

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CONSTITUTIONAL PETITION NO. E006 OF 2024

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23(1), 258 AND 259 OF
THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22(1),
(c), 23(1), (3), (a), 46(1), (a), (d) AND ARTICLES 159 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MICROFINANCE ACT, 2006, THE CENTRAL BANK OF KENYA
ACT, CAP 491, CENTRAL BANK OF KENYA AMENDMENT ACT 2021
AND THE CENTRAL BANK OF KENYA (DIGITAL CREDIT
PROVIDERS) REGULATIONS, 2022 AND THE CONSUMER
PROTECTION ACT CAP 501 LAWS OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006**

BETWEEN

MARK MUKOPETITIONER

VERSUS

MWANANCHI CREDIT LIMITED1ST RESPONDENT

**PLATINUM CREDIT LIMITED2ND
RESPONDENT**

**IZWE LOANS LIMITED3RD
RESPONDENT**

**PREMIER CREDIT LIMITED4TH
RESPONDENT**

**THE CENTRAL BANK OF KENYA5TH
RESPONDENT**

RULING

1. The Petitioner commenced the present proceedings vide the Petition dated 15/03/2024 where he sought the following orders;

- 1) A declaration that the 1st, 2nd, 3rd and 4th Respondents are not licensed Microfinance Business of Digital Credit Providers within the meaning of Section 3(1) and related provisions of the Microfinance Act, 2006 and connected provisions.**

- 2) A declaration that the 1st, 2nd 3rd and 4th Respondents are not licensed Digital Credit Providers under the Central Bank of Kenya Act, Cap 491, the Central Bank of Kenya (Amendment) Act, 2021 and the Central Bank of Kenya (Digital Credit Providers) Regulations 2022.**

- 3) A declaration that all contracts, agreements entered into between the 1st , 2nd 3rd and 4th Respondents and the public, operating either as Microfinance Business or Digital Credit Providers the basis upon which the Respondents supposedly disbursed credit or loans under the Micro finance Act, 2006, the Central Bank of Kenya Act, Cap 491, the Central Bank of Kenya (Amendment) Act, 2021 and the Central Bank of Kenya (Digital Credit Providers) Regulations 2022 all monies earned or received by the 1st, 2nd 3rd**

and 4th Respondents in the nature of interest, fees, penalties and connected charges from the public are illegal, invalid and null and void *ab initio*.

- 4) Pursuant to prayer (3) above, a declaration that the 1st , 2nd , 3rd and 4th Respondents are constitutionally obligated to refund and compensate all the borrowers from whom they have illegally and fraudulently received and/earned interest, fees, penalties and connected charges in the manner as they shall be ordered by the Court.
- 5) A declaration that the 5th Respondent is in violation of Article 46(1) of the Constitution of Kenya 2010, Section(s) 2 and 3 of the Microfinance Act, Section(s) 4, 4A, 33R and 33S of the Central Bank of Kenya Act, Cap 491, Section(s) 4(1), (2) and (5) of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022, the Consumer Protection Act, 2012 and other connected provisions relevant thereto.
- 6) An order directing the 5th Respondent to immediately cease the operations of the 1st, 2nd, 3rd and 4th Respondents pending licensing pursuant to the relevant Statutes.
- 7) Costs of this Petition.

2. The Petition is supported by the Affidavit sworn by the Petitioner of even date. The Petition is supported by the Affidavit of Mark Esinyen Muko sworn on the same day.

Responses

3. The Respondents on their part filed their responses as follows; The 1st Respondent file Grounds of Opposition dated 3rd June 2024 through their Lawyer M/s Murgor & Murgor. The 2nd Respondent filed a Replying Affidavit sworn by one Richard Shimbala dated 24th April 2024 and Grounds of Opposition dated 2nd April 2024 through their Lawyer M/s Gatonye and Gatonye. The 3rd Respondent filed a Replying Affidavit sworn by one Vallen Omari and a Notice of Preliminary Objection (PO) dated 11th June 2024 through their Lawyer M/s Nyaanga & Mugisha Advocates.

4. The 4th Respondent filed a Replying Affidavit sworn by James Mugambi and grounds of Opposition dated 9th July 2024 through their Lawyer M/s Kimanthi and Associates. The 5th Respondent filed a Replying affidavit sworn by Ms. Evelyne Kilonzo who is the Senior Manager, Bank Supervision in the Central bank of Kenya sworn on 11th June 2024. To all the Replying Affidavits filed, the Petitioner filed Further Affidavits. With the pleadings in place, the Court on 3rd July 2025 directed that the Preliminary Objection file by the 3rd Respondent be heard 1st and Counsel for the 3rd Respondent was to file and serve his submissions on all the parties with leave to the rest of the parties to file their submissions upon service within the given time frame.

5. However, the only submissions on record as at the date of preparing this Ruling were the Petitioner's dated 14th May 2025 those of the 3rd Respondent dated 16th July 2025. The court will therefore proceed and render its Ruling based on these two sets of submissions. The PO is premised on grounds that:

- 1) **This Honorable Court lacks the original jurisdiction to hear and determine the Petition herein in view of the mandatory provisions of sections 33R and 33S of the Central Bank of Kenya Act and Regulation 4, 5, 9, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 & 52 of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022.**
- 2) **If this Honorable Court proceed to hear and determine the Petition herein, it will be usurping the powers of the regulator, the 5th Respondent herein, under sections 33R and 33S of the Central Bank of Kenya Act and Regulation 4, 5, 9, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 & 52 of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022.**
- 3) **Further, the Petition offends the *exhaustion doctrine, the ripeness doctrine and justiciability dogma doctrine* hence the same is an abuse of court process, frivolous and vexatious and should be struck out with costs to the 3rd Respondent.**
- 4) **The Petition is also incurably defective in form and in substance, as there are no discernible constitutional issues to warrant its admission and adjudication before this court in terms of the principles enunciated in *Anarita Karimi Njeru vs. Republic (1975)***

eKLR and Mumo Matemu vs. Trusted Societies of Human Rights Alliance & 5 others (2013) eKLR.

The 3rd Respondent's Submissions

6. On whether the petition raises constitutional issues, Counsel for the 3rd Respondent submitted that it is trite law that in a petition claiming violation, threat and/or infringement of the human rights and/or fundamental freedoms of an individual, the Petitioner has the burden of demonstrating the specific provisions said to be infringed and the manner in which they are alleged to have been infringed. Counsel urged that the constitutional transgressions must be pleaded with exactitude and lucidity.

7. Counsel further submitted that the Petitioner must meticulously state the nature of the constitutional violation including the specific provisions of the constitution, alleged to have been infringed and how the violation occurred. In nutshell, the petition must be precise on how a right or fundamental freedom guaranteed under the Constitution has been denied, violated, infringed, or is threatened.

8. He relied on the High Court decision in **Anarita Karimi Njeru v Republic [1979]1KLR**, the decision of the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] Eklr**, the Supreme Court decision in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** as well as **Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR**.

9. That based on the requirements therein set out, Counsel submitted that that upon careful examination of the reliefs sought in the Petition, none of the prayers enumerated from (1) to (7) expressly invoke or anchor themselves upon a specific right or fundamental freedom guaranteed under the Bill of Rights, which the Petitioner allege has been denied, violated, infringed or threatened with infringement.
10. Counsel therefore urged that the absence of express linkage of prayers to any constitutional provision clearly shows that the Petition does not meet the threshold for enforcement of rights under **Articles 22 and 23 of the Constitution**. Further, Counsel submitted that the Petitioner has not established a clear connection between the alleged constitutional violations and the 3rd Respondent, and that the Petition is laced with ambiguity and confusion and there is no clarity in the presentation of factual situations to the extent that the claim against the 3rd Respondent has not been substantiated with cogent and empirical evidence.
11. Counsel submitted that in actual fact, the Petitioner has entirely relied and cited statutory provisions and not constitutional provisions and referred the court to paragraph 8 to 37 of the Petition in which he states that the Petitioner has alleged violations of various provisions of Microfinance Act and the Central Bank Act and that it is only in part c and paragraphs 38 and 39 where he has cited **Articles 22 (1), (c), 23(1), 3, 258, 259 (1) and 46 of the Constitution** which he opines do not at all disclose any particulars of any constitutional violation.

