REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCOM NO. 350 OF 2016

(FORMERLY CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. 369 OF 2016)

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 4(2), 10, 22, 23, 47, 50(1), 156, 165, 258

AND 259(1) OF THE CONSTITUTION OF KENYA 2010.

- AND -

IN THE MATTER OF: USING THE CENTRAL BANK RATE (CBR), AND NOT THE KENYA BANKS'

REFERENCE RATE (KBRR) ALSO SET BY THE CENTRAL BANK, AS THE APPLICABLE

BASE RATE FOR CAPPING BANK INTEREST RATES.

- BETWEEN –

OKIYA OMTATAH OKOITI.....PETITIONER

-VERSUS-

CENTRAL BANK OF KENYA.....1ST RESPONDENT

KENYA BANKERS ASSOCIATION.....2ND RESPONDENT

THE CABINET SECRETARY, NATIONAL TREASURY.....3RD RESPONDENT

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

AND

THE NATIONAL ASSEMBLY.....1ST INTERESTED PARTY

CONSUMER FEDERATION OF KENYA (COFEK).....2ND INTERESTED PARTY

INSTITUTE OF CERTIFIED

PUBLIC ACCOUNTANTS OF KENYA (ICPAK).....3RD INTERESTED PARTY

J U D G M E N T

1. In his petition dated 5/09/2016 and amended on 10/09/2018, **Mr. Okiya Omtatah Okoiti** ("the petitioner") challenged the constitutionality of the interest rate cap imposed under ***section 33B (1) of the Banking (Amendment) Act No. 25 of 2016***. The same was

passed into law, assented to by the President on 24th August 2016 and was operationalized on 14th September 2016.

2. The petitioner is a resident of Nairobi City County, a human rights defender and a member of the Kenyans for Justice and Development (KEJUDE) Trust.

3. He has brought this petition against the 1st respondent (Central Bank of Kenya) duly established under ***Article 231 of the Constitution of Kenya*** with the responsibility of formulating monetary policy, promoting price stability, issuing currency and performing any other functions conferred on it by an Act of parliament.

4. His claim against the 1st respondent is that, the latter has failed in its regulatory functions by undermining the law capping interest rates through allowing and facilitating lenders under its supervision to continue exploiting their customers by capping their interest rates using the higher Central Bank Rate (CBR) instead of the much lower Kenya Banks' Reference Rate (KBRR). He also claims that the 1st respondent has undermined the law capping interest rates by purporting to abolish the Kenya Banks' Reference Rate (KBRR) introduced in 2014 as a base rate to calculate the cost of credit and also for pushing for the repeal of the law capping interest rates.

5. The 2nd respondent is the Kenya Bankers Association, the umbrella body of the financial institutions licensed and regulated by the 1st respondent with a current membership of 45 organizations and whose mandate is to promote industry development and economic growth by engaging the government and sector regulator, the CBK.

6. As against the 2nd respondent, on behalf of its members, the petitioner claims that it's members are capping their interest rates using the CBR instead of the KBBR. That the 2nd respondent was threatening the Constitution of Kenya by pushing for the repeal of the law capping interest rates.

7. The 3rd respondent is the Cabinet Secretary, the National Treasury, in charge of the national government's department which formulates financial and economic policies and oversees effective coordination of national government financial operations. The claim against him is for threatening the Constitution of Kenya by pushing for the repeal of the law capping interest rates.

8. The 4th respondent, the Hon. Attorney General is sued as the legal adviser and representative of the Government of Kenya, whose mandate is to promote, protect and uphold the rule of law and defend the public interest, within the meaning of Article 156 of the Constitution of Kenya.

9. The other parties in the petition are; the 1st interested party, the National Assembly, being one of the two Chambers of Parliament of Kenya, the 2nd interested party, the COFEK, Kenya's independent, self-funded, multi-sectorial, non-political and apex non-profit federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer-care issues and the 3rd interested party, ICPAK, an institution mandated to protect and uphold public interest as well as develop and regulate the accountancy profession in Kenya. All these have been enjoined in this petition as parties with an identifiable stake in these proceedings.

10. The Petitioner's claim revolves around ***section 33B (1) of the Banking (Amendment) Act .***

11. He has sought a declaration that the 1st, 2nd, 3rd and 4th respondent have violated and threatened the provisions of the Constitution of Kenya being ***Articles 1, 2, 3(1), 4(2), 10, 22, 23, 50 (1), 159, 165, 258 and 259***. The alleged violations and threats to the Constitution can be summarized as follows: -

a) The decision by banks, supported by the 1st and 2nd respondents that, in compliance with ***Section 33B (1) of the Banking Act,*** they will apply the CBR and not the KBRR in capping interest rates undermines and threatens the rule of law as pronounced by ***Article 10***;

b) The same is also a violation of ***Article 40*** to the extent that it arbitrarily deprives borrowers of their legitimate property or interest in property under the law, while allowing lenders to unlawfully acquire property;

c) The same is also a violation of ***Article 47*** to the extent that it does not constitute administrative action that is fair, lawful or reasonable; and

d) The agitation by the 1st, 2nd and 3rd respondent to remove interest rate caps constitute a threat to ***Article 40*** as read together with ***Articles 24, 95(5)(b), 129, 238(1) and 259(1) of the Constitution***.

12. The petitioner's case is that, ***section 33B (1) of the Banking Act*** refers to the base rate set and published by the CBK pursuant to ***section 36A (1) of the Central Bank of Kenya Act*** and not the CBR published pursuant to ***section 36 (4) of the Central Bank of Kenya Act***.

13. That in enacting the law, Parliament would have expressly stated that ***section 33B (1)*** referred to the CBR if it had intended it to be so. His case is that Parliament intended that CBK would study the loans market and, then determine and publish a special lending base rate for pricing of loan products on the basis of KBBR and not otherwise.

14. The 1st respondent opposed the Petition through the Replying Affidavit and Further Affidavits of **Kennedy Kaunda Abuga** sworn on 21/11/2016, 16/01/2017 and 13/07/2020, respectively. He avered that CBK is established under ***Article 231(1) of the Constitution of Kenya***

and tasked with a specific mandate to, *inter alia*, formulate monetary policy, promote price stability, issue currency and perform any other functions conferred on it by an Act of Parliament.

15. He contended that CBK has performed its constitutional and statutory duties as prescribed by law contrary to the Petitioner's allegations. That ***section 33B*** did not specify the base rate for purposes of capping interest on loans and deposits under the Banking Act nor did it refer to any provision of the ***Banking Act Cap. 488 or the Central Bank Act Cap. 491.***

16. That notwithstanding the ambiguity in ***Section 33B (1),*** the CBK issued a Banking Circular No. 4 of 2010 on 13th September 2016 to guide the implementation of the ***Banking (Amendment) Act 2016*** which set the base rate as the CBR pursuant to ***section 36(4) of the Central Bank Act.***

17. That the provisions of ***Section 33B of the Banking (Amendment) Act 2016*** were challenged in Petition No. 413 of 2016, **Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] eKLR**.

18. That after the challenge, the National Assembly enacted the ***Finance Act No. 10 of 2018*** which amended ***section 33B (1)*** which set the base rate as the CBR. This was also noted by the Court in ***Boniface Oduor case (supra)***.

19. That the amendment of the ***Banking (Amendment) Act 2016*** through the *Finance Act 2018* and the ***Boniface Oduor (supra)*** decision has settled the applicable rate as the CBR. Further, that the High Court having pronounced itself in the ***Boniface Oduor (supra)*** case on the applicable base rate, it cannot now sit on appeal, review or set aside decisions and findings already made as sought in the amended Petition.

20. That in any event ***Section 45 of the Finance Act 2019*** further repealed ***section 33B of the Banking Act*** and therefore there is no interest cap provided for by any laws in Kenya therefore no violation of ***section 33B*** can be occasioned by any of the respondents herein.

21. The 2nd respondent opposed the petition through the replying affidavit of **Habil Olaka** sworn on the 9/07/2020. He avered that ***section 33B of the Banking Act*** was deleted by ***section 64 of the Finance Act 2018*** which came into force on 1st October 2018 and the new ***section 33B (1)*** simply refer to the Central Bank Rate. That subsequently, it was repealed by ***section 45 of the Finance Act 2019*** which came into force on 7th October 2019.

22. That **Boniface Oduor case (supra)** the court declared ***section 33B (1) (2) and (3) of the Banking Act*** unconstitutional null and void and determined that the setting of Central Bank Rate under the provisions of ***section 36 of the Central Bank Act***, is a function of formulation of monetary policy and therefore is the exclusive sphere of the Central Bank of Kenya.

Issues for determination

23. The Court has carefully considered the depositions and the submissions on record. The issues for determination are: -

a) Whether the Petition as amended has been overtaken by events in light of the Judgement in **High Court Petition No. 413 of 2016 Boniface Oduor Case (supra)** and the repeal of ***Section 33B of the Banking (Amendment) Act 2016***.

b) Whether the Constitution imposes an obligation on Parliament and the Executive to cap bank interest rates by legislation.

24. This petition was lodged in Court on 5/9/2015. As already stated, its purpose was to challenge the constitutionality of ***section 33B of the Banking Act.*** That provision has since been repealed by ***section 45 of the Finance Act, 2019*** which provided: -

"The Banking Act is amended by repealing section 33B"

25. The aforesaid ***Finance Act, 2019*** was assented to on 9/11/2019 and the subject section came into effect immediately.

26. The Court has also considered the decision in Petition 413 of 2016, **Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] Eklr.** The court delivered itself thus:

> ***"The provisions of Section 33B of the Banking Act (Cap. 488 Laws of Kenya) do not infringe on CBK's constitutional mandate of formulating monetary policy stipulated under Article 231 of the Constitution.***
>
> ***Sections 33B(1) and 33B(2) of the Banking Act (Cap. 488) Laws of Kenya be and are hereby declared unconstitutional, null and void for being vague, ambiguous, imprecise and indefinite.***
>
> ***In view of the consequences of Declaration 2 above, Declaration 2 above is suspended for a period of twelve (12) months from the date of delivery of this judgment for the National Assembly to consider making appropriate amendments to the impugned sections.***
>
> ***In default of order 3 above, the declaration of invalidity in Declaration 2 above shall take effect.***
>
> ***Section 33B (3) of the Banking Act is hereby declared unconstitutional, null and void for being discriminatory contrary to Articles 27 and 29 of the Constitution and infringement of fair hearing under Article 50 of the Constitution.***

…"

27. In view of the foregoing, prayer nos. (a), (a1), (a3) (a4), (b), (c), (d) and (d1) of the Amended Petition are moot and have been overtaken by the above changes in the law. In any event, this Court having pronounced itself in **Boniface Oduor (supra**) as aforesaid, it is not open to it to re-open the issue of ***section 33B of the Banking Act*** again. Only the appellate court can.

28. This leaves the court to consider prayer nos. a2) and a2) in the amended petition. These concern themselves with whether there is a Constitutional obligation on Parliament and the Executive to Cap interest rates by Legislation.

29. The petitioner seeks a declaration that ***Article 40 (Protection of Right to Property)*** as read together with ***Articles 24, 95(5)(b), 129, 238(1) and 259(1) of the Constitution*** impose on Parliament and the Executive, the obligation to cap bank interest rates by legislation and that removing the cap on bank interest rates violates the said Articles.

30. ***Article 40*** provides, *inter alia*, as follows: -

> ***"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***
>
> ***(a) of any description; and***
>
> ***(b) in any part of Kenya.***
>
> ***(2) Parliament shall not enact a law that permits the State or any person—***
>
> ***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***
>
> ***(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).***
>
> ***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***
>
> **…"**.

31. The petitioner submits that interest rates are a means through which banks and similar institutions acquire property. That in the premises, there is an obligation on the Executive and the Legislature to enact a law clearly determining what is lawful and what is not as regards interest rates.

32. He contends that, in framing ***Article 40(6)*** as '***The rights under this Article do not extend to any property that has been found to have been unlawfully acquired",*** the framers of the Constitution anticipated every avenue of acquiring wealth to be governed by clear legislation that makes it clear for one to determine whether the property so acquired is lawful or not.

33. In addition, that the obligation under ***Article 40(2)(a)*** prohibits the State or any person from arbitrarily depriving another of property of any description or of any interest in, or right over, any property of any description. That in the premises, the Executive and the Legislature should ensure, through legislation, that the acquisition of property through interest rates is not through overcharging borrowers and where banks are free to charge whatever rates of interest.

34. The petitioner further submits that the National Assembly has an obligation to cap interest through legislation by dint of ***Articles 95(2) of the Constitution.*** That in doing so, it would not interfere with the CBK's constitutional mandate of making monetary policy under ***Article 231(3).*** That on its part, the Executive has an obligation to protect Kenyans from predatory lending rates by dint of ***Article 129 of the Constitution***. That the obligation to set interest caps is also underscored by ***Article 238(1) & (2) of the Constitution*** as it is a matter of national security to the extent that it poses an internal threat to the people of Kenya.

35. The 1st respondent submits that there is no constitutional provision which directs the enactment of a statute to cap interest rates. That the petitioner is stretching his interpretation of ***Articles 40(2)(a) & (6), 95, 129, 238(1) & (2)*** beyond what they actually provide. That this Court had in the **Boniface Oduor (supra)** appreciated that interest rate cap regulation is a policy decision taken by the Members of Parliament as representatives of the people.

36. Reliance was placed in the Court of Appeal decision in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] Eklr,** wherein that court in distinguishing the roles of the Legislature, Executive and Judiciary, held that the Legislature is concerned with making laws and policies and the Executive implements them while the Judiciary interprets them as enacted and therefore has no role to play in policy formulation.

37. That ***Article 40*** protects the right to property in two respects. First, the right to acquire, own and use any property of any description in Kenya and secondly, the right from arbitrary deprivation of property by the State or any person through the law. That none of these scenarios arise in the present petition.

38. On its part, the 2nd respondent submited that there is nothing that requires the control of the rate of interest chargeable on loans. Further, there is nothing that requires Parliament to pass such legislation. In the premises, it is not for the Court to dictate to Parliament on what legislation it should pass.

39. In determining this issue, the Court would have to answer three question, *to wit*, ***whether the petitioner's case prove breach of the right to property? Whether there is jurisdiction to direct the Executive and the National Assembly to enact a legislation? When can the Court infer authority to legislature to make laws for the protection from infringement of rights?***

40. In answer to the first question, ***Article 40*** needs to be interpreted. In **Apollo Mboya v Attorney General & 2 others [2018] Eklr,** the court observed: -

> ***"It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion. In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner. Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.' It is also true to say that situations may arise where the generous and purposive interpretations do not coincide. In such instances, it was held that it may be necessary for the generous to yield to the purposive. Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question".***

41. ***Article 40*** entitles every person the constitutional protection of the right to acquire and own property. It also protects every person from arbitrary limitation or restriction of this right.

42. The petitioner's claim is that the lack of an interest rate cap law infringes this right as banks and financial institutions can arbitrarily charge interest in a bid to acquire the borrowers' property. It is not clear how this is possible considering that charging of interest arises out of contractual relationships between lenders and borrowers. This relationship is governed by laws that govern financial institutions as well as land acquisition.

43. That being the case, it is unclear how in the absence of interest rate cap law, such banks and financial institutions would act whimsically and acquire borrowers' property without due consideration of the Constitution and the laws of the land. In this regard, the Court holds that the lack of an interest rate capping law does not in any way infringe on ***Article 40.***

44. On the second question, the court will refer to the decision in **Anthony Ritho Mwangi and another vs The Attorney General Nairobi Criminal Application No. 701 0f 2001.** In that case, the court held: -

> ***"Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law."***

45. In view of the foregoing, it is clear that the Court lacks the jurisdiction to direct the National Assembly, in realization of the structure of separation of powers, to enact a legislation and especially one which the National Assembly has already dealt with unless such legislation be unconstitutional.

46. On the final question, the Court can only direct the Legislature to review or make laws in compliance with the Constitution. It cannot direct how such legislation is to be effected. In **Advisory Opinion Reference No. 2 of 2013 The Speaker of the Senate and the Senate of the Republic of Kenya v the Attorney General and the Speaker of the National Assembly [2013] Eklr,** the Supreme Court of Kenya observed: -

> ***"The position is not different in the case of Canada, as emerges from Amax Potash Ltd. v. government of Saskatchewan [1977] 2 S.C.R. 576 [at p.590]:***
>
> ***'A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."***

47. In view of the foregoing, the Court finds the petition to have no merit and dismisses the same. This having been a matter of public interest, each party should bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE