



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 51 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st July, 2018)

GEORGE WEKE JABA.....PETITIONER

VERSUS

THE NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

MOHAMED ABDIRAHMAN HASSAN.....2ND RESPONDENT

WILFRED MUSAU.....3RD RESPONDENT

HENRY ROTICH.....4TH RESPONDENT

ANTHONY OMERIKWA.....5TH RESPONDENT

ERASTUS MWONGERA.....6TH RESPONDENT

FRANCIS ATWOLI.....7TH RESPONDENT

JOSEPH KIMUTAI KERING.....8TH RESPONDENT

BEATRICE WANGUI GATHIRWA.....9TH RESPONDENT

LINNET MIREHANE.....10TH RESPONDENT

JONES MAKAU NZOMO.....11TH RESPONDENT

HABIL WASWANI.....12TH RESPONDENT

THE ATTORNEY GENERAL.....13TH RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS....14TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS15TH RESPONDENT

JUDGEMENT

1. The instant Petition was filed by the firm of Kimani & Michuki Advocates wherein the Petitioner seeks for orders that:

1) A Declaration be and is hereby issued that the Respondents acts of maliciously making damaging and unsubstantiated allegations against the Petitioner goes against his rights and fundamental freedoms and is a violation of Articles 19, 20, 27, 28, 29, 33, 35, 40, 47, 50, 73 and 259 of the Kenya Constitution 2010.

2) A Declaration be and is hereby issued that the interference and misuse by the Respondents of any public body such as the Kenya Police, Directorate of Criminal Investigations and/or the Banking Fraud Unit to engineer unlawful arrests of the Petitioner or in any way influence the investigations being carried out by the said public bodies goes against all the tenets of natural justice and is a violation of Articles 29 and 50 of the Constitution.

3) A Declaration be and is hereby issued that the acts by the Respondents to have a gag order enforced against the Petitioner which acts to disallow him from properly defending himself from the unfounded allegations brought against him is unconstitutional, is against all the tenets of natural justice and is a violation of Articles 47 and 48 of the Constitution.

4) An Order directing the Respondents to provide all information held by them in support of the allegations made against the Petitioner in various correspondence and pleadings filed in (George Weke Jaba –vs- National Bank of Kenya Limited - Employment Cause No. 2212 of 2016) to enable him exercise and protect his rights and fundamental freedoms.

5) An Order restraining the Respondents, their Directors, their employees, servants, agents or any of them from using any public body such as the Kenya Police or the Banking Fraud Unit to harass, intimidate and or in any other way causing or influencing the unlawful arrest of the Petitioner or in any other way influencing and or interfering with the investigations being carried out by the said public bodies.

6) An Order restraining the Respondents, the Kenya Police, Directorate of Criminal Investigations, Banking Fraud Unit, the Office of the Director of Public Prosecution and any other related investigation and prosecution agencies from harassing or prosecuting the Petitioner.

7) Costs of and incidental to this Petition.

8) Or that such other Orders as this Honourable Court shall deem just.

2. The Petitioner also filed a Notice of Motion application simultaneously with the petition seeking for orders that:

1. THAT this application be certified as urgent and service thereof be dispensed with in the first instance.

2. THAT pending the hearing and determination of this application inter partes, an order be issued restraining the Respondents, their Directors, their employees, servants, agents or any of them from using any public body such as the Kenya Police or the Banking Fraud Unit to harass, intimidate and or in any other way causing or influencing the unlawful arrest of the Petitioner or in any other way influencing and or interfering with the investigations being carried out by the said public bodies.

3. THAT pending the hearing and determination of this application inter-partes, an order be issued restraining the Kenya Police, Directorate of Criminal Investigations, Banking Fraud Unit, the Office of the Director of Public Prosecution and any other related investigation and prosecution agencies from harassing or prosecuting the Petitioner.

4. THAT pending the hearing and determination of the Petition herein, an order be issued restraining the Respondents, their Directors, their employees, servants, agents or any of them from using any public body such as the Kenya Police or the Banking Fraud Unit to harass, intimidate and or in any other way causing or influencing the unlawful arrest of the Petitioner or in any other way influencing and or interfering with the investigations being carried out by the said public bodies.

5. THAT pending the hearing and determination of the Petition herein, an order be issued restraining the Kenya Police, Directorate of Criminal Investigations, Banking Fraud Unit, the Office of the Director of Public Prosecution and any other related investigation and prosecution agencies from harassing or prosecuting the Petitioner.

6. THAT an order directing the Respondents to provide all information held by them in support of the allegations made against the Petitioner in various correspondence and pleadings filed in (George Weke Jaba –vs- National Bank of Kenya Limited - Employment Cause No. 2212 of 2016) to enable him exercise and protect his rights and fundamental freedoms.

7. THAT the costs of this application be provided for.

3. The Application is premised on the grounds that:

1. On 13th April 2016, the Claimant was unfairly terminated by the Respondent. He filed a Memorandum of Claim (George Weke Jaba –vs- National Bank of Kenya Limited - Employment Cause No. 2212 of 2016) on 31st October 2016 pleading, inter alia, that the Respondent's Notice to Show cause did not provide any specifics of the alleged misconduct and/or misreporting and that the termination was unfair. The Respondents also instigated investigations during April 2016 for the sole purpose of laundering the unfair termination.

2. In a Memorandum of Reply filed on 07th December 2016, the Respondent, for the first time, made damaging unsubstantiated allegations against the Claimant particularly at paragraphs 13, 14, 15 and 16 of the Memorandum of Reply. The Respondent's refusal to provide details of the accusations continues to greatly hamper the Claimant's ability to prosecute his claim and defend his rights since he is now required to guess what the Respondent's accusations are.

3. On 24th April 2017, the Claimant filed a detailed Response to the Memorandum of Reply that covers the various "key" issues

alluded to by the Respondent since it was the first time that such allegations were being made against him. This information makes it clear that the Board of Directors of National Bank Kenya Limited knowingly abdicated its responsibilities and is now blaming the Petitioner for a crisis that was authored by them.

4. The 1st to 12th Respondents, in a Board meeting a resolution that contravenes the express provisions of the Constitution of Kenya and other laws for the sole purpose of interfering and influencing investigations by the Banking Fraud Unit of the Kenya Police. They specifically resolved that they should and will misuse the Kenya Police by interfering with investigations to ensure that the Claimant and others are charged in Court for purposes of “aiding” them in their sham defences filed at the Employment Court.

5. On 15th May 2017, the Respondent’s Managing Director, Mr. Wilfred Musau, wrote to the 14th Respondent’s Director of Banking Supervision and *inter alia*, demanded interference as follows:

“We believe that the above constitutes a violation of section 31(2) of the Banking Act and clause 4.2.5 of the Prudential Guidelines on Corporate Governance CBK/PG/02. While we will take appropriate action in Court, we would be grateful if you consider taking appropriate action against the Claimant including but not limited to initiating prosecution in view of the provisions of Section 31(2) of the Banking Act.

Further, we would appreciate if the ongoing investigations by the Banking Fraud Unit with respect to the irregular action by the former staff were concluded to aid the Bank in defending these cases.”

6. The 2nd to 12th Respondents have continued to act with total impunity in the mistaken belief that they operate above the law and the Constitution of Kenya since they have the power, networks and financial capability to influence key agencies, including investigating arms of the Central Bank of Kenya and the Kenya Police, to institute any charge/s, that 1st to 12th Respondents deem fit, against the Respondent for purposes of “aiding the Bank in defending these cases.”

7. On 18th May 2017, the Respondent initiated proceedings with an intent of gagging the Claimant and limiting his right to rely on any information that is extremely useful for the protection of his fundamental rights and prosecution of his lawful claim against the Respondent. The application is coming up for hearing on 06th June 2017 before the Honourable Justice Nduma Nderi.

8. The 1st to 12th Respondents have now set in motion a process that interferes with ongoing investigations and are unlawfully engineering the arrest and prosecution of the Claimant for exercising his constitutional rights to access to information and justice. He is now not permitted to use factual information, which was already selectively disclosed to the Banking Fraud Unit of the Kenya Police and other agencies by the 1st to 12th Respondents, to defend himself.

9. Pursuant to the offending interference on investigating agencies, there is a real likelihood that the 14th Respondent will make up charges against the Petitioner and deprive him of his right to access to information, fair administrative action, freedom and hearing without any regard for due process. It is clear that the “investigations” are meant to achieve a collateral purpose of “aiding the Respondent in the Defences.”

10. The Petitioner has been left with no option but to now seek this Honourable Court’s intervention against the Respondents for the enforcement of his Constitutional rights to freedom, equal protection, non-discrimination and benefit of the law, right to information, access to justice, fair administration and hearing.

11. That it is just and equitable that some conservatory orders be issued on a priority basis to save the Petitioner from the continuing unconstitutional conduct of the 1st to 13th Respondents.

4. The Petition and Application is supported by the affidavit of George Jaba Weke wherein he states that on or about 25th July 2014, he entered into a Contract of Employment with the Respondent in which he was employed as the Chief Risk Officer which appointment was confirmed via a letter dated 16th February 2015.

5. That on 23rd and 24th March 2016, meetings were held between the 1st Respondent’s Board, Management staff and External Auditors, Deloitte and Touché, for the External Auditors to present their position to the Board, without having previously met with the Management team. The Auditors were racing against deadlines. Despite not having previously sighted the Report by the External Auditors, the Petitioner did his best to elaborate his report and figures to the Board. The Petitioner avers that at some point, for undisclosed reasons, the Management team was requested to leave the meetings.

6. That at this juncture the significant issue of contention raised by the External Auditors was that provisioning was not adequately provided for. The Petitioner avers that he gave satisfactory explanation, and also pointed out *inter alia* that the External Auditors failed to take into account critical detailed disclosures by the management.

7. The Petitioner avers that the internal audit department (an independent department within the 1st Respondent) had reviewed the numbers and had not raised any issues with regard to adequacy of provisions or grading of accounts. Further, the same judgment applied by the credit department had been applied for the previous year and the external auditors had not raised any issues.

8. The Petitioner avers that he made it clear to the Respondent’s Board that he did not originate the numbers as to whether clients were

servicing their loans or not as the same was the responsibility of the operations department.

9. That at no time during the meetings of 23rd and 24th March 2016 was the Petitioner informed that these usual meetings between the Respondent and its External Auditors for purposes of reconciliation of positions/accounts would constitute the basis for unfair termination. No details or allegations of “misconduct” or intention to terminate the Claimant were discussed at these meetings.

10. The Petitioner further avers that on 29th March 2016 at 7p.m, the Claimant received a letter from the 2nd Respondent dated 29th March 2016, referenced “*Notification of a Disciplinary Hearing and Show Cause Notice*”, informing him of a disciplinary hearing to take place on 31st March 2016. The Claimant was then sent on compulsory leave.

11. That the said letter stated *inter alia*, that the 1st Respondent was considering terminating the Claimant’s Contract of Employment for alleged gross misconduct occasioned by “*failure to take appropriate action to ensure that the state of the Bank’s financial results reflected the correct position.*”

12. The Petitioner contends that the said letter was very scanty and did not disclose specifics of the alleged misconduct, details or extent of the Petitioner’s participation in the alleged misreporting. Further, he was not supplied with any documentation that the Respondent relied upon to arrive at the skewed findings. As such, it was extremely difficult for the Petitioner to respond to the blanket accusation.

13. That he was expected to comprehensively respond to the unspecific accusations by 31st March 2016, at 1p.m., an extremely short period, especially taking into account the fact that he was being charged with gross misconduct without particulars.

14. That in view of the 2nd Respondent’s ambiguous letter, the Petitioner groped in the dark in his efforts to prepare a probable response for the disciplinary hearing, which was in the letter dated 31st March 2016. He contends that in his letter, the Claimant requested for minutes of the Board meetings held on 23rd and 24th March 2016, in particular the deliberations made in his absence, as well as the summary of the deliberations during the disciplinary hearing, none of which have been provided to the petitioner to date.

15. The Petitioner avers that the 2nd Respondent, in the most insensitive manner, called him on 13th April 2016 and issued him with a Summary Dismissal letter despite having served the Respondent with diligence, integrity and loyalty from the date of employment to the date of his dismissal. His termination was therefore baseless and designed to discriminate against him.

16. That the said summary dismissal from employment by the 1st Respondent was not only unfair, illegal and unlawful but also malicious, unreasonable and contrary to the rules of natural justice. That the Petitioner and his colleagues are now being used as scapegoats by the 2nd to 12th Respondents for purposes of laundering their gross incompetence and abdication of duties.

17. Following his termination from employment the Petitioner states that on 31st October 2016, he filed a Memorandum of Claim (*George Weke Jaba –vs- National Bank of Kenya Limited - Employment Cause No. 2212 of 2016*) pleading, *inter alia*, that the 1st Respondent’s Notice to Show cause did not provide any specifics of the alleged misconduct and/or misreporting and that the termination was unfair. The Respondents also instigated investigations during April 2016 for the sole purpose of laundering the unfair termination.

18. That in a Memorandum of Reply filed on 07th December 2016, the 1st Respondent, for the first time, made damaging unsubstantiated allegations against the Petitioner particularly at paragraphs 13, 14, 15 and 16 of the Memorandum of Reply. That the 1st Respondent’s refusal to provide details of the accusations continues to greatly hamper the Claimant’s ability to prosecute his claim and defend his rights since he is now required to guess what the Respondent’s accusations are.

19. Further that on 24th April 2017, the Petitioner filed a detailed Response to the Memorandum of Reply that covers the various “key” issues alluded to by the Respondent since it was the first time that such allegations were being made against him. In the Petitioner’s view this information makes it clear that the Board of Directors of National Bank Kenya Limited knowingly abdicated its responsibilities and is now blaming the Petitioner for a crisis that was authored by them.

20. That the 1st to 12th Respondents, in a Board meeting made a resolution that contravenes the express provisions of the Constitution of Kenya and other laws for the sole purpose of interfering and influencing investigations by the Banking Fraud Unit of the Kenya Police. In a letter dated 15th May 2017, the Respondent’s Managing Director, Mr. Wilfred Musau, wrote to the 14th Respondent’s Director of Banking Supervision and *inter alia*, demanded interference as follows:

“We believe that the above constitutes a violation of section 31(2) of the Banking Act and clause 4.2.5 of the Prudential Guidelines on Corporate Governance CBK/PG/02. While we will take appropriate action in Court, we would be grateful if you consider taking appropriate action against the Claimant including but not limited to initiating prosecution in view of the provisions of Section 31(2) of the Banking Act.

Further, we would appreciate if the ongoing investigations by the Banking Fraud Unit with respect to the irregular action by the former staff were concluded to aid the Bank in defending these cases.”

21. The Petitioner is apprehensive that since no offence was committed by him, the 1st to 12th Respondents are actively influencing the Kenya Police to institute amorphous charges including abuse of office and conspiracy, with a view of tarnishing the Petitioner’s reputation.

22. That on 18th May 2017, the Respondent initiated proceedings with an intent of gagging the Petitioner and limiting his right to rely on any

information that is extremely useful for the protection of his fundamental rights and prosecution of his lawful claim against the Respondent.

23. The Petitioner avers that he has no intention of using the information in the said Response for any other purpose other than for his defence since, in any event, he has never disclosed it in any other forum apart from in the prosecution of his claim before the Employment and Labour Relations Court.

24. The Petitioner contends that the 1st to 12th Respondents have now set in motion a process that interferes with ongoing investigations and are unlawfully engineering the arrest and prosecution of the Petitioner for exercising his constitutional rights to access to information and justice. He is now not permitted to use factual information that was already selectively disclosed to the Banking Fraud Unit of the Kenya Police and other agencies by the 1st to 12th Respondents, to defend himself.

25. That Pursuant to the offending interference on investigating agencies, there is a real likelihood that the 14th Respondent will make up charges against the Petitioner and deprive him of his right to access to information, fair administrative action, freedom and hearing without any regard for due process. It is clear that the “investigations” are meant to achieve a collateral purpose of “aiding the Respondent in the Defences.”

26. The Petitioner avers that the Respondent has violated his fundamental rights set out as:

1. Article 19 of the Constitution of Kenya provides that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.

2. Article 20 of the Constitution provides that the Bill of Rights applies to all law and binds all State organs and all persons.

3. Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination.

4. Article 28 of the Constitution guarantees for every person inherent dignity and the right to have that dignity respected and protected.

5. Article 29 of the Constitution guarantees every person the right to freedom and security of the person which includes the right not to be treated in a cruel, inhuman or degrading manner.

6. Article 33 of the Constitution guarantees that every person has the right to freedom of expression which includes freedom to seek, receive or impart information or ideas.

7. Article 35 provides, amongst others, that every citizen has the right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom. It also provides for the right to the correction or deletion of untrue or misleading information that affects a person.

8. Article 47 of the Constitution guarantees every person’s right to fair administrative action that is lawful, reasonable and procedurally fair hence every administrative action must pass the test of the principles of natural justice.

9. Article 47(2) of the Constitution further requires that if a fundamental freedom of a person is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

10. Article 50 of the Constitution provides for the right to a fair hearing which is the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

11. Article 73 of the Constitution provides that authority that is assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, Demonstrates respect for the people; Brings honour to the nation and dignity to the office; and Promotes public confidence in the integrity of the office and further that such authority vests in the state officer the responsibility to serve the people rather than the power to rule them.

27. That as a result of the Respondent’s violation of the Constitution the Petitioner has suffered and is likely to suffer the following injury:-

1. The right to rely on information that is extremely useful for the protection of his fundamental rights and prosecution of his lawful claim against the Respondent contrary to Article 35 of the Constitution.

2. That the 1st to 12th Respondents have now set in motion a process that interferes with ongoing investigations and are unlawfully engineering the arrest and prosecution of the Petitioner for exercising his constitutional rights to access to information and justice. That he is now not permitted to use factual information that was already selectively disclosed to the Banking Fraud Unit of the Kenya Police and other agencies by the 1st to 12th Respondents, to defend himself.

3. That pursuant to the offending interference on investigating agencies, there is a real likelihood that the 14th Respondent will make up charges against the Petitioner and deprive him of his right to access to information, fair administrative action, freedom and hearing without any regard for due process.

4. That the Respondents have also maliciously made false allegations against the Petitioner and have refused to reveal the sources of the said allegations which prevents the Petitioner from properly defending himself. As such the following provisions of the Constitution of Kenya have been contravened, or are threatened with contravention, namely; Articles 19, 20, 27, 28, 29, 33, 35, 40, 47, 50, 73 and 259 of whose provision has been referred to in detail above.

28. The Petition is opposed by the 1-12th Respondents who filed a replying affidavit sworn by Habil Waswani the 12th Respondent wherein he avers that the Respondents herein have not in any way influenced or used the Kenya Police or the Banking Fraud Unit to intimidate or harass the Petitioner or to interfere with the ongoing investigations. That in any event, the 13th to 15th Respondents operate independently of the 1st to 12th Respondents and ought not to be influenced in any way.

29. That the Respondents have no control over investigations of misreporting of the financial position of the bank which began as early in year 2016. The investigations are run independently by the Banking Fraud Unit under the Central Bank of Kenya. Further that the Respondents had reasonable cause to terminate the Petitioner's contract of employment and the due process was followed.

30. The Respondents also contend that it is untrue that the impugned paragraphs 13, 14, 15 and 16 of the 1st Respondent's statement of response filed on 7th December 2016 make damaging and unsubstantiated allegations against the Petitioner. Those paragraphs set out the events and the reasons leading to the termination of the Petitioner who was in fundamental breach of his contract of employment.

31. The Respondent denies the allegations at paragraphs 17 and 20 of the Petitioner's supporting affidavit regarding the board's alleged incompetence and abdication of duty by the Petitioner and state that the same are scandalous and should be struck out.

32. The 12th Respondent admits that the 1st Respondent held a board meeting on 29th May 2017 but avers that there was no resolution passed to misuse, interfere or influence the investigations by the Banking fraud as alleged by the Petitioner at paragraph 21 of the supporting affidavit. The allegations are outrageous and scandalous and ought to be struck out.

33. He further contends that the Respondents have not in any way infringed on the Petitioner's constitutional rights to access information and justice. As set out at paragraph 13 of the Statement of Response, the matters discussed by the management, board of directors and the external auditors during the meetings leading up to the disclosures of financial misreporting on the part of the senior managers that were terminated together with the Petitioner are very sensitive.

34. That the issues discussed during these meetings touched on key credit accounts with non-performing loans which have been under investigations by third party agencies, inter alia the Central Bank of Kenya. Disclosure of the information is likely to jeopardize the recovery efforts as well as the ongoing investigations. These minutes have not been shared with the Petitioner for the same reasons.

35. That the order obtained by the 1st Respondent on 18th May 2017 to restrain the Petitioner from broadcasting the confidential information set out in the offending paragraphs 11,12,13 and 21 of his response to the Memorandum of Reply does not in any way infringe on the Petitioner's rights. The Petitioner is in breach of Section 31(2) of the Banking Act, Clauses 4.2.5 of the Central Bank of Kenya Prudential Guidelines, 2013.

36. That by allowing the Petitioner to rely on his response to the Memorandum of Reply as sought by the Petitioner at paragraph 20 with the offending paragraphs intact will be aiding breach of express provisions of the law and will be embarrassing to the Court.

37. That the confidential information disclosed by the Petitioner in the offending paragraphs 11, 12, 13 and 21 of his response to the memorandum of reply, substantially prejudice the commercial interests of the 1st Respondent and prejudices the banker customer relationship, public trust and confidence which are vital to the banking sector.

38. He further states that the information set out by the Petitioner in the offending paragraphs 11,12,13 and 21 of his response to the Memorandum of Reply should be limited pursuant to Article 24 of the Constitution of Kenya, 2010 and Section of 6(1)(e) (f)(g)and (h) of the Access to Information Act.

39. That the matters contained in the offending paragraphs have no connection whatsoever with the dispute in Court and will not assist the Court in any way in arriving at a fair and just determination of the real issues in dispute.

40. Further that the powers to investigate lie with the 14th Respondent whereas the power to prosecute lies with the 15th Respondent. The Respondents herein have no control whatsoever of these two processes. He urges the Court to dismiss the Petition with costs.

41. The 13th and 14th Respondent's filed notice of Preliminary Objection opposing the Petition wherein they raise the grounds that:

1. The 1st Respondent is a legal entity which can sue and be sued on its own behalf.

2. That the issues raised in the application and petition are purely contractual hence can be conversed between the petitioner and the 1st Respondent.

3. That the application is basically anticipatory hence there is no substantive cause of action disclosed against the 13th and 14th Respondents.

4. That there is no cause of action disclosed against the 13th and 14th Respondents herein.

5. Article 152(2) of the constitution 2010, establishes the cabinet and makes AG a member therein at the National level where the AG thus represents the National government other than in Criminal cases. This is however a labour relation case where the National Government should not be a party at all.

6. The AG can only be a party to this suit upon request and with the leave of the court which in this case does not apply.

7. Section 5 of the Attorney General Act 2012 states that the AG can only be a party to a proceeding where the national government is a party otherwise in this case he can only be present as a friend of the Court.

8. That court cannot issue AG with orders with no legal force otherwise the 1st Respondent would be subordinate to the National Government which would offend its regulations and activities.

9. The application as drawn is defective, bad in law as the applicant has not sought leave to join the Respondents as is required by law.

10. The Honourable Court therefore lacks the requisite jurisdiction to hear and determine the matter against the 13th and 14th Respondents in the light of the provisions of the law cited above.

11. The application as filed herein against the 13th and 14th Respondents is a waste of Court's time and an abuse of the due process of the law.

42. The 13th and 14th Respondents pray for the Application and Petition to be dismissed with costs.

43. The Petitioner in response to the notice of Preliminary Objection filed a reply in which he avers that the 13th Respondent, is the Principal Legal Adviser to the Government of the Republic of Kenya and state officer constitutionally authorized and mandated to represent the National Government in court or in any legal proceedings to which the National Government is a party. For purposes of this suit, he is sued in his representative capacity on behalf of the Cabinet Secretary, National Treasury.

44. That the Attorney General under the Attorney General Act 2012 Section 5 (b) & (k) including other powers and functions he is the sole officer to advise the government on all matters relating to the constitution....."Human Rights" and performing any function necessary for the effective discharge of the duties and exercise of the powers of the Attorney General.

45. It is the Petitioner's contention that the Preliminary Objection, is an attempt by the Respondents to evade their constitutional enshrined and mandated powers, duties and responsibilities or a blatant waste of court's precious time and public resources. He prays that the said Notice of Preliminary Objection be dismissed with costs.

Petitioner's Submissions

46. The Petitioner submits that Respondents blatantly disregarded processes, procedures and guidelines known to them and subjected the Petitioner to continuous, unreasonable, unlawful and unsubstantiated allegations leading to and continue to, substantially violate his rights. He further submits that the 1st Respondent later terminated him without any specific offence nor misconduct committed, but accused him with a blanket and premeditated allegation which according to the Respondents was "failure to take appropriate action to ensure that the state of the Bank's financial results reflected the correct position".

47. That the Petitioner was expected by the Respondents to respond to allegations and or accusations he did not and does not have particulars of. He cited the case of **Dennis Edmond Apaa And Others -Vs- Ethics And Anti Corruption Commission Nairobi Petition No.317 Of 2012 [2012] EKLr D. S. MAJANJA J then, in determining the matter and relying or referring to R v Ward [1993] 2 ALL ER 557 emphasised that:-**

"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so".

48. That in regards to the above, the 1st Respondent in its own composition and in line with its structures forms a quasi – prosecutorial body and the Petitioner herein becomes the defendant. He submits that the Respondents', especially those who constitute the leadership/Directorship, should have insisted on a fair administrative process, but that was not the case. That they proceeded to conduct and settle on an illegal decision in cohorts with the other Respondents.

49. It is further submitted that the duty of disclosure is a continuing duty and the 1st Respondent is bound to produce the documents, statements, recordings and or any evidence they are relying on to enable the Petitioner to adequately prepare a defence in accordance to Article 35 and 50 of the Constitution of Kenya 2010.

50. He also cites the case of **Geoffrey Muhuzani Anyira v Director of Public Prosecutions & 2 others [2016] eKLR RUTH N. SITATI J cemented the issue of disclosure as a duty of the prosecuting body and indicated that disclosure is a continuing process, meaning in**

the event of new information, they are bound to inform the Defendant in reasonable time for them to adequately present their defence.

51. It is further submitted that the actions against the Petitioner are a means to maintain status quo as the Petitioner herein is seen as a 'loose-end' hence the 1st Respondent leadership herein are trying their level best to ensure that every 'loose-end' is dealt with using any means possible including the "joint –task force". For this the Petitioner relies on the decision in David Mathenge Ndirangu v Director of Public Prosecutions & 3 others [2014] eKLR G V ODUNGA cited the decision in Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703 where it was held:-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth.....When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

52. The Petitioner prays for the Petition to be allowed.

The 1st to 12th Respondents submissions

53. In their submissions the Respondents seek to address the following issues:

- 1. Whether the petition amounts to a multiplicity of action.***
- 2. Whether the prayer for documents is vague.***
- 3. Whether the court should interfere with investigations and prosecution.***
- 4. Whether the petition has substance***

54. It is submitted that the petition raises issues which have been raised or which ought to have been raised in ERLC Number 2212 of 2016 George Weke Jaba v National Bank of Kenya. The issues in question are that the Petition in effect, challenges the termination of the Petitioner's employment. The Petition in fact goes to great detail at part B under "material facts" setting out the sequence of events leading to the termination of the Petitioner's employment. That the termination of employment is not an issue for this court to determine in this Petition. It is pending determination in the labour case which is yet to be determined.

55. The Petition in effect challenges the ruling made in the labour case restraining the Petitioner from relying or disclosing certain information. This is what the Petitioner refers to as the "gag order."

56. That the alleged "key issues" referred to at paragraph 19 of the petition are those that were expunged by the ruling delivered on 11th October 2017 in the labour case. It is submitted that there is therefore no basis to ventilate issues relating to that ruling before this Petition. They emphasise that the said ruling was never appealed against.

57. The Respondents cite the High Court in the case of United States International University (USIU) v Attorney General (2012) eKLR stated that in order to determine whether the Employment and Labour Relations Court has the jurisdiction to deal with matters concerning the enforcement of fundamental rights and freedoms, the constitutional provisions had to be construed as a whole in harmony with each other. In answering this question, the Court adopted the position of the Constitutional Court of South Africa in Gcaba v Minister of Safety and Security & Others CCT 64/08 (2009) ZACC 26 and pronounced itself as follows:

“The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.”

58. They submit that by the Petitioner bringing a constitutional petition in relation to matters that are currently ongoing in a Court that also has the jurisdiction to enforce and determine questions relating to constitutional matters causes multiplicity of proceedings and is hence an

abuse of Court process.

59. That there is no basis to warrant separate fresh proceedings which are clearly based on wild and unsubstantiated allegations against the 1st to 12th Respondents. They submit that the Petitioner's evidence, alleges that these Respondents were at the time of filing the Petition interfering and influencing investigations. That the letter in support of this allegation dated 15th May 2017 referred to at paragraph 21 of the Petition written by the 1st Respondent's Managing Director to the 14th Respondent does not constitute any such evidence. The Managing Director was simply making a report of violation by the Petitioner of provisions of the Central Bank of Kenya Act and the Prudential Guidelines, which violation was noted and addressed by this Court when it expunged the offending information from the labour case in the ruling delivered on 11th October 2017, referred to above.

60. It is submitted that it is a well established principle of law that constitutional petitions must be pleaded with reasonable precision failure to which they fail. This principle was developed in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. The importance of this principle was enumerated in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.

61. The instant Petition claims that the Respondents have infringed his right to information yet he has not made any reference to the particular documents that he seeks. That it is not the obligation of this court to grant blanket orders nor to frame particulars for the Petitioner.

62. It is also submitted that the office of the Director of Public Prosecutions is provided for under article 157 of the Constitution vested with the prosecutorial powers of the state. With precision, article 157 (10) of the Constitution provides that:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

63. That from the reading of the aforementioned provision, the Director of Public Prosecutions is an independent office that is not under the direction or control of any person or authority. That the rationale for this is pointed out by Professor S.A Dr. Smith in his book, *The New Common Wealth and its Constitution* SC London Stevens & Sons [1964] at pg 144 – 145 where he states as follows:

“The independent constitutional status of the DPP stemmed from the need to safeguard the stream of criminal justice from being polluted by the inflow of noxious political contamination....to segregate the process of prosecution entirely from general political considerations.”

64. The Petitioner has not in any way proved how the prosecutorial mandate of the DPP is being prejudicially exercised against him. In Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR the Court noted that:

“The Office of Director of Public Prosecution is an independent office and the court will therefore in an ideal situation be reluctant to prohibit that office from exercising its statutory and constitutional powers except in the clearest of cases.”

65. The Respondents submit that the petition is an abuse of process within the meaning addressed by the Court of Appeal in the case of Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others. The Court of Appeal placed reliance on the definition of abuse of court process given by the Appeal Court of South Africa in Beinosi v Wyley (1973) SA 721 that set out the legal principle as follows:-

“What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective”.

66. In giving instances of what amounts to abuse of Court, the Court of Appeal also sought guidance from the Nigerian case of Sarak v Kotoye (1992) 9 NWLR 9PT 264 at 188-189 which gave illustrations of the abuse of Court process to include:

a. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's

notice.

67. It is submitted that This petition falls squarely in illustration (a) as the petition revolves around the termination of the petitioner's employment with the 1st Respondent. This is the subject of dispute in the labour case. The 2nd-12th Respondents are Board members of the 1st Respondent and it can thus be largely inferred that these are the same parties involved in the labour suit as they were involved in the termination of the petitioner. They urge the Court to find that this Petition is devoid of merit and ought to be dismissed with costs to the 1st to 12th Respondents.

13th and 15th Respondent's submissions

68. It is submitted that the Kenya Police Service, the Directorate of Criminal Investigations, and the Banking Fraud Unit are public institutions mandated and authorized to investigate criminal conduct in the country. The Kenya Police Service is established under Article 243 of the Constitution of Kenya. Its functions are laid out under Section 24 of the National Police Service to include investigation of crimes, collection of criminal intelligence, apprehension of offenders, and enforcement of all laws and regulations with which it is charged.

69. Additionally, the Department of the Director of Criminal Investigations is created under Section 28 of the National Police Service Act. The mandate of this Department is outlined in Section 35 as follows:

The Directorate shall—

a. collect and provide criminal intelligence;

b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

c. maintain law and order;

d. detect and prevent crime;

e. apprehend offenders;

f. maintain criminal records;

g. conduct forensic analysis;

h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;

i. co-ordinate country Interpol Affairs;

j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

k. perform any other function conferred on it by any other written law.

70. The Respondents submit that the above provisions give the Director of Criminal Investigations and the Kenya Police authority to investigate economic crimes and apprehend offenders for purposes of prosecution. That from the Applicant's pleadings the Director of Criminal Investigations and the Kenya Police Service are only doing their work as required by law.

71. The Respondents further submit that this would be a great injustice were this Honourable Court to interfere with the legal and constitutional mandate of the Director of Criminal Investigations and the Kenya Police Service. Assertions that the lawful activities of these public bodies amount to an infringement of rights is a blatant misread and misinterpretation of Chapter Four of the Constitution of Kenya.

72. They cite the case of Thuku Kirori & 4 Others v County Government of Murang'a [2014] eKLR where Ngaah, J expressed himself as hereunder:

“Moreover, where a statute or the Constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs...this court will be hesitant to intervene and curtail these organ's efforts to execute their statutory or constitutional mandates; it is the duty of this court to interpret the Constitution in a purposive rather than a restrictive manner.”

73. That the Applicant as a former employee of the 1st Respondent is still bound by the Central Bank of Kenya Prudential Guidelines, 2013 on Corporate Governance CBK/PG/02 (Prudential Guidelines) and Section 31(2) Banking Act Cap 488 of the Laws of Kenya. The gag order against the Applicant is therefore based on the law, reasonable, justifiable, and proportionate and meant to protect the rights of the 1st Respondent's customers, investors, and shareholders.

74. They further submit that the petition is premature, misconceived, and an abuse of the Court process since no charges have been preferred

against the Applicant. That if it is true, as the Applicant claims that he is innocent and he has nothing to hide, then there is no harm in allowing these public authorities perform their constitutional mandates.

75. The Respondents submit that it is clear that the actions of the 13th and 14th respondents remain impartial, independent, reasonable, and founded on the law. As a result, they cannot be termed as a violation of the Applicant's rights in any form, shape or manner. Further, this Court's gag order on the Applicant should remain enforceable in order to protect the rights and freedoms of millions of the 1st Respondents customers, shareholders and investors. They are of the view that the Petition is frivolous, vexatious, an abuse of the Court's due process and dismiss it with costs.

