REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 90 OF 2015

IN THE MATTER OF ARTICLES 22, 23, 40, 43, 47, 75, 165, 258 & PART 2 (SIXTH SCHEDULE) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMANL RIGHTS AND FREEDOMS UNDER CHAPTER FOUR, ARITCLES 22, 23, 40 & CHAPTER SIX, ARTICLE 75 OF THE CONSTITUTION 2010

AND

IN THE MATER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2010

BETWEEN

SAMUEL MUIHIA KARIUKI & 26,249 OTHERS.....PETITIONERS

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF

CO-OPERATIVE DEVELOPMENT & MARKETING.....2ND RESPONDENT

THE GOVERNOR-CENTRAL BANK OF KENYA.....3RD RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF FINANCE.....4TH RESPONDENT

THE PRINCIPAL SECRETARY,

OFFICE OF THE PRESIDENT MINISTRY OF INTENRAL SECURITY &

CO-ORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

JUDGEMENT

PETITION

1. The Petitioners through a Petition dated 6th March 2015 and Verifying Affidavit of Samuel Muihia Kariuki, Petitioner No.1 sworn on 3rd January 2015 seek the following reliefs:-

a) A declaration that the Respondents owed a duty of care under statute and/or common law and/or equity and the Constitution,

to the petitioners, to regulate the entities and outfits which it had registered and therefore legitimised to ensure that they did not become agents of perpetration of deceit, frauds and money laundering crimes on unsuspecting citizens.

b) An Order for account and proportionate distribution among the petitioners of all the nominees which had been deposited by them in the various banks and financial institutions as set out in this petition, and were remitted to the 3rd respondent on directions.

c) An Order directed at the Respondents jointly/severally to make good, if necessary, any shortfalls of money currently held by the 3rd respondent on proven losses suffered by the petitioners.

d) An Order for general compensation directed at the respondents for the negligent performance of public duty owed to the petitioners for the foreseeable damage caused to their financial and property interests and the losses suffered therefore, the same to be paid proportionate to the refunds made.

e) An Order for refund of expenses incurred by the petitioners in the nationwide collection of fraud data; an operation which should rightly have been undertaken by the respondents as recommended by a Task Force set up by the 2nd Respondent in 2009.

f) An Order for modalities to be put in place by the respondents to enable peaceful and systematic refund of the money recovered by the petitioners, who have previously provided the bank account numbers to the 4th Respondent, who had indicated that he was prepared to do the refund.

g) An Order for costs and interests to be paid to the petitioners for the duration their money has been impounded.

h) Any other relevant and appropriate Orders and/or Reliefs directed at the respondents jointly/severally, and in favour of the Petitioners, to bring this matter to an amicable conclusion.

PETITIONERS CASE

2. The Petitioners case is that the petitioners are Kenyan adults who were defrauded various amounts shown against their names through various banks and financial institutions, purportedly under control of the Respondents. The process of their being defrauded is said to have started with the untenable registration of at least 257 outfits during the period with the full knowledge of the Respondents. The Petitioners contend that the Respondents owed the Petitioners a duty of care which is imposed on them by the Kenya constitution, statues and common law and in diverse case laws made by the Kenyan Courts.

3. The Petitioners urge that the outfits were styled as Limited Liability Companies, Trusts, Sole Partnerships, Businesses, Welfare Associations, Non-Governmental Organisations (NGOs), Foundations, Ventures, Investments, Micro-finance Groups, Savings and Credit Societies, etc. Armed with this registration, the operators of the frauds opened a number of bank accounts under false pretences of paying high returns on deposits made with them. They approached the petitioners, who were misled and deposited various sums of money as shown against their names above in a number of accounts opened in banks and financial institutions. None of the petitioners paid the amounts shown to individuals but only through the banks.

4. It is Petitioners averment that the Respondents were grossly negligent as public servants, and were in breach of their duty of care and trust owed to the petitioners and the public generally in registering the outfits, which had no legitimate business to do or perform, then or in future, as this enabled them to make false representations to the petitioners that they were viable business concerns with whom the petitioners could do business. The damage caused to the petitioners by the registration of the outfits, which became defunct after the perpetration of the frauds, was well within the range of foreseeability by the respondents, who thereby incurred tortious civil liability against the Kenyans who were defrauded.

5. It is averred that the Petitioners come from across Kenya and live in 45 of Kenya's 47 counties, this in itself confirming that the national operation of the outfits was not otherwise possible without the legal legitimisation by the respondents, so that they could access public commercial and governmental infrastructure, institutions, opportunities and certifications rendering the Respondents liable for the losses arising therefore.

6. The Petitioners further contend that the fraudulent national operation was brought to an end by an order made by the 3rd Respondent and directed at the banks and other financial institutions that the accounts operated by the outfits be closed. It is stated that without this intervention, the outfits, being legally registered, could have continued with their fraudulent business to this day, this confirming the responsibility of the respondents, in preventing what happened from the beginning.

7. It is further stated by the Petitioners that the Respondents also ordered that the money held in the various bank accounts be remitted to the 3rd Respondent. The Petitioners claim this money as of right, with interest and the damages arising therefore; the respondents have impounded it for the last eight (8) years, when it never belonged to them; the petitioners cannot just be punished because people known to the respondents, who should have been arrested, prosecuted and ordered to refund the petitioners' money, committed crimes.

8. It is further contended by the Petitioners that from 2005, and after the outfits registered by the respondents defrauded the petitioners, the respondents set up the SACCO Societies Regulatory Authority to control deposit taking societies. This was a new provision to strengthen the respondents' had because provisions in the ***Penal Code (1930)*** and in other laws have always been there to deal with ***"obtaining under false pretences"*** offences.

9. The Petitioners aver that their property rights as contained in Article 40 of the Constitution which outlaws the state taking of private

"property of any description" without the payment of compensation is violated daily by the respondents' retention of the Petitioners' money without account or justification in law. The respondents have treated the petitioners worse than scoundrels by bringing about the circumstances under which the petitioners parted with their money and then intervening later to demand that the banks remit the petitioners' money to the Central bank, where it has been held for the last 8 years without refunding it to the respective deposits within the shortest possible time and then prosecuting those who had organised the deception.

10. The Petitioners contend further that the Respondents in total disregard of their public duty to protect the property interests of the petitioners brought about the situation which prevailed eight years ago, where the petitioners were defrauded over Shs 8 billion in a nationwide financial scam which was clearly foreseeable. It is further stated that the actions of the respondents of impounding the money which belonged to the petitioners has prevented or interfered or minimised the petitioners' enjoyment of all the other rights which are enshrined in the constitution and are only realisable upon expenditure of money. Further it is averred that the actions of the respondents have denied opportunities to the petitioners, generated stress and strife in their families, left children without provisions and school fees and parents without resources to improve themselves and sometimes buy medicine – leading to poverty and destitution, acrimony, insanity, suicides, deaths, etc.

11. The Petitioners further state that after frauds were committed, before the 2007 General Elections, there was a public outcry because of the extent and size of the frauds and by 14/1/2009, the then Minister for Co-operatives & Marketing, Hon. Joseph Nyaga, decided to put in place a Task Force under the Chairman of the late Hon. Francis Nyenze, for the following purposes:-

> ***"a) To establish the number and the nature of the pyramid and the other related schemes…***
>
> ***b) To inquire into and investigate the amount and whereabouts of the funds…***
>
> ***c) To recommend mechanisms for the recovery of funds…with a view of recommending restitution of money and/or property recovered…"***

12. The Petitioners aver that the High-powered Task Force reported to the Minister on 14/6/2009 and the Minister, in turn table its report in Parliament on 10/8/2009 where it was adopted. The Taskforce observed in its summary of Recommendations at page 105 (166) that ***"…the government has a duty to safeguard the interests of its citizen."*** And on page 22/23, 90 directed that:-

> ***"(ix) Frozen Accounts***
>
> ***The CBK issue public statement on the current status of all frozen accounts related to pyramid schemes…"***

THE 1ST, 2ND, 4TH, AND 5TH RESPONDENTS RESPONSE.

13. The 1st, 2nd, 4th and 5th Respondents are opposed to the Petitioners petition and do rely on replying affidavit by Ali Noor Ismail sworn on 28th June 2016.

14. The 1st, 2nd, 4th and 5th Respondents contend that the various enterprises into which the petitioners invested were registered simply as savings and credit cooperatives Societies (SACCO) companies, Business and Welfare Organisations and issued with Licenses only under the business registration regimes, that they were registered under and presented to investors by their founders, as normally happens after incorporation on registration, as legal entities and registration certificates, were conspicuously displayed to the investors by the operators of these businesses.

15. It is 1st, 2nd, 4th and 5th Respondents contention that it was the founders of these enterprises who had full knowledge of the business they wanted to carry on. It is their contention that none of these respondents did anything that enabled the said entities to make false representations to the Petitioners that they were viable business concern.

16. The 1st, 2nd, 4th and 5th Respondents further assert that registration of any business upon application is a legitimate expectation of any entrepreneurship minded citizen in Kenya, and as such no person could therefore have been denied registration under their preferred legal regime. It is further stated so far as the Ministry of Industry, Trade and Co-operatives was concerned, the cooperatives were registered to operate ordinary savings and credit (SACCO) business in line with the ***Cooperative Societies Act, Cap 490*** and their registered by laws. That any deviation from the core business of the SACCO or any other enterprise was not sanctioned by the Respondents.

17. The 1st, 2nd, 4th and 5th Respondents contend that in light of the facts revealed above that it is the operators of the businesses and the investors (Petitioners) and not the Ministry of Industry, Trade and Co-operatives who should be held responsible for the Petitioner's losses if any because the investors were in a better positon to know what kind of business they were investing in.

18. The 1st, 2nd, 4th and 5th Respondents further aver that it is not correct or true because the said entities operated all over the country save in two counties to claim that they could not have operated without legitimization of nefarious activities by the government. It is respondents positon that the government never authorized any nefarious activities and the licensing authorities do not necessary restrict the operations of private commercial enterprise to any geographical locations unless there is good reason to do so, spreading of branches of these enterprises was therefore an expected effect.

19. The Respondents further stated that the Ministry, designing to address the problem formed a Task Force to investigate the operations of pyramid schemes and establish the extent of their impact in the country. It is urged that it is therefore not true that the Government failed to

form an organic data to collect information nationally on losses suffered by people who had deposited their money with the pyramid schemes as alleged by the Petitioners.

20. The Respondents aver that upon conducting investigations, the Task Force established that:-

a) The cooperatives so registered were being misused as entry points to parallel organizations that run the fraudulent schemes.

b) The accounts held in the names of the affected cooperatives or directors were characterized by numerous deposits and huge withdrawals.

c) A majority of the accounts were closed with nil balances.

21. The Respondents subsequently with a view to quelling the mischief the Ministry of Industry, Trade and Co-operatives deregistered all the enterprises that had taken advantage of Wananchi by operating pyramid schemes and those that were misquarading as SACCOs. The Government further issued press notices and conducted public awareness campaigns urging the public not to invest in dubious enterprises had known as pyramid schemes; which press statements and public awareness campaigns the respondents contend were received negatively by the public who viewed them as Government interference to otherwise legitimate investments.

22. The Respondents contend that in view of the aforesaid the Petitioners cannot now turn around and blame the Government for their misfortune, if any, in a contract that was private between the Petitioners and the enterprise owners.

23. The Respondents aver it is not correct as alleged by Petitioners that the government ordered that the money that were held in various bank accounts by the said entities be remitted to the Central Bank, stating further that in any event there were no money that the 1st, 2nd, 4th and 5th Respondents ever recovered from any of those enterprises and that they were not so placed to effected such recovery.

24. The Respondents further state the process of enacting the SACCO Societies Act, 2008 commenced in the year 2003 contrary to the Petitioners allegations that the Sacco Societies Regulatory Authority was put in place only after the Petitioners were defrauded through the pyramid schemes.

25. The Respondents contend that the nature of pyramid schemes is that they are unregulated finances scams relying on a pyramid of investors who contribute money to a fraudulent scheme on the promise of phenomenal returns. However, since the investments were a matter of contracts between the investors and enterprise owners, it is Respondents contention that it should have been very obvious to the Petitioners themselves that the same were a fraud. The Respondents contend therefore they cannot be held responsible for Petitioners' loss if any as they did not contribute to the loss.

THE 3RD RESPONDENT'S RESPONSE

26. The 3rd Respondent is opposed to the petition and relies on Replying Affidavit by Kennedy Abuga sworn on 25th May 2015 and a further affidavit by Kennedy Abuga sworn on 20th October 2016.

27. On 6th November 2019, by consent of the parties, the Replying Affidavit sworn on 25th May, 2015, the Further Affidavit sworn on 25th October, 2016, were accepted by the Court as CKB's testimony and evidence in these proceedings. That on 12/6/2017 the Court expunged the Petitioners Books / Volume No. 6B, & 8 leaving the Petitioners to proceed with their case on the basis of evidence/documents contained in Book one and three.

28. The 3rd Respondent contend that the crux of the claim made against the CKB is based on the prayers sought in primarily on a purported ***"order/direction that all the monies which had been deposited by the Petitioners in the various banks and financial institutions, and were remitted to the 3rd Respondent on directions".*** Which the claim the 3rd Respondent is opposed to.

29. The 3rd Respondent contend that its authority is derived from the statute, which in turn governs its actions. It is therefore contended that pyramid schemes were neither licensed nor regulated under the ***Banking Act*** and as such, the CBK could not and did not hold any regulatory mandate over them, neither did it owe any duty of care under the statute and or common law and or equality and the constitution to the Petitioners to regulate the entities and outfits listed in their petition. It is further averred that the Law on Duty of Care is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.

30. The 3rd Respondent contend that the Petitioners state that they were approached by the said pyramid scheme entities that misled them and they deposited various sums of money; and that none of them paid the amounts to individuals but only through Banks. It is uncontested that any attempts to intervene were met with acrimony from the investors, who viewed government involvement as interference with their investment activities. It is therefore urged that the Petitioners can only have themselves to blame for the risks they took in making their investments with the pyramid scheme styled entities.

31. The 3rd Respondent on the ***Task Force Report*** state that in its final report on pyramid scheme state that even as it carried out its duties, the investors in their various Victims Initiative Groups, which included the Petitioners, and particularly Pastor Samuel Muihia Kariuki, initiated and orchestrated activities meant to derail the work of the Task Force, which included the attempted disruption of the Nairobi public hearing, and advising investors not to register claims with the Taskforce and holding parallel meetings. The 3rd Respondent seek the conduct of the Petitioners, and their role and their status be taken into consideration; ***ex turpi causa non oritur actio***, over and above that the

fact that all aspects ***of volenti non fit injuria*** on the part of the Petitioners exist in this case. The 3rd Respondent further contend that none of the circumstance exempted in the Petition existed as between the 3rd Respondent and the Petitioners and urges that the 3rd Respondent neither owned nor breached any duty of care to the Petitioners.

32. The 3rd Respondent urge that a distinction must be made between the 3rd Respondent herein who is the Governor of the Central Bank of Kenya, and the institution that is Central Bank of Kenya. The Governor of the Central Bank of Kenya is appointed under ***Section 13 of the Central Bank Kenya Act*** and authorized under ***Section 13(4)*** to be the principal representative of the Bank and shall, in that capacity is authorised to do the following:-

a) To represent the Bank in its relations with other public entities, persons or bodies;

b) To represent the Bank, either personally or through counsel, in any legal proceeding to which the Bank is a party;

c) To sign individually or jointly with other persons contracts concluded by the Bank, notes and securities issued by the Bank reports, balance sheets, and other financial statements, correspondence and other documents of the Bank.

33. On the other hand, the Central Bank of Kenya (CBK) is established as a body corporate with perpetual succession and a common seal, with power to acquire, own, possess and dispose of property, to contract, and to sue and to be sued in its own name. The CBK on its part is mandated to license and regulate Banking Institutions, it is important to state that CBK is not as a body corporate, joined as party to these proceedings, and the listed entities did not fall under the mandate and or regulations of the CBK.

34. The 3rd Respondent further state that contrary to the assertions by the Petitioners, it is untrue that no mechanisms were available to protect would be investors against being swindled. The 3rd Respondent urge that the Penal Code, the Banking Act, Co-operative Societies Act, and the Microfinance Act, were inforce and should have bene applied. It is pointed out that all those allegations were all in place before and at the times the petitioners decided to engage with the pyramid scheme entities. It is further averred that neither the Governors, nor the CBK, is culpable or liable to the unsubstantiated claims in these proceedings by the Petitioners.

ANALYSIS AND DETERMINATION

35. I have carefully considered the Petitioners Petition, supportive Affidavits, annextures; the Respondents Responses and annextures; the parties oral evidence and documentary evidence, Counsel rival submissions both written and oral and from the aforesaid the following issues do arise for consideration:-

a) Whether the Respondents owed the Petitioners duty of care at common law?

b) Whether the Respondents owed the Petitioners statuary duty of care?

c) Whether the Respondents are liable for breach of contract between the Petitioners and third entities?

d) Whether the Petition as drawn and filed raises constitutional issues for determination in this Petition?

A. WHETHER THE RESPONDENTS OWED THE PETITIONERS DUTY OF CARE AT COMMON LAW?

36. The Petitioners urge that Kenya is a country with a Constitutional government under the rule of law where the government and its institutions have certain duties and responsibilities to generally protect the public under the law. The government is urged should act diligently, responsibly, without negligence and not unduly expose the citizen to under public risks, more particularly as in this case to deceits, frauds, obtaining property under false pretences, and conspiracies to defraud.

37. The Petitioners urge that it is in these circumstances that they have a grievance against the governmental institution s which under their watch, they were fleeced across this country in 45 out of 47 counties and suffered serious financial losses. It is the duty of the government and its agencies to oversee, control and manage banking under, inter alia;- the Central Bank Act, the Banking Act, more recently under the Microfinance Act; to prevent fraud and ensure that the industry operates properly and is not abused by insiders and those who are outside. Its further alluded to by the Petitioners that effective banking supervision that requires it to be done more, autonomously of direct governmental control, under the Basel Core Principles on banking supervision, the independence is ceded only to ensure more effective oversight to prevent crimes being committed, as were perpetrated against the petitioners. It is the petitioners' view that the abuse of the monetary system by people and instrumentalities released in the market by the 1st & the 2nd Respondents, and other operative arms of government, all using public infrastructure, led to the Petitioners being defrauded en masse in 45 counties, at that same time, and the Respondents herein should take responsibility for the monetary losses the petitioners suffered.

38. The Petitioners state that in 2004 according to the Respondents own report, and before these crimes were committed, the 3rd Respondent was part of a Task Force which was formed to develop a regulatory framework for savings and credit co-operatives which later led to the enactment of the SACCO Societies Act 2009, and the establishment of prudential and regulatory framework for the SACCO industry. It is averred that the 3rd Respondent knew very well that the 2nd Respondent was not required to establish a regulatory oversight before it could register safe deposit-taking SACCOs.

39. On the issue of negligence at common law the Petitioners submit that he Respondents owed duty of care to the Petitioners during the normal course of their work to ensure that the petitioners would not get hurt because of their negligent performance of their work and culpable management of the national banking system. The Petitioners referred to the case of ***Donoghue vs Stevenson [1932] AC 562, a***

1932, a leading authority on liability for negligence, whose ***"…categories (giving rise to liability) are not closed"*** as was put by Lord Atkins in his speech.

40. The Petitioners hold the 3rd Respondent liable urging that the 3rd Respondent and Petitioners duty of care at common law became of the nature of public work they perform and cannot do it carelessly or negligently or improperly or not perform it at all, because they can forsee that their neighbour would be hurt or injured. The Petitioners aver that duty of care was breached and petitioners severally suffered damage. The Petitioners contend that liability arose, not from direct contract but from the ***"special relationship"*** of the 3rd Respondent with the petitioners under ***Sec 4 Central Bank Kenya Act***, under which the said Respondent is under a statutory duty to oversee, control, regulate and maintain unrelenting and protective oversight over the domestic and international finance market.

41. The Petitioners urge that since the money was lost in 2006/7 the Petitioners and their families have suffered loss of savings, capital and interest and their lives have been a basketful of tears and misery. (See Chapter 6, Nyenze Report starting pp 127 on the Effects of Pyramid Schemes on the Petitioners.) The Petitioners contend that the advertisement was posted in the local media without any ***'disclaimer of responsibility'*** and was intended by the 3rd Respondent to be relied on by members of the public, which the petitioners did, only to suffer financial harm. The Petitioners urge that was expected that all the entities referred to in the advert were good, sound and genuine as, it could not be expected that the Petitioners could know about the existence on non-genuine ones, and not take instant action through the 5th Respondent, to protect the public. It is arguable that the 3rd Respondent committed an offence under ***Section 315 Penal Code*** when they posted the advert on 1/11/2005, which induced ***"…any person to pay or deliver to any person any greater form of money or goods than he would have paid or delivered…"*** as the advert induced some petitioners to approach the outfits, for the first time, or with more money.

42. The Petitioners seek reliance on the case in ***Three Rivers District Council vs. Governor and Company of the Bank of England [2201] UKHL 16 (Lord Steyn, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Wood-borough, Lord Millett)*** where the Bank of England failed in its supervisory duties and acted too late to stop a public misfeasance where 6, 019 deposits with the Bank of Credit and Commerce International (BCCI), lost their deposits (BOOK 5a pp 1 – 69). The House of Lords held the Bank liable because of failing in its supervisory duties and acting too late in July 1991 when it knew BCCI was not observing or qualified to continue the business under the bank supervision regulations.

43. The Petitioners contend that there would have been no defrauding of the petitioners without the 1st & the 2nd Respondents providing a total 366 instruments of fraud used by the outfits, which were registered. The ***Nyenze Taskforce*** had found and listed 271 entities, but there were at least 366 entities which were in operation but none of them existing today. The Petitioner therefore state that, there were different extents of involvement and participation in the fraud by the entities, and the top 10 led by DECI and CLIP reviewed 7.262 B, as shown in the Nyenze report.

44. It is further contended that before any registration and giving of any legal identity to the outfits, the 1st and the 2nd Respondents, were under legal and statutory duty to demand from those who presented the registration documents, what business the entities were being registered to do. It is therefore averred that by accepting to register the outfits, the public officials acted carelessly in a situation where they could see, giving legal cover to the entities could inexorably lead to illegal activities being undertaken by the fraudsters from a distance, and without accountability. For those registered as limited liability companies, the work of the outfits should have bene strictly disclosed in the articles of association. It is stated that the negligent registration enabled the outfits to open the bank accounts where all the petitioners deposited their money and subsequently lost it.

45. On the use of medium bank the petitioners cited that the medium banks in the frauds was an essential step facilitated by the Respondents. It is further urged that on closer scrutiny of the instruments used by the entities, it would be found that, all of them used official national identifications, like ID/Nos, Passports Nos, Driving Licence Nos, PINs, etc to mislead the petitioners about their status. Some of the outfits completed the frauds by demanding: P. O. Box Nos, Mobile telephone Nos, land line Nos, names & numbers of bank accounts, through which the principle and the interest would be refunded.

46. The Petitioners further aver that according to the ***Nyenze Report***, the 3rd Respondent froze accounts which had over Shs. 8b; money which the 3rd Respondent has never accounted for since 2006/7. The report demanded that the account for all money held in frozen accounts, as per part of the evidence of RW.2, Mr. P. N. Gichuki, who was the secretary to the Taskforce. Some reports had it that over Shs 34b went through the banking system during the peak of the illegal banking frauds. The Petitioners aver that it is impossible to believe all this happened in under 2 years between 2006/7 without the knowledge of the 3rd Respondent. The Nyenze Report cites certain accounts where the Petitioners' money was held, and wonders why couldn't be refunded to them immediately after it was rounded up and what has it been waiting for, when there was no court order to sequester the funds.

47. The common Law Duty of Care is founded in English tort Law, where an individual may owe duty of care to another, to ensure that they do not suffer any unreasonable harm or loss. If such duty is breached, a legal liability arises against the tortfeasor to compensate the victim for any looses that has been incurred. The doctrine has significantly developed, to distinguish social types of harm (psychiatric harm, and pure economic loss).

48. It is established law that public authorities like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party. In support of this proposition the 3rd Respondent referred to the case of ***Michael v. Chief Constable of South Wales Police [2015] UKSC 2; [2015] AC 1732***, Lord Toulson explained the point in this way:

> ***"it is one thing to require a person who embarks on an action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else."***

49. Further in the case of ***Hill v Chief Constable of West Yorkshire [1987] UKHL 12, [1989] AC 53***, the House of Lords unanimously struck out the claim as disclosing no justiciable cause of action, upholding the decision of the judge at first instance and of the Court of Appeal.

The claim was struck out on the alternative basis of (i) the police owed no specific duty of care to a member of the general public, and (ii) on public policy grounds. The claim was by the mother of Jacqueline Hill (one of the last victims of Peter Sutcliffe, the "Yorkshire Ripper") against West Yorkshire Police that their negligence in failing to apprehend the killer resulted in her daughter's death.

50. Similarly as per Supreme Court of the United kingdom, in the case of ***Poole Borough Council v GN (through his litigation friend "The Official solicitor") and another [2019] UKSC 25***;

> ***Public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm.***

51. However it should be noted that there are circumstances where even duty of care may be owed, such an example is in such circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied. The Petitioners herein have not demonstrated in their evidence any of these circumstances existed as between the 3rd Respondent and themselves or any of the other Respondents.

52. The Petitioners may as well argue that by issuing Notice to the public, the 3rd Respondent assumed responsibility for an individual's safety on which the Petitioners relied. On examination of those notices, I find that they discharge the 3rd Respondent from any responsibility regarding the actions of the Petitioners after reading the notices. I find the Petitioners testimony through their various witnesses to be mostly identical and is captured in part as follows:-

> ***"I read a Notice in the newspaper informing the public that there are entities that are microfinance and people can invest because they are good. The Notice is at page 96 Vol. 5(b) dated 1/11/2015. I refer to paragraph one of the Notice."***

53. The Notice referred to herein above was dated 31st October 2005, and carried in the Daily Nation of 1st November 2005. The Petitioners take the positon that by way of this notice they were encouraged and convinced to invest in the pyramid scheme entities wherein they lost their money. From the aforesaid notice the following facts are clearly discernible:-

> ***Para1; CBK supports the development of micro finance institutions and in particular the crucial role genuine microfinance institutions are playing in extending financial services to micro and small enterprise throughout the country.***
>
> ***Para 3; CBK would like to bring to the attention of the public Section 3(a) of the Banking Act …, Section 16 of the Banking Act preludes any person or institution, not licensed under the Act, from soliciting, taking or accepting deposits.***
>
> ***Para 4; It is to be noted that any persons or entities set up as a business through incorporation as companies bearing the names "finance" and relate derivatives like "microfinance" and issue advertisements, brochures, circulars or other documents inviting persons to make deposit are in contravention to the Banking Act, and are liable to an offence punishable in accordance with the provisions of the Act.***
>
> ***Para 6; in the meantime, members of the public are advised to exercise due care and circumspection before entering into financial transactions with institutions which are not licensed under the Banking Act, or conduct microfinance business without license, or which have not obtained the consent of the Minister of Finance to use the protected words."***

54. It is clear from critical perusal of the Notice by the 3rd Respondent dated 31st October 2005 and copied in the Daily Nation of 1st November 2005, that it was warning and calling on the Petitioners to be extra vigilant and exercise diligence in any dealings with the institutions they now claim, swindled them with the alleged support of the 3rd Respondent. It is further contended that 3rd Respondent issued two more press notices dated 20th February 2007 and 25th May 2007 which were widely circulated in the print media dissuading the public against investing in pyramid schemes.

55. The 3rd Respondent contend that the 26th February 2007 notice was made for the following purposes:-

> ***a) Advise that pyramid schemes are owned and managed by persons not licensed nor regulated by the CBK and as such deposits collected are not protected under the Deposit Protection Fund Scheme.***
>
> ***b) Advise the general public to conduct due diligence so as to independently verify the source of the handsome returns.***
>
> ***c) Warn the promoters of these schemes that taking deposits from the general public contravenes the Banking Act and as such is liable to prosecution in accordance with the provisions of the Act.***
>
> ***d) Warn the public to beware if investment opportunities that promotes high returns or dividends and to be cautious in putting their money at risk in such schemes.***
>
> ***e) Advise members of the public with complaints on such schemes to contact the Director, banking Fraud Investigations Department, 5th Floor, Marshalls House, Harambee Avenue. P. O. Box 60000-00200 Nairobi.***

56. The 25th May 2007 press notice by the 3rd Respondent advised members of the public that pyramid schemes were fraud, and urged the public to avoid putting their money in such schemes. The notice further called upon commercial banks and financial institutions, which fall under the Central Bank of Kenya's regulatory mandate to urgently conduct due diligence on accounts exhibiting characteristics of pyramid

schemes in accordance with ***"Know Your Customer (KYC)"*** guidelines issued by CBK, not to accept further deposits in the pyramid schemes accounts, and to act decisively in closing such accounts. The notice was also circulated through the electronic media to increase its outreach, and further advised members of the public with complaints relating to fraud by such schemes, and or evidence that persons or organizations in this "business" are soliciting deposits from the public to contact the Director BFID, 6th Floor, Marshals House Harambee Avenue.

57. The 3rd Respondent further state that the complaint received from members of public with regard to pyramid schemes were forwarded to the BFID, a specialized unit of the Kenya Police seconded to the Central Bank to handle financial fraud, for investigations and follow up. Indeed the BFID investigated a number of pyramid schemes and even initiated court action against some promoters of pyramid schemes.

58. I find that the 3rd Respondent's conduct and action including issuance of notices cannot be described to have encouraged the Petitioners to deposit their funds with pyramid schemes but was warning them against depositing their funds with pyramid schemes since November 2005 and if they ignored such warnings then they have themselves to blame for their own misfortune. I find that given the attitude adopted by the Petitioners that any attempts to intervene we met with acrimony from the investors, who viewed government involvement as interference with their investment activities, in this scheme of things, the Petitioners were indeed accomplices in the commission of offences under the Banking Act, ***ex turpi caus non oritur action.*** It is trite law that claims that public authorities may owe an individual involved in criminal behaviour a duty of care, have been barred.

59. In view of the circumstances of this case, I find that this case do not place any common law duty of care on the 3rd Respondent or any of the other Respondents with regard to the Petitioners claim and in the event such duty of care is discernible, such duty was discharged by the notices widely circulated in the print media dissuading the public which included the Petitioners against investing in pyramid schemes dated 31st October 2005, 26th February 2007 and 25th may 2007.

B. WHETHER THE RESPONDENTS OWED THE PETITIONERS STATUARY DUTY OF CARE?

60. The Petitioners contend that the Respondents breached statutory Duty of Care vested upon them. It is averred that the 1st Respondent, an important custodian of national laws breached the Companies Act, Societies Act, the Registration of Business Names Act, etc, and registered many bogus entities, thus enabling them to open bank accounts which were later used to defraud public across the country. With respect to the 2nd Respondent it is urged it registered many outfits under the ***Co-operative Societies Act 2004*** and ***SACCO Societies Act,*** whereas as regards the 3rd Respondent it is stated that it failed to carry out statutory duties vested in it by ***Sections 4 and 4A Central Bank of Kenya Act 1966*** and also by ***Part II & III Banking Act 1989***. The Petitioners contend that these duties ought to be carried out promptly and diligently as set out in ***Sec 8 & 9 Public Officer Ethics Act (Cap 187) and Sec 5 & 7 Public Service (Values and Principles) Act (No 1A of 2015)*** . Under ***sec 23, Unclaimed Assets Act 2011***. The Petitioners aver that it is the responsibility of a bank to retain control of disputed assets held by a bank, a responsibility overseen by the 3rd Respondent, with respect to the Petitioners, which commenced about 2007.

61. The 1st, 2nd, 4th and 5th Respondents deny having been in breach of their statutory duty as averred by the Petitioners and heavily rely on the Replying affidavit sworn by Ali Noor Ismail. It is Respondents case that the various enterprises into which Petitioners invested were registered simply as savings and ***Credit Cooperative Societies (SACCO)***, ***Company, Business and Welfare Organizations*** and issued with licenses only under the business registration regimes that they were registered and it was only founders of the enterprises who had full knowledge of business they wanted to carry on. The Respondents deny have done anything that enabled the said entities to make false reputation to the petitioners that they were viable business concerns.

62. The Respondents urge further that registration of any business upon application is a legitimate expectation of any entrepreneurship minded citizen in Kenya, and no person could therefore have been denied registration under their preferred legal regime, and the entities were registered to operate ordinary savings and Credit (SACCO) business in line with the ***Cooperative Societies Act, Cap 490*** and their registered by law and any deviation from the core business of the SACCO on any other enterprise was not sanctioned by the Respondents. The Respondents therefore contend in light of the facts of this case, it is the operators of those businesses and investors (Petitioners) and not the Respondents who should be held responsible for the Petitioners loss, if any, because the investors were in better position to know what kind of business they were investing in.

63. Upon perusal of the petition and as contended by the 3rd Respondent , I note that the Petitioners while claiming breach of statutory duty, they have not set out any particulars of the negligence in their Petition nor relevant Articles but only ***Article 40 of the Constitution*** is pleaded. Further though ***Section 4 and 4A of the Central Bank Act*** is mentioned in the Petitioners' submissions, no reliance is placed on the functions of Central Bank of Kenya under legislation nor is it pleaded in the Petition. The law is explicit that parties are always bound by their pleadings and the Court's attempt to go beyond the pleadings is unacceptable as it is an infringement on the right to be heard. It should be noted that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even, if, by exercising their statutory functions they could prevent a person from suffering harm.

64. In the case of ***Kiamokama Tea Factory Co. Limited v Joshua Nyakoni [2015] eKLR***, the High Court held that breach of statutory duty is a tort. Black's law Dictionary 10th edition. Defines tort as ***"a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on person who stand in a particular relationship to one another."***

65. ***Section 4A of the Central Bank Act*** provides :

> ***"(1) Without prejudice to the generality of section 4 the Bank shall-***
>
> ***a) Formulate and implement foreign exchange policy;***

b) Hold and manage its foreign exchange reserves

c) License and supervise authorized dealers;

d) Formulate and implement such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems;

e) Act as banker and advisor to, and as fiscal agent of the Government;

f) Issue currency notes and coins; and

g) License and supervise mortgage refinance companies."

66. The Petitioners contention is that the 3rd Respondent failed to carry out its duties under ***Section 4 and 4A of the Central Bank Act***, but in the Petition the Petitioners failed, neglected and / omitted to give particulars to place statutory duty, if any, to the Respondents, which they failed to carry out and how they failed to carry out those duties to the detriment of the petitioners. Similarly the Petitioners did not plead that he 3rd Respondent failed to carry out statutory duties under ***Part 2, and 3 of the Banking Act***.

67. The ***Banking Act*** is an Act of Parliament to amend and consolidate the Law regulating the business of banking in Kenya and for connected purposes. ***Part 2 of this Act*** provides for Licensing of Institutions, and any person who carries out banking business without a license shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a tem not exceeding three years or to both.

68. In the instant petition it is not denied or disputed that all the entities that the Petitioners paid money to were not licensed by the Central Bank of Kenya, and therefore ***Part 3 of the Banking Act*** does not apply to them. The 3rd Respondent has indeed demonstrated beyond reasonable doubt that following complaints to the Banking Fraud Investigations Department, those institutions that were found to be in contravention of ***Part 2 of the Banking Act*** were charged in court. Indeed a distinction must be made between ***regulatory function of the CBK***, and the ***Policing / Law enforcement duties*** that the Petitioners have now sought to place on the CBK. The functions regarding ***policing / law enforcement*** and ***regulation*** are largely separate, policing / law enforcement and state intervention regarding crime is aimed formally at the repression of illegal markets while regulation involves control of legal activities / entitles. This is evident in the fragmentation of policing and regulatory agencies. Further it should be noted that where Public institutions purport to act outside of their statutory mandates, such actions are conducted ***ultra vires*** and ***void ab initio***.

69. It is noted that despite the Central Bank not having a mandate over the pyramid scheme structured entities, as a matter of public interest and to curb violations of the Banking Act, it did the following;

a) Issued 3 press releases warning the public on the illegality of the said entities / pyramid schemes.

b) Advised the general public to conduct due diligence so as to independently verify the legitimacy and the sources of the handsome returns.

c) Warned the public to beware of investment opportunities that promise high returns dividends and to be cautious in putting their money at risk in such schemes.

d) Invoked provisions of the Banking Act on suspicious transactions and Know Your Customer (KYC) guidelines to require licensed banks to freeze all accounts of pyramid schemes with suspicious transactions and tighten their KYC procedures to ensure that they would not open bank accounts for suspicious culprits engaged in running of pyramid schemes.

e) Forward complaints to BFID to investigate with the aim of preferring criminal charges against the proprietors and promoters of the various schemes, and the BFID managed to take the proprietors of Developing Enterprises & community Initiative and Akiba Micro Finance to Court and obtained orders freezing their bank accounts.

70. Upon perusal of the affidavit testimony of ***Kennedy Abuga*** on behalf of ***CBK,*** he states that he is advised by the Director BFID that:-

a) ***Following investigations by the BFID into the activities of the various entities, it became apparent that preferring criminal charges against the proprietors for taking deposits without licenses from CBK was untenable as the said institutions were collecting the funds mostly through their individual banks accounts.***

b) ***Despite this impediment all complaints on pyramid schemes continued being forwarded to the BFID, which managed to take the proprietors of DECI and Akiba Micro Finance to court and obtained orders freezing their bank accounts.***

c) ***The Petitioners herein are only out to deceive this honourable court as various persons/promoters and other persons were charged in court following complaints by the Petitioners herein including Petitioners number 3072 one Ms. Margaret Wanjiku Njoroge, the complainant in CR.142/251/2003.***

d) ***In certain instances such as SYLVIA INVESTMENTS, where the complainant was Mr. S. T. Wainaina, the accused person one Charles Waweru Chege was fined Kshs.50,000/- or 14 months imprisonment on 15th November, 2006 before the Senior Principal Magistrate's Court in Nairobi, and the Court ordered the release of all the deposits to the investors from account No.***

315588 domiciled at Family Bank Building Society and the orders were compiled with. See Task Force Report, page 85 paragraph 5.3.3.2.

e) ***In CR.142/84/2002 with the complainants being Mr. John Mburu Muhia (Petitioner No.11507) & 11 others, against Akiba Microfinance, the case was withdrawn under Section 204 of the Criminal Procedure Code on 5th November 2013 after the parties reconciled.***

71. The above demonstrates the efforts undertaken by the BFID in carrying out its mandate under the Banking Act, in so far as conducting banking or related business without a license was concerned.

72. It is noted that the Petitioners in their submission at paragraph 2.1 state as follows:-

"Under sec 23, Unclaimed Assets Act 2011, it is the responsibility of a bank to retain control of disputes assets held by a bank, a responsibility overseen by the 3rd Respondent, with respect to the Petitioners."

73. Upon perusal of ***Section 23 of the Unclaimed Assets Act 2011***, it is clear that the Section makes no such provision as alluded to by the Petitioners. The Petitioners are proceedings on behalf / notion that when commercial bank proceeded to close accounts held by the pyramid schemes, there were funds in those accounts, and that those funds were remitted to CBK. I find that in the instant matter the order for the remittance of funds purported to have been issued to, or by CBK has not been demonstrated to exist or exhibited before this Court.

74. The Task Force on pyramid schemes investigations established that the accounts operated by the schemes were held in the names of the schemes or directors and were characterized by numerous deposits and withdrawals, a majority of these accounts were however closed with nil balances. In addition thereto the bank accounts can only be frozen by Court order, thus in respect of the impugned accounts, there were no funds held in the said accounts to be remitted to Central Bank of Kenya, in any event or at all. No evidence had been adduced supported by any documentary evidence of moneys remitted to Central Bank of Kenya.

75. Finally the Petitioners have failed to demonstrate that the Respondent's owed the Petitioners statutory duty of care.

C. WHETHER THE RESPONDENTS ARE LIABLE FOR BREACH OF CONTRACT BETWEEN THE PETITIONERS AND THIRD ENTITIES?

76. From the Petitioners evidence, the purpose of their monetary remittance to the pyramid scheme entities was for the purpose of investment, which is confirmed by examination of various documents that the Petitioners were due to earn for handsome profits or returns on their investments with pyramid schemes entities.

77. The privity of contract is a doctrine in English contract law that covers the relationship between parties to a contract and other parties or agents. At its most basic level, the rule is that a contract can neither give rights to, nor impose obligations on, anyone who is not a party to the original agreement.

78. This Court notes that the agreements / contracts exhibited and relied upon by the Petitioners reveal a common thread of voluntary creation of rights and obligations including payments made. It is quite clear that the Petitioners assumed the risk of their investments within the entities they entered into contract with. Looking at a sample of a contract filed in book 6 it shows the following:-

a) Executed Commercial Agreement with dispute resolution mechanism.

b) Kenya Business Community cooperative savings & credit society limited.

Page 14 of Book 6: covenants and security-committee members guarantee to be personally liable for payment of sums to the investor. Page 15 of Book 6; shows a certificate of warranty and indemnity to 3rd parties.

c) Sasanet limited

Page 21 of Book 6; Should Sasanet not meet any of the obligations, its directors hereby guarantee to be personally, jointly and or severally liable for the payment of any sums that may be due to the investor.

d) Circuit investments

Page 37 of Book 6; Commercial Agreement with dispute resolution mechanism provided for before single mediator, Arbitrator, Court.

e) Family in need

Page 50 of Book 6; As partner / contributor I agree to abide by rules and regulations governing the programme, I also understand that benefits derived from this programme are solely at the discretion of Family in need Organization directors.

f) Spell investment limited

Page 65 of Book 6; Commercial Agreement with dispute resolution mechanism before a single mediator, Arbitrator, Court. Pages 85, 76 show cheque payments from the pyramid scheme entity showing that some of the Petitioners did get their money back.

g) Amity investments ltd

Page 95 of Book 6; I being of sound mind have in free will gotten into this contract with Amity investments Ltd, an declare that all conditions have been clearly explained to me. By this I agree to abide by the terms and conditions of the Contract.

h) Smart group

Page 97 of Book 6; Send kshs.200/= to the person whose name appears on the top of the smart group from using money order and make sure you write your name at the back of the same.

After sending this form the smart group form, you will receive three (3) forms which you will sell at Kshs.200/= each, this will help you recover your Kshs.600/=. Also upon your name appearing on top position of the smart group form you will receive kshs.200/= from each person who purchases form the person at the bottom of the page.

The participants were fully aware that they were to recover their payments by selling the said smart groups forms.

i) Povera investment

Page 102 of Book 6; I being of sound mind and health have bought 20,000/= povera bonds, I expect to resell the bonds to Povera on or after 14/6/08.

I understand the Povera Investments will buy the bonds from me at the stated price above but in the unlikely event that the company not being able to raise the price of 60,000/= my initial money will be refunded in full on or after 14/6/08 at 25% interest.

j) Earning Force

Page 118 of Book 6; Commercial contract entered into willingly with parties described as partners. Partnership, Commercial contract, law of contract, breach of contract applies.

k) African Christians in Development (ACID) Trust

Page 145, 146, receipts state that all collections made on the said receipts are non-refundable.

79. The privity of contract clearly covers the relationship between the parties to a contract and other parties or agents. The rule is clear that a contract can neither give rights to nor impose obligations on anyone, such as the Respondents herein, who are not parties to the original agreement or any subsequent agreement.

D. WHETHER THE PETITION AS DRAWN AND FILED RAISES CONSTITUTIONAL ISSUES FOR DETERMINATION IN THIS PETITION?

80. The Petitioners herein entered into contract between themselves and various institutions which they did not sue or join in this Petition. The Respondents were not party to the various contracts. The Petitioners Petition is based either on breach of contract or on the law of tort for negligence as drawn. The Petition in my view do not raise any constitutional issue for consideration by this court. I find the proper forum for this matter should have been either Civil Division or Commercial Division and not the Constitutional and Huma Rights Division. The Petition does not in my view raise any constitutional issue against the Respondents and the same is incompetent.

81. In view of the conclusion that I have come to, I find that this Petition is an abuse of the court process, and just an attempt to pressurize the Government to burden the taxpayer and pay petitioners monies they say they lost to the pyramid scheme entities, whom they know and have not sued as I have found in this suit, pursuant to contractual relationship between themselves and now seek unsubstantiated claims against the Respondents.

82. ***Accordingly I find no merit in this Petition and dismiss the same with costs to the Respondents.***

Dated and Signed at Nairobi on this 18th day of February, 2021.

Delivered electronically at Nairobi on this 25th day of February, 2021.

.....

J. A. MAKAU

JUDGE