



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 383 OF 2015

**IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF: RULES 11, 12 AND 13 OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION & PROTECTION OF THE FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL.) HIGH COURT PRACTICE AND PROCEDURE RULES,
2006**

AND

**IN THE MATTER OF: CONTRAVENTION and or ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 46 and 47 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF: SECTION 19(2) OF THE CREDIT REFERENCE BUREAU
REGULATIONS 2013**

BETWEEN

ANN WANJIRU MURIITHI.....PETITIONER

VERSUS

JAMII BORA BANKRESPONDENT

JUDGEMENT

In a petition dated 11th September, 2015 and filed in Court on the same day,

Anne Wanjiru Muriithi, the petitioner, sought the following reliefs:

- 1. A declaration that the actions of the respondent in placing and listing wrongful and incorrect information relating to the petitioner to the Credit Reference Bureau was malicious, unreasonable, unwarranted and infringement of the petitioner's Consumer Rights as well as her Rights to the fair administrative action.***

2. An injunction restraining the respondent from further relying, causing to be published providing or in any other manner placing wrongful and incorrect information relating to the petitioner to any Credit Reference Bureau.

3. An order that the respondent is liable to pay the petitioner general damages for contravention of the fundamental Rights and for the loss of business opportunities during the period the wrongful information was so listed and the court be pleased to assess the same.

The petitioner is supported by an affidavit of the petitioner sworn on 15th September, 2015 to which was attached annexures in support of the petitioner's case. Brief facts of the petition are as follows;

The petitioner was a customer to the respondent, a banking institution. She applied for and was granted a loan facility of Kshs. 500,000/= in 2013, payable in two years. The loan was cleared in March, 2015. In August 2015, the petitioner applied for a loan from **Barclays Bank of Kenya Limited** which was approved subject to a positive report from the **Credit Reference Bureau (CRB)**. However, a report from **Credit Reference Bureau Africa Ltd** showed that the petitioner had taken two loans of Kshs. 500,000/= and Kshs. 104,173/= respectively, which the petitioner says was untrue. Although the report showed that she had cleared the loan of Kshs. 500,000/= it indicated that she had been in arrears for **301 days** which again the petitioner says was untrue. The petitioner sought to have the respondent correct the erroneous information, and although the respondent is said to have acknowledged that the loan had been repaid, it never requested the **Credit Reference Bureau Limited** to remove the erroneous information from its records. The petitioner now says that she has not been able to access a loan facility due to that erroneous report, thus her Consumer Rights as well as Fundamental Rights have been violated.

The respondent filed a replying affidavit through **Velma Okoth**, sworn on 29th September, 2015. The respondent admitted that the petitioner had obtained a Loan of Kshs. 500,000/= and that it requested the Credit Reference Bureau to list the petitioner as a defaulter from 27th March 2014 by which date the petitioner was still in arrears of Kshs. 5,671/=. The respondent however denied ill motive in asking for listing of the petitioner because as a matter of fact, the petitioner was in default. It also denied causing listing of the petitioner with the **Credit Reference Bureau** for 301 days, or for two loans. The respondent further stated that it gave the petitioner a letter showing that she had cleared the loan, a fact that shows there was no malice on its part.

Parties filed written submissions which they highlighted. For the petitioner, it was submitted that the information to the **Credit Reference Bureau** was incorrect, that the Consumer Report for 15th January, 2016 which contains information to the effect that the petitioner was in arrears of **504 days**, although she was actually in arrears for **82 days** was also incorrect, and that the statement contains a mysterious entry for which the respondent should be held responsible.

It was further submitted that the respondent did not act in accordance with **Regulation 25 of the Credit Reference Bureau Regulations, 2013** by failing to issue to the petitioner notice of intention to submit her name for default. It was also submitted that the respondent failed to furnish an update to the **Credit Reference Bureau** on the petitioner's current status as required by **Regulation 33(5)**. In the petitioner's view, **Articles 35, 46 (a) (b) and 47** of the constitution were violated. The petitioner relied on the decision in the case of **Isabel Waithira Njoroge Vs Permanent Secretary Ministry of States for Provincial Administration and Internal Security and 4 others (2014)** to fortify their submissions.

