leading to inconveniencing customers;
- Systemic risks arising from the disruption of payments in the Real Time Gross Settlement System (RTGS) hence eroding trust and confidence in the national payments system.

The above situation needs to be urgently addressed. This will need institutions connecting to SWIFT through third parties to:

1. Put in place effective SWIFT connectivity BCP to be developed by your institution;
2. Test the BCP to ensure smooth change-over in the event of a failure in the primary channel;
3. Submission of the SWIFT connectivity BCP to CBK for review and approval.

Accordingly, CBK has considered the cost and time it would take for institutions to migrate to effective and direct SWIFT connectivity platform. Following engagement with CBK, SWIFT has agreed to avail a cloud connectivity service ("SWIFT Alliance Lite 2 ") which offers significant technical capabilities, at a reduced cost (see further details at annexes 1 and 2).

The purpose of this letter is to request you to nominate two (2) senior representatives in operations and IT from your institution to attend a virtual meeting on May 31, 2021 at 11:00 am with CBK to discuss the above matter.

Please send the names and email addresses of these nominees to swift@centralbank.go.ke by May 21, 2021. The meeting credentials will thereafter be provided to the nominees.

For any clarification or enquiries, please contact:

SWIFT secretariat

Central Bank of Kenya

Email: swift@centralbank.go.ke

Telephone: +254 20 2863104/3111/3122/3126

Yours Faithfully,

Michael Eganza

Director, banking and payment services.

63. The respondent in rejoinder contended that it had not violated the petitioner's constitutional rights adding that the petitioner had failed to disclose the manner in which it had acted ultra vires whilst exercising its mandate and acting within its powers in the end violating its constitutional rights. The respondent's mandate is established under article 231 of the [Constitution](#) and the [Central Bank of Kenya Act](#). Additionally its functions are set out in various enabling legislations. The [Central Bank of Kenya Act](#) under section 4(1) &(2) provides that the principal object of the respondent is to formulate and implement monetary policy directed at achieving and maintaining stability in the general level of prices and foster the liquidity, solvency and proper functioning of a stable market-based financial system.



64. Further, section 4A of the [Act](#) provides that the respondent is also mandated to:

- 1) Without prejudice to the generality of section 4 the bank shall:
 - a) formulate and implement foreign exchange policy;
 - b) hold and manage its foreign exchange reserves;
 - c) license and supervise authorised dealers;
 - d) formulate and implement such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems;
 - e) act as banker and adviser to, and as fiscal agent of the government; and
 - f) issue currency notes and coins.

2) In subsection (1) (d).

“clearing” means the process of transmitting, reconciling and confirming payments prior to settlement, including the netting of payments and the establishment of net positions for settlement;

“payment system” means a system of instruments, procedures and rules for the transfer of funds among system participants;

“settlement” means an act that discharges financial obligations between two or more parties.

65. In light of the purposes of the act in question, (the [National Payment System Act](#)) the respondent is mandated under section 3 of the [Act](#) as follows:

- (1) The Central Bank may, by notice in the gazette, designate a payment system for the purposes of this act, if it is of the opinion that:
 - a) the payment system poses systemic risk;
 - b) the designation is necessary to protect the interest of the public; or
 - c) such designation is in the interest of the integrity of the payment system.
- (2) The notice designating a payment system under subsection (1) shall specify—
 - (a) the payment system that is the subject of the designation;
 - (b) the operator of the payment system that is the subject of the designation; and
 - (c) any terms and conditions to which the designation may be subject.



- (3) The central bank shall give a written notice of designation of a payment system to the operator of the payment system that is the subject of designation.
- (4) The central bank may revoke or vary any designation made under this section by—
 - (a) amending or revoking any condition to which the designation may be subject; or
 - (b) making the designation subject to a new condition or conditions.
- (5) In determining whether or not to revoke or vary a designation, the Central Bank may have regard to any or all of the following matters
 - (a) failure by the designated payment system to comply with any condition to which the designation may be subject;
 - (b) whether or not the designated payment system has ceased to operate;
 - (c) whether or not the designated payment system operator has knowingly furnished information or documents which are false or misleading in any material respect to the Central Bank in connection with the designation of the system;
 - (d) whether or not it is in the public interest to revoke the designation;
 - (e) any other matter that the Central Bank may deem appropriate.
- (6) The revocation of a designation or the variation of the conditions to which a designation is subject shall not—
 - (a) have retroactive effect;
 - (b) affect the validity or enforceability of the rules of the designated payment system, nor shall it affect any payment to or out of the account of a payment system participant or netting or settlement that took place, prior to the coming into effect of such revocation or variation.
- (7) Revocation of designation of a payment system or variation of conditions thereof, if any, shall be by notice in the gazette, and advice thereof shall be given in writing to the designated payment system operator.
- (8) Without prejudice to section 32 (1), an operator of a payment system shall, upon advice by the Central Bank to that effect, and within such period as the Bank may prescribe, apply for the designation of the payment system under this act.
- (9) A person who, upon receipt of advice from the Central Bank in accordance with subsection (8)—
 - (a) fails or refuses to apply for designation of a payment system in accordance with the advice; and



- (b) continues to operate a payment system that has not been designated under this act commits an offence.

66. Undoubtedly, the respondent's mandate in the context of this case is legally sanctioned in the management of Kenya's payment system through the various payment service providers in accordance with the dictates of the law. Suffice to say the dispute herein stems from the respondent's circular which the petitioner argues directed banks to connect to SWIFT directly essentially violating the respondent's Prudential Guidelines 2013 which provide that financial institutions regulated by the respondent are at liberty to choose providers for their infrastructure.
67. A look at the contents of the respondent's circular reveals that its contents were in line with its mandate as the supervisory authority of the banks. From my reading, the respondent's circular did not in any way direct the banks to unsubscribe from the petitioner's service as a third party to SWIFT.
68. The overall objective of the respondent's mandate under section 4A (1)(d) of the *Central Bank of Kenya Act* empowers is to implement policies as best to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems in the interest of the integrity of the payment system under the *National Payment Services Act*. It follows that the petitioner had the duty to demonstrate how the respondent had acted ultra vires in discharging this mandate. I have not found this demonstrated as required by the law.
69. This court takes cognizance of the fact that where the law outlines powers and functions of a body and the same are carried out in accordance with the law and constitutional principles, it will not interfere. The petitioner had the duty and/or burden to show that the respondent had acted outside this mandate.
70. Likewise in respect of the petitioner's contracts with banks, the petitioner did not submit any specific contract which may have been affected due to the respondent's circular. The allegation that the impugned circular would interfere with the contracts required evidence of the specific contracts for this court to determine how the respondent's direction would negatively affect the said contracts owing to the terms and conditions therein. Furthermore, the banks who would in like manner be affected by the implication of the breach of the contract with the petitioner were not parties to the instant petition. As such the court is inept to make a determination on breach of contracts not before it. Moreover, whether the respondent in light of these contracts violated its Prudential Guidelines 2013 as averred, is neither here nor there.
71. It is evident from the material placed before this court that the respondent had through numerous correspondences and meetings sought to engage the petitioner with reference to the purposes of the Act in question, and impugned circular. The petitioner took a firm stand on what it believed hence the matters before this court. The petitioner cannot therefore turn around and claim that it was never given an opportunity to put its case forward or be heard. The fact that the two parties did not agree in the meetings does not mean its right to fair administrative action was violated.
72. From the foregoing, it is my humble finding that the respondent did not violate the petitioner's rights under articles 10, 40, 47 and 73 of the *Constitution*. The respondent acted within its constitutional and statutory mandate. The petitioner has failed to prove its case to the required standard. It is therefore not entitled to any of the reliefs sought.
73. The upshot is that the petition lacks merit and is dismissed with costs.

Orders accordingly.



**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN
OPEN COURT AT NAIROBI.**

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

