



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E181 OF 2021

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL

FREEDOMS UNDER ARTICLES 10, 40, 47 & 73 OF THE CONSTITUTION

BETWEEN

KENYA COMMERCE EXCHANGE SERVICE BUREAU LIMITED (KENEX)....PETITIONER/APPLICANT

VERSUS

THE CENTRAL BANK OF KENYA.....RESPONDENT

RULING

1. The Petitioner through a Notice of Motion dated 24th May 2021 seeks the following prayers:-

2. pending the inter partes hearing of this application:

a. A conservatory order be issued restraining the Respondent, its directors, servants, agents or otherwise howsoever form proceeding with the virtual meeting on 31st May 2021 or any subsequent date thereafter seeking to direct all banks and financial institutions to migrate to a different SWIFT connectivity platform from that contractually offered by the Petitioner to its banking and financial institution clients.

b. A temporary order of interdict be issued restraining the Respondent from considering, deliberating and/or making any decision either solely or with any other party in any manner whatsoever regarding the connectivity to SWIFT and back-up for business continuity to support banking and payment systems stability and causing any termination of contracts between the Petitioner and its banking clients regarding SWIFT services pending the hearing and determination of these proceedings.

3. Pending the hearing of the Petition, the Conservatory Orders in prayer 2(a) and (b) be confirmed and the Petition be heard expeditiously.

4. Costs of this Application be borne by the Respondent.

2. The Application is premised on the grounds on the face of the application thus:-

a. By a letter dated 17th May 2021 the Respondent has invited all the banks and financial institutions in Kenya to a virtual meeting with the aim of compelling them to unilaterally terminate their contract with the Petitioner on provision of SWIFT services and move to the Respondent's solely appointed foreign SWIFT provider.

b. The Petitioner has been providing SWIFT services to its various banking clients since 2002 and is now being condemned unheard and will suffer irreparable injury as the Respondent will coerce its clients to terminate their contracts with the Petitioner owing to its dominant role as regulator and using its coercive powers in an abusive manner.

c. The action by the Respondent is illegal, null and void and without any jurisdiction under the Central Bank of Kenya Act or the National Payment Act and in breach of Article 10(2) of the Constitution by infringing on the national values and principles of governance of equity, social justice, good governance, transparency, accountability and sustainable development.

d. The Respondent's actions are oppressive, arbitrary and unconstitutional as the intended action to force all the Petitioners; bank clients to breach their contract with the Petitioner causing the Petitioner to lose its investment in Kenya which will contravene Article 40(3) of the Constitution that deplores the deprivation of property of any description.

e. The Respondent has breached Article 47 of the Constitution and Sections 4(1), (2) and (3) of the Fair Administrative Action Act by refusing to give any reasons to the Petitioner as to why its contracts with its banking clients should be terminated in favour of a foreign entity which action will adversely affect the Petitioner's right to property under Article 40 of the Constitution.

f. The Respondent has breached the rules of natural justice by condemning the Petitioner unheard and making baseless and unsubstantiated accusations in its letter dated 17th May 2021 about purported incidents and disruptions allegedly caused by the Petitioner without providing an iota of evidence to support the spurious allegations or bringing them to the attention of the Petitioner and instead use them as the pretext to instigate the breach of contract between the Petitioner and its banking clients.

g. The Respondent and its Director of Banking and Payment 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 by failing to serve the people in an equitable, inclusive, accountable and transparent manner amounts to abuse of power through intimidation, disregard for property rights and the right to fair administrative action.

3. The application is further supported by supporting affidavit of Prakasam Vasu sworn on 24th May 2021.

4. The Respondent is opposed to the application and filed a Replying Affidavit sworn by Kennedy Kaunda Abuya on 27th May 2021.

5. Mr. Alan Gichuhi and M/s Nzilani Mweu learned Advocates appeared for the Petitioner whereas Mrs. Oduor, learned Advocate appeared for the Respondent. The Petitioner's Counsel reiterated the grounds on the face of the application and contents of the affidavit in support whereas the counsel for the Respondent sought support from the Replying Affidavit.

6. It is Petitioner's case that the Respondent herein issued a circular dated 17th May 2021 to Banks regarding the connectivity to "SWIFT" and back-up for business continuity to support banking and payment systems stability. The Respondent made certain references to the Third Party providing SWIFT services in Kenya. The Petitioner urges that it has been the third Party providing SWIFT services in Kenya since 2002 and provides it for 27 Banks in Kenya contributing to 23% of the Petitioners business.

7. It is contended that the Respondent's circular dated 17th May 2021 directed the Banks to migrate from using the Petitioner's Bureau to connect to SWIFT connectivity platform directly. They then went on to attach a summary of the products and costs from SWIFT Alliance Lite 2, a cloud service provided by SWIFT, stating that they had been engaging the SWIFT to negotiate the costs on behalf of financial institution in Kenya. It is further averred that the Respondent ordered the banks and directed them to nominate two senior representatives in operations and Information Technology to attend a virtual meeting on 31st May, 2021 at 11 am to discuss implementation of the directive.

8. In view of the circular letter and direction by the Respondent, the Petitioner contend that the Respondent does not have the mandate to direct banks to terminate their contracts with the Petitioner and to compel the banks to use a specified SWIFT service provider or, any alternative service to SWIFT or any other network common infrastructure and in doing so is acting ultra vires to it's a mandate under the Central Bank Act as well as abusing its powers as the sole and dominant regulator in the financial sector. It is further contended that the Respondent is further acting in excess of its mandate, abusing its powers and taking a bi-partisan position by marketing a specified product and going ahead to negotiate the rates on behalf of banks who are the Petitioner's clients to terminate their commercial contracts with the Petitioner. As regards the allegation of the Respondent that there were several incidents of disruption in the transmission of payment messages from institutions, that connect to SWIFT indirectly through third party bureaus, which are not regulated and lack effective Business Continuity Planning (BCP) the Respondent state that is false and malicious as the Respondent has not presented any evidence to support its claim.

9. The Petitioner state, that if the meeting intended for 31st May 2021 is held, the Petitioner's / Applicant's client's will be forced to terminate their contract with the Petitioner/Applicant causing irreparable damage and loss to the Petitioner's/Applicant's business. The Petitioner further urge in Providing third party SWIFT services it has contributed to Kenya's economy in the following ways:-

a) the Petitioner has consistently been paying VAT, PAYE and income tax of not less than KES 30,000,000.00 million a year.

b) The Petitioner employs 21 Kenyans who have come to rely on the income from the Petitioner.

c) The Banks have been receiving SWIFT messaging services at a lower rate than they would be if they connected directly to SWIFT under the Respondent's proposed plan. The costs for the banks when they connect directly as per the discounted rates of SWIFT will be KES 83 Million against what they currently incur viz. KES 44 Million.

d) the Petitioner offers competitive rates as well as additional value to its services which are beneficial to its clients which support the clients meet operational standards set out by the Respondent.

e) The Petitioner has been saving the Country's foreign exchange. The outflow in terms of Foreign Exchange will be the equivalent of approximately KES 63 million as against virtually nothing at present.

10. Further it is contended by Respondent's actions to compel Banks to switch to connecting to SWIFT directly the Petitioners' will lose revenue and will have to retrench more than half of their employees. It is stated the Respondent directives in the Circular dated 17th May 2021 would force all the Petitioners' bank clients to terminate their contract with the Petitioner.

11. The Petitioner further state the Respondent has not given the Petitioner any reasons as to why its banking clients should be terminated in favour of a foreign entity.

12. The Respondent in response states that it is not a party to any contract between the Petitioner and alleged Banks on connectivity to SWIFT by such Banks and Financial Institutions through the Petitioner. It is therefore Respondent's submissions that any claim in respect of termination of such agreement is a contractual dispute between the Petitioner and the respective Banks and financial institutions, which are not parties to this Petition, and can only be resolved as and between the Petitioner and each respective Bank or financial institution.

13. The Respondent further aver that the Respondent is a Constitutional body established under **Article 231(1) of the Constitution of Kenya** tasked with certain core obligations under **Article 231(2) of the Constitution of Kenya** including formulating monetary policy in Kenya, promoting price stability, issuing currency and performing any other obligation as provided for by an Act of Parliament. Further it is averred 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 and in discharging its duties, the CBK exercises powers expressly provided under statute, to wit, the Banking Act, the National Payments System Act, the Proceeds of Crime and Anti-Money Laundering Act, 2009, the Prevention of Terrorism Act and the Regulations made thereunder. Further it is contended in exercising its powers under the aforesaid Acts, the CBK strives to ensure compliance with international law and international best practices in the banking and financial sector.

14. The Respondents contend that CBK in exercising of its mandate of establishing, regulating and supervising an efficient and effective payment, clearing and settlement system has noted that third parties providing connectivity to SWIFT to institutions lack effective business continuity planning and as they are not regulated, CBK is not able to ensure effectiveness and adequacy of such third parties BCP. The Respondents further state that the Applicant in seeking to interfere with and stop the discharge of CBK's constitutional and statutory mandate and urged this Court not to grant any conservatory orders as prayed or at all and they submitted that they are ready to proceed with the expeditious disposal of this matter by abiding by all directions as the Court may issue. It is further submitted for the Respondent that in exercising its power as a regulator and requiring institutions to have back up on connectivity to SWIFT for business continuity to support bank and payments, the CBK acted strictly within the remit of its mandate in accordance with the Constitution and the laws of Kenya. It has not exceeded its constitutional or statutory mandate as alleged by the Petitioner.

15. The Respondent aver that if the Orders sought by the Petitioner are granted, there is the risk of financial institutions that are connected to SWIFT through third parties continuing to operate without any back up for business continuity to support banking and payment systems stability and the risks as occurred on 20th February, 2020 will continue to erode trust and confidence in the National Payments System. It is further submitted that the grant of the Orders as sought in the application dated 24th May, 2021 will be to stop the CBK from discharging its constitutional and statutory obligations contrary to the Constitution and the Laws of Kenya.

16. It is Respondent's case that there will be no prejudice to the Applicant if the meeting of 31st May, 2021 proceeds as there are no resolutions or decisions taken by CBK, and the Applicant will be at liberty to challenge the same and or apply for the same to be quashed if indeed the same are unconstitutional. It is urged that the Application as of now is premature.

17. The Application before me is a constitutional application seeking the conservatory orders. A party seeking a conservatory order is required to demonstrate that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. Looking at the application and grounds in support and the Petitioners affidavit in support it is evident that the Applicant / Petitioner has met the threshold required to meet before being granted the conservatory orders sought in the application. The Petitioner / Applicant has demonstrated that he has a prima facie case and further if the orders sought are not granted it would be prejudiced or would stand to suffer prejudice. On the other hand the Respondent has not demonstrated what prejudice it would suffer if the orders are granted.

18. The upshot is that the application is granted in the interim under prayer 2(a) and (b) being as follows:-

a. An Interim conservatory order be and is HEREBY issued restraining the Respondent, its directors, servants, agents or otherwise howsoever from proceeding with the virtual meeting on 31st May 2021 or any subsequent date thereafter seeking to direct all banks and financial institutions to migrate to a different SWIFT connectivity platform from that contractually offered by the Petitioner to its banking and financial institution clients.

b. An Interim order of interdict be and is HEREBY issued restraining the Respondent from considering, deliberating and/or making any decision either solely or with any other party in any manner whatsoever regarding the connectivity to SWIFT and back-up for business continuity to support banking and payment systems stability and causing any termination of contracts between the Petitioner and its banking clients regarding SWIFT services pending the hearing and determination of these proceedings.

c. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY, 2021

.....

J. A. MAKAU

JUDGE