REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 457 OF 2015

GODFREY PAUL OKUTOYI (*suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya*.....PETITIONER

VERSUS

HABIL OLAKA – *the Executive Director (Secretary) of the Kenya Bankers*

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

JUDGMENT

1. This petition is premised on section 44 of the Banking Act Cap 488 Laws of Kenya,(the Act), which was introduced in 1989 and provides; ***"No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.***" The section prohibits banks and financial institutions from increasing bank rates and other charges except with the Minister's approval.

2. ***Godfrey Paul Okutoyi***, the petitioner, filed this petition on his own behalf of what he called all past and present customers of banking institutions in Kenya. The petition was brought against ***Habil Olaka***, the Executive Director of the Kenya Bankers Association on behalf of the Association he leads, the 1st respondent, and the Central Bank of Kenya as 2nd respondent.

3. The petitioner averred that since the introduction of section 44 in November 1989, none of the 1st respondent's member institutions, (Banks and financial institutions) had sought approval from the Minister before increasing bank rates and other charges though those rates and charges had been increased from time to time. It was stated with regard to the 2nd respondent, that as the regulator of the Banking sector, the 2nd respondent failed and or neglected to enforce compliance with section 44 of the Act pursuant to its mandate under the Central Bank Act (Cap 491) Laws of Kenya.

4. The petitioner stated that due to fraudulent and or illegal increase of bank rates and charges, the 1st respondent's members had unjustly enriched themselves with monstrous and preposterous super profits as exemplified by the Banking survey of 2011 a publication showing performance of respective banks over the years.

5. The petitioner averred that from the above acts, the petitioner and other customers of banks and financial institutions, had been deprived of their hard earned money leading to many instances of mortgaged properties being prematurely auctioned, businesses being impoverished, and others placed under indignified receivership. The petitioner stated that the 1st respondent's members still continued to defraud their customers while the 2nd respondent looked on without taking any action.

6. The petitioner therefore sought the following reliefs;

i) A declaration that the member institutions (banks) of the 1st respondent have infringed their customers' rights by depleting respective customers' accounts contrary to Article 46.

ii) A declaration that the 2nd respondent (as the regulator) has failed to protect the economic interests of the customers of the member institutions (banks) of the 1st respondent contrary to Article 23(3)(a) and 46(1)(c).

iii) A declaration that the 2nd respondent (as the regulator) despite having information/ data of institutions (banks) not being in compliance of (sic) section 44 of the Banking Act has not taken any action necessary for the banks' customers to gain the full benefits of the banking services in Kenya (Articles 23(3)(a) and 40(1)(b).

iv) A declaration that the audited accounts of member institutions (banks) of the 1st respondent be revised upon deduction of their unjust enrichments (Article 23(3)(a)).

v) Order of compensation for the loss and or injury occasioned to the customers by member institutions (banks) of the 1st respondent.

vi) Costs and such other orders as the Honourable court shall deem just.

1st Respondent's Response

7. The 1st respondent filed a replying affidavit sworn on 8th December 2015 by Habil Olaka and filed in Court on the same day. Mr Olaka deposed that Kenya Bankers Association is a registered Trade Union representing 42 licensed commercial banks, a mortgage finance company and two micro finance banks operating in the country. He however deposed that neither he nor the Kenya Bankers Association carry on business of commercial banks or financial institutions.

8. In that regard, Mr. Olaka deposed that the petitioner had neither a cause of action nor a right to institute this petition against the 1st respondent as a person or on behalf of the Kenya Bankers Association or against Kenya Bankers Association itself either under the Constitution or any other law.

9. Mr **Olaka further** deposed that the impugned section 44 requires every institution licensed under the Act to obtain approval before increasing rates. According to him, it was only when an existing charge was to be increased that the minister's approval was required. He deposed that section 44 relates to charges and not interest rates which were regulated by section 39 of the Central Bank Act now section 44. He went on to depose that the petitioner's contention that banks had defrauded customers by illegally increasing charges, sold mortgaged properties in default and or impoverished businesses was not based on any evidence.

10. With regard to the case of ***Rose Florence Wanjiru v Standard Chartered Bank of Kenya Ltd HCCC No 433 of 2003***, Mr. Olaka deposed that the Court (***Gikonyo J***) had stated that any violation of section 44 was a breach of statutory duty which would entitle a party to a relief in law. He contended that if one were to succeed, he would have to place before Court evidence to prove the individual's case. In that case, Mr Olaka deposed, ***Rose Florence Wanjiru*** moved the Court in her individual capacity to prove her loss and that of others but against a specified bank.

11. Mr Olaka stated that the issue raised in HCC 433 of 2003 was on breach of contractual relationships against specific banks against whom a claim of protection under Article 31 of the Constitution could be raised. He deposed that under section 52 of the Baking Act, a contravention of any provision of the Act or the Central Bank Act does not affect or invalidate any contractual obligations between institutions and persons hence such persons can sue the banks in their private capacities unlike the manner the petitioner seeks to raise private matters under the guise of a constitutional petition.

12. The deponent took issue with production of newspapers as exhibits which he contended were of no probative valued. Mr. Olaka deposed that on 12th June 2003 the Minister for Finance brought to the attention of the public the possibility of violations of section 44 of the Banking Act and therefore any claim by a customer of a particular bank may have become time barred by 12th June 2007. He contended that the petitioner had failed to demonstrate that a right under the Constitution had been violated or the manner of such violation. He also contended that there was no identification of the provision of Articles of the constitution that had been violated.

2nd Respondent Response

13. The 2nd respondent filed a replying affidavit by Neala Wanjala, the manager legal services on 18th January 2016. She deposed that the claim raised in the petition is similar to that raised by ***Rose Florence Wanjiru*** in HCC No. 433 of 2003 suing on her own behalf and on behalf of all persons interested in and being past and present account holders of specified banks in Kenya v Standard Chartered Bank Kenya Limited, J. K Wanjala (on behalf of Kenya Bankers Association & Central Bank of Kenya, which is still pending before the Commercial Division of this Court; and that the suit had been instituted as a representative suit on behalf of all those who would have been prejudiced had an opportunity pursuant to leave of Court in that suit to apply to be enjoined in those proceedings.

14. Wanjala further deposed that the petitioner herein is aware of suit No. 433 of 2003 since he had made an application to bring on board that suit a class action instead of joining the proceedings in his own capacity but the application was dismissed. It was deposed that the petitioner did not appeal against the ruling dismissing his application, but chose to file the present petition when private rights are being pursued in HCC No 433 of 2003 alleging that, banks have continuously and progressively increased rates and bank charges without complying with the provisions of section 44 of the Banking Act.

15. It was Wanjala's further deposition that in the suit pending before the Commercial Division, the claim against the 2nd respondent herein is that it was negligent in enforcing compliance by banks with provisions of the banking Act and more specifically section 44 of the Act and sought a declaration to that effect.

16. According to Wanjala, therefore, the present petition is in effect an agitation of the same cause of action being pursued in HCCC No 433 of 2003 still pending in Court, thus the present petition offends the ***sub-judice*** rule, and that this petition is a collateral attack on the proceedings in HCCC 433 of 2003 which should not be allowed.

17. It was deposed that Commercial Division is a High Court and can resolve constitutional issues if any in that suit, and further contended that the issue raised in the petition is about bank-customer relationship which is contractual in nature hence within the purview of private law and, therefore, no constitutional issues arise for determination as no right or fundamental freedom has been violated. It was also deposed that this is not a real constitutional petition since it did not set out precisely the provisions of the Constitution alleged to have been violated and the manner of violation.

18. Regarding the veracity of the petition, it was deposed that there was no evidence that banks have been levying charges contrary to law or that the 2nd respondent had failed or neglected to discharge its mandate. It was also contended that newspaper articles are of no evidential value and cannot be used to prove the petitioner's case. In the 2nd respondent's view, the petition is a forum shopping process thus an abuse of the court process.

Petitioners Submissions

19. Mr Gichuki Waikwa, learned Counsel for the petitioner, submitted, highlighting the petitioner's written submissions, that the issue raised in the petition was about unjust enrichment by members of the 1st respondent without the 2nd respondent taking action against the 1st respondent's members. Learned counsel submitted that the petitioner filed the present petition after ***Think Business*** published a survey indicating the performance by banks between 2005 and 2010 after which banks were feted for their good performance.

