



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E325 OF 2020

GEORGE RAGUI KARANJA

(SUING AS DIRECTOR OF INTERACTIVE ADVERTISING LIMITED).....PETITIONER

-VERSUS-

THE CENTRAL BANK OF KENYA.....RESPONDENT

-AND-

EQUITY BANK KENYA LIMITED.....INTERESTED PARTY

JUDGMENT

1. The Petitioner, George Ragui Karanja, has brought this petition on his own behalf and on behalf of Interactive Advertising Limited, of which he is a co-director.
2. The Respondent, the Central Bank of Kenya, is established under Article 231(1) of the Constitution. It is responsible for the formulation of monetary policies, promoting price stability, issuing currency and performing any other functions conferred upon it by an Act of Parliament.
3. The Interested Party, Equity Bank of Kenya Limited, is a company incorporated and licensed to carry out banking business in Kenya.
4. Through the petition dated 6th October, 2020 the Petitioner alleges that the Respondent violated his fundamental rights under Articles 2(1), 4, 10, 27, 40, 46, 47 and 231 of the Constitution and also breached the Central Bank of Kenya Act, Cap. 491. The petition is supported by his affidavit sworn on the date of the petition.
5. The Petitioner seeks the following reliefs;

(a) A Declaration that the Respondent's failure to conduct an independent and objective inquiry as to the allegations of negligent and/or fraudulent account opening by Equity Bank Limited as raised by the Petitioner violated Petitioner's right to fair administrative action.

(b) A Declaration that the Respondent's failure to conduct independent investigations in order to ensure adherence to CBK prudential guidelines on customer due diligence and consumer protection violated the Petitioner's consumer rights protected under Article 46 of the Constitution.

(c) A Declaration that the failure of the Respondent to investigate the complaint as to malpractices as raised by the Petitioner herein violated the Petitioner's right to equal protection of the law and freedom from discrimination protected under Article 27 of the Constitution.

(d) General damages as against the Respondent for suffering and financial loss suffered by the Petitioner.

(e) Exemplary damages against the Respondent for breach of fiduciary duties, constitutional and statutory owed to the Petitioner.

(f) That costs of the petition be provided for.

(g) Interest on (d), (e) and (f) above.

(h) Such other order(s) as this Honourable Court shall deem just.

6. The Petitioner's case is that at all material times he was a co-director of Interactive Advertising Limited which engages in the general business of advertising through mileage using industrial design No. 1d 400 owned by his other company called Trolley Concepts Limited. According to the Petitioner, he was in charge of the company's operations while his co-director, Edith Njeri Kimani, was in charge of the finances. The Petitioner avers that the company maintained a bank account with Barclays Bank (K) Limited (now ABSA Bank), Haile Selassie Avenue, in which the two directors were the joint signatories and it is through this account that all income was channeled.

7. The Petitioner's case is that in period June 2007 to June 2008, he noted unremitted income for services rendered to one of the clients prompting him to investigate the reasons behind the unremitted payments. The investigation revealed that his co-director had fraudulently opened an account with Equity Bank's Four Way Towers branch sometime in 2012 with the sole objective of fraudulently converting the company's income for her personal benefit. He also found that sums totaling to Kshs. 19,197,200.00 belonging to Interactive Advertising Limited had been collected through the said account.

8. The Petitioner avers that he sought legal reprieve against his co-director for fraudulent diversion of company funds as well as violation of his intellectual property rights in *Nairobi HCCC No. 20 of 2011* and *Industrial Property Tribunal Case No. 67 of 2012*. He also filed complaints with the police.

9. The Petitioner states that on 17th February 2014, he entered into a settlement with his co-director in which he was to be paid Kshs. 20,000,000.00 for the fraudulent diversion of company funds, violation of his intellectual property rights and all claims arising from the industrial property dispute. He was in turn expected to withdraw all the complaints and cases he had filed against his co-director.

10. The Petitioner deposed that he filed *Nairobi HCCC No. 219 of 2014 Interactive Advertising Limited v Equity Bank Limited & another* (hereinafter simply referred to as *Nairobi HCCC No. 219 of 2014*) seeking reprieve against the Interested Party for breach of the duty of care and fiduciary duty.

11. It is further the Petitioner's case that vide letters dated 13th April, 2020 and 27th April, 2020 he informed the Respondent of the negligent and fraudulent opening of the account with the Interested Party by failure to observe the basic requirement that a bank must know its client as per the Central Bank of Kenya Prudential Guidelines, 2013. It is the Petitioner's assertion that the Respondent dismissed his complaints preliminarily and in a casual manner hence violating his rights. He alleges that as result of the way his complaints were handled by the Respondent, Articles 2(1) & (4), 10, 27, 40, 46, 47 and 231 of the Constitution were violated.

12. The Petitioner highlights the Respondent's violations as the failure to ensure compliance by the Interested Party with the due

diligence requirements; failure to investigate non-compliance with the due diligence requirements on the part of the Interested Party; failure to initiate appropriate remedial action against the Interested Party for failure to report a suspicious activity; failure to pursue remedial measures provided under sections 33, 33A, 34 and 35 of the Central Bank of Kenya Act; and, the reckless absconding of duty by summarily dismissing his complaints.

13. The Petitioner swore a supplementary affidavit on 9th March, 2021 in response to the Interested Party's replying affidavit and averred that this matter is not *res judicata* for the reasons that the Respondent was not a party to *Nairobi HCCC No. 219 of 2014*; that this matter relates to the failure by the Respondent to investigate his complaints; and, that the orders sought in *Nairobi HCCC No. 219 of 2014* are different from the reliefs sought in this petition.

14. The Respondent opposed the petition through a replying affidavit sworn by its General Counsel, Kennedy Kaunda Abuga, on 15th December, 2020. The Respondent's case is that on 21st January, 2014 it received a letter detailing the Petitioner's complaint against the Interested Party regarding the opening of an account stated therein. Upon asking the Interested Party to investigate the complaint and give it a feedback, the Interested Party informed it through a letter dated 26th May, 2014 that the Petitioner's complaint had been settled and withdrawn.

15. The Respondent deposed that it was apparent from the Petitioner's letter dated 30th June, 2014 that the Petitioner had made up his mind as to the guilt of the Interested Party. According to the Respondent, it communicated its decision to the Petitioner in a letter dated 30th September, 2014 that owing to the withdrawal of his criminal complaints against his co-director, the existence of a civil case between him and the Interested Party, the need to avoid double jeopardy, and the possibility of abuse of its regulatory authority, it would not be pursuing his complaint. It is the Respondent's case that the steps it took cannot be said to be an abdication of duty and that it carries out its mandate diligently and routinely as is required of it under the law.

16. The Respondent averred that the Petitioner had failed to disclose in his pleadings that *Nairobi HCCC No. 219 of 2014* was determined in favour of the Interested Party in a judgement delivered in 2019. It is the Respondent's position that since the Court pronounced itself vindicating the Interested Party by finding that the Petitioner had withdrawn the complaint, it could not undertake further investigations on the matter.

17. In conclusion the Respondent deposes that the petition is an abuse of the court process, frivolous and does not meet the threshold of a constitutional petition due to the failure to specify the nature of the rights allegedly infringed.

18. The Interested Party opposed the petition through a replying affidavit sworn on 24th February, 2021 by its Manager of Legal Services, Kariuki King'ori. It is the Interested Party's position that this petition is an abuse of the court process and *res judicata* as the issues raised in the petition were canvassed in *Nairobi HCCC No. 219 of 2014*. The Interested Party details the various issues and aspects of the present petition and points to their similarity to the issues in previous case.

19. It is further the Interested Party's case that the Respondent's dispute resolution and supervisory function is *quasi-judicial* and could not be performed during the pendency of the civil case filed against it by the Petitioner. The Interested Party avers that although the Petitioner lodged a complaint regarding the account in question and also lodged complaints with the DCI, the Petitioner had on 17th February, 2014 entered into a settlement agreement with his co-director. Further, that pursuant to the agreement, the Petitioner's advocates wrote to the Interested Party indicating that the issue had been resolved and all complaints withdrawn including those lodged against it.

20. The Interested Party additionally deposes that it was absolved of any liability in *Nairobi HCCC No. 219 of 2014* in which the Petitioner had raised issues similar to those raised in this case. According to the Interested Party, the Petitioner had filed a notice of appeal against the judgment in that case but has since failed to file any other document to prosecute his appeal.

21. Finally, the Interested Party deposes that the petition does not raise any substantial justiciable constitutional issues to be determined by this Court. The Court is therefore urged to dismiss the petition.

22. In his submissions dated 9th November, 2020, the Petitioner contended that the Respondent violated his right to fair, expeditious and efficient administrative action under Article 47 of the Constitution. The Petitioner contended that the Respondent deliberately and negligently acted or omitted to act on his complaints regarding the Interested Party's fraudulent opening of the account in

question.

23. According to the Petitioner, the Respondent's action of fraudulently opening the account also denied him the right to equal protection and benefit of the law. To this end, he relied on the Supreme Court case of **Re The Matter of the Independent Electoral and Boundaries Commission [2011] eKLR** and argued that the Respondent though an independent entity, was required to perform its functions within the constitutional and statutory boundaries so as to protect his right under Article 47 of the Constitution. Further, that Article 27 gives all persons the right to equal protection and benefit of law.

24. The Petitioner also relied on the case of **Waweru & 4 others v Central Bank of Kenya [2014] eKLR** to argue that the Respondent has a duty to license and supervise authorized dealers and to ensure stability and security of the banking sector. It was his position that this duty was breached when the Respondent failed to conduct an independent and objective investigation on the Interested Party. The Petitioner relied on the case of **Equity Bank (Kenya) Limited v Don Ogalloh Riario & another [2019] eKLR** and submitted that it is in the public interest and for the protection of consumer rights that the Respondent enforces the Prudential Guidelines in order to ensure that authorized dealers adhere to secure and safe banking practices.

25. On his claim that his consumer rights under Article 46 of the Constitution were violated, the Petitioner argued that it was in the best interest of consumers of banking services that the Respondent supervises and regulate the banking sector. The Petitioner asserted that the failure by the Respondent to ensure that the Interested Party complied with the Prudential Guidelines, 2013 amounted to gross violation of his right to quality and secure financial services. The Petitioner buttressed his argument with the case of **Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank Limited [2015] eKLR** where the Court ruled that the Prudential Guidelines were binding and their breach would result in sanctions from the Central Bank of Kenya.

26. The Petitioner also filed supplementary submissions dated 29th June, 2021 and submitted that the current petition is not *res judicata* as the issues in this petition are not the same with the issues in *Nairobi HCCC No. 219 of 2014*. He added that the Court in *Nairobi HCCC No. 219 of 2014* did not make a finding as to whether the Interested Party acted negligently.

27. The Petitioner submitted that for the doctrine of *res judicata* to apply, the case must be on the same subject matter and between the same parties, which was not the case in the instant petition. Reliance was placed on the case of **Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party) [2019] eKLR** as stating the law on *res judicata*. The Petitioner further submitted that the doctrine of *res judicata* should be invoked sparingly in constitutional litigation.

28. The Petitioner additionally submitted that the current petition is neither scandalous nor frivolous. He stated that he has tendered evidence to prove the allegations of breach of constitutional rights and the failure by the Respondent to discharge its statutory obligations and his case has therefore met the threshold for constitutional petitions.

29. The Petitioner submitted that the reasons advanced by the Respondent for declining to take further action on his complaint against the Interested Party were unreasonable and unjustifiable. This Court was therefore urged to find merit in the petition and hold that the Petitioner suffered violation of his constitutional rights warranting compensation.

30. Through submissions dated 9th June, 2021 the Respondent stated that under Section 4 of the Central Bank of Kenya Act it is mandated to license and regulate the banking sector which regulation is a quasi-judicial and administrative function. It is the Respondent's position that it duly exercised its mandate upon receipt of the Petitioner's complaint.

