



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 4 OF 2018

MUSTAFA ABDULRAHMAN KHOGALI.....PETITIONER

VERSUS

GULF AFRICAN BANK LIMITED.....RESPONDENT

JUDGMENT

1. The story that emerges from the pleadings filed and the evidence adduced in this case is that sometimes in 2008 the Petitioner, Mustafa Abdulrahman Khogali, received a call from a sales lady working for the Respondent, Gulf African Bank Limited, urging him to open an account with the Respondent. The Petitioner who was then the Head of Mission of the League of Arab States was sufficiently persuaded by the sales lady and indeed opened a bank account with the Respondent.
2. The Petitioner enjoyed the services of the Respondent until he received a letter dated 1st July, 2017 informing him that his account had been closed. It is the Petitioner's case that the letter did not give reasons for the closure of his account.
3. The Petitioner went to the Respondent's Westlands branch where he was informed that his account had been closed as a result of sanctions imposed on Sudan by the Americans. The Petitioner informed the bank officials that he was not on the list of the entities that had been issued by the Office of Foreign Assets Control but nobody listened to him even after he provided the list to the bank. The Petitioner eventually went and opened an account with the National Bank of Kenya which he operates to date.
4. Through his petition dated 8th January, 2018 the Petitioner seek orders as follows:
 - a) **A declaration that the Respondent's actions in closing the Petitioner's account amounted to discrimination on the basis of his nationality as provided in Article 27(5) and a violation of his consumer rights as provided for in Article 46 of the Constitution.**
 - b) **General damages for the infringement of the Petitioner's rights under Articles 27(5) and 46 of the Constitution.**
 - c) **Costs of the Petition.**
 - d) **Such other orders as this Honourable Court shall deem just.**
5. The Respondent opposed the petition through an affidavit sworn on 22nd January, 2018 by its Legal Officer, Lawi Sato. Lawi Sato also testified as DW1.
6. Lawi Sato's testimony was that the Petitioner was indeed the Respondent's customer from 2008 when he opened his account until 2017 when the account was closed. His evidence was that a contractual relationship existed between the Petitioner and the Respondent and Clause 26 of the Bank's Terms and Conditions provided the circumstances under which a client's account can be closed. He confirmed that the bank was indeed required to give reasons for the closure of a customer's account. His testimony was that the letter dated 1st July, 2017 from the Respondent informed the Petitioner that it could not serve his banking needs at that time and that was the reason for the closure of the account.
7. When DW1 was cross-examined by counsel for the Petitioner, he denied that the Respondent had discriminated against the Petitioner based on his nationality. He also agreed with counsel for the Petitioner that the bank was still offering the services it was offering at the time

the Petitioner's account was closed.

8. The advocates for the parties filed and exchanged written submissions on the petition. I will consider the submissions in the process of determining this petition.
9. The Respondent filed a notice of preliminary objection dated 22nd January, 2017 containing seven grounds. Those grounds can be summarized as follows: that the subject of this petition is a contractual dispute and does not fall within the jurisdiction of this court; that the Petitioner did not particularize how the Respondent infringed on his rights and fundamental freedoms; and that there is no evidence in support of the alleged violation of rights.
10. In my view, these grounds of preliminary objection are in the nature of a defence and they will therefore be addressed in the course of the determination of the petition.
11. In my view the only issue for the determination of this Court is whether the Respondent's action of closing the Petitioner's account violated his constitutional rights.
12. The Respondent urged this Court to find that the Petitioner's complaint is one that should not attract the application of constitutional provisions as the same is based on a contractual dispute. The Court was also asked to apply the principle of avoidance and dismiss the petition for failing to raise constitutional issues.
13. There is indeed merit in the Respondent's submission that the Court will not determine a constitutional issue when a matter may properly be decided on another basis – see **Communications Commission of Kenya & 5 others v Royal Media Services & 5 others, Petition No.14, 14A, B & C of 2014**.
14. It is also a correct statement of the law that where there are alternative civil and other remedies available to a party, the courts may decline to exercise constitutional jurisdiction – see **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR**. As was held by the Court of Appeal in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR**, the Constitution should not be turned into a thoroughfare for the resolution of every kind of common grievance.
15. The doctrine of avoidance was also stated in **Attorney General of Trinidad and Tobago v Ramanooop (Trinidad and Tobago) [2005] UKPC 15 (23 March 2005)** as follows:

“In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in *Observer Publications Ltd v Matthew* (2001) 58 WIR 188, 206.”
16. In my view the instant petition has a special feature that grants me the authority to proceed with the matter as a constitutional litigation. That special feature is what appears to me to be a silent discrimination against Sudanese nationals by the Respondent. This is not an issue of a contractual dispute between a bank and its client. The issue of discrimination clearly stands out like a sore thumb in the Petitioner's pleadings and evidence. It is therefore my finding that the issues raised in the Petitioner's pleadings calls for the direct application of the Constitution.
17. Despite the Respondent's assertion that the Petitioner has not set out with a reasonable degree of precision that of which he complains of, the Constitution provisions said to have been infringed, and the manner in which the rights have been infringed, the petition is clear that the Petitioner complains of violation of his right not to be discriminated against under Article 27. It is also the Petitioner's case that the alleged discrimination resulted in the violation of his consumer rights which are protected under Article 46 of the Constitution. The Petitioner has also clearly explained why he believes that his rights have been violated. His case therefore brings forth constitutional issues and the fact that those issues are clear is confirmed by the direct response by the Respondent to the issues raised in the petition.
18. Section 26 of the Terms and Conditions applicable to the Petitioner's bank account required the Respondent to give the Petitioner a reasonable notice of not less than fourteen days before closing the account unless the account was being used for illegal activity or was being closed pursuant to a court order. The Respondent was also required to provide the Petitioner with the reasons for the closure of account.
19. It is the Respondent's case that the reason for the closure of the account was provided in the letter addressed the Petitioner on 1st July, 2017. The letter partly stated:

“RE: NOTIFICATION OF CLOSURE OF YOUR ACCOUNT NUMBER ...

We write as regards the above matter. We regret to inform you that we are unable to serve your banking needs at this time. Your above reference account with the Bank will be closed within 14 days of the date of this letter and a cheque representing the balance in your account on that date, if any, will be mailed to you at the above address...

20. It is the Respondent's case that the reason from the closure of the account was provided and the claim by the Petitioner that the account was closed an account of his nationality is therefore denied.

21. The claim by the Respondent that it could not serve the Petitioner's banking needs was rebutted by the Petitioner in the affidavit he swore on 8th January, 2018 in support of the petition. In the affidavit he deposed that an official of the Respondent by the name Reshma Parmar had informed him that the Respondent was undesirous of maintaining his account due to his Sudanese nationality. The Petitioner averred that he was also told by the same official that Sudanese nationals were being targeted by the international community due to sanctions against Sudan and the bank feared repercussions if it continued to maintain his account. The Petitioner repeated this evidence in his oral testimony and the same was not rebutted by the Respondent.

22. The assertion by the Respondent that it closed the Petitioner's account because it could not meet his banking needs at that time is not supported by any evidence. Indeed, when DW1 Lawi Sato was cross-examined by the Petitioner's counsel he disclosed that the bank still operated dollar and sterling pound accounts. These are the type of accounts that the Petitioner was operating with the Respondent. There was therefore no justification for the Respondent's claim that it was not able to meet the Petitioner's banking needs.

23. In any case the statement that "*we are unable to serve your banking needs at this time*" is so vague that it cannot be called a reason. In accordance with the terms of the contract entered between the Petitioner and the Respondent the Respondent was required to state why it could no longer meet the Petitioner's banking needs.

24. In short, the Petitioner has established that his business relationship with the Respondent was terminated because he is a Sudanese. The Respondent had no justification for closing the Petitioner's account because he was not among the entities listed in the US Department of the Treasury's Office of Foreign Assets Control Sanctions List. That the Petitioner had no blemish was indeed confirmed when he was welcomed with open arms by National Bank of Kenya.

25. Article 27 of the Constitution prohibits discrimination. It states:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

26. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR it was held that:

"...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...."

The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."

27. The Respondent did not attempt, and it was indeed an impossible feat, to justify why the Petitioner's nationality could be a justifiable basis for closing his bank account. The actions of the Respondent were clearly in violation of Article 27 of the Constitution. He was given

different treatment from the other customers of the Respondent without any valid justification. The reason for the closure of the Petitioner's account is that he was a Sudanese national. He was therefore treated differently from other customers and that amounted to discrimination.

28. I am in agreement with the Petitioner that his discrimination led to the violation of his rights as a consumer under Article 46. His right to enjoy the services offered by the Respondent was violated when his account was closed for no legitimate reason.

29. What are the appropriate remedies in this case? The Petitioner prayed for general damages but did not suggest any quantum. The Respondent also did not propose what it thought should be the appropriate award in the circumstances of this case.

30. The reason for award of monetary compensation in claims of violation of constitutional rights and fundamental freedoms was explained in **Attorney General of Trinidad and Tobago v Ramanooop (Trinidad and Tobago) [2005] UKPC 15 (23 March 2005)** as follows:

“Damages for breach of a constitutional right should vindicate that right and are a matter for the court's discretion. But it is not appropriate to punish the state or an individual by way of constitutional relief and the court has no jurisdiction to do so...

Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.”

31. I am guided by the principles expressed in the cited decision. In deciding on the appropriate monetary compensation, I take note of the fact that the Petitioner was quickly embraced by another bank and he continued enjoying banking services. However, this case has disclosed silent discrimination of the Sudanese nationals by the Respondent. The award to be made must also show that the Respondent's actions cannot be entertained under our Constitution. In my view, I find an award of Kshs.2 million adequate compensation as general damages in the circumstances of this case and that is what I will award the Petitioner.

32. In summary, judgement is entered in favour of the Petitioner and against the Respondent as follows:

- a. A declaratory order is hereby issued that the Respondent's closure of the Petitioner's bank account violated the Petitioner's rights under Articles 27 and 46 of the Constitution;
- b. The Petitioner is awarded Kshs.2 million as general damages;
- c. The Petitioner is awarded costs of the petition; and
- d. The general damages and costs shall attract interest at court rates from the date of this judgment until payment in full.

Dated, signed and delivered virtually at Nairobi this 17th day of December, 2020.

W. Korir,

Judge of the High Court