For the respondent, it was submitted that the petitioner did not show that she was denied a loan because of her listing with the **Credit Reference Bureau**, that she did not show that she suffer loss, and that this is a commercial dispute which ought to have been filed in the appropriate Division. It was further submitted, that the information by **Credit Reference Bureau** through **Metropol Credit Reference Bureau Limited** dated 24th May, 2016 shows that the petitioner was no longer a defaulter, and for that reason she did not prove her case. The respondent relied on the case of **Amos Gikonyo Turunga Vs Annania Maingi-Nyeri Civil Appeal No.6 of 2013**, for the proposition that damages for loss of business must be pleaded and proved. The respondent also cited **Thornton Vs Tauifaxinc. 6198 2nd 700 p2** where it was held that

if actions are based on information disclosed pursuant to requirements of a statute, a Consumer may not bring an action unless the relevant information is false. The respondent urged that the petition be dismissed with costs.

I have read the petition, the response thereto, submissions by counsel for both parties, and considered the authorities cited. This petition is founded on **Articles 23, 46, and 47** of the constitution. **Article 23** gives the court jurisdiction to grant remedies in cases where there is infringement and or violation of fundamental rights. On the other hand, **Article 46** relates to consumer rights. It provides;

“1) Consumers have the right;

a) To goods and services of reasonable quality,

b) To the information necessary for them to gain full benefit from goods and services;

c) To the protection of their health, safety and economic interests,

d) To compensation for loss or injury arising from defects in goods or services.

2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising

3) This Article applies to goods and services offered by public entities or private persons.

The petitioner basing her case on this Article, has argued that the listing of information about her with the **Credit Reference Bureau**, which was false, has violated her consumer rights because she is unable to get credit facilities with another financial institution. She has given **Barclays Bank of Kenya Limited** as an example where she was unable to secure a facility due to that listing.

The issues raised in this petition are whether the petitioner’s fundamental rights were violated and whether the court should grant the orders sought. The petitioner’s complaint as I understand it is that her name was erroneously listed with the **Credit Reference Bureau**, and that the said information was false and misleading. The petitioner therefore states that her fundamental rights as well as consumer rights were violated by this act. She has relied on **Article 46 (1)** of the constitution to press her case.

The listing of the petitioner with **Credit Reference Bureau** is sanctioned by the **Banking (Credit Reference Bureau) regulations 2013**. These regulations were promulgated pursuant to the **Banking Act, Cap 458**, Laws of Kenya. The listing is therefore a legal requirement. **Regulation 18** states the kind of information to be exchanged between an institution and the credit Reference Bureau. The information includes non performing loans and **any other negative information**. **Regulation 35 (1)** provides that a customer has a right to know what information the institution has submitted to the Credit Reference Bureau regarding him/her, and under **regulation 35 (2)** a customer is entitled to access credit reports kept by the bureau. Under **regulation 35 (3)**, a customer is entitled to a free copy of his credit report from a Bureau or its agents periodically. **Regulation 35** is central to the customer’s right to access information kept by the Bureau and **sub-regulation (5)** thereof provides that **where the customer believes the information contained in the database is inaccurate, erroneous or out of date, the customer may notify the Bureau in writing of the information disputed**. Once notified, the Bureau is required to take steps to rectify that error after conducting investigations and may contact any person who has provided that information. In this regard therefore, **regulation 35** provides internal mechanisms for dealing with inaccurate or disputed information and resolving the same.

It is therefore clear that **regulation 35** places an obligation on the **Credit Reference Bureau** to deal with issues like that raised by the petitioner with the institution that provided that information. Once information on non-performing loans has been passed on to the Credit Reference, **regulation 35** allows the Bureau to keep that information for up to 5 years.

On the other hand, **regulation 25** requires that before a negative information is passed on to the Bureau, the customer should be given notice. The institution is not supposed to give information that it has reason to believe to be inaccurate. And where a customer raises issues regarding the information, the institution is required to address that issue and only give the information after it has addressed the customer's concerns or if it believes the information is accurate.

The petitioner complained that she was not given notice that negative information was to be given out about her non performing loan and has cited regulation 25 to buttress her arguments. The respondent on the other hand has argued that information .was true because at the time the petitioner was in default. The petitioner admits that she was indeed in default and that she had been in default for **82 days** but not **301 days**. The respondent on his part says that they did not give information on 301 days but on **82 days**. The respondent further says that they later issued a letter to the petitioner to confirm that she was no longer in default after the petitioner regularized her position and blamed the petitioner for not taking advantage of **regulation 35 (5)** to have the information rectified.

With all this push and pull, the question is whether the petitioner's constitutional rights violated. Whereas the constitution (**Article 22**) allows anybody to come to court and seek orders on violation of rights and fundamental freedoms, it is important that fundamental rights and normal disputes be distinguished. The petitioner and the respondent were in a commercial relationship as customer and client. There was a default leading to giving of the information complained of. The **Banking CRB regulations, 2013** give Credit Reference Bureau mandate to resolve any emerging disputes. Breach or violation of these regulations as is alleged to have happened in this case, in my view, cannot amount to violation of fundamental rights.

The petitioner conceded that she had been in default for 82 days. To the extent therefore that she was in default albeit for some days, information on her default given to **Credit Reference Bureau** was not false and in dispute. What is in dispute however is the number of days she was in default. This is a dispute that could be resolved through **regulation 35 (5)**. The respondent issued a letter to the petitioner confirming that she was no longer in default. This is information that the petitioner should have used to her advantage as required by the regulations rather than file a constitutional petition. I do not see how **Articles 35, 46 (1), and 47** were violated.

Article 35 is on the right to information. This right is provided for in the regulations. The petitioner did not utilize these regulations and therefore cannot at this stage seek to rely on **Article 35** of the constitution. **Article 46(1) of the constitution is on consumer rights**. I do not see how the petitioner's consumer rights were violated in the circumstances of this case. The petitioner took a loan which she repaid despite some challenges. She is not complaining that she was not given specific information which she may have needed at the time she was taking the loan. Reliance on this provision of the constitution is not helpful.

The petitioner has also cited **Article 47** of the constitution saying that her right to fair administrative action was violated. **Article 47(1)** provides;

“1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

The right to fair administrative action is a constitutional right. It is now enshrined in the constitution. Any person who contemplates to take an administrative action that may affect or infringe fundamental rights or freedoms of the affected party, must comply with constitutional requirements of promptness, reasonableness and procedural fairness. In the case of **Judicial service Commission v Mbalu Mutava & Mother [2015] eKLR, the court stated-**

“Article 47 marks an important and transformative development of administrative justice for it

not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of rights... 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 common law was developed “

In the case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT 16/98)2000(1) SAI**, it was stated;-

“The right to a just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with constitutional standards of administrative justice...” (emphasis)

We now have the Fair Administrative Act, whose section 4(3) 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 decision-

- 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 or taking the administrative action.”*

Even when applying this act, section 9 is clear that one cannot come to court until internal dispute resolution mechanisms have been exhausted. The petitioner could have taken advantage of the regulations to resolve the dispute which she did not do. She has not shown that the mechanism was not adequate in order to come to court by way of this constitutional petition.

I must also point out the principles established in the case of **Amarita Karim Njeru v republic [1976-80] 1KLR 1283** and emphasized in **Trusted Alliance Society of Human Rights v Attorney General and others [2015] eKLR** on the manner of pleading in constitutional petitions. A party is required to plead with precision the rights alleged to have been violated the manner of the alleged infringement the constitutional provisions alleged to have been violated and the jurisdictional basis for it. I am not satisfied that the petition herein meets the constitutional threshold set in those decisions.

An issue similar to that of the petitioner was dealt with by **Mumbi Ngugi J** in the case of **Ann Njoki Kinyanjui v Barclays Bank Ltd [2015] eKLR** where the petitioner had been charged what she considered were illegal charges. She petitioned for declarations that her fundamental rights under **Article 46 (1) and 35** had been violated and infringed. The learned Judge dismissed the petition holding that the petition did not raise constitutional issues.

That is the position I find in the petition before me. The petitioner's claim is more of a commercial dispute than a claim for violation and infringement of fundamental rights and freedoms. The petitioner has a right to pursue her claim in a normal civil suit if she feels aggrieved by the respondent's actions. I say so because many of the issues raised by the petitioner have to do with some alleged entries in her bank statement than constitutional rights violation.

Ultimately and for the reasons stated above I find that the petitioner's petition dated 11th October, 2015 lacks merit and is hereby dismissed. Each party to bear their own costs.

Dated and Delivered at Nairobi this 14th Day of March 2017

E C MWITA

JUDGE