



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 17 OF 2013

AMY KAGENDO MATEPETITIONER

VERSUS

PRIME BANK LIMITED1ST RESPONDENT

CREDIT REFERENCE BUREAU

AFRICA LIMITED.....2ND RESPONDENT

RULING

1. In her petition dated 11th January 2013, the petitioner seeks the following orders:

a. *A declaration that the Respondents' official actions and conduct are subject to the Constitution of Kenya, the Banking Act, cap 488 of the Laws of Kenya and the banking (Credit Reference Bureau) Regulations, 2008.*

b. *A declaration that the Respondents are bound by the provisions of the Banking Act, cap 488 of the Laws of Kenya and the Banking (Credit Reference Bureau) Regulations, 2008.*

c. *A declaration that by failing to fully apply the relevant provisions of the Banking Act Cap 488 of the Laws of Kenya and the Banking (Credit Reference Bureau) Regulations, 2008 in favour of the petitioner the Respondents contravened the petitioner's right to*

protection and benefit of the law which right is secured by Article 27(1)&(2) of the constitution

d. *A declaration that by maintaining and disseminating inaccurate, outdated and untruthful credit information regarding the Petitioner and without due notice to her of the same, the Respondents contravened the petitioner's right to the human dignity which right is protected under Article 28 of the Constitution.*

e. *A declaration that by maintaining and disseminating inaccurate, outdated and untruthful credit information regarding the petitioner and by refusing to correct or delete the same when requested to do so by the petitioner, the Respondents contravened the petitioner's rights against psychological torture and cruel treatment which right is protected under Article 29(d)&(f) of the constitution.*

f. *A Declaration that by refusing to furnish the petitioner with the listed credit information after being requested to by the petitioner the respondents contravened the petitioner's right to seek and receive information under Article 33(1)(a) of the Constitution.*

g. *A declaration that by refusing to furnish the petitioner with the listed credit information, the respondents contravened the petitioner's right to access information for purposes of protecting her rights which right is protected by Article 35(1)(b) of the Constitution.*

h. *A declaration that by failing to correct or delete the impugned credit information that adversely affects the petitioner the respondents contravened the petitioner's right to the correction or deletion of untrue and misleading information that affects her under Article 35(2) of the constitution.*

i. *A declaration that by failing to maintain correct credit information and or by refusing to conduct reasonable and expedient investigations as requested by the petitioner, the respondents contravened the petitioner's right to services of reasonable quality under Article 46(1)(a) of the Constitution.*

j. *A declaration that by furnishing, maintaining and disseminating incorrect and outdated credit.*

k. *A declaration that by refusing to resolve the dispute amicably and expeditiously as requested by the petitioner, the respondents contravened the petitioner's right to dispute resolution by the application of law as guaranteed under article 50(1) of the Constitution.*

- *A declaration that the respondents' conduct was and still is inconsistent with the constitution and is in violation of Article 2(1)&(4) of the constitution.*

m. *A declaration that the respondents' violated Article 3(1) of the constitution by refusing to respect, uphold and defend the constitution in their conduct regarding the petitioner's credit information.*

- *A declaration that by failing to fully comply with the relevant provisions of the Banking Act, cap 488 of the laws of Kenya and the Banking (credit Reference Bureau) Regulations, 2008 the Respondents violated the constitutional values and principles of rule of law, human rights, good governance, transparency, accountability as obligated under Article 10 of the Constitution.*
- *A declaration that by unconditionally releasing to the Petitioner log book number 100627 duly discharged and the accompanying transfer form duly executed, the 1st respondent by conduct absolutely and unequivocally abandoned and renounced its claim against the petitioner entirely and has therefore no further claim against the petitioner.*

p. *A declaration that by denouncing its entire claim against the petitioner, the 1st respondent acknowledged that the petitioner is no longer indebted to the 1st respondent and is thereby fully discharged from any claim or liability.*

q. *A declaration that the credit information maintained and or disseminated by the respondents is baseless, false, outdated, noncurrent, unauthentic, illegitimate, unreliable, inaccurate and untruthful and does not reflect the existing situation, unconstitutional and illegal and is therefore malicious and invalid, null and void and of no legal effect.*

