



REPUBLIC OF KENYA



**Khisa v Kenya Commercial Bank (Petition E006 of 2022) [2025] KEHC 2923 (KLR)
(Constitutional and Human Rights) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2923 (KLR)

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

PETITION E006 OF 2022

RC RUTTO, J

MARCH 7, 2025

BETWEEN

SHADRACK KHISA PETITIONER

AND

KENYA COMMERCIAL BANK RESPONDENT

JUDGMENT

1. The Petitioner's petition dated 16th December 2021 is premised on Articles 2, 22 (1) & (3), 35 of *the Constitution*, Section 4 of the *Access to Information Act* and Section 44 of the *Banking Act*. The petition is supported by the Petitioner's affidavit sworn on the date of the petition.
2. The Petitioner seeks the following reliefs:
 - i. A declaration that the failure by the Respondent to provide information sought under Article 35(1) and on the basis of the petitioner's request is a violation of the right to access information;
 - ii. A declaration that the illegal and unlawful deduction of monies by the Respondent infringed on the Petitioner's economic rights and that of his family;
 - iii. General damages as compensation for infringement of rights pain, suffering and emotional anguish at Ksh. 500,000'
 - iv. An order for the reimbursement of monies illegally deducted by the Respondent from Petitioner's salary; and
 - v. Cost of the Petition.



Background of the Petition

3. The Petitioner herein was a consumer of the Respondent's banking services. On or about, February 2009 he applied for a loan facility of Ksh.400,000 from the Respondent. The Loan facility was approved and Ksh.416,565 was disbursed to the Petitioner's account.
4. The Petitioner averred that it was agreed that the loan repayment was to begin in July 2009 through the check off system but it is only until July 2010 that the first payment of Ksh.9,094 was effected on his pay slip. He avers that the Respondent failed to commence deductions immediately yet proceeded to charge interest and penalty fee for payment default.
5. It was his averment that he wrote several correspondences to the Respondent seeking information as to the deductions and status of the loan but the Respondent declined to respond. He then proceeded to instruct his advocate who wrote to the Respondent. He also made a complaint to the Commission on Administrative Justice who directed the Respondent to furnish the Petitioner with the requested information.
6. That when the Respondent finally furnished him with a loan statement it was incomplete and upon further inquiries the Respondent neglected/declined to furnish him with a complete statement.
7. The Petitioner avers that as at February 2022 the Respondent was still making deductions for the loan and his pay slip indicated that he still had a loan balance of Ksh. 82,106 yet the payment period was 72 months for which the Respondent has not provided any information on its extension.
8. The Petitioner therefore postulated that as a result of the Respondent's actions his right to access of information under Article 35 of *the Constitution* as well as his economic rights had been infringed thereby necessitating the institution of this Petition.
9. The Respondent opposed the Petition through a replying affidavit sworn on 3rd February, 2023 by its Credit Administrator, Humphrey Abero. The Respondent avers that it granted the Petitioner a loan to be repaid at an interest rate of 20% p.a with a rate of 3% over and above the said rate being applicable upon default. That the loan was to be repaid through the check off system and deductions were to commence in July 2009 but it was only until November 2010 that the Respondent began receiving the loan repayments.
10. He averred that the delay in repayment resulted in accumulated arrears of Ksh.210,480 which amount was capitalized back to the outstanding loan. Further as per the terms and conditions of the loan in the event the check off deductions were not effected the Petitioner was obligated to directly make payments to the loan account. The Petitioner did not make any efforts to settle the amounts due before the check off system deductions were effected. Therefore, it is the Petitioner who failed to honour his obligations as per the express terms and conditions of the loan to make direct payments of the loan where the check off system was not effected by his employer.
11. On infringing the Petitioner's right of access to information it was the Respondent averment that the Petitioner was availed with all the requested documents.
12. At the directions of the Court this petition was canvassed on the basis of the parties respective affidavits and submissions. The Petitioner's submissions are dated 3rd October 2025 while the Respondent's were dated 22nd August 2024.

Petitioner's Submissions

13. The Petitioner framed the following three issues for determination;



- i. Whether the Petitioner's right to information was infringed;
 - ii. Whether the Respondent breached the loan terms; and
 - iii. Whether the petitioner is entitled to the reliefs sought.
14. The Petitioner submitted that on multiple occasions he requested for copies of documents pertaining to the loan from the Respondent. That the Respondent only provided part of the documents and despite several correspondences all the requested documents were not availed and it was only upon filing of the petition that the Respondent produced the documents in Court.
 15. It is his submission that the import of Article 35 of *the Constitution* and Section 4 of the *Access to information Act* is that he had a right to the information held by the Respondent who was obligated to provide consistent statements of account. Reliance was placed on the case of Ezekiel Osugo Angwenyi & another v National Industrial Credit Bank Limited (2017) eKLR. He reiterated that the Respondent had an obligation to provide periodic statements of account and information of any changes in the terms.
 16. On whether the Respondent breached the terms of the loan, it was his submission that the Respondent breached the terms by: disbursing funds without making final arrangement as to the check off system; failed to enforce the check off system from March 2009 and instead enforced deductions from November 2010; failed to make deductions as stipulated; failed to deduct sums within the agreed period of 72 months; restructured the loan without the Petitioner's consent; changed the interest rate and made a loan adjustment without the petitioner's consent.
 17. The Petitioner submitted that a party to a contract cannot unilaterally change the terms of a loan agreement without consent of the other party and the Respondent had to give notice when varying the terms of the contract to give the borrower a chance to either accommodate the new terms or end the contract. Reference was made to Surya Holdings Ltd & 4 others v ICICI Bank Ltd & another; Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya and Mohan Meakin Limited & another v National Bank (2016).
 18. It was submitted that the Respondent not only charged interest but also charged a penalty despite the fact that it was their wrong doing to fail to deduct the loan payments as per the loan agreement and had not tendered any evidence as to why the check off system began to work after a year.
 19. The Petitioner submitted that he had since paid Ksh.1,358,677 instead of Ksh.754, 416 which was a clear indication that the interest rates charged was higher than the agreed percentage. That failure to avail information on the interest rate was unfair and the Respondent did not have unfettered discretion to charge exorbitant interest. To buttress this point reference was made to the case of Margaret Njeri Muiruri v Bank of Baroda Ltd (2014) and Supreme Court Petition E005 OF 2023 Stanbic Bank v Santowels Limited.
 20. It was the Petitioner's submission that the Respondent was under obligation to establish how it arrived at its figures to prove that it adhered to the terms of the loan and interest rates and to notify the customer of any changes. They cited Givan Okello Ingari & Another v Housing Finance C0(k) Ltd (2007)2KLR 232 and John Gatu Nderitu v Kenya Commercial Bank (2011) eKLR (Civil Case No 55 of 2001).
 21. The Petitioner contended that he had overpaid the loan facility and was entitled to repayment of the surplus sums as the Respondent had not demonstrated how it arrived at the amount paid. They placed reliance on the cases Joseph Gichuki Muthui v Kenya Commercial Bank (2019) eKLR and James Mungai Magari v Housing Finance Company Kenya (2019) KECA 206 KLR.



22. As to the Respondent's contention that the Petitioner was estopped from alleging the amount, he was paying was not correct, he submitted that one cannot be estopped by conduct in matters perpetuating an illegality. It was his submission that the Respondent's actions were oppressive and arbitrary, infringed on his rights and caused him psychological harm thus he was entitled to the reliefs sought in the Petition.

Respondent's Submissions

23. The Respondent identified the following issues for determination:

- i. Whether Respondent infringed on the petitioner's right to access relevance financial information;
- ii. Whether Respondent varied the loan interest;
- iii. Whether Respondent breached the terms of loan agreement in failing to start deductions at the expected time; and
- iv. Whether deductions made were more than required to pay the loan amount.

24. The Respondent submits that it duly performed its duty as required. That the signed letter of offer clearly informed the Petitioner of the loan granted, the expected monthly payment, applicable interest rate and period of the loan. Thus, it disclosed all the necessary preliminary information on the loan.

25. It is their submission that upon request by the Petitioner and his advocates they furnished him with the loan statement of his account from the year 2009 to 2021. That failure to provide the Petitioner with information for the period December 2010 to December 2011 and September 2013 to March 2015 was an inadvertent omission occasioned by a printing error. It was their contention that they availed all documents and information to the Petitioner as and when requested thus did not infringe on his right to access the information held by the Respondent.

26. On variation of the loan interest rate the Respondent submitted that as per the terms of the duly signed offer letter the loan was to be repaid at an interest rate of 20% per annum with a rate of 3% over and above the said rate being applicable for the amount in arrears for the period there is default. Accordingly, the rate of 23% was applicable for the period in arrears of any sums in default.

27. It was their submission that deductions did not commence in July 2010 as agreed. This was a default on the part of the Petitioner consequently the rate of 3% over and above the agreed interest applied. Therefore, that, they did not vary the interest rate but only applied the penalty interest as agreed upon default of payment. That the Respondent in applying the rate of 23% per annum for the period of arrears was only giving effect to the terms of the signed contract which the Petitioner was neither coerced or under undue influence at the time of signing.

28. They urged the Court to anchor its deliberation on the signed letter of offer to find that the rate of 3% was justly applied. They relied on the case of National Bank of Kenya v Pipeplastic Samkolit (K) Ltd and another (2001) eKLR.

29. It was their submission that it was not its responsibility to ensure deductions were made from the Petitioner's salary to pay off the loan. Further, as per the offer letter in the event the check off arrangements were not finalized as anticipated the Petitioner was expected to make direct payments into his loan account until his employer effected the check off. Hence, the omission to do so was a failure on the Petitioner to discharge his contractual obligations.



30. The Respondent submitted that the 1st repayment vide check off having been made in November 2010, and no direct payments made by the Petitioner, loan arrears of Ksh.210,480 accrued and interest on the accrued arrears amounted to Ksh.111,329.35.
31. It was their submission that upon default the loan had to be restructured with a review of the payable monthly instalments from Ksh.10,478 to Ksh.9,094 monthly as that was the deductible amount from the Petitioner's pay slip. That consequently on account of the reduced instalment amounts and restructure the loan could not be cleared within the stated 72 months' period.
32. The Respondent submitted that pursuant to Section 120 of the *Evidence Act* the Petitioner is estopped by his conduct from claiming that he did not consent to a restructure of the loan. They cited the following cases Pickard v Sears 112 E.R 179; Court of Appeal in Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR.
33. It was their submission that failure to question the pay slip deductions which clearly indicated there was a restructure of the loan made the Respondent believe that the Petitioner had acquiesced thus is precluded from stating the contrary. That the Petitioner cannot claim ignorance of the facts leading to the restructure.
34. As to whether the deductions made were more than required to pay the loan the Respondent submitted that whereas the initial offer was for the Petitioner to pay Ksh.10,478 per month over 72 months' payments begun in November 2010 and concluded in July 2022. That the delayed adoption of the check off system, subsequent reduced installment amount and the arrears led to the extension of the payment period for which the interest rate remained 20% per annum.
35. They urged the court to find that the petitioner has not shown how his right to access information was infringed; that it did not vary the interest rates but simply applied an agreed penalty rate of 3% above rate up in default and which amount was written off in light of the restructure; no improper deduction have been made in settlement of the loan advanced to the petitioner and all sums have gone towards settlement of the loan and interest properly due.

Analysis & determination

36. I have considered the pleadings, depositions and rival submissions and the decisions relied on by the parties. The issues that arise for determination are:
 - i. Whether the Respondent violated the Petitioner's right of access to information;
 - ii. Whether restructuring of the loan was a breach of the contract; and
 - iii. Whether the Respondent unilaterally varied the interest rate resulting to overpayment of the loan.

Whether the Respondent violated the Petitioner's right of access to information

37. The Petitioner sought information on his loan account vide letters dated 22/2/2021, 22/7/2021 and 26/10/2021. In addition, vide its letter dated 29th November 2021 the Commission on Administration Justice directed the Respondent to provide the requested information in line with Article 35 of *the Constitution* and Section 4 of the *Access to Information Act*.
38. It is only until 3rd January 2022 that the Respondent responded to the letter of 26th October 2021 by the Petitioner's advocate on the request. However, from the Petitioner's affidavit the Respondent's letter did not contain any attachments of the documents and information requested. This was brought



to the attention of the Respondent vide a letter dated 26th January 2022 which elicited no response from the Respondent.

39. The Respondent contends that it did not violate the Petitioner's right to access information on his loan account. It is their submission that the Petitioner was provided with the requested information. That this was evident from the fact that a copy of the loan statement and loan application form were part of the documents he filed in support of his Petition.
40. The Respondent did acknowledge that the statements of account provided to the Petitioner were incomplete. It was his submission that this was not intentional and the omission was occasioned by a printing error. However, I note that the Respondent still did not avail a copy of a complete statement of account upon being informed by the Petitioner's advocate that their letter of response did not contain any attachments.
41. Article 35(1) of *the Constitution* grants every citizen the right of access to information held by the state or another person and which may be required for the exercise or protection of a right or fundamental freedom. Article 35 has been operationalized by the *Access to Information Act*. Specifically, Section 4 of the Act provides for the procedure to access information while Section 9 provides the period within which the information should be provided or a response given to such request.
42. In *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] KEHC 5194 (KLR) it was held that Access to information is a fundamental right as it underpins the value of good governance, integrity, transparency and accountability.
43. From the evidence before the Court, it is clear that the Petitioner severally sought information from the Respondent on the status of his loan account but the same was not forthcoming. When the Respondent finally did provide information to the Petitioner the same was incomplete and despite being informed of the incompleteness and lack of any attachments the Respondent did not bother to avail the complete documents.
44. I therefore find that in neglecting to avail the information sought by the Petitioner by way of complete statements of account and demand letters, as well as ignoring his advocate's letter of 26th January 2022 intimating that the Respondent's letter did not have the necessary attachments, was an unreasonable denial of the request for information and amounts to violation of the Petitioner's right to information under Article 35(1) of *the Constitution*. Accordingly, I must make a declaration that the Respondent violated the Petitioner's right to access information.

Whether the restructuring of the loan was in breach of the contract terms

45. The Petitioner obtained a loan of Ksh400,000 from the Respondent on or about March 2009. As per the terms of the signed offer letter the loan was to attract interest at 20% and was to be repaid for a period of 72 months @ Ksh.10,487 per month through salary check off system.
46. Whereas the offer letter does not stipulate when repayment was to commence, both parties have stated in their pleadings that the deductions were to be effected in July 2009. It is also not in dispute that it was until November 2010 that the deductions were effected.
47. It was the Respondent's submission that due to the delay in effecting the deductions the loan had to be restructured and the monthly instalment reviewed to Ksh.9,094 thereby extending the period of repayment beyond the 72 months stipulated in the contract.
48. Therefore, it is clear from the evidence and submissions that the terms of the loan were restructured, the monthly instalment payable reviewed to Ksh. 9094 thereby extending the loan period.



49. The Respondent did not tender any evidence to show that the Petitioner was notified of the changes or was agreeable to the same. However, it was its submission that the Respondent's failure to question the reviewed monthly deductions on his pay slip estopped him from claiming that he did not consent to a restructure. The Petitioner on his part contends that one cannot be estopped by conduct in matters perpetuating an illegality.
50. Estoppel is a principle of justice and equity. I borrow from the finding of the Court of Appeal in *John Mburu v Consolidated Bank of Kenya* [2018] eKLR referring to the case of *D&C Builders v Sidney Rees* [1966] 2 QB 617 where Lord Denning, M. R. stated: -
- ‘It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.’
51. In the instant case the restructure was informed by the delay in the deductions being effected by the Petitioner's employer and the Petitioner's failure to make direct payments. The restructure was done way back in 2010 and the Petitioner from his monthly pay slips received information and was aware of the downward review of the monthly instalment payable from Ksh.10,478 to Ksh.9,094.
52. At no time was any challenge made to the review of the monthly instalments or legal recourse sought. In fact, until this petition was filed, the Petitioner did not raise any objection on the propriety of the restructure. Consequently, he is estopped by his conduct from claiming that he was not notified nor did he consent to the restructure.
53. The Petitioner further contended that the obligation to effect the deduction through the check off system was on the Respondent and therefore the Respondent could not penalize him for the delay to effect deductions from his salary.
54. I have perused the offer letter and it states as follows:
- “in the event check off arrangements are not finalized as anticipated for whatever reason the obligation to repay the loan remains and the loanee is expected to make direct payments into his loan accounts as they fall due, until the employer effects the check off or until the loan is repaid in full whichever comes earlier”.
55. The established principle of law is that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. See *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* (2017) KECA 152 (KLR).
56. I therefore find that as per the express terms of the letter of offer it was the Petitioner's obligation to make direct payments to the loan account when the check off deductions did not commence as agreed. Therefore, in failing to make the direct payments the Petitioner was in default of the loan and the Respondent was justified in applying the 3% additional interest on the default arrears.



Whether the Respondent unilaterally varied the interest rate resulting to overpayment of the loan

57. It was the Petitioner's submission that the Respondent charged interest rates higher than the agreed percentage and this was demonstrated by the fact that he had so far paid a total of Ksh.1,358,677 whereas he was supposed to pay a sum not exceeding Kshs.754,416.
58. On the other hand, the Respondent submitted that there was no variation of the interest rate. That it applied the interest rate of 20% and the rate of 23% was only applied for the period in arrears for the sum in default. This was as per the terms of the duly signed offer letter. That in any event it later waived the interest accrued on default arrears.
59. The Petitioner did not explain nor avail any expert report that informed his calculations and the stated amounts. Neither did he challenge any of the entries in the statement of account provided by the Respondent nor highlight the irregular amounts and interest to determine if indeed the Petitioner varied the interest or amount payable. Section 176 of the Evidence Act (Cap.180) provides that:

“ A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.”
60. The burden was on the Petitioner to upset this presumption by pointing out which entries in the accounts were mistaken or erroneous. Be that as it may be, on the other hand, the Respondent denied varying the interest rate and only provided the statement of the loan account, Exhibit HA-3 of the Respondent's replying affidavit. It did not provide information on the total amount the Petitioner was expected to pay nor the total amount of the loan paid by the Petitioner as at June 2022.
61. It is also pertinent to note that the statement of account by the Respondent begins from 9/3/2009 when the loan was disbursed and runs to December 2021. No averment was made or evidence placed before the Court to explain the payments and how the loan period extended for a period of almost 144 months from the initial loan period of 72 months.
62. Even with the delayed commencement and the downward review of the monthly payments to Ksh.9,094 it is inconceivable how the loan repayment period enlarged to a period almost twice the initial repayment period if indeed there was no variation in the interest rate.
63. Further, the Petitioner tendered copies of his pay slips as evidence from which I note inconsistencies and discrepancies in deductions made towards the loan and outstanding balance. For instant in the pay slip for April 2021 the loan balance was Ksh.840 which was deducted in the month of May resulting to a no loan deduction in June 2021. However, in November 2021, four months later, the loan resurfaces showing a loan balance of Ksh.109,338. In addition, the Petitioner's pay slip of June 2022 indicates that there was an outstanding balance of Ksh.45,730 yet the Respondent stated that repayment of the loan concluded in July 2022. The Respondent did not offer any rebuttal on the pay slip deductions.
64. The sum total of the above is that while the statement of account serves as prima facie evidence of the loan account in this case it cannot be fully relied upon to determine whether there was a variation in the interest rate and whether the Petitioner ended up paying more than was expected.
65. In view of the above the court can neither rely on the Petitioner's calculations or the Respondent's statement of accounts to ascertain if the interest was varied and if any amount is due and owing to the Petitioner. Therefore, the aforementioned issues can only be answered by the parties after proper accounts have been taken. Accordingly, I will invoke Order 21 Rule 17 of the Civil Procedure Rules, 2010.



66. For the above reasons I order as follows:

- a. A declaration is hereby issued that the failure by the Respondent to provide information sought under Article 35(1) of *the constitution* on the basis of the petitioner's requests was a violation of his right to access information.
- b. The Respondent to furnish the petitioner with complete statements of the loan account from 2009 to date as well as all correspondence relating to the loan account.
- c. An account be taken in respect to all the sums paid by the Petitioner to the Respondent by an independent certified accountant appointed by both parties. In the absence of consensus, on appointment of a certified accountant the relevant professional body shall appoint one.
- d) The accountant to file his report within 45 days from the date of his appointment.
- e. The cost of the certified accountant shall be shared equally by the parties.
- f. Further orders of the Court to await the filing of the said report.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF MARCH, 2025.

In the presence of;

.....for Applicant

.....for Respondent:

.....Court Assistant:

