



REPUBLIC OF KENYA



**Mutyaene v KCB Bank Ltd & another (Petition 412 of 2020) [2023] KEHC 2205 (KLR)
(Constitutional and Human Rights) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2205 (KLR)

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

PETITION 412 OF 2020

M THANDE, J

MARCH 17, 2023

BETWEEN

REUBEN KIOKO MUTYAENE PETITIONER

AND

KCB BANK LTD 1ST RESPONDENT

THE CENTRAL BANK OF KENYA 2ND RESPONDENT

JUDGMENT

1. The Petitioner filed a Petition dated 10.12.2020 seeking the following reliefs:
 - i. A declaration that the 1st Respondent's actions and commissions of unpaying the Petitioner's cheque no. 000673 for Kshs. 300,000/- on 11-12-2019 and levying charges when the bank account was sufficiently funded amounted to negligence and ignorance and was a foul of statutory duty of care and in breach of the banker-customer contract.
 - ii. A declaration that the 1st Respondent's actions and commissions was in breach of the Defamation Act; the Banking Act; Bills of Exchange Act; Fair Administrative Action Act; Consumer Protection Act; CBK Prudential Guidelines.
 - iii. A declaration that the 1st Respondent's actions have denied, infringed and are in violation of the Petitioner's constitutional rights and fundamental freedoms as enumerated in paragraph 26(i) herein above.
 - iv. An order directing the 1st Respondent to permanently expunge from his bank statement the words, "unpaid cheque 673"; "Unpaid Item charge", and



“Unpaid Item charge – unpaid charge CHEQUE- 673” posted on his bank account on 11-12-2019 and further issue him with a corrected bank statement.

- v. An order directing the 1st Respondent to pay damages in lieu of apology for the numerous inconveniences caused to the Petitioner.
 - vi. An order for compensation as general and/ or special damages to the Petitioner for breach of myriad of his constitutional rights and fundamental freedoms as enumerated in paragraph 26(i) and particularized in paragraph 28 hereinabove and in addition, order for exemplary /aggravated damages.
 - vii. An order directing the 2nd Respondent to formulate and issue guiding policy to banks on how to delete/ expunge/ correct or amend invalid/ erroneous entries posted into customers bank accounts/ and or statements including words depicting erroneously unpaid cheques so as to conform to the Banking Act, Fair Administrative Action Act and the Constitution.
 - viii. Cost of this petition and interests on orders (v) and (vi) above at court rates.
 - ix. Any other relief the court may deem fit.
2. The Petitioner banks with the 1st Respondent (the Bank). The genesis of this Petition as set out in the Petition is cheque no. 000673 issued by the Petitioner for Kshs. 300,000/= payable to his supplier, Alpha Grain Millers Limited. At the time, his bank account had a credit balance of Kshs. 533,341.05. Upon depositing the said cheque in bank account no. 1136600868 at the Bank’s Flamingo branch in Nakuru on 11.12.2020, the same was unpaid and bank charges of Kshs. 600/= and 3,000/= were levied. He also paid the supplier Kshs. 2,500/=:, being penalty charges levied for the unpaid cheque. On inquiry, the Bank informed the Petitioner that the cheque was unpaid due to insufficient funds in his bank account. The Petitioner then wrote to the Bank, demanding an explanation why the cheque was unpaid, refund of the unpaid cheque charges amounting to Kshs. 3,600/= and the penalty charges of Kshs. 2,500/= paid to the supplier; and to totally expunge/ delete the offending words in his bank statement viz:
- i. “INHouse CHQ000673 AT-DPC Unpaid 673 FT193456NWYK BANK FT19; Value Date 11DEC 2019; AMOUNT KSHS. 300,000.00”;
 - ii. “Unpaid Item charge AT-DPC AC-PL52036 FT19345D59; Value Date 11DEC2019; AMOUNT KSHS. 600.00”;
 - iii. “Unpaid item cha AT-DPC Unpay chrg CHQ-673 FT193; Value ate 11 DEC 2019; AMOUNT KSHS. 3,000.00”.
3. On 31.12.19, the Bank admitted the error and advised that the unpaid cheque charges amounting to Kshs. 3,600/= had been reversed and the penalty charges of Kshs. 2,500/= refunded. The Bank however stated that it could not expunge the words appearing in the Bank statement account stating “the entries appearing in the account statement are usually permeant and no interference is permitted”.
4. It is the Petitioner’s case that the incident severed the business relationship between him and the supplier. Despite refunding the penalty charges and his apology vide a letter dated 14.12.19, the supplier never made any other supplies to the Petitioner nor did it respond to the letter. The Petitioner is thus aggrieved by the Bank’s action of dishonouring the cheque in question and further by its refusal to expunge/delete/amend the offending words. Further that its explanation is wanting and in contravention of his right to good reputation, dignity, correction/deletion of untrue or misleading



- information and protection of his economic interest and consumer rights under Articles 28, 33, 35, 43, 46 and 47 of *the Constitution*. He is further claimed that the same amounts to negligence, breach of statutory duty of care and bank customer contract and that the Bank is in contravention of the *Defamation Act*, the *Banking Act* and CBK Prudential Guidelines.
5. The Petitioner accused the Bank of mishandling his account. He stated that on 5.12.19, his cheque for Kshs. 88,000/= was posted as Kshs. 8,800/=. Instead of deleting or reversing and posting the correct amount, the error was corrected by posting an additional amount of Kshs. 79,200/= without prior notice or advise to the Petitioner. The Bank has also persistently failed to pay cheques issued by the Petitioner even where his account has been adequately funded. Cheque no. 000646 for Kshs. 80,350/= was unpaid on 4.4.16 and the Bank admitted the error. Cheque no. 000655 for Kshs. 900,000/- was dishonored on 6.1.18 with the remark “crossing stamp cancelled”. The Bank corrected the position by honouring the cheque 4 days later. This prompted him to file Nakuru CMCC No. 107 of 2018 (previously Nakuru HCCC No. 34 of 2017) against the Bank. The matter is pending appeal at the Court of Appeal.
 6. The Petitioner claims that the offending words in his bank statement on 11.12.19 are defamatory, malicious, injurious to his dignity, integrity, and image and reputation and has caused him to be shunned by banks and business partners and associates. On account of the Bank’s inaction, the Petitioner’s mortgage application at HFC Ltd for Kshs. 10,000,000/= on 19.2.2020, was declined as was his application for building construction services on his land parcel No. MASII/MITHINI/774 by Kyamu Construction and engineering Limited costing Kshs. 6,000,000/- on 7.10.2020. As a result, the proposed building on his land stalled, occasioning him a loss of Kshs. 800,000/= per month which he would be earning, as per a prospective tenant’s letter dated 10.9.19. The Petitioner claims that as a result of the Bank’s actions, his rights under articles 28, 29, 33, 35(1) (b) and (2), 40(1) and (2), 43, 46(1), 47 and 50 of *the Constitution* have been violated and he has consequently suffered pecuniary loss and damages.
 7. According to the Petitioner, in order to be effective, promote efficiency, foster confidence in the banks cheque payment system and to bolster customer care, it would be prudent for the CBK to formulate and issue pursuant to Section 33 of the *Banking Act*, guiding policy and standard procedure for all banks for deleting, expunging and amending erroneously posted entries in bank customer accounts, statements and database in conformity to Articles 10, 19, 20, 21, 28, 29(d), (f), 33(3), 35(2), 43, 46 and 47 of *the Constitution*.
 8. The Bank has opposed the Petition by a replying affidavit sworn on 28.1.21 by Bonnie Okumu, its Director, Legal Services. He deposed that there was an appeal pending before the Court of Appeal addressing the same issued raised in this Petition and concerning the same subject matter in Nakuru HCCA No. 163 of 2019. The Petitioner has therefore approached this Court in a manner that is irregular and improper and amounts to asking this Court to sit on the appeal through back door. The Petition is thus an abuse of the court process.
 9. It is the Bank’s case that the Petition fails to meet the threshold for a constitutional petition. It provides little or no particulars as to the allegations and the manner of alleged infringement on the Petitioner’s constitutional rights. The Petition also failed to define the dispute to be determined by this Court or state with particularity, the specific right allegedly breached and how it was violated. Further that the averments do not raise any constitutional issues that can clearly guide this Court as to the alleged infringement of the Petitioner’s constitutional rights. The alleged infringements as pleaded raise issues in civil law, in particular banking and contract law and are matters that can comfortably be handled by the civil court and that this Court has unfettered discretion to transfer the matter to the civil court.



10. Additionally, it was averred that failure of the Petitioner to file an affidavit in support of the Petition meant that the same is not backed by any evidence and that the claims made in the Petition are mere allegations. Further, the documents intended to be relied upon by the Petitioner should have been presented as annexures to the affidavit and since there is none, the documents should be expunged. The Bank urged the Court to find that the Petition is fatally defective and strike it out with costs.
11. In addition to the replying affidavit, the Bank filed a notice of preliminary objection dated 30.8.21 in opposition to the Petition. The objection is that the Petition falls short of the doctrine of res judicata under Section 7 of the *Civil Procedure Act* as a suit with the exact same subject matter has already been dealt with and concluded by the High Court sitting in Nakuru.
12. The 2nd Respondent (CBK) opposed the Petition vide a replying affidavit sworn on 12.10.21 by Kennedy Kaunda Abuga, the General Counsel. He set out the functions of CBK which include regulation of the banking industry with a view to fostering a proper functioning and stable market based financial system. To this end, CBK does routine inspections of banks has a robust mechanism for monitoring complaints by customers and their resolution under Part IV and X of its Prudential Guidelines on reporting requirements. Where it is found that complaints handling and customer recourse procedures adopted by any bank are inadequate, CBK as regulator steps in and directs such bank to strengthen its procedures to address customer complaints.
13. On its part, CBK asserted that the Petitioner has not met the test for a constitutional petition which requires that he sets out with a reasonable degree of precision, that of which he complains, the provisions infringed and the manner of infringement. The Petition is founded on generalized complaints without any focus on the fact, law or constitution. The Petitioner has not suffered any loss and has not provided particulars or evidence of the alleged loss and cannot therefore claim compensation for any loss whether as general or exemplary damages, or at all, for non-existent or unproved loss. Additionally, the Petitioner has failed to prove the nature of his rights or fundamental freedoms which the CBK has violated or threatened. CBK thus urged that the Petition be struck out in its entirety.
14. I have given due consideration to the parties' written submissions. The issues that arise for determination are:
 - i. Whether the Petition is defective for want of an affidavit.
 - ii. Whether the petition offends the doctrine of res judicata.
 - iii. Whether the petition offends the doctrine of constitutional avoidance.
 - iv. Whether the petition has met the threshold for a constitutional petition.
 - v. Who is entitled to costs.

Whether the Petition is defective for want of an affidavit

15. It is the Bank's case that the Petition is defective for want of a supporting affidavit. The Bank contended that the documents intended to be relied upon by the Petitioner should have been presented as annexures to the affidavit and since there is none, the documents should be expunged. The Bank urged the Court to find that the Petition is fatally defective and strike it out with costs.



16. Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides:

Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

17. Rule 10(1) provides that an application under Rule 4 shall be by way of a petition while Rule 11 makes provision for documents to be annexed to an affidavit or petition and stipulates as follows:

1. The petition filed under these rules may be supported by an affidavit.
2. If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

18. Flowing from the above provisions, it is clear that the filing of an affidavit is optional and that a party wishing to rely on any documents may choose to annex the same to the petition or supporting affidavit. Accordingly, the contention by the Bank that the Petition is defective for want of an affidavit, is without merit.

Whether the Petition offends the doctrine of res judicata

19. The Bank submitted that the matter falls right under the doctrine of res judicata. The Bank asserted that the Petitioner had filed Nakuru CMCC No. 107 of 2018 which was heard and concluded. He appealed the decision in Nakuru No. 163 of 2019 which was dismissed and has now proceeded to the Court of Appeal. It is the Bank's contention that the previous suit raises the same issues in the Petition herein. The bank account in question is the same in both suits, namely account no. 1109141807 held at the Bank's Moi Avenue branch in Nairobi. In both matters, the Petitioner claims that the Bank failed to pay cheques as per his instructions and that he incurred losses. The particulars of facts in both cases are very similar including the wording. The Petitioner thus ought to have raised the issues herein in the Nakuru suit. The Bank therefore submitted that the matter meets the requirements of res judicata outlined by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR.

20. CBK supported the Bank's preliminary objection and submitted that the issues raised in this Petition are similar to those in the Nakuru cases.

21. On his part, the Petitioner submitted that the issues raised in the Petition have to do with the misposting of the cheque no. 000672 dated 5.12.19 for Kshs. 88,000/=, illegal dishonour of Cheque No. 000673 dated 11.12.19 for Kshs. 300,000/=, deletion of the offensive words in the Petitioner's bank statement and an order directing CBK to formulate and issue a guiding policy for deletion of entries in their customers' bank accounts and statement. These issues had not been raised in the previous suit. The Petitioner contended that the cause of action arising from the cheques in question could not be said to have been determined in the judgment in the former suit. In any event that it was not clear what the outcome of the previous litigation will be, as the matter is still pending determination at the Court of Appeal.

22. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* which provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

23. For a party to succeed in an objection on ground of res judicata, such party must demonstrate each of the elements in Section 7 of the *Civil Procedure Act*. This requirement was set out by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, as follows:

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

24. And in the case of Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR, the Court of Appeal stated:

To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.

25. I have considered the issues raised herein and note that they relate to cheques issued in December 2019 and a bank statement for the same month. I have also perused the plaint in Nakuru CMCC No. 107 of 2018 dated 3.8.17 and amended on 25.5.18. The subject matter therein relates to events that took place in 2016. The Petitioner had issued a cheque for Kshs. 80,350/= in favour of Ogola, Kipkoech & Co Advocates in the belief that he had sufficient funds to cover the same. The cheque was however marked unpaid in his bank statement for April 2016 and an amount of Kshs. 3,300/= was debited from his account as unpaid cheque charge. Similarly, on 5.1.18 the Petitioner issued a cheque for Kshs. 900,000/= to Peter Kioko Kithuka. Although his account had a credit balance of Kshs. 935,654.80 the cheque was returned with the remarks "Crossing Stamp Cancelled". The cheque was ultimately cleared 4 days later. He claimed that his letters demanding explanation went unanswered.

26. In HCCOMMM 605 OF 2003 Winfred Wambui King'ori v Paramount Bank Limited & Others, (unreported), Mativo, J. (as he then was) considered the elements of res judicata and stated:

The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

The learned Judge went on to state:

The doctrine of res judicata is provided for in Section 7 of the *Civil Procedure Act* and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive



a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.

27. The previous suits were between the Petitioner and the Bank. The Petition herein is between the Petitioner and the Bank with the addition of CBK. This notwithstanding, it is now settled that mere addition or omission of a party in a subsequent suit or omission of a party does not necessarily render the doctrine of res judicata inapplicable. Other than the inclusion of CBK, the parties remain the same. The record shows that judgment in Nakuru CMCC No. 107 of 2018 was delivered on 3.9.19. This was clearly before the cause of action in this Petition arose. The matter directly and substantially in issue in the Petition, though similar, was not directly and substantially in issue in the previous suits. Further the appeal is still pending before the Court of Appeal. Accordingly, it cannot be said that the matter has been heard and finally decided in the former suit.
28. In view of the foregoing, I find and hold that the elements for res judicata have not been satisfied.

Whether the Petition offends the doctrine of constitutional avoidance

29. The Bank submitted that the claim by the Petitioner does not raise any constitutional issues. The alleged infringements as pleaded in the Petition raise issues in civil law and in particular, banking and contract law. As such the matter can comfortably be handled in the civil court.
30. On its part, CBK contended that the Petitioner's remedy lies in civil law/court and not in this Court. CBK argued that the Petitioner categorically cited alleged breach of duty by the Bank. He also alleged breach of the *Defamation Act*, thereby making his claim a tortious transgression.
31. It is noted that the Petitioner did not address this issue but submitted that the Court is called upon to interrogate and declare unconstitutional and a nullity, the Bank's position that that it cannot delete or expunge erroneous and misleading entries appearing in a bank statement. He further contended that the Bank's edict in that regard, is not backed by law and falls afoul the ethos enshrined in Articles 28, 33(3), 35(2) 46(c) and 47(1) of *the Constitution*. He further submitted that the inaction by CBK leaves him an abandoned, helpless, disgruntled and aggrieved customer. His ultimate recourse for justice and relief for the losses suffered lies in the hands of this Court.
32. AS I consider this issue, I am aware that the doctrine of constitutional avoidance does not divest this Court of the jurisdiction to hear and determine this matter. What the doctrine means is that while this Court can indeed hear and determine the matter, it restrains itself from hearing the same because there exists another appropriate forum that can hear and determine the matter effectively.
33. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The Court held 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)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

34. And in the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was) had this to say about the doctrine:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause.

35. It can be discerned from the foregoing that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief he seeks, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.

36. And in *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR, Lenaola, J. (as he then was) stated:

I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.

The complaint in this case is not so serious as to attract Constitutional sanction.

37. The Court of Appeal in the case of *Peter O. Ngoge v Francis ole Kaparo & 4 Others* [2007] eKLR, the Court of Appeal stated:

Similarly in *Harriksson V Attorney General Of Trinidad And Tobago* [1980] Ac 265, Lord Diplock stated:-

“The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some



human right or fundamental freedom guaranteed to individuals by the chapters of *the Constitution* is fallacious ... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

38. The prayers sought by the Petitioner in the Petition are civil in nature with civil remedies and could have readily been redressed in a civil court. The Petitioner ought to have filed a civil suit as opposed to bypassing the same and coming to the constitutional court.
39. 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 Irengi aka Jimmy 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. In Kenya, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Krentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in *Ashwander v Tennessee Valley Authority* the U.S. Supreme Court 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. Currie and de Waal } opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author's state: -

“When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

40. I similarly agree with Mutungi, J, who in the case of *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR, had this to say about the practice of filing constitutional petitions in claims that are civil in nature:

Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where



there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.

41. And in *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR, Ohungo, J. stated as follows regarding the constitutional jurisdiction of the Court and I concur:

The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of *the Constitution* by filing a petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave.

So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court.

42. Having considered the foregoing, I find and hold that the Petitioner’s claim which is founded on his relationship with the Bank as its customer is a plain civil claim. Equally, the compensation contemplated in Article 23 of *the Constitution* may only be available to a claimant who proves denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22. Accordingly, the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction.

Whether the Petition has met the threshold for a constitutional petition

43. It is the Bank’s submission that the Petition does not meet the threshold of a constitutional petition. The Bank submitted that it is not enough for the Petitioner to state that his constitutional rights have been violated but must demonstrate how such rights have been violated. The Bank contended that the Petitioner has alleged violation of his rights without proof of the manner of the violation. Accordingly, the Petition falls short of the requirements of a constitutional petition.
44. On its part, CBK submitted that the Petition does not meet the legal threshold of a constitutional petition, namely that a person seeking redress on a constitutional matter must set out with a reasonable degree of precision that of which he complains, the provisions infringed and the manner of infringement. It is thus the submission of CBK that the Petition which goes against the well-founded principle of pleading constitutional infringement with specificity, thereby rendering the Petition fatally defective.
45. Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that any person affected or likely to be affected by the denial, violation or infringement or threaten to any right or fundamental freedom provided for in *the Constitution* may make an application to the High Court for redress. Rule 10(1) provides that an application under Rule 4 shall be made by way of a petition while Rule 10(2) stipulates what a petition is required to disclose, as follows:

- a. the Petitioner’s name and address;
- b. the facts relied upon;
- c. the constitutional provision violated;



- d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- f. the petition shall be signed by the petitioner or the advocate of the petitioner; and
- g. The relief sought by the petitioner.

46. All constitutional petitions are required to be pleaded with reasonable precision, and a party who alleges violation of rights must clearly state the nature of injury, the rights violated and the manner in which they have been violated. This principle was enunciated in the oft cited case of Anarita Karimi Njeru v Republic [1979] eKLR in which Trevelyan and Hancox, JJs stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

47. This principle was upheld in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR by the Court of Appeal, which observed as follows:

The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.

48. In Timothy Njoya v Attorney General & another [2014] eKLR Lenaola J held: -

I agree with the above reasoning, and with respect, the Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the Court. He must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated, by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated - See Anna Rita Karimi Njeru v Republic (1976-1980) 1 KLR 14 and Trusted Society of Human Rights v Mumo Matemu and Another Petition No. 279 of 2012.



49. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR held that:

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

50. In *Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another* [2017] eKLR, Mativo J, (as he then was) stated the following on pleading with precision:

28. There are numerous court decisions by the superior courts in this country stating that it is important for a person seeking redress from the High Court or an order which invokes a reference to *the Constitution*, to set out with reasonable degree of precision, what he complains of, the provisions of *the Constitution* infringed, and the manner in which they are alleged to be infringed. Thus, an applicant in an application alleging violation of constitutional rights is obliged to state his complaint, the provisions of *the Constitution* he considers has been infringed in relation to him/her, and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the provision. It is not enough to allege infringement without particularizing the details and manner of infringement.

51. Flowing from the cited Rules and cases, it is quite evident that for a constitutional petition to be sustainable a petitioner must cite the constitutional provisions that are alleged to have been violated or threatened and must also demonstrate the manner in which the said provisions have been violated or are threatened with violation from the facts and evidence of the case.

52. In the present case, the Petitioner stated as follows in Paragraph 26(i) of his Petition which is reproduced below:

26. Particulars Of Facts

- i) Wilfully and with impunity threatening, denying and trampling on the Petitioner's constitutional rights and fundamental freedoms enshrined in *the Constitution* of Kenya viz:
 - i. Under Article 28 - right to human dignity;
 - ii. Under Article 29 - right not to be subjected to psychological torture;
 - iii. Under Article 33 - freedom of expression and respect of the Petitioner's reputation;



- iv. Under Article 35(1)(b) and (2) - right to information Access to Information. deletion of untrue and misleading information;
- v. Under Article 40(1) and (2) – Protection of right to acquire;
- vi. Under Article 43 - right to attainment of economic and social freedom;
- vii. Under Article 46(1) - right to Consumer rights;
- viii. Under Article 47 - right to fair administrative action;
- ix. Under Article 50 - his right to fair hearing.

53. Other than listing the constitutional provisions, the Petitioner has not given any specific details on how the Respondents have violated the said rights and fundamental freedoms. The Petition provides little or no particulars as to the allegations and the manner in which the Respondents are responsible for the alleged infringements. It is not sufficient to allege infringement without particularizing the details and manner of infringement. My finding therefore is the Petition does not meet the threshold for a constitutional petition.

Who is entitled to costs

54. It is trite that costs always follow the event. Rule 26(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. In determining whether or not to award costs therefore, this Court must be mindful not to hinder the advancement of constitutional justice. The Court has found that the claim herein is a civil claim couched as a constitutional petition and ought not to have been filed in this Court in the first place. The Respondents are therefore entitled to costs for defending a needless petition.

55. In the end and in view of the foregoing, I find that the Petition herein lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MARCH 2023

M. THANDE

JUDGE

In the presence of: -

for the Petitioner

for the 1st Respondent

for the 2nd Respondent

Court Assistant

