



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO 30 OF 2018**

**IN THE MATTER OF ARTICLES 22, 23, 27 AND 258 OF THE**

**REPUBLIC OF CONSTITUTION OF KENYA AS READ WITH**

**SECTION 19 OF THE SIXTH SCHEDULE TO THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED HARASSMENT, DISCRIMINATION,**

**VIOLATION INFRINGEMENT, AND THREAT TO FUNDAMENTAL RIGHTS**

**AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 19, 20, 22, 23, 27,**

**28, 29, 33, 35, 47, 50 AND 159, 258, 259 OF THE CONSTITUTION OF KENYA**

**AND**

**CONTRAVENTION OF THREAT OF CONTRAVENTION OF ARTICLES 3,**

**10, 35, 73, AND 75 OF THE CONSTITUTION OF KENYA**

**BONIFACE LUM AMUNGA BIKO.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**NATIONAL BANK OF KENYA LIMITED.....3<sup>RD</sup> RESPONDENT**

**THE CAPITAL MARKETS AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**THE PETITION**

1. The Petitioner through an Amended Petition dated 12<sup>th</sup> July, 2019 sought the following reliefs:-

a. That a Declaration be and is hereby issued that the interference and misuse by the Respondents of any public body such as the Kenya Police, Directorate of Criminal Investigations and/or the Banking Fraud Unit and the Capital Markets Authority to engineer unlawful arrests of the Petitioner or in any way influence the investigations being carried out by the said public bodies goes against all the tenets of natural justice and is a violation of Articles 29 and 50 of the Constitution.

b. That this Honourable Court be pleased to issue a Declaration that the Respondents have violated the Petitioner's rights, and contravened the Constitution under Articles 3, 10, 19, 20, 27, 28, 29, 33, 35, 47, 50, 73, 75 and 259 of the Kenya Constitution 2010.

c. That this Honourable Court be pleased to issue an order of prohibition permanently prohibiting the Director of Public Prosecutions and or the Directorate of Criminal Investigations from summoning, interrogating, arresting, investigating, instituting or continuing with any criminal prosecution against the Petitioner in connection with or relating to Complaints lodged by the 3<sup>rd</sup> Respondent, being the national Bank of Kenya Limited, to any offences allegedly arising from or connected with the alleged malicious.

d. That the Honourable Court do issue an order of Certiorari to remove into the High Court and quash the decision by the 1<sup>st</sup> Respondent to charge the Petitioner in Criminal Case Number 1604 of 2017 and 2044 of 2017 Republic –vs- Boniface Amunga Biko & Others.

e. That this Honourable Court be pleased to issue an order of Mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to produce to the Court and serve the Petitioner with copies of all the following documents:-

a) Minutes of the alleged Disciplinary meeting held on 31<sup>st</sup> March 2016;

b) Copy of our Client's (Boniface Lum Biko Amunga) signed job description;

c) Boniface Lum Biko Amunga certified payslips form May 2013 to April 2016

d) Boniface Lum Biko Amunga performance appraisal for years 2013, 2014 and 2015

e) Organizational chart of National Bank as at 31<sup>st</sup> Dec 2015 and organizational chart of Corporate, Institutional and Business Banking Division as at 31<sup>st</sup> Dec 2015

f) Particulars of the alleged "key/nonperforming accounts/customers" that our Client is accused of rebooking and or underreporting; and

g) Human Resource Policy regulating termination

h) NBK delegated authority manual

i) NBK credit risk management report 2015

j) Board Paper No. BP/202/10/2015

k) Board Paper No. BP/129/05/2013 credit risk management policy – V.2.0

l) Audit Report by Deloitte and Touche for the period ending December 2015;

m) Audit Report by Deloitte and Touche for the period ending December 2016;

n) Signed Minute of the Board Meeting held on 23<sup>rd</sup> and 24<sup>th</sup> March 2016

o) National Bank of Kenya Limited Special Procedures report dated 31<sup>st</sup> Dec 2016

p) Minutes of the 424<sup>th</sup> board meeting of NBK held on 30<sup>th</sup> Sept. 2015 at 8.30a.m.

q) Board paper No. BP/216/11/2015 – Summary of the tender awards form September 2014 to November 2015

r) Board Paper No. BP/189/09/2015 – Board Financial update

s) Board Paper No. BP/220/11/2015 – Board Financial update

t) Board Paper No. BP/148/07/2015 – Board Financial update

u) Board Paper No. BP/37/02/2016 – Board Financial update

- v) *Board Paper No. BP/147/07/2015 – Board Financial update*
- w) *Acceptable use policy dated 3<sup>rd</sup> Feb 2015*
- x) *Board paper No. BP/132/05/2013 – Procurement policy and procedures manual*
- y) *NBK Procurement Policy 2015 -10*
- z) *NBK Procurement procedures manual – validity period Jan 2016 2016 to Jan 2018*
  - aa) *NBK Board Charter*
  - bb) *NBK board CBK inspection report 2015*
  - cc) *Minutes of the 45<sup>th</sup> meeting of the board, credit/legal & remedial committee of NBK held on 18<sup>th</sup> June 2015*
  - dd) *Minutes of the 6<sup>th</sup> nomination & remuneration committee of the board of directors of NBK held on 30<sup>th</sup> June 2015*
  - ee) *Accounts payable black book jotter April 2013 to December 2017*
  - ff) *Minutes of the 2<sup>nd</sup> meeting of board risk committee of NBK committee of NBK held on the 6<sup>th</sup> August 2015*
  - gg) *Board paper No. BP/188/09/2015 – Transformation Initiatives status report to the board of directors as at 31<sup>st</sup> August 2015.*
  - hh) *Board paper BP/123/06/2015 – summary of deliberation of the 2<sup>nd</sup> board risk committee meeting held on 6<sup>th</sup> August 2015*
  - ii) *Minutes of the 4<sup>th</sup> meeting of the board risk committee of NBK held on 9<sup>th</sup> Feb 2016.*
  - jj) *Minutes of 425<sup>th</sup> board meeting of the NBK held Baobab conference room Serena Beach Resort & Spa Mombasa on 3<sup>rd</sup> Dec 2015*
  - kk) *Minutes of the special board meeting of NBK held at Hemingway hotel, Karen, Nairobi on 14<sup>th</sup> July 2015*
  - ll) *Minutes of the special board meeting of NBK held on 7<sup>th</sup> the October 2015 at 9 AM.*
  - mm) *Minutes of the 47<sup>th</sup> meeting of the board credit, legal and remedial committee of NBK held on 17<sup>th</sup> September 2015*
  - nn) *Minutes of the 51<sup>st</sup> meeting of the board credit, legal & remedial committee of NBK held on the 16<sup>h</sup> February 2016*
  - oo) *Opinion by Federation of Kenya Employers (FKE) on the dismissal cases field by the 4<sup>th</sup> directors dated 22<sup>nd</sup> August 2017*
  - pp) *Board Paper no BP/184/10/2017 update report on employee related Court cases – signed by CEO/MD, Mr. Wilfred Musau dated 16<sup>th</sup> October 2017*
  - qq) *Statements of all Bank Suspense accounts from Dec 2012 to Dec 2016.*

*f. That this Honorable Court be pleased to issue an order of mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to produce tot the Court and serve the Petitioner with copies of Business Credit Approvals, offer letters accepted by the clients, Copy of charge documents/collaterals for the loans/facilities granted, Certified loan statements and current account/certified saving account statements, for the Accounts /customers listed 1 to 20 below, which accounts the Petitioner is accused to have manipulated;*

- 1. Transafric Timber Limited*
- 2. Kaab Enterprises Limited*
- 3. Benvar Estate Limited*

4. *Virgin Packaging Limited*
5. *Tahir Sheikh Said Grain Millers*
6. *Juja Coffee Exporters Limited*
7. *Signature Tours and Travel Limited*
8. *Presbyterian Foundation*
9. *Sovereign Hotel Limited*
10. *Kenya Airways Limited*
11. *Swahili Beach Resorts Limited*
12. *Bellevue Park*
13. *Lordship Africa Fund Management Limited*
14. *Fozi Investments Limited*
15. *Res Court Hotel Limited*
16. *Zingo Investments*
17. *Rising Star Commodities Limited*
18. *Nyoro Construction Co. Limited*
19. *Mulji Devraj & Brothers Limited*

*g. That this Honourable Court be pleased to issue an order of Mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be return/release the Petitioner's Passport Number B153162 forthwith and not curtail his freedom of movement.*

*h. ....*

*i. That this Honourable Court be pleased to issue an order restraining the Respondents, their Directors, their employees, servants, agents or any of them from using any public body such as the Kenya Police or the Banking Fraud Unit to harass, intimidate and or in any other way causing or influencing the unlawful arrest of the Petitioner or in any other way influencing and or interfering with the investigations being carried out by the said public bodies.*

*j. Costs of and incidental to this Petition*

*k. Or that such other orders as this Honourable Court shall deem just.*

## **RESPONSES**

### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS RESPONSE**

2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are opposed to the Petitioner's Petition and in response filed Replying Affidavit sworn by No.236114 IP Julius Musoga dated 9<sup>th</sup> May 2019 deponing that he is involved in investigation of cases reported by the 3<sup>rd</sup> Respondent pending before Court in which the Petitioner has been charged with the offences contained in the attached two charge sheet.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that during the investigation there has been no influence from any of the Bank Management staff on the board. It is further stated that there has been no interference with investigations from any quarters. It is further denied that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are merely trumping up charges against the Petitioner.

### **THE 3<sup>RD</sup> RESPONDENT'S RESPONSE**

4. The 3<sup>rd</sup> Respondent similarly is opposed to the Petition and filed Replying Affidavit dated 9<sup>th</sup> March 2018 and grounds of opposition dated 12<sup>th</sup> March 2018.

5. The 3<sup>rd</sup> Respondent in the grounds of opposition states as follows:-

**a) The application and the Petition amounts to an abuse of the process of the Court in that;**

**i) The Petition and the application do not disclose any violation of the Constitution as alleged or at all.**

**ii) The petition and the application raise matter which have been raised or ought to be raised in Employment and Labour Relations Court Case Number 1072 of 2016 Boniface Lum Amingo Biko v National Bank of Kenya Limited (herein referred to as “the labour case”)**

**iii) The Petition and the application raise matters which ought to be raised in response to the criminal cases and/or any other judicial or quasi-judicial action taken or that may be taken by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent.**

**b) The Petitioner has unlawfully relied and disclosed confidential and sensitive matters relating to the 3<sup>rd</sup> Respondent’s operations and customers. The reliance and disclosure contravenes the provisions of the law including but not limited to the Central Bank of Kenya Act and Prudential Guidelines made thereunder. The documents and information are prejudicial to the 3<sup>rd</sup> Respondent. A party should not be allowed to use a benefit he has obtained which he obtained in contravention of the law. See Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR.**

**c) Prayer 2 of the application is not necessary. The Petitioner can rely on any document he wishes to including the Statements of Claim filed in the labour case and it is for the Court has to determine what value it has on the application and the Petition. If the intention is to raise matter which have been raised or ought to have been raised in the labour case, this should not be allowed.**

**d) The prayers sought are in such general and amorphous terms that they are incapable of enforcement**

**e) The right to information under Article 35 of the Constitution is not absolute.**

**f) The Court ought not to trespass into the jurisdiction of investigations and prosecution. See Njuguna S. Ndung’u vs. Ethics & Anti-Corruption Commission (EACC) & 3 Others [2014] eKLR.**

**g) No determinations or decision have been taken against the Petitioner. There is no basis for the Court to intervene with the ongoing process at this point.**

**h) The 1<sup>st</sup>, 2<sup>nd</sup> and the 4<sup>th</sup> Respondent have the discretion to determine whom to charge. See Republic versus Capital Markets Authority ex parte James Murigu and Barth Ragalo.**

**i) The Employment & Labour Relations Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incidental to these matter as set out in United States International University (USIU) vs. Attorney General (2020) eKLR. There was no need to file a fresh action.**

**j) To hear largely the same suit between the same parties in two different actions is to vex one party and will lead to costs being incurred unnecessarily. There is no basis why the 3<sup>rd</sup> Respondent has been included as a party to this case. See Chimwell Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others (2016) eKLR.**

#### **THE 4<sup>TH</sup> RESPONDENT RESPONSE**

6. The 4<sup>th</sup> Respondent filed Replying Affidavit sworn by Paul Muthaura in opposition of the Petition and aver that the 4<sup>th</sup> Respondent acted within its mandate and acted in the interest of protecting the investor interests. It is further averred the 4<sup>th</sup> Respondent acted fairly and lawfully in the conduct of the proceedings against the Petitioners.

7. The 4<sup>th</sup> Respondent further stated that it availed to the Petitioner a catalogue of evidence accompanying the Notice to Show Cause which formed the basis upon which the allegations were founded (Annexure “PM2”) and upon which evidence the 4<sup>th</sup> Respondent held and had shared with the Petitioner.

8. It further stated that the existence of a suit in any other court should not prevent the 4<sup>th</sup> Respondent from carrying out its statutory duties as it was not a party to any proceedings before Court of law.

#### **BACKGROUND OF THE PETITIONER’S CASE**

9. The Applicant vide a notice of motion dated the 25<sup>th</sup> day of January 2018, coupled with the supporting affidavit sworn by the Applicant, Boniface Lum Amunga sought orders from this Honourable Court as a result of alleged harassment, discrimination, violation, infringement and threat to fundamental rights and freedoms under the Constitution of Kenya. The brief facts of the case are as follows.

10. The Petitioner is a career banker with 16<sup>th</sup> years of experience. He was employed by the National Bank of Kenya Limited as a General Manager, Business Banking. On 8<sup>th</sup> July 2015, he was promoted to Executive Director, corporate and Institutional and Business banking CIBB (ED-CIBB). He held the position in acting capacity for more than six months without confirmation. He then decided to join Eco-Bank

Kenya Limited on 4<sup>th</sup> June 2015 as cluster head, domestic Bank for EAC region. A few days after joining the Bank, he received a call from the National Bank of Kenya Limited recalling him and offered him similar perks to match what he had received from Eco- Bank. Due to underperforming in his docket and allegations of misrepresentation of account balances, the Petitioner was summarily dismissed by the 3<sup>rd</sup> Respondent. He was dissatisfied by the decision and filed a claim in the employment and Labour Relations Court (Boniface Lum Amunga Biko vs National Bank of Kenya No. 1072 of 2016). The 3<sup>rd</sup> Respondent upon noticing the misrepresentation, invited the banking Fraud Unit to investigate the matter. Upon conclusion of the investigations, a number of criminal cases were filed including:

113/161/2017 CF 1604/2017; and

113/161/2017 CF 1604/2017; and

11. The Petitioner then alleged harassment, discrimination, violation, infringement and threat to fundamental rights and freedom under the Constitution of Kenya by the respondents.

### **ANALYSIS AND DETERMINATION**

12. I have carefully considered the Petition, the Respondents responses, the rival submissions and from the aforesaid I find the following issues arise for consideration:-

*a) Whether the court has jurisdiction to hear and determine the matters raised in the Petition which are within the purview of the Employment and Labour Relations Court.*

*b) Whether the Petitioner should be allowed prayers No 5 and 6 of the Petition in which he seeks private and confidential documents from the Respondents.*

*c) Whether Court has the power to interfere with the powers and mandate of 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

*d) Whether the Petitioner's rights have been violated by Respondents.*

*e) Whether the Petitioner is entitled to relief sought.*

### **A. WHETHER THE COURT HAS JURISDICTION TO HEAR AND DETERMINE THE MATTERS RAISED IN THE PETITION WHICH ARE WITHIN THE PURVIEW OF THE EMPLOYMENT AND LABOUR RELATIONS COURT.**

13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the Petitioner has at paragraphs 6, 9, 10 & 18 of the Petition raised matters touching and/or related to the issues set out and reliefs sought in **Boniface Lum Amunga vs National Bank of Kenya Limited-Employment Cause No. 1072 of 2016**, a labour case, that is currently pending before the Employment and Relations Court in which he alleges unlawful termination of his employment by the 3<sup>rd</sup> Respondent.

14. The reliefs sought in the instant Petition seek to address issues that arise during the Petitioner's employment with the 3<sup>rd</sup> Respondent. Looking at the pleadings and reliefs sought it turns out that this is a dispute relating to or arising out of employment between the employer and an employee. **Section 12(1) (a) of the Employment and Labour Relations Court Act No 20 of 2011** bars any other Court from hearing and determining dispute that falls under the jurisdiction of the Employment and Labour Relations Court.

15. It is noted that the Petitioner in his submission dated 5<sup>th</sup>, June, 2020, under **paragraph 7(c) and 7(d)** submits that:-

***“Following these sustained malpractices by the 3<sup>rd</sup> Respondent, the Petitioner was unfairly terminated resulting in the filing of a claim before the Employment and Labour Relations Court (Boniface Lum Amunga Biko vs. National Bank of Kenya Limited – EKLRC No. 1072 of 2016) the 3<sup>rd</sup> Respondent, in its response, made various unsubstantiated allegations and declined to provide various documents that would enable the Petitioner to prosecute his case. It is for this reason, and the need to prepare for his defence in ongoing malicious criminal proceedings, that the Petitioner seeks this Honourable Court's intervention to access this very vital information. This case is still pending:***

***The documents that the 3<sup>rd</sup> Respondent continues to hide include minutes resolving to misuse the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' investigative and prosecutorial powers to “aid” in defending cases before the Employment and Labour Relations Court. So far, the Petitioner has been charged in Criminal Case Number 1604 of 2017 and Criminal Case Number 20144 of 2017 – Republic vs. Boniface Amunga Biko & others.”***

16. From the above it is expressly pleaded and admitted by the Petitioner that the documents he is seeking in his prayers in this Petition are to enable him prosecute his Employment and Labour Relations case pending against the 3<sup>rd</sup> Respondent. The documents already being sought are under the purview of the Employment and Labour Relations case and as such I find that this Court lacks the requisite jurisdiction to determine and grant the orders sought by the Petitioner which in my view border on Petitioner's Employment and Labour Relations Case with the 3<sup>rd</sup> Respondent and which Employment and Labour Relations Court can decide on.

17. The Employment and Labour Relations Court was created under **Article 162(2) (a) of the Constitution** to determine employment and labour relation disputes. The Employment and Labour Relations Court is of a similar stature to the High Court. The Constitution in **Article**

165(5)(b) distinctively provides that the High Court lacks jurisdiction in respect of matters falling within the jurisdiction of the Employment and Labour Relations Court. In addition, **Section 12 of the Employment and Labour Relations Court (ELRC) Act** codifies the jurisdiction of the Employment and Labour Relations Court as provided in the Constitution.

18. It is trite law that jurisdiction is derived from the Constitution and statutes and that without jurisdiction, a Court cannot make one more step and must down its tools. (See **Owners of Motor Vessel "Lillan "S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR**. Reliance on the above proposition is further placed in the Supreme Court case of **Samuel Samuel Macharia & Another v. Kenya Commercial Bank & 2 others, Application No. 2 of 2011 (2012) eKLR**, where the Court pronounced itself on jurisdiction as follows:-

**"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where the constitution exhaustively provides for the jurisdiction of the Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."** (Emphasis added)

19. In view of the pleadings in this Petition and authorities mentioned hereinabove, I find that the proper forum to adjudicate on issues as raised in the Petition, for the purposes of obtaining the documents, the Petitioner requires to prepare for the employment case, he has filed against the 3<sup>rd</sup> Respondent is the Employment & Labour Relations Court. There are rules of procedure in that Court governing production of such documents, which the Petitioner can put in operation. The Petitioner has neglected and failed to seek the orders in the right forum, which in my view, is the Employment and Labour Relations Court and in filing this Petitioner in this division the Petitioner is merely urging this Court in effect to interfere with the Employment and Labour Relations Court case, arrogating itself jurisdiction which this Court lacks.

20. In view of the aforesaid, I find this Honourable Court lacks the requisite jurisdiction to make any determination and grant orders on matters related to Employment and Labour Relations case. I find that this Court must therefore down its tools as regards the Petition herein seeking reliefs which fall within the jurisdiction of the Employment & Labour Relations Court. The information sought was acquired by the parties during the course of the Petitioner's employment with the 3<sup>rd</sup> Respondent and the project forum is the Employment and Labour Relations Court.

21. The Petitioner seeks an order of mandamus to compel the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to produce in Court and serve him with various documents listed at paragraph 5 and 6 of the prayers. The documents in question, it is urged by the 3<sup>rd</sup> Respondent are confidential documents and information relating to the 3<sup>rd</sup> Respondent's operations as well as its clients. Disclosure of such information it is stated would harm the 3<sup>rd</sup> Respondent's commercial interests within the meaning of **Section 6(e) of the Access to Information Act, No. 31 of 2016, Laws of Kenya**. It is contended that the minutes referred to para 11 of the Petition and paragraph 18 of his affidavit are marked **"private and confidential."** They are confidential documents, which should not be in the Petitioner's possession. The 3<sup>rd</sup> Respondent submits that the same should be expunged from the Court's record.

22. Further to the foregoing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that in any event and without prejudice to the foregoing, the minutes are not signed and there is therefore no basis for relying on them. It is also asserted that it is not true as alleged by the Petitioner in the said paragraphs, that the minutes capture that the 3<sup>rd</sup> Respondent will misuse the Kenya Police to interfere with the investigations.

23. The Petitioner seeks an order of mandamus to compel the 1<sup>st</sup> to 4<sup>th</sup> Respondents to produce to Court and serve the Petitioner with various documents, such as offer letters accepted by clients

24. In response the 3<sup>rd</sup> Respondent in its submissions averred that the documents sought for in the Petition and the information provided by the Petitioner at paragraphs 34 to 37 of the amended Petition relate to the operations and clients of the 3<sup>rd</sup> Respondent and are private and confidential in nature. I find in view of the nature of the documents that the 3<sup>rd</sup> Respondent has an obligation to maintain the confidentiality and privacy of its clients' information. Further I note that proceeding to disclose confidential clients information would be contrary to the provisions of **Section 31(2) of the Banking Act** and **Clause 4.2.5(a) of the Prudential Guidelines**. Further **Section 31(2) of the Banking Act, Cap 488** titled **"Publication of information"** prohibits bank or any of its employees or officials from disclosing or publishing any information which comes into their possession as a result of the performance of duties or responsibilities. Similarly **Clause 4.2.5. (a) of the Prudential Guidelines on Corporate Governance, 2013** prohibits a financial institution from divulging or making use of any correspondence or accounts of the institution of its customers.

25. On publication of the information by Banks the Court of Appeal in **Kim jong Kyu v Housing Finance Company Ltd & 2 others [2015] eKLR** emphasised that a bank was prohibited by **Section 31(2) of the Banking Act** from disclosing or publishing any information in its possession except as provided by the Act. The Court was emphatic that where a persons on a fishing expedition and invokes **Article 35 of the Constitution** in order to get information on clients of a bank, then the bank is prohibited from disclosing such information.

26. In view of my findings herein above, I find that the Banking Act prohibits publication and/or disclosing any information which comes into their possession as a result of performance of duties or responsibilities. I further find in any event the documents sought are under the purview of the Employment and Labour Relations Act Case and further thereto any issues relating to such documents should therefore be dealt with by the Employment and Labour Relations Court as this Court lacks jurisdiction to deal with the matter raised in the instant Petition.

27. **In view of my findings that this Court lacks jurisdiction to hear and determine this Petition and notwithstanding that I have set out other issues in this matter that I would have considered, had I found this Court has jurisdiction, I have no alternative in view of my findings on issue of jurisdiction save to down my tools. The upshot is therefore that this Court lacks jurisdiction to hear and determine this Petition. The Petition is accordingly dismissed with costs to the Respondents.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

.....

**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**