



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION No: 259 OF 2012**

**ANN NJOKI KINYANJUI..... PETITIONER**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. In her petition dated 18<sup>th</sup> June 2012, the petitioner alleges violation of her rights by the petitioner, in whose Murang'a Branch she was a customer.
2. The petitioner claims that the respondent was making illegal and unlawful deductions from her salary which had been deposited in her account number 005107183 held at the Barclays Bank Murang'a Branch. The petitioner alleges breach of Article 35(2) of the Constitution which guarantees the right to correction and or deletion of untrue or misleading information, as well as Article 46(1) (a) and (c) which provides for the right to goods and services of reasonable quality and protection of consumer economic interests.
3. The petition is opposed. The respondent, which is a commercial bank registered under the Banking Act, denies violating any of the petitioner's rights. It contends that the petition is frivolous and an abuse of the court process as the underlying dispute arises out of a loan agreement between the petitioner and the respondents and raises no constitutional issue.
4. The petitioner states that she has accounts in two of the respondent's Branches, namely account number 2021278818 at the Nairobi Karen Branch and a second account at the Murang'a Branch being 005107183.
5. It is common ground that the petitioner borrowed a sum of Kshs 500,000 from the respondent, the only point of departure being when the loan was advanced. According to the petitioner, it was advanced in January 2007, while the respondent contends that it was advanced in December 2006.

6. It is also common ground that the loan repayment was to be made through monthly deductions from the petitioner's salary. According to the petitioner, she repaid the loan in full in November 2007. The respondent disputes this, arguing that while the monthly remittances were made, they were made late, as a result of which a residual balance of Kshs 37, 758 was outstanding, which is what the respondent debited into the petitioner's account.

7. The petitioner claims that in February 2012, she started receiving calls from the respondent's representatives demanding payment of arrears. She explained that she had cleared her loan but the respondent went ahead to unlawfully deduct Kshs.11,784.25 in February 2012 and other monies in March 2012 from her account 0051027183. She claims further that the respondent had also been unlawfully deducting Kshs. 12,987 from her salary every month purportedly because she has a loan.

8. It is her case that she does not have any loan with the respondent and thus the deductions are illegal and unlawful. She avers that she has visited the respondent several times at its headquarters at Queensway House, Nairobi, seeking to stop the deductions and refund of the sums deducted and has also written demand letters but the situation has not been remedied.

9. In the written submissions highlighted by her Counsel, Mr. Adira, the petitioner submits that she complied with the terms of the loan agreement by making timely payments. It is also her case that the respondent also had an enforceable and distinct guarantee from the government, which is her employer, in the form of a letter for the direct debiting of the petitioner's account to cover the loan.

10. The petitioner submits further that the respondent had not proved that there were late payments in respect of the loan and has not provided justification in the form of calculations of the amounts. She has relied on the case of **Molo Mount Mineral Water Limited –vs Industrial and Development Bank Limited Nakuru High Court Civil Case No. 113 of 2004 (2012) eKLR** for the proposition that, in accordance with Section 107(1) of the Evidence Act, whoever desires any court to give judgment as to any legal liability dependent on the existence of facts which he asserts must prove the existence of those facts. Mr. Adira submitted that the respondent had failed to prove the late remittances and had a duty to inform the petitioner of those late remittances which it had not done.

11. The petitioner further questions the acts of the respondent with regard to the deductions made in her account in May 2012 and argues that there was negligence on the part of the bank in balancing its books. She also makes further allegations regarding the charging of ledger fees by the respondent.

12. It is her submission that the Constitution must be read as a whole, and that Article 46(a) and (c) must be read together so that the consumer is entitled to goods and services of reasonable quality She submits that the respondent violated her right to banking services of reasonable quality when it deducted uncalculated amounts from her account. She states that the Court has a responsibility to ensure that these rights are protected.

13. With regard to the violation of Article 35(2), the petitioner contends that due to the misleading information availed to parties which have access to the petitioner's payslip, and the failure by the respondent to correct the misleading information about her, her financial credit has been affected leading to a loss of opportunity to get credit. The petitioner asks the Court to strike out the respondent's replying affidavit on the basis of Order 2 Rule 15 of the Civil Procedure Rules, and to grant her the following prayers:

***1. That all the monies unlawfully deducted from the petitioner's salary be refunded with interest.***

***2. That she is awarded compensatory and or exemplary and or punitive damages as assessed by the court.***

***3. That the costs of, and incidental to, this Petition be awarded to the Petitioner against the Respondent.***

14. In opposing the petition, the respondent filed an affidavit sworn by Mr. Vincent Ojung'a, a Customer Relationship Manager with the respondent, sworn on 24<sup>th</sup> September 2012. The respondent terms the petition vexatious, frivolous and an abuse of the court process which has no merit as it discloses no constitutional issue being a purely commercial dispute relating to the petitioner's bank account and the loan agreement with the respondent.

15. The respondent's case as presented by its Counsel, Mr. Ochieng, is that the petitioner borrowed Kshs.500,000 from the respondent on 14<sup>th</sup> December 2006.

16. The respondent avers that the dispute is purely commercial in nature as the petitioner is aggrieved that the respondent has irregularly debited her bank account even after full repayment of the loan. The loan, according to the respondent, was granted through a scheme Loan system at negotiated interest rates through the petitioner's employer. It is repaid through a check-off system through monthly deductions which are forwarded to the respondent until payment in full. The respondent argues that the payments were due from February 2007 and any late payments would attract interest on a daily basis. Its case is that while the repayments and deductions were made, some were made late leading to the accrual of interest. It received the 60th remittance of the instalment of Ksh12, 887/- on 17 January 2012 as opposed to 14<sup>th</sup> January 2012.

