



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 34 OF 2018

IN THE MATTER OF: DEPOSITORS OF IMPERIAL BANK LIMITED (UNDER RECEIVERSHIP)

BETWEEN

NAFISA KANJI.....1ST PETITIONER

ALNOOR KANJI.....2ND PETITIONER

THE ESTATE OF THE LATE ADBULMALIK ALIBHAI KANJI

(Suing through the Administrator

GULSHAN ABDULMALIK KANJI.....3RD PETITIONER

GULSHAN A. KANJI.....4TH PETITIONER

AAHIL ALNOOR KANJI.....5TH PETITIONER

AMYN A. KANJI.....6TH PETITIONER

LEILA A. KANJI.....7TH PETITIONER

IQBAL MANJI.....8TH PETITIONER

NOREEN MANJI.....9TH PETITIONER

SAKERKHANU MANJI.....10TH PETITIONER

TANYA MANJI.....11TH PETITIONER

-VERSUS-

CENTRAL BANK OF KENYA.....1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND RESPONDENT

RULING

1. Although the title of this matter may suggest that this is an ordinary civil matter, it is in fact a Constitutional matter where the Petitioners seek a determination whether the Respondents contravened their Constitutional rights.

2. This matter is filed by eleven Petitioners, as the title shows, whom are all adults working for gain in Nairobi. They are some of the depositors at Imperial Bank Limited (under Receivership). The 1st Respondent, Central Bank of Kenya, is established under Article 231 of the Constitution as read with Section 3 of the Central Bank Act. The 2nd Respondent, Kenya Deposit Insurance Corporation, is a statutory

body established under Section 4 of the Kenya Deposit Insurance Act.

3. The eleven Petitioners filed this Petition seeking the following reliefs:

a) A declaration that the decision by the 1st Respondent to place the Imperial Bank limited under receivership on 13th October, 2015 and appointing the 2nd Respondent as the receiver was unlawful and unreasonable, and was in violation of Article 47 of the Constitution as read together with Section 5 of the fair Administrative Action Constitution No. 4 of 2015.

b) A declaration that the decision of the 2nd Respondent made on the 13th October, 2015 suspending the banking business of the Imperial Bank vide the Gazette notice No. 7717, Vol. CXVIII is a violation of the Petitioners' right to fair administrative action under Article 47 of the Constitution as read together with Section 5 of the fair administrative action Constitution No. 4 of 2015.

c) A declaration that the 1st and 2nd Respondents have infringed the Petitioners' right to consumer protection under Article 46 of the Constitution;

d) A declaration that the actions of the 1st and 2nd Respondents of putting the bank under receivership and suspending its banking business is in violation of the Petitioners' right to property guaranteed under Article 40 of the Constitution.

e) An order for restitution of the Petitioners' full deposits at Imperial Bank limited as at 13th October, 2015 being:

i. 1st and 2nd Petitioners Kshs. 30,450,709.00

ii. 3rd and 4th Petitioners Kshs. 9,126,588.64

iii. 5th Petitioner Kshs. 15,874,684.36

iv. 6th and 7th Petitioners Kshs. 36,616,531.18

v. 8th, 9th, 10th & 11th Petitioners Kshs. 11,109,702.41

f) Interest on the sums set out in (f) hereinabove at rate of 7% being 70% of the current Central Bank Base

g) Rate, from 13th October, 2015 until payment in full.

h) General damages.

i) Costs of this Petition.

4. The Petitioners filed a Notice of Motion dated 23rd January 2018 seeking that they be granted leave to institute the Petition in a representative capacity on their own half and on behalf of depositors of Imperial Bank Limited (under receivership) (hereinafter the Bank); and that a notice of the suit be published in at least one daily newspaper with the widest circulation in Kenya to all persons on whose behalf or whose benefit the Petition is filed.

5. The affidavit in support of that application is sworn by Daniel Musyoka the Advocate having the conduct of this matter on behalf of the Petitioners.

6. He deponed that the Petitioners are a fraction of the depositors of the bank, which bank was placed under receivership on 13th October 2015. That the bank had several branches within Kenya.

7. It is because of the existence of many other depositors, that were affected by placing the bank under receivership, it is deponed that it would be in the interest of justice and would save judicial time for the Court to grant leave as sought.

8. The application was opposed by the two Respondents.

9. The main opposition raised by the Respondents is that because the bank had specific and unique commercial contracts with each depositor the Petitioners, herein, cannot act on behalf of those other depositors. Also that to seek to join the numerous depositors of the bank would make litigation impossible and there fore that this action should continue to be private and not public representative suit.

DISCUSSION AND DETERMINATION

10. The Petitioners seek determination of whether their rights under Articles 40, 46 and 47 of the Constitution were violated by the Respondents. They therefore seek to invoke Article 22 of the Constitution which gives every person right to institute Court proceedings claiming a right or fundamental freedom in the bill of rights has been denied, violated or infringed. The Petitioners further invoke Article 22 (2)(b) which provide that such action may be instituted by:

“(b) a person acting as a member of, or in the interest of, a group or class of persons;”

11. I have considered the opposition raised by the Respondents, in respect to Article 22 of the Constitution, and find the said opposition to have no merit. The Petitioners allege infringement and/or violation of their fundamental rights to protection of property (Article 40); to protection of consumer rights (Article 46); and to protection of fair administration action (Article 47). Because those are the reliefs they seek, they can, as provided under Article 22(2) (b) institute this Petition acting as a member of, or in interest of, a group or class of persons, that is other depositors of the bank. This would serve to ensure the Court deals with one issue affecting many persons in one action. Such an action, which can also be said to be class action was discussed in the South African case **TRUSTEES FOR THE TIME BEING OF CHILDREN’S RESOURCE CENTRE TRUST AND OTHERS V PIONEER FOOD (PTY) LTD AND OTHERS (050/2012) [2012] ZASCA 182** as follows:

“The class action serves to bring a number of separate claims together in one proceeding. In other words, it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out, is the fact that the class action is ‘a representational device’. It is:

“...a procedural device that expands a Court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.

Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a Court to treat a named party as standing in judgment on behalf of them. This is a mistake... class member neither start out as parties nor become parties when a class is certified.”

12. I am persuaded by the above holding.

13. I am concerned by the opposition raised by 2nd Respondent that since this matter will be heard in the Commercial & Tax Division of the High Court, and not the Constitutional Division of the High Court, it is a civil matter and not a Constitutional matter. I am concerned with that submission because it implies that the Commercial & Tax Division Judges cannot deal with Constitutional matters. If I may attempt to allay the 2nd Respondents concern, I shall refer to Article 165 (3) (b) of the Constitution. Under that Article jurisdiction of the High Court includes to hear any question whether a right or fundamental freedom in the bill of rights has been violated or infringed. The Commercial & Tax Division is a division of the High Court and therefore has the powers which are exercisable by the Constitutional Division of the high Court.

14. I have perused the reliefs sought by the Petitioners and it is clear that they can only act in representative capacity in respect to the declarations sought at paragraph E (a) to (d). They cannot act in representative capacity in the prayer of restitution because each depositor will undoubtedly have to prove, individually, their claim for deposits held by the bank. The prayers therefore sought by the Petitioner will be restricted as stated above.

15. In the end, I grant the following orders:

i. The Petitioners are hereby granted leave to institute/proceed with this Petition in a representative capacity on their own behalf and on behalf of depositors of Imperial Bank limited (under receivership) only in respect to relief E (a) to (d) of the Petition.

ii. A notice of this Petition shall be published in at least two daily newspapers with the widest circulation in Kenya to all persons on whose behalf or whose benefit the Petition is filed to be made party to the Petition.

iii. The costs of the Notice of Motion dated 23rd January 2018 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PETITIONERS

..... FOR THE 1ST RESPONDENT

..... FOR THE 2ND RESPONDENT