12. Counsel further submitted that throughout its Petition, the Petitioner has not even tried to particularize how the 3rd Respondent and even how all the Respondents have violated any specific provisions of the constitution. Counsel urged that there is no demonstration of how the Respondents have violated or infringed his rights. Specifically, there is no connection between allegations of statutory violations and the constitutional infringements.
13. Counsel added that the declaratory prayers sought by the Petition is with regard to violation of statutory provisions, being **Microfinance Act, 2006; Central Bank of Kenya (Amendment) Act, 2021** and the **Central Bank of Kenya (Digital Credit Providers) Regulations, 2022** and that there are no prayers sought for infringement, violation or threatened violation of any fundamental freedoms and human rights at all.
14. Counsel observed that although there is an allegation of violation of consumer rights under Article 46, the Petitioner has not pleaded with specificity and no factual foundation, and more particularly, the Petitioner has not particularized how Article 46 has been violated with backing of empirical evidence. Counsel submits that this is in fact a complaint of statutory violation rather than a constitutional petition. Counsel urged that this Petition is vague, jumbled, imprecise and embarrassing as was held in the case of **Gesicho v Kenyatta & 3 others (Constitutional Petition 321 of 2018) [20221 KEHC 10935 (KLR)**, the **Mumo Matemu case (Supra)** and **Omondi & Another v Attorney General & 2 Others; Ethekon & 7 Others (Interested Parties) (Constitutional Petition E269 of 2025) [2025] KEHC 9956(KLR) (Constitutional and Human Rights) (10th July 2025) (Judgement)**

15. That in n view of the foregoing cited persuasive and binding authorities, Counsel urged the Court to proceed and dismiss the instant Petition for failing to meet the threshold for filing a constitutional petition.
16. On whether this Court will be usurping the mandate of the Central Bank Counsel submitted that the gravamen in the Petition is that the 3rd Respondent as well as the 1st, 2nd and 4th Respondents are providing digital credit lending services without licensing by the Central Bank of Kenya, the 5th Respondent, as required by the **Central Bank of Kenya (Amendment)Act, 2021** and the **Central Bank of Kenya (Digital Credit Providers) Regulations, 2022**.
17. Counsel observed that in his prayers, the Petitioner has sought various declaratory orders including an order directing the 5th Respondent, the Central Bank of Kenya, to immediately cease the operations of the 1st, 2nd, 3rd and 4th Respondents and is also seeking an order declaring that these Respondents are not licensed digital credit providers. Counsel submitted that however, the regulatory and licensing mandate has been bestowed upon the Central Bank of Kenya, the 5th Respondent, which is duly established under **Article 231 of the Constitution** and **Section 3 of the Central Bank of Kenya Act** and that **Article 231 (1)** provides that the Central Bank of Kenya shall perform other functions conferred upon it by an Act of Parliament.
18. Counsel submitted that **Section 33R of the CBK Act**, the 5th Respondent has the powers to register, license, regulate and supervise the operations of the digital credit providers. Further, he submitted that in **Section 33S**, no digital credit provider shall operate without licensing by the 5th Respondent

and added that this mandate has constitutional credence under **Article 231 (1) of the Constitution.**

19. Counsel submitted that the procedure for application for licensing to provide digital credit lending services is clear stated under **Section 33S (2), (3) and (4)** of the **CBK Act** as read together with Regulations **4, 5, 9, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52** of the **Central Bank of Kenya (Digital Credit Providers) Regulations, 2022.**

20. Counsel further submitted that licensing procedure is rigorous, lengthy, intensive and/or comprehensive as it involves three stages. First, the applicants are required to submit their names for consideration and approval. Secondly, the applicants are required to file and electronically submit application for licensing. The last stage is provision of data for testing before issuance of a license.

21. Counsel added that once the 5th Respondent has satisfied itself that all the requirements have been met, it has the discretionary power to grant or reject an application for a license by written notice addressed to the applicant within sixty days from the date of receipt of an application under **Section 33S (5)** of the **Central Bank of Kenya Act.**

22. Counsel submitted that **Regulation 9 of the Digital Credit Providers Regulations, 2022** gives the 5th Respondent the power to suspend and/or revoke the license of any digital credit lender for reasons stipulated in **Sub clause (a) to (h) of Regulation 9** and that there are other conditions including the right to be heard, giving reasons as well as transfer of data and closure of operations.

23. Counsel urged that the cessation of operations of digital credit providers cannot be done in haphazard or unmethodological manner as argued by the Petitioner. Counsel argued that the court cannot step into the arena of regulation of financial institutions which are dealing with sensitive personal data and maintained that these powers are constitutionally and statutorily reserved for the 5th Respondent. Counsel posited that looking at the body and the prayers in the Petition, the Petitioner has directly invited this Honorable Court to usurp and/or interfere with the constitutional and statutory regulatory and licensing mandate of the Central Bank of Kenya, the 5th Respondent and urged that this invitation must be rejected by this court as it directly affronts the well-established doctrines of law.

24. Further hat it is now an established doctrine of law in our jurisdiction that the constitutional and statutory bodies and/or organs must be allowed to discharge their mandates unhindered provided that their actions are within the confines of the constitution and the law and that the court will only interfere if there is a justifiable reason to do so as was stated in the case of **Njeru v Office of the Director of Public Prosecutions & 2 Others (Constitutional Petition 206 of 2021) [2024] KEHC 356 (KLR)** and in **Waweru Munyi Jackson v Director of Criminal Investigation & 4 Others [2021] eKLR**

25. Counsel further urged that it is trite law that where the constitution and the law has distributed functions to various constitutional and statutory bodies and/or organs, the court cannot be invited to usurp. He placed reliance on the case of **Shaban Mohamud Hassan & 3others [2013] eKLR**.

26. In addition, Counsel submitted that the doctrine of separation of powers presupposes that constitutional organs, including this court, are required to keep to their lane and exercise restraint by avoiding undue interference with matters within the constitutional mandate of other constitutional organs. Counsel maintained that the court's intervention is only limited to the scope of checks and balances as was explained by the Court of Appeal in the **Mumo Matemu case (supra)** and the Court of Appeal decision in **Salaries and Remuneration Commission v National Hospice Insurance Fund Management Board & 2 Others (Civil Appeal 165 of 2016) [2024] KECA 419 (KLR) (26th April 2024) (Judgement)**
27. Counsel submitted that in view of the foregoing, in hearing and determining the present petition, the court will be usurping and interfering with the 5th Respondent's constitutional and statutory mandate to register, license, regulate and supervise the operations of the digital credit providers, the 1st to 4th Respondents herein.
28. On whether the instant petition offends the doctrine of exhaustion, ripeness and justiciability, Counsel urged that it is trite law that litigants must exhaust alternative dispute resolution mechanisms before approaching the court. Further, Counsel urged that the doctrines of constitutional avoidance, justiciability and ripeness precludes the court from entertainment a constitutional where there are other available remedies to the litigant. He observed that doctrine of exhaustion of alternative dispute resolution procedures before approaching court was well stated by the Court of Appeal in the case of **Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42(KLR)**.

29. Counsel further submitted that the doctrine of constitutional avoidance and justiciability are now well known in constitutional litigation. Counsel pointed out that whereas constitutional avoidance allows the courts to decline to hear a matter due to existence of other alternative mechanism, justiciability encompasses the principles of ripeness and mootness of the issue in dispute. He added that the Supreme Court of Kenya in **Communication Commission of Kenya & 5 Others v Roval Media Services Ltd & 5 others (at para 256)** held that courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine.

30. Counsel argued that it is now clear that the 5th Respondent has constitutional and statutory mandate to grant, reject, suspend and/or revoke license for digital credit provision services. Counsel maintained that this in itself is an administrative decision which is governed by the **CBK Act, the Digital Credit Providers Regulations** as well as **Article 47 of the Constitution** and the **Fair Administrative Action Act**.

31. Counsel submitted that the Petitioner is complaining that the 1st to 4th Respondents are operating without license and that the 5th Respondent has prolonged the issuance of license thus violating his consumer protection laws under **Article 46 of the Constitution** and that he is also seeking the invalidation of contracts and refund of interest, fees, penalties and other charges to customers. That however, a keen scrutiny of the Petition reveals that the Petitioner appears to be a dissatisfied with the operations of the 1st to

4th Respondents with the permission and/or licensing by the 5th Respondent and added that the Petitioner has also acknowledged that although the licensing of the 1st to 4th Respondents is ongoing, the same has been prolonged or delayed.

32. Counsel submitted that first, **Regulation 22 of the Digital Credit Providers Regulations**, provides for the procedure for resolution of consumer disputes and states that any complaints against the operations of the digital credit provider should be first reported to concerned provider for resolution within 30 days, and thereafter escalated to the regulator if dissatisfied. Secondly, that **Regulations 48, 49, 50 and 51 of the Digital Credit Providers Regulations** has established a mandatory procedure for resolution of disputes concerning the operations of the digital credit providers. Counsel observed that it provides that any person is aggrieved with the administrative decision of the CBK has a right to request for review within 14 days of being aware of the decision.

33. Counsel added that once a request for review has been filed, CBK has the mandate to determine the request and communicate its decision within 30 days pursuant to **Regulation 51 (1)**. Counsel observed that under **Regulation 51 (2) of the Digital Credit Providers Regulations**, the Bank must hear the representation of the digital credit provider or other persons on the request for review before rendering its decision.

34. Counsel submitted that under **Regulation 52 of the Digital Credit Providers Regulations**, the decision on the request for review must be backed by reasons and that this requirement is in accordance with **Article 47(1) and (2) of the Constitution** and **Section 4, 5 and 6 of the Fair**

Administrative Action Act (FAA) which requires administrative decisions to be effective, efficient, timely and with reasons.

35. Counsel submitted that although the **CBK Act** and the **Digital Credit Providers Regulations** are silent on the right to appeal against their decisions, these decisions are administrative decisions within the meaning of **Article 47 (1) and (2)** of the Constitution and **Section 4, 5 and 6 of the FAA Act** and are thus subject to judicial review under **Sections 7, 8 and 9 of the FAA Act**.

36. Counsel maintained that the Petitioner ought to have complied with the above dispute resolution procedures before approaching this court by way of judicial review and not a constitutional petition. Counsel urged that this court must therefore invoke the constitutional avoidance doctrine as the Petition offends the exhaustion, the ripeness and justifiability doctrines as postulated in the in the case of **KKB v SCM & 5 others (Constitutional Petition 014 of 2020)[2022] KEHIC 289 (KLR)**, the Court of Appeal decision in **Speaker of the National Assembly v Karume(Civil Application 92 of 1992)[1992] KECA 42 (KLR) (29th May 1992(Ruling)**, the Supreme Court decision in the **Communications Commission of Kenya case(supra)**, and the High Court decision in **Chilango v Independent Electoral Boundaries Commission & 3 Others (Constitutional Petition E005 of 2022 [2022] KEHC (KLR) (17th June 2022)(Judgement)**

Petitioner's Submissions

37. Counsel submitted that the Notice of Preliminary Objection raised by the 3rd Respondent as under Section(s) 33R and 33S do not merit as a preliminary objection towards the hearing and determination of this Petition. That the

jurisprudence ancillary to preliminary objections is elaborate and settled in law. He relied on the case of **Mukisa Biscuit Manufacturing Ltd vs West End Distributors (1969) EA 696** and the case of **Hassan Nyanje Charo-vs-Khatib Mwashetani & 3 other (2014) eKLR**.

38. Counsel further submitted that **Section 33R and 33S of the Central Bank of Kenya (Amendment) Act, 2021** and the cited Regulations deal with the licensing and regulation of Digital Credit Providers by the 5th Respondent and urged that the subject of the Petition is whether by failing to license the Respondents and/or comply with the Act and the Regulations above stated, the 5th Respondent has violated, infringed on and/or threatened the provisions of **Article 46 of The Constitution of Kenya (2010)**.

39. He submitted that if the answer be in the affirmative, it then renders all the activities and operations of the Respondents as Digital Credit Providers (*within the meaning of the Act and the Regulations*) illegal and in violation of Article 46 and the provisions of statute. That in their opinion, they do not raise pure points of law and/or material to disposing off the proceedings and that on the contrary, the two provisions are critical in determining the legality of the activities and operations of the 1st to 4th Respondents and the statutory obligations of the 5th Respondent in compliance with **Article 46**.

40. Counsel added that as to whether the 1st to 4th Respondents are licensed Digital Credit Providers authorized to operate as they do, is a contested fact and that neither the 1st to 4th Respondents nor the 5th Respondent have provided any evidence to justify if indeed the 1st to 4th Respondents have made any applications to be licensed. Counsel observed that on the other hand, and quite astonishing at that, the 1st Respondent in its Replying

affidavit contends that it is not a Digital Credit Provider, contrary to the deposition made by the 5th Respondent in its response that the 1st Respondent has applied for a license and operates as a Digital Credit Provider. Counsel urged that these are unascertained and contested matters of fact for determination by the Court. Further to the above, Counsel submitted that the doctrines of exhaustion, ripeness and justiciability dogma border on proof of facts, discernible during a trial and not at such preliminary stage of the proceedings and urged that the PO must fail at the door step.

41. On the jurisdiction of the Court, Counsel cited **Article 166(1) of the Constitution** on the jurisdiction of the High Court and submitted that **Article 23 (1) and (3)** vests in the High Court, the power to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and grant appropriate relief. Counsel argued that the Petition is civil in nature and that the Petitioner has exercised his right to institute the Petition pursuant to **Article 22(1) of the Constitution**. Counsel added that the Article bestows upon the Petitioner the unfettered right to institute a Petition before the Court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.

42. Counsel urged that the Petitioner is acting in the public interest in line with **Article 22(2) (c)** claiming denial, violation, infringement and/or threats to consumer rights as provided for under **Article 46 in the Bill of Rights**. That in this regard, this Court bears the exclusive original and unlimited jurisdiction to interpret and implement the Bill of Rights as enshrined. Counsel submitted that as noted above **Section 33R** and **33S** deal with

licensing and regulation of Digital Credit Providers. Counsel argued that they do not in any way oust the constitutional jurisdiction of the High Court to interrogate and adjudicate as to whether there is a denial, violation or threat to a right in the Bill of Rights that is enforced in statute, in this case **Section 33R and 33S**.

43. Counsel further urged that the 5th Respondent bears no constitutional and/or statutory mandate to implement the Bill of Rights within the meaning of Article 23. Counsel added that its duty in reference to the cited provisions and Regulations is limited to licensing and regulation. That in view of the foregoing, the contention that in determining the Petition the Court shall be usurping the powers of the 5th Respondent is misplaced, misrepresented and misleading and urged that this Court has jurisdiction.

44. On the **Anarita Karimi Njeru case (Supra)**, Counsel submitted that the principles sought to be relied upon in the respective case constitute *orbiter dictum* and not a statement of law. That it is purely judicial opinion, not the Court's holding and/or determination of a point or question of law. Counsel observed that the Court of Appeal in the **Mumo Matemu case(supra)** broadly and reasonably emphasized on the need for Court's to employ a progressive approach in determining the admissibility and propriety of constitutional petitions; that is adopting the subjective test.

45. Counsel added that **Article 159 (1) and (2)** is instructive in terms of the modern day constitutional approach to the fair administration of justice without focus on unnecessary limitations and submitted that the Petition is well framed, precise and articulate on the violation of **Article 46**. That in the **Mumo Matemu Case** the Court restated that what is critical is that the

Petition should be well drafted and precise in articulating the violation and/or infringement of the rights in the Bill of Rights and further adequate notice of the violation(s) be given to the adversary(ies) to respond to the Petition. That in the instant case, the Petition was duly served upon the Respondents.

46. That the 2nd and 5th Respondents have comprehensively responded to the petition by filing Replying Affidavits. Counsel argued that the responses clearly demonstrate a clear understanding of the issues by the respective Respondents, to the extent that the 1st Respondent even contends that it is not a Digital Credit Provider within the meaning of the Act. Counsel submitted that the responses manifest adequate notice and preparation by the Respondents. Counsel argued that the simple function of pleadings, hearing submissions and judicial decision is to define the issues in litigation and adjudication.

47. Counsel urged that to demand exactitude and mathematical precision in drafting of constitutional petitions is to miss the point, hence the superior Court's advice on the subjective test in approaching such petitions and further submitted that it is only when a Petition raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy. Counsel urged that the dictum in the **Anarita Karimi Njeru Case** is widely deemed as being oppressive and to say the least myopic, often tossed around by opposing Counsel to frustrate litigation of constitutional issues.

48. Counsel reiterated that the Petition is accurate, is in simple language and clearly sets down the violation, infringement and/or threat to the provision(s)

of The Constitution and statute as narrated. In the end, Counsel urged that the objections raised are not pure points of law to merit a preliminary objection to the Petition.

Determination

49. Having addressed my mind to the Preliminary Objection raised by the 3rd Respondent herein, it is my considered opinion that the primary issue for determination is **whether the Preliminary Objection based on the grounds raised has merit.**

50. The Supreme Court in **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others** cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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... 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”.

51. Further, the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others** [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

52. A preliminary objection therefore must be founded upon a settled and crisp point of law. It must be noted that the preliminary objection if allowed may dispose of the entire suit at the very onset and without hearing the main suit. The PO herein raised by the 3rd Respondent is based on the three grounds as already summarized. The 1st ground is that this court lacks jurisdiction to hear the Petition in line with the provisions of **Section 33R and 33S of the Central Bank of Kenya Act.**

53. Having considered the submissions made, on the 1st objection, which is that by hearing this petition, the court will usurp the constitutional and statutory mandate of the Central bank of Kenya, the 5th Respondent herein, the court’s simple finding is that in light of the mandate of the High Court as accorded to the court as under the provisions of **Article 165(3)(b)(ii) & (6) of the**

Constitution of Kenya 2010, Section 33R and 33S of the Central Bank of Kenya Act do not in any way oust the constitutional jurisdiction of the High Court to interrogate and adjudicate as to whether there is a denial, violation or threat to a right in the Bill of Rights. This aspect of the PO therefore lacks merit and the same is accordingly dismissed.

54. On the Objection as to whether the petition as drafted and filed raises any constitutional issues so as to properly invoke the jurisdiction of the court under **Articles 22, 23 and 165(3) of the Constitution**, as already herein summarized, the threshold for a Constitutional Petition was set out in the case of **Anarita Karimi Njeru vs AG & Others Miscellaneous Application Number 4 of 1979** where the Court held:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

55. The issue pertaining to the threshold set in the **Anarita Karimi Njeru case (supra)** was further discussed and elucidated upon at length by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & Others Civil Appeal Number 290 of 2013** where the court stated thus:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

“...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional Petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today...The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

56. To determine this issue, all that this Court needs to do is to look at the Petitioner's pleadings and or Petition. A perusal of the Petition dated 15th March 2024, reveals that the Petitioner has cited and outlined the various constitutional provisions which have been alleged to have been infringed and/or violated. They are **Articles 19, 20, 21, 22, 23, 46, 258 and 259 of the Constitution**. From his pleadings, the petitioner has sufficiently demonstrated his *locus standi* under **Article 22 of the Constitution**. The petitioner is precise on the reasons for the petition *to wit*, that the 1st to 4th Respondents have infringed upon and violated his rights as a consumer as provided under **Article 46 of the Constitution** by operating their various named businesses without any licenses, a fact not denied but explained away by these Respondents in their responses.

57. The petitioner also avers further, that for reasons that the 5th Respondent who is the Regulator of the 1st to 4th Respondents has failed to perform its duty of issuing the requisite licenses to the Respondents, and is in fact aware that they are operating without them and has not taken any remedial measures as are available to it by dint of the operating statute, the 5th Respondent is not only in breach of its statutory duty, but has also by extension violated and infringed upon the petitioner's rights as a consumer as provided under **Article 46 of the Constitution**.

58. Even though the petitioner in his pleadings has not adequately demonstrated the injuries occasioned to him by the alleged infringements and violations, the petition as it is adequately precise to enable the opposing parties appreciate the cause of action to enable them respond, which in fact they

have all done very satisfactorily hence prima facie underscoring the fact that the petition has adequately met the required threshold.

59. Further to the above, being satisfied that the petition has sufficiently and with reasonable precision set out the issues in contestation, a consideration of these issues will require that issues be resolved at a full hearing where both oral and evidentiary evidence is adduced to support any/and all the fact alleged and/or disputed. For this reason, this aspect of the objection too does not meet the threshold of a preliminary objection for it is premised on a mix of law and facts. Accordingly, then, it is also dismissed.

60. On objection that the instant petition as drawn and filed, offends the exhaustion, the ripeness, the constitutional avoidance and justiciability doctrines, touching on the doctrine of Constitutional avoidance, the court is guided by the decision of the Supreme Court in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where the doctrine of avoidance was well discussed as follows;

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd Respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court...”

61. Further in the persuasive case of Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020) [2022] KEHC 287 (KLR), Hon. Mativo, J. (as he then was) indicated:

27. The doctrine of avoidance is primarily viewed by Courts from the position that although a Court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme

Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis

....

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system...

62. The primary statutes that guide the existence, licensing and operations of the five Respondents and that are applicable to this Petition are the **Central Bank of Kenya Act (CBK Act), CAP 491** and the **Micro Finance Act (MFA), CAP 493C Laws of Kenya**. There are also **The Central bank of Kenya (Digital Providers Regulations) 2022** that came into effect through **Legal Notice Number 46 of 2022**.

63. Counsel for the 3rd Respondent submits that before coming to court, the petitioner ought to have applied himself to, and exhausted every avenue of

dispute resolution clearly set out in the regulations to the MFA. That for reasons that he did not, then his petition is not yet ripe for resolution by the High Court and it offends the constitutional doctrines of exhaustion, justiciability and avoidance as herein above very well elucidated in the authorities cited by the court, it ought not hear the petition.

64. Counsel submitted that the relevant regulations which provides for the procedure for the resolution of any consumer disputes against the operations of the digital credit provider and the manner of appeal to the CBK by any dissatisfied party Regulations 22, 48, 49, 50, 51 and 52. That these procedures as established are mandatory. That even as these procedures do not provide for a recourse for appeal against the decisions of the CBK, the decisions are administrative within the meaning of Articles 47(1) and (2) of the Constitution and Sections 4, 5 and 6 of the Fair Administrative Action Act and are therefore subject to Judicial Review under Section 7, 8 and 9 of the Fair Administrative Action Act.

65. That in this regard, the Petitioner ought to have complied with the above dispute resolution procedures before approaching the court and only by way of judicial review and not by way of a constitutional petition. To this submissions, the response by Counsel for the Petitioner in his submission while not rebutting, denying and/or controverting the assertion that a mandatory alternative manner of resolving disputes as herein submitted and outlined by Counsel for that 3rd Respondent does in fact exist in the Regulations to the MFA simply stated that the doctrines of exhaustion, ripeness and justiciability dogma border on facts discernable during a trial

and not at such a preliminary stage of proceedings and therefore do not meet the threshold of a preliminary objection.

66. Of significance to these submissions is **Section 9** of the **Fair Administrative Action Act** provides for the procedure for judicial review as follows: -

“(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.

(2)The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3)The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4)Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5)A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

67. I have perused the Regulations cited and as submitted by Counsel for the 3rd Respondent there does indeed exist a dispute resolution mechanism set out therein through which the complaints raised against the 1st to 4th Respondents in this Petition ought to have been raised with the Regulator, the Central Bank of Kenya, who has been sued as the 5th Respondent. The court notes that the petitioner has not in any way averred and/or demonstrated that this mechanism has already been explored and a resolution communicated to the petitioner hence the necessity for this petition.

68. Further, as per the provisions of **Section 9 of the Fair Administrative Action Act**, the court is satisfied that in the event that the Petitioner is not satisfied with the decision of the 5th Respondent, then the correct procedure is to approach the court through a judicial review and not by way of a constitutional petition. Whereas it is correct that the process of addressing the specific complaints that he has against the 1st- 4th Respondents would involve adducing facts discernable during a trial, the procedure on how and in which arena those facts ought to be adduced is the subject of the preliminary objection.

69. In my consideration of the provisions of the **Regulations to the MFA**, the court is satisfied that the said procedure and arena has been very well laid out therein as already herein summarized and that in the event a party is

aggrieved with the decision of the regulator who is the 5th Respondent herein, the avenue of channeling that dissatisfaction is as given in **Section 9 of the Fair Administrative Action Act**. In this regard, I am satisfied that this limb of the objection is on a pure point of law and has therefore met the required threshold of a Preliminary Objection

70. In this regard, I am satisfied that the doctrines of exhaustion, ripeness and justiciability are applicable in the sense that the Petitioner has not yet exhausted the legally available channels for redress. In this regard then his cause of action is not yet ripe for adjudication before this court and it has therefore not met the justiciability threshold. For these reasons, the court is satisfied that this petition is not only prematurely before it, but it is also improperly before for reasons that it ought to have come by way of judicial review as already stated. In conformity with the doctrine of avoidance therefore this court will not adjudicate over this Petition. The court in this regard finds merit in the preliminary objection on this limb and the same is accordingly upheld. The upshot then is that the Petition is misconceived and lacks merit and the same is therefore dismissed. This being a public interest litigation, there shall be no orders as to costs.

Read dated and Signed at ELDORET on 20th February 2026

E. OMINDE
JUDGE

