



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E346 OF 2020

ROBERT KAMAU MBUGUA.....PETITIONER

-VERSUS-

ABSA BANK PLC.....1ST RESPONDENT

NCBA BANK.....2ND RESPONDENT

-AND-

SIDIAN BANK LIMITED.....INTERESTED PARTY

JUDGEMENT

1. The Petitioner, Robert Kamau Mbugua, through the petition dated 26th October, 2020 seeks the following reliefs:

- a) It be declared that the purported freezing, blocking, seizing and/or withholding of the Petitioner's Bank accounts [is] unconstitutional, null and void;
- b) It be declared that the decision by the 1st and 2nd Respondents to freeze, block, seize and/or withhold the Petitioner's respective bank accounts and further appropriating funds from them without a valid court order and in contravention of the fundamental rights and freedoms in above (ii), illegal and unconstitutional;
- c) It be declared that the 1st and 2nd Respondents have breached Banker Customer Relationship by not keeping the Petitioner's account affairs a secret or confidential from third parties without his consent or communicating to him;
- d) It be declared that the 1st and 2nd Respondents have contravened the right not to be discriminated against protected by Article 27 of the Constitution, the freedom and security of the person under Article 29 of the Constitution, the right to privacy protected under Article 31 of the Constitution, the freedom to acquire property protected by Article 40 of the Constitution and the rights under Article 47 to expeditious, effective, lawful, reasonable and procedurally fair administrative action and [Article] 50 of the Constitution to observance of fair hearing respectively.
- e) It be declared that the 1st and 2nd Respondents have contravened the constitutional requirements that they respect the rule of law and respect human rights under Article 10 of the Constitution;
- f) An order be issued to compel the 1st and 2nd Respondents to unfreeze Bank Account No. 2042148027 that he holds in the 1st Respondent's Garden City Branch and Bank Account No. 40002542811 that he holds in the 2nd Respondent's Mama Ngina Branch;
- g) A permanent injunction to restrain the 1st Respondent, their agents and/or servants from harassing, molesting and/or intimidating the Petitioner's clients and all other persons depositing funds into his account without his consent as the same is humiliating and defamatory;
- h) Damages for contravention of the Petitioner's rights on (iv) and breach of Banker-Customer Relationship in (iii) above;

i) An order that the Respondents do pay to the Petitioner costs of this Petition.

j) Interests on (viii) and (ix) above;

k) Any such other order as this Honourable Court shall deem just.

2. The 1st Respondent, ABSA Bank PLC, and the 2nd Respondent, NCBA Bank, are companies incorporated in Kenya to carry on banking business. On 2nd December, 2020, at the request of counsel for the 1st and 2nd respondents, SIDIAN Bank Limited was enjoined to the proceedings as an Interested Party. The Interested Party is also a company incorporated in Kenya to carry on banking business.

3. The Petitioner's case as gleaned from his petition and the affidavit sworn in support of the same is that on or about 19th August, 2020 when he walked into the 2nd Respondent's Annex Branch to check the state of affairs in respect of his bank account, he was taken into custody by an officer of the DCI's Bank Fraud Unit. He was informed that his Bank Account No. 40002542811 in NCBA LOOP Mama Ngina Branch and Bank Account No. 2042148027 in ABSA Bank Kenya PLC Garden City Branch were blocked or otherwise frozen awaiting an impending bank fraud investigation in respect of the accounts.

4. The Petitioner claims that he was neither given any further reasons for blocking or freezing his accounts nor was he supplied with a court order authorising the respondents' actions. The Petitioner complains that he was also not given a reasonable opportunity to present his case.

5. The Petitioner avers that he was taken to Ex-Telecom House for questioning and was later released at about 2100 hours. The Petitioner further deposes that he has not been charged with any offence nor has any court adjudged that the money in his said accounts are proceeds of fraud. He claims that he has not accessed his NCBA account since 1st September, 2020 and his Absa Bank account since 26th August, 2020. Further, that since then a total of Kshs. 999,999/- had been debited/appropriated from his ABSA Bank account and a sum of Kshs 41,813.70/- had been withdrawn from his NCBA account without his consent. The Petitioner claims that he has not been told where the appropriated funds were deposited.

6. It is the Petitioner's case that in the absence of any factual basis to warrant investigations or the respondents' freezing, blocking and/ or withholding of the monies in the said bank accounts the decisions of the respondents are arbitrary and unilateral thereby contravening his fundamental rights and freedoms.

