



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NO. E 415 OF 2020

IN THE MATTER OF : ARTICLES 2, 22(1), 23(1), 40, 46 AND

47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;

AND

IN THE MATTER OF : THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION

AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE

INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013;

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS, ACT NO. 4 OF 2015;

-BETWEEN-

HIRUY AMANUEL.....PETITIONER

-VERSUS-

STANDARD CHARTERED BANK (KENYA) LIMITED.....RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through a petition dated 14th December, 2020, seeks the following orders:-

a. A declaration that the adverse actions taken by the Respondent in commencing the process of closure of the Petitioner's bank account held with it, including issuing a notice of intention to do so and thereafter denying him access to and use of the funds in his accounts and unjustifiably dishonouring his remittance instructions were unconstitutional and therefore null and void ab initio;

b. A declaration that the Respondent's actions of denying the Petitioner access to and use of funds in his bank accounts and further failing to honour his remittance instructions without any justifiable reasons infringes on the protection of his right to property guaranteed under Article 40 of the Constitution;

c. A declaration that the Respondent's actions of failing to honour the Petitioner's instructions on effecting of remittances without any justifiable cause is an affront to the protection of his consumer rights under Article 46 of the constitution as it jeopardizes his economic interests;

d. A declaration that the Respondent's actions of failing to give the Petitioner any reasons for issuance of the notice to close his bank accounts as well as declining to give reasons for not honouring his remittance instructions and not according him a right to be heard and make representations in that regard prior to reaching the said adverse decisions violates Article 47 of the Constitution as read together with Section 4 (2) & (3) of the Fair Administrative Action Act;

e. An order lifting the Respondent's notice of intention to close the Petitioner's account and reinstating the provision of all the banking services due to the Petitioner as a consumer of the Respondent's services;

f. General damages;

g. Costs of this petition and interests thereon and (g) above at court rates;

h. Any other reliefs that this honourable court may deem fit and just to grant.

THE PETITIONER'S CASE

2. The Petitioner herein is a consumer of the respondent's banking services having three account numbers namely 8700xxxxxxxx, 8700xxxxxxxx and 8700xxxxxxxx.

3. The Petitioner avers that on 20th November, 2020, the Respondent issued a notice to him advising him on its intention to close his account within thirty (30) days of the said notice.

4. The Petitioner avers that he unsuccessfully wrote emails and several correspondences to the Respondent seeking reasons behind the bank's drastic action of which the bank declined to respond.

5. The Petitioner proceeded to instruct his advocate who wrote to the respondent on or about the 26th November, 2020 seeking reasons for the closure of his account to which the Respondent responded vide an email dated 30th November, 2020 stating that its relationship with the respondent was contractual and as such it was well within its right to issue such notice as it deemed fit and it was therefore upon the Petitioner to begin making alternative banking arrangements.

6. The petitioner avers that he initiated several transactions of **USD 14,600 and USD 6,432.75** that were not completed as the same had been dishonoured by the Respondent on diverse dates of 2nd December, 2020 and 9th December, 2020.

7. The Petitioner avers that upon seeking reasons for the blockages of transfer of funds, the respondent cited internal reasons as the justification.

8. The Petitioner avers that since the commencement of his banking relationship with the Respondent, there have been no incidences of flagging of any irregular or suspicious transactions by either the Respondent or the central bank to warrant the Respondent's actions.

9. The Petitioner therefore avers as a result of the Respondent's actions his rights under **Articles 22, 23, 40, 46 and 47** has been infringed thereby necessitating the institution of this petition.

THE RESPONDENT'S RESPONSE

10. The Respondent vide its replying affidavit sworn by Carolyne Bii on the 12th of January, 2021, opposed the Petition.

11. The Respondent's position is that the Petitioner signed account opening forms which contained terms and conditions of the agreement between the Petitioner and the Respondent in relation to his accounts.

12. The Respondent averred that **Clause 27.1** of their agreement clearly stated that the petitioner or Respondent could end the banking agreement in any manner including through electronic banking services by giving the other party prior notice in writing.

13. The Respondent averred further that **Clause 27.6** of their terms and conditions provided that the product terms may specify additional circumstances in which the petitioner or respondent would end the banking agreement for a product.

14. The Respondent avers that in line with the agreement the Respondent gave the Petitioner a 30 days notice of the closure of the Petitioner's accounts vide the letter dated 20th November, 2020.

