



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.452 OF 2014

BETWEEN

JORUM KABIRU MWANGI (CHAIRMAN)

JOHN MUTUA MBAGARA (SECRETARY)

JOSEPH MWANGI MWAURA (TREASURER)PETITIONERS

(suing as the registered officials of Faith

Foundation Housing Cooperative Society Ltd)

AND

CO-OPERATIVE BANK OF KENYA

(KAWANGWARE BRANCH).....RESPONDENT

JUDGMENT

1. The Petition dated 11th September 2014 is stated to be premised on **Article 31(a)** and **(d)** of the **Constitution** which *inter alia* provides as follows:

"Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b)

(c) ...

(d) the privacy of their communications infringed."

2. The Petition, brief to the point, only seeks the following prayer:

"That the Court finds the Respondent's action to allowing a stranger access to the Petitioners' Acc. No. 01120229921200, Co-operative Bank of Kenya - Kawangware Branch unconstitutional and that the Respondent takes full responsibility and compensates the Petitioners for loss

incurred as the result with costs.” (sic)

Petitioners’ Case

3. The Petitioners claim to be the registered officials of Faith Foundation Housing co-operative Society Ltd and in their Petition and I reiterate that it is very brief, they contend that on various and diverse dates between 2011 and 2013, the Respondent allowed a stranger to access Account No.01120229921200, at its Kawangware Branch leading to the loss of Kshs.4.05 Million. That the Respondent, for unclear reasons also transferred the said account to its branch at Ruiru without the authority of the signatories thereto.
4. There is no Affidavit in support of the Petition but the Petitioners filed a joint Verifying Affidavit sworn on an unclear date and also filed a List of Witnesses (themselves) and copies of a number of documents including:
 - i. An application to open a business account at the Respondent’s Kawangware by Faith Foundation Housing Co-operative Society Ltd.
 - ii. Cheques said to be drawn by the said company on various dates in October and November 2012.
 - iii. PIN Certificate for the same Company.
 - iv. Minutes of the 2013 Annual General Meeting of the company.
 - v. Forensic audit Report on the Company.
 - vi. Document Examiner’s Report.
5. They also filed Submissions on 14th July 2015 and stated that the loss of Kshs.4.05 Million in the Company’s account was occasioned by the forging of the 3rd Petitioner’s signature which anomaly has led to the Company being rendered near bankrupt. It also allegedly lost 3 acres of land that it had intended to buy because it was no longer financially able to meet that obligation after loss of the sum aforesaid.
6. In the said submissions, they made a new claim for Kshs.17 Million being the monies allegedly siphoned off from the Company’s account plus Kshs.13.95 Million being the alleged value of the lost land, Kshs.1.5 Million being costs of collecting information relating to the unlawful withdrawals as well as costs of prosecuting the Petition. In addition they sought costs of the Petition.

Respondent’s Case

7. The Respondent, by an Affidavit sworn on 26th March 2016 by Erastus Tinda, it’s Account Services Officer, stated that when the Petitioners opened an account with the Respondent’s Kawangware Branch, four signatories were appointed viz:
 - i. Samwel K. Wando – Chairman
 - ii. Eliud Wathugi Karanja – Secretary
 - iii. Joseph Mwangi Mwaura – Treasurer
 - iv. Benson Njuguna Warui – Member
8. One of the conditions for withdrawal of funds was that any three of the four could sign for such withdrawals on condition that the Chairman and Treasurer had to be mandatory signatories.
9. Further, that on 6th February 2013, the Respondent received an application for transfer of the said account to Ruiru which application was signed by three signatories vis; Samuel K. Wando, Eliud Wathugi Karanja and Joseph Mwangi Mwaura. Thereafter, the signatories were changed to:
 - i. Jorum Kabiru Mwangi (Chairman)
 - ii. Charity Wanjiru Kimani (Member)

- iii. John Mutua Mbagu (Secretary)
- iv. Joseph Mwangi Mwaura (Treasurer)

10. The said application for change of signatories, it is stated by the Respondent, was addressed to the Manager, Ruiru Branch, where the account was situated.
11. It is also the Respondent's contention that all withdrawals from the account were made by known and authorised signatories and at no time, prior to the filing of this Petition, did the Petitioners protest that a stranger had accessed the Company's funds. In addition, that the transfer of the account to Ruiru was made on the application of the authorised signatories and not strangers as alleged.
12. On whether there is a constitutional question to be determined in the Petition, it is the Respondent's contention that the dispute, if at all, raises criminal issues, to be tried as such, and any claim about refund of monies lost falls in the realm of Civil Law. That in the said regard, no particulars of any violation of a constitutional right have been given and that the Petition is therefore one for dismissal.
13. In her submissions, Counsel for the Respondent stated that the Petitioners had failed to meet the test set out in **Anarita Karimi Njeru v R, Misc. Application No.4 of 1979** that a Constitutional petition must set out with a reasonable degree of precision the issue complained of, the provisions of the **Constitution** that have been violated and the manner of such violations.
14. Further, relying on **Ondieki v Barclays Bank of Kenya Ltd [2007] eKLR**, she submitted that because the relationship between a bank and a customer is contractual, no constitutional issue arises for determination and that there exist other mechanisms for resolving the present dispute. Further reliance on that point was made on **Murage v Finserve Africa Ltd and 3 Others [2015] eKLR, Harrikinson v AG of Trinidad and Tobago [1980] AC 265 and Boniface Mwangi v RM's Court at Milimani and 2 Others [2015] eKLR**.
15. Counsel also submitted that the Respondent, at all times, acted with reasonable skill and care and if any funds were fraudulently withdrawn from the Company's accounts, then its officials should be held liable thereto and not the Respondent.
16. For the above reasons, the Respondent prays that the Petition be dismissed with costs.

