REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 433 OF 2003

ROSE FLORENCE WANJIRU

(SUING ON HER OWN BEHALF AND ON

BEHALF OF AND REPRESENTING AND FOR

THE BENEFIT OF ALL PERSONS INTERESTED

IN AND BEING PAST AND PRESENT ACCOUNT

HOLDERS WITH SPECIFIED BANKS IN KENYA) --------..---------- **PLAINTIFF**

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED----.------1ST DEFENDANT

J.K. WANYELATHE EXECUTIVE DIRECTOR (SECRETARY)

OF THE KENYA BANKERS ASSOCIATION BEING SUED ON

BEHALF**OF KENYA BANKERS ASSOCIATION ----------2ND DEFENDANT**

CENTRAL BANK OF KENYA---------- 3RD DEFENDANT

RULING

Joinder of parties in a representative suit

[1] The Court allowed publication of a Notice under Order 1 rule 8 of the Civil Procedure Rules giving notice of the suit to all persons on whose behalf or whose benefit the suit was instituted or defended calling them to apply to be made a party in this suit. In response to the said notice, the following persons filed applications for joinder:-

(1) Godfrey Paul Okutoyi- application is dated 10th December 2014 (seeks that all customers of banks to be made party unless they opt out)

(2) Printing Industries and Multiple Industries Limited- application is dated 8th August 2014

(3) Margaret WambuiWamuti- application is dated 11th August 2014

(4) James SamwelKinyanjui, Anne NjeriKinyanjui and EastlandsThearters Ltd- application dated 15th August 2014

(5) Nova Industries Limited- application dated 25th September 2014

(6) Application dated 15th August 2014 by Waigwa-185 applicants

(7) Joseph Kariuki Ngigi administrator of the estate of Peter Joseph Ngigi (deceased), and Kenya Shoe Company Limited- application dated 12th August 2014

(8) Kenneth Kimani Nyoike and or Datini Mercantile Limited- application dated 18th August 2014

(9) IDB Capital Limited (formerly Industrial Development Bank Limited) to be joined as Defendant– application dated 27th October 2014

(10) Jennifer Shamalla- application dated 2nd September 2014.

Issues

[2] Parties filed submissions in support of their respective stand points on the applications. The Defendant also filed grounds of objection which raise substantial issues of law. I will consider all the issues arising from the various submissions, grounds of opposition as well as the affidavits filed but in a manner that will avoid dull repetition. I will also consider all the judicial authorities filed in court. After all pertinent issues raised are resolved and a clear path has been cut in all the issues, the court will determine individual applications based on the law as shall have been set out by court.

Parties' arguments

[3] The application dated 10th December 2014 by Godfrey Paul Okutoyi is what I will call ''a legal tumult'' as it prays for a general order that all customers of banks be made party unless they opt out. Novel arguments have also been urged in this matter and particularly with respect to the application by Godfrey Paul Okutoyi. I will, therefore, be making specific references to the arguments by Godfrey Paul Okutoyi because of the novel nature of the arguments in his application. I will also analyse the general arguments which have been made by all the applicants. Fathom these arguments. Godfrey Paul Okutoyi argues that all borrowers from banks under the Banking Act constitute a class, and are entitled as such class to relief which relate to section 44 of the Banking Act. He urged the court to treat this suit as class action for the benefit of all customers who were affected by the arbitrary and illegal increases of interest rates by banks without the prior approval of the Minister as required under section 44 of the Banking Act. He stated that he has come to court as an interested party as defined in the Constitution and the Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, 2013. According to the Practice Rules above, an interested person is means:-

> **''...a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation''.**

He stated further that his application is filed in the ''public interest'' to reverse wrongs which were committed by banks and he does not seek personal gain. He submitted that Black's Law Dictionary, Ninth Edition defines public interest as:-

‘’...the general welfare of the public that warrants recognition and protection’’

or

‘’something in which the public as a whole has a stake, especially an interest that justifies government regulation’’.

[4] According to him and some other applicants, the Constitution opened access to justice to all parties and application as this merely actuates the right to access to justice. He did not stop there. He argued further that section 44 of the Banking Act as an existing law under section 7(1) of the Sixth Schedule of the Constitution must be interpreted with such necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution. He cited the case of Supreme Court **CCK& 5 Others vs. Royal Media Services [2014] eKLR** to support the point. He also beseeched the court to adopt the rule of harmony; rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution in interpreting the Constitution as expounded in the case of **John Harun Mwau vs. AG [2011] eKLR**. Therefore, he holds the view that articles 22, 258 and 259(1) of the Constitution have enlarged locus standi to the effect that every person, includingpersons acting in public interest, can move a court of law contesting infringements of any provisions in the Bill of rights. According to him, he does not need written consent of the affected customers to have them enjoined in the suit given the provisions of articles 22 and 258 of the Constitution which allows any person to act in the interest of a group or a class of persons or in the public interest. He submitted, therefore, that he has locus standi to apply as he did. He cited case of **MumoMatemu vs. Trusted Society of Human Rights Alliance [2014] eKLR**and **John Wekesa Khaoya vs. AG [2013] eKLR** on locus standi.

[5] The Plaintiff sued on her own behalf and on behalf and for the benefit of those who are interested in the suit, especially past and present account holders of banks. On the basis of the Constitution, Godfrey Paul Okutoyiargued that Order 1 rule 8(3) of the Civil Procedure Rules is not in conformity with Order 1 rule 8(1) as it requires a party to apply to be joined as a party yet the plaintiff sued on behalf of and represented all such interested parties. He took the view that, it is on this basis that he applied for joinder of all parties interested unless they opt out. He refuted claims that persons who do not wish to join the suit may be forced to pay costs they never invoked on themselves but for force joinder. He stated that the option to opt out is the answer, but yet still, it is only the Plaintiff who will be condemned to pay costs in the case. He made further submissions that on the aspect of discrimination. He submitted that some are illiterate or uninformed or poor or impeded by one reason or other and may not have applied to be joined because of the said incapacity. Therefore, the requirement that one has to apply to join the suit is discriminative to such clients. He said that private power as much as public power has the capacity to oppress. He equated the violation of section 44 of the Banking Act as oppression by the banks. This argument found in the case of **Rose Mambo & 2 others vs. LimuruContry Club**. To him, the application before the court has a direct impact on all citizens corporates included. The technological tools have been used by the banks to illegally deduct monies from their accounts as computers are commanded to deduct interest at a rate which has no prior approval by the Minister- and that is illegal according to him. The Regulator, i.e. Central Bank of Kenya has also failed to safeguard and protect the interests of customers and so the affected customers should be given a refund of all sums that the bank illegally deducted from their respective accounts. He gave an example of Nigeria where banks were ordered to refund over N17billion (about USD 113 million) as a way of reprieve of disgorgement of amounts that had been deducted illegally from customers by banks.

[6] The Applicants especially counsel for the Plaintiff and majority of the applicants replied to arguments on limitation of actions and stated that limitation of actions started to run on 8.7.2014 when the notice was advertised as this is the day the customer discovered the fraud. See section 26(a) of the Limitation of Actions Act. He referred the court to the definition of fraud under the Limitation of Actions Act that it:-

> **‘’...includes conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for one to do to the other’’.**

He argued that “**unconscionable thing**” is the gravamen of the suit herein – the contravention of S. 44 of the Banking Act. He also relied on the fact that the suit was reinstated by the Court of Appeal on 8.10.2013 when the customers right crystalized and should be protected by the court.

[7] Questions of banks which have ceased being legal persons and those were not banks as at the filing of the suit were also canvased by applicants. Majority of the applicants except Godfrey Paul Okutoyi averred that they were holders of accounts and borrowers of the named banks and they suffered changes in interest rates in contravention of the law. Their joinder is mainly founded on this fact. The plaintiff tackled the issue of those bank which were not members of the 2nd Defendant but they are now, as well as those which have ceased to be legal persons in a somewhat different manner when she intimated through counsel that she shall apply to amend the plaint to include all banks that are members of the 2nd Defendant and remove those banks which no longer exist as legal persons.

[8] Mr Waigwa, and he was supported by the other applicants confidently stated that no person is allowed in law to enter into a contract that is illegal or one that is intended to violate the law. Therefore, whereas bank-customer relationship is private and contractual, it is subject to the law. See the case of **Heptulla vs. Noor Mohamed [1984] KLR 580** where the court stated that:-

> **‘’...it cannot be safe in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of privacy, in order to escape constitutional accountability...’’**

To him, class action is a device of private enforcement of the law. He took a swipe at the Defendants and asserted that this case is not about fees but refund to customers of illegal charges on their loans. Therefore, he submitted, this case will offer reparations to the affected customers. And any continued delay in resolving the issue perpetuates unjust enrichment by the banks.

Defendants opposed the joinder *en masse*

[9] The Defendants argued vehemently against the joinder of all customers of banks *en masse* without consideration of the requirements of the law on joinder. They filed their individual pleadings, affidavits, submissions as well as grounds of opposition on support of their respective stand points on the matters in issue. One of the major arguments and was prominently presented by Oraro SC Counsel for the 1st and 3rd Defendants is that the court made an order on 24th July 2014 that all persons who are interested in the suit to file formal applications for their joinder as parties within 45 days of the publication of the notice herein. Several applications were made. But others were filed after the deadline for filing was extended by the Court to accommodate more interested parties to file their respective applications. The last such extension was 20th December, 2014. On this last day, counsel argues that the application seeking to have all former customers of all the member banks of the 2nd Defendant to be made parties unless they opt out was made by Godfrey Paul Okutoyi. Senior Counsel as well as the other eminent counsel took particular stance on the said application.

[10] The Defendants separately argued that joinder of parties in a suit is governed by either Order 1 rule 8 or Order 1 rule 13 of the Civil Procedure Rules. Order I Rule 8 provides as follows;

> **“(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.**

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is institute"

Whereas, Order 1 Rule 13 on the other hand requires the filing in court of written authority authorizing one or more of the plaintiffs to appear, plead or act for such other persons in the suit as follows;

"(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."

[11] Counsel cited **Ruth WamboiMuturi –vs- Joseph KarisaKatsoma& 4 Others [2007] eKLR**where the Court had this to say;

"To my mind Order 1 Rule 8, does two things: One, it lays down the practice to be followed in cases where there are numerous persons having the same interest in one suit and where one such person is suing or being sued on behalf of all. Two, it contains a direction as to the manner in which the rights of all such persons must be safeguarded. <u>It is couched in mandatory terms</u>. The notice of the institution of the suit must be given to all parties interested in the suit, that is to say subject matter."

[12] Counsel argued that Order 1 Rule 8 only contemplates the above two scenarios. Therefore, the directions of the court in the instant case,were that, the notices of the suit invited any interested parties to make their formal applications for joinder within a prescribed time. Order 1 Sub-Rule 8(3)) contemplate that parties make an application for joinder and **not** that they be automatically enjoined in the suit and then later opt out, as suggested by the Applicant. The "opt out" procedure sought by the Applicant is **not** what is contemplated by the said rules and therefore if the court were to grant the application, it would be in blatant breach of the very rules that guide this court. specifically, counsel contended that Order 1 Rule 8 clearly envisages an opt-in, representative action – which is entirely different to the "opt-out" "class action" procedure applicable in other jurisdictions like the United States. Counsel was of the view that, the Applicant has misleadingly sought to conflate the two distinct concepts. For instance, referring to "*…this particular novel representative (Class Action) suit."*). Indeed, the Notice itself– which was approved by the Honourable Court– defines the present action as a "*representative suit."*.The case of **Stephen Muthee (Suing as the legal representative of the Estate of EVALYNKARAMBU) –vs- Samson NderituMurithi, Nyeri Civil Appeal No. 350 of 2005**was cited on the rules of procedure being the handmaidens of justice which are intended to facilitate the administration of justice to all parties before court.

[13] More was submitted. The Defendants were of the view that joinder of all customers of the banks without applying would deprive the parties sought to be joined, the right to appoint an advocate of their choice and thereby defeat the court's finding at paragraph 18 of the ruling delivered on 24th June, 2014 that the notice (Notice of the suit being HCCC No. 433 of 2003) must recognize the need to allow the persons interested to exercise free will in engaging an advocate of their own choice. The move may also contravene section 46(c) of the Advocates Act which prohibits the payment of fees to advocates only in the event of success. SC Oraro also urged that adopting an opt-out procedure would expose the persons who are sought to be enjoined

to the suit to liability in costs against their will and without notice to them. See the case of **KiaiMbaki& 2 Others v Gichuhi Macharia & Another [2005] eKLR**on right to be heard.

[14] Counsel refuted claims by the Mr Waigwa that the prescribed under Order 1 Rule 8 of the Civil Procedure Rules, 2010 contravenes provisions of the constitution. He was of the view that this case is a civil claim arising out of the private relationship between banks and customers. It is not a suit instituted pursuant to Article 22 of the Constitution and consequently the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 do not apply. The decision by a bench of five judges in the case of **International Centre for Policy and Conflict & 5 Others v The Hon. Attorney-General & 4 Others, High Court Petition No. 552 of 2012 as consolidated with Petitions 554, 573 and 579 of 2012 (Unreported),** which affirmed the observation made in the case of **Bernard Samuel Kasinga v AG & others High Court Petition No. 402 of 2012 (unreported)** that the mere fact that the Constitution is cited or invoked is not enough to elevate the matter to a constitutional matter. Mere allegation of breach of rights – and the citation of inapplicable provisions of the constitution (including the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2014) - does not elevate a matter falling within the purview of private, civil law to a public interest, constitutional matter. They ought to file a constitutional petition if they intend the court to declare a statute or subsidiary legislation to be unconstitutional. That has not been done here. See the case of **Kenya Union of Domestic, Hotel, Educational Institutions and Hospitals –vs- Kenya Revenue Authority & Others High Court petition No. 544 of 2012 [2014] eKLR**where it was held that;

> **"The principles upon which the court determines the constitutionality of statutes are now well settled. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. In considering whether an enactment is unconstitutional, the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions."**

[15] In addition, they argued that only parties to a suit can seek remedies in the suit. The Applicant herein is a stranger; he is neither a party in these proceedings nor has he sought to be joined, in his private capacity, as a party. As such the Application is incompetent and ought to be struck out. See the case of **Sammy M. Mawer, Commissioner of Insurance & Others –vs- Kiragu Holdings Limited, Civil Suit No. 67 of 2012** [**2013] eKLR**where the court rendered itself thus;

> **".....<u>It is only after a party has been joined in a proceeding that it can purport to participate and seek relief in such a proceeding</u>. There is no dispute that the 1st Interested Party did not seek leave to be joined in these proceedings. No order of joinder was ever made. To that extent the 1st Interested Party is a stranger to these proceedings. It cannot properly agitate any cause before this court. ..... A party who approaches a court of law through a window or backdoor cannot expect to be entertained howsoever serious his interest may be. In this case, there having been no leave sought and/or granted, the 1st Interested Party's application is incompetent."**

[16] The Defendants also argued to the effect that each customer bears individual burden of proving individual claims. Therefore the court can join only those parties who intend to and shall participate in the proceedings in order to give relief to such parties. See the case of **Telkom Kenya Limited –v- John Ochanda {Suing on his own behalf and on behalf of 996 other former employees of Telkom Kenya Limited} Civil Appeal No. 60 of 2013**where the Court of Appeal held that each of the Respondents therein had to prove their cases individually before the court can grant the damages as pleaded. The application for joinder of all customers of the banks disregards the law and the directions of this Honourable Court.

[17] The 2nd Defendant also submitted extensively on the issue at hand and their arguments

augmented those of the other Defendants. They, however, specifically emphasized that the Plaint which was filed on 22nd July, 2003 is the foundation of these proceedings which is representative suit under Order I Rule 8 of the Civil Procedure Rules. The common feature under the rules is "numerous persons have the same interest". The authorities on representative actions refer to a "community of interest" - see MaragaJA in Court of Appeal Civil Appeal 216 of 2004 between the parties in this case. The "community of interest" for whom this suit is brought is spelt out in paragraph 1 of the Plaint where the plaintiff states that she is "suing on her own behalf and on behalf of and representing and for the benefit of all person interested in and being past and present account holders in the first defendant and in all member banks of" the second defendant. As per Paragraph 1 of the Plaint, the "community" is "past and present account holders" as at 22nd July, 2003. There is no reference to future account holders and so, the class is closed as at 22nd July, 2003 and can not extend to persons, who opened bank accounts with the first defendant or any member of the second defendant after 22nd July, 2003. Such persons did not have any cause of action in existence at 22nd July, 2003 and were not members of the "community" on whose behalf the proceedings were filed. Accordingly, the 2nd Defendant took the view that under Order 1 Rule 8 (3) only "any person on whose behalf or for whose benefit a suit is instituted" who may apply to be made a party. No one who is outside the "community" can make an application to be joined. All persons who did not have a bank account on or before 22nd July, 2003 must be excluded from these proceedings.

[18] The 2nd Defendant urged further that theapplicant has to show he has locus to be joined and that he is a member of the "community" whose members are eligible to apply to be joined.Many of the applicants do not give a bank account number and some do not even give the name of the bank of which they alleged to be a customer. There is therefore no evidence that they are within the "community" for whose benefit the suit has been brought and therefore not within the persons entitled to be joined under Order 1 Rule 8(3). These applications should be refused.Apart from the foregoing, the 2nd Defendant contended that the same principle of "community of interest" applies to the banks represented by the second defendant.Paragraph 3 of the Plaint states that the second defendant is sued on behalf of the "commercial banks" who were members of the second defendant on 22nd July, 2003 when the Plaint was filed. Paragraph 3 lists who those members were. Applicants who claim to be customers of banks which do not appear in paragraph 3 of the Plaint should not be joined, firstly because the bank concerned is not represented in this case and secondly, as the bank concerned was not a bank on 22nd July, 2003, the applicant cannot have had a bank account with that bank on 22nd July, 2003 so as to be a member of the "community" eligible to apply for joinder.Paragraph 10 (a), (b) and (c) of Mr Olaka's Affidavit of 14th January, 2015 shows that Equity Bank Limited, Family Bank Limited and Gulf Bank Limited were not banks; were not members of the second defendant; and are not mentioned in paragraph 3 of the Plaint. Therefore all applicants claiming to be customers of Equity Bank Limited, Family Bank Limited and Gulf Bank Limited should have their applications dismissed.Paragraph 10 (d) of Mr Olaka's Affidavit of 14th January, 2015 show that Housing Finance Company of Kenya Ltd is not mentioned in paragraph 3 and even now is not a commercial bank. Therefore all applicants claiming to be customers of Housing Finance Company of Kenya Ltd should have their applications dismissed.

[19] The 2nd Defendant also added its voice on issues of the Constitution. They argued that the new Constitution was promulgated on 27th August, 2010- which was over 7 years after the Plaint was filed.It is submitted that the rights contained in the new Constitution do not have retrospective effect and cannot change the representative nature of the present case as commenced by the Plaint filed on 22nd July, 2003 - see:

a. **Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and two others** [2012]eKLR at page 18 paragraph 62 [authority number 1].

b. **Duncan Otieno Waga v the Attorney General** [2012] eKLR at page 6 paragraphs 39 to 43 [authority number 2].

c. **Richard Wasilwa Wafula v Commissioner of Police** [2014] eKLR at page 2 paragraph 7 [authority number 3].

In addition, these are not proceedings under Article 22 of the Constitution to which the Constitution and the rules made thereunder would apply.For these reasons, the 2nd Defendant is convinced that the applications for joinder must be considered and determined under the Civil Procedure Rules relating to joinder and representative actions. The provisions in the new Constitution and particularly references to "Class Actions" have no relevance to the present case or applications. They also supported the argument that consent to joinder by parties is necessary for applications under Order 1 Rule 8(3). The procedure for joinder is spelt out in Order 1 Rule 10 especially Rule 10(3) of the Civil Procedure Rules which provides that "no person shall be added as a plaintiff suing without a next friend ... without his consent in writing thereto." See **Lombard Banking Kenya Limited v Shah BhaichandBhagwanji [1960] EA 969;** and similarstatement by Ibrahim J (as he then was) in **Komen Ego and 3 others vs. District Surveyor UashinGishu District and 2 others [2007] eKLR.** The consent is important for the individual being joined, because, once a person is made a party to the suit he will be subject to the Court's powers to order for payment of costs of the suit under section 27 of the **Civil Procedure Act**. If there is no consent in writing from the person sought to be joined, then the application should be dismissed.

[20] The Defendants also submitted that no person who is already a party to an existing suit should be joined. They cited the Court of Appeal case of **CA CivAppl'n NAI 291 of 2011 Lawrence Ndutu and 6000 others v Kenya Breweries Limited** that a person affected by a representative suit has a choice whether to apply to join the suit or not and has the right to opt out and file his own case. They asserted that, it would be in breach of section 6 of the **Civil Procedure Act** to allow a party to pursue remedies against his bank in his own case while also seeking to be joined as a party in the representative action.

[21] They also submitted on limitation that all of the applicants and indeed, all of the represented persons were free to file their own case if they were of the opinion that the charges levied by their bank were in any way improper. Such action was not dependent on the action commenced by the plaintiff. Therefore any delay which may have occurred in the prosecution of this case has no impact on the application of limitation to the causes of action of any of the represented parties.Some of the applicants seek to rely on section 26 (a) of the Limitation of Actions Act. That section only applies if the action is based on fraud or the right of action was concealed by fraud, or the action is for the relief from the consequences of a mistake. None of those circumstances is pleaded in the Plaint and it is submitted that section 26 (a) has no application to this case.

DETERMINATION BY COURT

Issues

[22] Applications which I have listed in the first part of this decision were filed upon advertisement of a notice under Order 1 rule 8 of the Civil Procedure Rules. Upon meticulous perusal and consideration of all applications, the arguments by the parties, the pleadings and the law applicable, there isone thing that is simply overt: That all the applications before me have a common ground; the applicants claim to be former or present customers and borrowers of banks and they claim to have a community of interest in the outcome of this case specifically on the import of section 44 of the Banking Act onincrease of interest rates and other charges by banks. Therefore, out of the pleadings and submissions filed, the general issues which emerge for determination by the court are:-

a. **Whether the court can make a general order joining all customers of the defendant banks as party to the suit. This issue will require a succinct decision on the kind of suit**

it is under Order 1 rule 8 of the Civil Procedure Rules. Inextricably, arguments of ‘’opt-out’’ versus ‘’opt-in’’ model will be discussed.

b. **Whether matters of section 44 of the Banking Act fall within the bill of rights. Rights such as, equality before the law, equal protection and benefit of the law shall be discussed. I should not forget also that the alleged discrimination of those who may be left out shall also come into sharp focus.**

c. **Eventually, whether the applicants should be joined as party to the suit. Here the court will determine the relevant considerations in such joinder, which are defined in law. Except, the squirm here is on the scope of application of this suit, i.e. whether only persons who were account holders on or before 22nd July 2003 should apply to join the suit. That way, all applications shall be determined completely.**

[23] The following questions are pertinent in this decision. Can the court make a general order joining all customers of the defendant banks as party to the suit? What legal and constitutional considerations will the court apply in making such joinder *en masse*? What is the kind of suit it is under Order 1 rule 8 of the Civil Procedure Rules? Inextricably, arguments of ‘’opt-out’’ versus ‘’opt-in’’ model will be discussed in answering these questions. I will invert the order in which I will answer the above questions for obvious reasons. One, the nature of the suit under Order 1 rule 8 of the Civil Procedure Rules will determine (1) the nature and scope of possible or permitted orders of joinder the court can make and (2) the legal and constitutional considerations which should guide the court in determining applications for joinder of parties in a suit under Order 1 rule 8 of the Civil Procedure Rules. I will start with the last question to wit:-

What is the kind of suit under Order 1 rule 8 of the Civil Procedure Rules?

[25] Mr Waigwa has put forth strong arguments that the Constitution in article 22 and 258 has enlarged the *locus standi* of parties to apply on behalf of others or for public good especially on public-interest cases. He rightly argued that, the basis of this case is alleged violation of section 44 of the Banking Act by banks by charging interest rates that do not enjoy prior approval of the Minister. Mr Waigwa also claims that despite this fragrant and notorious violation of the law, the official regulator for banks, that is, the Central Bank of Kenya has not helped poor borrowers from being oppressed by the banks who have consciously charged illegal interest on loans advance to their customers. I admit that section 44 of the Banking Act is an important statutory-safeguard provision which was specially enacted to prevent oppression of borrowers bybanks who may be tempted to use their dominant positions to offer unconscionable and or illegal bargains in commercial world. The section is,therefore, underpinned by pertinent state policy to ensure equality in commercial transactions. It is, therefore, a section that should not be taken as an adornment in the statute books which can be flouted with impunity. For clarity, the section reads:-

Section 44: Restrictions on increase in bank charges

No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.

Therefore, as a matter of law, banks are bound by section 44 of the Banking Act and any charge of interest or other charges which are made in violation thereof makes the interest or charge so charged to be illegal. Courts of law have said time and again that a party who proves that the interest charged was un-contractual or illegal shall receive a remedy from court.And, I should prophesy that as cases on illegal interest and bank charges are brought to court, so shall the matter become one of the general welfare of the public that warrants recognition and protection by the state and the courts. Kenya is a fast growing economy and availability of credit facilities to the public is one of the pillars of this growth. Therefore, notoriety of incidences of illegal interests and bank charges is something in which the public as a whole should have a stake, especially an interest that would justify government regulation and intervention.

[26] The above notwithstanding, is violation of the said section by banks a matter of the Constitution? As I have stated, a violation of a statutory provision especially section 44 of the Banking Act is a breach of statutory duty by the Bank which will entitle the borrower to relief in law. Such breach may also justify government intervention and the government through the Regulator may take action against offending banks generally. However, even if the protection offered under section 44 of the Banking Act is available to and is for all borrowers, in a set-up of legal dispute, judicial pronouncement will depend; first on a party coming to court for remedy, and second, such party laying evidence before the court to prove its individual case that a particular bank has been levying illegal interest and other bank charges in contravention with section 44 of the Banking Act. Except, however, in this case it is possible for the court to make a finding on the approved and applicable rates of interest or charges at any given time given that official communications from the Finance Minister is always through the official Gazette Notice of which the court will simply take judicial notice. Even the Court of Appeal in **CA NO 216 OF 2004** in remitting this case for hearing was alive to this fact and observed that there is no difficulty in the court deciding whether the banks in this country have been levying illegal charges which have not been approved by the Minister. The court will also be obligated to consider the individual defence by each bank to see whether the charges in issue were lawfully authorized by the Minister. Ordinarily, and I have said this, such official communication on interest rate or bank charges is done through the official gazette notice of which the court simply takes judicial notice. Therefore, without judicial pronouncements or empirical finding by the Regulator that banks have been levying illegal charges contrary to the law, a generalized statement condemning banks at this stage shall be most unfortunate and a regress in investment. My approach would, therefore, be a practical one; to make a finding of fact and law based on careful analysis of the totality of the evidence that will be provided in this case on whether banks have been levying illegal charges in Kenya rather than treat this matter as violation of the Constitution. But Mr Waigwa has cited the Constitution in another sense; that Order 1 rule 8(3) of the Civil Procedure Rules is unconstitutional. But, I will deal with that aspect of this case after I have established the nature of the proceedings under Order 1 rule 8 of the Civil Procedure Rules.

Nature of proceedings under O 1 rule 8

[27] Order 1 rule 8 of the Civil Procedure Rules provides as follows:-

> **8(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.**
>
> **(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.**
>
> **(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party.**

[28] A reading of Order 1 rule 8 envisages a suit commenced or defended by one or more of, on behalf of and for the benefit of numerous persons who have same interest in the proceeding. The person or persons who have commenced or are defending the suit are deemed to be representing all of the numerous persons with same interest in the proceedings. Essentially, the proceeding in Order 1 rule 8 of the Civil Procedure Rules is a representative suit which may also include class action and derivative suits. Therefore, a person coming under the said provisions of the law should abide by the legal requirements thereto. Mr Waigwa argued that rule 8(3) of Order 1 is unconstitutional in so far as requires that the...''**Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party''.** His reasons are that access to justice has been eased and *locus standi* enlarged by the

Constitution specifically by article 22, 48, 50 and 258 of the Constitution. I agree. But to my mind, rule 8(3) of Order 1 of the Civil Procedure Rules must be understood within the entire regime of substantive and procedural law provided for under the Civil Procedure Act and the Civil Procedure Rules respectively. More specifically, rule 8(2) is a classic enabler of access to justice. It provides- in mandatory terms- that the parties filing such suit shall serve notice of the suit to all persons on whose behalf and for whose benefit the suit is brought. See the said subrule 2 which provides as:-

> **The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.**

[28] Again, and I said this before, a case founded on alleged violation of section 44 must be proved by the borrower against the specific bank which is alleged to have flouted the law. A general condemnation of all banks without empirical evidence that all banks have been levying illegal charges would be most unfair verdict. In the same breath I must state that banks are also expected to adhere to the law and if they fail to do so the law will not hesitate to chastise them.I should also state here that, the Regulator of Banks should also be keen to enforce the law against those banks which defy the law with impunity, and should take even the most draconian measures against the Banks to safeguard customers from oppression by banks- oppression may be stealth, covert and underlying any commercial transaction given the dominant position of banks as holders of the much needed capital by borrowers. In other jurisdictions banks have been forced to make refunds of such illegal charges which run into billions of dollars. But we are yet to see data of any action that the Central Bank of Kenya has taken against banks which have been adjudged by courts to have flouted section 44 of the Banking Act. This kind of measure will require indomitable resolve by the state to disentangle itself from what many would call ‘’state capture’’ into a public-spirited plan of action to enforce the laws it has enacted. I say these things fully aware of the history of some of these enactments especially those on interest rates and *in duplum rule* etc.

[29] Back to the main channel. Given the nature of the proceedings under Order 1 rule 8 of the Civil Procedure Rules, as well as the type of case that is before the court, a party who has ***the same interest in the proceedings*** should apply to be joined. Further, this position is informed by the fact that causes of action will be based on particular evidence that must be proved specifically by the party alleging the violation of statutory provision against the particular bank as opposed to all banks. Again, the issue of costs cannot be ignored because, in a private civil dispute costs follow the event and may not enjoy the magnanimous approach on costs on public interest litigation. I am not saying, however, that a case of violation of statutory law has no public interest element as breach of law is contrary to public policy. I am simply saying that the nature of this case is that each party or customer must prove that their bank was in breach of the law by adducing evidence that is required in, to prove civil claims.

[30] Who therefore can apply to be joined as plaintiffs or defendants in this case? According to the law, only person or persons who have same interest in the proceedings can apply. The category includes personal representatives, administrators and administratrix, executors and executrix, duly appointed agents, and holders of power of attorney of the persons with same interest in the proceedings. What is ‘’same interest’’? See the case of **Kenya Airways Corporation Ltd v Tobias OganyaAuma& 5 Others Civil Appeal No. 350 of 2002** where the Court of Appeal stated as follows;

> **“In Robin Cahill & 9 Others v. T.S. Nandhra& 3 Others – Civil Appeal No. 57 of 2002 (unreported) this Court upheld the decision of Ringera J. (as he then was) when he held:**
>
> > **“The claim in the present suit sounds in tort contrary to the opinion of the plaintiffs’**

> **counsel. Breach of statutory duty of care is to my mind a claim in tort essentially, so is the claim in negligence and fraud. Of the cases cited, the one which in this context is most pertinent is PRUDENTIAL ASSURANCE CO. LTD. VS. NEWMAN INDUSTRIES LTD & OTHERS [1979] 3 ALL ER 507. As seen earlier the same case is authority for the proposition that a representative action could lie in tort even though the members of the class have separate causes of action provided care was taken to ensure that the action did not confer on any member of the class a right he could not have claimed in a separate action or bar a defence which the defendant could have raised in such separate action. The case also held that because of that reason a plaintiff in his representative capacity would normally be able to obtain only declaratory relief."**

And that:-

> **"The authorities I have so far analysed seem to suggest that the words "same interest" do not mean one joint cause of action and relief. A representative action can lie in either contract or tort where numerous persons claim either in one cause of action jointly or in separate causes of actions severally."**

[31] In the **Kenya Airways case** as well as the **Robin Cahill & 9 Others v. T.S. Nandhra& 3 Others – Civil Appeal No. 57 of 2002 (unreported)**, same interest was equated to having ''community of interest'' in the determination of any substantial question of law or fact that has arisen in the proceedings in question.And, also it was settled in this case that, same interest does not have to arise from the same contract, cause of action or transaction as long as the plaintiffs are pursuing same relief. The Court of Appeal in remitting this case for hearing identified ''same interest'' in this particular case to be and stated as follows:-

> **''In this case the same interest is whether the banking charges the commercial banks charge are approved by the Finance Minister as required by section 44 of the Banking Act''.**

Accordingly, despite the fact that each party has a separate contract with particular bank, the question that has arisen in these proceedings relate to alleged violation of section 44 of the Banking Act by the defendant banks. It is a question of law which constitutes ''same interest'' in these proceeding amongst the customers of the banks mentioned in the case. Therefore, bank customers who have same interest in section 44 of the Banking Act may apply to be joined as parties in this suit. Similarly, banks which have same interest in the outcome of these proceedings especially in relation to section 44 of the Banking Act are also eligible for joinder in these proceedings.I doubt whether pendency of suits between the same partes will prevent joinder of the same parties under Order 1 rule 8 of the Civil Procedure Rules to proceedings which are especially based on ''the community of interest'' on a statutory provision which binds all banks.But where similar issue is directly in issue in a pending suit, the court may have to consider that fact in an application for joinder. The broader principles of joinder and as enunciated in the case of **Mai Mahiu Kijabe/Longonot Co. Ltd v Ayub Mugo Njoroge & 5 Others Civil Suit No. 1672 of 2001, Unreported, [eKLR]** in considering the application of Order 1 Rule 8, are as follows;

> **"It is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit."**

[33] However, there aretwo issues I should address in a pointed manner as they were was also given much prominence by parties- (1) limitation of actions and (2) need for consent from the party. I belong to the school of thought who posits that matters of limitation of actions should be determined at the trial and not at preliminary stage. There is ample judicial authority on this

subject which I need not multiply. Except, I should state that I am guided by the wisdom under section 27 of the Limitation of Actions and Order 37 rule 6 of the Civil Procedure Rules which provides for application to extend time before filing and after filing suit. And even where extension has been granted before filing suit, limitation will also be subject of or issue for trial. Therefore, arguments on limitation should be used at the trial as a defence. On need for consent, under Order 1 rule 8 of the Civil Procedure Rules, it is sufficient that a party has applied in person or through legal counsel. Such party shall be joined in the suit unless he has no same interest in the proceedings. Long gone is the requirement for leave or representation order where consent may have been a necessity. In fact Order 1 rule 8 of the Civil Procedure Rules does not require grant of leave before commencing representative suit. Notably also, a party who wishes to withdraw his standing as a party is at liberty to do so even after being properly joined under Order 1 rule 8 of the Civil Procedure Rules. In all these arguments, it is clear that an en masse joinder may not be possible in such suit as this. But, I will make specific order on the application by Okutoyi at the appropriate time. I have now set out the parameters of joinder of parties under Order 1 rule 8 of the Civil Procedure Rules and I am in a position to make a decision in each of the applications before the court.

Of Notice of Motion dated 15th August, 2014

[32] This application was filed by S GichukiWaigwa& Associates by the plaintiff to join 185 persons. Applying the parameters I have set out above, I allow the proposed plaintiffs to join as parties except applicant number 159 and those customers of banks which have ceased to be banks. On the death of a legal person as provided in law, such person cannot be sued. This, however, does not include successors in title or through merger. Delphis Bank is a good example. All the other issues of misjoinder or lack of evidence of being account holders are matters for trial. As I have stated above, section 6 of the Civil Procedure Act is not offended by joining party number 26 in the Schedule to the Notice of Motion as stated in paragraph 12 (a) of Mr Olaka's Affidavit of 14th January, 2015. Also Mr Olaka's Affidavit as well as Further Affidavit relate to failure to trace or lack of record to show these persons ever had accounts with the banks cited. As I stated earlier, these are matters of evidence which can only be unravelled in the trial and appropriate orders for costs shall be made where the party fails to establish his case to the required standards. I also note that arguments that Equity Bank Limited, Family Bank Limited, Gulf Bank Limited and Housing Finance Company of Kenya Limited are not involved in this suit. I take the view that those customers who claim that section 44 was violated have same interest in these proceedings. Whether they will succeed or not in their respective causes of actions is a different matter altogether which is for trial. It is so ordered.

Of Notice of Motion dated 8th August, 2014

[33] This application was filed by Kosgey&Masesefor and on behalf of Printing Industries Limited and Multiple Industries Limited. The Supporting Affidavit of Horatius Da Gama Rose dated 8th August 2014 clearly states at paragraph 1 that he has the requisite Authority and consent to make and swear the Affidavit on behalf of both Printing Industries Ltd. and Multiple Industries Ltd. The following argument by the applicant makes sense; that the existing suit, that is to say, HCCC 335 of 2008 between the Intended Interested parties herein and the Bank of Baroda relate to validity and enforceability of Debenture and Charge document that were registered out of time contrary to section 96 of the Companies Act, and therefore, a challenge to appointment of receivers under such documents; are quite apart from the question of whether the bank charged interest rate without prior approval of the Minister.I allow their joinder. From the material on record, the two parties have shown that they have same interest in these proceedings despite the pending case in Court.

Of Notice of Motion dated 11th August, 2014

[34] This application was filed by Jennifer Shamalla& Company on behalf of Margaret

WambuiWamuti. I note that the Applicant is the widow to John WamutiMuthungi the Deceased Plaintiff in HCCC No. 254 of 2007: John Wamuti versus Housing Finance Company of Kenya. I also take judicial notice of the fact that the suit which the Applicant ought to have substituted the Plaintiff has since abated by virtue of the provisions of Order 24 Rule 3(1) of the Civil Procedure Rules and a ruling delivered by the Honourable Justice E. K. O. Ogola on the 5th Day of May 2015 in which the judge dismissed the application to revive the suit. A cause of action must exist before joinder in any suit. In this case by law, the cause of action abated and cannot be revived otherwise than in accordance with Order 24 of the Civil Procedure Rules. On that basis, I decline the joinder of Margaret WambuiWamuti.

Of Notice of Motion Application dated 26th December 2014 and 25th September, 2014 by Nova Industries

[35] The argument by the 2nd Defendant limiting the scope of ''same interest'' to 22nd July 2003 relates to limitation of action. And as Section 44 of the Banking Act has its delineated scope of application in law, these are matters which the trial court shall determine at the trial. I will therefore, not preoccupy myself with those arguments albeit they are plausible. Again, I will not determine matters of evidentiary connotation which relate to whether they were accounts holders or not without the benefit of comprehensive evidence from both parties. It is sufficient that it has been averred on behalf of Nova Industries Limited the applicant is a past customer of Standard Chartered Bank Limited- Industrial Area Branch- on A/C – 01090-300187-00 And A/C No. 01140-300187-00; a past customer of Kenya Commercial Bank Limited, Fidelity Commercial Bank Limited and National Industrial Credit Bank Limited. I allow their joinder as party in these proceedings.

Of Motion dated 12th August 2014

[36] The Motion was filed to enjoinJoseph Kariuki Ngigi(Administrator of the Estate of Peter Joseph Ngigi) and Kenya Shoe Company Limited. The affidavit evidence shows that the late Peter Joseph Ngigi was a shareholder in Kenya Shoe Company Limited. Kenya Shoe Company Limited and was advanced a loan facility by Kenya Commercial Bank of Kshs. 2,200,000.00 sometime in 1982. The loan facility was secured by a floating debenture over the company machines and other assets which included L.R. NO. KIAMBU/LARI/551 which belonged to the company.Further, the late Peter Joseph Ngigi guaranteed the loan facility by use of his land which was then known as L.R. NO. 170/7 (Red hill) South East of Limuru.Compound interest rate was applied on the loan which the applicants argue was without approval of the Minister for Finance. The company then lost its assets and the factory was closed down as it could not keep up with servicing the loan. After the death of the deceased, the Bank called upon the Administrators of the Estate of Peter Joseph Ngigi to make good the guarantee that had been placed by the deceased to secure the loan. A portion of L.R. 170/7 (Red hill) South East of Limuru was therefore hived off and sold to clear the loan balance.

[37] In law, the bank has a duty of care to the deceased's estate and the administrator of the late guarantor of the loan herein. See the case of **Margaret NjeriMuiruri (administrator of estate of late Joseph Muiruri Gachoka)vs. Bank of Baroda [2014] eKLR**. The company was an account holder and the borrower in the bank. Therefore, both the estate of the guarantor and the company have same interest in these proceedings. Accordingly, I order their joinder.

Of Motion dated 15.8.2014

[38] This motion prays for joinder of James Samuel Kinyanjui,Eastlands, Theatres Ltd and Anne NjeriKinyanjui. The applicants admitted that the issues which are before this Honourable Court are similar to those in the pending matters to which they are parties:-

a. **MILIMANI CMCC No. 10065 of 2007 (formerly No. 960 of 2001)National Bank of Kenya –vs- James Samuel Kinyanjui**

b. **MILIMANI HCCC No. 772 of 2001National Bank of Kenya –vs- James Samuel Kinyanjui and Anne NjeriKinyanjui**
c. **MILIMANI HCC No. 4640 of 1988Kenya National Capital Corporation –vs- James Samuel Kinyanjui, Eastlands Theatres Ltd and Anne NjeriKinyanjui**
d. **MILIMANI HCC No. 1158 of 1999Southern Credit Banking Corporation Ltd. –vs- James Samuel Kinyanjui and Park Enterprises Ltd.**

The issues in the above suits deal with illegal rates of interest, arbitrary variation of the rates of interest and illegal bank charges applied by the banks to their accounts. As I stated earlier, the same interest is on section 44 of the Banking Act. The parties will then have to prove their respective cases on quantum. There is absolutely nothing wrong and I do not see any violation of the law to allow joinder of such parties in a generic suit as this one. But, I think in law, in such circumstances, the cause available is to apply for stay of the other suits pending the outcome of the preferred case on section 44 of the Banking Act. As nothing will prevent the applicant from relying on the decision of this court as a persuasive decision in the existing case- that is if this case is completed first- it may not be appropriate to allow their joinder in this case. On that basis, I hereby decline their joinder in this case. However, I will not condemn them to costs. It is so ordered.

Of Motion dated 10th December, 2014

[39] This is the Motion that attracted most attention and novel arguments by counsels. It was filed by GODFREY PAUL OKUTOYI. As I stated, the nature of proceedings under Order 1 rule 8 of the Civil Procedure Rules is a representative suit which includes class action and derivative suits. But, the type of cause of action or community of interest being litigated is alleged violation of section 44 of the Banking Act by banks in levying charges that did not receive approval of the Minister of Finance. This matter has public element in it because violation of law is contrary to public policy of any state. However, it remains a matter that will require individuals to prove individual claims that particular banks violated the statutory provision which restricts all institutions governed by the Banking Act from increasing rate of banking or other charges except with the prior approval of the Minister. I also stated that en masse condemnation of banks may be unfair. The court therefore found that only parties with same interest in the proceedings or their personal representatives, appointed agents, holders of power of attorney or successors in title or by merger would apply to be joined under Order 1 rule 8 of the Civil Procedure Rules. I should also state that this suit is not really public litigation in *strictu sensu* although it carries some element of great public concern. It is also not a proceeding under article 22 of the Constitution which would drift it to the airspace of public constitutional law. I would therefore be hesitant to give it constitutional complexion yet. And as such, a person who has no same interest in the proceedings as customers and or banks may not have the right to be joined in the first place unless he falls within the category above. But, I will complete my decision on whether Godfrey Okutoyi should join and all customers of banks after I have determined the issue of discrimination that Mr Wagwa ably argued.

[40] I also found that the said Order 1 rule 8 is not unconstitutional as it conforms to the requirement of the Constitution on principles of justice especially right to access to justice under article 48 and 50 of the Constitution. When considered within the broad scheme of justice, the said Order does not take away any or essential core of the right to access to justice. The constitutional yardstick on whether a piece of legislation curtails rights of persons is article 24 of the Constitution as well as the principle of proportionality. I will place the submission by Mr Waigwaon the said yardstick. He argued that, by requiring parties to apply to be joined in a suit, subrule 3 of Order 1 rule 8 of the Civil Procedure Rules is discriminatory. He gave his reasons to be that; (1) *locus standi* has been greatly enlarged by article 22 and 258 of the Constitution; and (2) that the provision discriminates against those litigants who are poor and so cannot afford the joinder or are illiterate and cannot comprehend the notice or were not aware of the notice of suit for one reason or other or were impeded by any reason to apply. I have tackled the issue of locus standi. I wish to state that the submission on discrimination looks attractive but therein lay danger

of spreading article of the Constitution on discrimination far too thin to achieve its purpose if each and every argument that is perceived to be discriminatory is to be treated as prohibited differential treatment.The rule does not introduce any discrimination of any sort by requiring a party to apply. I must admit that matters of illiteracy, poverty are serious and regrettable situations of life found in any society. And Kenya is not any exception. However, the Constitution has put measures and obligations on the state to address such matters through legal and policy interventions. Therefore, my own view is that, I would rather that arguments on discrimination should attain well-focused construction of the concept of discrimination as set out in Article *27* and to be directed at laws and practices that perpetuate prohibited forms of discrimination rather than a crude reduction of every argument on intrinsically difficult social issues such as poverty and illiteracy. If the concept of discrimination was entirely unqualified, that would raise the prospect of theoretical, innocuous or *de minimus* disadvantages qualifying as prohibited discrimination, and that indeed would risk trivializing the right protected under the Constitution. At least violation of a right needs to be established by the person alleging discrimination. Mr Waigwa has not established any. Needless to state that under the Civil Procedure Rules especially Order 33of the Civil Procedure Rules provides for suits by paupers.Order 1 rule 8(3) of the Civil Procedure Rules does not deny any person equality and benefit of the law at all.

[41] With regard to whether I should order joinder of all customers of the bank until they opt out, I say that procedure may not be supported in law especially within the prescriptions of the Civil Procedure Rules. I say these things well aware that the decision in this case on section 44 of the Banking Act may be used in other matters since it relates to a statutory provision. I am also aware that courts have pronounced themselves in the past in a number of cases that charges levied in contravention of section 44 of the Banking Act are illegal and makes the bargain unconscionable and morally wrong. See for instance the decision by the Court of Appeal in the case of **Margaret NjeriMuiruri (administrator of estate of late Joseph Muiruri Gachoka) vs. Bank of Baroda [2014] eKLR.** Thus, matters raised in this suit are serious and may require even more intense policy measures by the state and the Regulator if commercial transactions should be made fair. The state and the regulator could take such measures as were taken by jurisdictions such as Nigeria and USA; that is welcome. Given what I have stated, I will not order joinder *en masse* of all the customers as each customer will have to show by way of evidence that he has same interest in the proceedings and that the specific bank with which he had a contractual relationship levied interest and other charges in contravention of section 44 of the Banking Act. Similarly, even if a party is joined such party may still opt out of the proceedings without any restriction save subject to costs if any. See **CA Civil App NAI 291 of 2011 Lawrence Ndutu& 6000 others v Kenya Breweries Limited.** I decline the application by Godfrey Okutoyi. But I will specific on costs of this application. The application was brought with public spirit as the motivator rather than personal gain. Therefore, I will not condemn the applicant to costs.

Of Notice of Motion dated 18th August, 2014

[42] This Motion was filed by Munyithya, Mutugi, Umara&Muzna Coon behalf of Kenneth Kimani Nyioke and Datini Mercantile Limited. Despite the pending case, they can join for purposes of resolution on issues on section 44 of the Banking Act. I allow the joinder sought.

Of Notice of Motion dated 2nd September, 2014

[43] This Motion was filed by Jennifer Shamalla& Company on behalf of Japheth Shamalla. The applicant has shown he has same interest in the proceedings herein. I allow his joinder as a party in the suit.

Of Notice of Motion dated 27th October, 2014

[44] This Motion was filed by Adera& Company on behalf of IDB Capital Limited. The second defendanthad no objection to the application. Their reason is that the applicant is no longer a member of the second defendant and is also no longer a bank. However, the applicant averred that

it was a licenced bank until 2005, and that it may therefore be affected by any global orders that may be made in respect of section 44 of the Banking Act. They have a recognizable stake (and therefore standing) in the matter. Also, in accordance with the general principles on joinder, they should be joined as parties, Accordingly, I allow their joinder as parties.

Costs

[45] Given the nature of the applications, except where it otherwise expressly stated costs of all the applications which I have granted shall be in the cause. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 27th day of August 2015.

F. GIKONYO

JUDGE