76. I have considered the averments of both parties. I have also considered the submissions filed accordingly. The Petitioner seeks various prayers, which relate to his relationship with the 1st Respondent as a former employer.

77. I take note of the fact that the prayers sought relate to an inference that the 12th Respondent have acted or are acting in a manner which would lead to the 13th to 15th Respondents taking illegal actions against him by falsely interfering with his rights and fundamental freedoms.

78. The inference relates to a letter written by the 3rd Respondent to the 14th Respondent dated 14.5.2017 demanding appropriate action be taken against the Petitioner including prosecution. I have looked at the impugned contents. Whereas it is true that the 3rd Respondent wrote the said letter, I would not consider that to be a directive.

79. The 14th Respondent is an office under the National Police Service. The National Police Service is established under Article 243 of the Constitution. Under Article 243(4) of the Constitution Parliament is to enact legislation to establish the police services under supervision of the National Police Service.

80. In this regard, Parliament enacted the National Police Service Act Cap 84 Laws of Kenya which under Section 28 established the office of the Director of Criminal Investigation. This office having been established under the National Police Service, it should strive to serve all and comply with constitutional standards of human rights and fundamental freedoms. If at all, there is any trace that there is action against the basic tenets of the Constitution that would be unconstitutional.

81. There has been no illegal action yet that has emanated from the 14th Respondent following the above letter. There is also no evidence that the 14th Respondent acted under the directions of the 3rd Respondent. In my view, it is premature for the Petitioner to allege that the 14th Respondent has acted on the directions of the 3rd Respondent and done any act or omission against the Petitioner in breach of the Constitution.

82. The prayers sought by the Petitioner in regard to his alleged breach is also very vague in terms of really what the Petitioner seeks.

83. The case of Anarita Karimi (supra) states precisely what should be pleaded in a Petition. The Learned Judge in this case stated that a constitutional petition must be pleaded with reasonable precision and the Petitioner must also set out the particular article of the Constitution apparently infringed upon.

84. As pleaded however, the Petitioner herein fails to set out the particular damaging and unsubstantiated allegations made against him upon which the 13th to 15th Respondents have acted against him.

85. The 12th and 15th Respondents are also independent bodies established under the Constitution of Kenya 2010. These bodies cannot act under the directive of the 3rd Respondent. If at all there is action initiated against the Petitioner by the 13th to 15th Respondents, the action should be according to the law. This Court cannot impute anticipatory action by the 13th to 15th Respondent and gag them against exercising their constitutional mandate.

86. This is what Hon. J. Ngaah in Thuku Kirori & 4 Others vs County Government of Murang'a (2014) eKLR alluded to as hereunder:-

“Moreover, where a statute or the Constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organsthis Court will be hesitant to intervene and curtail these organ's efforts to execute their statutory or constitutional mandates; It is the duty of this Court to interpret the Constitution in a purposive rather than a restrictive manner”.

87. The Supreme Court in Petition 32 of 2014 a unanimous SC decision Ibrahim; Ojwang; Wanjala; Njoki Ndungu and Lenaola SCJJ rendered itself thus:-

“84...From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case....”.

88. From the foregoing, it is my finding that I am unable to make any orders to gag the 13th to 15th Respondents from fulfilling their constitution mandate as prayed by the Petitioner herein.

89. On the issue of orders given by Court on 18th May 2017, I believe this Court was the Court of first instance to deal with this matter. The Petitioner has avenues of appealing the orders given by Court.

90. The Petitioner cannot seek to “appeal” orders of this Court through a constitutional petition. When the Petitioner felt curtailed by this Court’s orders of 15th May 2017, the reasonable thing was to appeal or seek review.

91. I however find that the Petitioner in as far as he seek a declaration that the said orders infringe on his rights, it is an abuse of this Court’s process as the Petition in essence seeks to appeal the Court’s decision through a Petition. The prayers must therefore fail.

92. On prayer No. 4 herein, I believe the Petitioner can seek to have information they need to support their case through the provision of the law under the Evidence Act and the Civil Procedure Act.

93. Section 69 of the Evidence Act Cap 80 Laws of Kenya states as follows:-

“69. Secondary evidence of the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case: Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases:-

(i) when the document to be proved is itself a notice;

(ii) when from the nature of the case, the adverse party must know that he will be required to produce it;

(iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(iv) when the adverse party or his agent has the original in Court;

(v) when the adverse party or his agent has admitted the loss of the document;

(vi) when the person in possession of the document is out of reach of, or not subject to, the process of the Court;

(vii) in any other case in which the court thinks fit to dispense with the requirement.

94. Indeed the Petitioner can seek and get documents and information he seeks without filing a Petition as provided above.

95. It is my finding that this entire Petition is an abuse of the Court process as orders sought are similar to those in Cause No. 2212 of 2016 pending in Court. I find order sought untenable. I dismiss the entire Petition with costs to the Respondents.

Dated and delivered in open Court this **31st day of July, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kiruri holding brief for Omingo for Petitioner – Present

Miss Kiriba holding brief for Makori for Respondent – Present

Motende for 13th to 15th Respondents – Present