



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 476 OF 2021

IN THE MATTER OF THREATENED CONTRAVENTION OF ARTICLES 1, 2, 3,

4(2), 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 35, 46, 47, 258, 259 AND 260 OF THE

CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 23 AND 24 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE

AND PROCEDURE RULES, 2013

AND

IN THE MATTER THE CENTRAL BANK OF KENYA CHAPTER 491 LAWS OF KENYA

AND

IN THE MATTER OF BANKING ACT CHAPTER 488 LAWS OF KENYA

AND

IN THE MATTER OF MICROFINANCE ACT NO. 19 OF 2006

AND

IN THE MATTER OF THE BANKING (CREDIT REFERENCING

BUREAU) REGULATIONS, 2013 (REPEALED)

BETWEEN

KATHAMBI RUCHIAMI.....1ST PETITIONER

ALEX GABRIEL.....2ND PETITIONER

BODA POA GROUP.....3RD PETITIONER

VERSUS

HEAD OF THE PUBLIC SERVICE.....1ST RESPONDENT

CABINET SECRETARY FOR TREASURY &

NATIONAL PLANNING.....2ND RESPONDENT

CENTRAL BANK OF KENYA.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

CREDIT REFERENCE BUREAU

AFRICA LIMITED T/A TRANSUNION.....1ST INTERESTED PARTY

METROPOL CREDIT REFERENCE

BUREAU LIMITED.....2ND INTERESTED PARTY

RULING

PETITION

1. The Petitioners in the instant Petition dated 8th November 2021 seek the following reliefs:-

a) A declaration that the amendment of the Banking (Credit Reference Bureaus) Regulations, 2020, by introducing Regulation 18(7) is inconsistent with Section 31 of the Banking Act Cap 488 Laws of Kenya and Articles 10, 27 and 46 of the Constitution therefore null and void.

b) A declaration that the amendment of the Banking (Credit Reference Bureaus) Regulations, 2020 by introduction of Regulation 18(7) violated Article 10 of the Constitution thus unconstitutional for want of public participation.

c) A declaration that the Presidential directive on the suspension of exchange of some aspects of negative credit information as made on 20th October, 2021 and subsequently Gazette vide Legal Notice No.225 of 5TH November, 2021 and further communicated through the Central Bank of Kenya Circular No. 5 of 2021, dated 8th November, 2021 violated Article 1, 2, 3, 10, 27, 43 and 46 of the Constitution thus the same be and is hereby set aside.

d) An order of injunction barring the Respondents from implementing the moratorium on exchange of some aspects of negative credit information.

e) An order lifting the suspension barring credit only Microfinance Institutions and digital lenders from participating in the Credit sharing mechanism to resume sharing credit information through CRBs unless specifically barred by the CBK upon exercise of fair administrative process.

f) An order be and is hereby issued setting aside the Central Bank of Kenya's directive vide Circular No. 8 of 2020, dated 14th April barring credit only Microfinance Institutions and digital lenders from participating in the Credit Information Sharing Mechanisms through Credit Reference Bureaus.

g) Costs of this Petition.

APPLICATION

2. The Petitioners simultaneously filed the instant Petition together with Notice of Motion dated 8th November 2021 seeking the following orders:-

a) Prayer No. 1 spent.

b) Prayer No. 2 spent.

c) That pending the hearing and determination of the Petition, this Honourable Court be pleased to issue conservatory orders suspending the enforcement of the Legal Notice No. 225 of 5th November, 2021 issued by the 2nd Respondent and the 3rd Respondent's Circular No. 5 of 2021 dated 8th November, 2021 on temporary suspension on exchange of some aspects of negative credit information.

d) Costs of this Application.

BRIEF FACTS OF THE APPLICATION

3. The Petitioners claim herein arises from His Excellency the President of Republic of Kenya Directives issued on 20th October 2021 and the **Legal Notice No. 225** issued on the 5th November 2021 based on **Regulation 18(7) of the Banking (Credit Reference Bureau) Regulations 2020**.

4. In the instant application the Petitioners have sought conservatory orders pending hearing and determination of the Petition to the effect that this Honourable Court do issue conservatory orders suspending the enforcement of the **Legal Notice No. 225 of 5th November 2021** issued by the 2nd Respondent and the 3rd Respondent's circular No. 5 of 2021 dated 8th November, 2020 on temporary suspension on exchange of some aspects of negative credit information.

5. In support of the application the Petitioners claim that they will suffer from the aforesaid directive if implemented as it will effectively collapse the Credit Information sharing frame work. In addition it is urged the directive will compromise the consumer's ability to secure credit from financial institutions.

THE RESPONDENTS RESPONSES

6. The 1st, 2nd and 4th Respondents are opposed to the application and in doing so they filed grounds of opposition raising 9 ground of opposition.

THE 3RD RESPONDENTS RESPONSES

7. The 3rd Respondent filed Replying Affidavit sworn by Kennedy Kaunda Abuga on 18th November 2021 in opposition of both the application and the Petition.

THE 1ST, 3RD, 4TH AND 7TH INTERESTED PARTIES RESPONSES

8. The 1st Interested Party supports the Notice of Motion and in doing so filed Replying Affidavit sworn by Joseph Nyaga on 25th November 2021.

9. The 3rd Interested Party supports the Notice of Motion and relies on Replying Affidavit sworn by Kamau Kunyihia dated 26th November 2021.

10. The 4th Interested Party similarly supports the Notice of Motion and places reliance in Replying Affidavit sworn by Hannah Ndarwa on 17th November 2021 and supplementary affidavit sworn by herself dated 30th November 2021.

11. The 7th Interested Party also supports the Notice of Motion and relies on Replying Affidavit of Caroline Kabui Karanja sworn on 24th November 2021.

ANALYSIS AND DETERMINATION

12. Having carefully considered the Application by Petitioners, replying affidavit and supplementary affidavit in support of the application and the 1st, 2nd, 3rd and 4th Respondents grounds of opposition and the 3rd Respondent's Replying Affidavit, as well as Counsel rival submissions, I find that only one issue arises for consideration thus:-

a) WHETHER THE PETITIONERS/APPLICANTS HAVE DEMONSTRATED THAT THEY ARE ENTITLED TO GRANT OF CONSERVATORY ORDERS SOUGHT IN THE NOTICE OF MOTION.

13. The Application herein mainly seek temporary conservatory orders to the effect that pending the hearing and determination of the Petition, this Honourable Court be pleased to issue conservatory orders suspending the enforcement of the Legal Notice No. 225 of 5th November, 2021 issued by the 2nd Respondent and the 3rd Respondent's **Circular No. 5 of 2021** dated 8th November, 2021 on temporary suspension on exchange of some aspects of negative credit information.

14. The guarding principles upon which the Court can grant conservatory orders are well settled within the framework of **Article 23 of the Constitution**, which the Courts are called upon to uphold and enforce the Bill of Rights. **Article 23(1) and (3)** provides:-

“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

15. I am alive that the Court at such stage is not called upon to make a definite finding on facts or the law but instead is required to evaluate the material placed before it and decide whether the applicant has made a prima facie case with likelihood of success and further whether by declining to grant the orders the Applicant will be prejudiced.

16. It is trite that for conservatory orders to be issued in a constitutional petition, the Applicant is required to demonstrate a prima facie case with probability of success and further that unless the orders are granted there is a real danger that the Applicant will be prejudiced by Court's refusal to grant the orders.

17. The Petitioners contend that unless the Court herein intervenes, the **Legal Notice No. 225 of 2021** will be implemented as well as the CBK's circular already served upon Financial Institutions and Credit Reference Bureaus must comply with the Directive by 10th December, 2021.

18. The Applicants further urge that as such the substratum of the Petition will be lost, and the Petitioners will suffer prejudice as the Petition will be rendered nugatory as the Presidential Directive and subsequent notices are time-bound and the directive is to remain effective for a period of twelve months from 1st October, 2021 to 30th September, 2022.

19. The Applicants further state that unless the conservatory orders are granted, time will start running from 10th December, 2021 when the Interested Parties will be required to submit their compliance reports and the Petitioners will suffer irreparable loss as they will not be able to obtain unsecured loans from financial institutions without the credit information.

