



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
PETITION NO.1217 OF 2007

BETWEEN

KIRAGU HOLDINGS LTD.....1ST PETITIONER
MUMBU HOLDINGS LTD.....2ND PETITIONER
KBKANNE INVESTMENTS LTD.....3RD PETITIONER
TAGAKA HOLDINGS LTD.....4TH PETITIONER
P.J KIRAGU MWANGI.....5TH PETITIONER
J.K MBUU.....6TH PETITIONER
MARY WAITHERERA GACHUI.....7TH PETITIONER

AND

THE HON. MINISTER FOR FINANCE.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT
THE CENTRAL BANK OF KENYA.....3RD RESPONDENT
THE CONSOLIDATED BANK OF KENYA LTD.....4TH RESPONDENT
THE PERMANENT SECRETARY TO THE TREASURY.....5TH RESPONDENT
PRIVATIZATION COMMISSION.....6TH RESPONDENT

RULING

Background

1. The Petitioners herein filed the instant Petition alleging violations of the Constitution and various laws pertaining to the takeover of **Nationwide Finance Company Ltd. (NFC)** together with eight other banks

and financial institutions by the Government of Kenya in or about January, 1990. In their Petition, they contend that the said process was marred by various irregularities and violations of the law.

2. This Ruling relates to a Preliminary Objection and Application filed before this Court on varying dates relating to the said Petition. The first is a Notice of Preliminary Objection dated 10th June, 2011 filed by the 4th Respondent, Consolidated Bank of Kenya Ltd. It raised the said Preliminary Objection to the effect that the present Petition is incompetent, bad in law and should be struck out on the following grounds:

(a) That there are no constitutional matters raised in the Re-Amended Petition dated 7th December, 2009 capable of sustaining a constitutional Application.

(b) Without prejudice to (1) above, even if there were constitutional issues raised in the Petition, such rights cannot be enforced as against the 4th Respondent.

(c) The Petitioners are guilty of laches and the Constitutional Court should dismiss the Petition with costs.

3. The Application on the other hand, was filed by the Petitioners on 3rd June, 2011. In the said Chamber Summons Application dated 2nd June, 2011 they pray for the following Orders:

1. ...

2. ...

3. **That the Honourable Court be pleased to order the 1st, 2nd, and 3rd Respondents whether jointly and/or severally to furnish the Petitioners with certified true copies of the following information and/or documents;**

i. **Copies of Minutes of a meeting of the Special Investments Committee held on 10th January, 1990.**

ii. **Agreement between Union East African Trust Ltd and Nationwide Finance Co. Ltd.**

iii. **The letter of the Permanent Secretary, Ministry of Lands Ref 8581/1 dated 4th October, 1991 addressed to the National Social Security Fund (NSSF).**

iv. **Letter from the Office of the President Ref. OP.9/161A/(39) dated 27th October, 1989 addressed to the Permanent Secretary Ministry of Lands.**

v. **List of parastatal deposits held by Nationwide Finance Company Ltd on 10th January, 1990 when its assets and business were taken over by the Government.**

4. **That the Honourable Court be pleased to order the Consolidated Bank of Kenya Ltd and/or Messrs Kaplan and Stratton Advocates to furnish the Petitioners with the following information and/or certified copies of the following documents:**

i. **The Memorandum of Understanding dated 30th January, 1990 between shareholders of NFC and Consolidated Bank.**

ii. **The Agreement for Sale of Shares of February/March, 1990 in NFCL between the shareholders of NFCL and Consolidated Bank of Kenya Ltd.**

iii. **The Memorandum of Understanding dated 30th January, 1991 between the shareholders of NFCL and Consolidated Bank of Kenya Ltd.**

iv. **The Agreement for sale of shares in NFCL between NFCL and the Consolidated Bank of Kenya Ltd.**

5. **That the Honourable Court be pleased to order the Consolidated Bank of Kenya Ltd- the 1st and 4th Respondent herein- to furnish the Petitioners with the following information and testimonials in proof thereof:-**

- i. *Total rent paid by tenants of Consolidated Bank House (formerly known known as Nationwide House including rent payable by Consolidated Bank of Kenya Ltd for the space it occupies) since the take-over of the assets of Nationwide Finance Company Ltd by the Government of Kenya on 10th January, 1990.*
 - ii. *Latest professional valuation of the Consolidated Bank House (formerly known as Nationwide House) at least as of 31st May, 2011.*
 - iii. *Certified true copies of the Annual Audited Accounts and Balance Sheets of Nationwide Finance Company Ltd between January 30, 1990 and 2nd August, 2002.*
 - iv. *Certified true copies of the Annual Audited Accounts and Balance Sheets of Consolidated Bank of Kenya Ltd from 10th January, 1990 up to 31st May, 2011.*
 - v. *List of parastatal deposits held by National Finance Company Ltd as at 30th January, 1990.*
 - vi. *Certified copies of documents to show the bank balances of Nationwide Finance Company Ltd as at 30th January, 1990.*
6. *That the Honourable Court be pleased to order the Privatization Commission- the 6th Respondent herein- to furnish the Petitioners with details on when and for how much the following entities acquired shares allegedly held by them in Consolidated Bank of Kenya Ltd as of 22nd January, 2010.*

Name of Shareholder	Ordinary Shareholding		Preference Shareholding	
	Value (000)	%	Value (000)	%
Deposit Protection Fund	200,000	50.2	Nil	
National Social Security Fund	44,500	11.2	161, 000	22.3
Kenya National Assurance Corporation	38,600	9.7	139, 600	19.4
Kenya Pipeline Company	14,400	3.6	52,630	7.3
Kenya National Examination Council	13,900	3.5	50,400	7.0
Public Trustees	13,200	3.3	48,400	6.7
Kenya Posts and Telecommunication Corporation	12,400	3.1	44,700	6.2
National Hospital Insurance Fund	11,800	3.0	42,400	5.9
Kenya Ports Authority	6,300	1.6	22,800	3.2
Tana and Athi River Development Authority	5,300	1.3	19,200	2.7
Industrial Development Bank	4,500	1.1	16,300	2.3
KP and TC Pension Fund	3,100	0.8	11,300	1.6

Co-operative Bank of Kenya	2,700	0.7	11,600	1.6
Kenya Industrial Estates	2,400	0.6	8,800	1.2
Kenya Reinsurance Corporation	2,400	0.6	8,600	1.2
Directorate of Industrial Training	1,800	0.5	6,600	0.9
Coast Province Water Branch	1,700	0.4	6,200	0.9
Mombasa Pipeline Board	1,400	0.4	5,000	0.7
National Housing Corporation	1,100	0.3	4,100	0.6
Mombasa Polytechnic	1,100	0.3	3,900	0.5
Kenya Power and Lightning Corporation	900	0.2	3,400	0.5
Catering Levy Trustees	700	0.2	2,400	0.3
Kenya Freight Consolidators	700	0.2	2,400	0.3
Kenya Local Government Officers	9,660	2.4	35,120	4.9
Superannuation Fund				
Local Authority Pension Fund Board	2,540	0.6	9,180	1.3
Local Government Loans Funds	1,300	0.3	4,800	0.7
Total	398, 400	100	721,130	100

7. That the Honourable Court be pleased to order the Central Bank of Kenya and Consolidated Bank of Kenya Ltd- the 3rd and 4th Respondents herein- to furnish the Petitioners with the following information and testimonials:-

- i. A list of the debtors and creditors of the Nationwide Finance Company Ltd (NFCL) as of 10th January, 1990.**
- ii. Details of the debtors of NFCL categorized as bad debts or loans as of 10th January, 1990.**
- iii. The total amount of debts recovered by the 4th Respondent between 10th January, 1990 and 2nd August, 2002 when Legal Notice No. 136 was published in the Kenya Gazette containing a vesting order by the 1st Respondent by which all the undertakings of the institutions specified in the schedule thereto including those of Nationwide Finance Company Ltd (NFCL) were vested in the 4th Respondent.**
- iv. The total amount of the bad debts on loans of the Nationwide Finance Company Ltd (NFCL) recovered by the 4th Respondent as of Friday April 17, 2009 when the 6th Respondent published a public notice in the Daily Nation of April, 17, 2009 inviting the expression of interest for**

transaction advisory services for Privatization Programme in respect of specified companies/investments including the Consolidated Bank.

8. *That the Court be pleased to give any directions and further orders necessary to secure the Petitioners' right of access to information secured by Article 35 of the Constitution of Kenya, 2010.*

9. *That the costs of this Application be borne by the Respondents herein.*

4. The above orders were sought based on the grounds that:-

- a. *The information and/or documents sought by the Petitioners are required for the effective protection of the Petitioners' fundamental rights and freedoms under Articles 27, 28, 40, 47 and 50 of the Constitution.*
- b. *The information and/or documents sought by the Petitioners are necessary to enable them to effectively and meaningfully enforce their rights and fundamental freedoms that have been and continue to be breached by the Respondents whether jointly and/or severally.*
- c. *In their respective affidavits the 1st, 2nd, 3rd, 4th and 6th Respondents have not discharged their duty of candour and they have intentionally concealed or suppressed information held by them that is critical for the just and conclusive determination of the Petition herein.*
- d. *The Petitioners have unsuccessfully sought the information and/or documents requested from the Respondents.*
- e. *The Respondents are enjoined under Articles 3 (1), 20 (1) and 35 of the Constitution to provide the information and furnish certified copies of the documents sought by the Petitioners in order to uphold the Constitution and the Bill of Rights.*
- f. *The information and documents sought by the Petitioners will enable this Honourable Court to justly determine this matter on the basis of all available facts and information.*

5. I shall first start by determining the Preliminary Objection by the 4th Respondent and then I shall finalise by determining the Application by the Petitioners.

The Preliminary Objection

6. The 4th Respondent through its Written Submissions dated 21st May, 2008, submitted that the Petitioners are using the constitutional Petition as a general substitute for the normal redress that is encapsulated under the general law of contract and in doing so they are abusing the court process. While relying on **Re Application by Bahadur [1986] LRC (Const) 297**, and **Peter Muiruri Ng'ang'a vs Credit Bank Limited and Others [2006] eKLR**, it was its submission that the right to access Court is not absolute and is subject to statutory rules and general principles of law.

7. Relying further on **Harikison vs Attorney General [1979] 3 WLR 63**, **Bahamas Entertain Ltd vs Koll and Others [1996] 2 LRC**, and **Abraham Kaisha Kanzika vs Governor of Central Bank [2006] eKLR**, the 4th Respondent took the position that the Constitution recognizes general principles of law and that the Petitioners are guilty of laches for sleeping on their rights for 18 years, and that this being a Court of equity, it should not aid the indolent. That therefore the Preliminary Objection should be upheld as prayed.

8. On their part and in their Written Submissions dated 20th November, 2015, the Petitioners opposed the Preliminary Objections raised by Consolidated Bank. Their submission was that the enforcement of the Bill of Rights under the former Constitution created a broad and effective right to seek redress "without

prejudice to any other action with respect to the same matter which is lawfully available”, and as such, the mere fact that a person may ventilate some of his grievances through an action in tort or contract, cannot be a ground for defeating an otherwise legitimate cause under **Section 84** of the **Repealed Constitution**. In this regard, reliance was placed on the decisions in **Peter M. Kariuki vs Attorney General [2014] eKLR**; **Olive Casey Jaundoo vs Attorney General of Guyana (1971) AC, 972**; **Ramlogan vs The Mayor, Aldermen and Burgesses of San Fernando, (1986) LRC 377**; **Kharak Singh vs State of Uttah Pradesh (1963) AIR 1295**; **Harun Thungu Wakaba vs Attorney General, HC Misc App No. 34 of 1992**; and **Kamlesh Mansukhlal Damji Pattni and Another vs Republic, HC Misc App No. 322 of 1999**.

9. Further, according to the Petitioners, the said Preliminary Objection is not founded on pure points of law as is required according to the dictum by Sir Charles Newbold in **Mukisa Biscuit Manufacturing Co. Ltd vs Westend Manufacturers (1969) EA at 701**. Their contention in that regard was that the said Preliminary Objection does not raise pure points of law particularly because the jurisdiction of this Court to hear the Petition has not been questioned neither has any other point of law been raised.

10. Their other argument was that given the fact that the Preliminary Objection was filed before the promulgation of the **Constitution of Kenya, 2010**, the first inquiry of this Court should be to determine whether the same is sustainable after 27th August, 2010. On this basis, their submission was therefore that upon the coming into effect of the **Constitution, 2010**, the said Preliminary Objection was rendered moot.

11. Additionally, they submitted that this Court is under a duty pursuant to **Article 23** of the **Constitution** to uphold and enforce the Bill of Rights and further that in the circumstances, there is no basis upon which this Court can avoid, decline or abdicate its duty to hear the Petition on merits as further stipulated by **Articles 3 (1)** and **165 (3)** of the **Constitution**.

12. While relying on the decisions in **Kenya Pipeline Company vs Glencore Energy (UK) Limited [2015] eKLR**; **Standard Chartered Bank vs Intercom Services Ltd and 4 Others**; and **Holman vs Johnson (1775-1802) All ER Rep 98**, they submitted further that the formation, decision and actions of the Special Investment Committee which culminated in the takeover of their assets and businesses were a nullity.

13. While further relying on **Obel and Another vs Attorney General [2012] 2EA 218**, their position was that their Petition raises weighty issues which are not matters that can be lawfully and fairly disposed of through a Preliminary Objection on the pretext that they are contractual matters obviously because the Respondents arranged for contracts to be signed in order to cover up their illegal and unconstitutional actions.

14. The Petitioners also took the position further that the said Preliminary Objection offends the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** because as required by the said Rules, the present Petition must be heard and determined on its merits. Accordingly, that unless a Preliminary Objection raises questions relating to the jurisdiction of the Court to hear and determine an Application for enforcement of fundamental rights, any other Preliminary Objection is superseded by **Article 20** of the **Constitution** which enjoins this Court to hear and determine the matter on merits. In addition, that any other interpretation would negate the value of the long struggle for protection and fair adjudication of basic rights which culminated in the promulgation of the **Constitution, 2010**.

15. The Petitioners additionally relied on the decisions in **Republic vs Chief Justice of Kenya and Others ex-parte Moiyo Mataiya Ole Keiwua (2012) 2 EA, 313** and **Equity Bank Ltd vs West Link Mbo Ltd (2013) 2 EA, 72** and submitted that under **Article 259** of the **Constitution**, the principle purposes of the Constitution is to advance the Rule of Law, the Bill of Rights and contribute to good governance. That all too often the device of Preliminary Objections seeks to short-circuit the fair and fullest exposition and adjudication of human rights questions and as such, **Article 20** of the **Constitution** commands this Court to disregard such Preliminary Objections.

16. They also submitted that Consolidated Bank cannot demonstrate through its Preliminary Objection that the serious grievances raised by the Petitioners have no basis under the Constitution. In any event, the specific orders and reliefs against the said Bank will certainly be enforceable against it if and when this Court grants them and that their affidavits have set out in detail the difficult circumstances under which they seek redress for violation of their constitutional rights as victims of abuse of State power expressly sanctioned by an all-powerful President whose word was law. According to them, there is no provision in any law that prescribes a limitation period for filing of a case to redress violation of constitutional rights and freedoms and further that this case is perhaps reason enough to say a silent prayer that the makers of the Repealed and the 2010, Constitutions did not prescribe such time limits otherwise many injustices would be sanitized by effluxion of time.

17. Furthermore, they maintained the stand that as matters now are, former President Moi left office in January, 2003 whereupon they embarked on a torturous journey to obtain evidence and information to file the present proceedings for redress and they did so in July, 2007. In this regard, they contended, while relying on the decision in **Arnacherry Limited vs Attorney General [2014] eKLR**, that the present Petition is sad and distressing and the sadness in it is aggravated by the choice of the Respondents to file Preliminary Objections in the hope that their illegal actions would escape judicial scrutiny and adjudication.

18. Finally while relying on the dictum by Alnashir Visram and M.K Ibrahim JJ in **Jacqueline Resley vs City Council of Nairobi [2006] eKLR** they urged the Court to dismiss all the Preliminary Objections with costs to them.

Analysis and Findings on the Preliminary Objection

The Law

19. In the **Mukisa Biscuit (supra)** Law J.A. stated a preliminary objection to be thus:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold, P stated in the same judgment as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

20. It is therefore apparent from the aforesaid that a Preliminary Objection should be premised on a point of law and a court should not be called in such instances to enquire into matters that are not law *per se*. Applying the above principles to the present matter, I note that the 4th Respondent’s Preliminary Objection is premised on three key grounds as I have reproduced elsewhere above.

21. On the first ground, it was its allegation ***that there are no constitutional matters raised in the Re-Amended Petition dated 7th December, 2009 capable of sustaining a constitutional Application.*** This in my view requires this Court to enter in the arena of the dispute and evaluate and analyse the evidence by both parties so as to reach the conclusion that there are or there are no constitutional issues raised. This Court cannot merely dismiss the matter by simply saying that the case does not raise any constitutional issues without evaluating the evidence and hearing the parties. On that basis alone, this ground must fail.

22. The second ground was that ***without prejudice to (1) above, even if there were constitutional issues raised in the Petition, such rights cannot be enforced as against the 4th Respondent.*** In my view, this

ground is untenable. I do not know of any law that makes provisions to the effect that constitutional rights cannot be enforced against the 4th Respondent as it suggests. In any event, the 4th Respondent has not submitted any law in support of that assertion. Needless to say, court orders are to be obeyed by every person as it is one of the tenets of the Rule of Law as sanctioned by the Constitution. It must be remembered that the **Constitution** under **Article 260** defines a person as to include a company, association or other body of persons whether incorporated or unincorporated and all such bodies are bound to respect, uphold and abide by the said Constitution. I am therefore unable to dismiss the instant Petition based on the grounds that the same cannot be sustained against the 4th Respondent.

23. The last ground advanced by the 4th Respondent was that ***the Petitioners are guilty of laches and the Constitutional Court should dismiss the Petition with costs***. Our courts have on several occasions had an opportunity to address the question of time limitation and enforcement of fundamental rights and freedoms. For example, in **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** the Court made the observation that:

“[24] Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported). Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

[25] I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: ‘Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim.’

[26] In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim.” (Emphasis added)

24. Further, in **High Court Petition No.306 of 2012 Ochieng’ Kenneth K’Ogutu vs Kenyatta University and 2 Others**, it was observed that:

“[35] As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner’s counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner’s rights (which I have not), I would have had difficulty in excusing the 12 years’ delay in this matter.

[36] There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): “Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An

applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.

In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation periods.” (Emphasis added)

25. The above cited authorities manifest the dissatisfaction by courts in entertaining Petitions alleging violations of fundamental rights and freedoms after a considerable length of time has lapsed since the alleged violations occurred but without expressly stating that they can be barred by limitation of time because the latter position is generally untenable. The above authorities further suggest that a court must examine each case and gauge the length of time taken before presenting such Petitions. Furthermore, a court is entitled to consider whether there has been inordinate delay in lodging the claim and whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim.

26. *Juxtaposing the above position with the present matter*, i note that the present Petition was filed on 13th November, 2007 contending violations that occurred as far as 1986. The Petitioners thus took a period of about 21 years to institute the present suit. In their view, and in that context, this Court is enjoined by the Constitution to determine the matter on the merits the long period notwithstanding. In addressing that question, i acknowledge that indeed under **Article 159 2 (d)** of the **Constitution**, this Court is enjoined to administer justice without undue regard to procedural technicalities among others. I must however caution that failure to adhere to limitation of time does not just amount to procedural technicalities but it goes deeper into the substantive of the matter to be determined. Inordinate delay can be prejudicial to a case and it further goes against the dictates of **Article 159 (b)** of the **Constitution** which is to the effect that justice shall not be delayed. However, each case must be looked at in its own circumstances and that is why in **Mwangi S. Kimenyi vs Attorney General and Another, Civil Suit Misc. No. 720 of 2009**, the Court observed that:

“[14] There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.”