20. Mr. Waigwa contended that the petitioner's decision to file the petition was also fortified by the decision in the case of ***Njeri Muiruri v Bank of Baroda Ltd CA No 282 of 2004*** in which the Court stated that the bank had the onus to prove that increase in bank rates had been done with prior approval of the minister. Learned counsel submitted that the respondents had not shown that there was approval by the Minister before increase in rates and charges.

21. Learned counsel argued that banks had breached the petitioner's and other customers' rights to property by imposing rates and charges without approval from the Minister contrary to section 44 of the Banking Act. In Mr. Waigwa's view, banks should not be allowed to keep what they acquired through unfair means and urged the Court to order restitution. He relied on a member of decisions to urge this petition.

1st respondent's submissions

22. Mr. Fraiser, Learned Counsel for the 1st respondent, submitted that this petition has nexus with HCC No 433 of 2003 pending before the Commercial Division because it also relates to violation of section 44 of the Banking Act just like this petition. He submitted that pursuant to order 1 rule 8, of the Civil Procedure Rules a notice was given and all those interested in that suit applied to be made parties therein including the present petitioner who wanted to have all present and former bank customers made parties but the petitioner's application was dismissed.

23. According to learned counsel, the Court, (***Gikonyo'J***) considered whether there had been violation of the Constitution and concluded that aggrieved parties would have to move the Court and prove by evidence their individual cases. In counsel's view, the issue placed before Court is one that can only be determined on evidence but which was not done hence the burden of proof was not discharged.

24. Mr. Fraiser further contended that the present litigation is intended to avoid the structures of proving individual claims by bank customers as opined by ***Gikonyo J*** and the Court of Appeal in previous litigation. Learned Counsel went on to submit that there is a remedy being pursued in the Commercial Division on behalf of bank customers and any individual who applied and was enjoined. According to counsel, the existence of the case by ***Rose Wanjiru*** does not only show that there is an alternative remedy but also that that alternative remedy has been activated and is being pursued in court. "Any constitutional issue that may arise, the Commercial Division will deal with it". Counsel submitted.

25. Learned counsel argued that the present petition is an abuse of the Court process and relied on the case of ***Governors Balloon Safaris Limited V Attorney General & 2 Others {2014} eKLR*** (paragraph 60-62). He also submitted that although it is an established principle of law that limitation of Actions Act does not apply to claims over violation of constitutional provisions, he contended that such claims should be presented within a reasonable time (***Dominic Arony Amollo v The Attorney General [2003]eKLR, Wachira Waheira v Attorney General [2010]eKLR, Harun Thiongo Wakaba V Attorney General [2010] eKLR***, and ***Jones Kanyiita Nderitu v Attorney General & another [2013] eKLR***,).

26. Mr Fraiser took issue with the petitioner's submissions arguing that they were not correct in purporting to insinuate that Articles 19 and 20 of the Constitution give a retrospective effect to the provisions of the 2010 Constitution. In learned counsel view, this is incorrect and there is no way those provisions can be read to suggest so.

27. Learned counsel contended that although Article 22 of the Constitution allows a person to sue on behalf of another person, there is no corresponding provision allowing a person to sue on behalf of a class of person against different people. He submitted that the complaint in the petition is about noncompliance with provisions of the Banking Act on increase of bank charges which can only be pursued by individual customers who must prove their claims in accordance with the law.

28. Learned counsel concluded that there was no evidence before the Court on increase of bank charges, a matter of contract and any orders granted would be in breach of privacy and constitutional rights of parties who have not been heard since individual banks have not been sued or heard.

2nd Respondent's Submission

29. Mr Oraro learned Senior Counsel for the 2nd respondent submitted also highlighting their written submissions that the present petition seemed to have arisen from a ruling made in HCC No 433 of 2003 on 27th August 2015 in which the Court observed that there may not be a violation of the Constitution. Learned Senior Counsel submitted that the petition does not raise any issue of violation of the Constitution. According to learned Senior counsel, this petition does not meet the test of a constitutional petition laid down in the case of ***Anarita Karimi Njeru v Republic (***No.1) [1979] KLR 154 and emphasized in the case of ***Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR,*** and on that ground alone, he urged that this petition should fail.

30. Learned Senior Counsel went on to submit that a cursory look at the petition and supporting affidavit shows that they merely allege, without evidence, violation of consumer of banking services rights under Article 46 of the Constitution. He contended that the petitioner's complaint is premised on section 44 of the Banking Act alleging that banks never sought the Minister's approval to increase bank charges and rates and that the 2nd respondent failed in its mandate to enforce compliance with that section..

31. Senior Counsel also argued that the petitioner having admitted that his petition has legal nexus with Suit 433 of 2003 now pending before the Commercial Division of this Court, and having filed an application to be enjoined in that case but lost, should

not be allowed to litigate in this petition that which he failed to do in HCCC. No 433 of 2003.

32. Learned Senior Counsel went on to contend that the primacy of the contractual nature of a bank customer relationship is buttressed by section 52(1) of the Banking Act to the effect that no contravention of provisions of the Act or of the Central Bank of Kenya Act should affect or invalidate contractual obligations between an institution and a person. In Counsel's view, violation of section 44 of the Banking Act would not affect or invalidate a contractual obligation between an institution and a person hence the 2nd respondent while exercising its mandate under the Banking Act or Central Bank Act is not liable to any breach of contract between individual institutions and their customers, and such a breach would not amount to a constitutional violation.

33. Reliance was placed on the case of ***International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others [2013]eKLR*** for the submission that the mere fact that the constitution is cited or invoked is not enough to elevate it to a constitutional matter, ***CO D & another v Nairobi City Water & Sewerages Co. Ltd [2015}eKLR*** for the proposition that the Constitutional Court should not be used as a substitute for everything and where it is possible to decide any case of dispute, civil, criminal, without reading a constitutional issue then that is the course that should follow.

34. Learned Senior Counsel further submitted that the matter raised in this petition has been raised by the same counsel in the suit pending before the Commercial Division (HCCC No 433 of 2003) hence the petition is ***sub-judice*** and referred to a number of authorities on the subject.

35. Lastly Senior Counsel submitted that no evidence was adduced to support the averments in the petition and according to him, a petition cannot be anchored on newspaper publications or articles. He contended that section 112 of the evidence Act has to be read together the principle that he who alleges must prove as provided for under sections 107 and 109 of the Evidence Act and relied on the Supreme Court decision in the case of ***Gatirau Peter Munya v Dickson Mwende Kithinji & 2 Others [2014]eKLR*** on the importance of sections 107 and 109 of the evidence Act and the burden of proof.

36. Reliance was also placed on the decision in the case of ***Independent Electoral and Boundaries Commission v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR,*** for the submission that a statement of fact contained in a newspaper is merely hearsay and inadmissible in evidence in the absence of the maker of such a statement appearing in court and deposing to have perceived the fact reported.

37. Learned Counsel contended that this petition is abuse of the court process and referred to the case of ***Kenya Planters Cooperative Union Limited v Kenya Cooperative Coffee Millers Limited and Another [2016] eKLR***, for proposition that a petitioner's conduct in filing a constitutional petition during the pendency of other proceedings before the same court raising same issues was clearly an abuse of the court process which the court is obliged to strike out pursuant to rule 3(8) of the ***Mutunga Rules*** He argued that this is a case that cannot be granted since the petitioner is before the commercial Division over the same issue.

Determination

38. I have considered the pleadings herein, submissions by Counsel for the parties and the authorities relied on. Two questions arise for determination in this petition, that is; whether there was a violation of rights and fundamental freedoms, and whether this petition is an abuse of the court process.

Whether there was violation of rights and fundamental freedoms

39. The petitioner has come to this Court on his own behalf and that of former and present customers of various banks and financial institutions, members of the 1st respondent. The petition was filed against the 1st respondent also sued on behalf of banks and financial institutions and against the 2nd respondent, the Central Bank of Kenya.

40. The gravamen of the petition is that banks and financial institutions have been violating section 44 of the Banking Act which prohibits these institutions from increasing bank charges without prior approval of the Minister, while the 2nd respondent is accused of failing and or neglecting to enforce compliance with section 44 of the Act. To the petitioner, these failures amount to a violation of rights and fundamental freedoms of both past and present bank customers.

41. In the petitioner's view, imposition of charges and rates without ministerial approval amounts to unjust enrichment by banks

which has in turn caused untold suffering to customers ruining their businesses and mortgaged and or charged properties indiscriminately sold due to these illegal charges.

42. The respondents on their part have contended that this is not a true constitutional petition, that there is no breach or violation of the constitution, or rights and fundamental freedoms and that no evidence has been adduced to prove that there has been violation of the Constitution or rights and fundamental freedoms.

43. The 1st respondent has also contended that he has no relationship with customers since banks operate as individual institutions and Kenya Bankers Associations has no customers of its own but is only a trade union for banks and financial institutions which have private contractual arrangements with customers. For the 2nd respondent it was contended that it had neither failed nor neglected to enforce section 44 of the Banking Act, hence there was no breach of the constitution or violation of rights or fundamental freedoms. There is a further contention that the petition is an abuse of the court process since there is a similar suit pending before the Commercial Division raising similar issues through the same counsel.

44. The petition in essence accuses banks and financial institutions of violating section 44 of the Banking Act by increasing bank charges without the necessary approval by the Minister, while the 2nd respondent as the regulator is accused of failing or neglecting to enforce and ensure that banks comply with the said section.

45. Between banks and their customers, there exists what is called Bank customer relationship. A customer willingly walks into a bank/ financial institution and either deposits his/her money with his bank of and in return the bank guarantees to keep the customer's money safe and on agreed terms. Bankers are in business and for that reason would apply charges and fees in that process. Alternatively a customer may seek and obtain a financial facility from the bank on agreed terms and or on some collateral, if necessary, payable within an agreed period of time. In case of default, there would be penalties and other sanctions.

46. The introduction of section 44 of the Banking Act was intended to avoid situations where banks would indiscriminately increase charges without notice to customers and therefore approval by the relevant minister became mandatory. In my view, therefore, the relationship entered into between a bank and customer, is a private contractual arrangement and any breach of its terms is a breach of a normal contract and the available redress is through normal civil Court process. In that regard, a violation of Section 44 of the Banking Act would be a breach a statutory provision that can readily be redressed through a normal civil suit subject of course to the usual standard of proof in civil matters.

47. A constitutional petition on the other hand is a litigation initiated to either challenge breach of constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution. These must expressly or impliedly recognized and protected rights and fundamental freedoms under the Bill of Rights. They must be the sort of rights and fundamental freedoms that belong to each individual, that are not granted or grantable by the state, and belong to individuals by virtue of their being human. These are rights and fundamental freedoms enjoyed by each individual and not collectively,

48. I have gone through the petition and the supporting affidavit. All that they allege are in general terms breaches or failure by members of the Kenya Bankers Association to comply with section 44 of the Banking Act by increasing charges without the minister's approval. The petition does not allege breach or violation specific constitutional provisions or infringement of specific rights and fundamental freedoms and the manner of such breach violation or infringement.

49. It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of ***Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154*** where the Court stated;

" if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." (see also Meme v Republic & another [2004] 1 KLR 637)

50. This principle was emphasized by the Court of Appeal in ***Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR,*** where it stated that:

"…the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court… Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle"

51. Looking at the petition and the supporting affidavit as well as the manner of pleading therein, I am unable to find any semblance of a constitutional petition pleading breach of know constitutional provisions, violation of and or infringement of rights and fundamental freedoms. What I find is a general pleading on breach of a statutory provision capable of redress in a normal suit and not through a constitutional petition.

52. Learned Counsel for both respondents contended and rightly so, in my view, that this petition is a continued the litigation in HCC No 443 of 2003 that is pending before the Commercial Division of this Court. I have perused the plaint filed in that suit and it is clear, without question, that the issue in that suit relates to breach of section 44 of the Banking Act, the same issue that is before this court. Parties in that suit are substantially the same as those before this court and in that suit, the 2nd respondent has been accused of failing and or neglecting to enforce compliance by banks with section 44 of the Banking Act. That is the same claim that is before this Court and a specific declaration has been sought in that suit as well as this petition to that effect.

53. Counsel for the respondents have contended, and it has not been denied by the petitioner, that the whole purpose of filing this petition was to run away from the finding by ***Gikonyo J*** that where there is a statutory breach such as in the case of section 44 of the Banking Act, aggrieved individual customers would have to move the Court and subject to the usual evidential proof, establish their individual claim(s) in court.

54. I entirely agree that a customer who is aggrieved by his bank's action of imposing new charges in contravention of section 44 of the Act without the Minister's approval, would have to mount his/her own claim and prove to the satisfaction of the court that there was indeed such a breach and as a result, s/he suffered loss and to what extent. Again where for instance a bank or financial institution levied charges against a customer at a time when section 44 was in place, that would be a matter for evidence in terms of sections 107 and 109 of the Evidence Act and not a violation of known rights or fundamental freedoms.

55. It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that "***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist*****".** It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that that indeed is the case. That is why section 109 of the Evidence Act again provides that ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"***

56. The Court of Appeal did emphasize on the above provisions in the case of ***Jenifer Nyambura Kamau v Humprey Mbaka Nandi*****[2012]eKLR** but also added that Section 108 of the same Act provides that ***the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (Gatirau Peter Munya v Dickson Mwende Kithinji & 2 Others supra-para 186***) It is therefore not enough for a party to merely allege that there has been a breach of section 44 of the Banking Act but fail to adduce evidence to support those claims and expect to win the court's favour.

57. The petitioner did not adduce any evidence to prove first, that banks had increased charges while section 44 of the Banking Act was in force without approval of the minister. Second; that any particular customer was aggrieved by such action. He simply attached news -paper articles to show that banks had made hefty profits over the years. News-paper reports are of little evidential value without the person who made the report. In the case of I***ndependent Electoral and Boundaries Commission v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR,*** it was held that a statement of fact contained in a newspaper is hearsay and inadmissible in evidence in the absence of the maker of such a statement appearing in court and deposing to have perceived the fact reported.

Whether the Petition is an abuse of the Court Process

58. The respondent also submitted that this petition is an abuse of the process of the Court given that there is a similar matter pending before the Commercial Division of this Court. I agree with Senior Counsel Oraro's submission that the decision to mount this petition when the same counsel is pursuing similar litigation before the Commercial Division is an abuse of the court process.

As stated in the case of ***Kenya Planters Cooperative Union Limited v Kenya Cooperative Coffee Millers Limited & Another [2016] eKLR,*** the filing of a constitutional petition during the pendency of other proceedings before the same Court raising the same issues is an abuse of the court process. There was no basis at all for instituting this petition yet the same issue was live in the Commercial Division of this Court, a Court of concurrent jurisdiction. It was simply meant to stretch the respondents' participation in more than one litigation so as to confuse the respondents and make them lose focus on the real issue before the court(s).

59. In the case of ***Beinosi v Wiyley [1973]SA 721 SCA*** the South ***African Court of Appeal*** stated with regard to abuse of process that i***n general terms, 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.*** The ***Supreme Court of Nigeria*** observed in the case of ***African Continental Bank PLC v Damian Ikechukukwu Mwaigwe 82 Others*** SC 35 of 2001 (14th January 2011) that abuse of court process arises ***where two or more similar processes are issued by a party against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used bona fide and properly.***

60. In ***Muchangi Industries Limited v Safaris unlimited (Africa) Limited and 2 others*** *t*he Court of Appeal stated that ***the person who abuses process is interested only in accomplishing some improper purposes that is collateral to the proper object of the process and that offends justice.*** And in ***Governors Balloon Safaris Limited V Attorney General & 2 Others*** (supra) the Court stated that "***it is an abuse of the court process to institute several proceedings in order to challenge the same action and the Court has inherent jurisdiction to prevent such abuse***

61. Bearing in mind the above jurisprudence, it is not in doubt that the petitioner filed this petition after he failed in his quest to join HCC No. 433 of 2003 and wanted to try his luck in this Court although fully aware that the same issue was being pursued in the Commercial Division. This is clearly an abuse of the court process that should never be tolerated

62. The 1st respondent also contended that he could not be sued on his own behalf or that of Kenya Bankers Association because he is not a bank or financial institution while Kenya Bankers Association is only a Trade Union representing banks and financial institutions, a fact that has not been contested by the petitioner. That being the true position why was the 1st respondent sued yet if there had been any violation of rights and fundamental freedoms or even breach of statutory provisions it was by individual banks" Moreover, why was the petition filed on behalf of both former and present bank customers some of whom may be dead or may not have been aggrieved at all".

63. Mr. Fraiser submitted and again I agree with him, that whereas civil procedure rules allow representative suits, the nature of violations alleged in this petition were private and personal in nature and only aggrieved individuals could file claims for breach of contract but, against individual banks. Since the suit pending in the Commercial Division is a representative one, those aggrieved were given an opportunity to join in that suit and if one did not that s/he should be taken to have not been aggrieved. There cannot be two suits in the same court(s) seeking similar reliefs. If this petition were to be allowed as well as HCC No. 433 of 2003, the petitioner herein and plaintiffs in the other suit would be enriching themselves yet that is what their complaint against the 1st respondent is about.

64. Regarding the 2nd respondent, the allegation raised against it is primarily that it has neglected its mandate to enforce the statutory provision which the petitioner contended amounted to a violation of constitutional rights and fundamental freedoms. I do not agree with this view. Failure to enforce a statutory provision is only failure but is not unconstitutional. The 2nd respondent did not fail to enforce a constitutional provision and therefore did not act unconstitutionally neither did such failure amount to unconstitutional acts or conduct that violated the constitution or rights and fundamental freedoms of bank customers.

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.

66. In that regard, it is worth remembering the warning sounded by ***Lord Diplock*** in the case of ***Harrikissoon V Atttorney General of Trinidad and Tobago [1980]AC 265*** where he decried the tendency of people rushing to institute constitutional petitions

alleging violation of fundamental freedoms where there was none stating;

"The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court… for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action… the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court…if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (emphasis)

67. In the case of ***Benard Murage v Fine serve Africa Limited & 3 others*** **[2015] eKLR** the Court stated;

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

68. The Court of Appeal of Trinidad and Tobago dealt with the same issue in the case of ***Damian Delfonte v The Attorney General of Trinidad and Tobago*** **CA 84 of 2004 and stated;**

"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably, indicates the means of legal redress otherwise available would not be adequate. To seek constitutional reliefs in the absence of such a feature would be a misuse or abuse of the Court's process. A typical but by no means exclusive example of such a feature would be a case where there has been arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed. Some of which are common rights and some of which protection is available only under the Constitution, and it would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights."

69. With the above pronouncements in mind, an examination of the petition filed herein shows that it least satisfies the features for a constitutional petition for violation or infringement of rights and fundamental freedoms. The allegations are on a breach of a statutory provision which has nothing to do with rights and fundamental freedoms under the Bill of Rights. Moreover, there is already a suit challenging the breach now pending before the Commercial Division a branch of this Court. From the details, it was initiated in 2003 and 15 years later, it is yet to be concluded, a worrying situation.

70. Instead of concentrating on having that suit heard and determined, counsel turned to this Court with the same suit disguised as a constitutional petition over violation of some rights and fundamental freedoms when there was none. To my mind, the petitioner may have realized that he could easily have the same issue determined in this Court much quickly but not because it was a true constitutional petition. He was just casting his net wide to try his luck in this Court which must not be allowed.

71. ***The Supreme Court*** of ***India*** decried situations where parties abuse the Court process by filling multiple suits or applications thus clogging the judicial system. Lamenting in the case of ***D nyandeo Sabaji Nail and Another v Mrs Pranya Prakash Khadekar and others*** (Petition Nos. 25331-33 of 2015 , ***Dr D Y Chandrachud J*** speaking for the Court stated;

"This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency"… Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth."

72. The learned Judge continued;

"Courts across the legal system - this Court not being an exception– are choked with litigation. Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Productive

resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes…"

73. His Lordship then concluded;

"…This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behavior. Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate causes simply by the weight of undeserving cases which flood the system. Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice. We commend all courts to deal with frivolous filings in the same manner."

74. I fully agree with His Lordship's observation as it represents what is ailing our own judicial system. This petition is truly illustrative of the situation addressed by ***Dr. Chandrachud J*** in our own country where the Court system is flooded by illegitimate cases at the expense of genuine ones and therefore delayed justice. It is the duty of this court and in deed every Court to deal firmly with such situations whenever brought to its attention, thus weed out unnecessary causes and ensure that its process is never abused.

75. In the circumstances therefore, I find no merit in this petition and I dismiss it with costs to the respondents.

Dated Signed and Delivered at Nairobi this 25th Day of January, 2018

E C MWITA

JUDGE