

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CONSTITUTIONAL PETITION NO. E018 OF 2025**

**HON. JUSTICE ALEEM VISRAM**

**5<sup>TH</sup> MARCH, 2026**

**NASSER ABDULHAMID AHMED BAKSH ..... 1<sup>ST</sup> PETITIONER**

**MAKARIM AHMED OMAR ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**STANBIC BANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENTS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Background:**

1. The Respondents filed a Notice of Preliminary Objection dated 19<sup>th</sup> September, 2025, seeking that the Petition dated 14<sup>th</sup> July, 2025, be struck out at the threshold. In summary, the Respondents contend that the dispute is, in substance, a private commercial contest arising from loan and security instruments, for which adequate statutory and ordinary civil remedies exist,

and that the Court ought to decline constitutional adjudication in keeping with the doctrines of exhaustion and constitutional avoidance.

2. The Petitioners filed written submissions opposing the Preliminary Objection.

The Petitioners' filed Grounds of Opposition to the Preliminary Objection were, however, abandoned.

3. The consequence of that abandonment is procedural and not substantive. It means only that the Court does not determine the Preliminary Objection by reference to the abandoned grounds. The Preliminary Objection is determined on the basis of the submissions filed in support and in opposition to it, together with the pleadings as filed.

#### **B. Issues for determination**

4. Two issues arise for determination: -

- a. Whether the Preliminary Objection raises a proper preliminary objection in law.
- b. If it does, whether the Petition is incompetent as framed, having regard to the principles on jurisdiction, exhaustion, and constitutional avoidance.

#### **C. Whether the objection is a proper preliminary objection**

5. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696* it was observed that a preliminary objection

must raise a pure point of law, argued on the assumption that the facts pleaded by the opposite party are correct, and which, if upheld, is capable of disposing of the matter.

6. The Respondents' objection challenges the competence of the Petition as a constitutional cause, and contends that, even assuming the pleaded facts to be correct, the dispute is one that ought to be ventilated through ordinary civil proceedings founded on the parties' instruments and the applicable statutes. That is a threshold question of jurisdiction and justiciability that can be determined from the pleadings and the reliefs sought, without the taking of evidence.

7. I am satisfied that the Notice of Preliminary Objection raises a proper preliminary objection.

**D. Applicable principles**

8. The High Court's constitutional jurisdiction is not a general substitute for ordinary civil remedies. In *Nicholas v Attorney General & 7 others; National Environmental Complaints Committee & 5 Others (Interested Parties) [2023] KESC 113 (KLR)*, the Supreme Court pronounced itself on this issue in the following terms: -

***“Where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising***

*their jurisdiction as conferred by the Constitution and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.”*

9. Guided by the above, the Court must therefore examine the true character of the dispute as disclosed by the pleadings and the reliefs sought. The mere citation of constitutional provisions does not, without more, convert a private commercial dispute into a constitutional controversy.

**E. Determination on the parties' submissions**

10. From the Respondents' submissions, the gravamen of the Petition is the Bank customer relationship, the accounting position, the levying and application of interest and charges, the consequences of alleged default, and the enforcement or threatened enforcement of securities.

11. Those matters are fact sensitive. They ordinarily turn on the loan and security documentation, statements of account, statutory notices, correspondence, and the parties' performance. They are amenable to resolution through ordinary civil proceedings, including claims for accounts, declarations, and injunctive relief, with the benefit of evidence tested in the usual manner.

12. The Petitioners submit that the dispute implicates constitutional rights and values, and that the Court ought to entertain the matter as a constitutional petition. I accept that the High Court is the proper forum for constitutional

interpretation where such a question squarely arises. But the question before me is whether, as framed, the Petition properly invokes constitutional jurisdiction as the primary vehicle for resolution. In my view, it does not. The dispute is, in substance, a commercial dispute arising from a private contractual relationship regulated by statute.

13. In *Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others [2015] eKLR* the Court of Appeal held as follows regarding the doctrine of exhaustion: -

***“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen.” (Emphasis mine)***

14. Addressing my mind to the above, I note that the Petitioners have not demonstrated that ordinary civil remedies are unavailable, inadequate, or ineffective. Nor have they shown that the issues cannot be fully and fairly resolved through ordinary civil process where any properly arising constitutional questions may be dealt with in their proper place.

15. Accordingly, applying the principles of exhaustion and constitutional avoidance, I find that the Petition is improperly before the Court as a constitutional petition.

**F. Conclusion**

16. Based on the reasons set out above, the Preliminary Objection dated 19<sup>th</sup> September, 2025, is upheld.

**G. Orders**

- a) **The Preliminary Objection dated 19<sup>th</sup> September, 2025, is upheld.**
- b) **The Petition is struck out.**
- c) **The Petitioners remain at liberty to pursue any remedies lawfully available to them by way of ordinary civil suit in the appropriate form.**
- d) **Costs of the Petition and the Preliminary Objection are awarded to the Respondents.**

17. It is so ordered.

*Dated and delivered virtually via Microsoft Teams this 5<sup>th</sup> day of March, 2026*

**ALEEM VISRAM, FCI Arb  
JUDGE**

**In the presence of;  
Court Assistant: Godfrey**

.....for 1<sup>st</sup> Petitioner

.....for 2<sup>nd</sup> Petitioner

.....for 1<sup>st</sup> Respondent

.....for 2<sup>nd</sup> Respondent

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