The Court further asserted that:

“[21] Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that;

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court, is to serve substantive justice through

judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

27. What then is the justification for the delay? The Petitioners have argued that former President Moi left office in January, 2003 whereupon they embarked on a torturous journey to obtain evidence and information to file the present matter. Based on the evidence before this Court, I note that indeed the Petitioners had made efforts to get various documents and information from various State agents pertaining to matters revolving around the present matter. I note for example that the Petitioners wrote to the Permanent Secretary, Ministry of Lands on 29th August, 2003, and on 7th November, 2003 it wrote to Consolidated Bank, and by another letter dated 25th June, 2005 it addressed M/s Kaplan and Stratton Advocates on its concerns. The letters that subsequently followed were written in the year 2007 prior to the filing of the instant proceedings.

28. Can it then be said that the delay in filing the present Petition is justified?

29. The **Constitution, 2010** ushered in a new constitutional regime whereby claims ought to be determined largely on merit. It is also true that prior to the change of political regime in 2002, the perception that the Kenyan Courts were not generally accessible to grant justice in sensitive political cases had pervaded the national psyche. Whether that was in fact true is another matter. In addressing past claims of injustices therefore our Courts in this transition period should not be too quick to dismiss matters merely because they were filed late. However, any claims filed say ten (10) years after 2002 can hardly attract any sympathetic ear unless exceptional circumstances for the delay are given. Given our history and the circumstances of this case therefore, I shall accept the explanation for delay as proffered by the Petitioners.

30. The above findings would therefore lead me to the conclusion that I am unable to accede to the Preliminary Objections which are hereby overruled.

31. The foregoing leads me to a determination of the Application dated 2nd June, 2011.

Application Dated 2nd June, 2011

32. The specific prayers sought in the above Application have been reproduced verbatim at the beginning of this Ruling. In a nutshell, the Petitioners seek certain information from the Respondents under **Article 35** of the **Constitution, 2010**.

33. I have taken into account the submissions of the Parties which I deem unnecessary to reproduce as the only issue arising, in my view, is the applicability of **Article 35** to the said Application.

34. In that regard, **Article 35** of the **Constitution** provides that:

(1) Every citizen has the right of access to-

(a) Information held by the State; and

(b) Information held by another persona and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading

information that affects the person.”

(3) The State shall publish and publicise any important information affecting the nation.

35. The right to information is an entitlement to every Kenyan citizen as enshrined above and the Constitutional Court of South Africa observed in the case of **Brummer vs Minister For Social Development 2009 (II) BCLR 1075 (CC)** that:

“access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.” (Emphasis added)

36. The importance of this right was further outlined in the case of **Famy Care Limited vs Public Procurement Administrative Review Board & another Petition No.43 of 2012**, where it was observed that:

“[16] The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.

[17] The right of access to information is also recognised in international instruments to which Kenya is party. The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples' Rights which provides, “Every individual shall have the right to receive information.” The Commission noted that right of access to information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”

37. In **General Comment No. 34 (CCPR /C/GC/34)** on the provisions of **Article 19** of the **International Covenant on Civil and Political Rights**, the Human Rights Committee observes at **paragraph 18**, with regard to the right of access to information:

“Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions.”

38. It should however be borne in mind that the right to access information is not an absolute right since it is not listed under **Article 25** of the **Constitution** as one of those rights that cannot be limited. It must therefore follow that the limitation of this right must be in accordance with **Article 24** of the **Constitution** which provides that:

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.*

39. In the present matter, the evidence before me suggests that the Petitioners made several attempts to get the information that they are now seeking through this Court. Of great importance is that through their letter dated 25th June, 2007, addressed to M/s Kaplan and Stratton, they sought for the following documents:

- i. The Memorandum of Understanding dated 30th January, 1990 between shareholders of NFC and Consolidated Bank.
- ii. The Agreement for Sale of Shares of February/March, 1990 in NFC between the shareholders of NFC and Consolidated Bank.
- iii. The Memorandum of Understanding dated 30th January, 1991 between the shareholders of NFC and the Consolidated Bank.
- iv. The Agreement for sale of shares in NFC between NFC and the Consolidated Bank.

40. In that regard, the said law firm responded and directed the Petitioners to seek the consent of Consolidated Bank for the release of the said documents. This is an important factor because the right to access information under **Article 35** of the **Constitution** is not a self-executory right and for a litigant to move the Court for coercive orders, he or she must demonstrate that he/she made efforts to obtain the said information. For this proposition of the law, I am persuaded by the holding of the Court in **Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company and 2 Others Nairobi Petition No. 278 of 2011**, whereby the Court took the view that in order for the right to access information to be justiciable, it must be established that the person seeking the information had sought the information, and access to such information had been denied. In that regard the Court stated thus:

“[40] Finally, in order to facilitate the right of access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

[84] However, this petition succeeds to the extent that I have found that the 1st respondent [Kenya Electricity Generating Company] has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the respondent, and the respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a constitutional obligation to provide the information sought.” (Emphasis added)

41. Having so said, I observe that the Petitioners are seeking to enforce their rights to access information under **Article 35** of the **Constitution** as against the Minister for Finance, the Attorney General, the Central Bank of Kenya and the Privatization Commission and yet they have not made any efforts to solicit for the said information from them before approaching this Court. This is a condition precedent before the right can be enjoyed. I am satisfied that therefore that the Petitioners' Application must fail for that reason alone. I am in this regard also in agreement with the findings in **Charles Omanga and 8 Others vs Attorney General and Another, Petition No. 29 of 2014, Consolidated With Petition No. 65 of 2014**, where it was stated that:

“This case concerns Article 35(1). The petitioner argues that this provision is self-propelling and that a person is entitled to apply to the court directly for such information to be given. In my view, this is the wrong approach. Article 35 is part of the

Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, “that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened” How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported), the court stated that, “[43] I am not inclined to grant the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.” (Emphasis added)

42. Similar sentiments were expressed by the Court in **Andrew Omtatah Okoiti vs Attorney General and 2 Others, Petition No. 92 of 2011** where Musinga J. expressed the view that:

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call.”

43. The above sentiments aptly capture the position I intend to take in the Application including as against the 4th Respondent because I see no evidence that in fact any request for information was made to the Consolidated Bank before the present proceedings were filed and as advised by M/s Kaplan and Stratton Advocates. Without evidence that the information was sought and was denied by any of the Parties (M/s Kaplan and Stratton Advocates is not a Party) then no proper claim under **Article 35** of the **Constitution** can be made. But that is not the end of the matter because even if the information had been sought and had been denied, can the Petitioners invoke **Article 35** of the **Constitution** in interlocutory proceedings? I think not.

42. Article 35 rights are not mere procedural rights but are substantive ones under the Bill of Rights and ought to be invoked in proceedings where a final decision (as opposed to an interlocutory decision before a Petition is finalized) can be made. The right to access information is therefore not akin to a temporary injunction or a conservatory order under **Article 23 (3)** of the **Constitution**. It is instead a stand-alone right to be invoked for purposes of enforcing another right in the Bill of Rights- See **FIDA-Kenya Chapter & 28 Others vs AG & Others (2015) eKLR** and **PFI International (BVI) & Others vs International Development Corporation of South Africa Ltd [2012] ZACC 21**. In the event, it is difficult to appreciate the prayers in the Application before me in that context.

Conclusion

45. I have read the record in this matter and it is unacceptable that a matter of such immense importance to the Petitioners and which they claim seeks to vindicate their rights to the assets previously held by Nationwide Finance Co. Ltd should remain unresolved one way or the other ten years after its filing. Many other matters that are even more complicated than this one have been expeditiously determined in that period. I implore all Parties to move with haste and finalize all preliminary questions and proceed to the final determination of the Petition herein. I digress.

Disposition

46. Based on my reasoning above, the Notice of Preliminary Objection dated 10th June, 2011 by the 4th

Respondent is overruled and the Application filed on 3rd June, 2011 by the Petitioners is dismissed. Costs will however abide the outcome of the Petition which should be fixed for hearing forthwith.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Ngatia holding brief for Mr. Kibe for Petitioner

Mr. Jele holding brief for Mr. Ojiambo for 4th Respondent

Mr. Obura holding brief for Mr. Sekwe for 1st, 2nd, 5th and 6th Respondents

Miss Ngonde for 3rd Respondent

Order

Ruling duly read.

Mention on 8/4/2016 for directions.

ISAAC LENAOLA

JUDGE