



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 229 OF 2019

CONSUMERS FEDERATION OF KENYA (COFEK).....PETITIONER

-VERSUS-

KENYA COMMERCIAL BANK.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

RULING

1. Through the petition dated 11th June, 2019 the Petitioner, Consumers Federation of Kenya (COFEK), sought a number of reliefs following the negative listing of one Ms. Shumi Rose by two credit reference bureaus as a result of default in repayment of a loan advanced to her by the 1st Respondent, Kenya Commercial Bank. The Central Bank of Kenya is named as the 2nd Respondent.
2. On 15th July, 2020, the Petitioner and the 1st Respondent entered into a consent marking the matter settled with each party meeting the costs of the proceedings. On the same day the Petitioner and the 2nd Respondent also marked the petition as settled but with a rider that the issue of costs would be left for the determination of this Court. This Court thereafter directed Petitioner and the 2nd Respondent to file submissions on the issue of costs.
3. The 2nd Respondent by way of submissions dated 22nd July, 2020 submits that it is entitled to costs for the expenses incurred and the tremendous troubles it went through in defending a commercial dispute camouflaged as a constitutional petition. The 2nd Respondent asserts that the dispute arose out of a banker-customer relationship and therefore it cannot be a constitutional petition. This argument is buttressed by reference to the case of **Moses A. Segite & 29 others v Kenya Flouspar Company Ltd [2015] eKLR**.
4. The 2nd Respondent asserts that it is entitled to costs as it defended the suit at all stages until the only remaining issue was the delivery of a judgment by the Court but the same was not rendered as the Petitioner and 1st Respondent decided to settle the matter out of court. The argument by the 2nd Respondent that it is entitled to costs is supported by the decisions in the cases of **Andrew Mukite Saisi v Tracker Group of Companies Limited [2020] eKLR; Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others [2014] eKLR; and Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR**.
5. In conclusion, the 2nd Respondent contends that it was erroneously enjoined in the petition and since the matter has been settled between the Petitioner and the 1st Respondent, the Petitioner must bear the costs for dragging them to Court.
6. The Petitioner filed submissions dated 23rd October, 2020 and urged the Court to dismiss the 2nd Respondent's request for costs. The Petitioner submits that it is the 1st Respondent who sought an out of court settlement to which the Petitioner agreed and that does not mean the Petitioner lost or withdrew the suit as alleged by the 2nd Respondent.
7. It is the Petitioner's contention that the 2nd Respondent failed to meet its statutory and regulatory obligations hence its inclusion as a respondent in the petition. Referring to Regulation 19 of the Credit Reference Bureau Regulations, 2013, the Petitioner submits that the 2nd Respondent is under a duty to ensure that the credit information relating to a customer of a regulated institution reflects the true position and failure by the 2nd Respondent to act amounts to failure to discharge its supervisory and regulatory function.
8. The Petitioner rejects the 2nd Respondent's argument that the petition is a disguised commercial dispute and asserts that it has approached this Court in regard to violation of consumer rights under Article 46 of the Constitution. It is argued that the Petitioner has demonstrated how the 2nd Respondent failed to ensure that services offered by the 1st Respondent are beyond reproach and that the information held by credit

reference bureaus is correct thus meeting the constitutional threshold.

9. The Petitioner in reliance on the decision in **Kenya Human Rights Commission & another v Attorney General & 6 others [2019] eKLR** argues that in suits involving public interest litigation courts are slow to award costs. According to the Petitioner, the withdrawn suit was of public interest as it concerned the threat to and violation of Article 46 of the Constitution. Further, that the 2nd Respondent is a constitutional public entity with a duty to protect consumers of financial services against unlawful and wrongful credit listing.

10. I have considered the submissions of the parties herein on the issue as to whether costs are awardable. The Petitioner asserts that the petition is in the nature of public interest litigation and it should not be compelled to pay costs to the 2nd Respondent. Conversely, the 2nd Respondent argues that the matter is a commercial dispute disguised as a constitutional petition. The question to be answered in this ruling is whether the compromised petition raised matters of public interest.

11. In the case of **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** the issue as to whether public interest litigation should attract costs was determined as follows:

“60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the *bona fide* interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren’t violated. The constitution envisages the judiciary as “a bastion of rights and justice...”

63. The question is whether the proceedings before me are *frivolous or vexatious* bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a *bona fide* intention and not a motive for personal gain, private profit or political or other oblique considerations.”

12. Similarly, in **Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR** it was held that:

“3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the Constitution, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.”

13. The question therefore is whether the petition before me is frivolous or vexatious and in my view, the answer is in the negative. The Petitioner approached the court in order to vindicate the negative listing of its member by two credit reference bureaus at the instigation of the 1st Respondent. The Petitioner believed that the actions of the 1st Respondent contravened the consumer rights of its member as guaranteed by Article 46 of the Constitution. The matter has been settled between the Petitioner and the 1st Respondent with the 1st Respondent agreeing to white-list the Petitioner’s client on all credit reference bureaus. This proves that the petition was not frivolous or vexatious and there was a constitutional question to be answered in the proceedings.

14. Although the case against the 1st Respondent was towards the vindication of the member’s personal rights, the case against the 2nd Respondent was brought to challenge its failure in carrying out its legal mandate under the Credit Bureau Regulations, 2013. The Petitioner therefore sought to hold the 2nd Respondent responsible for a duty which affects the public at large. This petition thus became a matter of public interest.

15. In **John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR** it was that:

“180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”

16. In view of the cited authorities, the appropriate order in the circumstances of this case is to direct the Petitioner and the 2nd Respondent to meet their respective costs in respect of the proceedings as there is no reason to deviate from the principle that costs should not be awarded in public interest litigations. Furthermore, the petition is not frivolous, vexatious or an abuse of the court process and I therefore see no reason to impose costs on the Petitioner. The Petitioner and the 2nd Respondent will therefore meet own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY,

2021.

W. KORIR,

JUDGE OF THE HIGH COURT