17. It contends that over the years, the late repayments had resulted in a shortfall of Ksh21,531.40 which was also accruing interest on a daily basis. It denies that the petitioner cleared the loan in November 2007. It further denies making any deductions on a monthly basis in the petitioner's salary, asserting that such deductions were done by the petitioner's employer pursuant to the loan. It concedes making three deductions of Kshs12,987.00 and 11,784.25, on, 11<sup>th</sup> April, 16<sup>th</sup> May 2012 and 12<sup>th</sup> June 2012 respectively with a view to recovering the residual balance.

18. Mr. Ojung'a further avers that it took the petitioner's concerns so seriously that it determined to waive the residual balance and it therefore credited the sum of Ksh37,758.25 into the petitioner's Bank Account No 0051027183 at the respondent's Muranga Branch, and duly informed the petitioner of this fact. It has produced in evidence a copy of a statement of the said bank account which Mr. Ojung'a alleges shows a credit of Kshs 12,937.00 on 12<sup>th</sup> June 2012 and 24,821.00 on 4<sup>th</sup> July 2012. It is its case that the petition has been overtaken by events and there has been no violation of the petitioner's rights.

19. I have considered the respective pleadings of the parties and their submissions, oral and written, which I have set out briefly above. I believe two issues arise in this matter: whether the petition raises any constitutional issue for determination by this Court, and whether the petitioner is entitled to any remedy from the Court.

20. Under Article 22, the Constitution has given every person the right to approach the Court claiming that a right or fundamental freedom has been violated or infringed, or is threatened with violation. Decisions of this Court have settled the conditions that a party seeking constitutional relief must meet. The petitioner has an obligation to demonstrate which Articles have been violated, and the manner of violation with respect to her. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance -vs- Attorney General & Others High Court Petition No. 229 of 2012**.

21. Further, as stated by Ouko J, in the case of **Passaghia Giuseppe -vs- Attorney General Malindi High Court Civil Case No 15 of 2005**, it is not enough to state that a right has been violated. One must demonstrate the manner of violation. In addition, where a party has a remedy under some other legislation, the Court will decline to determine whether or not there has been a constitutional violation. Courts have held in many decisions that it would be improper to convert every issue into a constitutional issue and present it before the Constitutional and Human Rights Division for determination: see the decisions in the case of **Harrikissoon -vs- Attorney General of Trinidad and Tobago (1980) AC 265 PC** and **Alphonse Mwangemi Munga & Others -vs- African Safari Club Petition No 564 of 2004**.

22. In the present case, the petitioner is aggrieved by the decision of the respondent to deduct certain

amounts from her salary deposited in her account with its Muranga Branch to offset certain amounts said to be due as a result of late payments on a loan. While she attempted to bring a constitutional angle to the matter by alleging violation of consumer rights under Article 41 and the right to deletion of incorrect information under Article 35(2), it is patently clear that there is nothing more before this Court than a straightforward commercial dispute. Should there be a violation of a constitutional rights as she alleges, then the Commercial Division of the High Court in which the matter should have been filed has the jurisdiction to determine the issue. Indeed, given the amount in dispute, Ksh37 758.25, this is a matter for determination before the Resident magistrate's Court

23. The Court notes from the affidavit of Vincent Ojung'a that the respondent waived the amount it had charged the petitioner as interest on late payment of the loan amount. Mr. Ojung'a refers the Court to annexure "VO2" and depones that the amounts charged were credited in June and July 2012. The Court notes, however, that the said annexure contains entries upto April 2012. It appears that the petitioner had not received the said amount as she prays in her submissions dated 22<sup>nd</sup> February 2013 that the respondent's affidavit be struck out and the respondent ordered to refund the entire amount. While this matter was heard more than a year after the submissions were filed and two years after the affidavit of the respondent, none of the parties addressed the Court on whether or not the refund had been made.

24. I observed at the outset that the Constitution grants parties the right to bring petitions before the Court alleging violation of their fundamental rights and freedoms. This right has, however, been prone to abuse, and virtually every dispute is now being converted into a constitutional claim. This is the case in the present matter. Not only is there no constitutional violation demonstrated, but no attempt was made to demonstrate the alleged violation. Further, judging from the averments of the respondent, the petitioner has suffered no loss that would require adjudication by the Court as the respondent indicates that it refunded the amount deducted in June and July 2012.

25. One cannot therefore gloss over the fact that this has been nothing but a waste of the Court's time. In other circumstances, this Court would be inclined to penalize the petitioner or her Counsel with an award of costs. However, noting that there is no clear evidence that the amount in question has been returned to the petitioner, it is my order that each party bears its own costs of the petition.

26. No benefit would be served by sending the petitioner to another Division to pursue such claim as she may have, given the averments of the respondent. I therefore direct that the respondent refunds the sum of Kshs 37, 758.00 to the petitioner, if it has not already done so, within the next 7 days from this judgment, and files in Court evidence of such refund.

27. It is so ordered.

**Dated, Delivered and Signed at Nairobi this 12<sup>th</sup> day of March 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr Adira instructed by the firm of Musyoki Kang'ata & Co. Advocates for the petitioners**

**Ms Odera instructed by the firm of Miller & Co. Advocates for the respondents**