



**Allianz Savings v Attorney General & 2 others (Constitutional Petition
05 of 2020) [2022] KEHC 13239 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 05 OF 2020**

JN KAMAU, J

SEPTEMBER 26, 2022

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 27, 40, 41, 43,
47, 48, 50, 157, 159 AND 160 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

**ALLIANZ SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED PETITIONER**

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

JUDGMENT

Introduction

1. In its petition dated January 10, 2020 and filed on January 31, 2020, the petitioner herein sought the following orders:-
 - a. A declaration that the orders freezing the operations of its bank account without being accorded a hearing and in cases/applications in which it was not a party were unconstitutional and lacked procedure and were in breach of its right to property.
 - b. An order immediately lifting and setting aside the orders made vide Kisumu Chief Magistrate's Court, Miscellaneous Criminal Applications Nos 128 of 2015 and 10 of 2016 freezing and/or stopping operation of bank account numbers 7542410016 at Commercial Bank of Africa Limited and 1156759382 at Kenya Commercial Bank Limited both in its name and it be at liberty to run/operate the same.



- c. An order is hereby issued to M/S Commercial Bank of Africa Limited and M/S Kenya Commercial Bank Limited to immediately unfreeze bank account numbers 754210016 and 1156759382 and allow it to run and/or operate its bank accounts.
 - d. Costs of this petition be borne by the respondents.
2. The petitioner's written submissions were dated November 12, 2021 and filed on November 15, 2021 while those of the respondents were dated December 7, 2021 and filed on December 9, 2021.
 3. The judgment herein is based on the said written submissions which the parties relied upon in their entirety.

The Petitioner's Case

4. The petition herein was supported by the affidavit of the petitioner's chairman, Michael Ochieng Onyango. The same was sworn on January 10, 2020.
5. The petitioner's case was that it was duly registered on July 17, 2014 as per its certificate of registration and that its aforesaid chairman was charged in Kisumu Chief Magistrate's Court Criminal Case No 79 of 2016 Republic vs Michael Ochieng Onyango with twelve (12) counts of obtaining money by false pretences contrary to section 313 of the *Penal Code* Cap 75 (sic) (Laws of Kenya).
6. It pointed out that the Banking Fraud Investigations Unit of the Central Bank of Kenya sought and obtained orders in Kisumu Chief Magistrate's Court Miscellaneous Criminal Applications Nos 128 of 2015 and 10 of 2016 (sic) to freeze its account numbers 75422410016 at Commercial Bank of Africa Limited and 1156759382 at Kenya Commercial Bank Limited pending investigations.
7. It was its contention that upon acquittal of its said chairman, it made several applications for the unfreezing of the said accounts but the same had not been unfrozen due to opposition by Directorate of Criminal Investigations and the Director of Public Prosecutions.
8. It was emphatic that it was not accorded a chance of being heard before the orders freezing its bank accounts were issued and its members and shareholders had been denied access to their money which was in breach of their constitutional right to property.
9. It therefore urged this court to order that the impugned orders be vacated and that it be allowed to operate and run its said accounts.

The Respondents' Case

10. The respondents opposed the petition herein vide a replying affidavit that was sworn by Martin Ndegwa, the officer in charge of the Banking Fraud Investigation Unit at Kisumu on October 14, 2021. The same was filed on even date.
11. They averred that the Banking Fraud Investigation Unit was a branch of the Directorate of Criminal Investigation under the general command of the Inspector General of Police and had the mandate to receive and investigate fraud complaints from commercial banks, other financial institutions and parastatals and to recover stolen funds and assets with a vision of restituting the same to the legal owners through the legal system.
12. They confirmed that criminal charges were preferred against the aforesaid Michael Onyango in Criminal Case No 79 of 2016 and that he was discharged on the grounds that the prosecution failed to discharge the burden of proof beyond any reasonable doubt but that such a discharge did not amount



to a declaration of innocence. It was their averment that persons with complaints against the petitioner could still enforce their rights in accordance with private law.

13. They pointed out that after acquittal, the said Michael Onyango applied to the trial court for the setting aside of the freezing orders but the court disallowed his application. They added that his application to review the orders of the trial court was dismissed by the High Court on the ground that the best forum for resolving disputes emanating from Sacco was the Sacco Tribunal and that it had no jurisdiction to entertain this matter.
14. They asserted that millions of shillings held in the petitioner's accounts belonged to members of the public whose interest this court had an obligation to protect. They were emphatic that the investigation file had not been closed as the matter would proceed as a civil case in the Sacco Tribunal. They stated that though the petitioner was a Sacco, it was a pyramid scheme and the ends of justice would be better served by not granting the orders sought.

Legal Analysis

15. Having considered the petition and respective parties' written submissions, it appeared to this court that the issues that had been placed before it for determination were:-
 - a. Whether or not this court had jurisdiction to hear and determine the petition herein;
 - b. Whether or not the petitioner's constitutional rights had been infringed upon;
 - c. If so, what reliefs was he entitled to; and
 - d. Who was to bear the costs of this petition
16. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

I. Jurisdiction

17. The petitioner relied on the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR where the Court of Appeal held that a court's jurisdiction flowed from either the *Constitution* or legislation or both and that a court could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.
18. It submitted that the High Court had jurisdiction to hear and determine issues relating to the breach or threatened breach of fundamental rights and freedoms that were set out in the *Constitution* as provided for under article 23 (1) and 165(3) of the *Constitution*.
19. It argued that contrary to the assertions by the respondents, under section 76 of the *Co-operative Societies Act* (cap 490), the Co-operative Tribunal's mandate was limited to hearing and determining disputes concerning the business of a co-operative society among members, past members and persons claiming through members, past members and deceased members or between members, past members or deceased members and the society, its committee or any officer of the society or between the society and any other co-operative society.
20. It asserted that the respondents averment that the grant of the orders sought for herein would visit injustice upon innocent members of the public. It was argued that this was an attempt to plead on behalf of unnamed persons was not borne by evidence but by allegation. It was its submission that this court had the requisite jurisdiction to entertain, hear and determine its petition.



21. On their part, the respondents' averment that the applications to set aside the freezing orders were dismissed by both the trial court and the High Court and therefore, the petition herein was *res judicata*.
22. They invoked the definition of *res judicata* which in *Black's Law Dictionary* 10th Edition, was defined as an issue that had been definitely settled by judicial decision. They also placed reliance on section 7 of the *Civil Procedure Act* and the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017]eKLR where the court held that the doctrine of *res judicata* served the salutary aim of bringing finality to litigation and without it, there would be no end to litigation.
23. They were emphatic that the Co-operative Tribunal was seized of the jurisdiction as outlined in section 76 and 76(2) of the *Co-operative Societies Act*.
24. The law pertaining to the doctrine of *res judicata* is captured under the provisions of section 7 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) which states that:-

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court (emphasis court).”
25. In the case of *ET vs Attorney General & another* [2012] eKLR, it was held that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy. It further held that the test was whether the plaintiff in the second suit was trying to bring in another way, a new cause of action, which had been resolved by a court of competent jurisdiction.
26. This court noted that although the respondents argued that the petition herein was *res judicata*, they did not annex the alleged High Court decision and/or provided the eKLR citation which could have assisted this court in tracing the said decision on the Kenya Law reports website to enable it determine if the issues the petitioner had raised herein were *res judicata*. The petitioner did not also annex a copy of the ruling from the High Court and/or submit on the issue of *res judicata*.
27. It is trite law that he who alleges must prove. Having raised the issue of the petition herein having been *res judicata*, it was incumbent upon the respondents to have provided this court with sufficient evidence as required under section 107 of the *Evidence Act* Cap 80 (Laws of Kenya) that stipulates that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.
28. Section 108 of the *Evidence Act* states that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
29. Further, section 109 of the *Evidence Act* provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



30. It was clear that the burden of proof as regards the question of whether or not the petition herein was *res judicata* lay with the respondents herein. The petitioner was under no obligation to adduce such evidence. Accordingly, in the absence of any evidence to verify the respondents' assertions, this court was not persuaded to find that they had ably demonstrated that the proceedings herein were *res judicata*.
31. Notably, article 23 of the Constitution of Kenya, 2010 gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the bill of rights. It states as follows:-
1. The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.
 2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.
 3. In any proceedings brought under article 22, a court may grant appropriate relief, including—
 - a. a declaration of rights;
 - b. an injunction;
 - c. a conservatory order;
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
 - e. an order for compensation; and
 - f. an order of judicial review.
32. The jurisdiction of the High Court to determine issues of violation of fundamental rights is further cemented by article 165 which establishes the High Court. Article 165 (3) (b) gives the High Court jurisdiction to determine the question of whether or not a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
33. As the petitioner had sought redress for alleged violation of its rights under articles 40 and 50(1) of the Constitution of Kenya, this court thus found and held that it had jurisdiction to entertain this matter by virtue of article 23 and 165 (3) (b) of the Constitution of Kenya.

II. Right To Be Heard And To Own Property

34. The petitioner submitted that the actions, omissions, commissions and/or steps taken by the respondents were injurious and in breach of the right to property as was set out and provided for in article 40 of the Constitution of Kenya.
35. It invoked article 50(1) of the Constitution of Kenya and argued that an adverse order was made in a trial in which it was not a party to and was therefore not accorded a chance of being heard. It added that the making of the said adverse order that affected its right to property was in breach of its constitutional rights. In this regard, it placed reliance on Halsbury's Laws of England Judicial Review (Volume 61 (2010) 5th Edition) at paragraph 639 where it provided that the rule that no person was to be condemned unless that person had been heard was a fundamental principle of justice.



36. It also relied on the case of *Mbaki & others vs Macharia & another* [2005] 2 EA 206 where the court stated that the right to be heard was a valued right and it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.
37. It further submitted that there had been an abuse of the court process and that the allegations by the respondents that investigations were ongoing amounted to abuse of the court process. It added that the 3rd respondent was enjoined to make a formal application in court pursuant to the provisions of sections 118 and 121 of the *Criminal Procedure Code* Cap 75 and accord it a chance to be heard but this was never done as a result of which it was condemned unheard.
38. It asserted that in the warrant to investigate dated January 25, 2016, the 3rd respondent had stated that Account Number 1156759382 was in its name yet the person charged was its said Chairman. It was emphatic that the respondents' actions were, jointly and severally, an abuse of the process of the court and that they were using the concluded case to frustrate its operations.
39. It referred this court to the case of *Republic v Permanent Secretary Ministry of Planning & National Development Ex parte Kaimenyi* [2006] 1EA 353 where it was held that where a body used its power in a manifestly unreasonable manner and refused to take relevant factors into account in reaching its decision, the court could intervene on the ground that the body had abused its power because where Parliament gave a statutory body power to act, it could be implied that Parliament intended that the body would act in a particular manner.
40. It also relied on the case of *Peter George Anthony Costa v Attorney General & another* [2013] eKLR where it was held that where there was an abuse of the court process, there was breach of the petitioner's fundamental rights as the petitioner would not receive a fair trial.
41. On their part, the respondents submitted that the petitioner was not entitled to the orders sought as he had not proved the case of malicious prosecution of one of its directors who was charged with the offence of obtaining by false pretence.
42. They placed reliance on the case of *Nzoia Sugar Company Limited vs Fungututi* [1988] KLR 399 where the court held that an acquittal *per se* on a criminal charge was not sufficient basis for grounding a suit for malicious prosecution as spite or ill will had to be proved against the prosecutor.
43. They pointed out that the petitioner had failed to prove that there was spite, ill will and lack of reasonable cause in freezing the bank accounts and arraigning one of its directors in court. They were emphatic that this claim could not stand as the threshold for malicious prosecution had not been met and that all the four (4) elements had not been proved as was stated in the case of *Bethwel Omondi Okal v Attorney General and another* [2018] eKLR.
44. They added that the Banking Fraud Investigation Unit acted reasonably and within its mandate to seek freezing orders. It was their contention that they had no cause of action (sic) and that their acts could only be construed to have been done in good faith to safeguard the public interest.
45. Notably, the freezing of the petitioner's accounts resulted from a legal process as there was need for investigations to be conducted following complaints that were received by the police and for the trial court to determine the case on merit. Having applied for the impugned orders to be set aside which was rejected, the petitioner still had a chance of appealing the said decisions of court in the event that it was aggrieved.



46. This court was alive to the fact that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court if the relief sought falls within the ambit of article 23 and article 165 (3) of the Constitution of Kenya. In deciding whether to entertain a suit, the court must therefore take into account the existence of such a remedy and its application to the issues at hand. Indeed, the court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in constitutional petitions.
47. This court noted that the petitioner was not a party to the criminal proceedings against its aforesaid chairman. However, it could not have been enjoined in the proceedings when its accounts were frozen as the offence could only have been committed by a natural person.
48. Having said so, a perusal of the warrant to investigate accounts indicated that the account would not be operated from the date of service of the said order until investigations were over. The petitioner's chairman was acquitted on February 1, 2018 and cash bail refunded to him on the same date. The respondents did not provide any evidence to show that the investigations were still ongoing.
49. Indeed, it was now more than four (4) years since the petitioner's chairman was acquitted. The sword of Damocles cannot be allowed to hang over the head of the petitioner indefinitely. The complainants, if any were at liberty to institute appropriate proceedings against the petitioner herein, if need be and seek orders to safeguard their interests.
50. As was correctly pointed out by both parties, any dispute between the petitioner herein and its members ought to be resolved by Co-operatives Tribunal as stipulated in section 76 and 76(2) of the Co-operative Societies Act Cap 490 (Laws of Kenya). There was no evidence that there were any proceedings before the Co-operative Tribunal.
51. Notably, article 40 of the Constitution of Kenya provides as follows:-
1. Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - a. of any description; and
 - b. in any part of Kenya.
 2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description; or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in article 27(4).
 3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. requires prompt payment in full, of just compensation to the person; and



- ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
 4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
 5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
 6. The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”
52. Accordingly, in the absence of proof that investigations are on going and/or an order that the freezing of the petitioner’s accounts was pending the hearing and determination of the dispute, if any at the Co-operative’s Tribunal, this court came to the firm conclusion that the continued freezing of its said accounts was an infringement, threat and/or violation of its right to own property contrary to article 40 of the Constitution of Kenya and the petitioner was thus entitled to the unfreezing of its accounts.

Disposition

53. For the foregoing reasons, the upshot of this court’s decision was that the petitioner’s petition that was dated January 10, 2020 and filed on January 31, 2020 was merited and the same be and is hereby allowed in terms of paragraph 35 of the petition as follows:-
1. An order be and is hereby issued to M/S Commercial Bank of Africa and M/S Kenya Commercial Bank Kenya Limited to immediately unfreeze bank account numbers 7542410016 and 1156759382 and allow the petitioner run and operate its accounts.
 2. As costs follow the event, the respondents will meet the petitioner’s costs of this petition.
54. It is so ordered.

DATED AND DELIVERED AT KISUMU ON THIS 26TH DAY OF SEPTEMBER 2022

J. KAMAU
JUDGE

