



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 260 OF 2011.

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 28, AND 35 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 19, 20,21,22,23,24,35,40 & 50 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA & RULE 11 (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40,47,48,50(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN IN THE MATTER OF ARTICLES 9(1) AND 14 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACPHR)

GEORGE M. MUSYA & 387 OTHERS.....PETITIONERS

VERSUS

MACHAKOS DISTRICT CO-OPERATIVE UNION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MINISTRY OF CO-OPERATIVES

JUDGMENT

Introduction

The Petitioners are coffee farmers resident in Machakos County, and have brought this petition on their own behalf and on behalf of the depositors and beneficiaries of the defunct Machakos District Union Co-operative Bank which was operated by the 1st Respondent. The 1st Respondent on the other hand is a co-operative union registered under the Co-operative Societies Act, and at the time of the Petition operated a banking section known as Machakos Union Co-operative Bank which had various branches at various coffee factories within Machakos District.

The 2nd Respondent is the Attorney General, and is sued in his capacity as the chief legal adviser of the Ministry of Cooperatives. The Ministry of Cooperatives and Marketing which is the 3rd Respondent, was the Ministry which at the time of filing this Petition that was responsible for overseeing the operations of the 1st Respondent is a company incorporated under the Companies Act Cap 486 of the Laws of Kenya.

The Petitioners and those persons on behalf of whom they have brought the Petition held money accounts at the 1st Respondent, and they claim that sometime in 1993 the Respondents without any explanation arbitrarily and unilaterally closed down the union banking section, thereby withholding the Petitioners deposits.

Further, that after the unexplained closure of the 1st Respondent, the depositors were denied any audience by the officials of the union and the Ministry of Cooperatives under whose docket the Cooperative Union fell, and they were therefore kept in the dark about their deposits which are still being held by the 1st Respondent. Some of the Petitioners engaged an advocate to make enquiry on their behalf regarding the status of the accounts, the amount of monies and interest held and which interest had accrued, but that the Respondent was evasive, uncooperative, and unconcerned.

The Petitioner's Case

The Petitioner's case was detailed out in its Petition dated 23rd September 2011, and in a supporting and supplementary affidavit sworn on 18th September 2011 and 2nd May 2012 by George M. Musya, the 1st Petitioner, and in additional affidavits sworn on 2nd May 2012 by Samuel Kilonzo Ndotu and Simeon Maingi Muya, who are also Petitioners herein. Anthony Mulekyo Advocates, the Petitioner's Advocates, also filed written submissions dated 4th May 2015.

The Petitioners claim that the Respondents have interfered with their constitutional rights to dignity, property and information, and have acted against the rules of natural justice by being unfair to the Petitioners and not giving them prior notice before closing the bank, and also not giving them the reasons for the closure. The Petitioners further claimed that they are hardworking coffee farmers who have contributed positively to the economy of this country, and they should have been subjected to fair administrative action by the government as enshrined in the Constitution.

It is alleged that the actions by the Respondents were contrary to the national values and aspirations in the Constitution and tantamount to conspiracy to defraud the citizens of their fruit from their 'toil and hard labour. In addition, that as a result of the Respondents actions, when the banking unit was closed, the Petitioners have gone through a lot of suffering, were left hopeless and some of them became psychologically traumatized and disturbed. Further, that some of the Petitioners were unable to continue meeting their obligations to their families and due to the Respondents actions they suffered troubled family life and low self esteem.

The Petitioners gave particulars of the accounts they held with the 1st Respondent and attached copies of

their bank passbooks, and the 1st Petitioner stated that he had made several deposits in his account held by the 1st Respondent which owed him Kshs 12,701/40 at the time of closure.

Simeon Maingi Muya on his part stated that his salary of Kshs 700 a day from Kawethei Farmers Co-operative Society was deposited in his account with the 1st Respondent, and that he had also deposited a loan he had borrowed of Kshs 12,000/- in the account, which sums have not been accounted for by the 1st Respondent.

Samuel Kalonzo Nduku stated that he was a farmer with Kyamwole Coffee Society and had a deposit account with the 1st Respondent which had Kshs 403/85 at the time of the bank's closure. He also stated that at the time of the closure he was on the queue at the Tala branch of the 1st Respondent, when the person in charge announced there was no money and they were ordered to go out without explanation.

The Petitioners also contended that the 1st Respondent was attempting to water down and derail this Petition by making payments to some of the Petitioners through societies which fall under it, and inviting all petitioners to receive payment. The Petitioners attached a notice to this effect from Sengani Farmers Co-operative Society dated 16th March 2012, which they allege also borders on being *sub judice* and is an admission on the part of the by one of the 1st Respondent's members that it is indebted to the Petitioners.

The Petitioner prays for the following final orders in the Petition:

1. A declaration that the Respondents have violated the Petitioners' constitutional rights to-
 - a) Right to Access of information , and
 - b) The right to property.
 - c) The right to dignity.
2. An order compelling the Respondents to supply the Petitioners with a register list of depositors and the amount withheld for each individual as at the time of closure of the Banking section.
3. An order for compensation of the Petitioners' deposits and accrued interest at bank lending rates.
4. General damages.
5. Exemplary damages.
6. Costs of the petition.
7. Any other relief the honourable court may deem just and appropriate in the circumstances.

The Respondents' Case

The 1st Respondent's case was set out in a replying and supplementary affidavit sworn on 15th December 2011 and 13th August 2012 respectively by Martin Kyalo Malila, the 1st Respondent's manager, and submissions dated 12th November 2015 filed by A.K. Mutua Advocates, the 1st Respondent's Advocates.

The 1st Respondent denied that it withheld any information to the Petitioners as all the information required by the Petitioners is contained in their individual bank pass books and any other information was to be obtained from the Petitioners' mother co-operative societies. The 1st Respondent further denied having infringed on the Petitioners, constitutional rights, and alleged that the Petitioners' claim is made in bad faith as the Banking section was owned by the Petitioners' affiliated societies, and upon its closure,

the 3rd Respondent appointed an arbitrator between the 1st Respondent and the said co-operative societies in which the Petitioners are members in arbitration cause number 46/94. Further, that the matter was resolved in favour of the 1st Respondent whereby the societies were ordered to pay back the Petitioners' loans.

It was also alleged that the Petition herein is incompetent and bad in law and should be struck out with costs on the grounds that:-

- a) The relationship between the Petitioners, the 1st Respondent and their affiliate societies was contractual and the Petition is filed outside the limitation period without leave of the Court.
- b) Most of the Petitioners herein are sons and daughters of the account holders in the collapsed bank and they have no capacity to Petition by want of letters of administration.
- c) The Petition herein is wrongfully filed before this Court by want of section 76 of the Co-operative Societies Act
- d) The purported authority to file suit is not an authority as the law requires, for reasons that not all the Petitioners have signed the purported authority and some Petitioners have signed for others.
- e) The Petition herein offends the provisions of the Government Proceedings Act.

The 1st Respondent gave the details of the Petitioners who were dead in their supplementary affidavit, and who were alleged to have signed the Petition, and of the signatures in the Petition that were similar. It was also alleged that the cause of action herein did not arise at the same time, and each individual Petitioner had a right to file a separate claim with the tribunal.

Further, that one of the Petitioners namely David Mbithi Ndulu who is now deceased, had filed a case No. 68 of 2005 before the Co-operatives Tribunal that had been determined, and that the present Petition was therefore *res judicata* in his case. Copies of the pleadings filed in the said case were attached. It was also contended that majority of the Petitioners herein were paid through their societies, and signed payment vouchers hence compromising the Petition. Copies of the said payment vouchers were annexed.

The 1st Respondent in addition applied to cross examine the 1st Petitioner, and the said cross-examination took place during a hearing held on 25th October 2016. The salient aspects of the said cross-examination were that there were examples given by the 1st Respondent, and admission made by the 1st Petitioner, that some Petitioners alleged to have signed the authority given to the 1st Petitioner to bring the Petition were since deceased, and that some of the signatures for various Petitioners were similar. In addition it was also admitted by the 1st Petitioner and that some of the money owed by the 1st Respondent to the Petitioners was sent to various co-operative Societies during the pendency of this Petition for collection, however that not all Petitioners had received the money.

The 2nd and 3rd Respondents on their part filed grounds of opposition dated 11th June 2014, wherein they asked for the Petition to be dismissed on the grounds that the Petition does not, as against the 2nd and 3rd Respondents, disclose any privity, or denial, violation, infringement or threat to the Petitioners' fundamental rights and freedoms. Further, that the issues and transactions in dispute are matters between the Petitioners and the 1st Respondent, an entity the Petition states is still in existence. The 2nd and 3rd Respondents did not file any submissions on the Petition.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed by the Petitioner and 1st Respondent. There are various preliminary issues raised by the 1st Respondent that need to be addressed before proceeding with a consideration of the substantive issues.

The Preliminary Objections

The first preliminary issue raised is whether this suit is competently before this Court on account of the 1st Respondent being the wrong party sued, the Petition being *res judicata*, and this Court lacking jurisdiction to entertain the Petitioners' Petition. The 1st Respondent has argued in this regard that the 1st Respondent is a separate legal entity from Machakos District Co-operative Bank and that the Petitioners were neither members nor had any contractual relations with the 1st Respondent, and attached its Certificate of Registration dated 28th March 1972 as annexure "MKM 6" to its Supplementary Affidavit.

Consequently, that it follows that there is no privity of contract between Machakos District Co-operative Bank and the 1st Respondent, and therefore the 1st Respondent is non suited in the matter. Reliance was placed on the case of **Muchendu -v Waita [2003] KLR** wherein it was held that a contract cannot confer rights or impose obligations arising out of it to any person except the parties to it.

Secondly, it was argued that several Petitioners have filed cases in the Co-operative Tribunal and been paid, hence the Petition is *res judicata*. In addition that several Petitioners have been paid by their respective societies even without filing cases hence the current petition and bad in law. Lastly, that the Court's jurisdiction has been invoked incorrectly and indeed the entire Petition is bad in law since it now trite law that the High Court lacks original jurisdiction under the Co-operatives Societies Act No. 12 of 1997.

The 1st Respondent cited the decisions in **Kibunja v Attorney General & 12 others [2002] 2 KLR 1** and in **Kirinyaga District Farmers Society vs Kirinyaga District Cooperative Union Limited [2000] KLR 563** in support of the submissions that section 80 of the Co-operative Societies (cap 490) expressly ousts the jurisdiction of the court in disputes concerning the business of registered societies, and that the High Court of Kenya has by section 81 of the Co-operative Societies Act, the appellate jurisdiction from a decision by the Co-operative Tribunal.

The Petitioners on the other hand relied on the decision of Odunga J. in **Kepha Omondi Onjuro & others vs Attorney General & 5 others (2015) eKLR** wherein it was stated that the provision of Article 23 of the Constitution of Kenya gives the High Court the jurisdiction in accordance with article 165 to hear, and determine applications for redress of a denial, violation, infringement of, or threat to, a right or fundamental freedom in the bill of rights and that the availability of an alternative remedy was not a bar to a party to invoke fundamental rights and freedoms of the constitution .

The Petitioners submitted that the matter before this court is a matter of breach of the constitutional rights and freedoms of the individuals and it is within the jurisdiction of this court to address the matter, the provisions of the Cooperatives Societies Act on tribunals notwithstanding .

The second preliminary issue raised is whether the Petitioners' claim is time barred. It was contended by the 1st Respondent in this respect that the Petitioners' claims are based on contract and are outside the 6 year limitation for contract actions under the Limitation of Actions Act. Further, that the cause of action herein arose when Machakos District Co-operative Bank closed its operations and offices. Reliance was again placed on the decision in **Muchendu vs Waita (2003) KLR 419** for the submission that in respect of the deceased Petitioners, time did not stop running upon their death.

The Petitioners on their part submitted that firstly, limitation of time does not arise in constitutional petitions; secondly, the violations are of continuing nature; and thirdly, the Respondent has admitted to wrong doing by compensating a few Petitioners after the filing of the petition. Reliance was placed on the case of **Hermane Marine Nderi vs Attorney General, (2012) eKLR** for the position that the issue of time bar does not arise in constitutional petitions.

The last preliminary issue is that of the 1st Petitioner's locus to prosecute the Petition on behalf of the other Petitioners. The 1st Respondent's submissions on this issue were that that the Petition is deceptive and fraudulent as numerous deceased persons have apparently signed the letter of authority in support of

the Petition, and single Petitioners have purported to sign the letter of authority on behalf of several petitioners without any power of attorney or authority to Act. It was urged that no Petition may be sustained if purported to be presented in the name of someone who is deceased.

Further, that the letter of authority in support of the petition has not been signed by each and every petitioner independently and the current petition is not a representative suit. Reliance was placed on the decision in **Peter Miriti Pius & 363 Others -vs- Kenya Airports Authority & Another, Meru HCCC No. 47 of 2009** where the Court held that under Order 1 rule 12 of the Civil Procedure Rules, the authority for two or more of such plaintiffs or defendant must be signed by the party giving it and must be filed in the case, and that authority and directions by the Court is required both to institute and defend a representative suit.

The Petitioners on their part expounded on the role of public interest litigation as stated by Bhagwati J. in the Indian case **Peoples Union for Democratic Rights vs India**, and submitted that the requirement for *locus standi* in public interest litigation is that one should have sufficient interest in the matter. It was urged that the Petitioners and those on whose behalf the petition is brought were account holders and were directly affected when the banking unit was closed, and have the right to petition as they were most affected by the injustices committed by the 1st Respondent.

This Court is of the view that all the preliminary issues raised herein can be resolved by determining the nature of the Petitioner's claim and the attendant rules that govern the said claim. The Petitioners have brought their Petition pursuant to their rights in, and provisions of the Constitution which they allege have been contravened by the Respondents, and also pursuant to procedural rules for bringing such a petition being the Constitution Of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice And Procedure Rules of 2013. Therefore what is essentially before this Court is a Constitutional Petition.

The arguments and issue raised as to this Court's jurisdiction to hear the Petition and the Petition being *res judicata* arise from the jurisdiction granted to *the Cooperatives Tribunal* to hear disputes involving Co-operative Societies. *Section 76 of the Cooperative Societies Act provides as follows in this regard:*

“76. (1) If any dispute concerning the business of a co- operative society arises:-

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative Society; it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include -

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.

(c) a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority.”

The said Tribunal is set up under section 77 of the Co-operative Societies Act.

The point for determination is therefore whether the dispute between the parties herein is a therefore need to determine whether the claim by the Plaintiffs before it amount to a “*dispute concerning the business of the society*” in the sense of section 76(1) and (2) of the Act. In construing whether a dispute is one concerning the business of a society within the meaning of section 76(1) and (2) of the Co-operative Societies Act. Gikonyo J. in held as follows in **Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others**[2012] eKLR:

“ [60] In construing a statute where a category of some descriptors is provided in a manner that is not closed as is in section 76(2) of the Act, the canon to be applied is that of *ejusdem generis*. Accordingly, as far as possible, anything else that is to be included in that category must be of the same kinds, class, or nature. In this sense, an overly wide meaning of such prescription should be avoided, and be restricted within the overall objective of the Act. I think, this is the proper construction that should be applied in the interpretation of section 76(2) of the Act since the issue here is one of ouster of the jurisdiction of the court. The jurisdiction of any quasi-judicial tribunal is never unlimited but is always circumscribed by the law creating it. That is the reason why the Honourable Justice Makhandia J (as he then was) adopted a subtle craft in the case of *Peter Ochara Anam* when he said:

‘These acts ((sic) ...continue to apply and should be applied to resolve disputes akin to them’
[Emphasis supplied]

[61] This approach of construction of statutes, and which is expressed in the words of Honourable Justice Makhandia J (as he then was), does not allow an expansion of open ended provisions of the law to the extent of covering matters that are not akin to or are strange to or are incompatible with or outside the essential jurisdictional bounds circumscribed by the Act.”

Likewise in Muriithi J held as follows in **Republic vs Matheka Kithome & 4 Others** (2011) eKLR;

“In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being “the promotion of the welfare and economic interests of its members.” It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws and rules.”

It not in dispute that the Petitioners were members of the 1st Respondent’s affiliate societies, and their claim arises from the action of a banking section that was operated up by the 1st Respondent’s affiliate societies. It is also not in dispute that the affiliate societies of the 1st Respondent closed their banking section which had the Petitioners deposits. This claim would ordinarily have been one concerning the business of the affiliate co-operative societies if it only concerned the said deposits. However, the main claim being sought by the Petitioners arising from these facts is that the Petitioners’ constitutional rights have been thereby violated.

Furthermore, the Petitioners in addition to the relief of compensation for the deposits lost, are also seeking declarations, orders of mandamus and damages for contravention of their constitutional rights, which reliefs go beyond the ordinary business of a society within the meaning of section 76(1) of the Co-operative Societies Act, or the relief that the Co-operatives Tribunal can grant under the said section.

A similar situation arose in **Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others** (*supra*) and the learned judge held as follows herein:

“In particular, the Tribunal does not have jurisdiction to issue a judicial review order to

compel, particularly the 6th Respondent, to act in accordance with a statutory or legal obligation in relation to elections. Such relief or mandatory injunctions in the context of the petition can only be issued by the High Court. It should be clearly understood that judicial review is a relief under Article 23(3) (f) of the Constitution, and so nothing prevents a party from applying for judicial review in a constitutional petition, and if it is so applied, it will be granted, but of course on merit.”

In addition, I have also perused the pleadings by the claimant before the Cooperatives Tribunal in Tribunal Case No 68 of 2005 annexed as Annexure “MKM3” by the 1st Respondent to its supplementary affidavit sworn by Martin Kyalo Malila on 13th August 2012. Unlike in the present Petition, the said claimant was solely seeking a refund of his deposit, a matter which was within the jurisdiction of the Tribunal.

This Petition cannot therefore be said to be *res judicata* on account of the said Tribunal case for reasons that firstly, the 1st Respondent did not provide a decision of the Tribunal on the issue raised by the claimant therein; and secondly and more fundamentally, the Petition herein raises constitutional issues that are substantially different from the issues raised in the Tribunal case.

On whether the 1st Respondent has been wrongly joined as a party to this Petition, Rule 5 of the Constitution Of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice And Procedure Rules of 2013 in this respect states as follows as regards joinder of parties to a Petition:

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit”

The Court is in addition given powers to strike out the name of a party improperly joined in a Petition or add the name a person who ought to have been joined.

In the present Petition, the 1st Respondent is sued in its capacity as the operator of a banking section in various coffee factories in Machakos District under the banner Machakos Union Co-operative Bank. The Petitioners annexed copies of their bank pass books which showed that they were passbooks for savings and loans with the 1st Respondent. They thus provided evidence of the 1st Respondent’s association with the bank. In addition the 1st Respondent in its replying affidavit sworn on 15th December 2011 by Martin Kyalo Malia did admit that the banking section was owned by the Petitioners and the 1st Respondent’s affiliated societies, and claims that the relationship between the Petitioners itself and its affiliate societies was contractual. The 1st Respondent clearly therefore had a relationship with the Petitioners and is a proper and necessary party to this Petition.

The third preliminary issue raised is about the 1st Petitioner’s standing to bring this suit, and particularly if he is doing so in a representative capacity. The answer to this issue is in Article 22 of the Constitution

which grants any person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 22 (2) has greatly expands the standing to bring constitutional claims as follows:

“(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

Article 258 of the Constitution also reiterates this position, and these provisions are also emphasized in Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

The import of these provisions is that under the Constitution a person acting on behalf of the grievant or in the public interest may file a claim, and there are no requirements as to the requirements as regards filing of authority by the persons on behalf of whom a claimant acts. All the claimant needs to establish is the existence of the class of persons he or she is acting on behalf of, and in the present Petition, the 1st Petitioner did so by annexing their names and signatures. The fact that some of the Petitioners were dead at the time or that their signatures may have been forged does not detract from the main requirement, which is that this class of persons exist, and their claims are still valid. The Petitioner’s petition is therefore properly before this Court.

The last Preliminary issue raised is whether this Petition is time-barred. The Limitation of Actions Act does not in this respect provide any time limitations to constitutional petitions. Nevertheless, even though such limitation does not exist, it has been held that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent’s defence. In **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** the Learned Judge observed as follows:

“[24] Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported), Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

[25] I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: ‘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.’”

In the present case, the banking section of the 1st Respondents affiliate societies were closed down in 1993, and this Petition was filed in 2011, after a period of about 18 years. The Petitioners averred that they severally sought audience with and information from the 1st Respondent to no avail. In addition, they also attached correspondence with the 1st Respondent from as early as 2000 written by their Advocate on the subject matter of the Petition. I am satisfied that the Petitioners have demonstrated that they have not

been sleeping on their rights.

In addition, if indeed the position is that the Petitioners were paid, then no prejudice will be occasioned to the 1st Respondent if it is able to show the same.

On the violation of the Petitioner's rights to Access to Information, Property and Dignity

Coming to the substantive issues raised in this petition, these are firstly, whether the Petitioner's rights to access to information, property, and have been infringed, and secondly if so, whether the Petitioners are entitled to the relief sought.

This Court is alive to the right to access information that is provided under Article 35 of the Constitution as follows:

“Every citizen has the right of access to -

a) information held by the state

b) information held by another person and required for the exercise of the protection of any right and fundamental freedom”

Mumbi Ngugi J. in Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others [2013] eKLR held that

“.....what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.”

The Petitioners in this respect averred that they on several occasions sought information from the 1st Respondent's officials after the banking section operated by the 1st Respondent was closed and their deposits withheld, and there was no response forthcoming. The 1st Respondent stated that the Petitioners' demands were superfluous as the Petitioners attached their passbooks which showed all their book balances.

It is evident that the information sought by the Petitioners was not as regards their book balances, but the fate of their deposits after closure of the Machakos District Co-operative Bank, and they were entitled to this information as it impacted on their livelihoods and enjoyment of their other rights. In addition, this information was in the hands and of the 1st Respondent who could not arbitrarily withhold it without reason or explanation. No such reason or explanation was proffered by the 1st Respondent, and it is in the interests of accountability, good governance and democratic society that the 1st Respondent be required to provide the said information.

On the right to property, this Court is mindful of Article 40 of the Constitution which provides as follows with respect to the right to property:

“(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.”

Property as defined under the Interpretation of General Provisions Act includes money, goods, choses in action, land and every description of property, whether movable or immovable; and also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as herein defined. This definition in my view covers any beneficial interest in property and is not confined to direct ownership as argued by the Respondent.

I am also persuaded in this regard by the opinion in **The Bill of Rights Handbook by Iain Currie & Johan de Waal, Fifth Edition, (2005)** at page 537-538, wherein the authors stated as follows as to what property meant in the context of similar provisions in section 25 of the South African Constitution:

“Property in other words is something recognized as property in existing law. This means that property in section 25 probably has the meaning... property as rights..... If property means property rights and not simply property itself, it seems clear that one must take the clause to be protecting more than the right to ownership and more than simply ownership of corporeal things. Certainly real rights other than ownership part of which private law understands to be property are likely to be protected by by the clause. Property then encompasses at least the real rights recognized by the law of property such as ownership, mortgage, lease, servitude, mineral rights, liens. It encompasses as least some of the component rights making up what is termed the bundle of rights that constitutes plenary ownership: the right to use a thing, to exclude others from it, to receive income from it and to transfer it to others on mutually agreeable terms.”

Property therefore has a wider meaning than the right of physical ownership, and includes any rights in property whether real, contractual or intellectual, that have an economic value. The only limitation is that such right should have vested in the sense that it has accrued to the claimant in accordance with the applicable laws, and should not be merely an expectation.

The Petitioners in this respect provided evidence of the passbooks and money held in their accounts with

the bank operated by the 1st Respondent and its affiliate societies. The 1st Respondent alleges that some of the Petitioners have since been paid. It provided a list of persons paid by various affiliate societies, however it is not evident if these persons are the Petitioners. In addition, it also provided evidence of communication from some of its affiliate societies in particular Matungulu Rural Sacco Ltd and Kangundo Farmers Rural Sacco Ltd acknowledging receipt of cheques from the 1st Respondent, being refund of the Union's banking section members' deposits.

In my view this evidence establishes and buttresses the allegation by the Petitioners that the 1st Respondent was indeed responsible for the refund of their deposits, and is thus under an obligation to ensure that the same is done. To this extent, the 1st Respondent is thus under an obligation to establish from its affiliate societies the status of each Petitioner as regards the amount they were owed, the amount paid if any, and any balance outstanding.

As to whether the Petitioner's right to property has been infringed, the main argument put forward by the Petition is that they have been deprived of their property without any explanation. The imposition of the requirement by the Constitution that no law shall allow for arbitrary deprivation by the State or any person of another person's property, the Constitution requires fair procedures and substantive due process before a person can be deprived of his or her rights to property. Fair procedures encompass adequate notice and opportunity to be heard, while the substantive due process require that there should be established and sufficient reasons for the deprivation of the property.

In my view the withholding of the Petitioners' deposits with no information being given by the Respondents as to the recourse due or procedures to be followed by the Petitioners, amounted to arbitrary deprivation of property. While indeed the Petitioners may have had recourse to the Co-operatives Tribunal for their deposit, it is my view that the Respondents were not only obligated to inform them of this option, but also facilitate their access to the said Tribunals or other due process, as they were responsible for the closing down of the banking sections of their affiliate societies.

The Petitioners provided evidence as to how the failure by the Respondents to provide them with the information sought, and the failure to refund of their deposits has affected their livelihoods. Article 28 of the Constitution provides for the right of inherent dignity of every person and the right to have that dignity respected and protected. Article 43(1) of the Constitution also expressly provides for economic and social rights as follows:

“(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.”

The purpose of the foregoing provisions is to ensure that all persons attain a reasonable livelihood, and in this respect the right to life, dignity and economic and social rights are all connected and indivisible, and I find that the Petitioners have demonstrated the effect the Respondents actions had in this respect.

Lastly on this issue, the 2nd and 3rd Respondents stated that the Petition does not disclose any infringement or threat to the Petitioners' fundamental rights and freedoms on their part, and that the

issues and transactions in dispute are matters between the Petitioners and the 1st Respondent. The Constitution in Article 20(1) provides that the Bill of Rights applies to all law and binds all State organs and all persons, and under Article 21(1) it is the is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

As regards the specific duties in this regard of the 2nd Respondent, in addition to being the principal legal adviser of the Government, Article 156 of the Constitution also provides that the Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

The 3rd Respondent's duties arise from section 3 of the Co-operative Societies Act, which provides for the appointment of the Commissioner for Co-operative Development who is responsible for the growth and development of co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution.

Under section 93 of the Act, the Minister in charge of cooperative development may at any time and on any matter direct the Commissioner as to the exercise of his powers and duties under this Act. In addition, the Commissioner of Cooperatives has specific duties of guidance and control over liquidators of co-operative societies in the interests of the protection of members

The 2nd and 3rd Respondent cannot therefore escape liability for infringement of the Petitioners' rights as they have constitutional and statutory obligations to protect and promote the same.

The Remedies

As regards the remedies sought, this Court has found that the rights of the Petitioners were violated, and they are therefore entitled to declarations to this effect, and remedial orders. Of the remedial orders sought, this Court finds that the order to provide information and payment of any monies due the most appropriate at this stage, for reasons that the Petitioner's individual status needs to be established before orders as to compensation and damages can issue.

In addition, only four Petitioners brought evidence of the loss they suffered, and this Court cannot in the circumstances award general damages to all Petitioners in the absence of proof of damage. Lastly exemplary damages are only payable where the Respondents have had a propensity for repeating the same violations which was not shown by the Petitioners. Such damages are not payable in the circumstances.

Arising from the findings above, the proper orders to make in the instant Petition are that judgment be and is entered in favour of the Petitioners against the Respondents in the following terms:

- a) A declaration is hereby issued that the Petitioners' rights to access of information, rights to property and rights to dignity were violated by the 1st Respondent's actions of closing down Machakos District Co-operative Bank without due information and legal process being afforded to the Petitioners.
- b) The 1st and 3rd Respondents shall within 90 days file in Court and serve the Petitioners with a list of all depositors in Machakos District Co-operative Bank, the amount of deposits withheld for each depositor as at the time of closure of the said Bank, any payments since made to the said depositors, and any amounts owed to the depositors as at the date of this judgment.
- c) The 1st Respondent shall thereafter pay any amounts owed to the Petitioners within 90 days of service of the details of depositors and deposits as ordered in order (b) hereinabove, with interest at Court rates from the date of filing of this Petition.
- d) The Respondents shall meet the costs of this Petition.

Orders accordingly.

Dated, Signed, and Delivered at Machakos this 18th day of September 2017

P. NYAMWEYA

JUDGE