



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CONST. PETITION NO. 16 OF 2018**

**IN THE MATTER OF SECTIONS 11(1) (h) OF**

**THE BANKING ACT, CHAPTER 488, LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 4 (a), (c), 33(F), (G), OF**

**THE CENTRAL BANK OF KENYA ACT, CHAPTER 491, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 10 (1) (c), 22, 23, 28, 29**

**(d) and (f) 31 (c), 40 (1) and (2) (a), 43 (1)(b), 46 and 232**

**OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONSUMER RIGHTS VIS – A VIS**

**FRAUDULENT, RECKLESS TRANSACTION OF BUSINES BY BANKS**

**BETWEEN**

**PERES A. ODHIAMBO.....PETITIONER**

**VERSUS**

**HOUSING FINANCE COMPANY (K) LTD.....1<sup>ST</sup> RESPONDENT**

**CENTRAL BANK OF KENYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

This Ruling is in relation to two applications, which are dated 17<sup>th</sup> October 2018 and 16<sup>th</sup> November 2018, respectively.

1. The first application was brought by the 2<sup>nd</sup> Respondent to the Petition, **CENTRAL BANK OF KENYA**.
2. Through that application the Central Bank asks the court to either strike out its name from these proceedings or to strike out the Petition against it.
3. Meanwhile, the second application was brought by the 1<sup>st</sup> Respondent, **HOUSING FINANCE COMPANY (K) LIMITED**.
4. Through that application the 1<sup>st</sup> Respondent asks the court to discharge the subsisting conservatory orders in this case, and also to strike out the Petition.

5. In respect to the application by the 1<sup>st</sup> Respondent, this court was invited to hold that the Petitioner had concealed material facts when she instituted these proceedings and when she sought and obtained ex parte orders.
6. The 1<sup>st</sup> Respondent drew the attention of the court to the fact that the Petitioner, earlier, filed another suit, (being **Kisumu High Court Civil Case No. 180 of 2010 (O.S)**), in which she had obtained a temporary injunction on 30<sup>th</sup> May 2011.
7. The said temporary injunction was granted on condition that the parties would exchange their respective Witness Statements and their respective Documents within 30 days; and also on the further condition that the suit would be set down for hearing within 45 days.
8. According to the 1<sup>st</sup> Respondent, the Petitioner failed to meet the conditions upon which the injunction was granted.
9. Nonetheless, the earlier suit was still pending, and therefore the 1<sup>st</sup> Respondent submitted this new suit ought not to have been filed by the Petitioner.
10. It was the 1<sup>st</sup> Respondent's further submission that the real issues in dispute herein arose from a contract between the Petitioner and the 1<sup>st</sup> Respondent. Therefore, the issue ought to have been instituted as a civil dispute between those two parties, said the 1<sup>st</sup> Respondent.
11. This court was invited to hold that a Constitutional Petition did not lie in the prevailing circumstances.
12. Meanwhile, in relation to the application dated 17<sup>th</sup> October 2018, the Central Bank of Kenya submitted there was no cause of action against it as there was neither a violation nor a threatened violation of any of the Petitioner's Constitutional Rights or Fundamental Freedoms.
13. It is the understanding of the 2<sup>nd</sup> Respondent that the substratum of the Petitioner's grievances is the mortgage or charge over **L.R. NO. 15983/192/3**, in respect to which the parties were the Petitioner and the 1<sup>st</sup> Respondent.
14. The dispute between those two parties was said to have arisen from their contractual relationship, between a banker and his customer.
15. The Central Bank of Kenya submitted that all the issues involved in the matter can be effectually and completely adjudicated by the court, without the Central Bank of Kenya being a party in the proceedings.
16. In answer to the applications, the Petitioner submitted that there is absolutely no truth in the assertion that she had concealed some material facts when she instituted these proceedings.
17. The Appellant told this court that the Hon. Lady Justice R.E. Aburili had stated as follows in a Ruling delivered herein on 3th August 2018;

*“ . . . . the respondent HFCK has acted fraudulently and recklessly by interfering with the bank account held by the petitioner at the 1<sup>st</sup> respondent's bank which has resulted in the petitioner/ applicant suffering poor and deplorable health as a result of which she was unable to attend KISUMU/ELC NO. 785/2015, leading to a discharge of temporary injunction orders. That the said discharge of the temporary injunction in the above ELC matter resulted in the 1<sup>st</sup> Respondent exercising its statutory powers of sale over property No. L.R. 15983/192/3 KENYA-RE*

*whose current Market Value is about Shs  
20 Million on 26.7.2018 and that the Bank  
may move to transfer it to a Third Party  
anytime, hence the need to protect the  
substratum of the Petition.”*

18. I have perused the Ruling of my Learned Sister, Justice Aburili, and found that the words attributed to the learned Judge were not a part of the court’s determination.

19. The said words constituted the submissions which the  
Petitioner had placed before the Court.

20. When the court was analyzing the submissions it made the following observation;

*“As matters stand, the 1<sup>st</sup> Respondent has  
sold the Applicant’s property in exercise  
of Statutory Power of Sale and by a Public  
Auction. The Applicant is challenging the  
said sale terming it illegal, reckless and  
fraudulent.”*

21. Having pointed out that the foregoing was the Applicant’s position in the case, the learned Judge made it clear that at the interlocutory stage of the proceedings, the Court was not expected to delve into the merits of the Petition.

22. Nonetheless it is true that when the Judge was summarizing the assertions made by the parties, she made reference to **KISUMU ELC NO. 785 OF 2015**; thus implying that that other case was not concealed from the court.

23. Secondly, as the Petitioner has said, the grant of a conservatory order or of an interlocutory injunction is within the discretion of the court.

24. The Respondents to the Petition have not suggested that the court lacked the discretion to award the temporary Injunctions. They have asked the court to discharge the subsisting conservatory orders.

25. The Petitioner submitted that after the court had granted the interlocutory orders, the Respondents could either lodge an appeal to challenge the orders, or they could wait for the substantive hearing to the Petition.

26. In other words, the Petitioner was of the view that it was not open to the Respondents to have the interlocutory orders discharged.

27. In my considered opinion, if an interlocutory order was granted, there is no hard and fast rule barring its discharge. Each case must be determined based on its own facts and circumstances.

28. For instance, an interlocutory order may be subject to specified conditions, such as the provision of a security.

29. If the security was not provided within such time as the court may have stipulated, the interlocutory order would stand discharged or vacated.

30. But it is possible that the Respondent may hold the view that the security provided did not meet the stipulations of the orders given by the court. In such a situation, the Parties could engage in arguments whether or not the interlocutory order should be discharged. If the court held that the Applicant had not provided such security as had been stipulated, the court may well discharge the interlocutory order.

31. **Order 39 Rule 4** of the **Civil Procedure Rules** expressly provides as follows;

*“Any order for an injunction may be*

*discharged, or varied, or set aside by*

*the court on application made thereto*

*by any party dissatisfied with such*

*order.”*

32. It therefore follows that if any party to a suit, persuaded the court that an interlocutory injunction which had been issued against him, was causing an injustice or a prejudice to him, the court would have the authority to discharge, vary or set aside such an order.

33. In this case, the Petitioner has invited the court to hold that the Law Firm of **OWITI, OTIENO, RAGOT & COMPANY ADVOCATES** should not be allowed to continue representing the 1<sup>st</sup> Respondent because **Mr. OTIENO DAVID** (who is a partner in that Law Firm) previously acted for the Petitioner in the case of **PERES A. ODHIAMBO Vs HFCK & PAUL OGUTU WERE KISUMU HCCC NO. 352 OF 1999.**

34. In my considered view, that is an issue which calls for a clear and specific application, which has to be directed at the Law Firm.

35. That is not an issue which was raised in either of the two applications which are currently being canvassed before me. I therefore decline the invitation to determine, in this Ruling, whether or not the Law Firm in question may

continue to represent the 1<sup>st</sup> Respondent in these proceedings.

36. As regards the Central Bank of Kenya, the Petitioner submitted that it had;

*“... failed in its statutory duty of supervising activities of HFCK which breached the petitioner’s rights as a customer.”*

37. The Petitioner went on to assert thus;

*“Particular breaches by the 2<sup>nd</sup> respondent include not directing the 1<sup>st</sup> Respondent to make all the necessary payments to KENYA RE-INSURANCE, in order to cushion the title of the petitioner to the property she had bought hence securing her economic interests.*

*Secondly, the 1<sup>st</sup> respondent failed to protect the monies deposited in the petitioner’s account and the 2<sup>nd</sup> respondent failed in ensuring the same was done vide issuing cogent instructions on how HFCK was to*

*go about the same work and doing*

*follow-up to ensure the same are*

*executed to its supervision.”*

38. Assuming for a moment that the Central Bank had failed to carry out frequent audits of the operations of **HFCK**, the Petitioner submitted that that;

*“..... showed in its judgement (In KISUMU*

*HCCC NO. 352/1999), in what manner HFCK*

*had breached its contractual responsibilities*

*towards the petitioner, hence the only thing*

*that the 2<sup>nd</sup> respondent ought to have done*

*is to have HFCK clear payments due to*

*KENYA RE, thus securing the petitioner’s*

*title.”*

39. In my understanding of that submission, the Petitioner has acknowledged that the dispute between her and the 1<sup>st</sup> Respondent was of a contractual nature.

40. Secondly, the Petitioner has acknowledged that the Central Bank of Kenya had some specified statutory obligations.

41. If the said statutory obligations were not met by the Central Bank of Kenya, that would constitute a breach of the statutory provisions which had spelt out the obligations.

42. Even if it were to be proved that the Central Bank of Kenya had breached **Section 2 (e) (ii)** of the **Central Bank of Kenya Act**, that could not constitute a violation of the Petitioner’s rights under the Constitution.

43. As Rika J. had reason to pronounce in the case of **GEORGE S. ONYANGO OGW V BOARD OF DIRECTORS OF NUMERICAL MACHINING COMPLEX LTD & 2 OTHERS, PETITION NO. 35 OF 2012;**

*“It is generally accepted, through a catena*

*of judicial precedents that the Constitution*

*should not be used for settlement of everyday*

*litigation.*

*.....*

*To characterize everyday disputes as a*

*constitutional violation, transforms the*

*Constitution from a blueprint of*

*fundamental freedoms and rights*

*to a document for litigating every-*

*day disputes; its moral force is*

*diminished.”*

44. On 28<sup>th</sup> May 2014, Advocate Onsongo, representing the Petitioner, said;

*“There is only issue we are trying to decide in this matter, namely whether the Defendant ever advanced the Plaintiff a loan amounting to 1,540,000/=. The Plaintiff says she applied for the loan but before she could get it, she got her own money which she gave to the Defendant to pay Kenya-Re, which was selling the house to her.*

.....

*Her position is that there is no way that the bank can have an interest in the house she purchased, yet it didn't finance it. That is why she is seeking the declaration in the O.S.”*

45. The house in issue was later sold.

46. The Petitioner then lodged the Petition, asserting that the Central Bank of Kenya had failed in its supervisory duty under **Article 231 (2)** of the **Constitution** as read with **Section 4A (1) (c)** of the **Central Bank Act**.

47. Pursuant to **Article 231 (2)** of the **Constitution**;

*“The Central Bank of Kenya shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.”*

48. When the **Central Bank of Kenya Act** conferred upon the Central Bank duties, such as supervision of banks, that would be a statutory obligation imposed on the Central Bank.

49. In this case, I understand the Petitioner to be asserting that the 1<sup>st</sup> Respondent did certain things which they ought not to have done.

50. I further understand the Petitioner to be asserting that if the Central Bank of Kenya had undertaken its supervisory roles, in respect of the 1<sup>st</sup> Respondent, the actions about which the Petitioner has complained, would not have taken place.

51. In order to prove that the Central Bank of Kenya failed to discharge an aspect of its supervisory role, the Petitioner would first have to satisfy the court about the actions of the 1<sup>st</sup> Respondent.

52. The Petitioner submitted thus;

***“The 2<sup>nd</sup> respondent has failed in its  
statutory duty of supervising the  
activities of HFCK which breached the  
petitioner’s rights as a custom.”***

53. It follows that the activities which the Petitioner describes as having breached her rights, are the very same activities which show the alleged failure by the Central Bank of Kenya to supervise the 1<sup>st</sup> Respondent.

54. If the Petitioner leads evidence to prove that the 1<sup>st</sup> Respondent breached her rights as a customer, she will be entitled to reliefs that are appropriate.

55. In the event that the Petitioner is successful against the 1<sup>st</sup> Respondent, she cannot obtain further reliefs against the Central Bank of Kenya, arising from the same facts.

56. Indeed, it appears that the Petitioner is aware of that position, because she has not sought any reliefs against the Central Bank of Kenya.

57. Furthermore, the breach of a statutory duty must not be equated to the breach of the Constitution. By submitting that the 2<sup>nd</sup> Respondent had failed in its statutory duty, the Petitioner has expressly acknowledged that that which had allegedly been breached was a statutory duty. I find no reason to elevate the said alleged breach of a statutory duty, into an allegation that there had arisen a breach of a constitutional duty.

58. The Central Bank of Kenya was not a necessary party in the dispute between the Petitioner and the 1<sup>st</sup> Respondent.

59. I also find that the 2<sup>nd</sup> Respondent was not a property party to the said dispute. I so find because if the case against the 1<sup>st</sup> Respondent was ultimately successful, the orders against that Respondent can be enforced without any reference to the Central Bank of Kenya.

60. The reliefs sought against the 1<sup>st</sup> Respondent can be adjudicated upon effectively and completely, in the absence of the 2<sup>nd</sup> Respondent.

61. And as the Petitioner acknowledged that that which was allegedly breached by the 1<sup>st</sup> Respondent were rights as the customer of the 1<sup>st</sup> Respondent, I find that the 2<sup>nd</sup> Respondent has no role in that relationship between the banker and its customer. I so find because even if the allegations against the Central Bank of Kenya were unsuccessful, that would not have a bearing on the Petitioner’s case against the 1<sup>st</sup> Respondent.

62. In the case of **SAVINGS & LOAN (K) LIMITED Vs KANYENJE KARANGITA GAKOMBE & ANOTHER, CIVIL APPEAL NO. 272 OF 2006**, the Court of Appeal expressed itself thus;

***“In its classical rendering, the doctrine  
of contract postulates that a contract  
cannot offer rights or impose obligations  
on any person other than the parties to  
the contract.”***

63. In conclusion, I hold that the Petitioner has failed to satisfy the court that there is any legal basis for sustaining her claim against the 2<sup>nd</sup> Respondent. Accordingly, I hereby order that the Petition against the 2<sup>nd</sup> Respondent be and is hereby struck out forthwith.

64. However, I find that the interests of justice demand that the claim against the 1<sup>st</sup> Respondent must be allowed to proceed to determination.

65. I appreciate that the Petitioner appears to have withheld some information from the court when she instituted the second case, as she did not reveal that she already had another case which was still outstanding. However, as earlier alluded to herein, Lady Justice R.E. Aburili made reference to that other case, when she delivered her Ruling dated 30<sup>th</sup> August 2018. In effect, the said other case was not concealed from the court, or at any rate, the court became aware of it.

66. The court went ahead and granted interlocutory reliefs, in favour of the Petitioner herein.

67. By the interlocutory reliefs, the court ordered that a Conservatory order do issue to stop the 1<sup>st</sup> Respondent from transferring the suit property to any Third Party.

68. I hold the considered view that there is still a need to safeguard the subject matter. Therefore, I decline the 1<sup>st</sup> Respondent's prayer for the discharge of the conservatory order.

69. However, I order that all pre-trial procedures must be concluded within the next **30** days.

70. I will mention the case shortly after the lapse of the said **30** days, to ascertain whether or not the suit was ready for trial.

71. If I should find that the Petitioner has complied with all pre-trial procedures which are within her control and power, (as distinct to those that were subject to the actions of the 1<sup>st</sup> Respondent), the conservatory order shall remain in place until the suit was determined.

72. But if the court should come to the conclusion that the Petitioner had not complied with all pre-trial procedures, within the stipulated period of 30 days, the conservatory orders shall stand vacated.

73. The Petitioner shall pay to the 2<sup>nd</sup> Respondent, the costs of the application dated 17<sup>th</sup> October 2018.

74. And the 1<sup>st</sup> Respondent shall pay to the Petitioner, the costs of the application dated 16<sup>th</sup> November 2018.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF FEBRUARY 2020**

**FRED A. OCHIENG**

**JUDGE**