



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NUMBER 413 OF 2016

IN THE MATTER OF ARTICLES 22(1) AND 165 (3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 19,20, 21(1),24,25,27,28,29,40 AND 50 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF CENTRAL BANK OF KENYA ACT (CAP.491)

AND

IN THE MATTER OF THE BANKING (AMMENDMENT) ACT

(NUMBER 25 OF 2016)

BETWEEN

BONIFACE ODUOR.....PETITIONER

AND

HONORABLE THE ATTORNEY GENERAL1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

KENYA BANKER’S ASSOCIATION.....INTERESTED PARTY

RULING

1. The Petition herein dated 10th October 2016, was initially in the Constitutional and Human Rights

Division of the High Court but later transferred to the Commercial, Admiralty and Tax Division for hearing and determination. It is brought pursuant to the provisions of Rules 3, 4(1), 8 and 10 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013, and supported by the Annexed Affidavit of Boniface Oduor sworn on the 10th day of October 2016.

2. The Petitioner is seeking for the following reliefs:

a) *A declaration that The Banking (Amendment) Act 2016 Act, No.25 of 2016, and every provision contained therein is null void and of no legal effect;*

b) *A declaration that the Act or deed of The National Assembly in passing the said Act was invalid for being unconstitutional;*

c) *A declaration that the National Assembly has no power or authority or jurisdiction to direct or control the Central Bank of Kenya in formulating or implementing monetary policy, which is an exclusive function of the Central Bank of Kenya;*

d) *The costs of and relating to this Petition;*

e) *Such other or further Orders as this Court may deem just and expedient in the circumstances in protection of the Constitution and protection against violation of Fundamental Rights.*

3. The factual backgrounds of the matter as stated by the Petitioner are that on or about 18th November, 2015; the National Assembly published a Bill titled "*The Banking (Amendment) Bill 2015*" alongside a Memorandum of Objects and Reasons. The publication was carried out in the Special Issue of Kenya Gazette Supplement Number 185 (National Assembly Bill Number 62). That the objects published stated, *inter alia*:

i) *That its principal object was to put a cap on the rate of interest that could be charged by Banks and financial institutions;*

ii) *To provide mechanism for regulation of interest charged by Banks and Financial institutions for loans; and*

iii) *That it concerned County Governments and affected their powers and functions.*

4. On 28th July 2016, the National Assembly passed the Bill and submitted to His Excellency the President for assent and was assented to on 24th August 2016, resulting into the Act No. 25 of 2016. The Act came into operation on 14th September 2016

5. The Petitioner argues that Parliament has no jurisdiction to legislate on matters which the Constitution under Article 231(1) makes an especial, exclusive province of the Central Bank of Kenya. That the Banking (Amendment) Bill, 2015 concerned County Government yet it was not tabled and discussed in accordance with Article 110 of the Constitution. It was not forwarded to the Senate as required under Article 110(3) and (4) of the Constitution. The Petitioner further argues that the resultant Act grossly violate fundamental rights and freedoms guaranteed by the Constitution under Articles 33B (3) as amended by the Banking (Amendment) Act, 2015, violates the Petitioner's fundamental rights, discriminates and infringes on the right to property. Finally the Petitioner argues that the Act is vague, imprecise, incomprehensible and open to various interpretations as the material terms used in the Act are not defined in the Act or other related legislation. Hence the reliefs sought as aforesaid.

6. As already stated, the matter was referred to the Commercial and Tax division on 14th October 2016. This Court became seized of the matter on 18th October 2016. On that date the Parties took direction in the matter whereby the Respondents were granted 21 days within which to file their responses.

7. It was also brought to the knowledge of the Court that there were two other matters filed in Court relating to the same subject matter as herein. A discussion on possible consolidation of the matters was not concluded. The issue was stood over to the 5th December 2016 when the other two matters were scheduled for mention.

8. However for one reason or another when the matter came back to Court on the 5th December 2016 the issue of consolidation was not pursued. The Parties took further direction on the filing of responses and/or submissions and highlighting thereof on 19th January 2017.

9. By the 19th January 2017, the Parties had not complied with the timelines given, as the 2nd Respondent had not filed their supplementary affidavit and the timelines were extended to 23rd February 2017. Again on the 23rd February 2017, the Petitioner was reported to have filed their submissions late which necessitated further extension of time for compliance and the matter was stood over to 28th March 2017.

10. On 23rd February 2017, the Parties highlighted the submissions and the matter was set down for Judgment on 30th May 2017. The Court was hopeful to deliver the final decision within the date set, however it was regrettably unable to and an apology was offered to the Parties. The decision date was to 18th July 2017. By that time I had only managed to read through the Pleadings as presented in the in the Petition totalling 84 paragraphs, the Replying affidavit filed by the 2nd Respondent of comprising of 52 paragraphs, a further affidavit of 12 pages and a further supplementary affidavit sworn by the 2nd Respondent with annexures running into 91 pages.

11. The Court then embarked on reading through the submissions filed by the Petitioner of 30 pages and the authorities annexed thereto and although they are not paginated, the physical count revealed a total of 151 pages. By the 18th July 2017, when the matter came for Judgment, I had not finished reading through the 2nd Respondents submissions. The said submissions run into 96 paragraphs and annexed authorities which are bound into a document of 310 pages. Once again I apologised to the Parties and set the matter for Judgement on 19th September 2017. This was informed by the fact that the Court was proceeding on vacation with effect from 1st August to 15th September 2017. That period offered a good opportunity to write the Judgment. I did actually comb through all the material presented and outlined above. I noted that the 1st Respondent was said to have filed grounds of opposition but the same were not on record. My efforts to call for them during the vacation did not yield much. The period after elections was rather slow on Court attendance and activities. A copy of the grounds was only availed on 18th September 2017 and I notified the Parties of the same. I set the matter for 25th September 2017.

12. However as the Court was dealing with this matter it became clear that the matter was generating great public debate (as here below outlined), and it became clear to the Court that this matter is of huge public interest. It also became clear that there are substantial questions of law that will require consideration by more than a single Judge; and this is informed by the fact that the issues raised turns on alleged violation of the Articles of the Constitution, which is the supreme law of the Land.

13. The Recent debate on this issue that has informed the decision of this Court to invoke the power granted to it under Article 165(4) of the constitution is evidenced by the following articles appearing in the Press and/or print media:

i) Could this mark the end of interest rate capping By Luther Odhiambo, | Published Tue, September 19th 2017 at 12:46, <https://www.standardmedia.co.ke/business/article/2001255004/could-this-mark-the-end-of-interest-rate>

ii) Treasury plans discussion on interest rate capping law changes ... www.businessdailyafrica.com
› Home › Economy: ***Sep 17, 2017 –***

iii) Kenya should maintain cap on loan interest rates By: Tom Published: ***September 16, 2017***

iv) RE: “Interest rate cap on loans will soon be reversed” (The New Times, ***September 15***).

v) Central Bank of Kenya considers reversing interest rate cap law ... <https://www.cnbc africa.com/.../central-bank-of-kenya-considers-rev...> ***Sep 14, 2017***

vi) Central Bank of Kenya Governor Patrick Njoroge speaks during a press conference at Villa Rosa Kempinski Hotel in Nairobi on September 13, 2017: The Central Bank of Kenya (CBK) Wednesday gave the clearest signal that it intends to push for a repeal of the year-old law capping interest rates because of the negative effect it has had on the economy.

vii) Interest rate cap a concern for foreign investors – CBK Governor September 13, 2017

viii) Interest rates cap shaves Sh 26 bn off banks' income - Business Daily www.businessdailyafrica.com › Home › Markets › News ***Sep 12, 2017***

ix) Winners, losers under Kenya's rate caps regime - The East African www.theeastafrican.co.ke › Business ***Aug 9, 2017 -***

x) Pornographic profits' blamed for banks' interest rates: By [Kennedy Kangethe](#), Nairobi, Kenya, ***Jul 17 – Eliud Kariara, Independent presidential candidate Japheth Kaluyu's running mate,***

xi) By Ken Macharia, Nairobi, Kenya, Jul 18 – The Central Bank of Kenya has received 16 requests to increase fees by banks following the implementation of the interest rate capping in September 2016

xii) Banks finally realise that rate cap is here to stay whether they like it or not By Otiato Guguyu | Published Tue, ***June 27th 2017*** at 09:04, Updated June 27th 2017 at 09:10 GMT +3

xiii) Kenya's Largest Bank Expects Rate-Cap Removal in Second Half: By Felix Njini , May 11, 2017, 7:03 AM GMT+3 ***May 11, 2017, 3:52 PM GMT+3***

xiv) Kenyan Economy Suffers Following Interest Rate Cap Apr. 9, 2017 9:22 AM ET

14. An issue of what constitute matters of a substantial questions of law was dealt with in the case of; ***County Government of Meru vs Ethics And Anti Corruption Commission (2014) EKLR***, where the Court identified the principles applicable to Article 165(4) as follows:-

“(a) The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.

(b) The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

(c) public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.”

15. In the case of; **Chunilal vs Mehta vs Century Spinning and Manufacturing Co, AIR 1962 SC 1314** the Supreme Court of India held that:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the Parties and which has not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

16. Article 165(4) of the Constitution of Kenya empowers the Court to refer a matter raising a substantial question of law under clause (3) (b) or (d) to the Chief Justice to constitute a Bench of uneven number of judges not less than three to hear this matter.

17. Based on these provisions, on 25th September 2017, the Court invited the respective Parties to appear before it and apologized for the delay in rendering the decision herein. It then informed the Parties that it was of the opinion that this matter be referred to the Hon. The Chief Justice for purposes of empaneling a Bench to hear it on the ground that it has become a matter of great public interest. The Court was also of the view that as there other two matters pending before Court, the Bench that would have been panelled may consider consolidation.

18. It sought the views of the Parties and the Learned Counsel Mr. Echesa appearing for the Petitioner expressed concern that the matter may be delayed due to the fact that the Courts are currently engaged in the hearing of the Election Petitions and yet the Petitioner herein is anxious to have a decision made at the earliest. However, he appreciated that the Court has the discretion under Article 165(4) of the Constitution to refer the matter as aforesaid.

19. Hon. The Attorney General who is the 1st Respondent did not appear on this date although they had been informed. The Learned Counsel Mr. Ouma appearing for the Central Bank of Kenya, the 2nd Respondent told the Court that although they appreciate the concerns of the Court in the exercise of its discretion, the 2nd Respondent wants the matter heard expeditiously and they too are concerned that due to the on-going of the hearing of the Election Petitions, the matter may not be finalized soon.

20. Kenya Bankers Association the Interested Party herein was represented by the Learned Senior Counsel Mr. Fraser who informed the Court that the other two matters namely; Petition No. 369 of 2016 has basically been dealt with by subsequent intervention of the Central Bank of Kenya and is currently marked “S.O.G.” That the second matter Petition No. 400 of 2016 concerns M-shwari product and is due for mention on 8th November 2017. Depending on the decision made therein it may or it may not affect this matter. His main concern however was the urgency of the matter. He informed the Court his clients

are anxious to have the matter decided. He was also concerned that this was a Commercial matter and it will be in the interest of the Parties and the matter that the bench to hear it be constituted from the Commercial Division.

21. I have considered these sentiments by the Learned Counsels and I appreciate the same. Indeed it will be in the interest of justice that the matter be dealt with at the earliest. As already stated if it was not for the public interest the matter has attracted, this Court would be ready to deliver the judgment herein any time. I also note that as much as the Courts are currently held up in the Election Petitions, these Petitions are being heard alongside other matters as and when time allows. I am of the opinion therefore that if the Hon. The Chief Justice empanels a Bench to hear this matter the Counsels will have an opportunity to bring the urgency of this matter to the knowledge of the Court and the Court will be able to give directions on the same.

22. My humble plea to the Hon. The Chief Justice is to consider the sentiments expressed by the Parties as he considers the request for the Bench.

23. I therefore certify this matter be referred to the Hon. The Chief Justice in accordance with the provisions of Article 165(4) of the Constitution for the constitution of a Bench to hear it.

It is so ordered.

Dated, delivered and signed on this 24th day of October, 2017 in an open Court.

G.L. NZIOKA

JUDGE

In the presence of:-

Mr. Oduor for the Petitioner

Mr. Oduor holding brief for Mr. Ouma for the 2nd Respondent

No appearance for the 1st Respondent

Mr. Fraser for the Interested Party

TeresaCourt Assistant



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