Mwatu v Credit Bank Limited; Spire Bank (Formerly Equitorial Commercial Bank Limited & 2 others (Interested Parties) (Petition E386 of 2020) [2024] KEHC 12754 (KLR) (Constitutional and Human Rights) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E386 OF 2020

LN MUGAMBI, J

OCTOBER 24, 2024

BETWEEN

PAUL MUSUMBI MWATU ..... PETITIONER

AND

CREDIT BANK LIMITED ..... RESPONDENT

AND

SPIRE BANK (FORMERLY EQUITORIAL COMMERCIAL BANK LIMITED ..... INTERESTED PARTY

TRANSUNION CREDIT REFERENCE BUREAU AFRICA LIMITED ..... INTERESTED PARTY

NICHOLAS MWINZI ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The petition dated November 9, 2020, is supported by the affidavit of the Petitioner of even date and his further affidavit dated July 11, 2023.

2. The gist of the Petition is an assertion by the Petitioner that his name was listed as a loan defaulter by the 2nd Interested Party due to a fraudulent transaction that was processed through the Respondent. That despite approaching the Respondent and informing it and making follow ups, the Respondent and the 2nd Interested Party has obstinately refused to request the delisting of the Petitioner by the 2nd Interested Party as a loan defaulter. This has caused him to miss out a financial facility of Kshs. 2,000,000- he was seeking from Co-operative Bank. He thus alleges that the Respondent has violated

his constitutional rights under Articles 35(2), 46(1) (c) and 47(1) of *the Constitution*. Accordingly, the Petitioner seeks the following relief:

a. A declaration that the Respondent's lack of due diligence which led to the fraudulent opening of a bank account in the Petitioner's name, and resulted in the Petitioner's being listed as a loan defaulter by the 2nd Interested Party is an infringement of the Petitioner's economic interests protected under Article 46(1) (c) of *the Constitution*.

b. A declaration that the Respondent's failure to provide the correct information to the 1st Interested Party which would result in the withdrawal of the Petitioner's name as a loan defaulter, is a contravention of the Petitioner's right to have untrue and misleading information about him corrected as guaranteed under Article 35(2) of *the Constitution*.

c. A declaration that the Respondent's failure to provide the correct information to the 1st Interested party, which would result in the withdrawal of the Petitioner's name as a loan defaulter is a breach of the Petitioner's economic interests protected under Article 46(1) (c) of *the Constitution* since the Petitioner has been unable to access any credit facilities in light of the wrongful listing as a loan defaulter.

d. An order for judicial review by way of an order of mandamus to compel the Respondent to close the account in the name of the Petitioner and provide the 1st Interested Party with the correct information regarding the fraudulent account opened in the name of the Petitioner by the 3rd Interested Party.

e. An order for judicial review by way of an order of mandamus to compel the 2nd Interested Party to remove the name of the Petitioner from the list of loan defaulters and issue the Petitioner with a Clearance Certificate.

f. An order that the Respondent compensates the Petitioner by way of general damages for the embarrassment suffered and tarnished reputation as a result of the wrongful listing as a loan defaulter.

g. An order that the Respondent compensates the Petitioner by way of special damages in the sum of Ksh.2,000,000 being the amount of credit that the Petitioner was unable to obtain from Co-operative Bank, Kenya to develop his business.

h. An order that the Respondent bears the costs of this Petition and further that the Respondent bears the costs of the interested parties. In the alternative that the Respondent indemnifies the Petitioner for all the costs that may be awarded to the Interested Parties against the Petitioner.

i. Any other orders that this Court may deem necessary to grant.

Petitioner's Case

3. The Petitioner depones that he had an intention of securing a loan facility of Ksh.2,000,000 from Co-operative Bank to expand his business. On 10th September 2015 he went to the bank and made an application. Later on, he was informed that he did not qualify for the credit facility because the 2nd Interested Party had listed him as a loan defaulter on the directions of the 1st Interested Party.

4. The Petitioner avers that he did not have any outstanding loan with any financial institution at the time. Furthermore, he states that he was not a customer of the 1st Interested Party. He thus visited the 2nd Interested Party's office on 17th September 2015, to enquire about the matter.

5. The 2nd Interested Party informed him that there was a bank account opened in his name at the Respondent's Bank. Thereafter a credit facility of Kshs. 6,400,000 was issued in his name to purchase a Mitsubishi FH lorry registration No. KCA 322K.This vehicle was registered in the Petitioner's and Respondent's name.

6. Additionally, the person who claimed to be the Petitioner was issued with a cheque book by the Respondent. That the person had issued cheques to the 1st Interested Party for insurance premium financing for the vehicle which cheques were however dishonoured. Consequently, the 1st Interested Party forwarded the Petitioner's name to the 2nd Interested Party on the grounds that he was a loan defaulter.

7. With this information, the Petitioner proceeded to the Respondent's branch at Industrial Area to ascertain how the account was opened and by who. He alerted them that he never opened the said account. At this juncture it was discovered that the impugned account had been opened by a person with the Petitioner's stolen identity. This became apparent when the Respondent showed the photograph of the person who had opened the impugned account.

8. The Petitioner depones that he was able to identify the person as the 3rd Interested Party, a person personally known to him. He states that the 3rd Interested Party had requested him to be one of his guarantors for a bank loan with the NIC Bank. Although the Petitioner had initially agreed to the request, he later changed his mind. He had at that point already issued the 3rd Interested Party with his copy of identity card that the 3rd Interested Party subsequently used to fraudulently open the disputed account with the Respondent.

9. Upon this ascertaining these facts, the Respondent reported the matter to the Banking Fraud Investigation Unit and the 3rd Interested Party was arrested and charged in Criminal Case No.1785 of 2015. Subsequently, the Respondent sold the lorry that the 3rd Interested Party had purchased to recover its money.

10. The Petitioner thus requested the Respondent to write to the 1st Interested Party explaining those facts to enable the 1st Interested Party pass this information to the 2nd Interested Party and remove the Petitioner's name from the loan defaulters list. The Petitioner asserts that the Respondent has not done so despite making consistent follow up in the matter.

11. He further depones that despite the awareness of the circumstances of this matter, the Respondent reported him to the 2nd Interested Party on 23rd September 2014 for having a non - performing account with a default history. Reference was made to his annexture dubbed Personal Consumer Reports attached to his supporting affidavit. He notes that the Respondent to date (with the latest CRB report being 26th June 2023) continues to list him as so, being fully aware that he never opened the impugned account.

12. He additionally avers that vide an email dated 25th March 2022, he wrote to the 2nd Interested Party his letter dated 22nd March 2022, requesting to have his name expunged from its records as a defaulter of the Respondent and the 1st Interested Party.

13. The Petitioner is aggrieved that the Respondent has failed to provide the correct information which is a violation of his constitutional rights. Likewise, that the Respondent's action has curtailed his ability to secure a loan facility from other financial institution so as to improve his economic status. The Petitioner as well asserts that as a result of the Respondent's failure to exercise due diligence he has had to suffer as an innocent party. He contends therefore that it is in the interest of justice that the sought orders be granted.

Respondent's Case

14. The Respondent through its head of the legal department, Wainaina Francis Ngaruiya, filed its response in a Replying Affidavit sworn on 27th October 2022. He commenced by reiterating and affirming the Petitioner's stated account of events.

15. He depones however that it was not the Respondent who forwarded the Petitioner's name to the 2nd Interested Party. It was the 1st Interested Party. He contends that the Respondent does not have control over the 1st Interested Party's operations and decisions neither does it have an obligation to issue such a directive to it.

16. He adds that since the Respondent is not an investigative body, it is not able to establish whether the 3rd Interested Party is guilty of fraud as alleged by the Petitioner. Considering this, he asserts that the Petitioner's claim that the Respondent breached his right under Article 35(2) of *the Constitution* is not sustainable.

17. With reference to the Petitioner's claim that his economic right to receive a credit facility of Kshs. 2,000,000 from Co-operative Bank was violated, he states that this is untruthful. He avers that the Petitioner did indeed receive a loan facility of Ksh.2,300,000 from Co-operative bank on 2nd December 2015 as seen from the annextures in the supporting affidavit. He as well argues that the Petitioner is not a consumer within the definition under Section 2 of the *Consumer Protection Act*, to claim violation of Article 46(1) (c) of *the Constitution*.

18. He further avers that the instant suit is a civil claim disguised as a constitutional petition hence an abuse of the Court process. He also claims that Article 21 of *the Constitution* expressly states that the obligation to enforce fundamental rights and freedoms is placed on the State yet the State is not a party in this suit. For these reasons, he argues that the Petition is incurably defective. Consequently, he urges the Court to dismiss the Petition with costs.

1st Interested Party's Case

19. Caroline Kori for the 1st Interested Party filed a replying affidavit sworn on 28th February 2023.

20. She states that at the material time, the 1st Interested Party had an arrangement with Xplico Insurance Limited. Basically, the 1st Interested Party would finance insurance covers for Xplico Insurance issued through Insurance Premium Financing. As such the only security the insured was required to submit was postdated cheques for the total sum advanced. In case of default, the 1st Interested Party would then write to Xplico Insurance to cancel the policy.

21. It is deponed that on 30th September 2014, the 1st Interested Party received an application in the name of the Petitioner. The application was processed and financing of Ksh.353,624 advanced. Subsequently, the cheques issued in the Petitioner's name were dishonored. In effect, the 1st Interested Party wrote to Xplico Insurance to cancel the insurance policy.

22. She states that this debt remained unpaid despite the 1st Interested Party's continuous follow up. Due to the continuing default payment, the 1st Interested Party then forwarded this information to the 2nd Interested Party.

23. She depones that on 31st July 2017, the 2nd Interested Party received a letter from the Petitioner stating that the financing had been procured fraudulently as a result of identity theft. Upon ascertaining the veracity of this claim, the 1st Interested Party proceeded to write to the 2nd Interested Party asking that it removes the Petitioner's name from the defaulters list.

24. In light of this, she asserts that the Petition is baseless as the Petitioner's name had already been delisted from the 2nd Interested Party long before this Petition was filed.

25. She added that the Petitioner had not set out her case with precision in view of the alleged constitutional violations. Further that the matter is civil in nature as the Petitioner's claim lies against the 3rd Interested Party. Equally it was argued that the Petitioner had not particularized neither proved the loss he had suffered.

2nd Interested Party's Case

26. In response, the 2nd Interested Party filed grounds of opposition dated 21st July 2023 on the grounds that:

    i. Issues raised in the Petition dated 9th November 2020 is a civil claim for negligence and fraud and doesn't raise any constitutional issues hence ought to be struck out as an abuse of the court process.

    ii. The cause of action arose on the 15th October 2014 and relates to negligence and fraud while the Petition was filed on the 15th December 2020 hence the cause of action has been caught up by the Limitation of Action and the Petitioner has framed the cause of action as a constitutional petition to circumvent Section 4 of the *Limitation of Actions Act*.

27. Furthermore, the 2nd Interested Party filed its Replying Affidavit by Esther Wanja Mungai also sworn on the same day.

28. She informs that the 2nd Interested Party's credit referencing mandate involves maintenance of a database through which institutions licensed under the *Banking Act* share amongst themselves prescribed credit information relating to their customers. This is pursuant to Section 31(3) of the *Banking Act*.

29. Equally, Regulation 23 of the Credit Reference Bureau Regulations, 2013 allows Credit Reference Bureaus to obtain credit information from third parties, such as the case herein. This is on the condition that the third party disseminating the information upholds the dictates of the Regulations, 2013. It is further noted that customers as stipulated under the Regulations have a right to access the information held by the Credit Reference Bureaus.

30. It is averred that the Petitioner ought to have filed a formal Individual Dispute Filing Form pursuant to Regulation 35 of this Regulations, to dispute the erroneous listed information. She states that the Petitioner failed to do so. Nevertheless, it is stated that Regulation 33(3) of the Regulations, 2013 bars financial institutions from solely relying on credit reports to deny or approve loans.

31. She additionally asserts that the instant Petition was filed 6 years after the Petitioner's name was listed by the 2nd Interested Party. She argues that this Petition invokes the provisions of Section 4 of the *Limitation of Actions Act*. It is further averred that the Petition does not raise any constitutional issue as is civil in nature owing to the cited fraud.

32. It is similarly noted that the Petitioner was granted a loan facility of Ksh.2,300,000 by Co-operative Bank thus the allegation otherwise is false. Moreover, she points out that the Petitioner has also been able to receive other credit facilities from Commercial Bank of Africa Ltd, KCB ltd and NCBA Ltd. To that end, she avers that the Petition should be dismissed with costs.

3rd Interested Party's case

33. The 3rd Interested Party's response and submissions are not in the Court file or Court Online Platform (CTS).

Parties Submissions

Petitioner's Submissions

34. On 9th October 2023, the Petitioner through Kogweno and Bubi Advocates LLP filed submissions in support of his case.

35. On violation of Article 35(2) of *the Constitution*, the Petitioner submitted that circumstances of this case arouse his right to deletion of untrue and misleading information. The Petitioner stated that he only became aware of the adverse listing on 10th September 2015.He informed the Respondent and 2nd Interested Party about the matter but they took no action though afterwards the Petitioner's name was afterward delisted after the 1st Interested Party was notified.

36. The Petitioner is however aggrieved that despite the Respondent being aware all through of the circumstances surrounding the impugned account, it neglected to take any action to ensure the Petitioner's name was delisted by the 2nd Interested Party. The Petitioner thus argued that the Respondent violated the Petitioner's right under Article 35(2) of *the Constitution* as read with Section 13 of the *Access to Information Act*.

37. Similarly, the Petitioner submitted that despite the Respondent being aware of those facts, to date it reports the Petitioner to the 2nd Interested Party for having a non-performing account with a default history in breach of Regulation 25 and 50 of the Credit Reference Bureau Regulations, 2013. Further also in violation of Article 35(2) of *the Constitution*. It is stressed that the Respondent has persistently continued to issue inaccurate information as pertains to the Petitioner to his detriment and also knowing that the 3rd Interested Party was convicted of the crime in 2020.

38. Reliance was placed in National Bank of Kenya Limited v Herman Nyambu Ombok [2021] eKLR where it was noted that:

> " There is a continuous obligation on the part of the appellant to address any concerns raised by a customer on the intended listing or already listing to the CRB."

39. Similar dependence was placed in Eunice Nganga v Higher Education Loans Board & 2 others [2020] eKLR.

40. Moving to violation of Article 46(1) (c) of *the Constitution*, the Petitioner submitted that consumers have a right to protection of their health, safety and economic interests. Acknowledging that the Petitioner was not the Respondent's customer, Counsel submitted however that the Petitioner's credit worthiness as a consumer of banking and financial services has suffered as a result of the fraudulent transaction and the Respondent's continual reporting of his credit worthiness to date.

41. The Petitioner rebuffed the Respondent and 2nd Interested Party's allegation that the Petitioner had received a credit facility of Kshs. 2,300,000. It was pointed out that the Petitioner was a guarantor of this loan facility and not a borrower. He stressed that this was clearly indicated in the Petitioner's attendant annexture. He added that the Petitioner was only able to access any loan after 5 years in 2020 thus his economic interests were affected significantly.

42. To support this claim reliance was placed in Eunice Nganga v Higher Education Loans Board & 2 others [supra] where the court held as follows:

> " This Court takes Judicial notice to the fact that whoever is ever listed by any of the CRB following an adverse information or report cannot be taken as a person worthy granting loan or doing business with otherwise CRB listing would have no meaning in the business world. It would therefore be extremely difficult for such individual to produce evidence to demonstrate that she applied for a loan with any Bank or financial institution or business or lost potential clients as no one would wish to give such an individual any chance to initiate such a process for fear of losing finances or being conned. The person loses all respect and dignity and becomes like unwanted individual by any financial institution."

43. The Petitioner maintained that the Respondent violated his right under Article 47(1) of *the Constitution* due to its officers' failure to exercise due diligence in opening the impugned account. It was argued that the attendant transactions were undertaken without proper verification of the account holder to the Petitioner's disadvantage in the end. Additionally, the continued listing of the Petitioner by the Respondent is in violation of this provision and Regulation 26(6) of the Credit Reference Bureau Regulations, 2013.

44. To the submission that the claim that this matter is civil in nature, the Petitioner took the view that the claim is unfounded. This is because the Petitioner was never the Respondent's customer to begin. As such there exists no contractual relationship. Further the alleged constitutional violation was specifically and clearly particularized. The Petitioner stressed that the Petition is rightfully constitutional in nature. Reliance was placed in Miliku v Zucchini Greengrocers Limited [2023] KEHC 20955 (KLR) where the Court held that:

> " The doctrine of constitutional avoidance which the respondent's advocate submitted on at length and cited relevant case law simply underscores the restraint that is exercised by the courts whereby they avoid deciding disputes based on *the constitution* where it is clear that such disputes can properly be decided/resolved without invoking *the constitution* but on other legal grounds...
>
> The exceptions to the doctrine of constitutional avoidance are:
>
> i. Where the constitutional violation is so clear and of direct relevance to the matter
>
> ii. In the absence of an apparent alternative form of ordinary relief and,
>
> iii. Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute..."

45. Flowing from this, it was argued that since there was no contractual relationship between the Petitioner and Respondent and matters raised are constitutional in nature, the assertion that the Petition was time barred is groundless. Reliance was placed in Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others [2022] eKLR where it was noted that:

> " ...courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights... In the circumstances it is my opinion that the reasons advanced by the Petitioners in this matter in which they allege gross

violation of their human rights and fundamental freedoms suffice for the court to find that the petition is not time barred."

46. On the assertion that the Petitioner failed to utilize the mechanism under Regulation 35 of the Credit Reference Bureau Regulations, 2013, Counsel stressed that the Petitioner had on 17th September 2015 and further on 25th March 2022 informed the 2nd Interested Party of the wrongful listing. Counsel stressed that once the Petitioner had reported the issue, the 2nd Interested Party was obligated to follow the said procedure but failed to do so. Accordingly, Counsel argued that that 2nd Interested Party cannot not now turn and assert the Petitioner failed to utilize the provided mechanism.

47. To buttress this point reliance was placed in Eunice Nganga v Higher Education Loans Board & 2 others [supra] where it was held that:

> " 31. The 3rd Respondent was bound to act on the Petitioner's email notifying it of her grievances and dissatisfaction with the information kept in its database but instead required the Petitioner to lodge the complaint in writing. This was weird and wrong as the Petitioner had lodged her complaint as required under Regulation 35(5) of the Credit Reference Bureau Regulation 2013. It was therefore upon the 3rd Respondent to have complied with Regulation 35(6), (7), (8), (9) and (10) of the CRB Regulation 2013."

48. On damages, Counsel submitted that the Petitioner having established its case was entitled to an award of Ksh.2,000,000/= as compensation for the embarrassment and tarnished reputation as a result of the Respondent's actions. Counsel relied in Eunice Nganga v Higher Education Loans Board & 2 others [Supra] where the Petitioner was awarded Kes. 10,000,000 following the wrongful adverse listing.

49. Like dependence was placed Reuben Kioko Mutyaene v Kenya Commercial Bank Limited; Transunion t/a Credit Reference Bureau Africa Limited (Interested Party) [2020] eKLR and Amson Njoka Mwenda & another v CFC Stanbic Bank Limited & another [2019] eKLR.

Respondent's Submissions

50. Maitai Nyawira and Associate Advocates for the Respondent filed submissions dated 5th October 2023. Counsel highlighted the issues for consideration as:

> " whether the Respondent has an obligation towards the Petitioner under Article 35(2) of *the Constitution*; whether the Respondent was privy to the contract from which the listing of the Petitioner in the credit reference bureau arose; whether the Respondent breached the Petitioner's economic rights; whether the Petitioner is entitled to protection of economic interests in the meaning of Article 46(1) (c) and the *Consumer Protection Act*; whether the principle of constitutional avoidance should be applied in this matter; whether the Petitioner has exhibited how the right to fair administrative action arises in this matter; whether the petitioner has satisfied grounds for grant of prerogative orders sought in the Petition and whether the Petitioner is entitled to special and general damages."

51. On the first issue, the Respondent answered in the negative. The respondent stressed that the Petitioner had clearly indicated that it was the 1st Interested Party who had given out his name to the 2nd Interested Party. Furthermore, it was argued that the Respondent does not have control over the 1st Interested Party's transactions and also has no legal obligation to write to the 1st Interested Party. Reliance was

placed in Linus Simiyu Wamalwa V University of Nairobi & Another [2015] eKLR where it was held that:

> " In addition to the above, as I understand the jurisprudence on the subject, for a person to enforce the provisions of Article 35(2) of *the Constitution*, he must have requested for the deletion of the untrue and misleading information and the same had been denied. Further where the request has been denied, the Court will further have to interrogate the reasons and evaluate whether the reasons accord with *the Constitution*."

52. Like dependence was placed in Humphrey Kariuki Ndegwa & 2 Others V Standard Group Limited & 8 Others [2018] eKLR.

53. On the second issue, it was submitted that this transaction was between the 3rd Interested Party and the 1st Interested Party. The Respondent only issued the mode of payment thus was not part of the said contract. Reliance was placed in Aineah Likuyani Njirah V Aga Khan Health Services [2013] eKLR where it was noted that:

> " The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."

54. Turning to the third issue, Counsel submitted that the Petitioner had failed to specify the economic rights that had been infringed and the manner it was infringed as echoed in Kenneth Gona Karisa v Top Steel Kenya Limited [2020] eKLR. Counsel also argued that enforcement of economic rights is the obligation of the state as provided under Article 21 of Constitution.

55. On Article 46(1)(c) of *the Constitution*, Counsel stressed that this provision is not applicable as the Petitioner is not a consumer within the meaning outlined in Section 2 of the *Consumer Protection Act*. Counsel recapped that the Petitioner was not a recipient of the Respondent's services and neither was there an agreement between them.

56. Moving to the fifth issue, Counsel submitted that the Petitioner's claim is civil in nature and so ought to be determined as such. Reliance was placed in Mutyaene v KCB Bank Ltd & another [2023] KEHC 2205 (KLR) where it was held that:

> " Having found that there exists a remedy in civil law, which the Petitioner ought to have pursued, this Court must refuse to be bogged down by a matter which is so plainly provided for under statute.
>
> In this regard, I associate myself with the sentiments expressed by Mativo, J. (as he then was in Mombasa Petition No. E002 of 2022, Jean Bosco Muhayimana & another v JImmy Irengeakajimmy Mwachugha & others. (unreported) The Learned Judge stated:
>
> The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved."

57. On the right to a fair administrative action, Counsel submitted that the Petitioner had not demonstrated how this right was applicable as there was no action that had been taken out against him by the Respondent. Counsel added that the specific administrative action had not been particularized and how it had been infringed.

58. On the order of mandamus sought by the Petitioner to close the impugned account, Counsel submitted that the Petitioner had not proved the allegations of illegality, irrationality and procedural impropriety on the part of the Respondent to justify grant of this order. To support its case reliance was placed in Esther Victoria Wanjiku Mahoro v Mary Wambui Githinji & 3 Others [2021] eKLR where it was observed that:

> " In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety."

59. Similar dependence was placed in Apotex Inc. v. Canada (Attorney General) [1994] 3 SCR 1100.

60. Counsel on the eighth issue submitted that it was evident that the Respondent had not reported the Petitioner to the 2nd Interested Party as alleged. Consequently, Counsel argued that the claim for general and specific damages ought to be sought against the 3rd Interested Party.

61. Furthermore, Counsel submitted that the Petitioner had not proved the alleged embarrassment and tarnished reputation to warrant grant of the orders. Counsel on this premise urged the Court to dismiss the Petition and award the costs to the Respondent.

1st Interested Party Submissions

62. The 1st Interested Party's submissions is not in the court file or Court Online Portal (CTS).

2nd Interested Party's Submissions

63. In support of the 2nd Interested Party's submissions, Madhani Advocates LLP filed submissions dated 29th September 2023. Counsel sought to discuss:

> " whether the Petitioner has recourse to an alternative statutory procedure as provided under Regulation 35 of the Credit Reference Bureau Regulations 2013; whether the instant Petition invokes Section 4(2) of the *Limitation of Actions Act*; whether the Petition raises any constitutional issues; whether the Petition is statute barred under Section 31(5) of the *Banking Act*; whether the 2nd Interested Party infringed the Petitioner's constitutional rights and whether the Petitioner is entitled to relief sought."

64. Counsel on the first issue submitted that the Petitioner had not utilized the procedure set out under Regulation 35 of the Credit Reference Bureau Regulations, 2013 before lodging this Petition. To buttress this point reliance was placed in Jimmy Mutinda v Independent Electoral and Boundaries Commission & 2 Others Exparte Shaileshkumarnata Verbai Patel & 2 Others [2013] eKLR where it was held that:

> " Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly, I agree with the decision in Pasmore vs. Oswaldtwistle Urban District Council (supra) that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement."

65. Comparable dependence was placed in *Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000*; Dickson Mukwelukeine vs Attorney General & 4 Others Nairobi

High Court Petition No. 390 of 2012, Kennedy Odhiambo Nyagundi vs Central Bank of Kenya & 3 Others [2013] eKLR and Amy kagendo Mate vs Prime Bank Limited & Credit Reference Bureau Africa Limited [2013] eKLR.

66. Turning to the second issue, Counsel submitted that the issues raised in the instant Petition were limited by the operation of the *Limitation of Actions Act*. This is because the Petitioner's credit listing was made on 15th October 2014 and this suit was filed on 9th November 2020.Similarly, Counsel submitted that the equitable reliefs in the form of judicial review orders should be sought within six months from the date the cause of action arises. Consequently filing of this matter renders the Petitioner's claim time barred.

67. Reliance was placed in Kenya Bus Services Ltd & 2 others vs Attorney General & 2 others [2005] eKLR where it was noted that:

> "...Although constitutional Application should be heard on merit, I find that there is nothing which would present a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example that the matter raised is res judicata. Res judicata is also in turn based on the principle grounded on public policy that litigation must at some point come to an end. Res judicata is a fundamental principle of law."

68. Parallel dependence was placed in Wilson Kiarie Njoroge v Family Bank Limited & Another [2017] eKLR.

69. Likewise, Counsel argued that the Petition does not raise any constitutional issues. Nonetheless it was argued that the Petitioner had not proved the alleged violation of his constitutional rights. Reliance was placed in Ann Njoki Kinyanjui v Barclays Bank of Kenya Ltd [2015] eKLR where it was held that:

> "21. Further, as stated by Ouko J, in the case of *Passaghia Giuseppe -vs- Attorney General Malindi High Court Civil Case No 15 of 2005*, it is not enough to state that a right has been violated. One must demonstrate the manner of violation. In addition, where a party has a remedy under some other legislation, the Court will decline to determine whether or not there has been a constitutional violation. Courts have held in many decisions that it would be improper to convert every issue into a constitutional issue and present it before the Constitutional and Human Rights Division for determination."

70. Comparable dependence was placed David Kenyanya Magare & another v Luthafal Jiwa Ranjwani & 4 others; Diamond Trust Bank Limited [Interested party] [2019] eKLR.

71. On the fourth issue, Counsel submitted that the instant Petition is barred by the operation of Section 31(5) (b) of the *Banking Act* as against the 2nd Interested Party. This Section as also read with Regulation 19(1) of the Credit Reference Bureau Regulations,2013 provides that no action shall lie against credit reference bureaus in the course of the performance of their duties, on account of disclosure if the same is done in good faith. Counsel submitted therefore that the claim against the 2nd Interested Party could only be sustained if the Petitioner proves its action were done in bad faith when it disclosed the credit information.

72. Reliance was placed in Terry Cousin vs Trans Union Corporation, 246 F. 3d 359 where it was held that:

> "In Pinner, we noted that "willful" is a word of many meanings and that its construction is often influenced by its context. See Pinner, 805 F.2d at 1263. In concluding that the consumer reporting agency in that case did not commit a willful violation, we remarked that there was no evidence suggesting that the agency "knowingly" and intentionally committed an act in conscious disregard for the rights of others." Id.; see also Philbin, 101 F.3d at 970; Stevenson, 987 F.2d at 293. Generally, courts have allowed a willful noncompliance claim to proceed where a defendant's conduct involves willful misrepresentations or concealments. See Pinner, 805 F.2d at 1263. In those cases, a consumer reporting agency has typically misrepresented or concealed some or all of a credit report from a consumer."

73. Analogous dependence was placed in Fair Credit Reporting Act (FCRA), 15 U.S.C & 1681 under Section 1681h (e) and Thornton vs Equifax Inc 619F 2d.

74. On whether the 2nd Interested Party infringed the Petitioner's constitutional right, Counsel reiterated the averments captured in the affidavit. Counsel stressed that the Petitioner's listing did not stop him from receiving credit facilities as the law is clear that a financial institution should not only consider a credit report but also other factors. In view of this Counsel argued that the Petitioner's rights were not infringed as alleged. For these reasons, Counsel submitted that the Petitioner was not entitled to the relief sought.

Analysis and Determination

75. Having regard to the pleadings and parties' submissions, I opine the following are the issues arising for determination in this Petition:

    i. Whether or not the Petition offends the doctrine of constitutional avoidance.

    ii. Whether or not the Petition is time barred.

    iii. Whether or not the Petition offends the doctrine of exhaustion.

    iv. Whether the Petitioner's rights under Article 35(2),46(1) (c) and 47 (1) of *the Constitution* were violated by the Respondent.

    v. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petition is barred by the doctrine of Constitutional avoidance

76. The main contention here is that the nature of this dispute is civil in nature and may appropriately be decided without any recourse to *the Constitution* hence the Respondent and the 1st and 2nd interested parties contended that the doctrine of Constitutional avoidance applies.

77. Discussing this principle in KKB v SCM & 5 others [2022] KEHC 289 (KLR), the Court observed as follows:

> "Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and

mootness.16 The doctrine of avoidance was fortified in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor in which Ebrahim JA said the following: -

...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

The Constitutional Court of Zimbabwe in Chawira & Ors vs Minister of Justice Legal and Parliamentary Affairs & Ors held:

"As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies."

The court in S v Mhlungu laid out constitutional avoidance as a general principle in the following terms: -

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

The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved."

78. Correspondingly, the Supreme Court in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) guided as follows:

> " (256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
>
> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
>
> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936))."

79. In the present case, the issue of negligence forming the basis of the claim or the contract on part of the Petitioner does not arise as suggested by Respondent. Firstly, the Respondent and indeed the Interested Parties can easily avoid liability in contract for there is no contractual obligation that ever existed between them and the Petitioner since he was in fact not their customer. Secondly, a claim based on negligence may also not be sustained because of the concept of the duty of care which exists on the basis of the nature of the relationship between the parties or the neighbour principle. In the present case, there was no form of relationship between the Petitioner and the Respondent or even the Interested Parties from which the duty of care existed as, he was neither a customer an employee or their loanee but a remote victim of fraud who had no relationship with them whatsoever. What

happened at the Respondent adversely affected him as a fraudulent loan was processed through the Respondent with his personal details. I am thus of the view that liability for the Petitioner's claim may not appropriately be based on the ingredients of negligence or contract as suggested by the Respondents and the Interested parties due to the inherent limitations noted in the civil law as the key elements would make his claim incompatible. The present dispute brought as a constitutional rights violation is thus broader and all-encompassing. I thus find that the doctrine of the Constitutional avoidance has no application in the present state of facts.

Whether the Petition is time barred

80. The Respondent and 2nd Interested Party were certain that the instant Petition is time barred in view of Section 4 of the *Limitation of Actions Act*. This is because the adverse credit listing by the 2nd Interested Party was made on 15th October 2014 yet the Petition was filed on 9th November 2020.

81. Section 4 of the Act provides as follows:

Actions of contract and tort and certain other actions

1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

    a. actions founded on contract;

    b. actions to enforce a recognizance;

    c. actions to enforce an award;

    d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

    e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

2. An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

    Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

3. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

82. However, having found that there are justifiable reasons for having this matter as a Constitutional dispute, this effectively shields the matter from the *Limitation of Actions Act* as was held in Eliud Wefwafwa Luucho & 3 others v Attorney General [2017] eKLR where the Court found that the Limitations of Actions Act did not apply in matters that allege violation of fundamental rights. The Court stated thus:

> "28. The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defense and further the state cannot shut its eyes

on its past failings nor can the court ignore the dictates of transitional justice discussed below.

"29. My understanding of the jurisprudence on the issue of limitation is that courts will be reluctant to shut out a litigant on account of limitation of time unless there are obvious reasons to do so..."

Whether Petitioner failed to exhaust the other alternatives remedies (doctrine of exhaustion)

83. The 2nd Interested Party contended that the Petitioner had overlooked the mechanism provided under Regulation 35 of the Credit Reference Bureau Regulations, 2013 (now repealed) before filing this suit. These Regulations in relation to this matter are enacted pursuant to Section 31(3) and (4) and 55(1) of the *Banking Act*.

84. For context, Regulation 35 provides as follows:

Customers' rights of access and correction.

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 are kept in a database administered by a Bureau.

3. A customer shall be entitled to a free copy of his credit report from a Bureau, or its agents, in the following instances;

    a. at least once per year;

    b. within thirty days of receiving an adverse action notice issued under regulation 50 (iii); and

    c. once per six months after making a request to a Bureau to have inaccurate information corrected in the database.

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 out-dated, the customer may notify the Bureau in writing of the information disputed.

(6) Within five working days of being informed that the 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 or credit information provider that supplied the information a notice of dispute requesting confirmation from the institution or credit information provider as to the accuracy of the information.

(7) The Bureau shall, within fourteen days, conduct investigation, based on the relevant information provided by the customer, and may contact any person who has furnished information.

(8) Where an institution or credit information provider receives a notice of dispute from the Bureau it shall, within fourteen 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 remedy the error and inform all persons who may be affected by the information including the customer.

(10) If the Bureau does not complete its investigation within twenty one days, it shall delete the disputed information as requested by the customer.

(11) If the Bureau later completes its investigation, it may re-insert or revise the disputed information based on the results of such investigation and shall inform the customer of the action taken.

(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 containing the incorrect information.

(13) Where 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 cost of its services in conducting an investigation of disputed customer information where the information disputed by the customer turns out to be false.

85. The essence of the principle of exhaustion of remedies was expounded by the Court in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

86. Harmoniously, the Court in Dhow House Limited vs Kenya Power and Lighting Company [2022] KEHC 11840 (KLR) observed as follows:

> " 19. ...The above Supreme Court decision conclusively settled the law. Where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies

established by statutes with the mandate to deal with such specific disputes in the first instance. the first instance.

20. As stated above, the Supreme Court decision conclusively settled the law, if at there were any doubts on the subject. I may add that from decided cases, at least two principles emerge on the doctrine of exhaustion :- First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including the level of public interest involved and the polycentricity of the issues (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. However, the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it."

87. Similarly, a caution was issued in Krystaline Salt Limited vs Kenya Revenue Authority (2019) eKLR on this doctrine as follows:

> " What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.
>
> ...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

88. In present case, the regulations make reference to a customer. The Petitioner was not in actual fact a customer of either the Respondent or the Interested Parties. It can thus be safely argued that these regulations do not apply to him as he was just a victim of fraud that was firstly processed through the respondent and progressed to the 1st Interested Party.

89. In any event, the Petitioner was categorical that he did in fact take action by informing the Respondent and the Interested Party as well as making numerous follow ups with the Respondent but his efforts came to nothing as the Respondent obstinately refused to take any action to have him cleared from the erroneous listing as a loan defaulter despite being aware of the fraudulent nature of the transaction which was done through the respondent leading to his eventual listing as a loan defaulter. The Respondent supplied the Personal Consumer Reports to the 2nd Interested Party indicating that the Petitioner had a non-performing loan account as at 23rd September, 2014. Subsequently, the 1st interested Party likewise reported the Petitioner to the 2nd Interested Party. The Petitioner annexed to his affidavit sworn on 11th July, 2023; an email communication of 2nd March, 2021 forwarding his letter of 22nd March, 2022 to the 2nd Interested Party seeking to have his name to be expunged from its records as a loan defaulter.

90. The doctrine of exhaustion of remedies cannot thus be used to defeat this Petition in the light of these facts because before instituting this Petition, the Petitioner had taken steps to have the matter resolved

but the Respondent neglected and continues to neglect to cause the information it provided against the Petitioner expunged. The Petitioner stated in para 5 of his affidavit of 11th July, 2023:

> " The Respondent continues to list me as having non-performing account with default history whilst knowing very well I never opened an account with the Respondent nor taken any loan from the Respondent. A copy of customer credit report and CRB Certificate both dated 26th June, 2023 that I obtained from Metropol Credit Reference Bureau Limited is at pages 6 to 20 of the exhibit hereto. Please see exhibit CK 2 annexed to the 1st Interested Party's replying affidavit dated 28th February, 2023."

91. In making this finding, I am guided by the following dicta in Eunice Nganga case (supra) where the Court observed thus:

> " 45. From the above it is clear that the Petitioner complied with the procedures of Regulation 35(5) of the CRB Regulations 2013 to have her grievances settled but the Respondents frustrated the whole process by failing to comply with clear procedure and process as set out under Regulation 35 CRB Regulation, 2013. The Petitioner notified the Bureau in writing of the information she was disputing as required. The Respondents blatantly refused to follow the procedure and process that is specifically prescribed for resolution of the particular dispute raised by the Petitioner. It was an obligation that required the Respondents to follow within the timelines clearly set out under Regulation 35 CRB, Regulation, 2013 which the Respondents deliberately ignored. The Respondents failed to follow a clear procedure and process for the redress of particular grievances prescribed by an Act of Parliament, yet knowing that they contravened the provision set out in Regulation 35 CRB, Regulations, they seek to shift the blame to the Petitioner; who strictly followed the laid down procedure but the Respondents frustrated the process. The Petitioner was only required to initially notify the Bureau of what she believed the information contained in the database was inaccurate, erroneous or out-dated, which she did in writing through an email. The Bureau did not take positive steps as set out to enable the process to be completed. The Respondents did not do so as it did not notify the information provider within five (5) working days upon receipt of the Petitioner's complaints nor did they act as required.
>
> 46. From the aforesaid, even if the Petitioner was required first to exhaust the procedure set out under Regulation 35 CRB, Regulation 2013, I find that she has demonstrated that she discharged her obligation by giving notification of her dispute to the Bureau and following Bureau failure to have the process completed, within the timelines given, the Petitioner had exhausted the process and therefore justified in filing the Constitutional Petition before this Court.
>
> 47. The Respondents have not demonstrated that the alternative dispute Resolution mechanism herein is expeditious, available, efficient, reasonable and procedurally fair. I find where alternative dispute Resolution mechanisms is shrouded with uncertainty, is not available; is not expeditious nor efficient nor reasonable and not procedurally fair, the Courts of law should be reluctant to insist that a litigant should first exhaust such alternative Disputes Resolution but allow the litigant access to the Court. Alternative Dispute

Resolution Mechanisms should not be used as means of denying a litigation access of Court of justice, where it clearly demonstrated the same is used as means of frustrating the litigant, who has complied with the laid down procedure and process in exhausting dispute Resolution mechanisms."

Whether the constitutional rights of the Petitioner were violated

92. It is trite law that allegations made in a constitutional petition must be proved. The Supreme Court in John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR affirmed this position as follows:

> " 299. .... As stated in both the Raila 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value. The petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard."

93. Likewise, in EG & 7 others v Attorney General; DKM & 9 others *(Interested Parties); Katiba Institute & another (Amicus Curiae) (Petition 150 & 234 of 2016* (Consolidated) the Court observed as follows:

> " 303. The general principal governing determination of cases is that a party who makes a positive allegation bears the burden of proving it. Moreover, the onus to establish the violation of alleged rights is not a mere formality. Differently put, the onus lies on he who alleges to prove every element constituting his or her cause of action. This includes sufficient facts to justify a finding that the rights have been violated.
>
> 304. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right, or a right guaranteed in the Bill of Rights, the analysis may move to the second stage. In the second state, the party seeking to uphold the restriction or conduct will be required to demonstrate the infringement or conduct is justifiable in a modern democratic state and satisfies Article 24 test.
>
> 305. Cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:-
>
> "No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."
>
> 306. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd:
>
> "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

307. Decisions on violation of constitutional rights should not, and must not, be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses."

94. In this case, it is not in dispute that the Petitioner was impersonated by a person who opened a bank account with the Respondent using the Petitioner's personal identification details and took out a loan without the knowledge of the Petitioner. The Respondent readily admits there was fraud but denies it was in any way connected to the fraud that was occasioned by the 3rd Interested Party. The Petitioner has already demonstrated that despite being aware of this fraudulent action, the Respondent did in fact share with the 2nd Interested Party reports indicating that the Petitioner was indebted to it. Further, the fraud progressed further as the 1st Interested Party also reported him on account of a further transaction connected to the initial loan.

95. In my view, it is a fact that the Petitioner was listed as a loan defaulter based on a fraudulent transaction hence the information that led to his listing was misleading. The Respondent was made aware of this fact at the earliest opportunity through protestations by the Petitioner. Curiously however, the Respondent continues to have the Petitioner listed as a loan defaulter even after the 3rd Interested Party was convicted of the offence vide judgment of the Court Milimani Chief Magistrate Court Criminal Case Number 1785 of 2015 delivered on 6/2/2020. Indeed, it is the Respondent that attached the said criminal case judgment in its affidavit sworn by Wainaina Francis Ngaruiya on 27th October, 2022. In my view, it is callous and a breach of the Petitioner's rights for the Respondent being fully aware of those facts to refuse to take steps to supply the correct information to the 2nd Interested Party to have the name of the Petitioner expunged.

96. It is noteworthy that under the principle of causation, it is the antecedent event of the fraudulent transaction at the Respondent that is the cause of all the other events that followed such that without this event happening, the events that took place later at the 1st Interested Party would have not occurred, hence it was reasonable to expect that the Respondent as the key factor would have ensured that the misleading information that caused the Petitioner to be listed was corrected. In failing to take action despite the Petitioner's insistence, the Respondent violated the rights of the Petitioner under Article 35 (2) of *the Constitution* to have untrue or misleading information against him expunged/deleted. Moreover, I also find that allowing the misleading information to persist to date against the Petitioner by depicting him as a loan defaulter assaults his inherent dignity and the right to have his dignity respected and protected since it reflects him badly by injuring his character and integrity thereby a violating Article 28 of *the Constitution*.

97. The Petitioner deponed that as a result, he was denied a loan from Cooperative Bank. However, evidence consisting of such loan having been applied for or his Bank citing this particular reason as the basis for declining to offer him the loan was not provided to this Court. I thus do not find this particular fact proved to the satisfaction of this Court.

98. In the overall analysis, I find that there was violation by the Respondent of the Petitioner's rights under Article 35 (2) and 28 of *the Constitution*.

Whether the Petitioner is entitled to reliefs sought

99. Having succeeded in establishing that his rights under Article 35 (2) and 28 were violated by the actions of the Respondent, the Petitioner is entitled to some reliefs. In the Supreme Court case of Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others (SC Petition No.13 (E015) of 2022) the Court guided as follows:

> "(91) By the provisions of Articles 22 and 23 of *the Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:
>
> "(a) a declaration of rights
>
> (b) an injunction
>
> (c) a conservatory order
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.
>
> (e) an order for compensation
>
> (f) an order of judicial review."
>
> (92) This Court in the case of Gitobu Imanyara & 2 Others v. Attorney General, SC Petition No. 15 of 2017, described Article 23 as "the launching pad of any analysis on remedies for Constitutional violations". This statement has repeatedly been made in other decisions like *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), SC Petition No. 3 of 2018*; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously."

100. The Superior Court proceeded to note as follows:

> "(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In

deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

(95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims...."

101. Further, in Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR the Court stated as follows:

" 96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. [46]The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;

i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;

ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;

iii. This remedy would be available when it is the only practicable mode of redress available;

iv. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of Sovereign immunity would be inapplicable.

97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate

> the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law."

102. Having regard to the foregoing, it is my considered view that the Petitioner is entitled to the following reliefs:

a. A declaration that the Respondent's failure to provide correct information to the 2nd Interested Party to expunge the name of the Petitioner as a loan defaulter is in contravention of the Petitioner's right to have untrue and misleading information about him corrected as guaranteed by Article 35 (2) of *the Constitution*.

b. An order of judicial review compelling the Respondent to close the fraudulent bank account with the Petitioner's personal identification information reflecting him as a loan defaulter.

c. An order of mandamus compelling the 2nd Interested Party to remove the name of the Petitioner from the list of loan defaulters based on this fraudulent transaction.

d. An order that the Respondent shall compensate the Petitioner to the tune of Kshs. 1,700,000/- for the violation of his rights under Article 28 on human dignity through injury caused to his inherent dignity and integrity as a person by causing him to listed as a loan defaulter and persisting in doing so while fully aware that this is factually untrue.

e. Costs of this Petition shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

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L N MUGAMBI

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JUDGE