



Kariuki v Sumac Micro-Finance Bank Limited & another (Constitutional Petition E009 of 2022) [2023] KEHC 18503 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E009 OF 2022**

PM MULWA, J

JUNE 15, 2023

BETWEEN

SIMON KINUTHIA KARIUKI PETITIONER

AND

CENTRAL BANK OF KENYA 1ST RESPONDENT

SUMAC MICRO-FINANCE BANK LIMITED 2ND RESPONDENT

RULING

1. The 1st Defendant filed a Notice of Preliminary Objection dated January 19, 2023 on the grounds that;
 - i. This court lacks the jurisdiction to hear and determine the suit.
 - ii. The petitioner's suit is incompetent, fatally defective, bad in law and an abuse of the court process.
 - iii. The petitioner's suit should be struck out with costs to the 1st Defendant.
2. Parties filed submissions to the preliminary objection.
3. The preliminary objection is premised on the grounds that the petitioner sought financial accommodation from the 1st defendant for a sum of kshs 765,000/= and offered Motor Vehicle KAW 481U as security for the loan. The petitioner defaulted in the loan repayment and the 1st Respondent initiated recovery proceedings for the repossession of motor vehicle.

Submissions by 1st Respondent

4. Mr Abok counsel for the 1st Respondent submits the preliminary objection as filed contains points of law as stated in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributions Ltd* (1965) EA 696



5. According to counsel this court lacks jurisdiction to entertain the petition and urged the court to apply the doctrine of avoidance and decline to hear it as the issues in the suit can be determined in a commercial suit. To buttress this point he cited the case of: *Lugo vs Director of Public Prosecution* (pet no 62 of 2020) (2022) KEHC 10574 KLR May 27, 2022 which references the case of Sports and Recreation Commission v Sagittarius Wrestling Club and Anor where the court stated as follows:

“...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 provisions or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been addition, a breach of the Declaration of Rights.”

6. According to counsel the petitioner has failed to exhaust the available mechanisms for resolving the dispute, and urges the court to decline to hear the petition.

Petitioner’s submissions

7. Mr Machina counsel for the Petitioner filed submissions on March 13, 2023, wherein he submits that the 1st Defendant has not addressed all the three issues raised in the Preliminary Objection. That this court has unlimited jurisdiction under Article 165(3)(b) of *the Constitution* when a constitutional right is threatened, infringed or violated.

8. Counsel submits the Petitioner has outlined the constitutional rights that have been infringed including the right to information, under Article 35 of *the constitution* of Kenya.

9. According to counsel the doctrine of avoidance is not applicable in this case and cannot ouster the court’s unlimited jurisdiction. He cited the case of *Katiba Institute v Presidential Delivery Unit & 3 others* (Constitutional Petition 468 of 2017) where the court held:

“the Respondent further contended that the Petition is premature basing their action on section 21 of the Act. Their take was that the Petitioner should have first complained to the Commissioner for Administration of Justice (CAJ) before filing the Petition. I have read the Act but could not trace a provision making a report to CAJ a condition precedent to triggering the jurisdiction of this Court to deal with petitions filed seeking to challenge violations of rights to access information under Article 35 of *the Constitution* of Kenya. This court has unlimited jurisdiction under Article 165(3)(b) to determine the question of whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The Respondent’s contention that the Petition is premature is therefore unsustainable.”

10. In conclusion counsel submits the 1st Defendant has not demonstrated the 2nd and 3rd grounds in the preliminary objection and the same ought to be dismissed.

Analysis and determination

11. The petitioner alleges a violation of his constitutional rights. That the 1st respondent has failed to issue a bank statement with respect to the loan account. He further states that his constitutional right to information under Article 35 of *the constitution* of Kenya has been infringed by the respondents. He has come to this court to seek redress for this violation



12. A person who seeks redress in a constitutional court must state with precision the provisions of *the constitution* which have been infringed as held in the case of *Anarita Karimi Njeru v Attorney General* (1979) KLR 154 in which the court held:

“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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

13. The Supreme Court stated in the case of *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* - at page 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.”

14. In *Lugo vs Director of Public Prosecution* (Pet No 62 of 2020) (2022) KEHC 10574 KLR (May 27, 2022) the court held:

“The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system.”

15. The petitioner seeks the 1st respondent to provide statements of its accounts. This court finds the orders sought by the petitioner do not raise constitutional issues. There are other remedies available to the petitioner. The petitioner was issued a loan facility by the 1st respondent and he defaulted in payment. The respondent moved to attach the motor vehicle issued as collateral and hence this petition by the applicant. The dispute in issue between the petitioner and the respondent needs to be canvassed through oral evidence and it is proper to have filed a civil suit as opposed to the constitutional petition.

16. Guided by the above decisions, I find this is a proper case to invoke the doctrine of avoidance.

17. Accordingly, I find the preliminary objection is merited. The petition is hereby struck out with costs to the 1st Respondent.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 15TH DAY OF JUNE 2023

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P.M. MULWA

JUDGE

In the presence of:

Kinyua – Court Assistant



Mr. Machina for Petitioner

N/A for 1st Respondent

N/A for 2nd Respondent