20. In support of the application the Applicants place reliance in the decision by Onguto, J., (as he then was) in **Board of Management of Uhuru Secondary School vs. City County Director of Education and 2 others (2015) eKLR**, where the Judge stated for grant of conservatory orders the application is required to meet the following conditions:-

“a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c) Thirdly, the Court should consider whether, if an interim conservatory orders is not granted, the Petition or its substratum will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.

21. The Applicant further rely on the decision of the **Law Society of Kenya vs. Office of the Attorney General & another, Judicial Service Commission (Interested Party) [2020] eKLR**, where the Court stated that:-

“In the instant application and applying the principles, that an Applicant seeking conservatory orders or interim orders is required to satisfy before grant of interim orders; as hi have set them out herein above, I find, that the Applicant has satisfied the aforesaid principles in regard to the granting of interim or conservatory orders. The Applicant has demonstrated an arguable prima facie case with likelihood of success and shown in absence of the conservatory orders he/she is likely to suffer prejudice; the Applicant has further met the second principle that grant or denial of conservatory relief will enhance the Constitutional values and objectives of a specific right or freedom in the Bill of Rights; thirdly the Applicant has demonstrated, if interim orders or conservatory orders are not granted, the Petition or its substratum will be rendered nugatory and finally has demonstrated that public interest will be prejudiced by a decision not to grant conservatory orders.”

22. The Petitioners also place reliance in the decision in the case of **David Ndii & others vs. Attorney General & others [2021 eKLR**, where the learned Judges in granting Conservatory Orders held that;

“... Such orders are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of the Constitution, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge...”

23. The Respondents in opposition to the granting of conservatory orders rely on the grounds of opposition and Replying Affidavit of the 3rd Respondent. The Respondents urge as regards the principles guiding the granting of conservatory orders; Lenaola J, (as he then was) in **Wilson Kaberia Nkunja vs. Magistrates and Judges Vetting Board & another [2016] eKLR** summarized the main principles as follows:-

“It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:-

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution;

b. Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

c. The public interest must be considered before grant of a conservatory order.”

24. Further this Court is guided by decision in the case of *Center for Rights Education and Awareness (CREAW) & Another vs. Speaker of the National Assembly & 2 others (2017) eKLR*, where the Court was emphatic that:-

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court his or her rights are under threat of violation; are being violated or will be violated and that such violation or threatened violation is likely to continue unless a conservatory order is granted. This is because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

25. Additionally to the above this Court is aware of the principles applicable in granting conservatory orders were outlined in the Supreme Court in the case of *Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Application No. 5 of 2014 3* where the Court stated:-

“Conservatory Orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay.”

26. The Respondents further rely in opposing the application in the case of *Progress Welfare Association of Malindi & 3 others vs. County Government of Malindi & 4 others Petition E 2 of 2020*; The Court dismissed the application for conservatory orders as the applicants failed to aver and prove they were facing imminent and actual danger, and that they will suffer as a result of the violation of the Constitution. The Court emphasized that the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent.

27. Upon consideration of the application, grounds on the face of the application and supporting affidavit, it is evidently clear that the Petitioners/Applicants have not shown or demonstrated how their rights will be violated if the conservatory orders are declined. Additionally the Petitioners have not demonstrated a prima facie case with any likelihood of success and that the substratum of the Petition will be rendered nugatory if the conservatory orders are not granted. The Petitioners herein further have not demonstrated that they would suffer prejudice if the orders are declined.

28. The Respondents urge the impugned Regulations enjoy the presumption of Constitutionality. This has not been denied nor challenged. I find that remains a good law at this stage of proceedings and that this Honourable Court cannot determine its inconsistency with Constitution or any other law without divulging into detailed analysis of the facts and the law. In addition and in reaching a conclusion in this matter the Court will be obligated to examine the purpose and effect of the impugned Regulations to determine its constitutionality, which is not a requirement at this stage as I have already pointed out in this Ruling earlier on.

29. The upshot is that the application is without merits. It is dismissed. The costs of the application shall abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA