



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 472 OF 2019**

**PETER KURIA WANYOIKE.....PETITIONER**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

**The Petitioner's Case**

1. The Petitioner, Peter Kuria Wanyoike, filed the petition and supporting affidavit dated 20<sup>th</sup> November, 2019 claiming that the Respondent, Barclays Bank of Kenya Limited, has infringed upon his rights and fundamental freedoms by neglecting and or refusing to provide him with specific cheque images for the period 1994 to 2000.

2. The Petitioner claims that the information is required to investigate his suspicion that bank staff had fraudulently altered the amounts on the cheques and effected withdrawals leading to the collapse of his business.

3. The Petitioner prays for the following orders:

- a. A declaration that the denial of information and or images relating to the cheques in question by the Respondent is illegal and unconstitutional;**
- b. A declaration that the Petitioner is entitled either to the copies or images of the cheques for purposes of the protection of his rights of property under the Constitution of Kenya, 2010;**
- c. General, exemplary and or aggravated damages for the denial of the constitutional rights aforesaid;**
- d. Costs of this petition;**
- e. Any other order this Honourable Court may deem fit to grant.**

**The Respondent's Case**

4. The Respondent filed a preliminary objection on 24<sup>th</sup> February, 2020 asserting that there has been an inordinate delay in lodging the petition as the cause of action arose way back in 2001; that the petition is a disguised civil suit; and that the petition is frivolous, scandalous and vexatious and thereby an abuse of the court process.

5. The Respondent further filed a replying affidavit sworn on 6<sup>th</sup> May, 2020 by its Customer Service Advisor, Evans Njoroge Gakunyi, asserting that the petition arose out of a contractual relationship between the Petitioner and Respondent and should have been settled by way of a civil suit.

6. The Respondent contends it acted on the Petitioner's request to be furnished with the specified cheques and sometime in 2002 forwarded to the Petitioner 26 cheque images that they were able to retrieve. The Respondent does not deny that it was unable to forward all the cheque images requested, and asserts that it explained to the Petitioner that the cheques for the period 8<sup>th</sup> April, 1994 to 24<sup>th</sup> May, 1996 were not available as they had been destroyed upon expiry of seven years as per the Respondent's retention policy. According to the Respondent, the

Petitioner was also informed that an additional seven cheque images could not be traced. It is therefore the Respondent's averment that the allegation that it refused or neglected to release the information to the Petitioner is false and unfounded.

### **The Petitioner's Submissions**

7. The Petitioner by way of submissions dated 12<sup>th</sup> June, 2020 submits that the first issue for the determination of the Court is whether he is owed a right to information that is being illegally withheld by the Respondent. The Petitioner relies on Article 35 of the Constitution of Kenya and Section 4 of the Access to Information Act, 2016 on the right to information. The decisions in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR**; **Katiba Institute v Presidents Delivery Unit & 3 others [2017]**; and **Charles Omanga & 8 others v Attorney General & another [2014] eKLR** are relied on to buttress the Petitioner's argument that he has met the requirement to claim that his right to information has been violated.

8. On the second issue as to whether the delay in seeking the information has deprived him of his right to information, the Petitioner argues that the Limitation of Actions Act does not apply to this petition as he has provided proof that once he received confirmation that there was evidence of fraud by the Respondent he proceeded to lodge the claim. Further, that limitation of time for filing claims is not applicable to constitutional petitions.

9. The Petitioner posits that the Respondent's conduct infers that they withheld the cheques as they contain damning evidence of forgery. Furthermore, it is asserted that the defence that the cheques were destroyed after seven years should not be taken seriously as the Respondent has produced cheques dating back to 1995.

10. On the third issue as to whether the Respondent should be compelled to give the information sought, the Petitioner claims that he has proved beyond reasonable doubt through a document examiner's report that fraud was committed by the Respondent. It is the Petitioner's case that the Limitation of Actions Act can only take effect from September 2018 when he secured the document examiner's report and not when the account was opened.

11. It is further argued that the allegation of fraud is criminal and there cannot be a limitation of time in cases of allegation of a crime. The Petitioner supports this assertion by relying on the English Court of Appeal case of **Lazarus Estates Ltd v Beasley [1956] 1 All ER 341** at page 345; and the Kenyan Court of Appeal decision in **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**.

12. On the fourth and final issue, the Petitioner contends that the costs of this suit should inevitably be awarded to him.

### **The Respondent's Submissions**

13. The Respondent filed submissions dated 14<sup>th</sup> August, 2020 submitting that the first issue for determination is whether there was inordinate delay in lodging this petition. The Respondent argues that the Petitioner has not proffered any reason why it has taken 18 years (between 2001 and 2018) to seek justice against it. It is submitted that the last communication that the Petitioner made to the Respondent was in 2002 and the Respondent actually replied to the letter. According to the Respondent, there was no communication from the Petitioner from 2002 until 2018 when the petition was filed.

14. The Respondent submits that 18 years is an inordinately long time for the Petitioner to sit on his rights even though there is no prescribed statutory period for the commencement of constitutional petitions. Reliance is placed on the Court of Appeal decision in **Wellington Nzioka v Attorney-General [2018] eKLR**.

15. It is further contended that if this Court were to grant the orders sought and compel the Respondent to furnish the Petitioner with the cheque images sought, the Respondent would not be able to comply as the cheques have been destroyed and the petition is therefore overtaken by events. The Respondent avers that the doctrine of laches defeats the petition and the same should be dismissed as equity only aids the vigilant.

16. On the second issue as to whether the petition raises any constitutional issues or violation of any constitutional rights, the Respondent contends that the petition does not set out the precise constitutional provisions that are alleged to have been infringed nor does it set out the exact nature of infringement. The statement is supported by the principle established in the case of **Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154**.

17. It is further asserted that the Petitioner's right to information arises from the contractual bank-customer relationship and the Petitioner could have easily pursued the Respondent for breach of contract under a civil suit. Reliance is placed on the decision in **Godfrey Paul Okutoyi (Suing on his own behalf of and representing and for the benefit of all past and present customer of banking institutions in Kenya) v Habil Olaka- Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**. The Respondent submits that the bank-customer relationship falls within the purview of private law and no constitutional issues arise in this petition.

18. Moreover, the Respondent points out that the Petitioner raises allegations of fraud, which is not a constitutional issue and the proper court to lodge such a complaint, would be the Commercial Division of the High Court. To buttress this argument the Respondent relies on the case of **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR**.

### **The Analysis and Determination**

19. In my view the issues for determination are as follows:

- a. Whether there has been inordinate delay in filing this petition and the consequences of such delay;
- b. Whether the Respondent has infringed on the Petitioner's right to information; and
- c. Who should bear the costs of the suit.

### **Inordinate Delay**

20. The Respondent argues that the Petitioner has failed to pursue this case for 17 years, which amounts to inordinate delay. It is submitted that the Petitioner's claims have been defeated by events as some of the cheques requested were destroyed under the Respondent's retention policy.

21. The Petitioner is unconvinced by the Respondent's argument and asserts that he has provided proof that once he received confirmation that there was evidence of fraud by the Respondent he proceeded to lodge the claim. He further claims in his supplementary affidavit sworn on 9<sup>th</sup> June, 2020 that as per Section 26 of the Limitation of Actions Act time does not start to run until the plaintiff has discovered the fraud.

22. From the evidence placed before this Court it is noted that the Petitioner first requested for the cheque images in 2002 which request was responded to by the Respondent vide their letters marked PKW4 and PKW6. The Respondent explained that they were unable to produce some of the cheques. As asserted by the Petitioner there is a discrepancy on the letters as the letter marked PKW4 and dated 29<sup>th</sup> July, 2002 states that the "*copies of the cheques requested...for the period 8<sup>th</sup> April 1994 to 24<sup>th</sup> March 1996 will not be available because they have been destroyed on expiry of six years as per bank retention policy.*" However, in the letter marked PKW6 and dated 9<sup>th</sup> May, 2002 the Respondent explained that "the bank's retention of entries, such as cheques, is 6 years. Items for 1994 and 1995 have been confirmed destroyed after expiration of the retention period in line with the legal requirements." The Respondent's letters refers to different dates for the destruction of the letters. However, I do not believe this discrepancy has any weight on the matter before me.