r. *A declaration that the credit information maintained and or disseminated by the Respondents be and is expunged from all credit and fundamental freedoms.*

s. *A declaration the petitioner is entitled against each of the respondent herein for the contravention of the petitioner's rights and fundamental freedoms.*

t. *A declaration that the petitioner is entitled to compensation for economic loss and hardships unreasonably, unconstitutionally and illegally visited upon her by the respondents.*

u. *A declaration that the petitioner is entitled to compensation for defamation, psychological suffering, social low esteem and damage to her reputation.*

v. *A declaration that the petition herein is in public interest.*

CONSEQUENTLY:

a. *A declaratory order that the petitioner has fully paid the outstanding loan amount to the 1st respondent and is hereby discharged from any liability in respect of the loan advanced by the 1st respondent.*

b. *An order that the credit information maintained and or disseminated by the respondents regarding the petitioner is unconstitutional, illegal and is therefore invalid and null and void and of no legal effect.*

c. *An order that the credit information maintained and or disseminated by the respondents regarding the petitioner be and is hereby expunged from the records.*

d. *A permanent injunction order restraining the respondents from storing maintaining and or disseminating the credit information listed by the 1st respondent on 14th June 2011 or thereabout in respect of the petitioner.*

e. *An order that the respondents be and are hereby jointly and severally compelled to compensate the petitioner for pecuniary damages and or loss arising from the storage, maintenance and dissemination of the credit information.*

f. *An order that the respondents do joint and severally compensate the petitioner for contravention of her rights and fundamental freedoms and breach of trust.*

g. *An order that the respondents do jointly and severally indemnify the petitioner for all costs and expenses reasonably incurred in prosecuting this petition.*

h. *Costs of this petition*

i. *Any other or further orders, direction, declaration, remedies and sanctions that the Honourable court may deem just and expedient to grant.*

2. In response to the petition, the 1st respondent filed a notice of preliminary objection dated 6th June 2013 in the following terms:

1. *That the Petition filed herein contravenes the provisions of Article 24(1)(d) of the Constitution of Kenya (2010).*

2. *That the subject matter of this instant Petition is res judicata as the issues in controversy had been conclusively dealt with in civil suit No. CMCC No.9333 of 2001 – Prime Capital & Credit Limited vs Amy Kagendo Mate to which no appeal was preferred.*

3. *That this instant Petition is an abuse of process as the Petitioner has recourse to an alternative statutory procedure provided for under Regulation 20 of the Banking (Credit Reference Bureau Regulations) 2008.*

4. *That this instant Petition is an abuse of the process of the court as it seeks to enforce constitutional rights in disputes involving private individuals, specifically defamation which lies in the Civil Courts.*

3. All the parties filed written submissions and lists of authorities in support of their respective positions, and the preliminary objection was argued before me on 19th June 2013.

4. Mr. Kisanga, Counsel for the 2nd respondent, raised four points on the basis of which he urged me to strike out the petition. He contended, first, that there is a **recourse provided by statute** to the petitioner under Regulation 20 of the **Banking (Credit References Bureau) Regulations of 2008**. According to Mr. Kisanga, the 2nd respondent is a limited liability company which acts as a licensee of the Central Bank of Kenya mandated under Regulations 14 of the Banking Rules to retain such customer information as is provided by Regulation 14(1); that it is the mandate of the 2nd respondent to retain and circulate customer information, in this case the petitioner's deficit in paying loans; and that the petitioner can challenge the contents of the information through the detailed process provided under Regulation 20. Mr. Kisanga referred the court in this regard to the decision in **Kennedy Nyagudi vs Central Bank of Kenya & Others High Court Petition No 209 of 2012** in which the court took the view that the reliefs offered by regulation 20 were sufficient. Consequently, this petition was an abuse of the court process.

5. The second issue raised by the 2nd respondent is **whether the petitioner's constitutional rights can be enforced against the 1st and 2nd respondent**. Mr. Kisanga relied on the provisions of Article 21 and 260 of the Constitution with regard to the duties of the state and state officers and submitted that the rights enshrined under Article 35 are not envisaged to be enforced against individuals. He relied on the case of **Kenya Bus Services Ltd -v- Attorney General Misc. Civil Suit No 413 of 2008** with regard to vertical and horizontal application of rights.

