



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 400 OF 2016

CONSUMER FEDERATION OF KENYA (COFEK).....PETITIONER

Suing through its officials namely STEPHEN MUTORO,

EPHRAIM KANAKE and HENRY OCHIENG

VERSUS

COMMERCIAL BANK OF AFRICA.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

SAFARICOM LIMITED.....INTERESTED PARTY

JUDGEMENT

1. The petitioner, **CONSUMER FEDERATION of KENYA (COFEK)** has moved the court by way of a petition pursuant to Articles 1, 4 (2), 10, 22, 23, 24, 35, 40, 46, 47, 48, 50, 232, 258, 259 and 260 of the Constitution of Kenya.
2. It seeks a declaration that any additional sums charged by the 1st respondent, **COMMERCIAL BANK of AFRICA**, above the rates provided under the Banking Act was illegal and unconstitutional, thus null and void.
3. It also seeks a declaration that any additional sum offered over and above the principal amount constitutes Interest Rates as defined within the Banking Act, and not "*Facilitation*", negotiation or any other "*Fee*" as purported by the 1st Respondent.
4. The court was invited to order the 1st and 2nd respondents to fully comply with the Banking Act 2016.
5. The court was also asked to order the 2nd Respondent, **CENTRAL BANK of KENYA**, to ensure that the 1st Respondent refunds all such higher interest levied on various customers of the 1st Respondent, in respect of their **M-SHWARI ACCOUNTS** after 14th September 2016.
6. The petition asked the court to order the **CENTRAL BANK of KENYA** to review terms and to ensure full compliance by the **COMMERCIAL BANK of AFRICA**, with all the provisions of the Banking Act and with the regulations of the Central Bank of Kenya.
7. A further request of the petitioner was that this matter be certified as a **CLASS ACTION SUIT** for the purposes of compensating all affected subscribers of the **M-SHWARI** service which is operated by the Commercial Bank of Africa.
8. Finally, the petitioner asked the court to order the respondents to pay the costs of the petition.
9. After the petition was filed, **SAFARICOM LIMITED** sought and was granted leave to be enjoined to the suit, as an Interested Party.
10. The reason for the joinder of Safaricom Limited to the petition is that, together with the Commercial Bank of Africa, it offers a platform through which the bank offers loans to its customers, through mobile phones.
11. According to the petitioner, the bank was guilty of partial and selective compliance with the Banking Act 2016.

12. In particular, the petitioner faulted the bank for charging Interest at the rate of 7.5% per a loan which was repayable within 30 days. However, the bank had, in the opinion of the petitioner, chosen to mislead its customers by calling the said interest, as "*Facilitation Fees*".
13. By charging that fee, the bank is said to be violating the provisions of Section 33 (2) of the Banking Act, which prohibits any person who was giving loans from charging interest at rates which were in excess of that which is prescribed by law.
14. Even though the concept of M-shwari was an innovation, the petitioner submitted that it was wrong for the Central Bank of Kenya to allow banking institutions to come up with "*innovations to defeat and circumvent the cause of justice.....*"
15. The petitioner pointed out that pursuant to Section 33 (a) (b) of the Banking Act, the rate of interest on lending was capped at 4% over and above the Central Bank Rate (**CBR**).
16. In the circumstances, as the petitioner is convinced that the bank was violating the statute, it stated that the bank was liable to a fine of not less than Kshs. 1 Million or in default the Chief Executive Officer of the bank should be imprisoned for a period of not less than a year.
17. By the petitioner's calculations, the 7.5% "*interest*" in respect to loans which are payable in 30 days, translates to 90% per annum. Therefore, that would mean that the bank was overcharging its consumers by 75.5 % per annum, considering that the Central Bank had imposed a maximum cap at 14.5 % per annum.
18. On the other hand, the Mshwari customers were being paid interest at the rate of 0.6% per month, or 7.35% per annum.
19. Therefore, the petitioner argued that the bank had failed to comply with the rule on consistency between the interest charged on loans and the interest paid by the bank on deposits.
20. The bank was further faulted for failing "*the Clarity test*" on the rate of interest charged on loans, as contrasted with the interest paid on consumers savings.
21. As far as the petitioner was concerned, Kenya Commercial Bank, which offers "*KCB Mpesa*", had complied with the law, by reducing its rate of interest.
22. Similarly, Equity Bank Limited was also said to have announced that its mobile-based loan product called **EAZZY LOAN** was priced at 14.5% per annum.
23. Therefore, the petitioner says that those two banks were now providing mobile phone-based loans which were in compliance with the law governing the maximum interest chargeable.
24. On the other hand, the Commercial Bank of Africa was deemed to be carrying on as if it was exempted from the law capping interest rates.
25. That is the reason why the petitioner has asked the court to tell the bank there was no sound legal basis for not complying fully with the Banking Act.
26. The petitioner submitted that the Commercial Bank of Africa had conspired with the Central Bank of Kenya to contravene Article 46 of the Constitution as well as the Banking Act 2016.
27. According to the petitioner, if the court failed to compel the bank and the Central Bank to comply with the law, that would escalate sector indiscipline, which would eventually hurt consumers, as banks would decide for themselves what and when to charge hapless consumers.
28. In answer to the petition, the respondents and the Interested party submitted that the petition did not meet the threshold of a Constitutional petition.
29. Upon the face of the petition there is a reference to numerous Articles of the Constitution.
30. However, in its submissions, the petitioner focused almost exclusively on the provisions of the Banking Act, when addressing the substantive petition.
31. As the petitioner stated, Article 3 (1) of the Constitution imposes an obligation on every person to respect, uphold and defend the Constitution. There is no exception.
32. Therefore, if the respondents or the interested party had asserted that they or any of them was exempted, the Court would have made it crystal clear to them that each and every person has a responsibility to respect, uphold and defend the Constitution.
33. However, it is equally important to emphasize that the violation of the provisions of any statute, such as either the Banking Act or the Consumer Protection Act cannot be equated to a violation of the Constitution.
34. Not every statutory provision embodies some provision which can be found in the Constitution.

35. Every provision of statute should be consistent with the Constitution, but that requirement does not elevate statutes to the level of the Constitution.
36. Therefore it is conceivable that when some provision of statute was violated, such violation would not also constitute a violation of the Constitution.
37. In this case, the petitioner has expressed its deep concerns about the bank's alleged partial compliance with the Banking Act.
38. But even if it were assumed that such violation had occurred, the petition should have sought to demonstrate that the said violation also constituted a violation of the Constitution.
39. In order to be able to demonstrate that a valuation of a statutory provision also constituted a violation of the Constitution, the petitioner or the applicant must identify the specific constitutional provision which had been violated, and indicate how the alleged violation is said to have happened.
40. If a statutory provision was violated, the party who had been impacted by the said violation would be entitled to a remedy.
41. For instance, if the applicant proved that the interest rates being charged were in excess of the rate allowed under the Banking Act, the court could order that any money that was in excess of what ought to have been paid, should be refunded.
42. In other instances, an applicant may only seek a declaration that the interest rates being charged were in violation of the law. If the court were to find in favour of the applicant, it might lead to a consequential order, (*if sought*), depending on whether or not the applicant had paid the legitimate amounts claimed.
43. An applicant, who was still repaying his loan, might ask that the bank be compelled to recalculate the interest, in accordance with the law, and to thereafter give him an appropriate credit.
44. The point I am making is that a person may seek and obtain appropriate remedies for wrongs emanating from the violation of statutory provisions, without having to invoke the Constitution.
45. In this case, the respondents have categorically denied the contention that the bank was violating the law, by charging interest at rates which were unlawful.
46. If anything, the respondents insist that the amounts complained about were not in respect of any interest at all. The said amounts were "**TRANSACTION FEES**", which were charged once only, in respect of each loan which the bank gave to its customer, through the **M-SHWARI** facility.
47. In effect, there is a serious dispute as to the facts upon which the petitioner founded its constitutional petition.
48. Was the bank charging interest or was it a "*loan facility*" or a "*transaction fee*"?
49. Does the fact that the **KENYA COMMERCIAL BANK and EQUITY BANK**, both lowered the rate of interest which they charged on their respective phone-based loans, so that the rates were capped at 14.5% per annum, indicative of what the **COMMERCIAL BANK of AFRICA** was obliged to do?
50. The bank herein insisted that those two other banks were charging Interest which they then had to bring in line with the amendment to the Banking Act 2016.
51. On the other hand, the bank was adamant that the only interest which they charged on the M-shwari loans was well within the lawfully prescribed maximum. In the event, the bank had no reason to reduce any rate of interest, so it said.
52. The only way of resolving the dispute on the facts would be through a case in which a customer would lead evidence to prove facts.
53. In this case, the petitioner proceeded to give submissions on the basis of assumptions, rather than on the basis of proven facts. And as the facts were disputed, it was a shaky foundation upon which the petitioner made submissions.
54. I find no basis for the contention that the Central Bank had allowed the bank to come up with "*Innovations to defeat and/or circumvent the cause of justice.....*"
55. The M-shwari facility was introduced in the year 2012, whereas the provisions of the Banking Act which the bank is accused of either defeating or circumventing were brought into place in 2016. It therefore defies logic to reason that an innovation which preceded the amendment of the statute was introduced with the intention of defeating or circumventing the amendments in issue.
56. Pursuant to Section 33 B (3) of the Banking Act, any bank which contravenes the Banking Act commits an offence, for which the bank could face a fine of not less than Kshs. 1,000,000/-. In the event that the bank defaulted in meeting the fine, its Chief Executive Officer could face a jail term for not less than one year.

57. In the light of that provision, it follows that a violation of the provisions in issue would attract the kind of sentence which is only meted out against criminals.

58. Considering the consequences, it would follow that when a person asserts that the bank was violating those provisions of the Banking Act, the standard of proof ought to be higher than on a balance of probability.

59. I find that the petitioner has not discharged the burden of proof.

60. I also find that the petitioner has not tendered any evidence of the alleged conspiracy between the Central Bank of Kenya and the Commercial Bank of Africa.

61. The evidence before me shows that the bank had made an application to the Governor of the Central Bank, seeking approval for the M-shwari product.

62. The Governor gave due consideration to the application and then a conditional approval.

63. It is essential to note that the product which was approved contained features which included;

a) No security required for the loan;

b) Repayment period would be 30 days from disbursement;

c) No Interest charged on the loan;

d) A facility fee of 10% of the amount disbursed;

e) Roll over fee of 10% of principal balance unpaid by the 31st date of the loan.

64. Later, the facilitation fee was reduced to 7.5% of the loan amount disbursed.

65. Therefore, the available evidence actually shows that the Central Bank of Kenya undertook its responsibilities seriously. It did not abdicate its obligations, nor has it been shown to have conspired with the Commercial Bank of Africa.

66. As regards the petitioner's contention that the bank was guilty of false representation and unfair business practice, I find that the petitioner has not proved its said assertion. The terms and conditions governing M-shwari have been set out in detail, in a document which is available to all customers. The petitioner has not shown any particular term or condition which constitutes false representation or which gives rise to unfair business practices on the part of the bank.

67. In any event, if the petitioner had proved the assertions of false representation or unfair business practice, the same would not amount to a violation of the Constitution.

68. In conclusion I find that the matters complained about by the petitioner did not meet the threshold of a constitutional petition.

69. I also find that the petitioner has failed to prove any of the allegations, in any event.

70. Consequently, the petition is dismissed.

71. As regards costs, I order each party to bear its own costs. I so order because, although the petition has been unsuccessful, I find that it had been brought for the intention of seeking protection to consumers whom the petitioner considered to be financially weak and vulnerable.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of March 2018.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Kurauka for the Petitioner

K. Fraser for the 1st Respondent

Ouma for the 2nd Respondent

Wilson for the 3rd Respondent.