23. It is important to note that this Court does not deal with matters of fraud but of violations of the Constitution and the rights and privileges recognised and protected by the Constitution. Therefore, I do not see how Section 26 of the Limitation of Actions Act would apply to this matter, and this would not be the proper forum to raise allegations of fraud. The alleged denial of information occurred in 2002 as evidenced by the letters marked PKW4 and PKW6 and therefore the alleged violation took place in 2002.

24. In the case of **Wellington Nzioka Kioko v Attorney-General [2018] eKLR**, the Court of Appeal postulated on the issue of inordinate delay and determined as follows:

**"When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses...If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don't seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent."**

25. Again on the issue of delay in commencing legal action, it was stated in the case of **James Kanyiota Nderitu v Attorney General & another [2013] eKLR** that:

**"45. [...] Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time."**

26. Moreover, in **Zipporah Seroney & 5 others v Attorney-General [2020] eKLR**, this Court determined that:

**"57. My understanding of the law as stated in the cited cases is that there is no time limit for the institution of claims touching on violation of constitutional rights and fundamental freedoms. However, where no plausible reason is offered for the delay and if the delay is inordinate that it is likely to prejudice the trial of the claim due to for instance unavailability of witnesses, then the court will be inclined to reject the suit for being time barred."**

27. In the instant case the Petitioner did not institute his case in 2002 when he was allegedly denied the information until 2018 when he failed this petition. For more than sixteen years the Petitioner did not seek to pursue the Respondent for the alleged violation of his right to information through the judicial system and did not communicate with the Respondent on his intention to obtain the impugned cheque images even after the initial request was responded to.

28. The Petitioner has justified his delay by claiming that he sought to prove that there was evidence of fraud by the Respondent before filing

a suit. However, the Petitioner has failed to explain how these allegations of fraud have any correlation with the violation of his right to information and consequent delay in pursuing the information that he claims would prove fraud on the part of the Respondent.

29. It is my opinion that the Petitioner has not made any effort to explain why he delayed to seek justice through the courts for sixteen years. The Respondent averred that it is no longer in a position to produce the information sought as the documents were destroyed after seven years in accordance with its retention policy. The decision of the Petitioner to commence action over sixteen years later has resulted in denying the Respondent an opportunity to defend itself as it no longer has in its possession the documents it could have used to defend its position. In the circumstances of this case, I am inclined to reject this suit on the ground of inordinate delay.

### **The Violation of the Right to Information**

30. The Petitioner accuses the Respondent of violating his right to information by failing to provide him with the impugned cheque images. He claims that the impugned cheque images would provide him with proof that the Respondent committed fraud against him.

32. The Respondent contends that the petition does not set out the precise constitutional provisions that are alleged to have been infringed nor does it set out the exact nature of infringement. It is further asserted that the petition raises allegation of fraud, which is not a constitutional issue and the proper court to lodge such a complaint would be the Commercial Division of the High Court.

32. The Respondent has provided the Petitioner and this Court with reasons as to why they were unable to provide the Petitioner with the information requested. The Petitioner has retorted in his supporting affidavit that the cheques were not destroyed as they are stored in the form of micro-film which are accessible to the Respondent. The Petitioner has not backed up this claim with any proof and therefore the Respondent's assertion has not been properly rebutted.

33. The Petitioner herein has failed to convince me that the Respondent has deliberately withheld the information sought out of malice or for any other fraudulent reason. The Respondent has informed the Petitioner and the Court the cheques could not be produced having been destroyed in accordance with its retention policy and although the Petitioner disputes this reason he has failed to controvert the Respondent's argument.

34. It is therefore my finding that the Petitioner has not proven the allegation of violation of his right to information as the information sought was not available as it was destroyed under the Respondent's retention policy. The allegation that the Respondent destroyed the cheques to hide evidence of fraud has not been substantiated by the Petitioner.

35. In view of the reasons stated hereinabove, I find that not only has the Petitioner failed to prove that his right to information was infringed but he has also sought the intervention of the Court after unexplained inordinate delay.

36. In the circumstances the petition is hereby dismissed with an order directing the parties to bear their own costs of the proceedings.

**Dated, signed and delivered virtually at Nairobi this 17<sup>th</sup> day of December, 2020**

**W. Korir,**

**Judge of the High Court**