



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**PETITION NO. 516 OF 2014**

**BETWEEN**

**BARBRA GEORGINA KHAEMBA.....PETITIONER**

**AND**

**CABINET SECRETARY, NATIONAL TREASURY.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Barbra Georgina Khaemba, in her Petition dated 23<sup>rd</sup> October, 2014, describes herself as an **individual** within the meaning of **Chapter 4** of the **Constitution** and a **person** within the meaning of **Article 20** of the **Constitution**. She also states that she is a business woman with interests in a number of business enterprises within the country and in such capacity is an **individual** with prosperity to obtain credit facilities from financial and banking institutions under the control and supervision of the 1<sup>st</sup> Respondent. She has filed the instant Petition against the 1<sup>st</sup> Respondent, the Cabinet Secretary in charge of the National Treasury charged with the duty of regulating the finance sector; and the 2<sup>nd</sup> Respondent, the Attorney General of the Republic of Kenya whose office is created under **Article 156** of the **Constitution**. According to the Petitioner, this Petition is instituted on her behalf and for the benefit of the Kenyan public and she is acting in the public interest as her right under **Article 22** of the **Constitution**.
2. Specifically and in addition to the above, the Petitioner has filed the instant Petition challenging the constitutionality of the **Banking (Credit Reference Bureau) Regulations, 2013** (hereafter "**the Regulations**") as formulated by the Government of Kenya. The reasons thereof will be detailed out shortly.

**The Petitioner's Case**

3. In her Affidavit in support of the Petition sworn on 23<sup>rd</sup> October, 2014, the Petitioner contended that on or about the year 2008, with further amendments made in the year 2013, the 1<sup>st</sup> Respondent, without proper justification or affording probable and laudable reasons and without involving members of the general public, herself included, made the Regulations, said to be intended to streamline the banking sector.

4. She averred that she has and continues to be exposed to loss of an economic nature and thereby suffering in all respects from implementation of the said Regulations which have threatened the soundness of financial systems of the economy and have equally constituted a potential source of systematic failure of the Kenyan financial systems that mitigate debt default.
5. She argued that while the the 1<sup>st</sup> Respondent has powers under the **Banking Act (Cap 488)** and the **Microfinance Act, 2006** to regulate the banking industry, the said powers cannot be used unconstitutionally by exercising his discretion to do the same without affording the public an opportunity to air their views.
6. That **Rule 26 (1)** of the said Regulations provides that any credit reference bureau shall protect the confidentiality of customer information which is negative or positive and shall only release such customer information to the customer, the Central Bank or a requesting subscriber, a third party as authorized by the customer concerned or as required by law, thus defeating the entire purpose of protection and confidentiality as anyone can access the information relating to any other person. In this regard, she contended that, at the moment, for her to access any credit facility, all institutions will have to share her private details and if there are no details, for instance since she has not been referred to any Bureau, she stands the risk of being advanced loans at exorbitantly high interest rates since she is unknown and her credit history will not be in the public domain. That the foregoing therefore imposes a hardship for every such unknown Kenyan.
7. The Petitioner alleged further that the actions of the 1<sup>st</sup> Respondent were purely actuated by extraneous considerations unknown to her or members of the public but which can only be attributed to a cartel in the banking industry that appears to be having the ear of the 1<sup>st</sup> Respondent to the detriment of all other Kenyans in general. That she has therefore suffered severe prejudice personally as well as to her businesses and general living standards and unless restrained or prevented from enforcing the Regulations, the Respondents will occasion her further and unwarranted prejudice.
8. She now prays for the following orders:
  - a. *That this Honourable Court be pleased to make a declaration that the Banking (Credit Bureau Regulations), 2008 made by the 1<sup>st</sup> Respondent are a gross violation of the constitutional rights of members of the general public and more so the Petitioner as protected under the Kenyan Constitution.*
  - b. *That this Honourable Court be pleased to make a declaration that the Applicant's fundamental right to equality and freedom from discrimination as well as the right to privacy under Articles 27 and 31 of the Constitution, 2010 have been and continue to be infringed and the Petitioner deserves protection by the Constitution of Kenya, 2010.*
  - c. *That this Honourable Court be pleased to make a declaration that the Banking (Credit Bureau Regulations), 2008 contravene the Constitution of Kenya, 2010 by limiting rights without due process thus derogating from their core or essential content as provided under the Constitution and are therefore null and void to the extent of the contradictions.*
  - d. *That the Honourable Court be pleased to grant the costs of this Petition to the Petitioner.*

### **The Respondents' Case**

9. In reply, the Respondents filed a Replying Affidavit sworn on their behalf on 1<sup>st</sup> April, 2015 by one, Kamau Thugge, the Principal Secretary of the National Treasury.
10. Their position was that the instant Petition is mischievous, ill-conceived, misplaced and an abuse of the court process and the same ought to be dismissed for want of merit.

11. Their case was that the Regulations, as enacted, grant the Central Bank of Kenya the mandate to license and supervise the operations of Credit Reference Bureaus and that Banking Sector Credit Information Sharing became necessary following the high level of non-performing loans manifested over the years which ideally threatened the stability of the financial sector. Their contention was thus that the information sharing mechanism was aimed at resolving the tendency of some serial defaulters resorting to multiple borrowing by taking advantage of information asymmetry.
12. Further, according to the Respondents, the process of enacting the said Regulations was participatory, transparent and inclusive as major stakeholders were involved in it.
13. They asserted that the Regulations allow all institutions licensed under the **Banking Act** to report all negative information including non-performing loans and advances, proven cases of fraud and forgery, false declarations and statements as well as tendering of false securities among other things. Further, the Regulations allow sharing of positive information and this has helped banks increase their lending volumes and improve the quality of credit portfolio while reducing their loan processing costs. In addition, the Central Bank has rolled out a robust surveillance system to establish and verify the extent to which Credit Reference Bureaus comply with the Regulations and to establish the adequacy, safety and security of the system.
14. They also argued that there is no threat of a systemic failure or unsoundness of financial systems of the economy as alleged by the Petitioner because usage of credit referencing has enabled the banks to increase their lending volumes and improving the quality of credit portfolio. That the Petitioner is wrongly interpreting the Regulations for a self-serving end as she has failed to appreciate that each right has a corresponding responsibility and it would be unfair for her to focus on an alleged violation of the right to privacy and overlook the fact that failure to service a loan amounts to violation of the right to property for the financial institution. Additionally, that unless a person is a serial defaulter, the Regulations do not affect the general public in any way and the Petitioner should be estopped from misleading the Court or the public with baseless claims.
15. The Respondent's other contention was that financial institutions are regulated under various statutes with liberty to set their lending rates within the confines of the law and therefore, the Petition is misplaced as it is an attempt to interfere with the internal lending mechanism of financial institutions while failing to appreciate that it is the credit status of the customer that determines the credit worthiness of that person. That credit facilities in any event are offered voluntarily and the customer always concedes to the terms of a loan agreement at will and members of the public cannot as such allege unfairness or discrimination when expected to fulfil the terms of the agreement which was entered into freely.
16. Lastly, that the issue of discrimination does not arise in the application of the Regulations as they apply equally to all persons who are potential credit customers with financial institutions and the purported rights of the Petitioner are not absolute but subject to various limitations under the Constitution; and from all the foregoing therefore, the Petitioner is not entitled to the prayers and declarations sought in the Petition and the same should be dismissed with costs.

### **Determination**

17. Based on my reading and understanding of the Parties' respective pleadings, I am of the view that this Court is being urged to determine the constitutionality or otherwise of the **Banking (Credit Reference Bureau) Regulations, 2013** and the Petitioner has challenged the constitutionality of the said Regulations on three grounds namely: that there was no public participation in their formulation; they violate the right to privacy; and they infringe on the right to equality and freedom from discrimination before the law. I will address these contentions *seriatim*.

### **Whether there was Public Participation**

18. **Article 10** of the **Constitution** recognizes the participation of the public as a core principle of

governance. **Article 10 (2)** in this regard provides that the national values and principles of governance include-

- a. ***Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
- b. ***Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;***
- c. ...
- d. ... ***(Emphasis added)***

19. The requirement of public participation also runs across the Constitution and for example with respect to parliamentary proceedings, **Article 118**, which is entitled “**Public Access and Participation**”, provides that:

1. ***Parliament shall-***

- a. ***Conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and***
- b. ***Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.***

2. ...***(Emphasis added)***

20. The Courts have also recognised the central place of the principle of public participation in the new constitutional dispensation and in **Kenya Small Scale Farmers Forum and 6 Others vs Republic of Kenya and 2 Others [2013] eKLR** the Court made the observation that:

***“One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” It also acknowledges the people’s ‘sovereign and inalienable right to determine the form of governance of our country...’ Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of ‘inclusiveness’ and ‘participation of the people.’”***

21. In the celebrated South African case of **Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC**, the Constitutional Court of South Africa expressed the following view in regard to public participation:

***“[145] It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.”***

On this issue, see also **Moses Munyendo and 908 Others vs-Attorney General and Another, Petition Number 16 of 2013; Glenister vs President of the Republic of South**

**Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); Robert N. Gakuru and Others vs The Governor Kiambu County and 3 Others, Petition No.532 of 2013 Consolidated with Petitions Nos.12, 35, 36, 42 and 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014; and Consumer Federation of Kenya (COFEK) vs Public Service Commission and Another, Petition No. 263 of 2013** among others where the courts similarly addressed the question of public participation along the lines above.

22. It is thus clear from the foregoing that public participation remains a critical tenet of the law making process and as such, it is the duty of the Legislature to ensure that the public is involved in any law making process.
23. In the instant Petition, whereas the Petitioner alleged that the Regulations were unconstitutional for lack of public participation, no further submissions were made in that regard and no evidence was adduced in support of those allegations. Furthermore, the Petitioner did not rebut the submissions by the Respondents that the process of enacting the **Banking (Credit Reference Bureau) Regulations** was participatory, transparent and inclusive as major stakeholders were involved in the process. Based on this, I am not satisfied that the said Regulations were enacted contrary to the requirement for public participation and that is all there is to say on that matter as little material was placed before me to enable an in-depth interrogation of the issue.

#### **Whether the Regulations Violate the Right to Privacy**

24. In her Written Submissions dated 9<sup>th</sup> March, 2015, the Petitioner submitted that the right to privacy as protected by the Constitution has and continues to be infringed as no express provision was made in the **Banking Act** or the **Microfinance Act** expressing an intention to limit the rights and sharing negative information or even positive information relating to the affairs of a person. That such a position by itself is an infringement on protected rights against disclosure of a person's private affairs.
25. She argued in this regard that at the moment, any person intending to obtain a facility from a banking institution will be faced with an uphill task and by the time the loan application is approved or denied by the institution, the banking institutions will have knowledge of any other loan facilities obtained by such a person whether performing or not performing. As such, her communications with one financial institution are relayed for all and sundry and without any written notice as required by the law. That presently, it is not only the financial institutions that exchange the information between themselves but now anybody making a request at any Credit Reference Bureau will get a person's private financial details and thus amounting to a blatant violation of constitutional rights.
26. The Respondents on their part, through their Written Submissions dated 6<sup>th</sup> July, 2015 submitted that this right is not in any way violated and the exchange of information is protected under **Rule 26 (1)** of the said **Regulations**. Their position was also that it is only the customer or the financial institution that can access the customer's information and any other party requiring customer information has to get authority from the customer. Furthermore, the Regulations oblige the Credit Reference Bureaus to secure customer information and as such, there is no threat or actual breach of the right to privacy.
27. They asserted further that the nature of the Regulations if interpreted purposively protects financial institutions from loss occasioned by non-performing loans because non-performing loans are a threat to the financial sector and in effect affect the economy. Their contention was therefore that there is no unconstitutionality in such positive Regulations as they protect the public at large from a failing financial sector.
28. While relying on **Samson Mumo Mutinda vs Inspector General National Police Service and 4 Others [2014] eKLR**, the Respondents submitted that since the law states that before obtaining a

customer's information, financial institutions and any other person has to get a customer's approval, there can be no breach of the right to privacy in such circumstances.

29. In that context, **Article 31** of the **Constitution** provides that:

*Every person has the right to privacy, which includes the right not to have-*

- a. *Their person, home or property searched;*
- b. *Their possession seized;*
- c. *Information relating to their family or private affairs unnecessarily required or revealed;*  
*or*
- d. *The privacy of their communication infringed.*

30. The right to privacy safeguards individuals' dignity in every democratic society and in that regard, **Rossler** opines that:

*“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialise the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to. Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”. (See B. Rossler, *The Value of Privacy* (Polity, 2005) p. 72)*

31. Further in **Brooker vs the Police (2007) NZSC 30** at para.252, the Supreme Court of New Zealand expressed the view that:

*“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”*

32. The foregoing authorities emphasise on the nature and importance of the right to privacy and the corresponding importance of ensuring that the right is protected. It must be acknowledged however that this right is not an absolute right such as those recognized under **Article 25** of the **Constitution**. It therefore follows that this right may be limited at any time and such limitation must be in compliance with **Article 24** of the **Constitution** which provides that:

1. *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*
  - a. *the nature of the right or fundamental freedom;*
  - b. *the importance of the purpose of the limitation;*
  - c. *the nature and extent of the limitation;*
  - d. *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

- e. *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*
2. *Despite clause (1), a provision in legislation limiting a right or fundamental freedom—*
  - a. *in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*
  - b. *shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
  - c. *shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*
3. *The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*

33. The question that arises in the Petition herein is whether the intended limitations imposed by the Regulations are in tandem with **Article 24** of the **Constitution**.

34. In that regard, I note that the impugned provisions under the Regulations stem from the following provisions of the **Banking Act** which provide as follow;

**Section 31:**

1. *The Central Bank or the Minister may publish in whole or in part, at such times and in such manner as it or he thinks fit, any information furnished to it or him under this Act:*

*Provided that the information so furnished shall not be published if it would disclose the financial affairs of any person unless the consent in writing of the person has first been given.*

2. *Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under this Act and, if he does so, he shall, for the purposes of section 49, be deemed to have contravened the provisions of this Act.*

3. *Notwithstanding the provisions of this section-*

- a. *the Central Bank may disclose any information referred to in subsection (2) to any monetary authority or financial regulatory authority, fiscal or tax agency or fraud investigations agency within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority, fiscal or tax agency or fraud investigations agency;*

*Provided that the sharing of information with institutions outside Kenya shall only apply where there is a reciprocal arrangement.*

- b. *the Deposit Protection Fund Board and institutions licensed under this Act shall, in the ordinary course of business and in such manner and to such extent as the Minister may, in regulations, prescribe, exchange such information on non-performing loans as may, from time, to time, be specified by the Central Bank in guidelines under section 33(4);*
- c. *the Central Bank and institutions licensed under this Act may, in the ordinary course of business, in such manner and to such extent as the Minister may, in regulations prescribe,*

*exchange such other information as is reasonably required for the proper discharge of their functions.*

4. *under this Act may, in the ordinary course of business, in such manner and to such extent as the Minister may, in regulations prescribe, exchange such other information as is reasonably required for the proper discharge of their functions. Without prejudice to the generality of subsection (3) (b) or (c), regulations under that subsection may provide for the establishment and operation of credit reference bureaus, for the purpose of collecting prescribed credit information on clients of institutions licensed under this Act, and disseminating it amongst such institutions for use in the ordinary course of business, subject to such conditions or limitations as may be prescribed.*
5. *No duty, to which an institution or its officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), to:-*
  - a. *the Central Bank or to another institution; or*
  - b. *a credit reference bureau established under subsection (4), in the course of the performance of their duties and no action shall lie against the institution or any of its officers on account of such disclosure.*

35. The specific impugned provision in the Regulations is **Regulation 18** which provides that:

1. *Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer's non-performing loan and any other negative information and may include details specified in sub-regulation (4).*
2. *An institution licensed under the Banking Act shall in addition to exchanging the information required under sub-regulation (1), exchange positive information of their customers with Bureaus.*
3. *An institution other than banks may in addition to exchanging the information required under sub-regulation (1), exchange positive information with Bureaus with prior written consent of the customers concerned.*
4. *The nature of customer information to be shared pursuant to sub-regulation (1), (2) and (3) include:*
  - a. *The customer's identity, including-*
    - i. *In the case of a natural person his name, date of birth, national identity card number, personal identification number, passport number, driving licence number, past and current addresses and other contact details and related matters;*
    - ii. *In the case of a customer who is not a natural person, the entity's name, registration number, personal identification number, names of directors, shareholders holding more than ten per cent of its shares or partners, trustees or officials, past and current addresses and other contact details and related matters.*
  - b. *The customer's credit status including the nature and amounts of loans or advances and other credit facilities granted, amounts outstanding thereof, credit application and related matters;*
  - c. *The nature and details of security or securities taken or proposed to be taken by any institution as security for the loans, advances and other credit facilities.*
  - d. *Details of credit facilities or default in payments by the customer, debt restructuring and actions taken by the institution to recover unpaid amounts including realization of*

*securities, legal proceedings and related matters.*

5. *Customer information shall be furnished using a standard format established by agreement of the institutions furnishing information and licenced Bureaus, or otherwise issued by the Central Bank.*

Under the Regulations:

*“Credit information” means any positive or negative information relating to individual’s or entity’s credit worthiness, credit standing, credit capacity, to the history or profile of an individual or entity with regard to credit, assets and any financial obligations.*

*“Negative information” means any adverse customer information relating to a customer*

*“Positive information” means any information on performing loan or other credit.*

- 36.I observe further that the Regulations mandate Credit Reference Bureaus to ensure the protection of the confidentiality of customer information; and the release or reporting of such customer information is only to be done to the customer, Central Bank, a requesting subscriber, (who under the Regulations is defined as an institution licensed under the Banking Act and which has subscribed to receive customer information from a Bureau) and a third party as authorised by the customer concerned or as required by the law. This can be seen from **Regulation 26 (1)** which states that:

*A Bureau shall protect the confidentiality of customer information received in terms of these Regulations and shall only report or release such customer information-*

- a. *To the customer concerned;*
- b. *To the Central Bank;*
- c. *To a requesting subscriber;*
- d. *To a third party as authorised by the customer concerned; or*
- e. *As required by law.*

37. The foregoing provisions in my view fall squarely within the tenets of the law as stipulated under **Article 24** of the **Constitution** and I am satisfied that the release of information as stipulated under the **Banking Act** and the **Regulations** is to be done under reasonable circumstances and within the ambits of the law. This in my view does not in any way infringe on the right to privacy. Limitation of any right must however be done in the context of the said **Article 24** and that is why in **Coalition for Reforms and Democracy and Others vs Attorney General and Others, Petition No. 628 of 2014, Consolidated with Petition Nos. 630 of 2014 and 12 of 2015**, it was pointed out that:

*“Any legislation that seeks to limit the right to privacy in a free and democratic open society must be such that it does not derogate from the core normative content of this right.”*

- 38.Juxtaposing the above dictum with the said Regulations, in my view, I do not think there is a derogation from the core normative content of the right to privacy. I say so because it was submitted by the Respondents that the rationale of the foregoing provisions is that the requirements for sharing such information is to enable financial institutions to assess the financial capacity of the borrower and gauge his or her repaying capabilities among others. I am in this regard satisfied that the said Regulations do not infringe on the right to privacy as the said limitation, in my opinion, is to facilitate and promote an efficient loan system with financial institutions having the necessary information in regard to loan applicants.

39. Based on the foregoing, I am unable to reach the conclusion that the Regulations infringe on the right to privacy. The above notwithstanding, I further note that an individual's right to privacy is additionally protected under **Regulation 19 (2)** which gives the right to institute proceedings where the right has been infringed. The said Regulation is to the effect that:

*Nothing contained in sub-regulation (1) shall affect the right of any person to make a claim against a Bureau, an institution or chairperson, director, member, auditor, adviser, officer or other employee or agent of such Bureau or institution, as the case may be, in respect of loss or damage caused to him on account of any such disclosure made by anyone of them and which is unauthorized or fraudulent or contrary to provisions of these Regulations, guidelines or any other law to which these Regulations relate.*

40. This provision is protective of loan applicants and is a further guard against breach of the right to privacy. From the foregoing, I am not able to agree with the Petitioner that the Regulations as enacted are an infringement to the right to privacy.

**Whether the Regulations Violate the Right to Equality and Freedom from Discrimination**

41. According to the Petitioner, financial institutions are treating borrowers who have a good credit history favourably than those who have no history or at all. She thus argued that a person who has borrowed previously and repaid his or her loan faithfully is admitted to financial facilities at a lower interest rate than the one who has not obtained a facility previously and who applies for the first time. In this regard, her submission was that in the sense that a new borrower has no known history, such a person is discriminated against by having loans given at higher rates by mere reason of unknown history. This, she submitted, amounts to discrimination on the ground of having not borrowed before. She submitted further that the instant Petition being in the public interest, she needed not prove any discrimination already suffered as the same is a threatened infringement to her rights and the rights of other members of the society. For this latter contention she relied on the decisions of the courts in **Micro and Small Enterprises Association of Kenya, Mombasa Branch vs Mombasa County Government and Others, Petition No 3 of 2014** and **Rose Wangui Mambo and 2 Others vs Limuru County Club and 17 Others [2014] eKLR**.

42. In response, it was submitted that the Petitioner's assertions are farfetched and without basis because lending institutions have been given the discretion to limit their lending rates and determine who to lend money pursuant to the law and as regulated by Central Bank of Kenya. That therefore, a customer cannot dictate the manner in which a lending institution will advance the facility and courts too cannot interfere with the internal affairs of a lending institution in so far as they are within the confines of the law as the same will amount to micro managing the said institutions.

43. The Respondents urged the Court to be guided by the dictum of the Court in **State of Kerala and Another vs N.M Thomas and Others, Civil Appeal No 1160 of 1974** in regard to the principle of equality before the law and argued that it is impractical for any rational entity to offer similar conditions to a person of good credit as well as a person with poor credit. Further, that the Petitioner has not demonstrated how the impugned Regulations violate the **Constitution** and the reasons she has advanced on unconstitutionality are only self-serving and coined to suit her personal needs. In any event, that the rights she has referred to are not absolute and are subject to the rights of other citizens as provided under **Article 24** of the **Constitution**. In this regard, their final submission was that the said rights have been reasonably limited by law for an objective purpose; and that the Constitution strikes the balance of ensuring that nobody tramples on the rights of another and hence the orders sought herein will not be in the best interest of the public.

44. In that context, **Article 27** of the **Constitution** guarantees every individual the right to equality and freedom from discrimination on any ground. The said provision is to the effect that:

1. *Every person is equal before the law and has the right to equal protection and equal*

*benefit of the law.*

2. *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
3. *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
4. *The State shall not discriminate directly or indirectly any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
5. *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
6. ...
7. ...
8. ...

45. The Court in **Peter K. Waweru vs Republic [2006] eKLR** defined discrimination as follows:

*“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”*

46. The above provisions of the Constitution therefore categorically prohibit discrimination on any grounds and it is intended to ensure that every individual is accorded equal treatment before the law. In the decision of **State of Kerala (supra)** it was opined that:

*“The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”*

47. Can it then be said that the provisions of the Regulations are discriminatory as alleged by the Petitioner? My answer to this question is in the negative and it is my view that the taking and applying for loans is a voluntary choice. It is not a requirement of the law that every individual must at one point in their life apply and take a loan from a financial institution. I am therefore in agreement with the Respondents' contention that the Central Bank issues directives in regard to interest rates and certain standard terms and conditions in regard to loan application and their repayments. Such terms and conditions as provided by the Central Bank are a guide to financial institutions in their loan applications processes among others and do appreciate that financial institutions do make their own arrangements in regard to offering loans to their clients and as such I also believe that the same is done as per the requirement of the law as stipulated by the Central Bank.

48. Further, whereas every individual may be in need of a loan, it must be remembered that not everybody may meet the criteria for qualification of being granted such loans as they may wish. In this regard, when an individual's credit history does not favour him or her in terms of getting a loan, or when such an individual's financial status is not favourable to convince the money lending institution of his or her ability of repaying a loan, it cannot be said that he or she is being discriminated against.

49. It would be an absurdity for this Court to enter the arena of financial institutions and mandate such institutions on the mode and criteria to be applied in giving loans or even the persons to be given loans. These arrangements are well regulated by the Central Bank of Kenya and this Court would only step in when called in appropriate and clear cases of violation of a Petitioner's constitutional rights or fundamental freedoms. In the present case, I am not satisfied that the Petitioner has made out a case for violation of her right or the right of any person to equality and protection from discrimination.

### **Conclusion**

50. Although the Petitioner has alleged that the threat of violation is obvious, I see no facts or even hypothesis to support such a contention. The Regulations are reasonable, are applied to all loan applicants and are intended to create discipline among loanees. To expect that a serial defaulter should walk in and obtain a loan without due diligence of past repayment records is mischievous to say the least. That is the position the Petitioner is propagating in the guise of a Petition to allegedly enforce fundamental rights. With respect to her, this Court cannot countenance such a situation.

51. Having answered all the questions in the negative, I am at this juncture inclined to agree with the Respondents' contention that the Petitioner has not demonstrated how the impugned Regulations violate the Constitution at all.

### **Disposition**

52. I hereby find the Petition to be without merit and with no foot to stand on and the same is hereby dismissed.

53. Let each party however bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MARCH, 2016**

**ISAAC LENAOLA**

**JUDGE**

### **In the presence of:**

Kazungu – Court clerk

Mr. Ndolo holding brief for Mr. Gachie for Petitioner

Miss Kamande for Respondents

### **Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**