15. It is the respondent's position that vide a letter dated 17th December, 2020, the petitioner through his advocate instructed the Respondent to close his accounts and transfer the funds in the Petitioner's account to the account details set out in the said letter.

16. The Respondent confirms that it transferred the funds complained of by the petitioner herein to the petitioner's account on 11th January, 2021 and produced (**exhibit CB 1 on page 66**) of its documents confirming the details of the said funds transfer. The respondent therefore averred that it is not true that it denied the petitioner access to the funds in his accounts.

17. The Respondent requested the Court to dismiss the Petition, herien.

THE PETITIONER'S SUBMISSIONS

18. The Petitioner vide his submissions dated 15th March, 2021 supports his Petition.
19. The Petitioner has raised two issues for determination which can be summarized as herein below.
20. One of the issue is whether a private citizen can enforce fundamental rights and freedoms as against another private citizen, the Petitioner cited **Article 2 of the Constitution** on the supremacy of the constitution and its binding power on all state organs. He also cited **Article 22 of the constitution** which provides that any party whose fundamental rights and freedoms are threatened or violated may move the court under **Article 23 of the constitution** for an appropriate relief.
21. On this issue reliance is placed on the case of *Mike Rubia & Another VS Moses Mwangi & 2 others [2014] eKLR*.
22. The second issue is on whether the Petitioner's fundamental rights were violated by the Respondent. The Petitioner averred that the respondent breached **Article 40 of the constitution** by failing to honour his remittance instructions on the monies in his account without any justifiable reasons and as said infringed on his right to property.
23. The Petitioner further state that the violations of **Article 47 of the Constitution** were equally infringed on grounds that the respondent failed to provide reasons for termination of their agreement under **clause 27.1** as read with **clause 27.3**.
24. The Petitioner contend that despite having a good relationship with his bank, he had legitimate expectation that he would be accorded fair hearing before the aforementioned drastic actions would be taken by his bank therefore justifying the violation under **Article 47 of the constitution**.
25. The Petitioner also pleaded further on violation of his consumer rights under **Article 46 of the Constitution** which provides for consumers economic interests protection on goods offered by public or private persons.
26. The Petitioner insist that the Respondent's actions exposed him to financial distress as he was unable to meet his financial obligations to his service providers and the Respondent's drastic action to close his accounts violated his consumer rights.
27. The Petitioner prays that his Petition be allowed with costs.

THE RESPONDENT'S SUBMISSIONS

28. In response the Respondent vide its submissions dated 16th April, 2021, raises two main issues for determination.
29. On the first issue the Respondent submit that the dispute between the Respondent is not a constitutional dispute since it was agreed that the Petitioner entered into a banking agreement with terms and conditions that were accepted by the Petitioner.
30. The Respondent contend further that the dispute between the petitioner and itself over the closure of the Petitioner's account was a contractual issue governed by the terms and conditions of their banking agreement, thus the dispute would only qualify to be a commercial dispute.
31. In support of the aforesaid proposition the Respondent relied on the cases of *Kenya Breweries Limited vs Bia Tosha Limited & 5 others [2020] eKLR* and *National Bank of Kenya Limited v Pipeplastic Samkoiit (K) Ltd and another [2002] 2 EA*.
32. On the second issue, the Respondent asserts that it did not violate any of the Petitioner's right as it only acted in accordance with the terms and conditions of the banking agreement with the Petitioner.
33. The Respondent contend that it invoked Clause 11.1 of the said agreement that allowed it to close a savings account, term deposit or a current account at any time upon giving the Petitioner at least 7 days notice which it rightly did.
34. It is therefore the Respondent's position that in light of the said agreement, it was not required to provide reasons for closing the Petitioner's accounts.
35. On the issue of violation of the Petitioner's right to property, which is central to the dispute herein, the Respondent avers that vide a letter dated 17th December, 2020, the petitioner instructed the Respondent to close the accounts and send the remaining funds to the accounts set out in the letter, to which the Respondent rightly did on 11th January, 2021, to which the Petitioner herein admitted thereby invalidating the alleged infringement.
36. On infringement of consumer rights under **Article 46(1) of the Constitution**, the Respondent reiterates that it acted as per the terms and conditions permitted by its agreement with the petitioner thereby justifying no violations on its part.
37. The Respondent prays the Honourable Court to dismiss the Petition with costs.

BACKGROUND OF THE PETITION

38. The Petitioner herein was a consumer of the respondent's banking services having three account numbers namely 8700xxxxxxxx, 8700xxxxxxxx and 8700xxxxxxxx.

39. On or about, 20th November, 2020, the Respondent issued a notice to Petitioner advising on its intention to close his account within thirty (30) days of the said notice.

40. The Petitioner avers that he unsuccessfully wrote emails and several correspondences to the Respondent seeking reasons behind the bank's drastic action of which the bank declined to respond.

41. The Petitioner proceeded to instruct his advocate who wrote to the Respondent on or about the 26th November, 2020 seeking reasons for the closure of his account and the Respondent responded vide an email dated 30th November, 2020 stating that its relationship with the Respondent was contractual and as such it was well within its right to issue such notice as it deemed fit and was therefore upon the Petitioner to begin making alternative banking arrangements.

42. The Petitioner avers that he initiated several transactions of USD 14,600 and USD 6,432.75 that were not completed as the same had been dishonoured by the respondent on diverse dates of 2nd December, 2020 and 9th December, 2020.

43. The Petitioner avers that upon seeking reasons for the blockages of transfer of funds, the respondent cited internal reasons as the justification and failed to give him sufficient reasons thereby occasioning him great financial distress and disservice.

44. The Petitioner therefore postulated as a result of the Respondent's actions his rights under *Articles 22, 23, 40, 46 and 47 of the Constitution* had been infringed thereby necessitating the institution of this Petition.

ANALYSIS AND DETERMINATION

45. Having carefully considered the Petition dated **14th December, 2020**, the Respondent's Replying Affidavit dated **12th January, 2021**, the Petitioner's and Respondent's submissions I find that the following issues arise for determination:-

a. Whether the petition is properly before this court;

b. Whether the Petitioner's Constitutional rights have been violated;

A. WHETHER THE PETITION IS PROPERLY BEFORE THIS COURT

46. The issue on whether this Petition is properly before this Court is of utmost importance. The Petitioner submitted that the dispute herein is not in respect to breach of contract by the Respondent but rather a violation of his fundamental rights as a result of the Respondent's action to close his bank accounts with it.

47. The Respondent on the other hand averred that the controversy between the parties is a purely commercial dispute having arisen out of a contractual relationship exhibited through a banking agreement entered into voluntarily between the parties herein.

48. The constitutional question is therefore of a vital role in the determination of the dispute herein.

49. The jurisdiction of the High Court is well established under *Article 165 of the Constitution of Kenya* which states;

(1) There is established the High Court, which—

(a)

(b)

2)

3)..... Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;

50. Further *Article 23(1) of the Constitution* states:-

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

51. From the aforementioned Articles, it is clear, the jurisdiction of this Court has been confined to interpretation of any constitutional question as well as redress for violations of constitutional rights.

52. The Petitioner in this suit avers that his right to property under *Article 40 of the constitution* and his right to access information under *Article 35 of the Constitution* has been infringed as a result of the Respondent closing his bank accounts and failing to remit the monies in the said accounts to him upon giving the said instruction, hence denying him access to his funds while declining to give him proper explanation for their actions or omissions. This then begs the question, has the Petitioner’s constitutional rights been violated.

53. The Constitutional question is a vital question in determining whether the Petition herein is properly before this Honourable Court.

54. In the case of *CNM v WMG [2018] eKLR*, this court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

The court went on further to state;

“When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.^[17] The issues raised here will only require the Court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*^[18] in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak*^[19] notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”^[20]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.^[21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

55. Considering the Petition herein and going by the above arguments and examining the dispute herein keenly, it is my view that the nature of the dispute herein is more of a commercial dispute, rather, than a constitutional one. The dispute revolves around a contractual relationship exhibited through a banking agreement willingly entered into by the parties herein (*Annexure CB-1*) and which agreement spells out the terms and conditions of the accounts opened by the parties.

56. The aforesaid agreement further, contains various clauses that justify any actions or omissions by either party. Specifically, *Clause 27.1* of the banking agreement between the parties provides that the Petitioner or respondent could end the banking agreement in any manner including through electronic banking services by giving the other party prior notice in writing.

57. Further it is expressly provided under *Clause 27.6* of the terms and conditions that the product terms may specify additional circumstances in which the petitioner or Respondent would end the banking agreement for a product.

58. Further it is worth noting **Clause 11.1** of the said agreement allows the respondent to close a savings account, term deposit or a current account at any time upon giving the petitioner at least (7) days notice.

59. Careful consideration of all the elements of this petition appear to be anchored on an existing contract that justified the actions taken by the Respondent in closing the Petitioner's bank account.

60. Referring to the Court of Appeal case of **National Bank of Kenya Ltd vs Pipelastik Samkolit (K) Limited and Another**, it is noted that the Court of Appeal held:-

"...a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved." (Emphasis added)

61. I find that from the above case law, it is clear, parties are bound by the terms of their contract. In the present Petition herein, I do not find support in respect of the Petitioner's arguments, that the Petition herein is more concerned with violations of his fundamental rights, rather, we agree with the Respondent, that the dispute herein arises out of a possible breach of contract between the Petitioner and Respondent, with respect to the terms and conditions of banking agreement between the Petitioner and the Respondent.

62. Further, I find that if anything is to go by, the respondents acted on clauses specified on the banking contract with the Petitioner and proceeded to terminate its relationship with the Petitioner by giving him a 30 days notice as per **clauses 11 and 27** on closing his bank account and remitting the monies to the said Petitioners account as clearly advised.

63. It is my view that this Court being a Constitutional and Human Rights Division Court, it has no business to rewrite the contract between parties or enforce violations arising out of breach of the contract between the parties. The right forum would be a Commercial and Tax Division to deal with the Petitioners claim.

64. In view of the aforesaid I find it proper to invoke the doctrine of constitutional avoidance as stated by the **Supreme Court** in the case of **Communications Commission of Kenya & 5 others v Royal Media Services & 5 others**, where the court stated in part;

"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."

65. Having examined in depth the evidence adduced by the parties herein, I opine that the course this Petition should take, should be more of a Commercial or Civil route rather than a constitutional one.

66. I therefore find that the petition filed herein is not properly before this Honourable Court being a Constitutional and Human Rights Division of the High Court.

B. WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED

67. The Petitioner aver that his constitutional rights under **Article 22, 23, 40, 46 and 47 of the Constitution** have been violated by the Respondent as clearly pleaded in the Petition.

68. Under **Article 40 of the Constitution**, the Petitioner averred that his Right to property had been infringed by the Respondent's actions of denying him access to use funds in his bank account thereby occasioning him financial distress which in turn affected his businesses.

69. The Respondents on the other hand states, that it acted as per Clause 11.1 of the agreement and terminated its relationship with Petitioner. The Respondent has further adduced evidence that it acted on the Petitioner's letter dated 17th December, 2020 and proceeded to remit the monies in his accounts as directed on 11th January, 2021, (Annexure CB-1) a fact that has been admitted by the Petitioner.

70. Upon consideration of the parties pleadings, I find that there was no violation of the Petitioner's right by the Respondent.

71. I now turn to consider the violation with the regard to **Article 47 of the Constitution** on fair administrative action, and being afforded an opportunity to be heard, I would agree with the respondent that in committing the actions of closing the petitioner's bank accounts, the respondent was simply enforcing the terms and conditions of its agreement with the petitioner which provided under Clause 11.1 that;

"We may close a savings account, term deposit or current account at any time upon giving you at least seven (7) days notice. We need not give a reason for doing so. If we do so, we will pay you any credit balance in the account in the manner we determine" (Emphasis added)

72. It is further noted that under **Clause 27.1** of the banking agreement between the parties provides that the Petitioner or Respondent could end the banking agreement in any manner including through electronic banking services by giving the other party prior notice in writing.

73. I find from the evidence on record and in light of the above clauses that the Respondent gave the Petitioner a 30 days' notice of its intention to close the petitioner's bank accounts held with it. The Respondent as per aforesaid clauses was not required to give reasons for its action and was at liberty to terminate its agreement with the Petitioner as it deemed fit, therefore, I find there was no violation of **Article 47 of the Constitution** on the part of the Respondent.

74. With regards to the issue of violation of consumer rights under *Article 46 of the Constitution*, I find there was no violation on the part of the Respondent having acted in accordance with the terms and conditions of the agreement with the Petitioner and which was binding between both parties.

75. It is trite that a Constitutional Petition ought to raise very clear constitutional violations for the same to be successful. The doctrine of constitutional avoidance should be strictly adhered to. Looking at the nature of the dispute herein, I find that the Petitioner ought to have pursued a proper avenue to air out his grievances which in my view would have been either Commercial or Civil Court but not a Constitutional Court.

76. The upshot is that the Petition herein is not merited and accordingly, fails. The Petition is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF NOVEMBER, 2021

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA