

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E476 OF 2021

BETWEEN

KATHAMBI RUCHIAMI.....1ST
PETITIONER
ALEX GABRIEL.....2ND
PETITIONER
BODA POA GROUP.....3RD
PETITIONER

VERSUS

HEAD OF THE PUBLIC SERVICE.....1ST
RESPONDENT
CABINET SECRETARY FOR TREASURY & NATIONAL
PLANNING.....2ND RESPONDENT
CENTRAL BANK OF KENYA.....3RD
RESPONDENT
ATTORNEY
GENERAL.....4TH
RESPONDENT

AND

CREDIT REFERENCE BUREAU AFRICA LIMITED
T/A TRANSUNION.....1ST
INTERESTED PARTY
METROPOL CREDIT REFERENCE BUREAU LIMITED.....2ND
INTERESTED PARTY
CREDITINFO CREDIT REFERENCE BUREAU..... 3RD
INTERESTED PARTY
CREDIT INFORMATION SHARING
ASSOCIATION OF KENYA (CIS KENYA)4TH
INTERESTED PARTY

**KENYA BANKERS' ASSOCIATION.....5TH
INTERESTED PARTY
DIGITAL LENDERS ASSOCIATION OF KENYA.....6TH
INTERESTED PARTY
ASSOCIATION OF MICROFINANCE INSTITUTIONS.....7TH
INTERESTED PARTY**

J U D G M E N T

Introduction

1. The Petition dated 8th November 2021 was amended on 2nd March 2023 and is supported by the 1st Petitioner's affidavit in support of similar date and a further affidavit dated 10th November 2024. The Petition challenges **Regulation 18(7) of the Banking (Credit Reference Bureaus) Regulations, 2020** for being inconsistent with Section 31 of the Banking Act and **Articles 10, 27** and **46** of the Constitution.
2. On this premise the Petitioners seek the following reliefs against the Respondents:
 - a) **A declaration that the amendment of the Banking (Credit Reference Bureaus) Regulations, 2020, by introducing Regulation 18(7) is inconsistent with Section 31 of the Banking Act Cap 488 Laws of Kenya and Articles 10, 27 and 46 of the Constitution, therefore, null and void.**
 - b) **A declaration that the amendment of the Banking (Credit Reference Bureaus)**

Regulations, 2020 by introduction of Regulation 18 (7) violated Article 10 of the Constitution thus unconstitutional for want of public participation.

- c) An order lifting the suspension barring credit only Microfinance Institutions and digital lenders from participating in the Credit sharing mechanism to resume sharing credit information through CRBs unless specifically barred by the CBK upon exercise of fair administrative process.**
- d) An order be issued setting aside the Central Bank of Kenya's directive vide Circular No 8 of 2020, dated 14th April barring credit only Microfinance Institutions and digital lenders from participating in the Credit Information Sharing Mechanism through Credit Reference Bureaus.**
- e) Costs of this Amended Petition.**

Petitioners' Case

3. The Petitioners state that following the Corona virus pandemic announcement in the Country on 13th March 2020, a consultative meeting of various stakeholders in Government and the private business sector including the Governor, 3rd Respondent, Chief Executive Officers of Financial Institutions and business entities, mobile telephone service providers among other private entities, was held at Statehouse Nairobi on the 18th March, 2020.
4. The Petitioners aver that the purpose of the meeting was to come up with emergency measures such as restructuring of

loans, suspension of listing of credit information with the Credit Reference bureau and increased amount of mobile money transactions to keep the economy afloat during the partial lockdown and suspension of several business operations.

5. The Petitioners depone that these measures were actualized vide a Circular dated 27th March 2020 addressed to all banking institutions and financing companies by the 3rd Respondent. Particularly, the Circular issued guidelines for the implementation of the emergency measures on loan restructuring and compliance.
6. Furthermore, it is deponed that in April 2020, the 3rd Respondent vide Circular No.8 of 2020 directed the 1st, 2nd and 3rd Interested Parties not to receive any credit information, whether positive or negative from credit only microfinance institutions and digital lenders.
7. Soon thereafter vide a Gazette Notice No.3096 dated 8th April 2020 and issued on 14th April 2020, the 2nd Respondent suspended sharing of negative credit information for the period with effect from 1st April, 2020 to 30th September, 2020. In particular, *banks, mortgage finance Companies, microfinance banks and Sacco societies were barred from submitting to credit reference bureaus any negative credit information on a non performing loan of a customer whose loans were performing for the period prior to 1st April, 2020,*

third party Credit information providers not to submit to any credit Reference Bureau any negative information on a customer which qualified as such from 1st April,2020 and Credit Reference Bureaus shall not include in any credit report any negative credit information specified above. It is noted that this directive was anchored on Regulation 18 (7) of the Banking (Credit Reference Bureau) Regulations, 2020.

8. The Petitioners assert that as a result of the undertaken measures, several businesses were hit hard, being forced to scale down and some closing down completely, such as Micro, Small and Medium enterprises (MSMEs) who depended on the credit rating to access loans. Furthermore, it is averred that owing to the implication of the directive, commercial banks, mortgage finance companies, microfinance banks and other lenders halted lending for fear of default which further affected the already ailing business environment.
9. The Petitioners state that subsequently, the 4th Respondent vide a Press Release on 1st October 2020 announced the lapse of the six-month suspension period on listing of negative credit information of borrowers with the Credit Reference Bureaus. It is stated however that the directive barring the 1st, 2nd and 3rd Interested Parties from receiving credit information from credit only microfinance institutions and digital lenders, was not lifted and persists to date.

10. It is claimed that the Banking (Credit Reference Bureau) Regulations, 2020 which conferred power to the 2nd Respondent to suspend listing by Credit Bureaus, was amended and published on the same date as the suspension notice, vide Gazette Notice No 55 on 8th April 2020. These Regulations are argued to have effectively repealed the Banking Act (Credit Reference Bureau) Regulations, 2013.
11. The Petitioners are aggrieved that the Respondents in amending Regulation 18 of the Banking (Credit Reference Bureau) Regulations, acted contrary and not in compliance with Article 10 of the Constitution. This is since the impugned Regulation was introduced without involvement of all the stakeholders which include the Micro, Small and medium Enterprises-MSMEs, and members of the Public. Furthermore, the impugned Regulation is claimed to be inconsistent with the primary legislation that is, the Banking Act under Section 31.
12. The Petitioners as well aver that on 20th October 2021, the President during his speech, while acknowledging the MSME's role in the economy, issued a directive suspending negative listing for non-performing loans capped at Ksh.5,000,000.00 for a period of one year ending in September, 2022. It is argued that the President's directive also affected listings of borrowers with loans below Ksh.5,000,000, from October, 2020. They assert that this

means that their rating would be inaccurate for a period of two years ending September, 2022.

13. The Petitioners state that in a bid to enforce the President's Directive, the 2nd Respondent, vide Legal Notice No 225 dated 5th November, 2021, published a number of directives on suspension of exchange of certain aspects of negative credit information as follows:

- a) *Banks/mortgage finance companies, microfinance Banks and Sacco Societies shall not submit to any Credit Reference Bureau, any negative credit information on non-performing loan of a customer of an amount less than Kshs. 5,000,000.00 where the loans were performing on September 30th, 2021 but became non-performing on 1st October, 2021.*
- b) *3rd Party Credit information providers shall not submit to any credit reference bureau any negative credit information of a customer on a loan of an amount less than Kshs. 5,000,000.00 which qualified as such from October, 1st, 2021.*
- c) *Credit Reference Bureaus shall not include any credit report, any negative credit information for loans of a customer less than Kshs 5,000,000.00 submitted to the Credit Reference Bureaus from 1st October, 2020 to 30th September, 2021, and any negative credit information specified in (a) and (b) above.*

14. The Petitioners contend that Legal Notice No. 225 was issued pursuant to the provisions of Regulation 18(7) of the Banking (Credit Reference Bureau) Regulations, 2020 whose constitutionality is challenged in this Petition. It is stated that

thereafter the 3rd Respondent seeking to enforce the President's Directive, proceeded to implement the Moratorium through its Circular No. 5 of 2021 dated 8th November, 2021 alongside a Press Release of even date titled *Suspension of the Listing of Negative Credit Information for Borrowers*.

15. According to the Petitioners the President in issuing his Directive acted unilaterally and arbitrarily without prior consultation and in total disregard of the national values and principles of good governance. They equally argue that the President's action not only usurps the 3rd Respondent's role but also discriminates against MSMEs access to credit, in violation of Article 27 of the Constitution on equality and freedom from discrimination which in turn violates their social and economic rights.
16. The Petitioners are concerned that if the President's Directive is implemented, it will cause a complete business shut down for individual and small-scale business borrowers as well as the Credit Reference Bureaus who mainly depend on credit reference information data.
17. As such, the Petitioners bring this Petition against the Respondents to challenge the constitutionality of the Presidential Directive on the suppression of negative listing of Borrowers by Credit Reference Bureaus and the legality of Regulation 18 (7) of the Banking (Credit Reference Bureaus)

Regulations, 2020 which was enacted without public participation prior to its amendment. Additionally, this Directive is argued not to be anchored in law thus an illegality.

18. Further to this, the Petitioners assert that the 3rd Respondent's Directive indiscriminately barring credit only microfinance institutions and digital lenders, contravenes Article 46 (b) of the Constitution and is an unfair administrative action as the lenders affected were not engaged or informed of their specific violations and given an opportunity to defend themselves before being barred.
19. The Petitioners further inform that while the instant Petition appears to be similar to one, **HCCHRPET/E255/2021**, the issues and the cause of action in the two Petitions are distinct and distinguishable. They also state that Hon. Lady Justice M. Thande on 28th August 2023 delivered a Judgment in **HCCHRPET/E255/2021**.

1st, 2nd and 4th Respondents' Case

20. In reaction to the Petitioners' case and Application, these Respondents filed Grounds of Opposition dated 25th November 2021 on the basis that:
 - i. *A grant of the conservatory orders sought at this stage would offend the presumption that every legally enacted statute is constitutional, noting that such a presumption can only be rebutted*

upon full hearing and determination of the Petition.

- ii. *The strict interpretation of Article 23(3)(c) is that a relief for conservatory Orders is prima facie, only available when a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The mere allegation that the Petitioners fundamental rights have been contravened is not of itself sufficient to entitle the Petitioners the conservatory remedies sought. The Petitioners must demonstrate real danger so imminent and evident, true and actual and not fictitious; so as to deserve immediate redress by this Court.*
- iii. *As such and based on the Notice of Motion application, the Petitioners, have not in any way demonstrated that the enactment of the Banking (Credit reference Bureau) Regulations, 2020 violated the Constitution and their rights.*
- iv. *From a reading of the application and the Petition, it is evident that the issue of contention is whether there was public participation conducted before Respondents opted to enact the Banking (Credit Reference Bureau) regulations, 2020. This issue cannot be decided at this interlocutory stage as there is need for this Court to interrogate the principles of public participation which can only be aptly decided at the hearing of the main Petition.*
- v. *There was inordinate delay in filling the Application challenging the Constitutionality of Banking (Credit Reference Bureau) Regulations, 2020.*
- vi. *It is clear and as admitted under paragraph 25 and 26 of the Supporting Affidavit sworn by the 1st Petitioner herein, the Presidential directive of 20th October, 2021 and the Legal Notice No. 225 of*

issued on the 5th November 2021 was pursuant to the provisions of Regulation 18(7) of the Banking (Credit Reference Bureau) Regulations, 2020 which were enacted in April 2020. Therefore, if at all there were any rights violated, by the directive and Gazette notice then those rights were violated way back in April 2020. The Petitioners have lived with the violations, for more than one year before moving the Court. It will do no more harm if they wait for the conclusion of the Petition, which will finally determine if indeed any rights have been violated as it was held in the case of **Okiya Omtatah Okoiti v Kenya University Teaching, Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (interested parties) [2019] eKLR.**

- vii. The Petitioners have not demonstrated any prejudice or irreparable harm, damage or injury likely to be suffered if the conservatory orders sought are not granted. There is also no evidentiary proof that the grant of conservatory orders sought would enhance constitutional values and objects specific to the rights and freedom in the Bill of rights.
- viii. The orders sought in the application are final in nature and this will require the Court to go into a conclusive or definite finding which is tantamount to pre-emptying the Petition. Moreover, this will go against the principles, purpose and intention of an application for conservatory orders.
- ix. The Petitioners have not demonstrated that if conservatory reliefs sought are not granted, the petition will be rendered nugatory.
- x. It is in the interest of the Public that this Application be dismissed.

3rd Respondent's Case

21. The 3rd Respondent filed its Replying affidavit sworn on 18th November 2021 by its General Counsel, Kennedy Kaunda Abuga.
22. To commence with, it avers that Section 31(3)(b) and (c) and (4) of the Banking Act empowers the 2nd Respondent to promulgate Regulations on the establishment and operation of CRBs for the purpose of collecting credit information on clients of institutions licensed under the Act, the Microfinance Act and the SACCO Societies Act and for the sharing of such credit information. Equally, the 3rd Respondent under Section 57 of the Central Bank of Kenya Act is empowered to prescribe Regulations, issue Guidelines, Circulars and directives to institutions including CRBs for the purpose of giving effect to provisions of the Act.
23. He depones that in line with these provisions, the 3rd Respondent in 2018 decided to review the Credit Reference Bureau Regulations, 2013. In doing so, the 3rd Respondent ensued to call for comments and views from the relevant stakeholders on the Draft Regulations. It is noted that the 3rd Respondent received comments from commercial banks, microfinance banks, CRBs, Kenya Bankers Association, Association of Microfinance Institutions, CIS Kenya and the Interested Parties herein. Following this feedback, it is averred that the 3rd Respondent formulated the Draft Credit Reference Bureau Regulations, 2019.

24. He depones that soon thereafter, the Draft Regulations were subjected to public participation in May 2019, where members of the public and stakeholders were invited to give their comments on the same by 17th June 2019. In like manner, the cited Stakeholders submitted their comments on the Draft Regulations.
25. He depones that the 3rd Respondent considered each comment in July 2019 wherein it was either agreed with and incorporated or disagreed with and reasons provided. Following this, the Draft Regulations were revised and forwarded to the 2nd Respondent for review and further action.
26. He avers that the 2nd Respondent proceeded to revise the Draft Regulations and published the same vide Legal Notice No. 55 of 8th April 2020 as the Credit Reference Bureau Regulations, 2020. *He asserts that at the time of filing this suit, the Credit Reference Bureau Regulations, 2020 had been in operation for 19 months with no legal challenge being raised.*
27. It is deponed that on 14th April 2020, the 3rd Respondent issued a Press Release informing the public about the CRB Regulations and the key reforms that had been introduced. Moreover, the measures that had been implemented to cushion borrowers from the difficulties of COVID 19. One of these measures was, the suspension of sharing of negative

credit information with CRBs for a period of 6 months. This was done vide Gazette Notice No.3096.

28. Furthermore, he depones that the 2nd Respondent in compliance with Section 11(1) of the Statutory Instruments Act transmitted the Credit Reference Bureau Regulations,2020 to the Clerk of the National Assembly for tabling before the House. The Regulations are said to have been approved by the House on 28th October 2020.
29. For this reason, he contends that the Regulations complied with the legislative framework contemplated under Article 94 of the Constitution as read with the Central Bank of Kenya Act, the Microfinance Act,2006, the SACCO Societies Act,2008 and the Statutory Instruments Act, 2011. The 3rd Respondent depones that thereafter, on 1st October 2020, it issued another Press Release notifying the public that the suspension notice had expired.
30. It avers that with the recommendation of the 3rd Respondent and in line with Regulation 18(7) of the Regulations, the 2nd Respondent vide Legal Notice No. 225 of 5th November 2021 suspended the sharing of negative credit information with CRBs to further cushion customers from the negative economic impacts of COVID 19.This was followed by the 3rd Respondent's Circular No.5 of 2021 dated 8th November 2021 to commercial banks, mortgage finance companies,

microfinance banks, SACCO societies and CRBs. This Directive was issued on the following basis:

- a) *The Kenya National Bureau of Statistics, the CBK and FSD Kenya ran the first wave of the Micro and Small Enterprise (MSE) COVID-19 Tracker Survey to better understand the impact of COVID-19 on micro businesses. The study found that 8% of businesses had benefitted from the suspension of the credit reporting to CRBs, accounting for the third most effective measure taken by the government during the survey period.*
- b) *Various Financial Sector Regulators in Kenya, including the CBK, compiled the Kenya Financial Stability Report in September 2021. The report focused on the impact of the COVID-19 pandemic on non-performing loans in 2021. The report concluded that all factors considered, the bank's credit risk is expected to remain elevated in 2021 due to non-performing loans. This further highlighted the need to impose mitigation measures which include but not limited to suspension of negative credit reporting.*
- c) *The CBK is required under Section 4 (2) and 4 (3) of the Central Bank of Kenya Act, Cap 491 of the Laws of Kenya to foster a stable market-based financial system and to support the economic policy of the Government. By recommending Legal Notice No. 225, the CBK was not only prompting a*

stable financial system but was also advancing the economic policies being advanced by the Head of Government.

31. In light of this, he contends that Legal Notice No.225 and the subsequent Circular No.5 of 2021 were premised on empirical, scientific and logical considerations not political considerations as alluded to by the Petitioners. Further to this, he asserts that while the Petitioners argued that MSMEs would be affected negatively by this Directive, they failed to establish the basis of the said allegations and issue the relevant evidence in support. Equally, that the Petitioners had failed to establish how the Directive infringes on Articles 10, 27, 46 and 47 of the Constitution.
32. He adds that the Petitioners failed to adduce evidence to show how businesses as they claim had been affected during the COVID period. Similarly, he avers that the Petitioners had failed to challenge the Regulations for over 19 months thus are guilty of inordinate delay.
33. He asserts that the impugned Regulation 18(7), was a by-product of the consultations that commenced in 2018 which involved engagement of the relevant Stakeholders and the public. That said, he argues that the Petitioners claim that the impugned Regulation is inconsistent with Section 31(3) and (4) of the Banking Act is unfounded. This is since the Section empowers the 2nd Respondent to make Regulations and second, Section 31(b) relates to Deposit Protection Fund

Board and Institutions regulated under the Kenya Deposit Insurance Act.

34. In sum, he contends that the Petition lacks merit as Legal Notice No.225 is constitutional, a position that the Petitioners have failed to rebut. For this reason, he urges that the Petitioners are not entitled to the relief sought.

1st Interested Party's Case

35. The 1st Interested Party through its Ag. Chief Executive Officer, Joseph Nyaga filed a Replying Affidavit sworn on 28th June 2022. He states that the 1st Interested Party is a Credit Reference Bureau (CRB) duly licensed by the 3rd Respondent to conduct credit reference bureau business pursuant to the provision of the Banking Act and the Banking (Credit Reference Bureau) Regulations. Predominantly, its role is to collect credit information, process it and disseminate it to financial institutions.
36. He informs that the 1st Interested Party acquired its license on 16th February 2010 and maintains a database through which banks, Microfinance Institutions and other lenders share amongst themselves, prescribed credit information relating to their customers only for use as permitted under Section 31 (3) (c) of the Banking Act and Regulation 27 of Banking (Credit Reference Bureau) Regulations, 2020.

37. He depones that at the time of its Registration, financial institutions were mandated to submit all non-performing loans to the Bureau and update the same on a monthly basis. He enlightens that by 2015, most of the financial institutions had begun submitting full file information which included both non-performing and performing loans, following amendments to the Banking Act and issuance of the Credit Reference Bureau Regulations 2013. He avers that this enabled the 1st Interested Party and other CRBs to offer sound credit scores which have in turn have resulted in informed loan appraisals and by extension increased access to credit.
38. Reiterating the facts of the Petition and as well in support of the Petition, he states that the 1st Interested Party following the President's directive was not consulted as a stakeholder, to give any comment or participate in the same, prior to publication of *Gazette Notice No. 225 of 2021*. He asserts that this was contrary to Article 10 of the Constitution, Section 5 of the Statutory Instruments Act as well as the President's direction that the relevant stakeholders be first consulted.
39. In light of the President's Directive and 3rd Respondent's Circular, he informs that as per the Data Specification Template (Version 4.1 released by 3rd Respondent on 29th January 2019), all credit information providers are obligated

to effect monthly submissions of credit information data by every 10th day of the month. In line with this, the data submissions made by the 10th November 2021 and those due in the subsequent months were expected to be compliant with the directive.

40. Considering this, he notes that the impugned Legal Notice compels CRBs to exclude any negative credit information for loans of a customer less than Ksh. 5,000,000 submitted by credit information providers from 1st October 2020 to 30th September 2021. He reasons that this exclusion is temporary and thus will only run for the specified relief period, after which the excluded data ought to be reinstated.
41. He argues that this is problematic as the 1st Interested Party and other CRBs maintain a database with millions of active profiles and so, given the huge volumes of data, implementation of the directive, requires redesigning of the entire IT system through various stages as outlined in the Affidavit. He notes that this will not take not less than three months and cost not less than Ksh.3,000,000/-.
42. Moreover, he asserts that the President's directive's effect of suppressing massive data will negatively affect the 1st Interested Party's business which will in turn threaten its sustainability with anticipated potential loss of employment.

43. Further to this, it is argued that the Directive is marred with ambiguity and dubiety in that cannot be implemented without further guidelines, as such lacks clarity. Chiefly, *the Directive is faulted for capping negative listing of loans less than Kshs.5,000,000/- but does not specify whether the amount relates to the principal sum or the outstanding loan balance; it does not specify whether the relief applies to MSMEs borrowers, individuals or all credit customers within the Kshs.5,000,000/- cap and there is ambiguity as to the relief timelines.*
44. The 1st Interested Party further argues that the prior to enactment of Regulation 18 (7) of the Banking (Credit Reference Bureau) Regulations, 2020, this Regulation was not part of the draft Regulations that were circulated for public comments by the 3rd Respondent. Consequently, it is contended that this Regulation was not submitted to public participation and further an opportunity for stakeholder to participate, in contravention of Section 5 of the Statutory Instruments Act.

3rd Interested Party's Case

45. The 3rd Interested Party through its Chief Executive Officer, Kamau Kunyiha filed a Replying Affidavit sworn on 6th July 2022.

46. He depones that the 3rd Interested Party is a CRB duly licensed by the 3rd Respondent pursuant to the provision of the Banking Act and the Banking (Credit Reference Bureau) Regulations. It acquired its license on 29th April 2015 and similarly, maintains a database through which banks, Microfinance Institutions and other lenders share amongst themselves prescribed credit information relating to their customers only for use as permitted under Section 31 (3) (c) of the Banking Act and Regulation 27 of Banking (Credit Reference Bureau) Regulations, 2020.
47. This Party filed an identical Replying Affidavit as the 1st Interested Party in support of the Petition, in relation to the substance of the Petition.

4th Interested Party's Case

48. The 4th Interested Party through its Counsel, Hannah Ndarwa filed a Replying Affidavit sworn on 13th June 2022. She states that the 4th Interested Party is a non-profit Organization registered as a Society under the Societies Act.
49. She states that this Party's objective is to facilitate the generation, collection, analysis, review, dissemination and use of accurate credit information and record for the benefit of all participants in the credit market. She notes that the essence of this role is informed by the historical background

of the development of the Credit Information Sharing legal framework as detailed in the Affidavit.

50. This Party in like manner filed an identical reply as the 1st Interested Party in support of the Petition, in relation to the substance of the Petition.
51. In addition to the underscored faults, the 4th Interested Party argues that the impugned Directives are also in violation of the Petitioners' economic rights as suspension of selected aspects of credit information from the credit information mechanism distorts the credibility of data and makes it unreliable in decision making, thereby denying consumers their consumer rights under Article 46 (b) of the Constitution to information necessary for them to gain full benefit from goods and services.

7th Interested Party's Case

52. The 7th Interested Party through its Chief Executive Officer, Caroline Kabui Karanja filed its Replying Affidavit sworn on 13th June 2022.
53. She informs that the 7th Interested Party is a non-profit organization that was registered as a Society in 1999 under the Societies Act. She informs that the 7th Interested Party primarily builds the capacity of the Kenyan Microfinance industry through, policy advocacy; capacity building;

networking & linkages and Research & knowledge management.

54. She equally informs that whereas the original legal framework for credit information sharing in Kenya did not incorporate microfinance institutions, their participation thereafter was enabled by a number of amendments to the Banking and Microfinance Acts as well as the Regulations governing the sharing of prescribed credit information undertaken between 2009 and 2016. As such, its members have since taken part in the credit information sharing framework. For this reason, that they will be directly impacted by the outcome of the instant Petition.
55. This Party in like manner filed an identical response as the 1st Interested Party in support of the Petition, in relation to the substance of the Petition.
56. In addition, to the highlighted challenges of the impugned Directives, she contends that financial institutions will refrain from lending to persons whose true credit history is unascertainable and ability to repay loans is uncertain.
57. Referring to a survey conducted by the 7th Interested Party, she avers that loan disbursements during this period dropped by over 16% in one month. Further that the survey revealed that the success rate for credit applications during

the period of data suppression dropped by 10% in the first month.

58. Moreover, she states that for almost all microfinance banks, lending is purely to the MSME sector who borrow amounts below Ksh. 3,000,000 and so for this reason, microfinance institutions rely on CRB information for decision making. She argues thus that failing to publish the credit score will deny good payers credit facilities while also failing to motivate poor payers to improve their credit score.

2nd, 5th and 6th Interested Parties Case

59. These Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

Petitioners' Submissions

60. Mutuma Gichuru and Associate Advocates for the Petitioners filed three set of submissions dated 2nd March 2023, 10th May 2023 and 26th June 2025 respectively. Counsel in the sets outlined the issues for discussion as: *whether the amendment of the Banking (Credit Reference Bureaus) Regulations, 2020 is inconsistent with Section 31 of the Banking Act and Articles 10, 27 and 46 of the Constitution and therefore unconstitutional, whether the Amendment of the Banking (Credit Reference Bureaus) Regulations, 2020 violates Article 10 of the Constitution on public participation, whether the suspension barring credit only microfinance*

Institutions and digital lenders from participating in the credit sharing mechanism contravenes Article 46 of the Constitution and is an unfair administrative action, whether Regulation 18 (7) of the Banking (Credit Reference Bureau) Regulations, 2020 is contrary to section 5 of the Statutory Instruments Act and whether the Judgment in Petition No. E255 of 2021 (dated 28th August 2023) has rendered the instant Petition moot.

61. Counsel on the first issue, reiterating the facts of the Petition submitted that the impugned amendment was not in accordance with the laws governing such amendments and so is inconsistent with the Banking Act and the Constitution. Particularly, Counsel submitted that the impugned amendment is inconsistent with Sections 31 (3) (b) & (c) and 31 (4) of the Banking Act which makes it mandatory for the Deposit Protection Fund Board, institutions licensed under the Banking Act and institutions licensed under the Microfinance Act, 2006 in the ordinary course of business, to exchange information on non-performing loans. This is contrary to the impugned Regulation which purports to empower the Cabinet Secretary to suspend some aspects of the exchange of negative information, in utter disregard of the mandatory nature of Section 31 (3) (b) of the Banking Act.

62. Furthermore, Counsel submitted that whereas Section 31 (3) (c) of the Banking Act provides for the exchange of information between the Central Bank of Kenya and other institutions, being among others the CRBs, as reasonably required for the proper discharge of their functions, the amended Regulation contrasts this legislation by suspending and curtailing the sharing of the information on the basis of negativity which in turn affects the proper discharge of these institutions' functions. In Counsel's view, the impugned Regulation in empowering the Cabinet Secretary to suspend such exchange of information, is tantamount to leaving the existence and operationalization of the CRBs at the Cabinet Secretaries mercy. This is since a suspension of the exchange information therein would render CRBs inoperative contrary to the Banking Act's provisions and further exposes the entire mechanism to political interference and manipulation by vested interests thereby endangering its credibility.

63. Similarly, the impugned Regulation is said to be inconsistent with the provisions of the Constitution, as the process and the amendment therein failed to comply with the set national values and principles on inclusiveness, participation of the people, integrity, transparency and accountability under Article 10 of the Constitution. Counsel highlighted that the 3rd Respondent on 17th June, 2019 formulated the *draft Banking (Credit Reference Bureau regulations), 2019* and

invited comments from the key stakeholders. It is stated however that during the gazettelement of the Regulations therein, a new Regulation, 18 (7) was inserted yet had not been subjected to public participation.

64. On the second issue, Counsel answered in the affirmative. Counsel submitted that amendment of the Banking (Credit Reference Bureaus) Regulations, 2020 by introducing the impugned Regulation, failed to meet the threshold to satisfy public participation in accordance with Articles 10, 118 and 201 of the Constitution. To buttress this point reliance was placed in **Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others (2013) eKLR** where it was held that:

“It does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

65. Comparable reliance was placed in **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR** and **Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5.**
66. Counsel contended that owing to the failure to undertake public participation, the impugned Amendment had not only affected the public, as they are unable to access or borrow loans from creditors but equally affected the credit information bureaus, as it threatened their sustainability with anticipated potential loss of employment. Accordingly, Counsel submitted that the introduction of Regulation 18 (7) the Respondents violated Articles 1, 10, 35, 118, 119, 124, 201, 221 and 232 of the Constitution and is therefore unconstitutional for want of public participation.
67. On the third issue, whether the impugned Amendment violates Article 46 of the Constitution and is an unfair administrative action, Counsel submitted that the impugned Regulation barring the 1st, 2nd and 3rd Interested Parties from receiving credit information from credit only microfinance institutions and digital lenders amounts to an infringement of consumer rights as the parties are denied the information necessary for them to gain full benefit from the goods and services. This is because issuance of credit facilities is heavily reliant on credit reports availed to the lending

institutions through the credit information sharing between the lending institutions and the CRBs.

68. For this reason, Counsel argued that the directive had infringed on the Petitioners' and all MSMEs' consumer rights by cutting their access to loans from the credit banks and microfinances.

69. Reliance was placed in **Leonard Otieno v Airtel Kenya Limited [2018] eKLR** where it was held that:

"I have severally stated that although issues of consumer rights affect only the parties, 'their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases."

70. Further reliance was placed in **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018) eKLR**.

71. Further to this, Counsel argued that the action of barring credit only microfinance institutions and digital lenders from

participating in the credit sharing mechanism was not a fair administrative action thus violates Article 47 of the Constitution. Reliance was placed in **Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR** where it was held that:

“a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached.”

72. Comparable dependence was placed in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**.
73. On the fourth issue, Counsel submitted that Section 5 of the Statutory Instruments Act as read together with Article 10 of the Constitution requires that every regulation making authority make appropriate consultations with persons who are likely to be affected by the Regulations. Counsel stated that the effect of the impugned Regulation affected businesses and borrowers alike yet they were not consulted. Counsel in light of this stressed that it is clear that the process of public participation ought to have been undertaken. Reliance was placed in **British American**

Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR where it was held that:

“It is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted.”

74. Comparable reliance was placed in **Keroche Breweries Limited & 6 Others v Attorney General & 10 Others [2016] eKLR** and **Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others [2014] eKLR**.
75. Counsel stressed that the onus of carrying out the consultations lie with the regulation making authority and not on the Houses of Parliament, wherein Section 13 of the Statutory Instruments Act, clearly outlines the roles of the Houses of Parliament. Counsel stressed that had the relevant stakeholders been consulted in this matter, the threats posed by the impugned Regulation could have been significantly mitigated.

76. On the final issue, Counsel distinguished the instant Petition with **Petition No.E255 of 2021** in that it sought to challenge the constitutionality of Regulation 28(4) of the Credit Reference Bureau Regulations (Amendment) 2020 for violating Articles 27, 28 sand 43 of the Constitution while the instant Petition challenges the constitutionality of Regulation 18(7) of the Banking (Credit Reference Bureaus) Regulations, 2020 for violation Section 31 of the Banking Act and Articles 10, 27, and 46 of the Constitution.
77. According to Counsel while the Court in **Petition No. E255 of 2021** declared the 2020 Regulations null and void on account of non-compliance with Section 11 of the Statutory Instruments Act, it did not address itself on the constitutionality of the Regulations with reference to Articles 10, 27, and 46 of the Constitution or their inconsistency with Section 31 of the Banking Act.
78. Moreover, Counsel noted that the matter had been appealed and now pending before the Court of Appeal. Counsel reasoned that if the Court of Appeal upholds the High Court’s decision, Regulation 18(7) will remain invalidated for non-compliance with Section 11 of the statutory Instruments Act. On the other hand, if the Court of Appeal overturns the decision, Regulation 18(7) will be revived, but its constitutionality and statutory validity under Articles 10, 27, 46, and Section 31 of the Banking Act will remain

unresolved. Considering these factors, Counsel urged that the matter is still alive thus not moot as argued.

1st, 2nd and 4th Respondent's Submissions

79. Litigation Counsel, Mwise Robi filed submissions on these Parties behalf dated 17th April 2023.
80. Counsel analyzing Section 31 (3), (b) and (c) of the Banking Act submitted that this Section indicates that the sharing or publication of any information on non-performing loans by institutions licensed under the Banking Act and institutions licensed under the Micro finance Act is guided by the Regulations formulated by the Minister, in this case the Banking (CRB) Regulations, 2020.
81. Counsel reasoned that the Regulations were formulated with the intention to establish the manner and extent to which the information on non-performing loans is shared and which the cited Regulations sought to establish through the impugned Regulation which provides *'The Cabinet Secretary may, on the recommendation of the Central Bank, by notice in the Gazette, suspend some aspects of exchange of negative information under paragraph (1) for such a period and for such reasons as the Cabinet Secretary may specify'*. Accordingly, Counsel argued contrary to the Petitioners' assertion, that Regulation 18(7) of the Banking (CRB)

Regulations, 2020 is consistent with Section 31 (3) (b) (c) of the Banking Act.

82. Counsel further argued that the legislature is shielded by the doctrine of separation of powers as the power to legislate is envisaged under Article 94 of the Constitution. Counsel submitted that Article 94(5) and (6) of the Constitution makes it clear that the legislative mandate of the Cabinet Secretary is a delegated authority which legislative power mandates the 2nd Respondent to act in accordance with Article 94(5) and (6) of the Constitution.
83. Counsel relying in the averments in the 3rd Respondent's Replying Affidavit stressed that the impugned Regulation is constitutional having undergone Parliamentary scrutiny under the Statutory Instruments Act. Counsel added that the Petitioners had not challenged the constitutionality of the decision by Parliament to enact the Banking (Credit Reference Bureaus) Regulations, 2020 and specifically the impugned Regulation or demonstrated in any way that Parliament in discharging its mandate acted in contravention to the Constitution or any other law.
84. Reliance was placed in **SDV Transami Kenya Limited & 19 others vs. Attorney General & 20 Others & another (2016) eKLR** where it was held that:

“[171] The Statutory instruments Act, No. 23 of 2013 has of course clarified the rationale and procedure for laying subsidiary legislation before Parliament. While the procedure therein laid out is new and will not be applied to the regulations which pre-date it, the reason for laying of instruments before Parliament as laid out in Section 10 thereof is relevant.

(3) In this Section, “rules” and “regulations” mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be.”

This provision for the laying of subsidiary legislation in Parliament was subsequently repealed by Statutory Instrument Act No. 23 of 2013, s.27, which has similar provision for the tabling of the subsidiary legislation before the Committee of the National Assembly under section 12 thereof.

[173] Section 10 of the Statutory Instruments Act, 2013 gives the rationale for tabling before Parliament as follows:

“10. The purpose of this Part is to facilitate the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance.

...

[174] clearly although the Judiciary is the final arbiter of constitutionality, Parliament would have done the initial sweep for mines that render the statutory instruments unconstitutional, ultra vires and, therefore, void, and for consideration apart from the question of constitutionality whether the

legislation should more properly be dealt with as an Act of Parliament. I would venture to suggest that had this been done, there may be not have been any petition of the kind before the court today.”

85. Like dependence was placed in **Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties) [2020] eKLR.**

86. On public participation, Counsel submitted that the 3rd Respondent in its Replying Affidavit had provided sufficient evidence which demonstrates that the same was complied with. Further to this, Counsel noted that the Petitioners aver that the impugned Regulation was introduced during gazettelement of the said Regulations. Counsel argued in view of this, that for this argument to succeed, the Petitioners need to demonstrate that the impugned Regulation was not subjected to public participation, which they failed to do.

3rd Respondent’s Submissions

87. The 3rd Respondent through Triple OK Law LLP filed two sets of submissions dated 21st April 2023 and 31st July 2025. Counsel underscored the issues for discussion in the two sets as follows: *whether the impugned Regulation was subjected to public participation as required under Article 10(2) of the Constitution, whether the impugned Regulation is inconsistent with Section 31 of the Banking Act as read*

with Articles 10, 27 and 46 of the Constitution, whether the suspension barring credit only microfinance institutions and digital lenders from participating in the credit sharing mechanism contravenes Article 46 of the Constitution and is an unfair administrative action and Whether the instant Petition is moot in light of Petition No. E255 of 2021.

88. On the first issue, Counsel relying on the 3rd Respondent's Replying Affidavit submitted that it is clear that the process culminating in the promulgation of the Credit Reference Bureau Regulations, 2020 was done in compliance with Article 10 of the Constitution. Counsel stressed that the stakeholders and the public were availed a reasonable opportunity to participate. Reliance was placed in **Gakuru & others v Governor Kiambu County & 3 others [2014] KEHC 7516 (KLR)** where it was held that:

“What then does facilitation of public participation connote? The issue was dealt with by the Judge thus:

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or

*organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process...”*

89. Similar reliance was placed in **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government and 3 others(2013)eKLR, Doctors for Life International v the Speaker National Assembly and other (CCT 12/05)2006 ZACC 11, Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (2018)eKLR, Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 others (2015)eKLR and Robert N. Gakuru & others v County Government of Kiambu County(2014)eKLR and Thurania & 4 others v Attorney General & 2 others; Registrar of Political Parties & 3 others [2022] KEHC 482 (KLR).**

90. Counsel similarly submitted that the Section 5 of the Statutory Instruments Act provides for consultation before making of statutory instruments. Counsel submitted that in compliance with this Section, the 3rd Respondent invited the public and stakeholders in May 2019 to issue their comments and views. As such, the public, the Interested Parties and other stakeholders issued their views, which were considered.
91. In further compliance with Section 11(1) of the Statutory Instruments Act, it was submitted that the Revised Regulations were then tabled before the National Assembly and approved on 28th October 2020. In view of the foregoing, Counsel asserted that it was evident that public participation had been complied with in the making of the cited Regulations wherein the impugned Regulation 18(7) was part of.
92. On the second issue, Counsel submitted that Section 31(3) of the Banking Act provides for a mechanism for sharing credit information among financial institutions as mandated by law and prescribed in the Regulations. Counsel stressed that the discretion to determine the manner and extent of credit information is vested in the 2nd Respondent by the law. In light of this, Counsel submitted that by parity of reasoning, the 2nd Respondent retains the same discretion to determine

as provided in the impugned Regulation 18(7) that is suspension of credit information. Equally, Counsel emphasized that the 2nd Respondent is under the same Section empowered to make Regulations. Counsel thus argued that there is no basis for challenging the 2nd Respondent's power to enact Regulations, as forms part of delegated legislation under legislative authority.

93. Speaking to, Article 27 and 46 of the Constitution, Counsel submitted that the Petitioners by virtue of the principle in **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272** are required to plead constitutional violations with a reasonable degree of precision. In this matter, Counsel submitted that the Petitioners argued that the impugned Directive had impacted on MSMEs negatively, however failed to adduce evidence to prove their claim. On the flipside, Counsel submitted that the 3rd Respondent had established that the impugned Directive was predicated empirical, scientific and logical considerations as evidenced in the Affidavit.
94. Counsel also maintained that the Petitioners had not demonstrated how the MSMEs had been discriminated against. Counsel noted additionally that the Court of Appeal in **Mohammed Abduba Dida v Debate Media Limited & another (2018) eKLR** guided that mere differentiation or inequality of treatment does not per se amount to

discrimination within the inhibition of the equal protection clause. Comparable reliance was placed in **Nelson Andayi Havi v Law Society of Kenya & 3 others (2018) eKLR.**

95. Counsel further submitted that the impugned Directive safeguards the economic interests of consumers under Article 46 of the Constitution by ensuring MSMEs are afforded sufficient opportunity to recover from adverse effects of the Covid 19 pandemic thus this right cannot be said to have been violated.
96. On the third issue, Counsel submitted that the Petitioners had failed to inform the Court whether credit only microfinance institutions and digital lenders were obliged to share credit information as alluded to. Counsel submitted that the 3rd Respondent following complaints raised concerning digital lenders intervened by an amendment under Section 59(2) of the Central Bank of Kenya (Amendment) Act, 2021 which provides for licensing of digital credit service providers who were not regulated by any law.
97. In a nutshell, Counsel submitted that the Petitioners were not entitled to the relief sought as had not demonstrated how the 3rd Respondent had violated their rights.
98. On the final issue, Counsel submitted that Hon. Lady Justice Mugure Thande in her pronouncement dated 28th August

2023, declared that the Banking (Credit Reference Bureau) Regulations, 2020 were null and void for their lack of compliance with Section 11 of the Statutory Instruments Act. For context, Counsel stated that the instant Petition challenges Regulation 18(7) of the Banking (Credit Reference Bureau) Regulations on the ground that it contravenes Section 31 of the Banking Act and Articles 10, 27 and 46 of the Constitution. Counsel argued as such that the instant Petition is moot as the impugned Regulation is part of the Banking (Credit Reference Bureau) Regulations, 2020 which were nullified as a whole in the cited Judgment.

99. To buttress this point reliance was placed in **Institute for Social Accountability & Another v. National Assembly & 3 Others (2022) KESC 39 (KLR)** where it was held that:

"A matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot."

100. Comparable reliance was placed in **Kenya Railways Corporation & 2 others v Okoiti & 3 others (2023) KESC 38 (KLR), Okiya Omtatah Okoiti & 2 others v**

Attorney General & 4 others [2020] KECA 589 (KLR)
and **Independent Electoral & Boundaries Commission v**
Cheperenger & 2 others [2015] KESC 2 (KLR).

101. Counsel argued that the Petition invokes the doctrine of mootness as there is no longer any live controversy in the matter. Counsel urged that the doctrine of mootness serves to preserve judicial economy and ensure that Courts confine themselves to disputes where actual rights and obligations of parties are at stake to avoid wasteful deployment of time and resources thus this Court should refrain from entertaining this matter.
102. Counsel as well submitted that issues relating to credit information sharing by Digital Credit Providers was also determined in **Machakos Petition E008 of 2022, Association of Microfinance Institutions Kenya v CBK & Others** wherein they are now regulated and allowed to share credit information under Part IV of the Central Bank of Kenya (Digital Credit Providers) Regulations 2022.

1st, 3rd, 4th and 7th Interested Parties Submissions

103. In like manner, these parties through Otieno and Amisi Advocates filed two sets of submissions dated 25th April 2023 and 30th July 2025 respectively. Counsel in the submissions highlighted the issues for determination as: *whether the Amendment of the Banking (Credit Reference Bureaus)*

Regulations, 2020 violates Article 10 of the Constitution on public Participation, whether Regulation 18 (7) of the Banking (Credit Reference Bureau) Regulations, 2020 is contrary to Section 5 of the Statutory Instruments Act, whether Regulation 18 (7) of the Banking (Credit Reference Bureaus) Regulations, 2020 is inconsistent with Section 31 (3) (b) of the Banking Act, whether the suspension barring credit only microfinance institutions and digital lenders from participating in the credit sharing mechanism contravenes Article 46 of the Constitution and is an unfair administrative action and the effect of Petition No. 255 of 2021 to the instant Petition.

104. On the first issue, Counsel submitted that the impugned Regulation was not part of what was circulated to stakeholders for public comments. It was stressed that the same was introduced during gazettelement of the Banking (Credit Reference Bureau Regulations) 2019, hence was never subjected to public participation. Counsel contended that this was despite the grave effects of the Regulation on the Interested Parties. To buttress this point reliance was placed in **Legal Advice Centre and 2 Others vs. Counter Government of Mombasa & 4 Others [2018] eKLR** where it was held that:

“...The more discrete and identifiable the potentially affected section of the population and the more intense the possible effect on their interests the more reasonable it would be to expect the legislature to be

astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say ...”

105. Turning to the second point, Counsel submitted that Section 5 of the Statutory Instruments Act is analogous to Article 10 of the Constitution to the extent that it calls for participation of the people during the making of subsidiary legislation. To expound on the direct and substantial effect of the impugned Regulation on these Parties, Counsel underscored that the 7th Interested Party in its Replying Affidavit had outlined all the key areas that were affected as a result of the implementation of the impugned Regulation as pertains to microfinance institutions and borrowers.
106. Counsel on the third issue submitted that the impugned Regulation is inconsistent with Section 31 (3) (b) of the Banking Act as whereas Section 31 (3) (b) of the Banking Act makes it mandatory for the institutions specified therein to exchange information on non-performing loans, for its part, the impugned Regulation purports to empower the Cabinet Secretary to suspend some aspects of the exchange of negative information. Counsel stressed that as long as the impugned Regulation is inconsistent with the parent Act, the same would be invalidated by operation of Section 31 (b) of the Interpretations and General Provisions Act, which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act.

107. Counsel on the following issue, submitted that suspension of the selected aspects of credit information from the credit information mechanism distorts the credibility of data and makes it unreliable in decision making which in turn denies consumers their right under Article 46 (b) of the Constitution. That is, to the information necessary for them to gain full benefit from goods and services. Equally, this suppression of data is argued to deny financial institutions the opportunity to exercise independent assessment of risks associated with lending, with the advantage of full file data.
108. On the final issue, Counsel noted that the Judgment in **Petition No. 255 of 2021** declared the Banking (Credit Reference Bureaus) Regulations 2020 void for want of compliance with Section 11 of the Statutory Instruments Act. Counsel underscored that while the Petitioners in **Petition No. 255 of 2021** challenged the Regulation 28(4) for violating Articles 27 and 40 of the Constitution and Section 11 of the Statutory Instruments Act the instant Petition challenges Regulation 18(7) for violating Articles 10, 27 and 46 of the Constitution and Section 31 of the Banking Act.
109. Echoing the Petitioners submissions, Counsel submitted that should the Court of Appeal uphold the judgment in **Petition E255 of 2021**, then the instant Petition will have been spent. However, should the decision be set aside and the

Regulations reinstated, the instant Petition would still be alive for determination. This is because the appellate Court's focus is on errors of law or fact made by the trial Court, not on issues that could have been, but were not, brought before it originally.

110. Reliance was placed in **Wachira vs. Ndanjeru (1987) KLR 252** where it was held that:

“The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.”

111. On this premise, Counsel submitted that this Court should proceed to determine this Petition as it raises distinct issues in comparison to those raised in **Petition E255 of 2021** or alternatively hold the determination of this matter pending final determination by the Court of Appeal.

Analysis and Determination

112. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. Whether the instant Petition is moot in the light of the Judgment in Petition No. E255 of 2021.***

- ii. Whether Regulation 18(7) Banking (Credit Reference Bureaus) Regulations, 2020, is inconsistent with Section 31 of the Banking Act and Articles 10, 27 and 46 of the Constitution thus unconstitutional.**
- iii. Whether the impugned Regulation is further unconstitutional for failure to adhere to the public participation principle in line with Article 10 of the Constitution.**
- iv. Whether the Petitioners are entitled to the relief sought.**

Whether the instant Petition is moot in the light of the Judgment in Petition No. E255 of 2021.

113. Notwithstanding the extensive Constitutional jurisdiction conferred on the High Court under Article 165(3) of the Constitution, the principle of justiciability plays a critical role in the Court's assumption of jurisdiction as Courts exist determine live and genuine controversies, not abstract issues or that disputes that have long been overtaken by events.

114. The Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 8 others [2017] KECA 170 (KLR) elaborated on the principle of mootness as follows:

“[14] The mootness doctrine is entrenched in the common law. The Black’s Law Dictionary, Ninth Edition, defines a moot case as:

“A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.”

In an article entitled “Federal Jurisdiction to Decide Moot Cases” published in the University of Pennsylvania Law Review [1946] Vol. 94 - No. 2, the author, Sidney A. Diamond explains the essence of the doctrine thus:

“Common - law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision.”

[14.1] In the United States of America, it is a constitutional requirement that federal judicial power extends to “cases” and to “controversies” [section 2(1) of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. It follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy - that is, rationing scarce judicial resources amongst competing claimants...”

115. Further, in **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] KEHC 2059 (KLR)** the Court held:

“26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.

27. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.

“...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.”

28. Furthermore, a case will be moot-

“...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision.”

29. Barron and Dienes put it succinctly when they observe that “a case or controversy requires present flesh and blood dispute that the courts can resolve.” Loots, a South African constitutional commentator, endorses these sentiments and points out that a case-

“...is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists.”

30. However, a court will decide a case despite the argument of mootness if to do so would be in the public interest.”

116. In the instant case, the Respondents assert that this matter is now moot on account of the decision of this Court in **Bogongo v Cabinet Secretary National Treasury and Planning & another (Petition E255 of 2021) [2023] KEHC 22253 (KLR) (Petition of No. E255 of 2021)**. In that case, the Petitioner had alleged that Regulations 28(4) and 32(4) of the Banking (Credit Reference Bureau) Regulations, 2020 were not in the Draft Regulations 2019 that were presented and subjected to public participation. The Petitioner as such contended that the impugned Regulations are unlawful and unconstitutional and therefore

invalid, null and void ab initio for violation of Articles 1, 10, 26, 27, 28, 40 and 43 of the Constitution.

117. The Court in its finding observed as follows:

“49. The Court has found that the entire Credit Reference Bureau Regulations are void for want of compliance with Section 11(1) of the Statutory Instruments Act. By Operation of law, the Regulations ceased to have effect immediately after the last day they were to be transmitted to the Clerk of the National Assembly for tabling before the House. In light of this, the question whether Regulation 28(4) violated Articles 27 and 40 of the Constitution is moot and the Court need not expend judicial time considering the same.”

118. The Petitioner and the Interested Parties argued that while the Court in **Petition No. E255 of 2021** declared the 2020 Regulations null and void on account of non-compliance with Section 11 of the Statutory Instruments Act, it nevertheless did not address itself on the question of the unconstitutionality of the Regulations with reference to Articles 10, 27, and 46 of the Constitution or their inconsistency with Section 31 of the Banking Act.

119. Further,, the Petitioner contended that the matter had been appealed and was pending before the Court of Appeal and should the Court of Appeal upholds the High Court decision, Regulation 18(7) will remain invalidated for non-compliance

with Section 11 of the statutory Instruments Act but if the decision of the High Court is overturned, Regulation 18(7) will survive yet its constitutionality with Articles 10, 27, 46, and Section 31 of the Banking Act would remain unresolved. In the light of this, it was the Petitioners and Interested Parties position that the matter is still on live controversy and thus not moot as argued by the Respondents.

120. The bottom line here is simple. The said Reg.18 (7) forms part of the Banking (Credit Reference Bureau) Regulation, 2020 that were invalidated by the High Court for non-compliance with Section 11 of the Statutory Instruments Act and declared illegal, null and void. As things stand, that is the judicial pronouncement that is obtaining at the moment.

121. The practical effect of this is that as things stand now, no reference can be made to such regulations as they are of no legal effect whatsoever. Whether or not the Court of Appeal will bring them to live, that is speculative and this Court cannot be invited to rule on the constitutionality of a regulation on mere hypothesis.

122. What this Petition is challenging is a regulation that forms part of what was thrown out by the High Court after being found to be null and void for non-compliance with Section 11 of the Statutory Instruments Act. Those regulations no longer exist and are legally incompetent and unenforceable.

123. What this Court is being invited to do is to determine the constitutionality of a regulation that is dead merely to assuage the Petitioners fears that the Court of Appeal might overturn the decision of the High Court and regulation 18 (7) could end up being reinstated. This Court does not resolve disputes based on supposition or hypothesis.

124. As it stands, the substratum of the Petition were the regulations it was challenging. Those regulations have ceased to exist by reason of the aforesaid judicial decision; hence, the controversy is effectively moot.

125. There would be no need of determining any of the remaining issues in this Petition as mootness is a jurisdictional principle.

126. The upshot is that this Petition is hereby dismissed.

127. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 12th day of February, 2026.

.....

L N MUGAMBI
JUDGE

ORIGINAL