



REPUBLIC OF KENYA

IN THE COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 91 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 20, 21, 22, 23, 25(C),

28, 31(C), 35, 47, 48, 50 OF THE CONSTITUTION 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER

ARTICLES 25(C), 31(C), 28, 35, 47, 48, 50 OF THE CONSTITUTION OF KENYA, 2010

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

IN THE MATTER OF HIGHER EDUCATION LOANS BOARD ACT, NO. 3 OF 1995

IN THE MATTER OF THE BANKING ACT, (CHAPTER 488 LAWS OF KENYA)

IN THE MATTER OF CREDIT REFERENCE BUREAU REGULATIONS, 2013

BETWEEN

EUNICE NGANGA.....PETITIONER

VERSUS

HIGHER EDUCATION LOANS BOARD.....1ST RESPONDENT

TRANS UNION KENYA.....2ND RESPONDENT

METROPOL CREDIT REFERENCE BUREAU LIMITED.....3RD RESPONDENT

JUDGMENT

1. The Petitioner through a Petition dated 8th March 2019 seek the following reliefs:-

a. Declarations to the effect that:

- i. The 1st Respondent was constitutionally and legally obliged to warn and/or inform the Petitioner of its intention to adversely list her name with the 2nd and 3rd Respondents;
 - ii. 1st, 2nd and 3rd Respondents are in breach of the Petitioner's constitutional rights to fair hearing under Article 50, fair administrative action under Article 47, information under Article 35 (c), privacy under Article 31(c), and dignity under Article 28;
 - iii. The 1st, 2nd and 3rd Respondents actions towards the Petitioner are a breach of the Fair Administrative Actions Act;
 - iv. The 1st Respondent is in breach of Section 3A and 14(2) of the HELB Act, Regulations 25(1) (2)(3)(7)(8), Regulation 50(5) & (6).
 - v. The 2nd and 3rd Respondents are in breach of Regulations Regulation 27(1) (h) (l) & (k), Regulation 33(4), Regulation 34(3) and Regulation 35(1), (2) & (3) of the Credit Reference Bureau Regulations 2013.
- b. An order directing the Respondents to immediately and unconditionally pay the Petitioner the sum of Kshs.45,000,000.00 being damages and/or compensation for the estimated loss (including loss of income) harm and damage arising from the infringement of the Petitioner's fundamental rights and freedoms;
- c. An order of mandamus compelling the Respondents to:
- i. immediately and unconditionally purge all adverse information in their records concerning the Petitioner;
 - ii. Jointly issue an apology in a newspaper of country-wide circulation, exonerating the Petitioner from any wrong doing and clarifying that her name was provided to the credit reference Bureaus erroneously, irregularly and unlawfully;
- d. The costs of and incidental to these proceedings;
- e. Interest on (b) above at court rates with effect from 30th January 2019 till the date of full and final settlement;
- f. Such other, further, additional, incidental and/or alternative reliefs or remedies as the Honorable Court shall deem just and expedient.

PETITIONER'S CASE

2. The Petitioner's case as per the Petition and supporting affidavit is that the 1st Respondent herein, Higher Education Loans Board, classified the Petitioner herein, as a loan defaulter, even though the Petitioner had never obtained a loan from the 1st Respondent.
3. The 1st Respondent forwarded the Petitioner's name to the 2nd and 3rd Respondents for listing the Petitioner, as a loan defaulter.
4. The 2nd and 3rd Respondents adversely listed the Petitioner's name in their records as a loan defaulter and proceeded to have Petitioner listed as a loan defaulter without first informing, or notifying or hearing the petitioner on the issue and in breach of constitutional, statutory and Regulatory requirements.
5. The Petitioner contend that the Respondents actions complained of in this Petition have adversely affected the Petitioner's personal, commercial and professional reputation.

1ST RESPONDENT'S CASE

6. The 1st Respondent filed a Replying Affidavit through Naftal Michira sworn on 23rd April 2019 and a preliminary objection dated 10th September 2019.
7. The 1st Respondent's Notice of Preliminary Objection raises two (2) grounds thus:-
 - i. That the Petitioner herein has failed to utilize the alternative statutory mechanisms under Regulation 35(5) of the Credit Reference Bureau Regulations, 2013 rendering this entire Petition incompetent and lacking in merit.
 - ii. That the 1st Respondent has at all material times complied with Regulation 25(7)(a) & (b) and 50(5) of the Banking Act (Credit Reference Bureau Regulations), 2013 and regularized the Petitioner's accounts. This suit is therefore frivolous and a complete waste of this court's time and resources.
8. The 1st Respondent admit that the Petitioner did apply for a loan from it in 1995/1996, however the said application was not successful

(see “HB1” a copy of the application form). The Petitioner vide a letter dated 28/11/1997 appealed to the 1st Respondent to reconsider her loan application (see “HB2” a copy of the letter).

9. The Petitioner’s application upon review, the 1st Respondent approved the loan application and forwarded the loan amount to Maseno University, where the Petitioner, to the 1st Respondent’s knowledge, had been admitted enabling her to pursue her university studies (see “HB3” a copy of the statement).

10. The 1st Respondent case is that Section 15 of HELB Act, requires a loanee to commence the repayment of monies advanced one year after completion of their studies. That when repayments did not commence the 1st Respondent initiated the recovery of the loan on several occasions between 1999 and 2016, when it wrote to the Petitioner demanding repayment of Kshs.8,000/= disbursed to the Petitioner’s university student fee account, the Petitioner then got in touch with the 1st Respondent indicating despite having obtained admission to Maseno University she did not attend the institution and that she did not utilize the loan.

11. The 1st Respondent upon review of her claim for non-admission at Maseno University, it informed the Petitioner vide a letter dated 15/2/2016 that it had reversed the Kshs.8,000/= sent to Maseno University and would follow up the matter with the University to recover the monies (see “HB4” a copy of the letter).

12. On 27th December 2018 the 1st Respondent aver that it encountered a system challenge which resulted in some data mix up and as a result the Petitioner was erroneously informed vide a email that she had been listed as a loan defaulter with the 2nd and 3rd Respondents. (See “HB5” a copy of the letter). On 3rd January 2019 and 9th January 2019, the 1st Respondent upon realization of the error, wrote to the Petitioner confirming that she was no longer listed and that her records with the 2nd & 3rd Respondent had accordingly been deleted (see “HB6” a copy of the letter).

13. The 1st Respondent through a letter dated 9/1/2019 again confirmed the Petitioner had never benefited from HELB loan and her records had completely been deleted from the 3rd Respondent. (See “HB7” a copy of email).

14. The 1st Respondent aver that it had complied with **Regulation 25(7) (a) & (b) and 50(5) of the Banking Act (Credit Reference Bureau Regulations) 2013**, by notifying the 2nd and 3rd Respondents that the information provided by it was inaccurate and directed them to delete the information (See “HB8” a copy of the letter).

15. The 1st Respondent urge while the error is regretted, the Banking Act (Credit Reference Bureau Regulations) 2013 provides, internal remedial measures to address such errors; and urges this Petition is a moot. It is urged that the 1st Respondent has not infringed upon any of the Petitioner’s constitutional rights as alleged or at all.

16. The 1st Respondent further denies that the Petitioner has suffered any harm, loss or damage as alleged or at all, as a result of her listing and is put to strict proof.

THE 2ND RESPONDENT’S CASE

17. The 2nd Respondent’s Counsel filed Notice of Appointment dated 23rd March 2019. The Court record do not reveal filing of any pleadings. However during the hearing the Counsel for 2nd Respondent sought to rely on submissions and list of authorities purportedly dated 22nd June 2020.

THE 3RD RESPONDENT’S CASE

18. The 3rd Respondent filed Replying Affidavit dated 6th May 2019 sworn by Pharis Kiama, its Dispute Administration officer sworn on 6th May 2019.

19. The 3rd Respondent contend that it was executing its statutory mandate when it took the steps it did and in doing so it followed the law as laid down in publishing the petitioner’s name. It avers that the alleged offending information against the Petitioner was deleted by the 3rd Respondent on the instructions of the 1st Respondent on the 9th January 2019 long before this Petition was filed.

20. The 3rd Respondent states that it is licensed under the credit Reference Bureau (hereinafter the Regulations) made pursuant to Section 31(4) of the Banking Act, by the Central Bank and under the Regulation, it is mandated to engage in inter alia; store; manage, evaluate, update and disseminate the customer information to subscribers in accordance with these Regulations.

ANALYSIS AND DETERMINATION

21. I have carefully considered the parties respective pleadings; written submissions and oral submissions and from the same the following issues arises for consideration:-

a. Whether the Petition is premature by virtue of doctrine of exhaustion?

b. Whether the Respondents breached or violated the Petitioner’s Constitutional rights?

c. Whether the 1st Respondent breached Sections 14(2) & 14(3A) of the HELB Act?

d. Whether the 1st Respondent breached Regulations 25(1) (2) (3), 27(7), 50, 50(5) and (6) of the Credit Reference Bureau Regulations, 2013?

e. Whether the 2nd and 3rd Respondents breached Regulations 27(1)(g) (h)(i) & (k), 34(3) and Regulation 35(1) (2) and (3) of the Credit Reference Bureau Regulations, 2013?

f. Whether the Petitioner is entitled to the reliefs sought?

A. WHETHER THE PETITION IS PREMATURE BY VIRTUE OF DOCTRINE OF EXHAUSTION?

22. The 3rd Respondent in its preliminary objection dated 10th September 2019 urge that the Petitioner herein has failed to utilize the alternative statutory mechanism under **Regulation 35(5) of the Credit Reference Bureau Regulation; 2013** which failure according to the 3rd Respondent renders the entire Petition incompetent and lack of merit. The 3rd Respondent therefore contend the Petition is premature.

23. The 3rd Respondent seek to rely on **Regulation 35 of the Credit Reference Bureau Regulation 2013** which states:-

“... (5) where the customer believes that the information contained in the database is inaccurate, erroneous or out-dated, the customer may notify the Bureau in writing of the information disputed. (Emphasis added).

(6) within five working days of being informed that the information in a customer’s credit report is disputed, the Bureau shall – (a) attach a note to the credit information report, warning that Kenya Subsidiary Legislation, 2014 the disputed information is under investigation, which notice shall remain on the file until resolution of the dispute; and (b) give the institution or credit information provider that supplied the information a notice of dispute requesting confirmation from the institution or credit information provider as to the accuracy of the information.

(7) The Bureau shall, within fourteen days, conduct investigation, based on the relevant information provided by the customer, and may contact any person who has furnished information.

(8) Where an institution or credit information provider receives a notice of dispute from the Bureau it shall, within fourteen days of receiving the notice, complete all necessary investigations into the disputed information and give the Bureau a notice of resolution, advising whether the disputed information is to be deleted, corrected, or remain unchanged.

(9) Where the investigation reveals an error, the Bureau shall remedy the error and inform all persons who may be affected by the information including the customer.

(10) If the Bureau does not complete its investigation within twenty one days, it shall delete the disputed information as requested by the customer.”

24. The 3rd Respondent asserts that by virtue of the above-mentioned section of the Regulation, the Banking (Credit Reference Bureau Regulation’s) 2013 provide for an alternative Dispute Resolution.

25. The 3rd Respondent contend that on 3/1/2019 the Petitioner did an email to it notifying it of her grievances and dissatisfaction with the information kept in its database.

26. The 3rd Respondent then responded to the Petitioners email on even date acknowledging receipt of the email and advising the Petitioner to lodge a formal complaint to enable it launch investigation in the dispute in accordance with the Regulations.

27. Regulation 35 requires a customer who believes the information contained in the database is inaccurate, erroneous or out-dated, to notifying the Bureau in writing of the information dispute. What is required is information notifying the Bureau in writing of the disputed information. There is no particular format. The writing can be a typed one or handwritten one or electronically send message or email. In the instant petition the 3rd Respondent admit receipt of the Petitioner’s email on 3rd January 2019 notifying it of the Petitioner’s grievances and dissatisfaction with the information kept in its database.

28. Regulation 35 of the Credit Reference Bureau Regulation 2013 required the 3rd Respondent within 5 working days of being informed of the customer’s credit report is disputed to act as provided under **Regulation 35(6)**; thus attach a note of credit report, warning of the disputed information; which notice is required to remain in file until resolution of the dispute; giving institution or credit information provider that supplied information a notice of dispute requesting confirmation from the institution or credit information provider as to the accuracy of the information.

29. The Bureau is under obligation, within 14 days, to conduct investigation, based on the relevant information provided by the customer and may contact any person who has furnished information. The institution or credit information provider is required to receive a notice of dispute from Bureau, which is under obligation within 14 days of receiving the notice, to complete all necessary investigation into the disputed information and give the Bureau a Notice of Resolution advising whether the disputed information is to be deleted, corrected or remain unchanged, where investigation reveals an error, the Bureau is bound to remedy the error and inform all persons who may be affected by the information.

30. The Regulation clearly provides that if the Bureau does not complete its investigation within 21 days, it shall delete the disputed information as requested by the customer.

31. The 3rd Respondent was bound to act on the Petitioner's email notifying it of her grievances and dissatisfaction with the information kept in its database but instead required the Petitioner to lodge the complaint in writing. This was weird and wrong as the Petitioner had lodged her complaint as required under **Regulation 35(5) of the Credit Reference Bureau Regulation 2013**. It was therefore upon the 3rd Respondent to have complied with **Regulation 35(6) (7)(8)(9) and (10) of the CRB Regulation 2013**.

32. Regulation 35 of CRB Regulations, 2013 has timelines for compliance, from the time when customer notifies the Bureau in writing of the information disputed. The Petitioner gave information on 3/1/2019. It is clear that if Bureau does not complete its investigation within 21 days, it has no option but to delete information as requested by customer. The 21 days in this regard lapsed on 25th day of January 2019. The alternative dispute Resolution in my view was frustrated by the 3rd Respondent's failure to comply with the provisions of **Regulation 35(6) of CRB Regulations, 2013** within the mandatory period of five (5) working days from when the credit information provider had been notified of the dispute as provided. In view of the aforesaid it is untenable for the 3rd Respondent to urge that as there is provision for alternative dispute Resolution, when the time for the same has since lapsed for non-compliance on their part, with clear provisions of the law the Petition is premature.

33. The 3rd Respondent contend that the Petition is premature as the Petitioner chose to bring the dispute before this Court before exhausting the alternative dispute resolution mechanism provided for by the statute. It urges further that the **Constitution of Kenya** under **Article 159(2) (c)** requires the Judiciary to promote alternative forms of dispute resolution. It therefore urges that the Court lacks jurisdiction to adjudicate over the matter in the first instance unless the Petitioner proves that she tried to resolve the matter before approaching the Court.

34. The 3rd Respondent aver that the Petitioner was given the individual Dispute Forms to fill in order to file an official complaint but she declined to do so. The 3rd Respondent contend the Petitioner ought to have followed the laid down guidelines for her dispute to be investigated according to the Regulations.

35. The Petitioner in response in her affidavit has deponed, that she sought information from the 1st Respondent submitted to 2nd and 3rd Respondents but the same was declined, despite various requests as regards the Credit information the Bureau were holding but she informed the Respondents the adverse listing was irregular, unlawful and illegal.

36. It is trite that jurisdiction of a court or tribunal is derived from the constitution; statute or by principle laid out in judicial precedent. In **Re the matter of the Interim Independent Electoral Commission (2011) eKLR Constitutional Application No. 2 of 2011**, the Supreme Court held:-

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent...”

37. The instant petition is premised on alleged infringement and/or threatening infringement of fundamental rights and freedoms. The Bill of Rights are clearly set out under **Article 19 to Article 59 of the Constitution of Kenya 2010**. The dispute resolution mechanism, where the predominant issue relates to the violation or breach of the rights or fundamental freedoms in the Bill of Rights do not oust the jurisdiction of this court to entertain this Petition as the Dispute Resolution Mechanisms cannot enforce fundamental rights and freedoms. The enforcement of fundamental rights and freedoms falls squarely within the jurisdiction of the High Court and Courts of equal status as provided under **Articles 22, 23 and 165(3) (b) of the Constitution**.

38. The Petitioner in support of the above-mentioned proposition relies on the case of **William Odhimabo Ramongi & 2 others vs. Attorney-General & 6 others (2018) eKLR**; where a five judge bench held that; alternative forums would not preclude the High Court from considering a matter in the first instance if the petition is centrally about the violation of fundamental rights of the petitioner and it is demonstrated that the claimed constitutional violations are not more “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to Court.

39. The Court while dealing with the case of **Okiya Omtatah Okoiti vs. Commissioner General, Kenya Revenue Authority & 2 others (2018) eKLR**; Hon. Justice Hon. J. Mativo; outlined the instances in which the exhaustion doctrine will not oust, the jurisdiction of the court even when alternative dispute resolution forums are set under statute. Court stated at paragraph 50, thus:-

“...The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit...”

40. Article 48 of the Constitution of Kenya 2010 is crafted in a such a manner that will ensure access to justice for all persons. This court is alive to the fact that the impediment to access to justice should not be given room to deny people their constitutional rights. In the case of **Leonard Otieno vs. Airtel Kenya Limited (2018) eKLR**, the Court held that Courts should be reluctant to deny a litigant access to the Courts unless it is proven the alternative mechanism are available, effective and sufficient. They should also in my view be able to expeditiously determine the matters before them. The Court in the above authority stated thus:-

“30. It is equally true that the need for an effective remedy in a case may justify this court to take the exceptional course of entertaining a dispute where the court is satisfied that the laid down statutory mechanism may not provide an effective

remedy to the aggrieved party or if it is clear the dispute disclosed by the facts substantially or wholly lies outside the scope of the laid down statutory mechanism. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred or will occur or there is a clear violation of the Constitution and that there is no alternative effective remedy within the statutory established mechanism.

31. Further, it is also equally true that our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute [see *The Speaker of National Assembly vs. James Njenga Karume* {1992} KLR 21] (PP 84 of the Petitioner's list of Authorities).

The Court noted further,

It is also settled that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ... a remedy is considered available only if the applicant can make use of it in the circumstances of his case. See *Dawda K. Jawara vs. Gambia, ACmHPR 147/95-149/96 – A decision of the African Commission of Human and Peoples' Rights. (PP 90 of the Petitioner's List of Authorities)*. (Emphasis added)

41. As regards the provisions of *Regulation 35(5) of the Credit Reference Bureau Regulation, 2013*, the Petitioner urges, she is aware that it provides for a disputant to notify a Credit Reference Bureau of the disputed information in writing. The Petitioner urges that that she wrote emails to the Credit Reference Bureaus and made several telephone calls but the Credit Reference Bureau refused to act on her pleas to give her records and compensate her for the damages caused.

42. The Respondents as regards the provisions under *Regulation 35(5) of the Credit Reference Bureau Regulations 2013 (CRB Regulations, 2013)* urge that it provides a comprehensive procedure and measures to be undertaken by the Credit Information Provider where there is an erroneous listing of a customer. The Respondents contend the Petitioner did not follow the procedure but instead field this Petition. The 1st Respondent referred to the case of *Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & another [2015] eKLR* where the Court of Appeal held that:

“This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of exaction of an order of the High Court issued in Judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

“[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed,”

(It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.”

43. Similarly in the case of *Kennedy Nyagundi v. Central Bank of Kenya (2013) eKLR*, the Court held that:-

“...the Regulations provide for relief to any customer who is aggrieved by wrong and erroneous information. The petitioner's grievances fall within the provisions and he is entitled to invoke the statutory procedure provided.”

44. The Petitioner on the issue of alternative dispute resolution mechanism set out under statute and regulations, the petitioner has deponed that she made several attempts to settle the unlawful claims out of court for slightly over 20 years. She deponed that after learning of the listing in December 2015, she appealed severally to the Respondents both through an email and telephone to purge her records and settle the matter out of court. That her pleas fell on deaf ears forcing her to sent notice to sue with sufficient time for response. She avers that the letter was equally ignored, leaving her with no choice but to seek redress in this Court.

45. From the above it is clear that the Petitioner complied with the procedures of *Regulation 35(5) of the CRB Regulations 2013* to have her grievances settled but the Respondents frustrated the whole process by failing to comply with clear procedure and process as set out under *Regulation 35 CRB Regulation, 2013*. The Petitioner notified the Bureau in writing of the information she was disputing as required. The Respondents blatantly refused to follow the procedure and process that is specifically prescribed for resolution of the particular dispute raised by the Petitioner. It was an obligation that required the Respondents to follow within the timelines clearly set out under *Regulation 35 CRB, Regulation, 2013* which the Respondents deliberately ignored. The Respondents failed to follow a clear procedure and process for the redress of particular grievances prescribed by an Act of Parliament, yet knowing that they contravened the provision set out in *Regulation 35 CRB, Regulations*, they seek to shift the blame to the Petitioner; who strictly followed the laid down procedure but the Respondents frustrated the process. The Petitioner was only required to initially notify the Bureau of what she believed the information contained in the database was inaccurate, erroneous or out-dated, which she did in writing through an email. The Bureau did not take positive steps as set out to enable the process to be completed. The Respondents did not do so as it did not notify the information provider within five (5) working days upon receipt of the Petitioner's complaints nor did they act as required.

46. From the aforesaid, even if the Petitioner was required first to exhaust the procedure set out under *Regulation 35 CRB, Regulation 2013*, I find that she has demonstrated that she discharged her obligation by giving notification of her dispute to the Bureau and following Bureau

failure to have the process completed, within the timelines given, the Petitioner had exhausted the process and therefore justified in filing the Constitutional Petition before this Court.

47. The Respondents have not demonstrated that the alternative dispute Resolution mechanism herein is expeditious, available, efficient, reasonable and procedurally fair. I find where alternative dispute Resolution mechanisms is shrouded with uncertainty, is not available; is not expeditious nor efficient nor reasonable and not procedurally fair, the Courts of law should be reluctant to insist that a litigant should first exhaust such alternative Disputes Resolution but allow the litigant access to the Court. Alternative Dispute Resolution Mechanisms should not be used as means of denying a litigation access of Court of justice, where it clearly demonstrated the same is used as means of frustrating the litigant, who has complied with the laid down procedure and process in exhausting dispute Resolution mechanisms.

48. For the reasons set out herein above and the Petition herein being on violation of fundamental rights of the Petitioner which are not mere “bootstraps”, I find the exhaustion doctrine will not oust the jurisdiction of Court even where dispute resolution forums are clearly set out under the statute and where the respondents uses the same to frustrate the litigants claims. I am upon considering rival submissions and facts of this Petition satisfied that the Petition is not premature as alluded to by the Respondents. The Petition is properly before this Court. The Court has jurisdiction to effectively hear and determine the issue in this Petition of breach and/or violation of constitutional rights as set out in the Petition.

B. WHETHER THE RESPONDENTS BREACHED OR VIOLATED THE PETITIONER’S CONSTITUTIONAL RIGHTS?

49. The Petitioner aver that her rights were breached and/or violated by the 3rd Respondent who published her name as a credit defaulter in its website or data base. It is Petitioner’s case that the 3rd Respondent breached **Articles 47 and 50 of the Constitution** as it failed to issue her with any notice and denied her chance to a fair hearing subsequently denying her a chance to be heard.

50. The 3rd Respondents contend that the law governing its operations is the Banking Act and its subsidiary, the Credit Reference Bureau Regulation, 2013 (hereinafter the Regulators).

51. The Regulators point out who should issue notice to the Petitioner before the name is published.

52. **Regulation 25(c) of the Regulations** provide that:-

“A credit information provider furnishing negative information to a Bureau regarding credit extended to a customer or arising from a product or service rendered to a customer shall, in writing or through electronic means, issue to the customer a notice of intention to submit the negative information within thirty days before submitting of the negative information to a Bureau or within such shorter period as the contract between the credit information provider and the customer may provide.”

53. It is clear from **Regulation 25(c) of the Regulations** the notice anticipated by the Petitioner could only be issued by the Credit Information Provider, in this case the 1st Respondent. The 3rd Respondent therefore aver that the Regulation absolve the 3rd Respondent of any omission of not issuing a notice to the Petitioner before publishing her name as a Credit defaulter in its website or database.

54. The 1st Respondent on its part refer to **Regulation 25(7)(a) & (b) and 50 (5) of the Banking Act; CRB Regulation 2013, Regulation 25(7)** which stipulates:-

“Regulation 25(7) stipulates that a credit information provider has a duty to correct any inaccurate or erroneous information when the fact of inaccurate or erroneous information comes to their knowledge or attention; and to inform the Bureaus within five days form the date of learning of the inaccurate or erroneous information.

55. Further **Regulation 50(5)** provides that:-

“Regulation 50(5) further provides that where an institution has provided customer information to the Bureau and subsequently becomes aware that the information was inaccurate at the time it was provide, the institution will within five working days from the day the institution becomes aware of the inaccuracy, give the Bureau an amendment notice instructing it to delete the inaccurate information and replace it with the correct information.”

56. The 1st Respondent contend that it acted as per the precepts of **CRB Regulation 2013** by notifying the Bureau to delete the inaccurate information pertaining to the Petitioner within five working days from the day the 1st Respondent became aware of the inaccuracy. It is 1st Respondent’s contention once it remedied the Petitioner’s grievance as required by **Regulation 25(7) and 50(5)** her claims were extinguished and no further remedy may be granted by the Court.

57. The 1st Respondent through an affidavit dated 23rd April 2019 sworn by Naftal Michira confirm that realization of the error was on 27/12/2018. That on 3rd January 2019 and 9th January 2019 they wrote to the Petitioner confirming she was no longer listed and that her record with 2nd and 3rd Respondents had accordingly been deleted. The 1st Respondent has not stated that on 27th December 2018 the Petitioner was erroneously informed vide an email that she had been listed as a loan default. The 1st Respondent has not indicated when the erroneous information, came to its knowledge nor when it informed the Bureau to carry out the correction. That even if this Court was to take 27th December 2018 as the date of Learning of the inaccurate information the 1st Respondent had upto 1st January 2019 to inform the Bureau within 5 days from the date of learning of the inaccurate or erroneous information. It is noted the 1st Respondent deliberately failed to indicate the date it purportedly complied with **Regulations 25(7) CRB, Regulation 2013 and 50(5) of the Banking Act**, because it did do so

within the specified period of five (5) days.

58. Article 25(c) of the Constitution provides the right to fair hearing as one of the non-derogable rights and therefore, it is inviolable under all conditions. *Article 25 (c) of the Constitution* provides:-

“25.Fundamental Rights and freedoms that may not be limited Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial;”

59. The Petitioner contend that she was not accorded a chance to be heard before a decision to list her as a credit defaulter was made by the 1st Respondent. The 1st Respondent has not controverted the Petitioner’s averment that she was not accorded an opportunity to be heard. I therefore find that her right under *Article 25(c) of the Constitution* was breached by the 1st Respondent and not 2nd and 3rd Respondents.

60. Under the *Banking Act and its subsidiary* legislation, the *Credit Reference Bureau Regulations 2013* do not require the 3rd Respondent to notify and/or hear a customer before listing him/her as a credit defaulter.

61. Regulation 15(1), of the Credit Reference Bureau Regulations 2013 outlines the duties of the 3rd Respondent as follows:-

a. Obtaining and receiving customer information;

b. Storing, managing, evaluating, updating and disseminating the customer information to subscribers in accordance with these Regulations; and

c. Compiling and maintaining database and generate reports from customer information database.

62. The law mandating the 3rd Respondent to carry out its duties being questioned by the Petitioner does not require that the Petitioner’s side of the story ought to have been considered before her name was published.

63. It is the 3rd Respondent’s contention that the actions taken by itself as mandated by a written law does not require the 3rd Respondent to inform the Petitioner before her name is published in its data base.

64. The Petitioner alleges that the 3rd Respondent violated her constitutional right to access information under *Article 35(2) of the Constitution* which guarantees every person the right to the correction or deletion of untrue or misleading information that affects the person. The petitioner contend the Respondents continue to infringe the Petitioner’s rights, specifically the right to information by withholding information sought by the Petitioner that was generated and sent to the 2nd and 3rd Respondents, which the Petitioner argue the 2nd and 3rd Respondents have refused to avail to the Petitioner. The Petitioner urge the 2nd and 3rd Respondents have been holding and distributing the information they received from 1st Respondent to subscribers.

65. The Petitioner further contend the 3rd Respondent denied her access to the information unless she paid for it a requirement she blatantly rejected claiming it to be unreasonable and an unlawful act by the 3rd Respondent to mint money from the public.

66. Regulation 35(3) of the Regulations provides that a customer is entitled to a free copy of his credit report from the a bureau or its agents in the following circumstances:-

a. At least once per year;

b. Within 30 days of receiving an adverse action notice under Regulation 50(iii); and

c. Once per six months after making a request to a bureau to have inaccurate information corrected.

67. The 3rd Respondent advised the Petitioner that its annexure 3 at page 13 of its Replying Affidavit on the procedure to be followed in order to access the information, including that she would be able to access her annual free credit report, which will give her credit account status. Further her advocates through a letter dated 22nd January 2019 were advised to access the current report. That in case of visiting the 3rd Respondent’s offices she was not required to pay fees on presenting an original national Identity Card.

68. Regulation 27(1)(c) of CRB Regulation equally provides that a Bureau can issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in these Regulations, upon payment of the Bureau’s fee except where the Regulation provides that no fee be charged.

69. The Access to Information Act at Section 4(3) provides that *Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.*

70. Regulation 31 of the Regulation on the other hand allows the 3rd Respondent to charge for the services it provides. It has not being demonstrated that the 3rd Respondent acted outside the Central Bank approval.

71. The Petitioner in support of her case relies on the case of *Martha Kerubo Moracha v University of Nairobi [2016] eKLR* (see pp107 of *the Petitioner's List of Authorities*), the Court held that refusal to avail to the Petitioner the information she sought was an infringement of Articles 35 and Section 4 of the Access to Information Act.

72. The Petitioner herein has not demonstrated that she was denied access to the information under the instances provided for under *Regulation 35(3) of the Regulations*. I further find that Right to Access to Information is not right that cannot be limited under *Article 24 of the Constitution*. *Article 24 of the Constitution* allows limitation on the Rights under the Bill of Rights by law as long as the limitation adheres to the parameters provided therein. I find that the limitation in this case is provided under both the *Access to Information Act* and the *Credit Reference Bureau Regulations* which the Petitioner has not demonstrated are contrary to the Constitution. I find it has not been demonstrated that the Petitioner's Right to Access to information has been infringed.

73. The Petitioner contend that the 1st Respondent has shared her information to third party (Tatua Center) without Petitioner's notice and/or consent. This the Petitioner urges clearly demonstrates that the Respondents have no respect for the basic principles of natural justice and that they do not understand the gravity of breaching the petitioner's rights.

74. It is further averred that the 2nd and 3rd Respondents have refused to purge the Petitioner's record as required under *Article 35(2) and Section 13 of the Access to Information Act*, which requires a public entity or private body to do so, within reasonable time, at its own expense, correct, update or annotate any personal information held by it relating to the applicant, which is out of date, inaccurate or incomplete.

75. The Petitioner alleges the 3rd Respondent in breach of *Article 31(c) of the Constitution* violated her right to privacy by sharing her credit Report. The 3rd Respondent in response urge that right to privacy is not absolute and can be limited by a written law as anticipated by *Article 24 of the Constitution*. It is urged that it is not one of the rights under *Article 25 of the Constitution*.

76. **Article 24(1) of the Constitution** provides:-

“24. Limitation of rights and fundamental freedoms(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant 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.”

77. The Regulations provide for the sharing of the customers' Credit Information with relevant subscribers. Sharing of the customers' information is one of the duties of the 3rd Respondent as provided by the regulation and in specific *Regulations 15(1)* which lists 3rd Respondents' duties as:

a. Obtaining and receiving customer information;

b. Storing, managing, evaluating, updating and disseminating the customer information to subscribers in accordance with these Regulations; and

c. Compiling and maintaining database and generate reports from customer information database.

78. It is clear therefore the sharing of information alleged by the Petitioner was carried out in accordance with the written law and the same has not been shown to be unreasonable and unjustifiable. The 3rd Respondent has acted within the law and has not violated the Petitioner's rights on the right to privacy as alleged.

79. In the case of *Barbra Georgina Khaemba v Cabinet Secretary National Treasury & another (2016) eKLR* the Court at paragraph 31 held:

“I observe further that the Regulations mandate Credit Reference Bureaus to ensure the protection of the confidentiality of customer information; and the release or reporting of such customer information is only to be done to the customer, Central Bank, a requesting subscriber, (who under the Regulations is defined as an institution licensed under the Banking Act and which has subscribed to receive customer information from a Bureau) and a third party as authorized by the customer concerned as required by the law.” This can be seen from Regulation 26(1) which states that:

A bureau shall protect the confidentiality of customer information received in terms of these Regulations and shall only

report or release such customer information.

- a. To the customer concerned;**
- b. To the Central Bank;**
- c. To a requesting subscriber;**
- d. To a third party as authorized by the customer concerned; or**
- e. As required by law.**

37. The foregoing provisions in my view fall squarely within the tenets of the law as stipulated under Article 24 of the Constitution and I am satisfied that the release of information as stipulated under the Banking Act and the Regulations is to be done under reasonable circumstances and within the ambits of the law. This is my view does not in any way infringe on the right to privacy.”

80. In the instant petition it has not been demonstrated that the petitioner’s information was supplied by the 3rd Respondent and that it was supplied to persons not allowed under the law and in a manner outside the provisions of the law. The Petitioner has not demonstrated that her right to privacy has therefore been infringed by 3rd Respondent.

81. The Petitioner urge under **Article 28 of the Constitution** it guarantees every person the right to dignity and the right to have that dignity respected and protected. The Petitioner contention is that the Respondents have exposed her to ridicule; stigma and opprobrium so much so that she had to change and move her banking transactions from the village market branches as she could no longer bear the shame.

82. The Petitioner urges **Article 29(d) of the Constitution** guarantees every person the right to freedom and security of the person, which includes the right not to be subjected to torture in any manner whether physical or psychological. The Petitioner contend the actions of the Respondents continue to cause the Petitioner immense distress, frustration and sleepless nights.

83. The 3rd Respondent contention is that its action did not in any way degrade or demean the dignity of the Petitioner. The 3rd Respondent’s contention is that its action were strictly done within the law and in any case, the Petitioner feels her dignity was degraded, she should then be challenging the constitutionality of the laws applicable in this case and in statute the Banking Act and the Credit Reference Bureau Regulations 2013.

84. To buttress the above proposition the 3rd Respondent referred to the case of **Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR** where the Petitioners had been named in the famous report titled as ETHICS AND ANTI-CORRUPTION COMMISSION REPORT ON THE STATUS OF CORRUPTION MATTERS UNDER INVESTIGATION TO THE PRESIDENCY this Honourable Court held that:

“The right to dignity and privacy is not violated by the public report in compliance with constitutional mandate to report on a matter under investigation, if the same is done within the parameters of the constitutional rights.”

85. The Petitioner’s Credit Report in compliance with the Banking Act and the Credit Reference Bureau Regulations in my view qualifies to be a public report as its generation, distribution and storage is governed by statute, which is required to be complied with. The Petitioner cannot therefore claim her dignity was violated by the 2nd and 3rd Respondents actions who merely published her credit report received from 1st Respondent, rightly or wrongly, in accordance with the written law. The Petitioner’s claim squarely lies with or against the 1st Respondent who forwarded inaccurate report to 2nd and 3rd Respondents. Her claim for violation of her dignity and privacy can only be against the 1st Respondent.

86. I find for Petitioner’s claim to succeed against the 2nd and 3rd Respondent she must demonstrate that the 2nd and 3rd Respondents actions were unprocedural and that they did not conform to the laws governing their duties.

87. The Petitioner urges the Respondents violated **Article 47 of the Constitution** and **Section 4 of the Fair Administrative Action Act** which provides that every person has the right to Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Section 4(3) of the Act** provides:

“Where an administrative action is likely to adversely affect the right or fundamental freedoms of any person, the administrator shall give the person affected by the decisions;

- a. Prior and adequate notice of the nature and reason for the proposed 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 administrative decision where applicable**

d. A statement of reasons pursuant Section 6

e. Notice of the right to legal representation, where applicable or

f. Notice of the right to cross examine where applicable or

g. Information, materials and evidence to be relied upon in making the decision to taking the administrative action.”
(Emphasis Added)

88. The 3rd Respondents states that **Regulation 25(1) of the Regulation** provides:-

“A credit information provider furnishing negative information to a Bureau regarding credit extended to a customer shall, in writing or through electronic means, issue to the customer a notice of intention to submit the negative information within thirty days before submitting of the negative information to a Bureau or within such shorter period as the contract between the credit information provider and the customer may provide.”

89. The Notice as per **Regulation 29** above contend only have been issued by the 1st Respondent and not the 2nd and 3rd Respondents. This absorbs the 2nd and 3rd Respondents from any claim and failing to act as provided by the Regulations. It is the duty of Credit Information provider; in this case the 1st Respondent, to have complied with **Regulation 29**. It was duty of the 1st Respondent, which furnished negative information to the Bureau regarding purported Credit extended to the Petitioner, to have any incorrect information, as no services has been provided; to have written or called the Petitioner or issued Petitioner a notice of intention to submit the negative information within 30 days before submitting of the negative information to the Bureau.

90. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014** the Court of Appeal in defining the scope of **Article 47** held that the right to administrative action in the Bill of Rights subjects fair administrative action in the Bill of Rights subjects fair administrative decisions to the principle of constitutionality rather than to the doctrine of ultra vires from which the administrative law under the common law was developed. The Court stated,

“[22] ...Article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.

[23] Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. ...The term “procedurally fair” used in Article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action.

...The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.” (Emphasis Added)

91. Further in the case of **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 [1999]**, the supreme Court of Canada set out the factors to be considered to determine the degree of procedural fairness in a given case as being:-

- 1. The nature of the decision being made and the process followed in making it;**
- 2. The nature of the statutory scheme and the term of the statute pursuant to which the body operates;**
- 3. The important of the decision to the affected person; The more important the decisions to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protection that will be mandated.**
- 4. The presence of any legitimate exceptions; ... If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness and**
- 5. The choice of procedure made by the decision-maker.”**

92. From the above it is clear that the Credit Information provider, 1st Respondent herein, before furnishing negative information to the Bureau, herein the 2nd and 3rd Respondents, was bound to give notice to the Petitioner of adverse information and give her an opportunity to be heard before listing her. The 1st Respondent in forwarding the Petitioner’s name for listing acted in breach of **Article 47 of the Constitution** and **Section 4(3) of the Fair Administrative Action Act**. The Petitioner’s right to fair hearing as enshrined under **Article 50 of the Constitution** was violated by the 1st Respondent. This further violated the Petitioner’s rights and resulted in her being denied financial facilities from Banks, who accessed that adverse information. The Petitioner had the right and legitimate expectation to be notified of the adverse Report and to be given a chance to be heard before being adversely listed as required contrary to the procedure chosen by the 1st Respondent to forward the adverse information to the Bureau to have Petitioner listed contrary to the constitution and statute and therefore illegal and unlawful.

93. Article 50 of the Constitution guarantees every accused person the right to a fair hearing which include the right to be informed of the charge with sufficient detail, evidence intended for use by the accuser, time and facilities to adduce and challenge the evidence. The Petitioner was never accorded a hearing by the 1st Respondent.

94. From the facts stated by the parties herein, it is clear that the 1st Respondent breached all the Petitioner's fundamental rights by failing to notify her of its actions. It's failure to give the Petitioner sufficient time and information to defend herself and proceeding to share the adverse information amongst the 2nd and 3rd Respondents, has breached the Petitioner's constitutional rights. This failure has resulted in her suffering financially as she has been unable to obtain financial facilities from financial institutions due to the adverse report issued by the 1st Respondent. I therefore find that Petitioner was denied fair hearing and fair Administrative Action; that is expeditious, efficient, lawful, reasonable and procedurally fair.

C. WHETHER THE 1ST RESPONDENT BREACHED SECTIONS 14(2) & 14(3A) OF THE HELB ACT?

95. Section 14(2) of the HLEB Act requires the Board to notify the customer if they (the Board) approve a loan application.

96. The Petitioner applied for loan in September 1997 expecting to report to school by November 1995. That by November 1995 the 1st Respondent had neither approved nor rejected the Petitioner's application for loan forcing the Petitioner to appeal the 1st Respondent to reconsider her loan application. That by March 1996 the Petitioner had not received any disbursement from the 1st Respondent.

97. The 1st Respondent admit that Petitioner did apply for loan from the 1st Respondent in 1995 however it states the application was not successful. The 1st Respondent has not demonstrated that it notified the Petitioner of approval or rejection of her application for loan as required under **Section 14(d) of the HELB Act**. Had the 1st Respondent done so the Petitioner would not have appealed to the 1st Respondent to reconsider her loan application.

98. In cases where loan application is rejected **Section 14(3A) of HELB Act** requires the Board to notify the customer in writing whether the application has been accepted or rejected. I find from the Replying Affidavit by Naftal Michira sworn on 23rd April 2019 that there is no averment that a rejection letter of the loan was ever sent to the Petitioner. The Board's failure to inform the Petitioner whether her loan application had been rejected or approved' I find is a clear breach of **Section 14(2) and 14(3A) of the HLEB Act**.

D. WHETHER THE 1ST RESPONDENT BREACHED REGULATIONS 25(1) (2) (3), 27(7), 50, 50(5) AND (6) OF THE CREDIT REFERENCE BUREAU REGULATIONS, 2013?

99. Regulation 25(1) of CRB Regulations requires HLEB to notify the customer in writing of intention to submit negative information to any Credit Reference Bureau. In the instance case and considering the 1st Respondent's Replying Affidavit sworn by Naftal Michire on 23rd April 2019 there is no averment to the effect that the Petitioner was ever notified of the intention to submit negative information to any credit reference Bureau, bearing in mind that the Petitioner had never been advanced any loan facility by the 1st Respondent.

100. The 1st Respondent's actions are contrary to **Regulation 25(2) of HELB Act** which requires HELB to ensure it does not furnish any information to any Credit Reference Bureau if it knows or has reasonable cause to believe that the information is inaccurate.

101. Regulation 25(3) of CRB requires HELB not to furnish information to any Bureau relating to the customer after the customer notifies the Board that the information they have is inaccurate. The Petitioner notified the Board that she did not receive any loan in 1999. The Board still went ahead to forward her name for listing by the CRBS notwithstanding notification made in 1999 that the Petitioner had never received any loan.

102. Regulation 25(7) places a duty on HELB to correct any inaccurate or erroneous information when the fact of inaccurate or erroneous information is brought to their knowledge or attention; and to inform the Bureaus within five days from the date of learning of the inaccurate or erroneous information. Since 1999, the Petitioner had severally informed the Board of the inaccuracy of the information they had been holding. The Board did not correct the information since 1999.

103. Regulation 25(8) of CRB requires HELB to notify the customer that his credit information has been forwarded to the Bureaus, within thirty days from the date the information is furnished to any Bureaus. The Board did not notify the Petitioner of such action.

104. Regulation 50 of CRB provides the procedure HELB ought to follow in notifying the customer key among them, to notify the customer, within thirty days of the first listing, that his name has been submitted to all licensed Bureaus; The Board did not notify the Petitioner.

105. Regulation 50(5) & (6) of CRB requires HELB to give to ALL Bureaus an amendment notice instructing them to delete inaccurate information within five days of becoming aware that the information it had provided to the Bureaus regarding the customer is inaccurate.

106. The 1st Respondent since 1999 was made aware of the fact that the Petitioner had not received any loan. In the affidavit of Naftal Michira sworn on 23rd April 2019 do not deny having prior knowledge of the fact that the Petitioner had not received any loan. The 1st Respondent even admit having reversed Sh.8,000/= sent to Maseno University through a letter dated 15th February 2016. It is clear that before the 1st Respondent forwarded the Petitioner's name for listing with CRB, was aware that the Petitioner had not received any loan and that she was not as such a loan defaulter. The 1st Respondent did not act diligently all through and as such it breached the clearly laid out procedures and processes in the Regulation set out herein above and continues to breach them. I therefore find and hold the 1st Respondent

breached **Regulations 25, 27, 50 of Credit Reference Bureau Regulations 2013.**

E. WHETHER THE 2ND AND 3RD RESPONDENTS BREACHED REGULATIONS 34(3) AND REGULATION 35(1) (2) AND (3) OF THE CREDIT REFERENCE BUREAU REGULATIONS, 2013?

107. The Petitioner urges that under **Regulation 27(1) (g) of CRB Regulations** requires Bureaus to accept without charge the filing of customer credit information from the customer concerned for the purpose of correcting or challenging information otherwise held by that Bureau concerning that customer.

108. The Petitioner contend that in breach of this regulation, the 2nd and 3rd Respondents required the Petitioner to “PAY and REGISTER” with them before they can consider her issues. The Petitioner contends that she should not be required to take any action, leave alone making any payments to assist the Respondents correct breaches of their constitutional and statutory obligations.

109. The Petitioner further contends that **Regulation 27(1) (h) of CRB** requires the Bureaus to take reasonable steps to verify the accuracy of the customer’s credit information reported to it. The 2nd and 3rd Respondents did not take any steps to verify information presented to it by HELB, more so, whether the Petitioner had been notified.

110. The Petitioner urge that **Regulation 27 (1) (k) of CRB** requires the Bureaus to promptly expunge from its records any information relating to the customer which is not permitted to be entered in its records or is required to be removed from its records. The 2nd and 3rd Respondents have refused to expunge the petitioner’s records to her detriment.

111. The Petitioner further asserts that **Regulation 33(4) of CRB** requires the Bureaus to implement procedures that ensure that the information registered in its database is regularly updated. It is the Petitioner’s view that the Bureaus did not and still have not updated their information even after HELB sent them confirmation that the listing of the Petitioner was wrongful, irregular and unlawful.

112. The Petitioner argue that **Regulation 34(3) of CRB** requires the Bureaus to record and make available to the customer the name and date each subscriber obtains access to customer information about the customer.

113. The Petitioner contend that the 2nd and 3rd Respondents have never informed her of access of her information by any subscriber and had they done so timely, the wrongful, irregular and unlawful listing would have been detected long ago and corrected accordingly.

114. The Petitioner further refers to **Regulation 35(1) (2) of CRB** which guarantees the customer the right to know what information the institution has submitted to the Bureau and right to access credit reports kept by the Bureaus.

115. Further its Petitioners contention that **Regulation 35(3) of CRB** entitles a customer a free copy of credit report at least once a year.

116. The Petitioner contend that in spite of what appears to be clear provisions, the petitioner sought information from 2nd and 3rd Respondents but was denied to be provided with the same.

117. The 3rd Respondent in response referred to **Regulation 27(1) (g) of CRB** which requires it to accept with charge the filing of a customer complaint. The 3rd Respondent contend that it did not charge, the Petitioner, no anyone in its instructions for lodging of a complain. As regards **Regulations 27(1)(h) of CRB** to take reasonable steps to verify accuracy of the customer’s credit information reported to it, it urges that one of the ways of ensuring this, is by ensuring that the information it uses is from reliable credible information providers. The Petitioner has not alleged or proved that the 1st Respondent is not a credible information provider. In addition the provisions of **Regulation 35(2) of CRB** also provide ways and means of such verification on complaint from a customer which complaint the petitioner refused to undertake as directed by the 3rd Respondent.

118. On response to **Regulation 27(1)(k) of CRB**, that the 3rd Respondent failed to expunge from its record. The information complained of, this allegation has not been substantiated with evidence as demonstrated by the 3rd Respondent and the 1st Respondent in their replying affidavits at paragraphs 17 and 12 of their replying affidavits respectively. The Respondents contend that the erroneous information was expunged promptly. No evidence to controvert their averments have been put forward through an affidavit rebutting there assertions.

119. On **Regulation 33(4) of CRB** it is purported that the 3rd Respondent did not regularly update its records. The 3rd Respondent has made reference to the Petitioner’s credit report under paragraph (c) and it is further submitted the claim is unsubstantiated. I find no evidence on record substantiating the Petitioner’s claim thereto.

120. Further on **Regulation 34(3) of CRB**, it is claimed that the 3rd Respondent failed to supply the Petitioner with information of which subscribers had accessed her information. The Regulation does not provide that information will be sent to a customer every time that a subscriber accesses her information but rather it will be made available to the customer. The Petitioner has not demonstrated that she requested this information and it was not availed to her. No document or evidence has been provided by the Petitioner in support of her claim. I find no basis in the same

121. The Petitioner as urged alleged breach of the Reference Bureau Regulations by the 2nd and 3rd Respondents. It is importance to note that the Petitioner has only alleged but has failed to avail credible evidence to demonstrate breach on part of the 2nd and 3rd Respondents. The 2nd and 3rd Respondents have clearly stated that they have expunged from records the listing of the Petitioner which was erroneously done arising out of incorrect information from the 1st Respondent. I find that the Petitioner’s claim on breach of Credit Reference Bureau

Regulations against 2nd and 3rd Respondents unsubstantiated and find no basis of her allegations on violation of the Regulations by the 2nd and 3rd Respondents.

F. WHETHER THE PETITIONER IS ENTITLED TO THE RELIEFS SOUGHT?

122. The Petitioner seeks numerous reliefs in this Petition. On declaratory orders the Petitioner has put forward detailed and specific constitutional rights, statutory provisions and Regulations purportedly violated by the 1st, 2nd and 3rd Respondents, which this court has considered and made specific findings in this judgment.

123. In regard to orders of mandamus, the Petitioner seeks reliance in the case of *Jesse Waweru Wahome & 42 others v Kenya Engineers Registration Board & 3 Others [2012] eKLR*, in which the learned Justice cited the South African case of Fose versus Minister of State on reliefs. In paragraphs 109, the court stated,

“Article 23(2) vests in the High Court the discretion to award relief, including the reliefs of the nature set out in the Article in order to vindicate the violation of the Bill of Rights. The High Court is granted wide latitude to frame appropriate relief according to the circumstances of each case. In Fose v Minister of safety and Security 1997 (3) SA 786 (CC) at para.19 the Constitutional Court of South Africa stated, “Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.” (Emphasis Added)

124. The Petitioner contend that it has demonstrated the express constitutional and statutory obligation of the Respondents requiring them to purge the Petitioner’s unlawful and illegal records which the Respondents have breached.

125. The 3rd Respondent urge that the Petitioner does not warrant grant of the reliefs sought as concerns the 3rd Respondents. It is urged that information on the credit report of the Petitioner is not localized to the 2nd and 3rd Respondents, as this is information, that is supplied to all Credit Reference Bureau, as provided for under *Regulation 50(6) of the Regulations* of CRB and therefore the 3rd Respondent cannot be penalized for such information. It is further contended that this information was available to any other credit reference bureau, and further the 3rd Respondent was not the information provider. I find that the information could be available from any other Credit Reference Bureau and not only from the 2nd and 3rd Respondents, which information could be accessible from any of the credit reference. I find that the 2nd and 3rd Respondents were not the information provider but 1st Respondent I therefore find it would be unfair and unjustified to penalize the 2nd and 3rd Respondents for executing their statutory mandate as provided by the law.

126. The information on the other hand on the Petitioner if supplied by the 3rd Respondent to any institution or subscriber, as allowed to by the Regulators, which binds the 3rd Respondent so to do. The 2nd and 3rd Respondents being disclosed agents, I find no liability can attach fractions allowed by statutes and in discharge of their statutory obligation. In the case of *Jamlick Gichuhi Mwangi* (supra) where a credit reference was sued alongside a bank at paragraph 200 the court held as follows:-

In this instance I am in agreement with the 2nd defendant’s submissions that the 2nd Defendant is merely an agent of the 1st Defendant for the primary function of acting as a conduit of the customer information in the possession of the 1st Defendant and transmitting the same to other banks which have subscribed to the Credit Reference Bureau. Accordingly, the 2nd Defendant being a disclosed agent no liability can attach for its act of publishing the said information to the other banks on behalf of the 1st Defendant.” (Emphasis Added).

127. On issue of compensation for breach of constitutional rights, the Petitioner has proved the resultant injury such as distress, frustration, opprobrium, psychological trauma have no monetary value. This is a matter of speculation and guess work in awarding the damages based on the facts of each case. There is no specific formulae or laid down procedure to guide the Court in arriving at what may be considered as appropriate award. The Petitioner sought reliance in the case of *Francis Mwangi Munyiri v Attorney General (2017) eKLR*, where Hon. Justice E. C. Mwita in paragraph 53, concurred with the decision in *Tinyefuze v Attorney General of Uganda [1997] UGCC3* in which the court stated that “if a Petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.”

128. Further in the case of *Peter M. Kariuki vs. Attorney General [2014] eKLR*, the Court of Appeal cited the *Supreme Court of Uganda decision in Cuossens v Attorney General, (1999) 1 EA 40*, where the court held,

“The object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury.

...where the injury in question is nonpecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.” (Emphasis Added).

129. The Petitioner further relied on the case of *C.O.M v Standard Group Limited & another [2013] eKLR*, where Court awarded KShs.1,500,000 for breach of right to privacy under Article 31.

130. The Petitioner contend that she is an IATA Travel Agent for twenty two (22) years and an Advocate of the High Court of Kenya. Her Credit standing was irredeemably dented forever by the action of the 1st Respondent operating with only one client on Credit - the average annual turnover for Petitioner's business is alleged to be about two hundred thousand dollars-USD 200,000 (Equivalent twenty million shillings – KES 20,000,000). DTB USD statements 2013 to date.

131. The Petitioner allege that she lost three (03) prospective accounts which were at the final stages of finalizing their contracts, amounting to approximate six hundred thousand dollars USD600,000 – Equivalent KES sixty million 60,000,000 in annual turnover. (pp Emails with final stages of contracts: WFP-270; EMBASSY OF COLOMBIA-271; GHANA HIGH COMMISSION)

132. The Petitioner further aver that she lost her International Air Transport Association (IATA) accreditation in 2015 because the Banks could not give her the letter of guarantee required due to her negative credit rating.

133. It is the Petitioners contention that the IATA accreditation gives a travel agent a credit period which they extend to their clients. This would have enabled the Petitioner to serve her target accounts on credit which currently give her very limited cash business. That is, the WFP, the Ghana High Commission, Botswana High Commission, Colombia and Angola Embassies. Only the Embassy of Congo-Brazaville is on credit terms.

134. The Petitioner contend that the 1st, 2nd and 3rd Respondents continue to breach petitioner's rights by arrogantly refusing to provide her with the requested information for enforcement of her rights. Additionally, the 1st Respondent gave the petitioner's details to a Third Party (Tatua Center) without the petitioner's knowledge and consent after the filing and service of this petition.

135. The 1st Respondent has apologized for a purported "system error" whereas the other Respondents have denied wrong doing.

136. The Petitioner urge to be put in the same position as she would have been had the respondents not illegally and unlawfully listed her for years, her prayer for a consolidated award of Kshs.45,000,000 inclusive of damages for prospective business, loss of expected income and breach of constitutional rights which is still continuing is conservative, reasonable and justified.

137. The 3rd Respondent in response to the prayer for compensation and damages of Kshs.45,000,000 urges the petitioner has not demonstrated her constitutional rights were infringed. That she has not demonstrated she applied for a loan with the alleged KCB; Fina Bank, Equity Bank, Chase Bank, National Bank and DTB or any other financial institution as alleged at paragraphs 47 and 16(k) of her petition and supporting affidavit respectively; and that the financial institution denied her credit on basis of an adverse credit reports from the 3rd Respondent. It is alleged she has not demonstrated the alleged business contracts she lost from potential clients and who these potential clients are or employment opportunities she lost.

138. I agree with the 3rd Respondent that the Petitioners might not have availed the list of Bank from which she applied for loan and was denied or list of financial institutions for that matter, from where she applied for loan and was denied. She has further not given a list of business contracts she lost from potential clients and who these potential clients are or employment opportunities she lost. However I am alive to the fact that an adverse report from CRB, is not a light joke and no prudent business person would go about giving loan or entering into business contract with someone who has an adverse report from CRB. No bank could attempt to engage to do business which such a character nor give loan proposal to such a character. Further no potential clients would wish to have any contract with such an individual or company.

139. This Court takes Judicial notice to the fact that whoever is ever listed by any of the CRB following an adverse information or report cannot be taken as a person worthy granting loan or doing business with otherwise CRB listing would have no meaning in the business world. It would therefore be extremely difficult for such individual to produce evidence to demonstrate that she applied for a loan with any Bank or financial institution or business or lost potential clients as no one would wish to give such an individual any chance to initiate such a process for fear of loosing finances or being conned. The person loses all respect and dignity and becomes like unwanted individual by any financial institution.

140. To the extent of my findings herein above I proceed to make the following orders:-

A. The 1st Respondent's preliminary objection to the Petition is without merit and is dismissed. The Petition is not premature and this Court has jurisdiction to hear and determine this Petition.

B. A Declaration be and is HEREBY issued that the 1st Respondent have breached the Petitioner's Constitutional Rights specifically;-

i. The 1st Respondent is in breach of the Petitioner's constitutional right to fair hearing under Article 50 and Article 25(c) of the Constitution.

ii. The 1st Respondent is in breach of the Petitioner's Constitutional Rights to Fair Administrative Action under Article 47 of the Constitution.

iii. The 1st Respondent is in breach of the Petitioner's Constitutional right to access to information under Article 35 of the Constitution.

iv. The 1st Respondent is in breach of Petitioner's Constitutional right to privacy under Article 31(c) of the

Constitution.

v. The 1st Respondent is in breach of Petitioners Constitutional right to dignity under Article 28 of the Constitution.

vi. The 1st Respondent is in breach of the Petitioner's Constitutional right to Freedom and Security of Persons including freedom from psychological torture under Article 29(d) of the Constitution.

C. Declaration be and is HEREBY issued that:

i. The 1st Respondent's actions towards the Petitioner is a breach of the Fair Administrative Actions Act and Access to Information Act No. 31 of 2016.

ii. The 1st Respondent is in breach of Section 14(3) and 14(3A) of the HELB Act.

iii. The 1st Respondent is in breach of Regulation 25(1) (2) (3) (7) (8) and 50 (5) & (6) of the Credit Reference Bureau Regulations, 2013.

iv. The 2nd and 3rd Respondents are not in breach of Regulations 27(1) (d) (h) & (k), 33(4), 34(3) and 35(1) (2) and (3) of the Credit Reference Bureau; Regulation 2013.

D. An Order directing the 1st Respondent to pay the Petitioner sum of Kshs.10 million being damages for infringement of the Petitioner's fundamental rights and freedom and for the estimated loss of business (including loss of income) arising from the said infringements as stated herein above.

E. An Order of Mandamus compelling the Respondents to immediately and unconditionally purge all adverse information in their records concerning Petitioner, and if that had been done the Respondents to furnish Petitioner with Records to that effect within Thirty (30) days from the date of this Judgment.

F. An Order be and is hereby issued to the 1st Respondent to issue an apology in a Newspaper of country wide circulation exonerating the Petitioner from any wrong doing, clarifying that her name was provided to the Credit Reference Bureau erroneously, irregularly and unlawfully.

G. Costs of the Petition awarded to the Petitioner against the 1st Respondent.

H. Interest on (D) above at Court rate with effect from the date of judgment till payment in full.

Dated, Signed and Delivered at Nairobi on this 15th day of October, 2020.

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J. A. MAKAU

JUDGE