



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**PETITION NO. E001 OF 2019**

**PAUL KOBIA.....PETITIONER**

**-VERSUS-**

**CENTRAL BANK OF KENYA.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner herein, **PAUL KOBIA**, who describes himself as a male adult of sound mind and prominent politician, filed the petition dated 9<sup>th</sup> April 2019 against the respondents herein seeking following orders:

**a. That the Honourable court be pleased to issue a declaration that the 1<sup>st</sup> respondent's regulation requiring full disclosure and proof of the basis of the source of funds by customers prior to crediting the customer's accounts is an infringement to the customers' constitutional right to privacy and property this null and void.**

**b. That the Honourable court be pleased to issue an injunction to allow the petitioner access his funds and to prevent the respondents, their employees, servants, agents and or entities from closing the petitioner's bank account.**

**c. That the Honourable court be pleased to issue an injunction to prevent the 1<sup>st</sup> respondent from imposing rules that make cash withdrawals by customers of banks difficult and which breach confidentiality of financial transactions of customers unless there is unresolved complaint lodged by any statutory agency or breach of the statutory provisions.**

**d. That the Honourable court be pleased to grant the petitioner general damages.**

**e. That the Honourable court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.**

**f. An order that the respondents do pay the costs of this petition.**

2. The petition is brought under Articles 1, 3, 4, 10, 22, 23, 24, 31, 35, 40, 46, 47, 48, 50, 231, 232, 258, 259 and 260 of the Constitution, the Banking (Amendment) Act and consumer Protection Act. The petition is supported by the petitioner's affidavit.

3. A summary of the petitioner's case is that by a letter dated 14<sup>th</sup> December 2018, one Barclays Bank of Kenya threatened to close his accounts because of the 1<sup>st</sup> respondent's unreasonable regulations.

4. It is the petitioner's case that he also received emails and letters from the 2<sup>nd</sup> respondent over its intention to close his bank account. The petitioner claims that the 1<sup>st</sup> respondent has orchestrated a plan to adversely affect his business by preventing him from accessing millions of Kenya Shillings from his business associates and partners globally. He contends that his business demands total confidentiality and that he has never been investigated for Economic Crimes relating to remittances of funds to his bank accounts.

5. The petitioner states that not all economic and legal transactions are documented and that the 1<sup>st</sup> respondent's demand for documentary evidence prevents many people from carrying out genuine economic transactions that lack documentary proof.

6. He further states that the 1<sup>st</sup> respondent has no legal and constitutional mandate to prevent him from accessing his genuine funds. He contends that developed countries such as Dubai, Singapore and Hong Kong do not demand documentary evidence prior to remitting cash to customers unless the accounts are under investigations for fraud or any other crime.

7. The petitioner listed the nature of injury to public interest as follows:

1. **The petitioner's constitutional rights to Privacy and Property will and is likely to be infringed unless the prayers sought herein are granted.**
2. **That the petitioner and many other customers are likely to suffer great loss if his bank accounts are closed and or they are restricted from accessing their funds.**
3. **The 1<sup>st</sup> respondent's rules will adversely affect foreign remittances thus slow down economic growth of the country.**
4. **Most customers of various bank accounts will lose funds that are intended to be remitted to their accounts.**
5. **The confidentiality and or privacy of business transactions will be affected thus affecting the customers of various financial institutions.**
6. **The regulations have adversely affected the banking institutions by scaring away potential investors into the country.**
7. **The regulations delay crediting of various customers' accounts thus adversely affecting their economic and financial situation.**
8. **The banking institutions customers who do not have documentary proof of the source of funds may lose their money.**
9. **The economic activities are adversely affected by the unnecessary regulations.**

8. The 1<sup>st</sup> respondent opposed the petition through the replying affidavit of **Kennedy Kaunda Abuya** who avers that there is no cause of action arising against it in respect to the petitioner's claim.

9. On its part, the 2<sup>nd</sup> respondent filed a Notice of Preliminary Objection wherein it stated that the instant petition offends the *res sub judice* rule.

10. Parties canvassed the petition by way of written submissions. **Petitioner's Submissions.**

11. **Mr. Karauka**, learned counsel for the petitioner, submitted that the petition is of public interest as the petitioner and many other customers are likely to suffer great loss if their bank accounts are closed or if they are restricted from accessing the money held in the accounts.

12. It was submitted that Article 40(2)(a) of the Constitution prohibits the passing of legislation that arbitrarily deprives a person of any interest or right over any property of any description. Counsel maintained that the petitioner's nature of business demands total confidentiality and that the demand for documentary evidence would prevent many people from carrying out genuine economic transactions with the petitioner.

13. It was submitted that the preliminary objection raised by the 2<sup>nd</sup> respondent was not on a pure point of law or the doctrine of *res sub judice* as the parties and the issues in the cited case being **Nairobi HC Petition No.426 of 2018** are not the same as the parties and issues in the instant petition. It was submitted that privacy is a fundamental human right recognized under numerous international human rights instruments and our Constitution.

14. Counsel added that the right to privacy is central to the protection of human dignity and forms the basis of any democratic society as it supports and reinforces other rights.

#### **1<sup>st</sup> respondent's submissions**

15. **M/S Ochieng, Onyango, Kibet & Ohaga advocates** for the 1<sup>st</sup> respondent submitted that the petition herein does not disclose a cause of action against the 1<sup>st</sup> respondent as it reveals that the petitioner's grievance is with his bankers M/S Barclays Bank of Kenya (BBK). It was submitted that the petitioner has absolutely not connected the 1<sup>st</sup> respondent with the alleged closure of his bank accounts.

16. It was submitted that the petition does not meet the threshold required for a constitutional petition as besides merely alleging that his rights to property and privacy have been violated or threatened with violation, the petitioner did not table any material before the court to explain how the alleged rights have been violated and the specific manner of the alleged violations.

17. Counsel maintained that the 1<sup>st</sup> respondent's primary duties as set under Article 231 of the Constitution includes formulating monetary policy in Kenya, promoting price stability, issuing currency and performing any other obligation as provided by an Act of Parliament. It was submitted that the 1<sup>st</sup> respondent is statutorily mandated to issue guidelines and regulations for financial institutions carrying out banking

business which guidelines give to the laws in Kenya generally. Counsel argued that the petitioner has not established that any of the guidelines issued by the 1<sup>st</sup> respondent have breached his rights to privacy or property.

18. It was the 1<sup>st</sup> respondent's case that even assuming that the petitioner had identified any specific guideline that he believes violates his rights to privacy and property, such rights are not absolute and are under Article 25 of the Constitution subject to Limitation as provided for under Article 24.

19. On the right to property, it was submitted that the 1<sup>st</sup> respondent has not stopped the petitioner from accessing his funds or receiving remittances from his business partners and associates.

## **2<sup>nd</sup> Respondent's Submissions**

20. **Mr. Kihara**, learned counsel for the 2<sup>nd</sup> respondent submitted that in view of the existence of **Nairobi HC Petitioner No. 426 of 2018** currently pending before court the matter in issue regarding the 1<sup>st</sup> respondent's role in issuing directives to banks and financial institutions is a matter that is subjudice thus ousting the court's jurisdiction by virtue of the doctrine of estoppel by record. For this argument, counsel relied on the case of **Republic v Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati** [2008] KLR 728 wherein it was held: -

**“The courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggests a curtailment of the court's power to review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to court.... It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the court should be construed strictly and narrowly. It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”**

21. It was further submitted that the instant petition is an abuse of the court process as it offends Sections 6 and 7 of the Civil Procedure Act. Counsel cited the case of **Pil Kenya Limited v Joseph Oppong** [2009] eKRL wherein it was held: -

**“It follows therefore the order was equally binding on the respondent and in my view any contrary claim in Kenya against the respondent is barred under the doctrine of estoppel and also constitutes an abuse of the court process here in Kenya.”**

## **Analysis and determination.**

22. I have considered the pleadings filed herein, the submissions by counsel together with the authorities that they cited, I discern the main issues for determination is whether the instant petition is sub judice and whether the petitioner has made out a case for the granting of the orders sought in the petition.

## **Res Sub judice**

24. The res sub judice rule is codified in Section 6 of the Civil Procedure Act as follows:

**6.No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

25. The 2<sup>nd</sup> respondent argued that the instant petition is offends the *res sub judice* rule in view of existence of Nairobi HC Petition No. 426 wherein the petitioner challenges the enactment of Section 65 of the Finance Act that amends the Banking Act by introducing Section 33C on the power of the Central Bank to prescribe the conditions on deposits and withdrawal by customers in banks and financial institutions.

25. I have perused the pleadings filed herein and the cited Petition No. 426 alongside the instant petition and I note that while the cited Petition challenges the enactment of specific section of the Finance Act, the instant petition seeks declaratory and injunctive orders over alleged threatened closure of the petitioner's bank accounts. I note that nowhere in the instant petition has the petitioner mentioned the Finance Act that appears to be the bone of contention in the cited petition. I am therefore unable to find that there is any relationship between the instant petition, as presented, and the cited petition so as to warrant the invocation of the *res sub judice* rule.

## **Orders sought**

26. The orders sought can be summarized to be declaratory orders, orders of injunction, general damages and costs of the petition.

27. The gist of the petitioner's case is that by a letter dated 14<sup>th</sup> December 2018, one Barclays Bank of Kenya threatened to close his bank account because of the 1<sup>st</sup> respondent's unreasonable regulations. The petitioner cited Articles 31 and 40 of the Constitution as the provisions that are likely to be violated by the respondent's actions. The said Articles stipulates as follows: -

**31. Every person has the right to privacy, which includes the right not to have—**

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

40. (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.”

28. On their part, the respondents argue that the petition does not meet the threshold of a constitutional petition as laid out in the oft cited case of *Anarita Karimi Njeru v Republic* [1979] KLR 154 where the court states: -

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the matter in which they are alleged to be infringed.”

29. The above position was reiterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2014] e KLR as follows: -

“.....the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court..... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru*(supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

30. Having considered the petition filed herein together with the supporting affidavit, I am unable to find that there is any semblance of a Constitutional Petition as the petition falls short of stating, with precision, that which the petitioner complains about. I say so because looking at the letter to the petitioner dated 14<sup>th</sup> December 2018 that triggered the instant petition, I note that firstly, the same was authorized by another entity, Barclays Bank of Kenya, and not any of the respondents herein.

31. In determining this petition, I find it necessary to reproduce the entire contents of the letter that precipitated this petition in order to appreciate this court's finding that the petition does not meet the threshold of a Constitutional Petition as envisaged in the *Anarita Karimi Njeru* case (supra). The said letter was worded as follows: -

**“Date: 14<sup>th</sup> December 2018**

**Dear Mr. Paul Kobia Miburi**

**Notice of closure of account.**

**PAUL KOBIA MIBURI A/C's 0361026756, 2040183607 & 0227267402.**

**I am writing to advise you that following a review of our business, a decision has been taken to cease our provision of banking/investment services to you.**

**As a result of his decision, your accounts/products will be closed with effect from 14<sup>th</sup> January 2019.**

**After closure, no further standing orders will be paid, any cheques or direct debits presented for payment will be returned “Account Closed”, and no other transfers will be accepted for the credit of your accounts/products. Any funds received in your favour after closure will be returned to the remitter. We cannot, however, guarantee that such funds will be re- sent to you by the remitter.**

**After we have closed your accounts, any additional funds remaining will be repaid. However, you should be aware we are unable to transmit the closure proceeds in US Dollars. Please advise us before [CLOSURE DATE AS STATED ABOVE) of your preferred alternative currency and the bank of your choice, to which will remit funds, provided the relevant currency/bank is acceptable under our policies.**

**We apologize for any inconvenience the above may cause. Should you have any questions, please contact Joan Kiragu.**

**Yours sincerely**

**Joan Kiragu**

**Premier Relationship Manager”**

32. Looking at the letter in question, this court is unable to find any nexus between the threatened closure of the petitioner's bank accounts and any action by the respondents herein so as to justify the granting of the orders sought in the petition. I further note that nowhere in the said letter has any reference been made to any of the respondents herein or any Regulations made by them as the reason for the intended/threatened closure of the petitioner's bank accounts.

33. It is a known principle of law that whoever alleges must prove and in this regard Section 107 (1) of the Evidence Act provides that: -

**“(1) 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.”**

34. I find that the petitioner herein did not discharge the burden of proof so as to entitle him to the orders sought in the petition.

35. For the reasons that I have stated in this judgment, I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with costs to the respondents.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 24<sup>th</sup> day of September 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Wambugu for Karauka for petitioner

Mr. Ouma for the 1<sup>st</sup> respondent.

Miss Karanja for Kihara for 2<sup>nd</sup> respondent

Court

Assistant:

Sylvia