



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 201 OF 2011

BETWEEN

**NELLIWA BUILDERS AND CIVIL ENGINEERS
LIMITED.....PETITIONER**

VERSUS

**UBA KENYA BANK LIMITED.....1ST
RESPONDENT**

**OFFICER IN CHARGE BANKING FRAUD INVESTIGATION UNIT.....2ND
RESPONDENT**

**DIRECTOR CRIMINAL INVESTIGATIONS DEPARTMENT (CID).....3RD
RESPONDENT**

**COMMISSIONER OF POLICE.....4TH
RESPONDENT**

**HON. ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....5TH
RESPONDENT**

JUDGMENT

Introduction

1. This petition revolves around two cheques alleged to have been issued by two foreign banks to the petitioner. Upon the petitioner depositing them with the 1st respondent, **UBA Bank**, the bank allegedly retained them and forwarded them to the 2nd respondent on the basis that it doubted their authenticity. It is for this reason that the petitioner filed the present petition in which it alleges violation of, inter alia, its right to property guaranteed under Article 40 of the Constitution.
2. The petitioner describes itself as an engineering and building company founded in 1980 as a business name but later incorporated as a limited liability company in 1993. It has been involved in a myriad of construction work throughout Kenya, and states that at all times material to the instant petition, it had secured a contract to develop villas on land known as Land Reference

Number Kajiado/Kitengela/4423 in a partnership with a company based in the United Kingdom.

3. The petitioner has filed its claim against the 1st respondent, UBA Kenya Bank Limited (UBA), a limited liability company registered under the laws of Kenya. It has also joined to the proceedings as the 2nd respondent the Officer in Charge of the Banking Fraud Investigation Unit, which is charged with the mandate to, among other things, conduct investigations pertaining to fraudulent activities in the banking sector in Kenya. The 3rd respondent, the Director of the Criminal Investigations Department and the 4th respondent, the Commissioner of Police, are responsible for the conduct of criminal investigations. The 5th respondent is the Attorney General of the Republic of Kenya whose office is created under Article 156 of the Constitution.
4. The petitioner first approached the court by way of an application brought under certificate of urgency dated 17th October 2011. The application sought orders to restrain the respondents from arresting the petitioner's Managing Director, Mr. John Chuchu Muchai, who was allegedly threatened with arrest by officers of the Banking Fraud Investigation Unit. The petitioner also sought in the said application an order for the release of funds allegedly held by, UBA which had allegedly been cleared on 30th July 2011. The Court granted an interim order restraining the arrest of the petitioner's Managing Director on condition that he co-operated with the Banking Fraud Investigation Unit. The application for conservatory orders did not proceed for various reasons, including two adjournments sought by the petitioner. On 14th of December 2011, Counsel for the petitioner asked that the application for conservatory orders be dispensed with and the parties proceed with the hearing of the substantive petition, to which this judgment relates.

Factual Background

5. The facts as they emerge from the pleadings are that on 22nd July 2011, the petitioner presented two cheques, Barclays Bank UK cheque No 102379 drawn on Liangyndeyrn Community Council V for GBP 2,807,860 and The Woolwich cheque No 881549 for GBP 998,785. Upon the deposit of the cheques, UBA advised the petitioner to wait for the clearance as was the custom. During this period, UBA forwarded the said cheques to the Banking Fraud Investigation Unit for investigations, apparently because it doubted their authenticity. The petitioner then filed this petition alleging that the respondents had violated its right to property by withholding the proceeds of the two cheques. In the petition dated 17th October 2011, it seeks the following orders:
 - a. ***A declaration that the 1st respondent's act of withholding the petitioner's GBP £3,806,645 is an infringement of its rights under Article 40 of the Constitution of the Republic of Kenya, 2010.***
 - b. ***A declaration that the 2nd respondent invocation of powers of arrest or other coercive mechanism to facilitate withholding of the said funds is an infringement of the petitioner's rights under aforesaid Article 40 as well as Article 29 of the Constitution of the Republic of Kenya, 2010.***
 - c. ***That the said funds be released to the petitioner and both respondents compensate the petitioner for such loss or damages incurred on account of withholding the said funds.***
 - d. ***An injunction be issued to restrain the respondents, their servants and or agents from interfering with the said funds or any other manner harassing, arresting, interrogating, or questioning the petitioner on account of the said transaction.***
 - e. ***Such other orders as this Honourable Court shall deem just.***

The Petitioner's Case

6. The petitioner's case is set out in the petition dated 17th October, 2011 and supported by an affidavit sworn by its Managing Director, Mr. John Chuchu Muchai, on the same date, a

supplementary affidavit also sworn by Mr. Muchai on 13th December, 2011 and submissions dated 21st February, 2012. Its case was presented by its Learned Counsel, Mr. Mbigi.

7. According to the petitioner, on or around March, 2011, a company by the name Woolwich based in the United Kingdom and doing construction work in South Sudan was introduced to it through its representative, a Mr. Ian Jones based in South Sudan. The said company wanted to undertake major construction of villas in Kenya and therefore wanted a joint partner in what is commonly known in construction parlance as a turnkey project. The petitioner alleges that on this basis, it sourced for land measuring about 50 acres in Isinya area, Kajiado county and agreed on the purchase price of the land reference number Kajiado/Kitengela/4423 belonging to a company known as Software Communications Ltd. An agreement in respect of the construction project was subsequently entered into between the petitioner and the said Woolwich and its sister company, Liangyndeirn Community Council V on 30TH March, 2011.
8. In the affidavit in support of the petition, Mr. Muchai deposes that an initial payment for ground breaking and excavation was made through two bank drafts totalling GBP 3,806,645 dated 30th May, 2011. He deposited the two drafts with UBA, Upper Hill Branch, in the petitioner's Account No 030130000328, and the originals and photocopies of the drafts were stamped. He was advised to wait for twenty one working days for clearance, but when he went back after the said period, he was informed by the Branch Manager that there had been some delay in sending the cheques for clearance to the United Kingdom and he should give UBA an extra week and return on 29th August, 2011. Mr Muchai averred that at this time, the drawers of the cheques had confirmed to him that the said drafts had been forwarded to Barclays Bank England and cleared on 30th July, 2011.
9. Mr. Muchai further avers that, UBA Upper Hill, when he checked with on 29th August, 2011, he was referred to the Head Office where he was informed by a Mr. Oscar Awiti that the said Awiti had referred the matter of the two cheques to the Banking Fraud Unit of Central Bank for further investigations. Mr. Muchai avers that he was never given the reasons why investigations were being conducted, so he went to the Banking Fraud Investigation Unit. On 3rd September, 2011 he wrote a statement on the matter with the investigating officer, a Mr. Samuel Ngeiywa, whom he later took to the property where the project was to take place at Kitengela/Isinya.
10. Mr. Muchai further deposes that on 6th October, 2011, he received an email from Woolwich confirming payment of the said drafts, but that on 13th October, 2011 he received a letter from UBA informing him that the value of the drafts was not credited in his account due to some unspecified irregularities. Mr. Muchai avers that from the letter of 13th October 2011, there was a radical departure from UBA's earlier position and a total negation of banking etiquette as he had not at any time deposited any drafts with the Banking Fraud Investigation Unit and that whatever drafts the Unit is allegedly in possession of, only UBA can explain where they came from as the original drafts had been taken for clearance with the bank.
11. The petitioner asserts that UBA's act of reporting it to the Banking Fraud Investigation Unit was an attempt to escape liability with respect to the payment of the drafts; and to intimidate, coerce it and criminalize an otherwise civil matter as the report to the Banking Fraud Investigation Unit was made long after the drafts had been cleared; and further, that UBA was yet to return the dishonoured drafts, if they had been dishonoured, with remarks from the receiving or paying bank.
12. Mr. Muchai deposes that he has been constantly under threats from the Banking Fraud Investigation Unit which has been threatening him with arrest and arraignment in court for offences he is yet to be advised of. It was his case therefore that for UBA to accept the drafts, wait for twenty one days and then report to the police exemplifies a total abuse of the police process and a violation of his constitutional rights with impunity. He believes that he has not committed any criminal offence known to law to warrant such treatment and harassment as he has given the

Banking Fraud Investigation Unit all information sought from him.

13. He contended therefore that the Court should determine whether it is an offence known in criminal jurisdiction for one to deposit cheques for payment in the bank; whether it is an abuse of the police process to interfere where there is no complainant in the matter; whether it was constitutional for a bank to accept cheques and later on purport to disown them long after clearance; what offence he has committed by demanding either dishonoured cheques or payment; whether his intended arrest and arraignment in court even before investigations have been finalized is a violation of his rights to freedom and liberty; and whether the conduct of the bank in question is a violation of his constitutional rights and an act of impunity.

The 1st Respondent's Case

14. UBA Bank filed an affidavit in reply sworn on 3rd November, 2011 on its behalf by Ms. Sylvia Magotsi, a further affidavit also sworn by Ms. Magotsi on 6th January, 2012, and written submissions dated 8th March, 2012. Its case was presented by Learned Counsel Mr. Kounah.

15. The position taken by the bank is that this petition is an abuse of the court process, is mischievous, scandalous, frivolous and vexatious and has absolutely no merit and must be dismissed with costs.

16. Ms. Magotsi averred on its behalf that the petitioner through Mr. Muchai opened a bank account with its Upper Hill Branch on 22nd July, 2011, account No 55030130000328, where he had been referred to by Paul Chuchu Njuguna of Kang'ethe and Company Advocates. On the same day, he deposited a sum of GBP £68.19 in the said account. He later returned on the same day to make further deposits vide two cheques namely Barclays Bank UK cheque No 102379 drawn on Liangyndeyrn Community Council V for GBP £2,807,860 and The Woolwich cheque No 881549 for GBP £998,785.

17. According to UBA, the two cheques were received and the petitioner was advised that they would be forwarded to UBA's Head Office at Westlands and that such a transaction would normally take twenty one days for clearance. The cheques were forwarded to the Head Office on 25th July, 2011 where they were reviewed by the Chief Operating Officer and the Regional Head Unit Control and Compliance upon which it was resolved that additional information was required with regard to the cheques and the petitioner.

18. Ms Magotsi avers that its Head of Operations and Chief Security and Investigations Officer did obtain some additional information about the petitioner from Kang'ethe and Company Advocates during a meeting held on 26th July, 2011 which was attended by two members of staff from UBA, the petitioner's advocate, and UBA's Relationship Manager after which the Head of Operations resolved to make further inquiries about the cheques with Barclays Bank of Kenya's Investigation Department.

19. Ms. Magotsi deponed that on 28th July, 2011, the Chief Security and Investigations Officer emailed one Mr. Ng'ang'a and on the basis of this email a meeting was held by UBA's management to discuss the preliminary findings of the inquiry; and that on 22nd August, 2011, two of the petitioner's representatives visited UBA's offices where they made inquiries about the cheques. They were informed about the preliminary investigations, and that it had been established that the two cheques were irregular and additional information was being sought from the Central Bank of Kenya's Anti-Banking Fraud Unit.

20. UBA further states that on 25th August, 2011, a meeting was held between the Banking Fraud Investigation Unit, UBA's Chief Security Officer, Mr. Muchai and the Relationship Manager when they were requested to write statements pertaining to the matter, and on the same day, the Banking Fraud Investigation Unit sent one of its officers to collect the original cheques from UBA's office.

21. Ms. Magotsi deposes that on 1st September, 2011 at about 15.12pm it received a letter from the petitioner's advocates demanding the immediate withdrawal of allegations labelled against the petitioner and an 'immediate credit of the customer's account or a return of the original cheques to them unpaid'. It is averred on behalf of the bank that it decided to wait for the report from the Banking Fraud Investigation Unit; that it believes that the Unit is still carrying out investigations about the matter.
22. UBA contends that in seeking further information from Barclays Bank of Kenya Investigations Department and further seeking assistance of the Banking Fraud Investigation Unit, it was only adhering to the standard banking rules, regulations and policies and as such, there was no radical departure or a total negation of banking etiquette as alleged. It also denies that by reporting the matter to the Banking Fraud investigation Unit, it engaged or is engaging in an attempt to escape liability in respect to payment of the cheques; nor is it attempting to intimidate or coerce the petitioner or criminalize an otherwise civil matter as alleged by the petitioner.
23. Ms. Magotsi further avers that the petitioner's account has never been credited with any monies resulting from the two cheques still under investigations by the Banking Fraud Investigation Unit; that it has not withheld the petitioner's funds' as alleged; nor is it aware of the allegations by the petitioner contained in the letter dated 6th October, 2011 by Woolwich PLC that the cheques totalling GBP 3,806,645 were cleared by a London Bank on 30th July, 2011. It contends that the investigations being carried out by the 2nd, 3rd, and 4th respondents were absolutely necessary and a decision on the validity, legitimacy and regularity of the two cheques would only be known after the investigations; and that its performance of its duties and obligations to the petitioner has not in any way violated the petitioner's rights.
24. The bank further deposes that after perusing the copies and contents of the two letters relied on by the petitioner as proof that the cheques were cleared, it doubted their authenticity and decided to conduct its own investigations which investigations have revealed that the telephone number on the letters does not exist or cannot be found and that the date on which the said drafts were allegedly cleared, 30th July, 2011 fell on a Saturday, and the Clearing House in the United Kingdom does not open on a Saturday. It also alleges that it wrote to Barclays Bank of Kenya Ltd on 10th December, 2011 requesting it to confirm the authenticity of the letters which request is yet to be responded to; that it wrote to the Money Laundering Department of Barclays Bank PLC, United Kingdom on 28th December, 2011 seeking the same information but is yet to receive a response. It is its contention also that it is yet to receive information on the investigations with respect to the drafts from the 2nd -5th respondents.

The Case for the 2nd -5th Respondents

25. The Attorney General filed a replying affidavit sworn on behalf of the 2nd -5th respondents on 3rd November, 2011 by Mr. Samuel Kiptui Ngeiywa, an investigating officer with the 2nd respondent, and a further affidavit also sworn by Mr. Ngeiywa on dated 10th January, 2012.
26. The case for the state organs involved in the investigation of the matter as presented by Learned State Counsel, Mr. Moimbo, is that the drafts of the cheques in question were forwarded to the Metropolitan Police (UK) Economic and Specialist Crime OCU, with a request that they confirm whether the said cheques and the letters purporting to confirm payment from M/s Woolwich PLC to UBA Kenya Bank Ltd dated 6th October, 2011 and the letter from Barclays Bank PLC to Kang'ethe & Co. Advocates dated 9th December, 2011 were genuine. They state further that they received through Interpol Kenya a detailed response from the Metropolitan Police confirming that both the cheques and the Woolwich letter are bogus. In particular, Mr. Ngeiywa avers that they were informed that in respect to the Woolwich cheque with a value of GBP £988,785, the Metropolitan Police noted that the short code 10-80-15 ceased to be operational in 2004 and that the signatures on the draft were not held on file as authorized and are therefore forged.

27. With respect to the Barclays Bank cheque with a value of GBP £2,807,860, Mr. Ngeiywa avers that it was noted by the Metropolitan Police that the cheque was issued from a stolen cheque book, and since the cheque book was issued in 2004, it is highly unlikely that it would be in genuine circulation seven years after it was issued.
28. With regard to the letter purporting to have been from the Woolwich PLC, Mr. Ngeiywa averred that he was informed that Woolwich PLC rebranded in July 2007 and ceased to use the stationery used for the letter; and further, that it had never employed or retained the services of one Humphrey Burmings, the alleged Managing Director. It was also contended by the AG that the information they received from the Metropolitan Police with respect to the letter purporting to have been from Barclays Bank PLC is that the date the cheque was alleged to have cleared, 30th July, 2011, was on a Saturday and it is standard practice in London that cheques do not clear on Saturdays. Further, with respect to the Barclays Bank PLC cheque and the Woolwich Cheque, the report forwarded by Interpol London indicated that the Liangynderyn Community Council had five cheque books whose serial numbers ranged from 103001 to 103300, and which range does not accommodate the cheque in contention whose serial number is 102379; that all the cheques in the possession of Liangynderyn Community Council were printed in 2010; that all cheques drawn by Liangynderyn Community Council are normally handwritten and not in print format; and that Woolwich is now fully incorporated into Barclays Bank and the short code of 10-80-15 was formally closed by the Bank in 2007 and all customers were then migrated to the Bank's Business Centre and given new codes and account numbers.
29. The 2nd -5th respondents denied that they were working with UBA to intimidate and instil fear in the petitioner with the ulterior aim of unlawfully taking its property. They submitted that the cheques in question have been in the safe custody of the 2nd respondent as investigations are still going and the cheques were likely to be exhibits. They maintained that the cheques have never been presented and therefore cannot under any circumstances, be said to have been cleared on 30th July, 2011 as alleged.

Rejoinder

30. In response to the submissions and pleadings by the respondents, the petitioner maintained that according to a circular issued by Kenya Bankers Association in May 2011, UBA was duty bound to receive and stamp the drafts as received and upon processing, if dishonoured, return them with such remarks to the petitioner. Mr. Muchai averred that one Nelson Nyaribo, in the course of due diligence, confirmed to him that the drafts were forwarded to UK for clearance and that in the month of September 2011 he had written to Woolwich seeking clarifications on the dates of the cheques in issue and the relationship between Woolwich and Barclays Bank PLC. He contended that at the moment there is no formal report or otherwise from Barclays Bank UK that the drafts were received and dishonoured or returned as forgeries as alleged.

Analysis and Determination

31. I have read the pleadings and submissions of the parties to this matter, and heard their respective oral submissions. I have also called for oral evidence from an officer of the 2nd respondent, which I shall revert to later in this analysis. From what has transpired since the petition was filed almost four years ago, and from the material placed before me, I am constrained to observe that this is in many respects a very peculiar case.
32. It commenced with the petitioner alleging that its Managing Director, Mr. Muchai, was threatened with arrest, and it also sought orders for the release of the amount of GBP £3,806,645.00. This amount was said to have been sent to the petitioner by way of two cheques. The cheques were said to be from Barclays Bank UK, cheque No 102379 drawn on the account of Liangynderyn Community Council V for GBP £2,807,860. The second was Woolwich cheque No 881549 for GBP £998,785.

33. According to the petitioner, the two cheques were deposited with UBA on 12th July 2011, and were cleared on 30th July 2011. The petitioner therefore claims a violation of its right to property.
34. It is noteworthy, however, that the petitioner approached the Court on 18th October, 2011, almost three months after the cheques were allegedly cleared. Its case was that its Managing Director was threatened with arrest by the 2nd respondent. The filing of the petition was followed by a somewhat leisurely progression of the matter before the Court, occasioned in a number of cases by the petitioner, which at some point indicated that it was pursuing a settlement of the matter. Hence the observation that this matter is peculiar: a party deprived of property worth in excess of Kshs.500,000,000 would doubtless have shown greater alacrity in pursuing its claim.
35. This, however, is not the only peculiarity that is of concern to the Court. In the course of the proceedings on 26th February 2013, and after the parties had made their submissions on the matter, the court observed that the dispute revolved around the two cheques, and the conflicting arguments on whether or not they were presented to the bank, and the proceeds cleared. The Court therefore directed that the officer of the 2nd respondent should produce the two cheques in Court.
36. The two cheques were presented in Court on 31st May 2013 by Mr. Gabriel Mbuvi, an Assistant Commissioner of Police in charge of the Banking Fraud Investigation Unit. Mr. Mbuvi stated on oath that his office had two cheques in respect of the matter. According to Mr. Mbuvi, the first cheque, no. 2018541, was drawn in favour of Nelliwa Builders and Civil Engineers, but did not have the word “Limited” at the end. It was for Sterling Pounds £2,807,860, was dated 30th May 2011, and was drawn by Liangyndeyrn Community Council, Barclays Bank. Mr. Mbuvi stated that the cheque had not been stamped by the receiving bank.
37. The second cheque, according to Mr. Mbuvi, was no. 1080151 dated 30th May 2011 and drawn in favour of Nelliwa Builders and Civil Engineers Limited. The cheque, for the sum of Sterling Pounds £998,785, was drawn by Woolhich Watling Street Bexleyheath Kent. This cheque had not also, according to Mr. Mbuvi, been deposited for payment. The cheques were produced in the presence of the parties, and there were no questions with respect thereto raised by the petitioner’s Counsel.
38. From the evidence, therefore, several facts are undisputed. The two cheques were presented by the petitioner to UBA on the same day that the petitioner opened an account with the UBA’s Upper Hill Branch. UBA had doubts about the authenticity of the cheques, and so it raised the matter with the 2nd respondent. The 2nd respondent then contacted the Metropolitan Police in England, the upshot of which was that the 2nd respondent received information that the cheques were not genuine, and that the letters allegedly stating that they had been honoured were forgeries. The question is what these facts imply for the matter before the Court.
39. The issue before the Court relates to alleged violation of the petitioner’s right to property. The petitioner alleges violation of its right under Article 40 of the Constitution, which provides as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

40. As has been held in the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**, a party alleging violation of constitutional rights must demonstrate how the articles of the Constitution that he alleges have been infringed have been violated with respect to him, and the manner of such violation. With respect to a claim of violation of the right to property, a party

must show that it has a right to the property in question, and that the right to the said property has crystallised, before proceeding to demonstrate that there was a violation.

41. The cheques produced in Court and which form the basis of the petitioner's claim were not, on the uncontroverted evidence of the 2nd respondent, deposited for payment. The evidence also indicates that they could not have been cleared on 30th July 2011 as alleged, this day being a Saturday, on which, according to the respondents, the Clearing House in England does not operate. The only material before the Court that suggests that the cheques were deposited for payment is that of the petitioner's Managing Director, which evidence has been controverted by the 2nd respondent.

42. At the close of this matter on 10th February 2015, I invited the parties to make final submissions with respect to the two cheques. Mr. Mbigi for the petitioner stated that he had been provided with copies of the cheques, but the two cheques availed by Mr Mbuvi did not have the stamp of the 1st respondent, while the cheques presented to the 1st respondent had been stamped on receipt. According to Mr. Mbigi, this was, prima facie, evidence that the cheques presented to this Court and availed to the parties were either different or had been interfered with. However, in light of the fact that Mr. Mbigi had been given a chance to test this by cross-examining Mr. Mbuvi, when he produced the cheques in 31st May 2013, not much credence can be placed on this submission.

43. It must be borne in mind that the Court is in this matter seized of a petition alleging violation of constitutional rights. Thus, while the petitioner makes various averments and submissions regarding the decision of UBA to refer the issue of the cheques to the 2nd respondent, arguing, inter alia, that purported email correspondence from a local Barclays Bank is of no probative value as it is based on suspicions; that it is hearsay and inadmissible in evidence; and that UBA's decision to refer the matter to the Banking Fraud Investigation Unit 30 days after receipt of the cheques was intended to scare away the petitioner from its funds, it does not help to advance the petitioner's claim with regard to the right to property.

44. The question remains, however, as to whether the 2nd respondent should have undertaken the investigations it did with respect to the two cheques. In a sense, although unstated, this appears to be the core of the petitioner's problem: that the investigations may lead to the arrest and, presumably, the prosecution of its Managing Director, Mr. Muchai. The petitioner has contended that there was no complainant with respect to the two cheques, and there should therefore have been no investigations as the absence of a complainant in any criminal investigations and/or proceedings renders a matter void.

45. This question was considered in the case of **William Ruto and Others vs Attorney General, High Court Misc. Appl. No. 1192 of 2005** where it was held that:

“We would first wish to note that the want of a complainant is not a constitutional issue for determination by this court. That is an issue that can be raised before the trial court and dealt with as a preliminary issue.”

46. The court went on to state thus:

“Section 89 of the CPC provides for the making of complaints and who may complain. The section reads as follows:

“S.89(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

(3) A complaint may be made orally or in writing but if made orally shall be

reduced to writing by the magistrate, and in either case, shall be signed by the complainant and the magistrate.

(4)

(5) Where the magistrate is of the opinion that a complaint signed made or presented under this case does not disclose an offence the magistrate shall make an order refusing to admit the complaint or formal charge and shall record no reasons for the order.”

Under the above section the word “complainant” covers a whole range of would-be complainants beside the State. Besides, the state is the complainant in every criminal case. In this case KPC is the complainant. For the above reasons, we find that want of a complainant would not necessarily be a basis for striking out of the charges and it is not a Constitutional issue.” (Emphasis added)

47. That being the case, it appears to me that there is no issue worthy of constitutional adjudication in respect of the investigations by the 2nd respondent. If there is no complainant and charges are still brought against the petitioner’s director(s) by the respondents, then the issue can be raised at the trial court. It appears, however, and in fact was submitted by the respondents, that the 1st respondent, which received the cheques whose authenticity it doubted, was the complainant. The evidence on record indicates that on 23rd August, 2011, the 1st respondent wrote to the Banking Fraud Investigation Unit reporting an attempted cheque fraud of GBP £2,807,860/= and GBP £998,785/= on A/C No 550-301300-00-3-28 in the name of the petitioner. It cannot therefore be properly argued that there was no complainant in respect of the matter, unless the petitioner is arguing, a clearly untenable argument, that a bank that receives cheques whose authenticity it doubts is bound to accept them without question.

48. Various arguments have also been advanced with respect to the admissibility of the electronic evidence, in the form of email communication between police officers from the 2nd respondent and the Metropolitan Police in London. These arguments, in my view, have no bearing in the present matter. As the Court has already found, there is no evidence of clearance of the cheques in question, or that the funds in respect thereof were received. The only evidence is that they were not deposited for payment.

49. Further, question related to whether there was fraud or not, or that the cheques and letters allegedly evidencing their being cleared were fraudulent, are not within the ambit of this petition. Should there be evidence obtained to justify arrest and prosecution of the directors of the petitioner, then the trial court can enter into the question of the admissibility or otherwise of the electronic evidence relied on by the parties.

50. Which leads to a consideration of the question whether the orders sought against the 2nd - 5th respondents in respect of the investigations against the petitioner regarding the cheques should issue. On this point, I agree with the Attorney General that there is no basis in law to issue the orders sought. Section 14 (1) of the Police Act that was then in force provided for the functions of the Police Force as follows:

“The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.

51. Similar provisions are contained in the National Police Service Act.

52. In the present case, there was a complaint of possible criminal conduct by the petitioner, a complaint that the 2nd -5th respondents were under a duty to act upon. The evidence on record indicates that by a letter dated 23rd August, 2011, UBA wrote to the Banking Fraud Investigation Unit reporting an attempted cheque fraud of **GBP £2,807,860/= and GBP £998,785/= on A/C No 550-301300-00-3-28 held at UBA Kenya Bank, Upper Hill Branch I.N.O Nelliwa Builders and Civil Engineer and Nelliwa Builders and Civil Engineers Ltd.** The letter requests the Banking Fraud Investigation Unit to take up the matter for further investigations. It is on this basis that the Banking Fraud Investigation Unit got involved in the instant matter. Pursuant to this letter, the Banking Fraud Investigation Unit commenced investigations as requested.

53. There is evidence before the Court of communications between the Kenya Police (Interpol) and the London Interpol and Metropolitan Bank London pertaining to the question of the cheques and the persons involved. It is from this communication that the 2nd respondent gleaned the information that it has now presented before the Court. In the circumstances, I can find no basis for interfering with the investigations undertaken or to be undertaken by the respondents. Should they find sufficient evidence to warrant arresting or charging the petitioner's directors with criminal offences, then they are fully within their mandate to do so.

Disposition

54. It must be evident that the present petition must fail. It is hereby dismissed with costs to the respondents as being wholly without merit.

55. For the avoidance of doubt, the interim orders granted to the petitioners on 18th October 2011 and extended from time to time since then are hereby discharged.

Dated, Delivered and Signed at Nairobi this 15th day of July 2015

MUMBI NGUGI

JUDGE

Mr Mbigi instructed by the firm of Mbigi Njuguna & Co. Advocates for the petitioner.

Mr Kounah instructed by the firm of J. Thongori & Co. Advocates for the 1st respondent.

Mr Moimbo instructed by the State Law Office for the 2nd – 5th respondents.