31. The Respondent submitted that after considering the Petitioner's initial complaint it communicated to him through the letter dated 30th September, 2014 that it would be appropriate to allow for the determination of the case that he had filed in Court against the Interested Party. The Respondent further submitted that upon the revival of the complaint by the Petitioner in 2020, it communicated to him through a letter dated 17th June, 2020 that it would not intervene as he had settled and withdrawn the criminal complaints against his co-director and received Kshs. 20 million as compensation in respect of the funds received through the account opened with the Interested Party. The Respondent stated that other reasons given for the non-intervention were that the Petitioner had failed to obtain judgement against the Interested Party in *Nairobi HCCC No. 219 of 2014*. Further, that the Court had held that any further payment to the Petitioner in respect of his claim against the Interested Party would amount to unjust enrichment.

32. On its claim that the petition does not raise any cause of action, the Respondent submitted that the issues raised in this petition had been settled between the Petitioner and his co-director and by extension the Interested Party. The Respondent argued that there was therefore no basis for the complaint raised by the Petitioner as he had withdrawn his complaint against his co-director and the funds that were the subject of the complaint had been refunded in accordance with the settlement agreement between him and the Interested Party.

33. The Respondent also submitted that the petition is scandalous, frivolous and vexatious because the Petitioner has tendered no evidence to prove the allegations of breach of his rights. According to the Respondent, the Petitioner has not tendered any evidence of any loss incurred by him as to claim compensation. The Respondent relied on the decisions in the cases of **Trust Bank Limited v H.S. Amin & Company Limited & another [2000] eKLR** and **Mpaka Road Development Co. Ltd v Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House [2001] eKLR** to argue that a pleading without substance is vexatious and offensive as it causes the opposite party unnecessary anxiety.

34. It was further submitted that the petition does not meet the threshold for constitutional petitions as it lacks specificity of fact, law or the constitutional provisions allegedly infringed by the Respondent. The Respondent buttressed its argument by referring to the case of **S.W.M. v G.M.N. [2012] eKLR**.

35. The Respondent also argued that the Petitioner is not entitled to the reliefs sought since he has approached the Court with unclean hands by failing to disclose the outcome in *Nairobi HCCC No. 219 of 2014*.

36. Through submissions dated 5th March, 2021, the Interested Party submitted that this petition is barred by the doctrine of *res judicata* which is legislated by Section 7 of the Civil Procedure Act, Cap. 21. The cases of **Henderson v Henderson [1843] 67 ER 313** and **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** were cited as explaining the doctrine of *res judicata*. The Interested Party highlighted various issues in the instant petition and submitted that those issues were dealt with in *Nairobi HCCC No. 219 of 2014*.

37. The Interested Party further submitted that since the High Court has supervisory jurisdiction over the Respondent in regard to its quasi-judicial functions, the Respondent was required to wait for the finalization of *Nairobi HCCC No. 219 of 2014* before making its decision.

38. Having gone through the pleadings and submissions filed by parties in this petition, I conclude that the issues for the determination of this Court are as follows:

- i. Whether this petition is *res judicata*;
- ii. Whether the Respondent violated its constitutional and statutory obligations;
- iii. Whether the Respondent infringed on the rights of the Petitioner; and
- iv. Whether the Petitioner is entitled to the reliefs sought.

39. By claiming that this petition offends the doctrine of *res judicata*, the Respondent and the Interested Party are asking the Court to down its tools for want of jurisdiction. The issue therefore needs to be addressed promptly as a threshold issue because once the defence of *res judicata* is upheld it denies the court jurisdiction to delve into the substance of the claim before it. This statement finds support in the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** where it was held that:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits.”

40. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act, Cap. 21 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

41. The rationale of *res judicata* is to bring an end to litigation, save precious judicial time and to ensure that courts do not make conflicting decisions in respect of the same matters. This position was confirmed by the Court of Appeal in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** when it stated that:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

42. The Court of Appeal in the just cited case restated the principles of *res judicata* as follows:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.**
- (b) That former suit was between the same parties or parties under whom they or any of them claim.**
- (c) Those parties were litigating under the same title.**
- (d) The issue was heard and finally determined in the former suit.**
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

43. Applying the law to the facts of this case, it becomes apparent that although the Petitioner’s claim herein arose from the same set of facts as those giving rise to his dismissed claim against Equity Bank, the parties in this matter are not the same as those in the previous litigation.

44. For the defence of *res judicata* to be successfully invoked, all its elements must be established by the party relying on it. There was no averment by any of the parties before this Court that the Respondent had previously been sued by the Petitioner over the same set of facts.

45. In the instant matter, the Petitioner has also pointed out that the issues he is raising in this case are fresh and have never been addressed by any competent court as they relate to the supervisory jurisdiction of the Respondent. This statement was not rebutted by the Respondent and the Interested Party. It follows therefore that the matters raised in the petition are novel and this Court is required to entertain them.

46. The Supreme Court reiterated the availability of the defence of *res judicata* in constitutional litigation in **John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** as follows:

“[81] We reaffirm our position as in the Muiri Coffee case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is

founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively...

[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of *res judicata*, they only need to invoke some constitutional provision or other.”

47. The Supreme Court, nevertheless, warned that though the doctrine of *res judicata* lends itself to promote the orderly administration of justice, it should not be invoked so as to cause injustice. This position was earlier acknowledged by the Court of Appeal in **Accredo AG & 3 others v Stefano Ucceli & another [2019] eKLR** when it stated that:

“However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.”

48. The Petitioner has raised constitutional issues which have never been addressed by any other Court. Turning him away from this Court on the claim that his case offends the doctrine of *res judicata* would deny him substantive justice. He is entitled to know what this Court has to say about the merits of his case. I therefore find that the doctrine of *res judicata* is not applicable in the circumstances of this petition.

49. Another ground upon which the Respondent and the Interested Party seek to deprive this Court of jurisdiction to entertain the Petitioner’s claim is that there is no proper constitutional claim before this Court. The Respondent and Interested Party asked this Court to find that the petition does not meet the threshold for constitutional petitions as it lacks specificity of fact, law or the constitutional provisions infringed by the Respondent. In response to this issue, the Petitioner contended that the petition is neither scandalous nor frivolous and has met the threshold for constitutional petitions. He further submitted that he has tendered evidence to prove the allegations of breach of his constitutional rights and the failure by the Respondent to discharge its statutory obligations.

50. In a constitutional petition, the petitioner is required to plead with clarity the rights alleged to have been violated by the respondent, the constitutional provisions infringed by the impugned action, the nature of the injury sustained and the relief sought. This will not only give the sued party an opportunity to directly respond to the issues raised but will also help the court to understand and properly adjudicate the dispute between the parties.

51. I have perused the Petitioner’s petition and he clearly states the facts and cites the constitutional provisions allegedly violated by the Respondent. He states how the violation of the Constitution has breached his right to property, consumer rights and right to fair administrative action. The Petitioner also explains how the Respondent failed to execute its supervisory role over the Interested Party. The Petitioner finally lists the prayers he seeks as a result of the violations and the injury suffered. His petition therefore meets the basic requirements of a constitutional petition and the claim by the Respondent and the Interested Party that his petition does not meet the threshold for constitutional petitions is found to be without merit and dismissed.

52. The remaining three issues as to whether the Respondent failed to discharge its constitutional and statutory obligations; whether the Respondent infringed on the rights of the Petitioner; and whether the Petitioner is entitled to the reliefs sought go hand in hand and I will address them simultaneously.

53. The parties in this matter agree that the Respondent has a duty to ensure that Equity Bank complies with the Prudential Guidelines issued by the Respondent in 2013. The Petitioner’s case is that despite several complaints to the Respondent about the alleged fraudulent opening of a certain account by Equity Bank, the Respondent has failed or neglected to exercise its supervisory role. On the other hand, the Respondent asserts that upon considering the facts of the case, it arrived at a conclusion that it needed not intervene in the matter.

54. This is a case that will be determined by an analysis of the pleadings of the parties and there is no need to refer to decided cases. In the initial response to the Petitioner's complaint through the letter dated 30th September, 2014, the Respondent stated that it was necessary to await the decision of the Court in *Nairobi HCCC No. 219 of 2014* considering the rights of the parties in that case to have their dispute decided by a competent court of law and to avoid subjecting any of the parties to double jeopardy.

55. As for the second complaint, the Respondent through the letter dated 17th June, 2020 responded to the Petitioner as follows:

“This is in reference to your letters dated 13th April, 2020 and 27th April, 2020 respectively, regarding Equity Bank (Kenya) Limited (Equity Bank). We note your allegation that Equity Bank was negligent during the opening and operation of an account for Interactive Advertising Limited.

Having reviewed the documents forwarded, we note that following the out of Court settlement agreement dated 17th February, 2020, you were paid the sum of Kshs. 20 Million in settlement of your claim. It is also noted that in *HCC 219 of 2014*, the Court held, *inter alia*, that any further award to you would amount to double payment to yourself.

Accordingly, and with the Court Order aforesaid, you will appreciate that CBK cannot intervene in the matter.”

56. The letter conveys the Respondent's decision on the Petitioner's complaint in that the Respondent appreciates the complaint, gives the reasons for the decision and determines that it cannot intervene in the matter. The Respondent cannot therefore be accused of abdicating its mandate. As correctly averred by the Respondent, the Petitioner wrongly believes that the Respondent's supervisory jurisdiction can only be said to have been exercised if it determines that the Interested Party did not exercise prudence and was negligent when opening the account in question. The decision of the Respondent not to intervene in the matter is a proper exercise of its supervisory jurisdiction and it cannot therefore be said that the Respondent abdicated its supervisory role.

57. Although the Petitioner in his pleadings only accuses the Respondent of failing to exercise its oversight authority and for dismissing his complaint summarily, the Petitioner attempted to expand his case through his supplementary written submissions dated 29th June, 2021 by arguing that the reasons provided by the Respondent for the non-intervention were not reasonable and justifiable.

58. The Petitioner submitted that the settlement agreement between him and his co-director did not bind the Respondent or the Interested Party and the Respondent cannot purport to dispense with the need for investigation by relying on that settlement. The Petitioner argued that the agreement did not extend to any claims against the Interested Party. The Petitioner also contended that the Respondent ought not to have used the settlement as an excuse for abdicating its statutory and constitutional mandate to investigate and supervise its licensees.

59. In order to convince this Court that the reasons advanced by the Respondent for its decision are not valid, the Petitioner ought to have demonstrated that the decision not to intervene was so unreasonable that no administrative body properly exercising its function would arrive at such a decision. The Petitioner also needed to prove that the decision not to intervene was not proportional to the violation allegedly committed by Equity Bank. In other words, he ought to have demonstrated that the alleged fraudulent opening of an account by Equity Bank was so egregious that a full-fledged investigation by the Respondent was the only available option.

60. The Respondent is correct when it states that the foundation of the complaint vanished the moment the Petitioner and his co-director compromised their dispute. This state of affairs was compounded by the dismissal of the Petitioner's claim in *Nairobi HCCC No. 219 of 2014*. It would have amounted to exercising appellate powers over the decision of the High Court had the Respondent decided to investigate the alleged fraud by the Interested Party where the Court had found the Interested Party not to be at fault. In my view, the Petitioner has not demonstrated any unreasonableness in the decision of the Respondent. He is the one who jumped the gun by dashing to the High Court instead of allowing the Respondent to perform its statutory mandate of supervising financial institutions. I do not find any misstep in the manner the Respondent exercised its authority and agreeing with the Petitioner would amount to this Court usurping the statutory powers of the Respondent.

61. In light of what I have already stated, it follows that the Petitioner is not entitled to any of the reliefs sought in the petition. Even if the Petitioner had convinced the Court that the Respondent had failed to exercise its powers and thereby violated his constitutional

rights, the appropriate relief in such circumstances would have been to direct the Respondent to reconsider the Petitioner's complaint. Monetary compensation would not have been available to the Petitioner considering the fact that he has already been compensated for the loss suffered as per the agreement reached with his co-director.

62. The summary of it all is that this petition lacks merit and the same is dismissed.

63. With respect to costs I will give the Petitioner the benefit of doubt and assume that he sincerely believed that his rights were violated by the Respondent's decision. As such, I will direct the parties to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 26TH DAY OF NOVEMBER, 2021.

W. Korir,

Judge of the High Court



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