7. The Petitioner avers that the respondents contravened his right to acquire property and own property under Article 40 of the Constitution by purportedly freezing his bank accounts without his knowledge or information and further allowing money to be taken out his accounts without his knowledge and consent while barring him from accessing the accounts.

8. The Petitioner deposes that the respondents contravened his right to fair administrative action under Article 47(1) of the Constitution and sections 4 and 6 of the Fair Administrative Action Act, 2015. He asserts that the actions of the respondents to unilaterally freeze, block, seize and withhold the funds in his accounts are against the principles of natural justice. The Petitioner additionally contends that the respondents, by seizing his bank accounts without any warrants or court orders, contravened his rights under Articles 28, 29 and 31 of the Constitution.

9. The Petitioner complains that the 1st Respondent infringed his right to privacy under Article 31 and right to human dignity under Article 28 by engaging in an unlawful exercise of calling and harassing anyone depositing funds in the accounts. He states that this was without his knowledge or consent. The Petitioner further avers that the unlawful disclosure of private facts about his bank account contravened his right to privacy and the confidentiality between him and the 1st Respondent.

10. The Petitioner contends that his right to correction or deletion of untrue or misleading information as protected by Article 35(2) of the Constitution was violated by the respondents' failure to provide him with the reasons for freezing his bank accounts so that he could correct the wrong information that they had relied on. He further avers that the respondents contravened his right to the information necessary for him to gain full benefit of their services under Article 46(1)(b) of the Constitution by refusing to provide him with information on the freezing of his said bank accounts. He finally claims that under Article 46(1)(d) of the Constitution he is entitled to be compensated for loss or injury arising from defects in services offered by the respondents.

11. The 1st Respondent opposed the petition through the replying affidavit of Fredrick Ogada sworn on 19th November, 2020. The 2nd Respondent responded to the petition through an affidavit sworn on 23rd November, 2020 by Stephen Atenya. The defence of the respondents is better told as a single narrative. Both the respondents concede that the Petitioner does indeed operate the bank accounts identified in the petition in their named branches.

12. The respondents' case is that on 18th August, 2020, the 2nd Respondent received a request from the Interested Party to recall a sum of Kshs. 1,691,953/- that had been credited in two tranches into the account of one of its customers by the name Geoffrey Chamanga Mtsonga on account that the same was a fraudulent transaction. When preparing to act on the recall request, the 2nd Respondent discovered that Geoffrey Chamanga Mtsonga had on 18th August, 2020 debited from his account the sum of Kshs. 999,999/- and credited the amount with the Petitioner's bank account at the 1st Respondent's Garden City Branch. The 2nd Respondent subsequently communicated the information to the 1st Respondent and requested for the amount to be recalled and request was acted upon after the 1st Respondent received the necessary indemnity from the 2nd Respondent. It is the 2nd Respondent's case that the debited amount has since been transferred to the Interested Party. It is the respondents' averment that Geoffrey Chamanga Mtsonga had since been charged in court in Criminal Case No. 2319 of 2020 for the offence of stealing by servant contrary to Section 281 of the Penal Code.

13. The 2nd Respondent avers that the Petitioner was subsequently called to the bank where he was arrested and informed of the fraudulent activities. According to the respondents, the Petitioner was at all material times aware of the source of the suspected amount and the ongoing

investigations by the Banking Fraud Unit into fraudulent activities concerning Geoffrey Chamanga Mtsonga and he therefore understood the reason for reserving and recalling the suspected amount from his bank accounts.

14. The respondents separately denied freezing the Petitioner's bank accounts with the 1st Respondent averring that the Petitioner actually carried out transactions in his account by making withdrawals between 21st and 26th August, 2020. The 2nd Respondent specifically deposed that the Petitioner made withdrawals between 24th and 29th August, 2020.

15. The respondents deposed that it is common practice in the banking sector in Kenya for a bank to effect a recall request of transferred funds from another bank based on an error or suspected fraudulent activity. They averred that there is no requirement for a requesting bank to explain reasons for suspecting fraud and in most instances, a bank will not require a court order to act on a recall request.

16. It is the respondents' averment that the Petitioner's rights are subject to constitutional limits as provided in Article 24 of the Constitution to protect public interest in the detection, prevention and prosecution of fraudulent activities. The respondents denied depriving the Petitioner of his property, and that in any event, the protection provided under Article 40 of the Constitution does not extend to any property that may be found to have been unlawfully acquired. They depose that the Petitioner has not demonstrated the manner in which his rights have been infringed and prays that the matter be dismissed with costs being awarded to them.

17. The Interested Party filed a replying affidavit sworn by Stella Kendi dated 7th January, 2021 stating that unless the Petitioner can satisfy the Court that he was and remains lawfully entitled to the funds which were remitted from their bank, both the application as well as the petition should be dismissed with costs for lack of merit and for being an abuse of the process of the court.

18. It is deposed that upon conducting investigations into some fraudulent activities involving its employees, the Interested Party discovered that the Petitioner's accounts regularly received fraudulently obtained funds from one of its employees by the name Geoffrey Chamanga. Further, that by two written statements signed on 28th August, 2020 or thereabout, Geoffrey Chamanga admitted to being involved in fraudulent theft of funds from the Interested Party and transferring the stolen funds to the Petitioner.

19. The Interested Party avers that the funds credited into the Petitioner's aforesaid bank accounts can be directly traced back to the funds stolen from it by Geoffrey Chamanga and it was accordingly within its rights to recall and recover the funds. It is further deposed that the Interested Party merely recalled the stolen funds and did not at any time request that the 1st and 2nd respondents freeze the Petitioner's accounts as claimed by the Petitioner.

20. The Interested Party states that the Petitioner seeks to deliberately mislead this Court into granting him unlimited access to proceeds of crime. Further, that the Petitioner has no proprietary interest in the said recalled funds, as he was not entitled to them in the first place. It is thus the Interested Party's case that the Petitioner's right to property has not been violated as alleged and he is therefore not entitled to the reliefs sought.

21. I have carefully considered the issues and arguments raised by the parties herein and the first issue that springs to mind is whether the actions of the respondents met the threshold of fair administrative action under Article 47 of the Constitution. The Petitioner claims that the respondents violated his right to fair administrative action by freezing his bank accounts and appropriating funds therefrom without a valid court order, notice to him or his consent.

22. The Petitioner urged through submissions dated 17th November, 2020 that the respondents were under a fiduciary duty to immediately notify him of their adverse actions. The Court is urged to find that the respondents did not act in absolute good faith and trust expected in a banker-customer relationship. This argument is buttressed by reference to the cases of **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**; and **Civil Case No. 175 of 2014 Viable Deco Solutions Limited v Co-operative Bank of Kenya Limited [2014] eKLR**.

23. The 1st Respondent denies freezing the Petitioner's bank accounts but admits that funds suspected to have been acquired through fraud were recalled in accordance with common practice in the banking sector. The 1st Respondent asserts that a court order is not required for a recall request. The respondents in their submissions dated 22nd January, 2021 further assert that the Court cannot assist the Petitioner to benefit from illegal and fraudulent transactions.

24. The Interested Party asserts that it merely recalled the stolen funds and did not at any time request that the 1st and 2nd respondents freeze the Petitioner's accounts as claimed by the Petitioner.

25. The parties have presented opposing accounts as to whether the Petitioner's bank accounts with the respondents were frozen by the respondents. The Evidence Act, Cap. 80 provides the law on matters of proof and evidence thus:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. The respondents having denied that they froze the Petitioner's accounts, the burden of proof lies on the Petitioner to show otherwise. The Petitioner has submitted as proof his bank statements marked 'RMK-1', 'RMK-2', and a demand letter dated 30th September, 2020 marked 'RMK-3'. Upon perusal of the Petitioner's evidence, I am doubtful as to whether his bank accounts were actually frozen by any of the respondents. The statements confirm the respondents' assertion that the Petitioner continued transacting with his bank accounts even after the suspected amount had been recalled. In the circumstances, the only reasonable conclusion I can reach is that the Petitioner's accounts were not frozen as he has failed to show otherwise.

27. The second allegation raised by the Petitioner is that the respondents debited and recalled money from his accounts without prior notice or consent. The Petitioner has submitted that the respondents were under a fiduciary duty to notify him without delay of their adverse actions. In response, the 1st Respondent contends that there is no requirement for a requesting bank to explain reasons for suspecting fraud and in most instances, a bank will not require a court order to act on a recall request.

28. The 1st and 2nd respondents further submit that the Petitioner has not demonstrated his entitlement to the funds in question, and has not denied that the suspected amount was credited to his bank accounts by Mr. Mtsonga. Further, that he has not provided evidence to show that the transfer of the suspected amount to his bank accounts was as a result of a legitimate business transaction between him and Mr. Mtsonga.

29. The Interested Party through its submissions dated 11th January, 2021 contends that the money credited into the Petitioner's bank accounts was directly traced back to the funds stolen from it by Geoffrey Chamanga and it was within its right to recall and recover the funds. According to the Interested Party, it was justified in recalling the stolen funds remitted into the Petitioner's accounts with the respondents, as the funds were obtained fraudulently and illegally and the Petitioner cannot and should not benefit from proceeds of crime. The Interested Party submits that it cannot be said to have acted unlawfully or illegally in such circumstances.

30. Before tackling the question of whether the respondents' actions violated Article 47, I am compelled to address the statement of the respondents that the Petitioner has not shown that the suspected funds were an outcome of a legitimate business transaction. Where this Court is commissioned to investigate the actions of an administrator, it shall not look into the substance and reasons for the administrative action but the process followed. In the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR** it was held that:

“75. Judicial review is not the re-hearing of the merits of a particular case. Rather, it is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. Judicial review is a more limited right than a right of appeal. The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.”

31. In other words, this Court shall not investigate whether the monies debited from the Petitioner's account were proceeds of fraud, but instead will focus on whether the respondents when carrying out business did so in accordance with the law and the Constitution of Kenya. Moreover, the burden of proof that the suspected funds were proceeds of crime cannot lie on the Petitioner and would always lie on the respondents and the Interested Party who have raised the allegation of fraud.

32. The respondents claim that they are not required to obtain a court order when recalling suspected proceeds of fraud. The respondents have failed to back this assertion with any legal provision but rely on the case of **Lazarus Masayi Onjallah v Kenya Commercial Bank Ltd [2004] eKLR**. Although the referenced case does discuss the matter of recalling funds erroneously deposited into a bank account, the question of procedure is not raised in the case. The Petitioner in opposition refers to the case of **Viable Deco Solutions Limited v Co-operative Bank of Kenya Limited [2014] eKLR** where the Court discussed the necessity of notice to a customer as follows:

“[20] Notice to the customer of important matters touching on the account held in a bank is almost an indispensable necessity. And although methods of communication are various and varied, most banks have adopted technology in communication of important matters to the customer; a method that is fast and almost instantaneous. The necessity of communication arises from the fiduciary nature of Customer-Bank relationship which is undergirded by absolute faith and trust. Ordinarily, full disclosure of any action taken by the Bank, especially those which are adverse to the Customer is imperative aspect of that relationship. Therefore, whereas the Applicant agreed “to comply, observe and be bound by the Terms and Conditions made by you [read the Bank] and in force from time to time or as amended by you [read the Bank] pertaining to such account (s) ... and the General Terms and Conditions documents”, any such terms and conditions so made must be brought, one way or other, to the attention of the Applicant without delay. Equally, any adverse action taken by the Bank on the account held by the Applicant must be brought to the attention of the Applicant without any delay. Freezing an account is an intrusive measure of extreme dimensions and must be fully disclosed to the affected party, unless, the disclosure has been restricted or limited by law through what I call “gag order” which prohibits the Bank or the relevant officer of the Bank from disclosing the existence of a surveillance or freeze order. Of importance, such restriction must be sanctioned by law and under the superadded authority of a court order; they are common in legislations on Bank Fraud, Anti-corruption and Antimoney Laundering laws; for instance, the Proceeds of Crime and Anti-money Laundering Act. In the absence of such restriction, a contrary view on disclosure of adverse actions by the bank would be unconscionable and a negation of the law especially in contractual and mutual engagement of a Customer and a bank. Accordingly, informing the Customer of the

taking of an adverse action authorized by the contract is not an onerous task whatsoever. In the present case, the Respondent was under an obligation to notify the Applicant of the freezing of its account as well as any other Terms and Conditions that the Applicant was subject to. The Notification could be by making an express reference to or by incorporating existing Terms and Conditions into the signed contract document or by a general advertisement or notification to the customers generally especially of those Terms and Conditions which are made subsequent to the Contract. It is worth of repeat that the methods for communication may be various and varied as long as they achieve the intended results.”

[Emphasis added]

33. According to Section 10 of the Central Bank of Kenya Code of Conduct and Ethics, 2003:

(1) A public officer shall carry out his duties in accordance with the law.

(2) In carrying out his duties, a public officer shall not violate the rights and freedoms of any person under Part V of the Constitution.

34. Article 47 of the Constitution forms part of the Bill of Rights under Part V of the Constitution and therefore is protected under the above referenced Code of Conduct. Section 4 of the Fair Administrative Action Act, which gives effect to Article 47 of the Constitution, states as follows:

4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

35. The law is clear that where administrative action is likely to affect the legal rights of a person, the administrator should give notice of the proposed action. The actions of the respondents were administrative and they were bound by Section 10 of the Central Bank of Kenya Code of Conduct and Ethics, 2003 as the recalling of the suspected amount from the Petitioner’s accounts was an action likely to affect his constitutional rights.

36. The question is whether the respondents failed to communicate their actions to the Petitioner. The 2nd Respondent specifically averred that the Petitioner was called to the bank where he was arrested and informed of the fraudulent activities involving his bank account. This averment that the Petitioner was summoned to the bank and found a police officer waiting for him is more plausible compared to the Petitioner’s claim that he had gone to the 2nd Respondent’s branch to check on the status of his bank affairs when he was arrested. Both respondents deposed that the Petitioner was aware of the investigations. Their averment is believable considering that a police officer is expected to tell a person the reason for his or her arrest before taking them into custody. The claim by the Petitioner that he was arrested for no apparent reason is therefore found to be without merit. It therefore follows that the Petitioner has not established a violation of his right to fair administrative action as protected by Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

37. The next issue is whether the respondents’ actions violated the Petitioner’s rights under Articles 27, 29, 31, 33, 35, 40, 46 and 50 of the Constitution. The respondents in reliance on the cases of **Anarita Karimi Njeru v Attorney General [1979] eKLR; Meme v Republic [2004] eKLR;** and **Trusted Society of Human Rights Alliance v A.G. & 2 others [2012] eKLR,** submitted that the Petitioner has failed to provide proof of the violation of his rights under Articles 27, 28, 29, 31, 40 and 47 of the Constitution.

38. The Interested Party submits that the Petitioner seeks to deliberately mislead this Court by alleging that his fundamental freedoms and rights have been infringed so that the Court can grant him unlimited access to funds that were, without doubt, stolen from the Interested Party with or without his involvement. This argument is supported by the decision of the Court of Appeal in **Standard Chartered Bank of Kenya Ltd v Intercom Services Ltd & 4 others [2014] eKLR.** It is urged that none of the Petitioner’s constitutional rights and fundamental freedoms have been violated by the respondents.

39. On the alleged breach of Article 27 on the right to equality, the Petitioner submits that he has not heard or seen anyone having their bank accounts frozen without notice or having their money misappropriated without their consent. The Petitioner further submits that the respondents violated his right to equality under Article 27(1) of the Constitution as they did not carry out their responsibilities impartially by informing him, like other customers, of the intrusive measures they took.

40. The respondents' reply is that the Petitioner has not demonstrated the manner in which, if any, they subjected him to differential treatment from other customers so as to establish a breach of Article 27 of the Constitution.

41. I must concur with the respondents that the Petitioner has not demonstrated the manner in which the respondents subjected him to differential treatment. He merely states that he **"has not heard of or seen anyone having their bank accounts frozen without notice or having their money misappropriated without their consent."** This statement alone does not show that the Petitioner was discriminated against. In an action alleging discrimination, the claimant has a duty to show, through evidence, that there are persons in a similar situation to him or her who have been given different and more favourable treatment. Blanket statements like that of the Petitioner cannot aid a claim of discrimination. In other words, the Petitioner has not framed his argument with the precision required for this Court to determine the issue in his favour. In order to prove discrimination, the Petitioner would have to identify a person or persons from whom he was treated differently, and show that the differential treatment was discriminatory.

42. On the claim of violation of the right to dignity, the Petitioner submits that the act of the respondents of unilaterally freezing, seizing or withholding his bank accounts and further appropriating funds from the accounts without his consent or notice thereof restrained him from carrying out productive work. The Petitioner claims that he was prevented from transacting or dealing with his property as the funds in the bank accounts were his only source of working capital and livelihood. Reliance is placed on the decisions in **Case No. 10 of 2003: Minister of Home Affairs & 2 Others v Muriel Millie Watchenuka & 2 Others; Kituo Cha Sheria & 8 Others v Attorney General [2013] eKLR**; and **M W K & another v Attorney General & 3 Others [2017] eKLR**.

43. On this issue, I wish to rely on the Supreme Court decision of **Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR** where it was held that:

"[128] Consequently, as the lawfulness of an act under Article 47(1) of the Constitution goes to substantive justice, having found that the Board acted ultra vires its mandate, it outrightly breached Article 47(1) of the Constitution. Notably in Judicial Service Commission v Mbalu Mutava & another, (above), the Court of Appeal also noted that fair administrative justice embodies dignity.

[129] Again, it therefore follows that a breach of Article 47(1) of the Constitution, where proved, amounts to a violation of the right to human dignity. Hence, having found that Article 47(1) of the Constitution was breached, it follows that that breach also resulted in the violation of the petitioners' right to human dignity."

44. The Court went on to state that:

"[132] Drawing from comparative jurisprudence, the Constitutional Court of South Africa has placed the right to dignity at the core of a violation of other fundamental rights and freedoms in the case of Dawood v Minister of Home Affairs, [2000] (3) SA 936(CC) where it was stated:

"Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

45. From the decision above, it is apparent that the right to dignity is at the centre of all other rights and fundamental freedoms. Since this Court has determined that the respondents did not violate the Petitioner's right to fair administrative action under Article 47 or any other right for that matter, there is no basis for finding that his right to dignity was violated.

46. The Petitioner asserts that the respondents violated his right to freedom of security of the person under Article 29 of the Constitution as the freezing, seizing or withholding of his bank accounts has prevented him from transacting or dealing with his property which he uses to pay his rent, medical expenses, transport and sustenance, and this has reduced him to relying on family and friends for his continued sustenance. The Petitioner relies on the definition of torture as provided under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Prevention of Torture Act, 2017 and the case of **Koigi Wamwere v Attorney General [2015] eKLR**. He contends that he is not talking of physical torture but essentially the mental and physiological effects of the unlawful denial of the use of his money without notice or his consent.

47. I have already found that the Petitioner has not sufficiently discharged his burden of proof in establishing that the respondents froze his bank accounts. The violation of the Petitioner's right to security of the person is founded on the allegation that his accounts were frozen, and since I have found otherwise this allegation does not stand. Apart from the above finding, it is also clear that the Petitioner has not precisely stated in what manner the respondents' actions amount to mental or psychological torture.

48. On the violation of privacy under Article 31, the Petitioner avers that the bank accounts are his property, which ought not to have been searched or investigated without his express consent and therefore the search and investigation violated his right to privacy. He complains that there was no factual basis at all presented by the respondents that would have warranted the bank accounts to be investigated by anyone including the respondents. He further argues that the continued freezing and investigation of the accounts by the respondents and anyone else without a court order is a flagrant breach of his privacy right. This argument is supported by the decisions in the cases of **Manfred Walter**

Schmitt & Another v Republic & Another Criminal Revision Nos. 569 and 2336 of 2012; The Investigating Directorate: Serious Economic offences and others v Hyundai Motor Distributors (Pty) Ltd and Others In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others (CCT1/00) [2000] ZACC 12; and CORD & Others v Republic of Kenya & Others, Petition No.628 of 2014.

49. The Petitioner through supplementary submissions dated 25th January, 2021 argued that although there was need for investigations once the complaint of fraud at the Interested Party's offices was raised, the process followed by the respondents was faulty. According to him, the respondents erred by taking part in the investigation and subsequent freezing of his accounts without a warrant to investigate or freeze the said accounts.

50. In response, the respondents argue that the Petitioner has not tabled any material before the Court to support the allegation that they violated his right to privacy. Further, that the Petitioner has not placed any material demonstrating the manner in which the 1st Respondent breached this right or the persons the private facts were allegedly disclosed to. It is additionally their case that the Petitioner has not given the particulars of the private facts the respondents are alleged to have disclosed.

51. Article 31 of the Constitution states that:

Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

52. The Petitioner contends that his right to privacy was infringed by the acts of the respondents of searching and appropriating his funds, and by their calling and harassing anyone depositing money in his accounts without informing him or obtaining his consent. I must concur with the respondents that the Petitioner has not put forward proof that the 1st Respondent harassed any person or revealed the private details of the Petitioner's business. However, Article 31 is express that an infringement of the right can include searching property or seizing possessions. Property is defined under Article 260 as including money.

53. Although the right under Article 31 can be limited under Article 24, the limitation must take into account the listed factors including:

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

54. The respondents have defended their interference in the Petitioner's accounts on the ground that the recalled funds were suspected to be proceeds of fraud. Article 24 is clear that rights may be limited depending on the importance and purpose of the limitation and the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice others. The respondents claim that the right herein was limited for the sake of public interest.

55. The question as to whether a bank can lawfully debit its customer's savings account without reference to the customer and pay out all or any of the money credited into that account to a third party who claims the deposit was made by mistake or fraudulently was answered by the Court of Appeal in **Lazarus Masayi Onjallah v Kenya Commercial Bank Ltd [2004] eKLR** as follows:

“Take for example a person who robs one bank and deposits the proceeds of the robbery in his account with another bank. That robber would clearly not be entitled to the proceeds of the robbery deposited in his account and the receiving bank would be, in law, justice and fairness entitled to pay out the money to the robbed bank, secure in the knowledge that it would be able to prove, if asked, that the money so paid out from the customer's account had been the proceeds of a robbery committed against the bank to which the money had been paid back.”

56. In the case at hand, the respondents and the Interested Party contend that the money withdrawn from the Petitioner's accounts was obtained from the Interested Party through fraudulent means. They have disclosed that the person who perpetuated the fraud is before a court of law facing criminal charges. The right to property does not extend to property that is unlawfully obtained. Courts are citadels of justice and it would be improper for a Court of law to extend its protection to property whose source is questionable. I am therefore in agreement with the respondents that the Petitioner has not shown that his right to privacy was violated by the respondents.

57. The information that was shared between the three banks was limited to the money that was allegedly transmitted to the Petitioner's bank accounts by an alleged fraudster. In my view, the respondents and Interested Party are correct that the Petitioner should have at least explained the legitimacy of the funds received from Geoffrey Chamanga Mtsonga. A court of law cannot in the pretext of protecting constitutional rights aid one party in defrauding another party.

58. The Petitioner submits that his right to freedom of expression under Article 33 and the right to information under Article 35 were violated. It is the Petitioner's case that the said rights were violated because between August 2020 and September 2020 numerous phone calls and a demand letter seeking information from the respondents pertaining to unlawful access to his accounts were not responded to. Reliance is placed on the case of **Constitutional Petition No 468 of 2017: Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR**, as well as Article 19(2) of the International Covenant on Civil and Political Rights and Article 9(1) of the African Charter on Human and Peoples' Rights.

59. This Court has already determined that the Petitioner's rights under Article 47 and the Fair Administrative Action Act, 2015 were not violated. The Petitioner was informed and knew the reason for the withdrawal of the suspected funds from his accounts. He cannot therefore be heard to say that his freedom of expression and right to information were violated by the respondents.

60. On the claim of violation of the right to property under Article 40 of the Constitution, the Petitioner submits that his bank accounts are his property. It is asserted that the failure to obtain warrants to investigate the accounts and the subsequent unilateral and arbitrary freezing or withholding of the accounts thereby restricting the Petitioner's access to them violated his rights and amounts to arbitrary deprivation of property. Reliance is placed on the decision of **Abubakar Shariff Abubakar v Attorney General & another [2014] eKLR**.

61. The respondents assert that the Petitioner has failed to demonstrate that he was entitled to the fraudulent amounts thereby deserving the Court's protection of the property. They point out that under Article 40(6) the right to property does not extend to any property that is found to have been unlawfully acquired.

62. As has already been established, the Petitioner has not demonstrated that the respondents froze his bank accounts hence denying him access to his property. However, although it may be a regular practice for banks to recall funds upon receiving a recall request, the banks are still bound by the law and in particular the law on fair administrative action. In this case the respondents informed the Petitioner immediately after taking the adverse action. It is unreasonable to expect a bank to alert a customer that it is about to recall funds from his account where the customer is suspected of being involved in fraudulent activities. This kind of information can only be divulged after the action has been taken.

63. I have already stated that the right to property does not extend to illegally acquired property. The Petitioner is now in the know as to why certain amounts of money was withdrawn from his accounts. Whether or not the money taken out of the Petitioner's accounts was fraudulently obtained is a matter in the hands of the Court trying the criminal case. At the moment it cannot be determined if the money belongs to the Petitioner or not. The Petitioner did not bother to explain the business relationship he had with the Interested Party's employee who is facing criminal charges for stealing from the employer. In the circumstances I cannot at this point in time determine the alleged violation of the Petitioner's right to property. The outcome of the criminal trial may as well lead to the decision that the suspected funds were proceeds of crime which the Petitioner is not entitled to.

64. The Petitioner submits that he has demonstrated that the respondents by denying him access to his accounts without a valid court order for over two months had reduced him to relying on family and friends to sustain himself and his family hence violating Article 43(1)(c) & (e). The Petitioner further alleges that his economic and social rights under Article 43 were infringed upon by the unilateral withholding of his bank accounts especially at this time when the country is facing the Covid-19 pandemic.

65. The allegations raised by the Petitioner have not been supported by evidence as required by the Evidence Act. The Petitioner claims that he was unable to access his rights under Article 43 without the assistance of his friends and family but he has not supported the allegations through documentary evidence or witness statements. Moreover, as I have determined above, the Petitioner has not shown that his accounts were frozen and that he was prevented from accessing his money. I therefore find that the Petitioner has not established the infringement of his rights as protected by Article 43 of the Constitution.

66. On his claim that his consumer rights under Article 46 of the Constitution were violated, the Petitioner submits that his consumer rights to services of reasonable quality, to the information necessary for him to gain full benefit from services, to the protection of his health, safety, and economic interests were violated. The Petitioner further submits that the above rights were contravened by the act of the respondents withholding information necessary for him to gain full benefit from their services. Further, that as a result of the unilateral freezing of his accounts, he is unable to protect his health and economic interests.

67. As per Article 46(1)(b) of the Constitution, the Petitioner was indeed entitled, as a consumer of the services of the concerned banks, to information necessary for him to gain full benefit from their goods and services. However, the Petitioner has not specified the information he was entitled to and that he was denied the information even after asking for it. I am therefore not convinced that he has proved that the respondents violated his consumer rights.

68. The Petitioner submits that the respondents breached his right to a fair hearing under Article 50(1) of the Constitution. He submits that in view of the fact that he not involved before the decision to freeze or withhold his bank accounts was made, he was therefore not afforded an opportunity to be heard. This is buttressed by the decisions in **Mradula Suresh Kantaria v Suresh Nanalal Kantaria, Civil Appeal (Application) No. 277 of 2005** and **Republic v The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua [2010] 1 KLR 428**.

69. The right to a fair hearing under Article 50(1) of the Constitution is in respect of **"any dispute that can be resolved by the application of the law...before a court or, if appropriate, another independent and impartial tribunal or body."** There is no evidence that the respondents have violated the Petitioner's right to approach the courts or tribunals for the resolution of his issues. The respondents are not

courts or independent tribunals. I therefore do not find merit in the Petitioner's assertion that his right to a fair hearing under Article 50 of the Constitution was violated by the respondents.

70. Having found that none of the identified constitutional rights of the Petitioner were violated, it follows that he is not entitled to any of the reliefs sought. As correctly submitted by the respondents, this Court should not lend its aid to the Petitioner as his claim is founded upon what is potentially an immoral and illegal act.

71. The respondents and the Interested Party argue that the Court should not grant the orders sought or award damages as doing so would be against public policy and would set a dangerous precedent where a party may benefit from criminal activity. They state that granting such orders may hinder banks from being vigilant in the execution of their business and the protection of customer funds. There is merit in the submission by the respondents and the Interested Party that this Court should not aid a party to access funds whose source is the subject of a criminal trial. Allowing some of the prayers sought by the Petitioner may defeat the criminal trial. It is not just to ask the respondents to credit the Petitioner's accounts with the suspected funds when there is a possibility that the money may actually have been obtained fraudulently from the Interested Party with the full knowledge of the Petitioner. The outcome of the criminal trial will determine the true owner of the disputed funds.

72. In light of what I have stated above, it follows that this petition fails in its entirety and is dismissed. The parties are directed to meet their costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 22nd day of September, 2021.

W. Korir,

Judge of the High Court