



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 209 of 2012

BETWEEN

HON. KENNEDY ODHIAMBO NYAGUDI PETITIONER

AND

CENTRAL BANK OF KENYA 1ST RESPONDENT

CREDIT REFERENCE BUREAU AFRICA LTD 2ND RESPONDENT

KENYA COMMERCIAL BANK LTD 3RD RESPONDENT

BARCLAYS BANK OF KENYA LTD 4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner is a former member of Parliament and businessman. He holds bank accounts at the Barclays Bank of Kenya Limited and the Kenya Commercial Bank Limited. He states that he has diverse commercial interests ranging from real estate to the hospitality industry.

2. He avers that his fundamental rights and freedoms protected under **Article 46** of the Constitution were been infringed by the respondents' jointly and severally and in the petition dated 15th May 2012, he seeks the following reliefs;

(a) *A declaration that the petitioner's Constitutional economic rights have been violated by the respondents jointly and severally.*

(b) *A declaration that the **Banking (Credit Reference Bureau Regulations) 2008** as contained in Legal Notice No. 97 is invalid and unconstitutional.*

(c) *General damages.*

(d) *A Mandatory injunction compelling the CRB to expunge the petitioner's name and financial records from its data base.*

(e) *Costs of this petition.*

(f) *Any other or further relief as deemed fit and just.*

3. In his supporting affidavit sworn on 15th May 2012, he has set out facts which point the relationship between himself and his bankers and the Credit Reference Bureau Africa Limited (“CRBAL”), the 2nd respondent. Although this case is a matter of enforcement of fundamental rights and freedoms under **Article 22** and specifically consumer rights protected by **Article 46**, as it will become apparent, it is not necessary to delve into the facts of the petition nor make any determination thereon.

Petitioner’s Case

4. In essence the petitioner’s complaint is that the 3rd and 4th respondents forwarded to CRBAL his confidential financial information without informing him. He avers that the CRBAL failed to inform him that it had received the information from the 3rd and 4th respondents and it failed to correct information about him despite several requests.

5. The petitioner accuses the Central Bank of Kenya (“CBK”), the 1st respondent, of failing to control the activities of CRBAL to ensure strict quality control procedures are put in place in order to ensure that it maintains current, authentic, reliable, accurate and truthful information reflecting the petitioner’s true and current position. By failure to carry out its statutory duty, the petitioner avers that CBK contravened its rights and fundamental freedoms.

6. The petitioner’s case is that the **Banking (Credit Reference Bureau Regulations) 2008** are unconstitutional and in violation of **Article 46** which protects the rights of consumers. The petitioner also submits that under **Article 35(2)** it is entitled to deletion of untrue and misleading information that affects one’s rights.

Respondents’ Case

7. All the respondents oppose the petition. The 1st respondent, the Central Bank, opposes the petition on the ground that it is empowered by the **Banking (Credit Reference Bureau) Regulations, 2008** (“**the Regulations**”) to licence CRB and it duly licenced the 2nd respondent. It also notes that the banks are entitled to share information about their customers. It denies any wrongdoing and avers that in accordance with **regulation 40** of the **Regulations**, the customer is entitled to access credit reports and to correction of wrong or inaccurate information. It states that nothing has been brought to its attention to show breach of the regulations by the other respondents.

8. Both the 3rd and 4th respondents aver that they strictly complied with the **Regulations** and that no cause of action has been established against them in the pleadings as no relief is claimed against them save for general damages which flow from the claim of unconstitutionality of the **Regulations**. The respondents contend that they had no role in promulgating the **Regulations** and they merely complied with them.

Determination

9. I have considered the pleadings, depositions and submissions filed by the parties and I take the following view of the matter.

10. The Regulations which are promulgated by the Minister of Finance pursuant to **sections 31(3) and (4) and 55** of the **Banking Act (Chapter 488 of the Laws of Kenya)** provide a framework for the establishment and regulation of Credit Reference Bureaus (“CRBs”). **Regulation 14(1)** provides that “**Customer informations shall be exchanged pursuant to these Regulations is any customer information concerning a customer’s non-performing loans, and may include details specified in sub-regulation (2).**” **Regulation 15** restricts the use of customer information and obliges the CRB to secure customer information.

11. The regulations also provide for customers right of access to information held by the CRB and the right to correct erroneous information. I am therefore constrained to agree with the position taken by the

CBK, that the complaints raised by the petitioner are provided for **regulation 20** of the **Regulations** which states as follows;

- (1) A customer has a right to know what information the institution has submitted to the Bureau regarding that customer.**
- (2) A customer shall be entitled to access credit reports relating to the customer that is kept in a database administered by a Bureau.**
- (3) A customer shall be entitled to a free copy of the customer's credit report at least once per year and within thirty days of receiving an adverse action notice issued under regulation 28(1)(b).**
- (4) Where a customer requests a Bureau for a credit report pursuant to sub-regulation (2), the Bureau shall, within five working days of receiving a request in writing and such particulars as the Bureau may reasonably require to enable it identify the customer provide to the customer a copy of all customer information relating to the customer held by the Bureau.**
- (5) Where the customer believes that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed.**
- (6) Within five working days of being informed that information in a customer's credit report is disputed, the Bureau shall;**
 - (a) Attach a note to the credit information report, warning that the disputed information is under investigation, which notice shall remain on the file until resolution of the dispute; and**
 - (b) Give the institution that supplied the information a notice of dispute, requesting confirmation from the institution as to the accuracy of the information.**
- (7) Within fifteen working days, the Bureau shall conduct a reasonable investigation, based on all relevant information provided by the customer, and contacting the furnisher of the information as necessary.**
- (8) Where an institution receives a notice of dispute from the Bureau it shall, within ten working days of receiving the notice, complete all necessary investigations into the disputed information and give the Bureau a notice of resolution, advising whether the disputed information is to be deleted, corrected, or remain unchanged.**
- (9) Where the investigation reveals an error, the Bureau shall promptly remedy the error.**
- (10) If the Bureau does not complete its investigation within fifteen days, it shall delete the disputed or correct information as requested by the customer.**
- (11) If the Bureau does not complete its investigations, it may reinsert or revise disputed information based on the results of such investigation.**
- (12) Upon receipt of a notice of resolution or an amendment notice from an institution the Bureau shall, within five working days of such receipt send a notice of change to any subscriber that has in the previous twelve months obtained a credit information report from the Bureau continuing the incorrect information.**
- (13) Should the customer disagree with the resolution of the disputed information, the customer may request the Bureau to attach a statement of not more than one hundred words to the customer's credit report, setting out the customer's claim that the information is not accurate and the Bureau shall take reasonable steps to comply with the customer's request.**

(14) A Bureau may charge the customer for the reasonable cost of its services in conducting an investigation of disputed customer information only if the information disputed by the customer turns out to be true.

12. The provisions I have cited above clearly show that the **Regulations** provide for relief to any customer who is aggrieved by wrong and erroneous information. The petitioner's grievances fall within these provisions and he is entitled to invoke the statutory procedure provided. It is for this reason, I have restrained myself from commenting on the facts of the petitioner's case as he is entitled to invoke these provisions.

13. **Article 46** of the Constitution deals with consumer rights and it provides as follows;

46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

14. The provisions of **regulation 20** are intended to protect the economic interests of the petitioner and fall within the purview of **Article 46(c)**. These provisions also give effect to the provisions of **Article 35(2)** which states that, "***Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***" The result of my finding is that the petition is dismissed.

15. I also agree with the submissions that there is no cause of action against the 3rd and 4th respondents. Assuming that the respondents complied with the law, they cannot be held liable for any harm flowing from following a law that is claimed to be unconstitutional when in fact they did not participate in or actually promulgate the regulations.

16. The petitioner has challenged the constitutionality of the **Regulations**. The **Regulations** are made by the Minister of Finance pursuant to the authority granted by the **Banking Act**. It is proper that when the constitutionality of an Act of Parliament or regulations is challenged, the State represented by the Attorney General, the State organ or institution promulgating the regulations is made a party to the proceedings. It is a necessary party and must be given an opportunity to put its case forward. This was not done in this case.

17. The 1st respondent submitted that the respondents were entitled to costs. Mr Munyalo, counsel for CBK, argued that the petitioner brought this case to protect his own personal rather than the public interest hence he should be ordered to pay costs. I agree with this proposition save that **Article 22** does not distinguish between personal or public interests as it is concerned with the enforcement of fundamental rights and freedoms.

18. Costs are, however, in the court's discretion (See **Harun Mwau v Attorney General Nairobi Petition No. 65 of 2011 [2012] eKLR**). As no cause of action has been established against the 3rd and 4th respondents, I award them costs in the sum of **Kshs.30,000/=**. I decline to award costs in respect of the 1st respondent which is a public institution.

19. The final orders in the matter are therefore as follows:

(a) **The petition be and is hereby dismissed.**

(b) **The petitioner shall bear the costs of the 3rd and 4th respondents which are assessed at Ksh. 30,000.00**

DATED and DELIVERED at NAIROBI this 18th day of March 2013

D.S. MAJANJA
JUDGE

Mr Mungao instructed by Aduda and Company Advocates for the petitioner.

Mr Munyalo instructed by Waweru Gatonye and Company Advocates for the 1st respondent.

Mr Njoroge instructed by Macharia-Mwangi and Njeru Advocates for the 3rd respondent.

Mr Karungo instructed by Walker Kontos Advocates for the 4th respondent.