Petitioners' Rejoinder

17. In further Submissions filed on 15th September 2015, the Petitioners stated that they had properly invoked **Article 31(c) and (d)** of the **Constitution** as the basis for their claim and therefore a constitutional question thereby arose for determination by this Court.
18. It is also their submission that they have obtained sufficient evidence that a stranger or strangers accessed the account in issue thereby indicating a breach of trust by the Respondent.
19. In addition, they submit that even where a commercial transaction is the subject of a dispute, the High Court can still determine the same as a constitutional issue contrary to the Respondent's assertions.

Determination

20. From the pleadings and submissions, the following issues clearly arise for determination;
 - i. Whether the jurisdiction of this Court has been properly invoked.
 - ii. If the answer to (i) above is in the affirmative, whether the Petitioners' rights to privacy under **Article 31 (a) and (d)** of the Constitution have been violated.

iii. What remedy, if at all, is available to the Petitioners.

Whether the jurisdiction of this Court has been properly invoked

21. It is the Respondent's case that the dispute between the Parties is one which raises questions relating to alleged criminal conduct on the part of the Respondent's employees and third parties and is also a bank-client issue falling under the realm of Civil or Commercial Law.
22. The Petitioners on the other hand have argued that their Petition is one pegged on a violation of **Article 31(a) and (d)** and therefore falling for determination under the jurisdiction of this Court to determine constitutional issues.
23. In that regard, it has been said time and time again that jurisdiction is everything and without it, no Court should wade into the determination of any dispute without such jurisdiction as would enable it to do so – See **Supreme Court Petition No.4 of 2012 Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others**.
24. In addition to the above, the doctrine of constitutional avoidance is well and truly alive in our realm. That doctrine is to the effect that where a dispute is one which can be determined under another area of law other than under the Constitution, then it is best that it be so determined and pure constitutional issues left to be determined as such.
25. That is why in Supreme Court in **Communication Commission of Kenya v Royal Media Services Ltd & 5 Others** stated thus in that regard:

[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

26.

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

27. Applying the above principles to the present case, granted, the dispute between the Parties indeed raised issues of a criminal nature as well as issues of bank-client confidentiality. However, I can only but agree with the Petitioners that once they have specifically invoked **Article 31(a) and (d)** of the **Constitution** as the sole basis for their Petition, then a constitutional question arises for determination. The merits or otherwise of that question is a wholly different matter because proof thereof would have to be on the basis of constitutional principles as set out in the case of **Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272** which are to the effect that a party alleging violations of the Constitution must at the very least indicate the constitutional basis for the violation, the manner in which the same was done and the remedies sought – See also **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

28. In the present Petition, I have no doubt that the Petition has largely met that threshold and the merits or lack of it is a matter to be determined shortly.

29. In the event, the Respondent's objection as to this Court's jurisdiction is overruled.

Whether the Petitioners' rights to privacy under Article 31 (a) and (d) of the Constitution have been violated.

30. Elsewhere above, I reproduced **Article 31(a)** and **(d)**. It is unclear to me however how the right not to have the "... **person, home or property searched**". As I have stated above, what is in issue is access to funds in a bank account by alleged strangers.

31. A "search" is defined as;

"An examination of a person's body, property or other area that the person would reasonably be expected to consider as private, conducted by a law enforcement officer for the purpose of finding evidence of a crime." – See Black's Law Dictionary, 8th Edition.

32. Taking the above definition, access to a bank account and siphoning of funds therefrom cannot amount to a search even if, as is true, under **Article 260** of the **Constitution**, money is defined as property.

33. In my view therefore, **Article 31(a)** is not applicable to the present dispute. But what then is "communications" under **Article 31(d)**? In **Black's Law Dictionary, 8th Edition**, "communication" is defined to mean;

"The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception."

34. What "communication" that was private to the Petitioners did the Respondent infringe upon? The gist of the Petitioner's complaint is that monies in an account belonging to their company was unlawfully released by the Respondent to strangers.

35. How can that action, even if true, amount to a violation of the right to privacy of communication?

36. As I understand it, privacy rights are to be protected in the context of the person hence the decision in **Brooker v the Police (2007) NZSC 30** where the Supreme Court of New Zealand stated thus;

"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."

37. Further, in **Kennedy v Ireland (1987) I.R. 587, Hamilton J.** stated thus;

"The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with."

38. I agree wholly with the above expositions of the law and juxtaposing the same with the facts before me, I am unable to find how the right to privacy of the Petitioners were infringed upon.

Remedies

39.It follows that if no violation of **Article 31(a)** and **(d)** has been proved, no remedy is available to the Petitioners.

40.In addition, elsewhere above, I noted that the Petitioners introduced new claims by their written Submissions. Of course, that is both unlawful and unprocedural as a substantive claim or remedy cannot be introduced in that manner. It is in pleadings that such an action can be taken and nowhere else.

Conclusion

41.The Petitioners are laymen and while they did their best to articulate their claim, their limitations were obvious and if any advise is needed, let them pursue a refund of their moneys, in proceedings elsewhere subject to limitation of time. I say so well aware of my findings elsewhere above and that I could have invoked, (but have declined to do so) the principle of constitutional avoidance.

Disposition

42.For the above reasons, the Petition dated 11th September 2014 is dismissed.

43.Costs are at the discretion of the Court and noting the relationship between the Parties, it is best that each bears its own costs.

44.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioners absent

Mrs. Okimam for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE