



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NO. E 382 OF 2020

IN THE MATTER OF : ARTICLES 22, 23, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;

AND

IN THE MATTER OF : THE FAIR ADMINISTRATIVE ACTION ACT;

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTISE AND PROCEDURE RULES, 2013;

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLES 35, 40, 47, AND 50 OF THE CONSTITUTION OF KENYA, 2010;

-BETWEEN-

ANTHONY MWANGI NGIGGE t/a

TIINDAH ONLINE SHOP.....APPLICANT/PETITIONER

AND

SAFARICOM LIMITED.....RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through a petition dated 2nd November, 2020, seeks the following orders :-

- a) A declaration that their right to own property and the protection of the said right by the Constitution of Kenya, 2010 in Article 40 has been violated by the Respondent;*
- b) A declaration that the petitioner’s right to fair hearing enshrined in the Constitution of Kenya, 2010 has been violated by the Respondent;*
- c) A declaration that the Petitioner’s right to access of information enshrined in the Constitution of Kenya, 2010 has been violated by the Respondent;*
- d) An order of permanent injunction issued restraining the Respondent either by itself, its agents, servants, employees and/or persons acting under its instructions from in any way blocking/freezing or in any manner interfering with the Applicant/Petitioner’s telephone numbers 0715xxxxxx and 0703xxxxxx and M-Pesa Till account numbers xxxxxx and xxxxxx ;*

e) Compensation for infringement of the Petitioner's right to property under Article 40 of the Constitution; violation of his right to information under Article 35 of the Constitution; violation of his right to fair administrative action under Article 47 of the Constitution and violation of his right to fair hearing under Article 50 of the Constitution;

f) Costs be borne by the Respondent; and

g) Any other and further orders the court may deem fit and just to award

RESPONDENT'S RESPONSE

2. The Respondent is opposed to the Petition and has filed a Replying Affidavit sworn by Daniel Mwanja Nduba, Respondent's Senior Legal Counsel – Litigation dated 14th December 2020.

3. The Respondent contend that on 23rd October 2020 it received a report from NCBA Bank Kenya PLC (hereinafter referred to as NCBA) of alleged fraudulent transactions involving NCBA loop accounts and the Petitioner's telephone numbers.

4. The Respondent upon receipt of the complaint, it carried out an investigation by itself on the transactions involving the Petitioner's telephone numbers and reached a conclusion that the transactions were fraudulent. On the basis of its internal investigation and the report thereof, the Respondent blocked the Petitioner's telephone number and barred him from registering any new telephone number using his details. Perpetually.

5. The Respondent similarly blocked/froze the Petitioner's M-pesa till account on no other ground other than simply that the Petitioner was trading under a business name known as Tiindah online Shop and not on any other reason.

6. The Respondent, additionally avers that the relationship between the parties was contractual and therefore the instant dispute ought to have pursued as contemplated by the parties in the terms and conditions and not before this Honourable Court. The Respondent further stated that there are no justiciable constitutional issues raised by the Petitioner against the Respondent for adjudication by this Honourable Court. It is Respondent's case, that the rights whose violation forms the basis of the instant suit are not absolute rights and are not recognizable under **Article 25** and thus may be limited.

BACKGROUND OF THE PETITION

7. The Petitioner alleges violation of his constitutional rights under the bill of rights as provided for in the **Constitution of Kenya, 2010**.

8. He avers for a period beginning sometime in the year 2017, he was a registered user and subscriber to the services provided by the Respondent. He was registered using two telephone numbers being 0715xxxxxx and 0703xxxxxx and M-Pesa till account numbers xxxxxx and xxxxxx for receiving payments and making payments from and for his business; Tiindah Online Shop.

9. The petitioner avers that on attempt to replace his lost sim card on or about the 29th October, 2020, he learnt from the respondent's agent/employee/servant or representative in Juja that his sim cards to the two telephone numbers had been blocked by the Respondent. He similarly learnt that he had been blocked/restrained in perpetuity from registering/owing or using any new telephone number registered in his personal details.

10. On or about the 26th October, 2020, the petitioner sought to withdraw money held by the Respondent in his M-Pesa till numbers only to be informed that the same had also been frozen/blocked.

11. The Petitioner avers he sought an explanation by writing to the respondent on why they took the said actions against him and the Respondent ignored and/or refused the Petitioner's inquiry thereby necessitating the filing of this Petition.

12. The Petitioner avers that as a result of the Respondent's action, he has been deprived of the right to own property in an unlawful manner, without legal justification or cause.

THE PETITIONER'S SUBMISSIONS

13. The Petitioner vide their submissions dated 10th February, 2021 supported their Petition.

14. They raised six issues for determination which can be summarized as follows.

15. On the issue of whether the petition was rightly before the Honourable Court, the petitioner cited **Article 2 of the Constitution** on the supremacy of the constitution and its binding power on all state organs.

16. He submitted that the Respondent's position that the dispute ought to have been adjudicated in an alternative forum as per **Clause 14** of their contract failed due to the fact that it did not provide a specific forum for dispute resolution, giving the parties liberty to pursue any forum they chose.

17. The Petitioner also submitted that **Article 165 (3) of the Constitution** gave only this Court powers to adjudicate on constitutional violations on the infringements of fundamental freedoms in the Bill of Rights.

18. The Petitioner also averred that his right to information as per **Article 35 (1) (b)** had been violated in the sense that the respondent ignored his complaints when he made an enquiry as to why his telephone numbers and M-Pesa Till Accounts had been blocked. He relied on the case of **Douglas Moturi Nyairo v University of Nairobi [2018] e KLR** to support his averments.

19. He also averred that his right to fair administrative action under **Article 47** had been infringed in the sense that he had been condemned unheard by the Respondent.

20. With regards to his right to property under **Article 40 of the Constitution**, the petitioner averred that his M-Pesa Till accounts; Account numbers xxxxxx and xxxxxx had moneys he could not access as a result of the Respondent freezing his two accounts.

21. The Petitioner averred that his constitutional rights were not limited by **Article 24 of the Constitution**, due to the fact that all the constitutional violations pleaded, were as a result of the respondent's unlawful actions of blocking his telephone numbers and freezing his M-Pesa Till numbers.

22. The Petitioner prayed that his petition be allowed with costs.

THE RESPONDENT'S SUBMISSIONS

23. In response to the petition, the respondent acknowledged that indeed the petitioner is the registered user of telephone numbers 0715xxxxxx and 0703xxxxxx as well as M-Pesa Till numbers xxxxxx and xxxxxx under the trading name Tiindah Online Shop and therefore had a contractual relationship with the Respondent subject to the M-Pesa Customer Terms and Conditions as well as Lipa Na M-Pesa Transacting Till Terms and Conditions for the ownership and use of the above stated numbers.

24. Further virtue of being the registered owner of the above telephone numbers, the Petitioner was subject to **Kenya Information and Communications Act, 1998**.

25. The Respondent avers that on or about the 22nd October, 2020, NCBA Bank Kenya PLC ('NCBA') reported to Safaricom fraudulent transactions processed from their Loop Account xxxxxx via Bank to Customer to two hundred and fifty (250) M-Pesa wallets between 20th and 22nd October, 2020.

26. The respondent avers its risk department conducted investigations into the allegations of fraudulent activities or transactions in its M-PESA system. This investigations revealed that a total of Kshs. 16, 260, 734.00 had been processed from NCBA Loop Accounts through Safaricom's M-Pesa system using two hundred and fifty (250) mobile numbers, which the respondent proceeded to suspend and the same included the petitioner's numbers 0715xxxxxx and 0703xxxxxx .

27. The Respondent raised six (6) issues which may be summarized as follows;

28. On the issue of whether the petition is properly before this court, the respondent submitted that the controversy between the parties is a purely contractual dispute as the same was governed by the M-PESA terms and conditions, annexed as AMN3 of the Petitioner's Supporting Affidavit.

29. The Respondent submitted further that **Clause 15.4** of the Agreement between the petitioner and respondent provides for alternative dispute resolution in case of a dispute which is Arbitration by a single arbitrator.

30. They relied on the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Limited and Another** in support of their assertions.

31. The Respondent equally submitted further that not every dispute that raises or touches on constitutional provisions automatically gives rise to a constitutional claim, it relied on the case of **Bernard Murage v. Fineserve Africa Limited & 3 others** to support its assertions.

32. With regards to violation of **Article 35 of the Constitution**, the respondent averred that the said right is not absolute and can be limited under certain parameters such as if the same is likely to substantially prejudice the commercial interests, including intellectual property rights, of that entity or significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration.

33. The Respondent averred further that if the requested information were to be relayed to the Petitioner before investigations were complete, there was a real apprehension and reasonable fear that the Petitioner would have gotten rid of any information that would be helpful in the consideration of the matter.

34. With respect to the violation of **Article 47 of the Constitution**, the respondent averred that for the same to apply, the applicant ought to have first exhausted available dispute resolution mechanism before seeking court intervention which the petitioner failed to follow.

35. The respondent further averred that its actions were justified and relied on **Clause 13.3** of their terms and conditions where it was compelled by law to suspend or freeze the petitioner's account if there was reasonable grounds to suspect that his account had been or was being used to receive or send funds in connection with any criminal or fraudulent activity.

36. With respect to violations of **Article 40 of the Constitution**, the Respondent cited **Article 40(6) of the Constitution** which states that the right to property does not extend to property that has been found to be unlawfully obtained as is the case with the Petitioner.

37. The Respondent further averred that **Article 50** only applied to criminal or quasi-criminal proceedings as was held in the case of **Judicial Service Commission v Gladys Boss Shollei & Anor**, and that the decision undertaken by the respondent was a purely administrative decision and the Petitioner could not invoke **Article 50(2) of the Constitution**.

38. The Respondent requested the Honourable Court to dismiss the Petition.

ANALYSIS AND DETERMINATION

39. Having carefully considered the Petition dated 2nd November, 2020, the Respondent's Replying Affidavit, the Petitioner's and Respondent's submissions, the following issues arise for determination:

a) Whether the Petition is properly before this court;

b) Whether the Petitioner's Constitutional rights have been violated; or infringed or threatened.

A. WHETHER THE PETITION IS PROPERLY BEFORE THIS COURT.

40. The issue on whether this petition is properly before this Court is of utmost importance. The Petitioner's submission is that despite there being an arbitration clause in the contract between the Respondent, and himself the same do not provide a specific forum for dispute resolution, rather, it created discretion for parties to seek any form of adjudication it felt fit.

41. The Respondent further averred that the controversy between the parties is a purely contractual dispute bound by an arbitration clause and the Petition herein do not raise any constitutional violations to warrant this court's intervention.

42. I find that the constitutional question is therefore of a vital role in the determination of the dispute herein as it deals with the jurisdiction of this Court to hear and determine the matter. The jurisdiction of the High Court is established by the Constitution under **Article 165 of the Constitution of Kenya** which states;

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

Sub article 3 states; Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;

43. Further **Article 23(1) of the Constitution** states;

“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.”

44. Upon consideration of the aforementioned Articles, it is clear, the jurisdiction of this Court has been confined to interpretation of any constitutional question as well as redress for violations of constitutional rights.

45. The Petitioner in the Petition herein averred that his right to property under **Article 40** and his right to access information under **Article 35** has been infringed as a result of the respondent blocking his telephone numbers 0715xxxxxx and 0703xxxxxx and freezing his M-Pesa Till accounts, which have resulted in denying him access to his funds while refusing to give him any form of explanation for the action. The Petitioner urged the Respondent's action has therefore violated his constitutional rights.

46. The Constitutional question is a vital question in determining whether the Petition herein is properly before this Honourable Court.

47. In answer whether the Petitioner is properly before this Court reliance is placed in the case of *C N M v W M G [2018] eKLR*, where this Court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

The Court went on further to state;

“When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider Constitutional rights or values. [17] The issues raised here will only require the Court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others [18]* in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak [19]* notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.” [20]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

48. Upon considering the pleadings and the dispute herein keenly, it is clear that the nature of the dispute herein is of a contract between the parties and not a Constitutional dispute. First and foremost the dispute arises out of an alleged breach of contract between the Petitioner and Respondent, which is merely a civil claim. The Petitioner’s affidavit reflect a claim based on the contract as evidenced in annexure AMN 2, which contains the terms and conditions of the contractual relationship between the Petitioner and Respondent and which binds both parties.

49. According to the aforesaid Agreement, and various clauses therein, gives rise to the cause of action the parties ought to have taken, in case of breach of contract.

50. It is noted, **Clause 15.4** of the terms and conditions provides;

“Any dispute arising out of or in connection with this Agreement that is not resolved by the Safaricom Manager responsible for operations of the M-PESA Services shall be referred to arbitration by a single arbitrator to be appointed by agreement between parties or in default of such agreement within 60 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Chartered Institute of Arbitration (Kenya Chapter)”

51. A Court of law is estopped from rewriting a contract between the parties but is required to apply the terms and conditions of contract between the parties. In reliance of this Respondent referred to the case of *National Bank of Kenya Ltd vs Pipelastic Samkolit (K) Limited and Another*, where the Court of Appeal held:-

“...a Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved.”

52. Considering the case law and facts of this case, I find that the parties are bound by the terms of their contract. In the present petition herein, **Clause 15.4** provides for arbitration which parties have first to exhaust. I find therefore the Petitioner ought to have pursued the alternative Dispute Resolution Mechanism stipulated in the Parties Agreement first and which this Court is constitutionally obligated to promote as provided under **Article 159 (2) (c)**.

53. I further find that the doctrine of constitutional avoidance is applicable in this Petition as this Petition can be decided as a Civil matter without considering the alleged constitutional issues as was stated by the Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others*, where the court stated in part;

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

54. The Petitioner in their submissions have averred that the Respondent having violated his rights as per the provisions of **Article 165 (3) of the Constitution of Kenya, 2010**, no other body is clothed with the jurisdiction to adjudicate the dispute herein, we however disagree with this notion in the sense that the dispute herein is more of a civil dispute arising from a breach of contract, where, the Respondent blocked the Petitioner's telephone numbers 0715xxxxxx and 0703xxxxxx and froze the Petitioner's M-PESA Till Account Numbers xxxxxx and xxxxxx on suspicion of a fraudulent transactions conducted by the said numbers in an attempt to save the public from fraud.

55. I have considered the rival pleadings and submissions, and I respectively note that, the violations the Petitioner avers arise more from a breach of Contractual Agreement between parties rather than constitutional violations. I therefore find the doctrine of Constitutional avoidance relevant and applicable in this Petition as the matter can be decided in a Civil Court.

56. The Petitioner's grievances can be well addressed through arbitration as clearly stipulated in **Clause 15.4** of the terms and conditions of parties Agreement, or should it be very necessary, through a Civil Division, where the Petitioner may sue the Respondent for damages arising from breach of contract, but not through a Constitutional Division which is solely concerned with real or threat or violation and infringements of constitutional rights.

57. I therefore find and hold that the Petition filed herein fails to answer the constitutional question and has been prematurely brought before this Honourable Court. This Court is not the properly forum for now to hear and determine this Petition.

B. WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED OR INFRINGED OR THREATENED.

58. The Petitioner averred that his constitutional rights under **Article 35, 40, 47 and 50 of the Constitution** have been violated, or breached or infringed or threatened.

59. Under **Article 35 of the Constitution**, the Petitioner averred that his Right to information had been violated due to the respondent's failure to give an explanation as to its actions, He further stated that the respondent ignored various communications as to why it had blocked the petitioner's telephone numbers as well as freezing his M-PESA Till Numbers.

60. The right to access to information as enshrined under **Article 35 of the Constitution** is not absolute and can be limited. **Section 6 of the Access to Information Act** provides;

“6. (1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained; (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;”

61. It is clear from the aforementioned section, the Respondent had a reasonable duty of care to withhold information particularly pertaining to suspected fraudulent transaction, since if such information were to be relayed to the Petitioner, before the investigations are conducted and completed, there was real apprehension and reasonable fear that the Petitioner would have gotten rid of any incriminating information which would in turn have the effect of frustrating investigations.

62. As regards allegation to the violation of **Article 47 of the Constitution** on fair administrative action, I find for the same to apply, the applicant ought to have first exhausted available Dispute Resolution Mechanism before seeking court intervention. The Petitioner has not demonstrated before this Honourable Court on any Dispute Resolution Mechanism it followed before seeking the court's intervention.

63. Further, it appears that the Respondent actions were justified having a look at **Clause 13.3** of the parties terms and conditions of Agreement where the Respondent was compelled by law to suspend or freeze the Petitioner's account, if there was reasonable grounds, to suspect that his account had been or was being used to receive or send funds in connection with any criminal or fraudulent activity. This is a necessary action to protect the public against any acts of fraud or criminal activities that may have or are likely to occur in such circumstances.

64. On Petitioners contention of violations of **Article 40 of the Constitution**, the Petitioner averred that as a result of the respondent's action in blocking his telephone numbers and freezing his M-PESA business Till Number accounts, his right to property has been infringed, as a result of the monies, that were being withheld by the Respondent. However, the Respondent cited **Article 40(6) of the Constitution** which provides that the right to property does not extend to property that has been found to be unlawfully obtained as is contended to be the case with the Petitioner. However, I find that the right to own property herein fails to arise, rather, the proper angle would be to sue for damages for breach of contract as a result of the actions of the respondent in blocking his telephone numbers and freezing his M-PESA Till Account Numbers.

65. The Petitioner further urged, that he was not afforded a fair hearing by the actions of the respondent as per **Article 50 of the Constitution**. The Respondent in response averred that **Article 50 of the Constitution** only applies to criminal or quasi-criminal proceedings but not otherwise. The Respondent in support placed reliance in the case of **Judicial Service Commission v Gladys Boss Shollei & Anor [2014] eKLR**, where the Court of Appeal held;

“Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the respondent which, as already noted were neither criminal proceedings nor quasi-criminal proceedings”

66. Considering the above-mentioned Article and the dispute herein, which I find to be civil in nature between the Petitioner and the

Respondent, I find that the same is not concerning criminal or quasi criminal elements against the Petitioner to warrant the pleading of the aforementioned **Article 50(2) of the Constitution**, and further in view of, the decision undertaken by the Respondent being an administrative decision, I find that the Petitioner ought to have challenged the same in a civil suit but not through a constitutional reference.

67. I therefore reiterate, that in my view, a Constitutional Petition ought to raise very clear constitutional issues for the same to be successful. I further find where Constitutional issues are lacking in any purported Constitutional Petition the doctrine of constitutional avoidance should be strictly adhered to. The Petitioner herein ought to have explored other forms of Dispute Resolutions Mechanism as provided in the parties Contract Agreement, before approaching the Court for any remedy. Further should the Petitioner have felt discontented, with any Dispute Resolution Mechanism against the Respondent, the proper avenue to address his grievances should be a Civil Division but not a Constitutional Division.

68. *The upshot is that the Petition herein is premature as the Petitioner has not exhausted Alternative Dispute Resolution Mechanism first and secondly the Petition does not raise any Constitutional issue for this Court's determination. The Petition is therefore struck out with costs.*

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE, 2021.

.....

J. A. MAKAU

JUDGE