6. Thirdly, it was the 2nd respondent's contention that the petitioner is asking the court to deal with **matters that are *res judicata***. The matters in issue relate to a debt owed by the petitioner to the 1st respondent; that the allegations of fact in the petition were the subject of **Milimani Chief Magistrate's Court Civil Case No 933 of 2001-Prime Capital and Credit Ltd –vs- Amy Kagendo Mate**. It was the 2nd respondent's contention therefore that the petitioner is inviting the court to look into matters that were heard and determined, and from which decision no appeal was preferred. Mr. Kisanga submitted that the concept of *res judicata* applies even to constitutional petitions as was held by Nyamu J in **Kenya Bus Services Ltd. -vs- Attorney General** (supra).

7. The final point raised by the 2nd respondent is that this **petition contravenes the provisions of Article 24 (i)(d)** which allows for limitation of rights. Mr. Kisanga contended that there is a constitutional limitation to every right in relation to the public interest, and it is in the public interest that the 2nd respondent submits information on loan defaulters and fraudsters.

8. The 2nd respondent distinguished all the authorities relied on by the petitioner. Mr. Kisanga observed that there was a distinction between this case and the **Nairobi Law Monthly –vs- Kenya Electricity Generating Company Limited & Others High Court Petition No. 278 of 2011** in that legislation is yet to be enacted on the right to information while in the present case, legislation already exists for access to information in the form of regulations, and the petitioner, as a customer who has a customer –bank relationship with the 1st respondent, can seek information as a customer.

9. Mr. Kisanga contended further that unlike the **Nairobi Law Monthly** case, the information sought in the present case is of a private nature. Section 31 of the Banking Act, read with section 49 of the Act, make it an offence to publish information about customers without consent. Further, information sought must reasonably be in the hands of the person from whom it is required; but the 2nd respondent does not have the information sought, and it would be impractical and impossible for the 2nd respondent to retain all the books of account of all banks in accordance with Regulation 28 of the Banking (Credit Reference Bureau) Regulations which require banking institutions to forward account information to the 2nd respondent.

10. Mr. Change, Counsel for the 1st respondent, supported the objections by the 2nd respondent and associated himself with the submissions by Mr. Kisanga.

11. In his response, Mr. Gachuba opposed the preliminary objection. He submitted with regard to Article 24(1)(d) that the 2nd respondent did have the right to receive and impart information under Article 33(1)(a), but that the said right must be considered against the provisions of Article 33(3) of the Constitution which requires respect for the rights and reputation of others, thus bringing in the issue of defamation, but that the petition is not, contrary to the respondents' claim, about defamation.

12. According to Mr. Gachuba, the gravamen of this petition is that the petitioner wishes to enforce Articles 27(1) and (2) Article 35, and Article 50, and seeks to rely on Regulation 17, 18(3), 20(2), (3), (4), (6), (7) and 29 which impose mandatory regulations on the 2nd respondent; that the petitioner had been denied information by the 2nd respondent; and that since the 2nd respondent did not perform its statutory duty, the petitioner's recourse lies in this court.

13. Mr. Gachuba denied that this matter is *res judicata*, contending that it seeks to enforce constitutional rights of the petitioner while the matter in the lower court sought to enforce a contract. He relied in this regard on the decision in **Uhuru Highway Development -vs- Central Bank – Court of Appeal Civil Appeal No. 36 of 1996**. The petitioner was also not seeking to review the judgment in the lower court; that she had paid what she was required to pay and is not asking for a refund.

14. Mr. Gachuba contended that the gist of this petition is that the petitioner has sought information which she has not received; that she can enforce constitutional rights against the respondents as provided under Articles 2(1), 3(1) and 20(1) of the Constitution as the Constitution binds all persons and all laws; that under Rule 15 of the **Gicheru Rules** it is intended that constitutional rights can be enforced against private parties while Article 165(3) gives the High Court unlimited original jurisdiction to deal with the issues raised in the petition in a whole context and in the interests of justice. He further relied on the case of **Rashid Allogoh & Others –vs- Haco Industries Ltd and C.O.M –vs- The Standard** for the proposition that weighty issues such as are raised in this petition can be addressed even where other lawful avenues exist instead of dismissing the petition at this stage.

15. Mr. Gachuba also contended that a Preliminary Objection consists of points of law that have not been pleaded in the reply and the preliminary objection in this matter cannot therefore dispose of the petition as the 2nd respondent has disputed the facts raised by the petitioner which requires the court to call for evidence. Further, that the Preliminary Objection raised by the 2nd respondent does not pass the test of **Mukisa Biscuits Manufacturing Ltd vs Westend Distributors (1969) EA 696** and should be dismissed with costs to the petitioner.

Determination

16. The petitioner has contended that the preliminary objection raised by the 2nd respondent does not meet the test set by the **Mukisa Biscuits** case above. In considering this submission I will do so against the four points raised by the 2nd respondent as follows:

- i) whether the petitioner has a recourse provided by statute;*
- ii) whether the petitioner's constitutional rights can be enforced against the 1st and 2nd respondent;*
- iii) whether the matters raised in this petition are res judicata*
- iv) whether the petition contravenes the provisions of Article 24 (i)(d)*

17. Further, in considering the preliminary objection against the four points set out above, I am guided by the words of Law, JA in the case of **Mukisa Biscuits Manufacturing Co. Ltd – v – West End Distributors Ltd Nairobi (1969) E.A 696** where he stated as follows:

‘A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.’

18. I take the view that the four points raised by the 2nd respondent in this matter and supported by the 1st respondent fall properly within the rubric of the **Mukisa Biscuits** case. The first point relates to the existence of an alternative remedy provided by statute for the petitioner. This is contained in Regulation 20 of the **Banking (Credit Reference Bureau)**

Regulations 2008, which is titled **Customer's rights of access and correction'** and provides as follows:

20. (1) a customer has a right to know what information the institution has submitted to the Bureau regarding that customer.

(2) A customer shall be entitled to access credit report relating to the customer that is kept in a database administered by a Bureau.

(3) A customer shall be entitled to free copy of the customer's credit report at least once per year and within thirty days of receiving an adverse action notice issued under regulation 28(1)(b).

(4) Where a customer requests a Bureau for a credit report pursuant to sub-regulation (2), the Bureau shall, within five working days of receiving a request in writing and such particulars as the Bureau may reasonably require to enable it to identify the customer, provide to the customer a copy of all customer information relating to the customer held by the Bureau.

(5) Where the customer believes that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed.

(6) Within five working days of being informed that information in a customers' credit report is disputed, the Bureau shall –

(a) attach a note credit information report, warning that the disputed information is under investigation, which notice shall remain on the file until resolution of the dispute; and

(b) give the institution that supplied the information a notice of dispute requesting confirmation from the institution as to the accuracy of the information.

(7) Within fifteen working days, the Bureau shall conduct a reasonable investigation, based on all relevant information provided by the customer, and contacting the furnisher of the information as necessary.

(8) Where an institution receives a notice of dispute from the Bureau it shall, within ten working days of receiving the notice, complete all necessary investigations into the disputed information and give the Bureau a notice of resolution, advising whether the disputed information is to be deleted, corrected, or remain unchanged.

(9) Where the investigation reveals an error, the Bureau shall promptly remedy the error.

(10) If the Bureau does not complete its investigation, within fifteen days, it shall delete the disputed or correct information as requested by the customer.

(11) If the Bureau later completes its investigation, it may re-insert or revise disputed information based on the results of such investigation.

(12) Upon receipt of a notice of dissolution or an amendment notice from an institution the Bureau shall, within five working day of such receipt, send a notice of change to any subscriber that has in the previous twelve months obtained a credit information report from the Bureau containing the incorrect information.

(13) Should the customer disagree with the resolution of the disputed information, the customer may request the Bureau to attach a statement of not more than one hundred words to the customer's credit report, setting out the customer's claim that the information is not accurate and the Bureau shall take reasonable steps to comply with the customer's request.

(14) A Bureau may charge the customer for the reasonable cost of its services in conducting an investigation of disputed customer information only if the information disputed by the customer turns out to be true.

19. In the present case, the petitioner complains and seeks a declaration, inter alia, that the 2nd respondent has violated her rights under the Constitution by maintaining in its database and disseminating ‘**inaccurate, outdated and untruthful credit information regarding the Petitioner and without due notice to her of the same...**’

20. The petitioner has not pleaded that she invoked the provisions of Regulation 20, and what the outcome thereof was. On the pleadings before me, it appears that the petitioner sought the assistance of this court after by-passing the statutory remedy which is intended to address her grievances with respect to the information held by the 2nd respondent. I would therefor agree with the 2nd respondent that this petition is improperly before me on this point. As Majanja J observed in the case of **Kennedy Nyagudi vs Central Bank & Others (supra)** with reference to the Banking (Credit Reference Bureau) Regulations):

‘The provisions I have cited above clearly show that the Regulations provide for relief to any customer who is aggrieved by wrong and erroneous information. The petitioner’s grievances fall within these provisions and he is entitled to invoke the statutory procedure provided.

The petitioner’s relief with regard to the alleged inaccurate information held and disseminated by the 2nd respondent lies under Regulation 20 of the said regulations which she is still at liberty to pursue.

21. The 2nd respondent has contended that this petition is *res judicata* as the issues that it raises were the subject of a civil claim between the parties; that the allegations of fact in the petition were the subject of **Milimani Chief Magistrate’s Court Civil Case No 933 of 2001-Prime Capital and Credit Ltd –vs- Amy Kagendo Mate**. I note from the petitioner’s petition and her affidavit in support, and in particular the orders that she seeks in her consequential orders, that she is asking the court to declare that she is not indebted to the 1st respondent. The consequential orders that she seeks include:

j. A declaratory order that the petitioner has fully paid the outstanding loan amount to the 1st respondent and is hereby discharged from any liability in respect of the loan advanced by the 1st respondent.

22. In my view, whether the petitioner was indebted to the 1st respondent with regard to the loan that she had borrowed from it was a matter that was, or ought to have been, the subject of litigation in the civil case before the Chief Magistrate’s Court. By seeking the said orders from this court, the petitioner is indirectly asking the court to re-open the issue that was before the Court in that matter. This, in my view, is not the proper function of this court. If the petitioner was unhappy with the decision of the lower court with regard to her indebtedness,

then she had the option of appealing in the usual manner to the High Court and thereafter to the Court of Appeal, or applying for a re-opening or review of the matter before the Chief Magistrate's Court. It would clearly be an abuse of process to mount a collateral attack on that decision by way of a constitutional reference. The matter before me is therefore *res judicata* and cannot be re-litigated as a constitutional petition.

23. The third argument raised against this petition is that the petitioner cannot maintain a constitutional petition against private entities such as the 1st respondent. This, however, is not the position established by judicial precedents on this point. The jurisprudence that has emerged from this Court is that the Constitution now contemplates both vertical and horizontal application of the Bill of Rights. Article 2(1) and 20(1) both clearly provide that the Constitution binds all persons. This has been the finding of this court in various decisions- see **Abdalla Rhova Hiribae & 3 Others-vs-The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya –v- Betty Sungura Nyabuto & Another Petition No. 21 of 2010 and B.A.O & Another –v-The Standard Group Limited & 2 Others Petition No. 48 of 2011**. Consequently, I agree with the petitioner that the Constitution binds both the state and non-state actors such as the respondents.

24. The 2nd respondent has also contended that the petitioner is improperly before me and that her petition violates the provisions of Article **24 (i)(d)** which provides for the limitation of rights. What the respondents seem to be saying is that even if there is a violation of the petitioner's rights, such violation is permissible under the Constitution and is in the public interest. This particular argument, in my view, would not fall within the test set by the *Mukisa Biscuits* case.

25. However, in view of my findings with regard to the first two points made by the 2nd respondent, the preliminary objection succeeds, and this petition is struck out but with no order as to costs.

26. I am grateful to the parties for their well reasoned submissions and authorities.

Dated Delivered and Signed at Nairobi this 24th day of September 2013.

MUMBI NGUGI

JUDGE

Mr. Gachuba instructed by the firm of Onyoni, Opini & Co. Advocates for the Petitioner.

Mr. Kisanga instructed by the firm of Mohamed Madhani & Co. Advocates for the 2nd respondent.

Mr. Change instructed by the firm of Rachier & Amolo Advocates for the 1st respondent



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