REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.457 OF 2015

BETWEEN

GODFREY PAUL OKUTOYI ***(SUING ON HIS OWN BEHALF AND ON BEHALF OF AND REPRESENTING AND FOR THE BENEFIT OF ALL PAST AND PRESENT CUSTOMERS OF BANKING INSTITUTION IN KENYA)*** **......................PETITIONER**

AND

HABIL OLAKA – ***THE EXECUTIVE DIRECTOR (SECRETARY) OF THE KENYA BANKERS ASSOCIATION BEING SUED ON BEHALF OF KENYA BANKERS ASSOCIATION…***…**..1ST RESPONDENT**

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

RULING

Background

1. The Petition dated 22nd October 2015 is brief and essentially seeks to challenge the alleged conduct of members of the Kenya Bankers Association (KBA) and the 2nd Respondent in so far as their application and enforcement of **Section 44** of the **Banking Act, Cap.488 Laws of Kenya** is concerned. For avoidance of doubt, that Section provides thus:

> ***"44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.***
>
> ***44A(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).***
>
> ***(2) The maximum amount referred to in subsection (1) is the sum of the following-***
>
> > ***a) the principal owing when the loan becomes non-performing;***
> >
> > ***b) interest, in accordance with the contract between the debtor and the institution, not***

exceeding the principal owing when the loan becomes non-performing; and

c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last become non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) In this section –

a. 'debtor' includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;

b. 'loan' incudes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and

c. a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that were loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following-

a. The principal and interest owing on the day this section comes into operation; and

b. Interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

c. Expenses incurred in the recovery of any amounts owed by the debtor.

2. It is the Petitioner's contention in that regard that members of the KBA which are banking institutions have fraudulently increased their rates of banking and other charges leading to alleged mortgaged properties being auctioned prematurely, businesses being placed in receivership and the general populace being impoverished.

3. It is also stated in the Petition that **HCCC No.433 of 2003 – Rose Florence Wanjiru v Standard Chartered Bank of Kenya Ltd & 2 Others** has a legal vexus with the issues raised in the Petition.

4. It is important to reproduce the prayers sought for reasons to be seen later. They are as follows:

i. A declaration that the member institutions (banks) of the 1st Respondent have infringed their customers' consumer rights by depleting respective customers' accounts (Article 46);

ii. A declaration that the 2nd Respondent (as the Regulator) has failed to protect the economic interests of the customers of the member institutions (banks) of the 1st Respondent (Article 23(3)(a) and 46(1)(c);

iii. A declaration that the 2nd Respondent (as the Regulator) despite having information/data of institutions (banks) not being in compliance of Section 44 of the Banking Act, has not taken any

action necessary for banks' customers to gain the full benefit of banking services in Kenya (Article 23(3)(a) and 46(1)(b));

iv. A declaration that the audited accounts of member institutions (banks) of the 1st Respondent be revised upon deduction of their unjust enrichments (Article 23(3)(a));

v. Order of compensation for the loss and/or injury occasioned to the customers by the member institutions (banks) of the 1st Respondent (Article 23(3)(3) and Article 46(1)(d));

vi. Costs; and

vii. Such other order(s) as this Honourable Court shall deem just.

The Application dated 7th December 2015

5. Before the Petition could be set down for hearing, the 1st Respondent not quoting any specific provisions of the law or any rules of procedure, filed a Notice of Motion Application seeking orders that;

1. The Petition herein be struck out.

2. In the alternative that paragraphs (d), (e) and (f) of the Petition and paragraphs 17, 19, 20, 22, 32 and 37 of the Petitioner's Supporting Affidavit be struck out as scandalous, vexatious and an abuse of the process of the Court.

3. The costs of the Petition and the application be paid by the Petitioner.

The grounds in support are said to be that;

a. There is no provision in the Constitution for suing a Respondent in a representative capacity.

b. There is no allegation or evidence in the Petition or the Supporting Affidavit that the 1st Respondent, Habil Olaka, or the Kenya Bankers Association has contravened Section 44 of the Banking Act or any provision of the Constitution.

c. The matters raised in the Petition are matters of private contractual relationships between the commercial banks and the individual customers and not constitutional matters.

d. The prayer for compensation for all the persons on whose behalf the Petitioner brings this Petition would entail access to the personal banking information of each such person which would constitute a violation of the right of privacy contained in Article 31 of the Constitution and Section 31 of the Banking Act of the individual customers.

e. The assertions by the Petitioner in paragraphs (d), (e), and (f) of fraudulent and/or illegal increase of charges; of deprivation of customers' money; premature auction of mortgaged/charged properties; unwarranted receiverships; impoverishment; "indignified" general populace; and defrauding customers are not based on any evidence that has been placed before the Court and are scandalous, vexatious and an abuse of the process of the Court.

f. The allegations in paragraphs 17, 19, 20, 22, 28, 32 and 37 of the Petitioners' Supporting Affidavit of deceit and fraud; fraudulent conversion; unjust enrichment, rogue financial institutions and rogue banks; moneys skimmed; milked dry are scandalous, vexatious and an abuse of the process of the Court and should be struck out.

6. In response, the Petitioner, by his Replying Affidavit sworn on 31st May 2016, and of relevance to the

Application at hand contends that the Kenya Bankers Association is a trade union and whose objects *inter alia* is to act as an agent or representative of any of its members in respect of matters connected with any of their operations, work or administration. That therefore the naming of Mr. Habil Olaka as having been sued on behalf of the said Association is neither unlawful nor unique as the Executive Director of KBA has sued or been sued in the past, for example in **H. C. Misc. application No.908 of 2001, Albet Rutuna & Anor and J. K. Wanyela** (Chairman and Executive Director (secretary) respectively of the Kenya Bankers Association suing for and on behalf of the **Kenya Bankers Association v Minister of Finance & Anor.**

7. Regarding the allegation that past and present customers of all banking institutions are an amorphous and unidentifiable group or class of persons, it is the Petitioner's case that the said persons are consumers with economic interests within the meaning of **Article 46(1) (c)** of the **Constitution** and can properly ventilate their claims through the Petitioner.

8. On **HCCC 433 of 2003** aforesaid, it is the Petitioner's contention that since Gikonyo J. had ruled on 27th August 2015 that alleged constitutional violations could not be introduced in that suit, he was properly entitled to institute the present Petition under **Article 22** of the **Constitution.**

9. Lastly, that looking at the substance of his Petition and the matters of fact and law that he intends to raise at the hearing, the Application herein is mischievous, and ought to be dismissed with costs.

Case for the 2nd Respondent

10. The 2nd Respondent, on its part, supports the Application and by grounds in reply filed on 6th July 2016 and in written submissions filed on the same day, it is its case that the Petition is bare of any clear and comprehensible material on violations of the Constitution and is not in line with the expectations of **Anaritta Karimi Njeru or Mumo Matemu**.

11. Further, that the proceedings are also subjudice in view of **HCCC No.433 of 2003** which has been admitted to be having a nexus with the present Petition.

12. Lastly, that the Petition is an abuse of Court process as the Petitioner had previously attempted to be enjoined in the above suit but having failed to do so, has now instituted the present Petition as part of his attempts at forum shopping.

Determination

13. From the outset, it must be remembered that before me is a constitutional petition alleging violation of **Article 46** of the **Constitution** which provides for the rights of consumers, in this case consumers of banking services. As I understand the law in that regard, striking out of such a Petition is a remedy sparingly granted and in the clearest of cases, more so where allegations of violations of human rights have been made as is the case in the present Petition.

14. I also note that in the submissions of the 1st Respondent, there are two substantial issues arising from the Application before me; whether the Petitioner has properly sued Habil Olaka as a representative or agent of the KBA and whether there is indeed a proper cause of action before the Court.

15. To my mind, I reiterate that it would seem that where violation of rights is alleged, it is best that those matters are determined upon the Court hearing all parties on the merits of their respective cases. That is why, even in civil cases where the threshold ought not to be as high as constitutional matters under the Bill of Rights, Madan, J.A in **D.T. Dobie and Co. v Muchina [1982] KLR 1** stated thus:

> ***"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the At this stage, the Court ought not to deal with any***

merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits [without discovery, without oral evidence tested by cross-examination in the ordinary way.] Sellers, JA (supra). As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the Court ought not to overact by considering itself in a bind summarily to dismiss the action. A Court of justice should aim at sustain a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

16. A reading of the above statement in the context of a matter such as the one before me would necessitate that in interrogating the Petition before me, I ought to see to it that striking out should only be ordered if I find that it is most hopeless and has no chance of revival.

17. With that background in mind, is the filing of the Petition against **"Habil Olaka – the Executive Director (secretary) of the Kenya Bankers Association being sued on behalf of Kenya Bankers Association"** fatal for the Petition? In that regard, the submissions by the 1st Respondent is that it is so but I am more attracted to the submission by the Petitioner that in the **Constitution** of the **Kenya Bankers Association** at Clause 99, suits or legal proceedings by or against the Association may be instituted or taken in the name of the Chairman, Vice Chairman, or the Executive Director of the Association for the time being, and therefore the present Petition was properly filed against Habil Olaka not in his personal capacity but as Executive Director of the KBA.

18. I say so because that clause is self-explanatory and it is indeed true that in his Replying Affidavit Habil Olaka states that he is the Chief Executive officer of KBA which I am certain is synonymous with the title Executive Director under the 2000 KBA Constitution.

19. In any event, under **Article 22** of the **Constitution**, any person can institute proceedings alleging a violation of constitutional rights and freedoms and even if Habil Olaka is not the Executive Director of KBA and is therefore improperly sued, proof of alleged violation of **Article 46** is a matter to be properly determined after a full hearing of the Petition and not in summary proceedings. Similarly, whether or not Habil Olaka, as Executive Director of the Kenya Bankers Association and the Association itself has contravened **Section 44** of the **Banking Act** is a matter to be tested and tried on the material evidence to be submitted and not on affidavit evidence alone.

20. What of the proceedings in **HCCC 433 of 2003?** In the Petition, the Petitioner admitted that the said suit has a legal nexus with the present proceedings and in this Application it has transpired that in fact the Petitioner attempted to be made a party to that suit but Gikonyo J. in his Ruling declined to do so and the Petitioner then filed the present Petition

21. I have read that Ruling and it would seem that while he addressed allegations of discrimination contrary to **Article 27** of the **Constitution**, the learned Judge dismissed the application for joinder for different reasons. He stated thus:

"Matters raised in this suit are serious and may require even more intense policy measures by the State and the Regulator if commercial transactions should be made fair. The state and the regulator could take such measures as were taken by jurisdictions such as Nigeria and USA; that is welcome. Given what I have stated, I will not order joinder en masse of all the customers

as each customer will have to show by way of evidence that he has [the] same interest in the proceedings and that the specific bank with which he had a contractual relationship levied interest and other charges in contravention of Section 44 of the Banking Act. Similarly, even if a party is joined such party may still opt out of the proceedings without any restriction save subject to costs if any".

22. In that context, the present Petition as I stated earlier, principally challenges **Section 44** of the **Banking Act** as being in violation of **Article 46** of the **Constitution.** That issue was never before Gikonyo J and while it may well be that this Petition is an ingenious way of addressing the same issues as in the prior suit, in the interests of justice, I should not pre-empt the Petitioner's case and summarily dismiss his claims.

23. That finding leaves me with a rather interesting aspect of the Petition; the assertions by the Petitioner that he seeks an order of compensation for the loss and/or injury occasioned to customers by the member institutions (banks) of the 1st Respondent. The 1st Respondent has taken issue with that prayer, arguing that no such claim can properly lie since the alleged customers are not disclosed and their losses, if any are unknown. Without saying more, such a matter ought to be determined on its merits upon a full hearing and if no evidence is presented as to the identity and losses of the said customers, the claim will die naturally.

24. It is also the 1st Respondent's case that the Petitioner's claims that banks have acted fraudulently, have unjustly enriched themselves and have milked their customers dry, are scandalous, vexatious and an abuse of Court process. Whatever the merits or otherwise of such a claim, the same can only be interrogated at a full hearing and not in summary dismissal or striking out of these proceedings more so where the fundamental claim is one premised on the Bill of Rights.

Disposition

25.Having held as above, it follows that I see no merit in the Application dated 7th December 2015 and the same is hereby dismissed.

26. Although costs ordinarily follow the event, in this particular instance, let costs abide the outcome of the Petition.

27. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRURARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY

OF FEBRUARY, 2017

E. CHACHA MWITA

JUDGE