



Central Bank of Kenya

EMERGING JURISPRUDENCE ON THE MANDATE OF THE CENTRAL BANK OF KENYA

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FOREWORD

This Digest highlights and illuminates on the mandates of the Central Bank of Kenya as determined by various Court decisions. As the country advances as a global financial hub, the continuous development of judicial precedent avails a critical reference point for regulatory consistency and development of the market.

Kenya's economic development blueprint, the Vision 2030, has an Economic Pillar which places a premium on: a stable macro-economic environment to cushion the poor who suffer the most during periods of high inflation; limited public sector deficits; low interest rates; and stable exchange rate – most of which fall under the mandates of the CBK. Commercial banks which are regulated by the CBK in our predominantly bank-based economy, are critical in enhancing investments, credit provision and mobilization of savings in supporting and promoting economic growth and development in Kenya.

The success of the financial sector also largely hinges on investor and consumer confidence in the market and the prevailing policy and regulatory environment. Accordingly, the Judiciary as a critical arm of government, will increasingly grow in significance as a critical part of the growth of Kenya's financial sector (banking and payment's sector).

This Digest therefore catalogues judicial decisions from the Kenyan courts that provide guidance on the interpretation of the mandates, powers, and functions of the Central Bank of Kenya. The Digest helps illuminate on the range of, and the manner of exercising powers vested in the Constitution of Kenya 2010, the Central Bank of Kenya Act, the Banking Act and the relevant Regulations, Circulars and Prudential Guidelines. The Digest is therefore expected to serve as a useful reference guide for various players in the financial sector including banks, investors, customers, judicial officers, regulators, legal practitioners, academics, students on how the Courts have interpreted CBK's mandates. It will act as an essential sensitization tool for stakeholders in terms of the operation and functioning of the CBK.

It is anticipated that this Digest will be regularly updated and re-issued as jurisprudence on CBK's mandates continues to evolve. I am of the firm conviction that this Digest will help in not only crystallizing the legal principles around CBK's mandates but also contribute to a better understanding of the context and manner in which the CBK operates.

I highly recommend the Digest to judicial officers, market actors, students, and all other stakeholders in the financial sector.

Mr. Mohammed Nyaoga
Chairman of the Board

PREFACE

I am not a lawyer by training. My area of expertise is economics, how the economy works, and how to make it work better for businesses, investors, and ordinary citizens. It is difficult to overstate the importance of the Central Bank in managing the economy. The Central Bank's functions in ensuring stability, monetary policy formulation and regulating banks mean that its decisions and policies reverberate in every aspect of life in Kenya. One might say that a significant part of managing the economy involves not only anticipating the future, but also considering and implementing policies across the full range of the constitutional and legislative functions ascribed to the Central Bank of Kenya. This is bearing in mind both the future and the present, and having a keen awareness of the impact of the policies we implement at every level of the economy and in every sector.

Admittedly, such important functions are attended to by the wide powers of the Central Bank, ranging from bank supervision to the determination of interest rates to foreign currency management. Constitutionally, these functions are to be carried out free from the direction or control of any person or authority. But with great power, comes great responsibility and accountability, where checks and balances are essential. In this regard, the law offers the necessary safeguards for the Central Bank's autonomy on the one hand, and provides checks and balances on the other hand. And that is why this Digest is so exciting and necessary: it records the facts of the several cases filed over the Central Bank's functions and powers before the Courts; it tracks the jurisprudence emanating from the courts on the nature, extent and exercise of the functions and powers of the Central Bank.

I began this preface by saying that I am not a lawyer; however, by now it must be clear, that the law permeates every aspect of the functions of the Central Bank – everyone ought to be reasonably informed of it. On my part, perusing this Digest has built my understanding of the law and how it works. The complexities of law and its somewhat arcane procedures are helpfully explained in this Digest, allowing even non-lawyers understand the law and how it works in the wider context of the economy and its management.

This Digest is an important addition to the wide range of Central Bank of Kenya (CBK) repository of publications. The CBK acknowledges the important role played by the General Counsel, Central Bank of Kenya, in coordinating the preparation of this document. We also acknowledge in a special way, staff from the CBK, particularly from the Legal, Research, and Communication Units, who assembled this document. It is my earnest hope that the team's efforts will inspire other public institutions to publish their own digests and contribute to the body of knowledge in their respective areas.

Dr. Patrick Njoroge
Governor

1. INTRODUCTION

The Central Bank of Kenya (CBK) is established under Article 231 of the Constitution. Its constitutional functions are to formulate monetary policy, promote price stability and issue currency.¹ The *Central Bank of Kenya Act*,² the *Banking Act*,³ the *National Payments System Act*, 2013 and the *Kenya Deposit Insurance Act*, 2012 provide further functions and powers and are discussed in some of the cases in this Digest. Additionally, the CBK has a role to play in national security and has powers and functions under the *Proceeds of Crime and Anti-Money Laundering Act*, 2009 and the *Prevention of Terrorism Act*, 2012

In exercising its powers under the legislative framework outlined above, CBK strives to ensure compliance with international law and is guided by international best practice in the banking and financial sector.

Importantly and uniquely, the Constitution provides for central bank independence. Specifically, it provides that the CBK shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions.⁴ It is arguable that those powers are wide – given that its Act provides for the CBK to exercise any type of central banking function unless specifically excluded under the Act, while enjoying all the prerogatives of a central bank.⁵ Unlike some central banks which are immune to suit,⁶ section 3 of the *Central Bank of Kenya Act* provides that CBK may sue and be sued. It is for these reasons that what the courts have to say about the powers exercised and the functions carried out by the CBK are so important – they clarify those powers and functions; avail much needed detail; affirm and even correct missteps in the performance of functions of the CBK.

In the next section, we discuss the emerging jurisprudence from the courts as relates to the mandate and powers of the Central Bank of Kenya. Section 2 offers an insight into the global landscape of Central Bank jurisprudence. Section 3, sets out the key elements of the Central Bank of Kenya mandates as interpreted by our Courts through court cases and the relevant laws. Finally, the last section highlights the lessons learnt from this Digest.

¹ Article 231 (2), Constitution of Kenya

² Cap 491, Laws of Kenya

³ Cap 488, Laws of Kenya

⁴ Article 231 (3), Constitution of Kenya. Of course, legislative authority concerning the composition, powers, functions and operations of the CBK is left to Parliament - article 231 (5).

⁵ Section 3 (3), Central Bank of Kenya Act, Cap 491 Laws of Kenya

⁶ The legislative and/or constitutional arrangements establishing the central banks of India and Singapore have explicit provisions preventing suits against those central banks, discussed with more detail in the next section.

2. CENTRAL BANK JURISPRUDENCE – A GLOBAL PERSPECTIVE

Across the world, central banks have witnessed increased litigation in the recent years, with most cases, understandably, arising from bank supervision.

Following the 2008 global financial crisis, central banks have taken a far more prominent role; the laws governing central banks have evolved over the years, resulting in more explicit objectives, and strengthened functions.⁷ In particular, there is emphasis on the independence of central banks together with increasing responsibilities.

Since the global financial crisis, Central Bank objectives have evolved to include financial stability, financial supervision, and financial inclusion. Decision-making has been enhanced with respect to the arrangements relating to central bank board member selection criteria, appointment procedures, and by changes in size of the Boards. Central banks are now mandated and expected to collect more, and more data and information.

According to the Bank for International Settlements,⁸ private parties are permitted to bring legal action against the central bank in most countries. The manner in which the central bank is established in the law has a direct bearing on the type of legal action that is permissible. For example, the Reserve Bank of Australia is established as a corporate able to sue and be sued. On the contrary, the central banks of India and Singapore have explicit provisions that prevent the possibility of a suit against the central bank. The potential legal liability of a central bank is closely related to the nature and extent of its responsibilities. Central banks with several functions may have immunity with respect to monetary policy but not with respect to other activities such as the operation of the payment system, the issuance of regulations, or the power to issue licenses.

Most countries have laws that allow claims to be filed against the central bank unless there is statutory provision exempting it from liability due to negligence. A number of central banks, including Bank of Canada, South African Reserve Bank, Bank of Thailand, and the US Federal Reserve, have immunity provisions that narrow the circumstances of a legal claim against the central bank or its officials to those cases in which bad faith or dishonest conduct can be demonstrated.

⁷ Khan, 2017

⁸ Bank for International Settlements, Political Framework and Legal Status, Issues in the Governance of Central Banks, pp 57-76, https://www.bis.org/publ/othp04_3.pdf

3. FUNCTIONS OF THE CENTRAL BANK OF KENYA AND RECENT LITIGATION

3.1 FORMULATING AND IMPLEMENTING MONETARY POLICY

The principal objective of the CBK is to formulate and implement monetary policy aimed at achieving and maintaining stability in the general level of prices.⁹ Monetary policy decisions and actions are guided by an inflation target provided by the National Treasury at the beginning of every financial year. The formulation of monetary policy, or determination of the Central Bank Rate (CBR), is informed by a wide range of information and is based on a forward-looking monetary policy rule (section 2.3 of the CBK White Paper¹⁰). Movements in the CBR (both direction and magnitude) signal the monetary policy stance, while the interest rate is the reference rate for all monetary policy operations. Monetary policy formulation and implementation is undertaken in the context of a flexible exchange rate regime. In the attainment of the set objectives, the CBK is accountable to Parliament and to the public.

The White Paper outlines various measures, including reforms in the interbank market, aimed at improving the transmission of monetary policy. In July 2014, the Kenya Banks' Reference Rate (KBRR) was introduced as part of measures to enhance the supply of private sector credit and mortgage finance in Kenya by facilitating a transparent credit pricing framework. The KBRR framework was also intended to provide a common base lending rate for banks, and to enhance the transmission of monetary policy signals through banks' lending rates. The KBRR was suspended in July 2015, as the cost of credit remained high, while transmission of monetary policy signals to lending rates remained weak.

The section below discusses recent litigation concerning monetary policy formulation and implementation.

i. *Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties) [2019] eKLR,*

Brief Facts

The petitioners, being officials and members of Ajibika Society, filed a constitutional petition in the High Court seeking an interpretation of the exercise of the National Assembly's legislative mandate under article 94 of the Constitution. The petition was in specific respect to an amendment¹¹ to the *Banking Act*, the purpose of which was to compel CBK to regulate conditions on deposits and withdrawals by customers in banks and financial institutions. *Inter alia*, the petition questioned whether in so doing, the

⁹ Section 4, Central Bank of Kenya Act

¹⁰ Central Bank of Kenya, 2021, Modernisation of the Monetary Policy Framework and Operations. <https://www.centralbank.go.ke/wp-content/uploads/2021/07/Modernisation-of-the-Monetary-Policy-Framework-Operations.pdf>

¹¹ By way of section 65 of the Finance Act, 2018 which introduced a section 33C to the Banking Act.

National Assembly had interfered with the mandate, responsibility and independence of the Central Bank of Kenya (CBK) under article 231(2) of the Constitution. They charged that the sole prerogative, responsibility and obligation of formulating monetary policy and performing other functions is conferred on the CBK in regulating banks and other financial institutions on the issues of deposits and withdrawals by their customers.

The background to the case is that the National Assembly had published the Finance Bill, 2018 which *inter alia*, sought to amend the *Banking Act*¹² to review the capping of interest rates; as well as to amend the Central Bank of Kenya Act¹³ to provide powers to CBK to regulate mortgage refinance business and bring mortgage refinance companies within CBK's reporting framework.

CBK argued that once Parliament passed the law providing for the composition, powers, functions and operations of the CBK, it could not again take away those powers, functions and operations by enacting a statute that attempted to take away the exclusive mandate vested upon the CBK by the Constitution itself. CBK's position was that the legislation contemplated by Article 231(5) of the Constitution could only provide *additional* functions and powers conforming to the constitutional provisions and could not take away or interfere with the manner in which the core constitutional obligations of the CBK were discharged. CBK further argued that Principle 2 of the Basel Core Principles requires regulators to possess operational independence, transparent processes, sound governance and budgetary processes that did not undermine the autonomy of the regulator. CBK further argued that under this principle, the supervisor has discretion to take any supervisory actions or decisions on banks under its supervision.

Issues and relevant provisions of law¹⁴

The Court identified the following amongst other salient but relevant issues for determination: the constitutionality of Section 33C of the Banking Act, 2018. The Court looked at the constitutionality of the process of its enactment, whether there was public participation in its enactment, and whether the National Assembly exceeded its mandate by infringing on CBK's mandate and independence.

Held

The High Court held that the independence granted to the CBK by Article 231(3) of the Constitution did not mean that the National Assembly could not legislate on anything touching on the functions allocated to the CBK by Article 231(2) of the Constitution.

Relying on the finding of the High Court in *Boniface Oduor v Attorney General & another*;

¹² Cap 488 Laws of Kenya

¹³ Cap 491, Laws of Kenya

¹⁴ The Constitution of Kenya, 2010, Articles 10(2); 94; 118 and 231; Banking Act, Cap 488, Section 33C; 33(4); Central Bank of Kenya Act, Cap. 491, Section 57; Finance Act, 2018, Section 65; The Statutory Instruments Act, 2013, Section 13; Basel Core Principles for Effective Banking Supervision, October 2006.

Kenya Banker's Association & 2 others (Interested Parties)¹⁵ where the decision by Parliament to vary the interest rates charged by banks was held not to be an interference with CBK's mandate of formulating monetary policy, the Court held that courts should not question the motives of the National Assembly when it legislates on certain matters.

Accordingly, the High Court found that inter alia that in passing Section 65 of the Finance Act, 2018 and Section 33C of the Banking Act, Cap. 488, the National Assembly breached the principles of public participation and good governance as established in Articles 10(2) and 118(1)(b) of the Constitution. In addition, The Court held that the National Assembly did not overstep its boundaries in directing the CBK to submit relevant Regulations for its scrutiny and approval, and that the independence of the CBK as provided for by Article 231 of the Constitution was not violated by the National Assembly.

Conclusion

This case is relevant as it draws the contours of Parliament and the CBK in so far as discharging their constitutional mandate is concerned with respect to monetary policy decisions. The case also explained the role of the National Assembly in exercising its oversight over subsidiary legislation drafted by the Regulators including the CBK.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/179226>

ii. **Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] eKLR**

Brief Facts

The petition sought to question the constitutionality of the interest capping law and other provisions of Section 33B of the Banking Act. The petitioner's main contention was that the provisions capping the interest rates charged by banks and financial institutions had the effect of depriving CBK of its exclusive constitutional mandate to formulate and implement monetary policy. CBK supported the petition arguing that Section 4D of the CBK Act establishes the Monetary Policy Advisory Committee (MPAC) which has the sole mandate of developing and/or formulating the monetary policy of Kenya. CBK further urged that the setting of applicable interest rates is purely a monetary policy issue and therefore the impugned statutory provisions clawed back CBK's independence and therefore inconsistent with the Constitution.

Issues and relevant provisions of the law¹⁶

- a. Whether the provisions of Section 33B of the Banking Act infringe on the mandate of CBK under Article 231 (2) of the Constitution for formulation of Monetary Policy.

¹⁵ 2019 [eKLR], a three-judge bench.

¹⁶ The Constitution of Kenya, 2010, Articles 1 (1), (2) and (3) (a); 10(2); 27;40; 94; 95; 110; 118; 186 and 231; Banking Act, Cap 488, Section 33B; 33(4); 36; 44; 54; Banking (Amendment) Act, 2016; Central Bank of Kenya Act, Cap. 491, Sections 4; 4D; 36(4); Finance Act, 2018, Section 65; The Statutory Instruments Act, 2013, Section 13; Banking (Increase of Rate of Banking & Other Charges) Regulations, 2006.

b. Whether the impugned section is vague, imprecise, and ambiguous?

Held

The Court held that the National Assembly had not violated Article 231(3) of the Constitution or interfered with CBK's mandate to formulate monetary policy. It stated thus:

“For that reason, it is not in our place to second guess the wisdom of the National Assembly in reaching a policy decision that interest rates needed to be regulated. Whatever our views of the impact of interest rate regulation, the Court must recognize that the law was reached by the Country’s democratically elected representatives and what was decided must be taken to reflect the conscience of a majority of Kenyans...”

Emerging from the material before this Court is that, in respect to interest rates, the setting of Central Bank Rates (CBR) under the provisions of Section 36 of the Central Bank Act, is undoubtedly a function in formulation of monetary and therefore in the exclusive sphere of CBK.

What is not apparent is whether the legal framework that regulates the manner in which banks or financial institutions charge interest for facilities granted to their customers is a function of monetary policy. In other words, the Petitioner has not clearly demonstrated that the provisions of Section 33B of the Act violate CBK’s constitutional mandate of formulating monetary policy. For this reason, some latitude must be given to the National Assembly that in enacting the challenged provisions, they did not act outside the Constitution.”

The Court in this case while acknowledging that variation of interest rates is indeed formulation of monetary policy and therefore within the exclusive mandate of CBK, nonetheless pondered on whether the law regulating the manner in which financial institutions charge interest rates was also a function of monetary policy.

In the end, the Court was guided by the principle of presumption of constitutionality and accordingly held that the National Assembly did not violate the Constitution.

Conclusion

This case is important as it clarifies on the legislative policy mandate of Parliament *vis a vis* the monetary policy obligation of the CBK under the Central Bank of Kenya Act. The Court further emphasized the need for cooperation amongst all government agencies discharging their respective mandates.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/169536/>

iii. **Okiya Omtatah Okioti v Central Bank of Kenya & 3 others; National Assembly & 2 others (Interested Parties) [2021] eKLR,**

Brief Facts

The Petitioner in this case challenged the constitutionality of the interest rate cap imposed under section 33B (1) of the Banking (Amendment) Act No. 25 of 2016, which amendment was assented to by the President on 24th August 2016 and operationalized on 14th September 2016. The Petitioner argued that CBK had failed in its regulatory functions by undermining the interest rates' capping law by 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). The petition further claimed that the CBK had 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 for pushing for the repeal of the law capping interest rates.

Issues and Relevant Provisions of the Law¹⁷

The Court identified the following salient but relevant issues for determination:

- 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** 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.

Held

The Court held that the Petitioner's claim that the lack of an interest rate cap law infringes their rights under Article 40 of the Constitution was not clear considering that charging of interest arises out of contractual relationships between lenders and borrowers. The court found that this relationship is governed by laws that govern financial institutions as well as land acquisition. That being the case, it was 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 held that the lack of an interest rate capping law does not in any way infringe on **Article 40**.

Conclusion

This case is relevant to the issue of formulating and implementing monetary policy since it sheds light on the decision of **Boniface Oduor** case that held that section 33B of the Banking Act in relation to the Kenya Banks interest rates was held to be unconstitutional, null and void.

¹⁷ The Constitution of Kenya, 2010, Articles 24, 40, 95(5)(b), 129, 238(1) and 259(1); Banking (Amendment) Act No. 25 of 2016 section 33B (1); The Central Bank of Kenya Act, Section 36A (1); Finance Act 2019, Section 45.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/210518>

iv. Kituo Cha Sheria & another v Central Bank of Kenya & 8 others [2014] eKLR,

Brief Facts

The Petitioners lodged a petition against the Respondents, including CBK, alleging that the respondents had acted in contravention of the values and principles enshrined in the Constitution; had directly procured currency printing services from the 5th, 6th and 7th Respondent without a competitive process; that the actions of the respondents amount to vulture funding; that there was no openness in the transaction; and that the Respondents had violated the right of citizens to access information held by the state.

the Petitioners also argued that the extension of the contract with the 5-7th Respondents following directions of Cabinet as expressed in a Cabinet memo was a violation of the Constitution given that under article 231(3) of the Constitution, the CBK was not required to take directions from any person or authority in the performance of its functions.

Issues and the Relevant Provisions of the law¹⁸

Whether the decision to extend the contract with the 5th-7th Respondents following directions of Cabinet was in violation of the Constitution.

Held

In dismissing the consolidated Petition, the Court made an important remark with respect to the working of the Central Bank of Kenya in relation to other government agencies. It held that the role of the Central Bank vis-à-vis government in general and the Cabinet in particular is one that requires co-operation, collaboration, and information sharing.

The Court further stated that in the absence of evidence that the decision alleged to have been made on the basis of a Cabinet memo was made at all, or was made without input from Central Bank, it was difficult to see a basis on which the court could declare the said decision null and void.

The Court further stated that it is expected that the Central Bank, in playing its role in “*formulat(ing) and implement(ing) monetary policy, and in “support(ing) the economic policy of the Government,” it would engage with government at the Cabinet level and that decisions would be made that impact on the supply of currency in the country such as is alleged to have taken place in this case. Accordingly, the Court held that there was no constitutional violation as alleged.*

¹⁸ Constitution of Kenya, Articles 10(1), 35(1), 73, 201, 227 and 231; Public Procurement and Disposal Act No 3 of 2005, section 2; Central Bank of Kenya Act, Cap 491, section 4.

Conclusion

The case highlighted the relationship between the CBK and the government in general and the Cabinet in particular was one that required co-operation, collaboration and information sharing.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/101569/>

3.2 AS BANKER AND ADVISOR TO, AND AS FISCAL AGENT OF THE GOVERNMENT

In its capacity as banker to the Government, and subject to instructions from any public entity, the Bank accepts deposits and effects payments on the accounts of the public entities in line with stipulated regulations (section 4 of CBK Act). As an agent of the Government, the CBK administers public debt (including issuance and redemptions of Treasury bills and bonds) of the Government.

The Bank may also lend to the Government in line with provisions in the CBK Act, for the purpose of offsetting fluctuations between receipts from the budgeted revenue and payments of the Government. All lending to the Government by CBK is at market interest rates and is secured with negotiable securities issued by the Government.

As advisor to Government, it is the duty of the CBK to advise the Minister for Finance on any matter which may affect the achievement of the primary objectives of the Bank. However, the Minister may also request the Bank to give its advice on any particular matter.

The section below discusses the recent litigations against the CBK in its capacity as banker to and advisor, and as fiscal agent of the Government, and their outcomes.

v. Republic v Central Bank of Kenya Ex parte Nairobi City County Assembly Services Board; Office of the Clerk of the County Assembly of Nairobi (Interested Party); Edward Ombwori Gichana & another (Intended Interested Parties) [2022] eKLR

Brief Facts

The *ex parte* Applicant (Nairobi City County Assembly Services Board) filed a judicial review (chamber summons) Application seeking leave to apply for an Order of mandamus compelling the CBK to effect signatory and mandate changes in CBK Internet Banking (IB) account numbers for account operations to the Clerk of the Nairobi City County Assembly as a signatory. In addition, and separately, the *ex parte* Applicant also sought in the interim, to be allowed partial access to the Nairobi City County Assembly named bank accounts to enable payment of salaries for staff and to be allowed to introduce other persons as Signatories and Level 2 Approvers of the bank accounts. Upon being furnished with this request, the CBK had written to the *ex parte* Applicant requiring to be provided with a list of requirements and documents as part of the CBK's Standard Operating Procedures.

In particular, the CBK required to be furnished with a letter forwarding the Internet Banking (IB) Token surrendered by the then outgoing Clerk of the National Assembly; and Mandate forms signed by the outgoing Accounting Officer/Clerk and the incoming Accounting Officer/Clerk to facilitate a handover.

The ex parte Applicant argued that the 1st Interested Party was mandated to nominate and maintain alternate CBK IB Mandate Holders and that these Mandate Holders are permitted by the CBK to access the Assembly Accounts with the approval of the Ex-Parte Applicant.

The Applicant further argued that failure by CBK to grant the approval was in bad faith and had hindered the resumption of normal County Assembly operations including but not limited to urgent payment of salaries, benefits, taxes, and suppliers. The Applicant urged that the CBK had failed to consider relevant factors including the fact that the outgoing Clerk had refused to hand over and sign the mandate forms after being removed from office through a Court Order, and that CBK failed to consider the efforts the Applicant had made in complying with the CBK's requests, while insisting on compliance with its SOPs which had no legal backing.

Issues and the Relevant Provisions of Law¹⁹

The court in this matter identified the main issue of determination to be whether there is an arguable case that is fit for further examination to determine whether leave to seek the Judicial Review Orders sought ought to be granted.

Held

The Court held that the Central Bank of Kenya is mandated under Article 231 of the Constitution of Kenya and Section 4 of the Central Bank of Kenya Act to implement policies as best to promote the establishment, regulation, and supervision of efficient and effective payment, clearing and settlement systems. The Court found that the Central Bank of Kenya had implemented the Standards of Procedure in order to maintain accountability and transparency in accordance with the provisions of Chapter 12 of the Constitution of Kenya and the provisions of the Public Finance Management Act. The Court found that the Central Bank of Kenya had not refused to perform its mandate. It only insisted on the adherence to the SOPs. The Court went on to say that allowing the application would be to exempt the ex-parte Applicant from the standards of procedure which would go against the provisions of the Constitution. In the Court's view, the logical step would have been for the ex parte Applicant to seek Orders compelling the outgoing Clerk to comply with the SOPs rather than seeking to compel the CBK to disregard the SOPs for purposes of accommodating the ex parte Applicant.

¹⁹ The Constitution of Kenya 2010, Articles 231 (1); Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya, section 3(1) and 4(1); The Standard Operating Procedures

Conclusion

This case is relevant as it buttresses the Central Bank of Kenya's mandate as banker and adviser to and fiscal agent of the government. The case also goes a step further to emphasize the importance of following the SOPs and maintaining accountability and transparency in all transactions regardless of whatever public entity seeks exemption.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/210518>

vi. County Assembly of Service Board of West Pokot v Governor County Government of West Pokot & 3 others [2021] eKLR

Brief Facts

The Petitioner (The County Assembly of Service Board of West Pokot) filed a Petition at the High Court in Kitale seeking orders to be granted to apply for an Order of mandamus to compel the CBK to effect signatory changes in CBK Internet Banking (IB) account numbers for account operations.

The Petitioner averred that despite several letters requesting the CBK to reinstate/activate the signatories who were illegally deactivated by the 2nd Respondent, the CBK has refused, ignored and/or neglected to do so to the detriment of the Petitioner. Consequently, the Petitioner could not withdraw funds to pay allowances to its members, staff and service providers thus exposing it to the risks of being sued.

Issues and the Relevant Provisions of Law²⁰

The main issue for determination by the Court was whether the Petitioner has made out a case for the grant of an interim mandatory injunction compelling the CBK to forthwith reinstate and/or activate the signatories approved by the Petitioner's County Assembly Service Board on 29th July 2020 pending the hearing and determination of both the Application and the Petition.

Held

The Court, while referring to Section 148 of the Public Finance Management Act held that the accounting officer under Section 148 (2) of the Public Finance Management Act, is the person responsible for the administration of a county government entity and in his capacity as the accounting officer, he is responsible for managing the finances of that entity. In this instance, that person was the Clerk to the County Assembly.

The Court further stated that for an interdiction to be operational, it must be communicated to the CBK, and a proper handing over had to be done between the outgoing and the incoming officers. This had not been done.

²⁰ The Constitution of Kenya 2010, Article 231 (1); Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya, section 3(1) and 4(1); Public Finance Management Act No. 18 of 2012 section 148; County Governments Act, No 17 of 2012, sections 13 (1) and (4); The Standard Operating Procedures

The Court stated that the CBK had not erred in continuing with the operations with the county's signatories as they were still validly and legally appointed and thus the CBK's actions were not unreasonable. The Court therefore disallowed the Petition on account that the Petitioner had not discharged the burden cast upon it of making out a case for the grant of an interlocutory mandatory injunction. Consequently, leave to file judicial review application for Orders of Mandamus against CBK was denied.

Conclusion

This decision shed light on CBK's role as banker to public bodies and the importance of adherence to the set SOPs pursuant to the Central Bank of Kenya Act, Public Finance Management Act, County Governments Act and The Standard Operating Procedures in discharging its duties as banker to public bodies.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/208841/>

vii. Central Bank of Kenya v Giro Commercial Bank Limited & 3 others [2019] eKLR,

Brief Facts

CBK brought an action against the Defendants, in its capacity as the fiscal agent of the government in charge of administering public debt. In this case, CBK alleged that the defendant bank had opened some accounts without following the laid down CBK Prudential Guidelines as well as the "Know Your Customer" guidelines. In particular, CBK charged that: the bank account was opened on the same date as the registration of the business name and without the financial statement of the business for the preceding 12 months or at all; there was no verification as to whether the proprietor was a registered taxpayer; there were no details of the permanent address of the business; there was no evidence of reference from the introducing party; Customer verification was sought from a third party Bank six (6) months after the account was opened instead of immediately after the proprietor approached the Defendat; and there was no verification of the horticultural business allegedly undertaken by the proprietor/customer.

Subsequently, this account was used to move money from a Central Depository System (CDS) Account thereby leading to the illegal and wrongful sale of Treasury Bonds belonging to another person. This led to a loss of about Ksh. 205 million. CBK therefore sought to recover this amount of money from the defendant bank terming it as its constructive trustee, or to recover the entire amount from the all the defendants jointly and severally.

Issues and the Relevant Provisions of Law²¹

The main issues for determination were whether the manner in which the 3rd Defendant's account was opened and operated was not in compliance with the law in particular the prudential guidelines issued by the Plaintiff in its capacity as a regulator and whether the CBK was entitled to recover Ksh 205 million lost as a result of the violation.

Held

In its determination, the Court agreed with CBK that the defendant bank had allowed the opening and operation of the said bank account in the most casual manner without regard for the applicable law.

The Court further faulted the Defendant branch Manager for not confirming that the receipt of the funds into the account was indeed from the horticulture business as alleged or raise any report on the suspicious activity on the 3rd Defendant's account, holding that the failure to make inquiries made the Defendant bank a conspirator in laundering the fraudulently obtained money.

The Court was of the view that the 2nd Defendant bank had fallen way below the applicable standard and duty of care owed by a bank to its customer.

The Court found the 2nd and 3rd defendants liable to repaying the lost money to CBK.

Conclusion

This case cemented the position of the CBK as a regulator and the place of prudential guidelines in the enforcement of the CBK's mandate. .

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/186512/>

3.3 LICENSING AND SUPERVISING AUTHORISED DEALERS

According to section 4A of the CBK Act, the Bank licenses and supervises authorized dealers in the foreign exchange market. On their part, the dealers are required to maintain records or other documents as specified by the Bank and is required to furnish the information to the CBK when required. The dealers are also required to comply with requirements on operation of foreign currency accounts as required by CBK.

The section below discusses the recent litigations against the CBK in its role of licensing and supervising authorized dealers, and their outcomes.

viii. Paul Kobia v Central Bank of Kenya & another [2020] eKLR, Petition E001 of 2019

Brief Facts

In this case, the Petitioner had sued the CBK following a letter dated 14/12/2018 from his bank, Barclays Bank Limited declaring its intention to terminate its bank-customer

²¹ Banking Act, Cap 488, section 34; CBK Prudential Regulations for Banking Institutions, 2000, Regulation 2

relationship with the Petitioner. In the said letter, no mention was made of the CBK or the regulations/guidelines it had passed as being the reason for the intended closure of the Petitioner's account, with the bank stating that the decision was a business decision. The Petitioner brought an action against CBK claiming that it was CBK's rules/regulations/guidelines that had resulted in the decision by his bank to decide to close his account. The Petitioner did not sue his bank, Barclays Bank PLC.

In this suit, the Petitioner sought a variety of orders including: a declaration that the CBK's regulation requiring full disclosure and proof of the basis of the source of funds by customers prior to crediting the customer's accounts was an infringement to the customers' constitutional right to privacy and property thus is null and void; an injunction to prevent CBK from imposing rules that make cash withdrawals by customers of banks difficult and which breach confidentiality of financial transactions of customers unless there is unresolved complaint lodged by any statutory agency or breach of the statutory provisions; injunction to allow the Petitioner to access his funds and to prevent the CBK and its agents from closing the Petitioner's bank account; and an award of general damages.

Issues and Relevant Provisions of law²²

In deciding this case the court identified the issue for determination as whether the Petitioner has made out a case for the granting of the orders sought in the petition.

Held

The Court found that the Petitioner had failed to show a nexus between the grievances that had been occasioned against him and the CBK. The Court stated that the Petitioner's grievances lay with his banker for the closure of the account since it was done by the bank at an internal level and not in accordance with any of the regulations set out by the CBK. Accordingly, the Court held that the action by the Petitioner's bank to close his bank account was not related whatsoever with CBK or its regulations/rules.

Conclusion

The Court did not have occasion to discuss salient issues that arose in the suit and which are important in illuminating on the mandate of the Central Bank in inspection and supervision of banks as well as a regulator (AML), as against the constitutional right to property and privacy. This would have clarified the balance to be struck and whether, if at all, the passage of such rules and enforcement of the same by CBK amounts to a violation of the constitutional right to property or privacy.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/201169>

²² The Constitution of Kenya Articles 1, 3, 4, 10, 22, 23, 24, 31, 35, 40, 46, 47, 48, 50, 231, 232, 258, 259 and 260; Central Bank of Kenya Act; Banking Act; Consumer Protection Act.

ix. Central Bank of Kenya & another v Ratilal Automobiles Limited & 10 others [2018] eKLR, Civil Appeal 279 of 2006

Brief Facts

In this case, the 1st to 4th Respondents (being customers of Charterhouse Bank Limited) obtained leave to file judicial review proceedings against the Appellants from the High Court at Eldoret, which leave operated as stay against the Central Bank of Kenya from, *inter alia*, auditing or investigating the affairs of Charterhouse Bank Limited; and refusing to renew the banking licence of Charterhouse Bank Limited. The stay Orders also prohibited the duly appointed statutory manager (2nd Appellant) from undertaking her functions over Charterhouse Bank as statutory manager.

Issues and the Relevant Provisions of Law²³

The issues for determination were:

- a. Whether the learned judge was right in granting leave to the 1st to the 4th Respondents to apply for judicial review orders as aforesaid; and
- b. Whether the learned judge erred in directing that the leave so granted do operate as a stay of the appellants' activities complained of by the ex parte applicants.

Held

On appeal, the Court of Appeal held that the stay Orders issued by the High Court were excessively wide to the extent that they sought to cripple the work of CBK and the statutory manager, to the extent that the orders that benefited Charterhouse Bank were not sought by the Bank (which was an interested party in the case) but rather by the Bank's customers; and the fact that the interlocutory stay Orders were couched in the manner of an *ex parte* mandatory injunction, of which the High Court had no jurisdiction to issue.

The Court of Appeal was of the view that the High Court in granting the wide stay orders did not appreciate their full implication, whose effect was to hamper the proper operation of the regulator (CBK) and the statutory manager, resultantly negatively affecting its statutory mandate.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/165385/>

x. George Ragui Karanja (Suing as Director of Interactive Advertising Limited) v Central Bank of Kenya; Equity Bank Kenya Limited (Interested Party) [2021] eKLR

Brief Facts

The Petitioner, a Director of a company (Interactive Advertising Limited), lodged a Petition against the CBK alleging that CBK had violated his constitutional rights through: failure to ensure compliance by Equity Bank with due diligence requirements; failure to

²³ Banking Act, Cap 488, section 34; Civil Procedure Rules, Order LIII.

investigate non-compliance with the due diligence requirements on the part of Equity Bank; failure to initiate appropriate remedial action against Equity Bank for failure to report a suspicious activity; failure to pursue remedial measures provided under sections 33, 33A, 34 and 35 of the Central Bank of Kenya Act; and, the reckless absconding of duty by summarily dismissing his complaints. The Petitioner's claim was that his co-director in the company had opened another bank account with Equity Bank thereby diverting the company's funds and causing him loss, and that the CBK had deliberately and negligently acted or omitted to act on his complaints regarding Equity Bank's (Interested Party) fraudulent opening of the account in question. CBK argued that the Petitioner had written to Equity Bank indicating that he had withdrawn all complaints against his Co-Director and the Bank after entering into a Settlement Agreement with the co-director. In view of this Settlement Agreement and withdrawal of the complaint, CBK argued that there was no basis for it to take any further action. CBK further argued that the Petitioner had lost in a civil case against the Interested Party (Equity Bank Limited); the Petitioner had received compensation from his co-director and any further payment to him would amount to unjust enrichment-as a basis for not taking further action.

Issues and the Relevant Provisions of Law²⁴

The Court framed four issues for determination, to wit:

- a. Whether this petition is res judicata,
- b. Whether the Respondent violated its constitutional and statutory obligations.
- c. Whether the Respondent infringed on the rights of the Petitioner; and
- d. Whether the Petitioner is entitled to the reliefs sought.

Held

The Court agreed with the CBK's decision not to intervene in the matter following the withdrawal of the complaint by the Petitioner, compensation to the Petitioner by the Co-Director, and failure to obtain a judgment against Equity Bank Limited on the basis of the doctrine of unjust enrichment.

Importantly, the Court stated that it was erroneous for the Petitioner to believe that the CBK's supervisory jurisdiction was only exercised if it had determined that Equity Bank Limited had not exercised prudence and was negligent when opening the account in question.

In the Court's reasoning, for CBK to investigate the matter further after the Petitioner was unsuccessful in his civil suit against the Interested Party (Equity Bank), would have amounted to CBK exercising appellate powers over the decision of the High Court.

The Court faulted the Petitioner for rushing to the High Court in a civil suit instead of letting the CBK perform its statutory mandate, which forced CBK to write to the Petitioner to state that it would await the High Court's decision.

²⁴ Constitution of Kenya, Articles 2(1), 4, 10,27,40,46,47 and 231; Central Bank Act, Cap 491, sections 33, 33A, 34 and 35.

Conclusion

the Court held that the decision of the CBK not to intervene in the matter was a proper exercise of its supervisory jurisdiction and it could not be said that it had abdicated its supervisory role or mandate.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/223556/>

xi. Samuel Muihia Kariuki & 26,249 others v Attorney General & 4 others [2021] eKLR, Petition No. 90 of 2015

The crux of this Claim arises from fraudulent activities which resulted in the Petitioners' being defrauded over Kshs 8 billion. The fraud was said to have started with the untenable registration of at least 257 outfits 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. The operators of these entities opened a number of bank accounts under false pretences of paying high returns on deposits made with them and approached the Petitioners, who were induced into depositing large sums of money in a number of accounts opened in banks and financial institutions.

The Petitioners contend that the Respondents, amongst them being the Governor of Central Bank, owed them and the public a duty of care which is imposed on them by the Kenyan constitution, statutes and common law and in diverse case law. The petitioners further took issue with the impounding of the money recovered from the fraudsters by the CBK for a period of 8 years. The Petitioners prayed for *inter alia*, a declaration that the Respondents owed them a duty of care under statute and/or common law and/or equity and the Constitution 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; 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 CBK on directions; and an order of general compensation.

In response, CBK argued that the dispute before the Court revolved around the creation of pyramid schemes which are neither licensed nor regulated under the *Banking Act* **and as such, fell outside the scope of CBK's regulatory mandate. CBK further averred that the Law on Negligence 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 and averred that there were mechanisms to protect the petitioners namely; the *Penal Code*,²⁵ the *Banking Act*,²⁶ *Co-operative*

²⁵ Cap 63, Laws of Kenya

²⁶ Cap 491, Laws of Kenya

Societies Act,²⁷ and the *Microfinance Act*.²⁸

Issues and the Relevant Provisions of Law²⁹

The Court framed the following issues for determination:

- a. Whether the Respondents owed the Petitioners duty of care at common law?
- b. Whether the Respondents owed the Petitioners statutory 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?

Held

In its Judgement, the Court held that CBK did not create any danger of harm and in no way had it assumed responsibility for the safety of the Petitioners. CBK, did in fact issue notices in the daily newspapers warning members of the public against potential fraud by pyramid schemes which were unregulated. In this notice, CBK called upon commercial banks and financial institutions, which fell under CBK's regulatory mandate to urgently conduct due diligence on accounts exhibiting characteristics of pyramid schemes in accordance with **“Know Your Customer (KYC)” guidelines and to act decisively in closing such accounts.**

In view of this, the Court held that CBK did not breach any statutory duty of care and did not carry out their duties to the detriment of the Petitioners.

Conclusion

This decision buttresses the need for depositors and investors to only deal with licensed institutions by the CBK if they are to seek relief under the doctrine common law duty of care.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/208040>

3.4 MANDATE EXERCISED UNDER THE KENYA DEPOSIT INSURANCE ACT 2012 AND IN FOSTERING THE LIQUIDITY, SOLVENCY, AND PROPER FUNCTIONING OF A STABLE MARKET-BASED FINANCIAL SYSTEM

Under Section 43 (1) of the Kenya Deposit Insurance Act 2012, Central Bank of Kenya is mandated to appoint Kenya Deposit Insurance Corporation as the sole and exclusive receiver of any institution if it determines that the circumstances listed at Section 43 (2).

²⁷ No. 12 of 1997

²⁸ No. 19 of 2006

²⁹ Constitution of Kenya, 2010, Articles 22,23, 40 and 75; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010

Further Section 54 (1) provides that:-

The Central Bank shall appoint the Corporation as the liquidator of an institution where:-

- a. a recommendation to liquidate has been made under this Act; or
- b. in any other case:-
 - (i) the institution is deemed to be unable to pay its debtors; or
 - (ii) a winding-up order is made or a resolution for voluntary winding-up is passed against the institution; or
 - (iii) the institution is unable to pay sums due and payable to its depositors or creditors; or
 - (iv) the Central Bank determines that the value of the institution's assets is less than the amount of its liabilities; or
 - (v) if in the opinion of the Central Bank, the institution has engaged in malpractices or activities that are contrary to the provisions of any Kenyan or other applicable law.

The appointment of the Corporation as the liquidator of an institution shall have the same effect as an appointment of a liquidator by the Court under the provisions of Part VI of the Companies Act.

No liquidator of an institution shall be appointed under the provisions of the Companies Act if the Corporation has already been appointed as liquidator.

No liquidator of an institution, other than the Corporation shall be appointed without approval of the High Court.

The High Court shall not grant approval for the appointment of a liquidator under subsection (4), unless the Central Bank certifies that it does not intend to exercise its powers under this section.

xii. Kimani Waweru & 4 others v Central Bank of Kenya & 7 others [2018] eKLR,

Brief Facts

This Petition was brought by some customers of Imperial Bank Limited (IR) against the CBK and the KDIC. The Petitioner's principal grievance against the Central Bank of Kenya was an alleged breach by the Central Bank of Kenya of its Constitutional duty under Article 231, Statutory duties under the Central Bank of Kenya Act, Sections 4 and 4(A) and the Banking Act, by extension.

The Petitioners pleaded that they had a legitimate expectation that the CBK would at all times discharge its Constitutional and Statutory Obligations.

The Petitioners took issue with the fact that by the time the bank was placed under Receivership, CBK had no constituted Board of Directors, charged with recommendation and/or making of such a decision. As such, they also took issue with the appointment of KDIC as the Receiver.

They pleaded breach of their right to: information, property, fair Administrative Action, and consumer rights.

Among the prayers sought were; an Injunction to stop the further liquidation of IBL and/or a freezing Order to stop the running of time for the receivership period, a declaration that CBK's decision to place IBL under receivership on 13th October, 2015 was illegal as was the appointment of KDIC as the receiver. A quashing Order was sought for purposes of quashing the gazette Notice through which CBK's communication was made and an Order for restitution of the Petitioner's full deposits at IBL as at 13th October, 2015.

In its response, the Central Bank of Kenya (CBK) defended its position to place IBL under receivership as lawful and that it took into consideration all pertinent matters. CBK denied violation of any of the Petitioners' rights and pleaded that it was simply exercising its mandate, in compliance with the law.

CBK's position was that the Order for restitution sought was an attempt by the Petitioners to circumvent the provisions of the Kenya Deposit Insurance Act, 2012 (KDI Act) which would amount to discrimination against other depositors and creditors.

CBK relied on section 10 of the **Central Bank of Kenya Act as being specific on the functions of its Board of Directors, none of which included to meet, recommend, and appoint a Receiver over a banking institution, as was implied by the Petitioners.**

Issues and the Relevant provisions of law³⁰

The court framed these issues as ripe for determination:

- a. What is the obligation of the CBK under the Constitution with regard to the manner in which financial institutions in particular banks are managed in the country;
- b. Whether the CBK carried out that constitutional mandate; and if not, whether the petitioners' constitutional rights were thereby violated.

Held

The Court found no merit in the Petition and dismissed the same but with no Order as to Costs. The Court held *inter alia* that:

Considering the objects and functions of the CBK and the precarious nature of the banking industry, it was the Court's view that it was prudent that a pre-emptive action be taken by the CBK in order to avert a run on the bank and that any challenge to the decision taken by the CBK be taken thereafter.

Where the action contemplated is for the protection of public interest, private interests may, on occasion, give way with each case to be considered on its own facts.

Absence of the Board of Directors does not disable the Governor from taking urgent measures such as placing a Bank under receivership.

³⁰ The Constitution of Kenya, 2010, Articles 22, 27, 35, 40, 47 and 231; Banking Act Cap 488, sections 4 and 32; Fair Administrative Actions Act, No 4 of 2015, sections 4 and 5; Kenya Depositors Insurance Corporation Act, section 43.

The Petitioners did not meet the threshold for directing that information be disclosed to them.

The Petitioners were undeserving of the Order of restitution because there was no satisfactory evidence that the Respondents had been responsible for the loss, if any occasioned to them.

The Court also observed that if it were shown that CBK had been made aware of irregularities and illegalities committed in the bank prior to its being put under receivership and took no action, then CBK would be guilty of failure to undertake its constitutional and statutory obligations with any person sustaining loss as a result thereof entitled to seek compensation from the CBK.

Conclusion

Specialized bodies established under statutes, like CBK, ought to be given the leeway to conduct their proceedings freely without unnecessary interference by the Court and that as long as they are acting within their jurisdiction, the Court can only step in to ensure fair conduct of their proceedings.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/151830>

xiii. East African Court of Justice Reference No. 8 of 2017, Pontrilas Investments Limited =vs= Central Bank of Kenya and Attorney General; Central Bank of Kenya v Pontrilas Investment Limited & Another, Appeal No. 3 of 2020 at the EACJ and Application No. 6 of 2022, The Central Bank of Kenya =vs= Pontrilas Investments Limited & Attorney General, Republic of Kenya

Brief Facts

The reference No. 8 of 2017 was filed by Pontrillas Investments Limited at the East African Court of Justice in Arusha against the Central Bank of Kenya and the Attorney General of the Republic of Kenya. The Applicant was claiming to be an assignee of deposits made at Imperial Bank Kenya Limited (Under Receivership) and alleging that the Central Bank of Kenya failed to discharge its obligations to properly supervise Imperial Bank and secure customer deposits for purposes of repayment upon maturity and further breach of Kenya's obligations under particularly Articles 6, 7(2) and 8(1)(c) of the Treaty for the Establishment of the East African Community as well as the Protocol for the Establishment of the East African Monetary Union.

The Applicant also alleged that the CBK breached its obligation to ensure that financial institutions are regulated in accordance with good governance, the laws of Kenya and the said treaty.

The Applicant sought a declaration that CBK was in breach of its obligations under the Treaty and the objectives of the Protocol for the establishment of the East African

Community Monetary Union in allowing the deposits to be lost; that the Applicant was entitled to compensation jointly and severally by CBK and the Attorney General of Kenya for the loss suffered by the Applicant as a consequence of the said breach; together with interest on amounts found to be due and costs.

The CBK raised a Preliminary Objection to the Reference on the ground that the Central Bank of Kenya was not an institution of the community and the East African Court of Justice lacked jurisdiction over it in terms of Article 9(2) of the Treaty. The Applicant filed another Application seeking to compel the attendance of Dr. Patrick Njoroge, the Governor of the Central Bank of Kenya, as a witness.

Issues and the Relevant Provisions of the Law³¹

Whether the CBK was an institution of the Community and a proper Respondent before the EACJ; whether the Governor of the CBK could be compelled to appear before Court to produce evidence.

Held

The Court delivered a Ruling on the Preliminary Objection on **4th July 2019** holding that the objection taken was not a pure point of law that could be raised and determined at the preliminary stage. The Court reserved the issue of jurisdiction for the hearing of the Reference. Given that the Reference was ready for hearing, we moved the Court by an Application dated 16th March 2022 and filed as Application No. 6 of 2022, seeking a bifurcated hearing of the Reference and requested the Court to first deal with the earlier reserved question of jurisdiction before proceeding to hear the main reference.

The Court heard the Application and delivered its Ruling on 2nd December 2022 where it held that the CBK was not an institution of the East African Community under Article 9(2) of the Treaty, that the EACJ did not have jurisdiction *ration personae* over it and dismissed all claims against the CBK and discharged it absolutely from the reference. Aggrieved by the Ruling of the Court, the Applicant filed Appeal No 2 of 2023, Pontrillas Investments Ltd =vs= The Central Bank of Kenya & Attorney General, Republic of Kenya, which is still pending determination.

The Trial Court had declined to order the Governor of the CBK to appear before the Court as a witness as urged by the respondent, instead ordering the head of CBK's supervisory department to appear since he was better placed to testify. On appeal, the Court dismissed the entire appeal and affirmed the decision of the Trial Court. Consequently, Witness Summons were issued compelling the Head of the Central Bank of Kenya's Supervisory Department to appear in person for purposes of adducing evidence and production of documents before the EACJ.

³¹ Treaty for the Establishment of the East African Community; Constitution of Kenya, 2010.

Conclusion

This case was important as it revolved around the cardinal question of bank supervision under the Kenyan and regional East African Community law, the obligations of a regulator under the Constitution and the law and the nexus of the obligations of the Republic of Kenya under the EAC Treaty and its protocols vis a vis the obligations of institutions established by members states in so far as regulation and supervision of banks is concerned. The other issue of importance was whether the Central Bank of Kenya was an institution of the community for purposes of being sued as a party before the East African Court of Justice under Article 30 of the Treaty.

xiv. Chase Bank (Kenya) Limited Employee Ownership Plan & another v Kenya Deposit Insurance Corporation & 4 others [2020] eKLR, Petition No. 06 of 2009

Brief Facts

The Petition was brought by the Employee Ownership Plan of Chase Bank which was put into receivership and taken over by SBM Bank. The Petitioners, being members of the Employment Ownership Plan argued that the Respondents, including CBK, did not disclose the fate of employees of Chase Bank that had since been taken over by SBM. In particular, the petitioners prayed for orders that: A declaration that the separation and disposal agreement between the respondents herein is a product of violation of Articles 10,41,47, it is prejudicial to third party employee interest and is invalid; in the alternative that the Petitioners were entitled to 7.3% equity acquired by SBM Bank; and an order that Section 15 of the Kenya Deposit Insurance Act is unconstitutional and in contravention with Article 10 read with 35 of the Constitution.

The Respondents' position was that the Petitioners lack *locus standi* to file the said Petition.

Issues and the Relevant provisions of law³²

- a. Whether section 15 of the Kenya Deposit Insurance Act is unconstitutional
- b. Whether the agreement entered between the CBK, KDIC and SBM was a violation of Articles 10, 41 and 47 of the Constitution
- c. Whether the petitioners had locus to bring the petition to court.

Held

The Court found that the Petitioners had no *locus standi* to lodge the Petition as the 1st Petitioner had not attached a certificate as required by the Trustee Act and the 2nd Petitioner had not provided evidence of his membership in the 1st Petitioner since he did not avail a certificate of entitlement representing the number of units he owned in the 1st Petitioner.

³² Constitution of Kenya, 2010, Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 35,37, 41,47 and 48; Kenya Deposit Insurance Act No 10 of 2012, sections 5, 15 and 50; Access to Information Act, 2016

On the functioning of the mandate of CBK and the Kenya Deposit Insurance Corporation (KDIC), the Court disagreed with the argument by KDIC that since it acts as an agent of an institution (bank) under receivership, it could not be sued, holding that the fact that KDIC acts as an agent does not exonerate its officers from responding to inquiries made on a matter.

Further, the Court held that while the Governor of CBK is forbidden under section 17 of the Central Bank of Kenya Act from making personal disclosure of information he obtains in the performance of his duties, he is not shielded by that legal provision from responding to an inquiry made in his official capacity.

The Court held that the KDIC and CBK was right in its refusal to disclose the contents of the agreement between Chase Bank and SBM Bank to the Petitioners as third parties since the agreement had a confidentiality clause.

Further, the Court found that the Access to Information Act, 2016 makes an exception to disclosure where such disclosure is likely to involve the unwarranted invasion of the privacy of an individual or substantially prejudice the commercial interests, including intellectual property rights, of an entity or third party from whom information was obtained.

The Court was of the view that the section did not stop information being released officially; rather, what it forbids is personal disclosure as opposed to official disclosure. Accordingly, it followed that the said section 15 was not contrary to Articles 10 or 35 of the Constitution.

Conclusion

This decision outlines the parameters of disclosure of information by Central Bank of Kenya and Kenya Deposit Insurance Corporation in responding with respect to requests made pursuant to receivership agreements.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/194992>

xv. Central Bank of Kenya & another v Ahmed Nassir & 4 others [2018] eKLR,

Brief Facts

The brief facts of this case are as follows: Vide a Gazette Notice, the Acting Governor of the **Central Bank of Kenya (CBK)** in exercise of powers conferred by **section 34(2) (a)** of the **Banking Act** appointed **Rose Detho (2nd appellant)** to be Statutory Manager of Charterhouse for a period not exceeding twelve (12) months. In this case, CBK and the statutory manager appointed to take over Charterhouse Bank lodged an appeal challenging the decision by the High Court to grant leave for judicial review, which leave operated as stay against the placing of Charterhouse under statutory management.

The net effect of the stay order was to wrest control of Charterhouse from the statutory manager and to return its control to the Board of Directors and shareholders of

Charterhouse, all of which interfered with the supervisory role and powers of the CBK.

Issues and the Relevant provisions of law³³

Judicial Review and the extent of infringement on the mandate of CBK.

Held

The Court of Appeal held that the Respondents were entitled to be granted leave to file a judicial review application.

However, the Appellate Court faulted the High Court for granting leave which operated as stay of placing Charterhouse Bank under statutory management. The Court noted that by the time this leave was granted, Charterhouse had already been placed under statutory management for a period of three months.

Accordingly, the issuance of leave operating as stay had the effect of reversing or inherently revoking the decision of CBK and restoring the management and control of Charterhouse to its Board of Directors without a substantive hearing.

Conclusion

This decision affirmed CBK's statutory power to intervene in the management of a bank and take over its management and control by appointing a statutory manager, if the circumstances stipulated in section 34(1) of the Banking Act do arise.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/164506/>

xvi. Charterhouse Bank Limited V Central Bank of Kenya & 2 Others [2007] Eklr,

Brief Facts

The Applicant bank principally sought the following Order from the Court of Appeal: "... Interlocutory injunction restraining the 3rd **Respondent from assuming the management of the applicant bank or otherwise further managing, controlling or directing the affairs and business of the applicant bank alongside or to the exclusion of its Board of directors pending the hearing of the applicants intended appeal against the ruling and/or Order of the superior Court, Azangalala J.**"

Issues and Relevant provisions of law³⁴

Whether the High Court exercised its discretion in refusing to grant an interlocutory injunction restraining the 3rd respondent (appointed statutory manager) from assuming the management of the applicant bank judicially.

³³ Banking Act Cap 488, section 34; Law Reform Act, sections 8 and 9; Civil Procedure Rules, Order 53, Rules 1, 2 and 3

³⁴ Central Bank Act, Cap 486; Banking Act Cap 488, section 34

Held

The Court of Appeal found no merit in the Application thereby dismissing it. The Appellate Court held that the High Court had exercised its jurisdiction properly and it would not disturb such decision.

The Court of Appeal was of the view that granting the interlocutory injunction in the in the terms sought by the applicant would not only be unlawful in view of section 34(4) of the Banking Act by restraining a statutory manager from performing her statutory duties but would also lead to undesirable consequences as such Order would result into a vacuum in the management of the bank as it would not restore the Bank's board of directors into management.

Conclusion

This case reinforced the mandate of CBK in interfering with the management of a bank to in the interest of a bank, its depositors, and creditors to ensure financial stability under section 34 of the Banking Act.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/37499>

xvii. In Re Central Bank of Kenya [2007] eKLR,

Brief Facts

This was an application at the High Court by CBK under *Section 34(3) of the Banking Act* (Cap 488) whereby CBK prayed for an order that the period of appointment of the statutory manager of Charterhouse Bank Ltd be extended for a further 12 months with effect from the 22nd **day of June 2007 on account that the statutory manager had been mired up in litigation and faced various court orders, both of which had prevented her from discharging her mandate.** In particular, a total of 5 cases had been filed at the High Courts in Kitale, Malindi, Eldoret and Nairobi whereby in 4 out of the 5 cases, injunctive orders had been issued against the statutory manager. The applicant argued that as a statutory manager, she had not been able to reverse the High Court orders at the Court of Appeal since the matter was yet to be heard.

The application was opposed by the Respondents, being the managing director of Charterhouse Bank and some depositors/customers of the bank who argued that the statutory manager had defied the Orders of the High Court which had issued stay Orders making her a contemnor who did not deserve audience of Court. The Respondents further contended that the statutory manager had failed to assume the management, control, and conduct of the affairs and business of the bank in breach of her statutory duty and Court orders. To them, the statutory manager was under a duty to continue to operate the bank to ensure that it is undertaking normal operations, offering credit, and making an income. The Respondents further argued that the bank was never insolvent in the first place, and it was therefore wrong for CBK to place the bank under statutory management.

Issues and the Relevant provisions of law³⁵

Whether the appointment of the statutory manager should be extended for a further period of 12 months.

Held

The Court held that section 32 of the Banking Act empowered the CBK to cause an inspection to be made by any person authorized by it of any institution, its books, accounts and records to establish compliance with the law, at any time, with the person making the inspection making a report to CBK for action.

The Court further stated that the purpose of appointing a statutory manager is to investigate allegations of noncompliance with law by an institution arising from regular inspections on institutions done by CBK.

To the Court, section 34(2) of the Banking Act empowers CBK to appoint any person to manage an institution placed under the management, and this means the appointed statutory manager may do all that is necessary for the interest of the institution, its depositors and creditors.

With respect to the allegation that the statutory manager had failed to operate the bank or provide banking services to customers during the period, the Court found that the same was not a primary responsibility of a statutory manager, but rather secondary and incidental to the investigation, inspection, audit and report of the bank.

The Court similarly dismissed the contention by the respondents that upon appointment, the statutory manager closed all the branches and chased customers, holding that a proper investigation such as that required of the statutory manager could not have been undertaken when the bank was offering banking services to customers since shadowy customers would carry away the money and evidence. In addition, the same could potentially lead to a run on the bank as depositors rush to withdraw their money thereby leading to the collapse of the bank.

The Court observed that in determining the continued stay or extension of the statutory manager, it would objectively examine the facts with particular reference to the terms of the appointment of the statutory manager and then conduct a balancing exercise weighing on one hand any benefits/purpose derived by the statutory manager and whether the presence of the manager is worsening the financial position of the institution and its depositors, on the other hand.

The Court held that the statutory manager was deprived and prevented from her work by the conduct of the Respondents and others who lodged multiplicity of suits, yet the statutory manager required an uninterrupted period and peaceful time at the offices and branches of the institution.

³⁵ Banking Act Cap 488, sections 32 and 34.

Accordingly, the Court held that the CBK and the statutory manager were deserving of an extension of another 12 months since failing to extend the timeline would have defeated the purpose and object of placing the institution under management plus the desired goal of establishing the extent of any violations by the institution.

In this case, the court further reiterated that in exercising its mandate supervisory powers under section 32 and 34 of the Banking Act in placing a bank under statutory management, CBK is not guided by the liquidity, solvency or the amount of money held by a financial institution. Instead, the guiding factor is compliance with the applicable rules, based on an initial routine inspection.

However, where the CBK or the statutory manager causes injury or damage to the institution, depositors, or creditors by not adhering to the law, then the CBK would be legally liable.

The powers of a statutory manager powers must not be exercised in an oppressive manner or in a manner that causes injury to beneficial and legal owners of the institution or its assets.

Conclusion

This case highlighted the supervisory mandate of the CBK in appointing statutory managers. The CBK is not guided by the liquidity, solvency or the amount of money held by a financial institution. Instead, the guiding factor is compliance with the applicable rules, based on an initial routine inspection. The case further highlights the limits of the powers of a statutory manager while emphasizing the need for ample time for the manager to execute the mandate for appointment.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/49763>

xviii. Imanan Limited & 5 others v Central Bank of Kenya & 5 others [2016] eKLR,

Brief Facts

This was a case revolving around the action by the CBK to place under receivership Imperial Bank Limited (IBL). The applicants lodged a judicial review Application in which they sought, *inter alia*, Prohibitory Orders: Against the Respondents, their agents/servants from transferring or dealing with the assets of IBL (I.R) pending engagement with the Applicants on their proposed recovery plan or an alternative viable plan to re-open the bank is agreed upon by the parties, engaging in any exclusion and transfer process of any of IBL's assets plus any of the deposits held at the bank in an unlawful manner, taking any steps that would result in the liquidation of IBL(I.R), Certiorari to quash the decision published in CBK's press release of 2nd December, 2015 which commenced a transfer and exclusion process to the benefit of the Interested Parties, Mandamus for the Respondents to allow the Ex-Parte Applicants and their agents access to information, documents and data of IBL (I.R).

The applicants premised their judicial review application on various grounds including that: CBK had demanded without justification or explanation, that the Applicants deposit Kshs. 20 billion with it. CBK by a Press Release dated 2nd **December 2015, published its decision to start an** exclusion and transfer process, which process entails the transfer and alienation of the assets and liabilities of IBL(I.R) to the Interested Parties; that the Respondents acted unreasonably in failing to engage the Applicants on their Recovery Plan which aimed at facilitating the reopening of the Bank and that the Respondents have discriminated against the Applicants by denying them access to the Bank's data, information, documents and/or records but have given access to other third parties.

CBK and KDIC on the other hand opposed the application holding *inter alia* that the proposals for recovery plan made were not genuine and were non-viable and KDIC had not started the exclusion and transfer process.

Issues and the Relevant provisions of law³⁶

Whether the respondents acted within the powers granted in law in placing the IBL under statutory management

Held

The Court noted that in placing Imperial Bank under receivership and appointing the Kenya Deposit Insurance Corporation (KDIC) as the receiver-manager, CBK was exercising its statutory obligation.

The Court held that the Respondents were under obligation to inform the applicants of their actions which were likely to adversely affect the applicants, specifically the decision to commence the exclusion and transfer process.

The Respondents were under an obligation to consider any reasonable proposals or recovery plans put forward by the applicants towards the revival of the bank and that the Respondents ought not to drive the bank into liquidation until all options of reviving the bank have been considered.

In this instance, the Court noted that CBK had given an opportunity to the applicants and considered their proposals which were unviable, and the applicants had failed to abide by the proposal from CBK.

The Court stated it would be reluctant to interfere with policy decisions made by bodies that have the expertise required. Questions as to the merit or otherwise of the decision would be left to a commercial Court rather than a judicial review Court which is not usually concerned with merits of an administrative decision.

The Respondents were under obligation to furnish the applicants with information provided it was not likely to prejudice the investigations that were being conducted.

³⁶ Constitution of Kenya, 2010, Articles 20, 21, 23, 27, 35 and 47; Central Bank of Kenya Act, Cap 491; Kenya Deposit Insurance Act, Cap 487, sections 43, 44, 45 and 53; Banking Act, Cap 488, sections 10, 11, 48; Fair Administrative Actions, 2015, sections 2, 11.

In the end, the Court *inter alia* issued a prohibitory Order against the Respondents from taking steps that would result into the liquidation of the Bank until all relevant legal requirements were complied with.

In the Judgement, the Court observed that CBK and KDIC being statutory bodies were obliged under Article 10 of the Constitution to abide by the national values and principles of governance which include the rule of law, good governance, integrity, transparency, and accountability. CBK and KDIC being statutory bodies, they are obliged under article 10 of the Constitution to abide by the national values and principles of governance include the rule of law, good governance, integrity, transparency, and accountability.

The Court also emphasized that liquidation of an institution, being a policy principle, must be subject to the national values and principles of governance in Article 47 and must be transparent and accountable. As a matter of fair administrative action, the Court opined that whenever shareholders make reasonable and tangible proposals, CBK and KDIC are under obligation to consider the same and in case of a finding that the proposals are not viable, reasons for such a finding out to be communicated to the shareholders/ Applicants.

The Court also had occasion to explain the role of a receiver whenever a bank is placed under receivership or statutory management, which is worth reproducing herein below:

“The role of a receiver, generally, is to enter into the management of the company under receivership, assess its viability and determine whether the Company can be salvaged or is beyond redemption. It is however my view that contrary to the experience of receivership in this country where the tendency is to milk the Company dry before hurriedly jumping ship, a prudent receiver ought to start from the premise that everything ought to be done in order to facilitate the company being resuscitated. Therefore, whereas the receiver is empowered to take whatever appropriate steps necessary to ensure that the Company does not degenerate further into the state of abyss, it ought as much as possible manage and run the company as a going concern. This in my view, and this is supported by the Corporation’s position, is the principle behind section 45 of Cap 487 C which authorizes the Corporation to inter alia carry on the businesses and manage the assets, liabilities and affairs of a problem institution in the name and on behalf of that institution until such appointment is revoked.”

Conclusion

Liquidation of an institution, being a policy principle must be subject to the national values and principles of governance in Article 10 of the Constitution and must be transparent and accountable. In addition, before placing a Bank under receivership, CBK and KDIC are under an obligation to consider any reasonable and viable proposals or recovery plans put forward by applicants towards the revival of the normal business of the bank.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/127396/>

3.5 ISSUANCE OF CURRENCY NOTES AND COINS

The role of the CBK in the issuance of currency notes and coins is anchored in the Constitution and CBK Act. According to section 22 of the CBK Act, the Bank has the sole right to issue notes and coins in Kenya, and only those notes and coins are legal tender. Additionally, the denominations, inscriptions, forms, material and other characteristics of the notes and coins issued by the Bank are determined by the Bank in consultation with the Minister for Finance and are notified in the Kenya Gazette and published in other public media.

According to the Act, the CBK has the power to withdraw any notes or coins issued by the Bank, in line with the stipulated procedure. For example, the CBK withdrew/demonetised the old 1,000 Kenya Shillings notes in 2019, with the objective of addressing concerns regarding illicit financial flows, and emergence of counterfeits mainly targeting this denomination.³⁷

The section below discusses the recent litigation against the CBK in the with regard to its objective of issuance of currency notes and coins, and the outcomes.

xix. Simon Mbugua & another v Central Bank of Kenya & 2 others [2019] eKLR,

Brief Facts

The Petitioners challenged the designs and the process that introduced the new generation Kenyan notes and coins as well as the decision by the Central Bank of Kenya to withdraw the old Kshs 1,000 note as legal tender with effect from 1st October 2019. This was a result of the demonetization process implemented in 2019 partly to curb corruption and flow of illicit money. The Petitioners argued that the design contained a portrait or a sculpture-portrait of the first President of Kenya, Mzee Jomo Kenyatta, contrary to Article 231 of the Constitution. They further alleged that CBK had also breached the Central Bank of Kenya Act, the Statutory Instruments Act 2013, and other statutes. The Petitioners further claimed that the CBK was unreasonable; contravened the Petitioners' rights to fair administrative action; and the developing, issuance and unveiling of new generational notes were done without public participation.

Issues and the Relevant Provisions of Law³⁸

The issues that the Court identified in relation to the banks mandate of issuance of currency, notes and coins included:

- a. Whether the design of new Kenyan currency notes violate Article 231 of the Constitution.
- b. Whether the withdrawal of the old Kshs 1,000 currency notes is valid.

³⁷ Press Release by CBK on Circulation of the New Generation Banknotes and Withdrawal of the Older 1,000 Shilling Banknotes (June 6, 2019).

³⁸ The Constitution of Kenya, Article 10(2)(a) Article 47 Article 231(4); Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya, sections 2, 4A (1)(f); Access to Information Act 201622(1) Section 5 Public Service (Values and Principles) Act No. 1A of 2015. Sections 5, 6, 8 and 12

- c. Whether the issuance of the new Kenyan currency notes and coins violates the CBK Act, the SIA, or other laws.
- d. Whether there was public participation in the issuance of the new currency or withdrawal of the old Kshs 1,000 currency notes.

Held

The consolidated Petitions were dismissed for lack of merit. With respect to the issue on whether the design of new Kenyan currency notes violate Article 231 of the Constitution, the Court held that the Petitioner's claim that the note contained President Kenyatta's portrait was invalid as the same only amounted to an image rather than a portrait as the same was a side shot and not a frontal and therefore it did not breach Article 231 of the Constitution. Further to this the Court held that the signatures on the notes were a creature of statute and hence the CBK had not violated any laws.

On the issue of whether the issuance of the new Kenyan currency notes and coins violates the CBK Act, the SIA, or other laws. The Court found that the CBK had followed all the necessary steps required in exercising its mandate and had not violated any laws. It had gone through the proper procedures of inviting members of the public to present proposals on the new generation notes, publishing legal notices in the Kenyan Gazette giving details on the descriptions of the new notes and coins. The Court held that the CBK had taken all the necessary steps to ensure that public interest had been obtained. On the issue of whether there was public participation in the issuance of the new currency or withdrawal of the old Kshs 1,000 currency notes the court was of the view that the same was permitted expressly by the law, however the same had not been preceded by public participation.

Conclusion

This decision was instrumental in identifying the steps that the CBK must take in issuance and unveiling of new generational notes, key of which was public participation.

You may access the Judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/180928/>

3.6 LICENSING AND SUPERVISING DIGITAL CREDIT PROVIDERS NOT REGULATED UNDER ANY OTHER WRITTEN LAW

The CBK (Amendment) Act, 2021 (the Amendment Act) was enacted in December 2021 to empower the CBK to regulate, license and have oversight over digital credit providers. Subsequently, the CBK published the regulations for the Digital Credit Providers.³⁹ The Regulations apply to persons operating digital lending services through an online platform and does not extend to persons offering lending services through other means.

³⁹ Central Bank of Kenya, 2021, Central Bank of Kenya (Digital Credit Providers) Regulations.

The section below discusses the recent litigations against the CBK in licensing and supervising digital credit providers not regulated under any other written law, and their respective outcomes.

xx. Association of Micro-finance v The Central Bank of Kenya & 3 Others (Constitutional Petition E008 of 2022) [2022] KEHC 13053 (KLR)

Brief Facts

The Petitioners, Association of Microfinance Institutions, comprising of non-deposit taking microfinance institutions, filed this constitutional petition challenging the constitutionality of Central Bank of Kenya (Amendment) Act, 2021 for having been enacted without sufficient public participation and for being discriminatory. The CBK (Amendment) Act 2021 amended sections 57 of the Central Bank of Kenya Act and mandated the CBK to make regulations to, inter alia, prescribe licensing requirements for digital credit lenders. Such regulations were to be formulated within three months of commencement of the CBK (Amendment) Act 2021. Pursuant to this amendment, the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022 (DCP Regulations) were published.

Under the DCP Regulations, any person in digital credit business not regulated under any other law was required to apply for a license within six months of the publication of the regulations. Members of the Petitioners were affected by the DCP Regulations as some of them were not regulated under any other law and were therefore required to obtain a license.

The Petitioners alleged that their businesses are properly regulated under the Microfinance Act 2006, and that this Act provides CBK with the power to prescribe regulations for non-deposit taking microfinance institutions. However, CBK was yet to make these regulations and was seeking to have DCP Regulations to apply to non-deposit taking microfinance institutions. To the petitioner, the DCP Regulations did not apply to it or its members as it was envisioned that they would be regulated under the Microfinance Act 2006. They therefore contended that CBK was improperly requiring them to comply with DCP Regulations.

Issues and the Relevant Provisions of Law⁴⁰

- a. Whether the Petitioners were regulated under the Micro Finance Act 2006 and the DCP Regulations;
- b. Whether the CBK Amendment Act and DCP Regulations were passed after public participation; and
- c. Whether there was any breach of the Petitioners' rights under Article 47 of the Constitution.

⁴⁰ The Central Bank of Kenya (Amendment) Act 2021; The Micro Finance Act 2006; The Sacco Societies Act 2008.

Held

In answering the above questions, the High Court reviewed the history, importance, and the rationale for the amendment to the Act and the promulgation of the DCP regulations. The Court found that the High Court cannot question the wisdom of Parliament in taking a policy position on an issue of public importance. In this case, the Court noted that it was the mandate of Parliament to decide when to legislate, what to include in the legislation, determine the content, context, extent, and parameters of the legislation. While reserving the right, nay duty, to review whether a legislation was enacted in compliance with the Constitution and the law, the Court appreciated its handicap in dealing with a policy challenge or an implementation challenge on a statute, as was in this case. The Court reiterated that where a statute is constitutionally infirm, the Court retains the jurisdiction and power to invalidate it. The Court further reviewed the steps taken in the enactment of both the Amendment Act and the DCP Regulations and found that indeed there was adequate public participation in the enactment of the Act and the DCP Regulations. It was the Petitioner that deliberately failed to participate in the legislative processes under the misapprehension that the law was not applicable to its members and could not pass the blame to the CBK and Parliament.

The Court further reviewed the content of the Regulations and found that the Petitioner had not shown how its members were discriminated against by the Regulations. The Court expressly noted that the Petitioner's members, who were not registered and regulated under any other statute in Kenya (including the Banking Act, Micro-Finance Act, SACCO Societies Act), were on boarded through the amendment Act and the Regulations and could not have been discriminated against in their onboarding into a regulated environment. The Court observed that the Respondents had discharged the burden imposed on them to show the justifications for treating the Petitioner's unregistered members differently, and this was not discriminatory.

In concluding the Court noted that the regulations were necessary and in the public interest for Parliament and the CBK to superintend the manner in which the unregistered members of the Petitioner were conducting their businesses and to address the complaints of predatory lending practices, high cost of facility and other charges, unethical debt collection practices, data privacy breaches, and concerns about money laundering and financing of terrorism. The Court found no violation of the Petitioner's rights, upheld both the Amendment Act and the DCP Regulations and dismissed the Petition, but with no order as to Cost, given the public interest in this case.

Conclusion

This has been very instrumental in treading this new territory of regulation of digital lenders by the CBK. This case was important to the CBK, Parliament, the players in the financial services sector, consumers, and members of the public as it brought order and sanity to the financial services sector particularly in the digital credit business. The court herein emphasized the need for regulation of all unregulated digital credit lenders by

the CBK in order to provide a framework of protection for both the lenders and their customers. Consequently, based on this finding, all erstwhile unregulated non-deposit taking microfinance institutions are now regulated and supervised by the CBK under the CBK (Digital Credit Providers) Regulations, 2021.

The Judgment can be accessed on the following link: <http://kenyalaw.org/caselaw/cases/view/241163>

3.7 PROVIDE OVERSIGHT OF THE PAYMENTS, CLEARING AND SETTLEMENT SYSTEMS

A key mandate of the CBK is to provide oversight of the payments, clearing and settlement systems (section 4 of the CBK Act). In 2022, the CBK rolled out a new national payments strategy which anchored on five core principles comprising a secure, fast, efficient, and collaborative payments system that supports financial inclusion and innovations that benefit Kenyans.

The section below discusses the recent litigations against the CBK in formulating and implementing such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems, and their outcomes.

xxi. Kenya Commerce Exchange Service Bureau Limited (Kenex v Central Bank of Kenya (Constitutional Petition E181 of 2021) [2022] KEHC 13189 (KLR))

Brief Facts

In this case, the Petitioner, Kenya Commerce Exchange Service Bureau Limited (KENEX) lodged a Petition against CBK claiming that it is not governed by the Central Bank of Kenya Act, the Banking Act, or the National Payment Act since it is not a financial institution or payment service provider to be supervised by the CBK. Consequently, the Petitioner also sought to have the circulars issued by CBK seeking to regulate it quashed and the attempt by CBK to demand that all banks (most of which happened to be the Petitioner's clients) to breach their contract with the Petitioner as unconstitutional.

The Petitioner argued that it is not a payment service provider (PSP) as to be regulated by CBK. Rather, it is an authorized service bureau for the Society for Worldwide Interbank Financial Telecommunications (SWIFT) which offers a messaging network service to financial institutions that financial institutions use to securely transmit information and instructions through a standardized system of codes, thus facilitating payments. The Petitioner argued that it only provides a gateway to the SWIFT network and services through its infrastructure thus extending connectivity to banks to enable them send messages without connecting to SWIFT directly. In particular, the Petitioner took issue with the communication by CBK to banks directing them to migrate from its bureau and connect directly to SWIFT, arguing that such directive was beyond CBK's supervisory mandate and contrary to its own prudential guidelines.

On the other hand, CBK argued that it is empowered under Section 17 of the National Payment Systems Act to formulate and implement policies that best promote the establishment, regulation, and supervision of efficient and effective payment, clearing and settlement systems. Accordingly, given that SWIFT services relate to payments and banking services over which it has regulatory mandate, it followed that it had oversight over SWIFT services in Kenya. CBK further argued that Section 19 of the National Payments Systems Act empowers it to regulate and supervise any payment system. CBK also argued that the Petitioner (KENEX) was a payment service provider since as a SWIFT bureau, KENEX was storing messages for a limited period of 120 days to enable banks connected through it. CBK claimed that it noted failure of SWIFT messages for the Real Time Gross Settlement (RTGS) system of nine institutions that were connected to SWIFT through KENEX (petitioner). CBK argued that third parties offering connectivity to SWIFT such as the petitioner lacked a business continuity plan to deal with such disruptions, and this was largely because they were unregulated, and that this posed a risk to the national payment system.

Issues and the Relevant provisions of law⁴¹

The Court considered the following among the issues for determination:

- a. Whether Kenya Commerce Exchange Service Bureau Limited (KENEX) is governed by the National Payment Act hence under the purview of the CBK.
- b. Whether the respondent violated the petitioner's rights under articles 10, 40, 47 and 73 of the Constitution.

Held

In its determination, the Court found that the Petitioner is a payment service provider within the definition of section 2 of the National Payment Systems Act which defines a payment system as: a system or arrangement that enables payments to be effected between a payer and a beneficiary or facilitate the circulation of money and include any instruments and procedures that relate to the system.

The intention of the law was to capture systems of the entire process of the payment system. Accordingly, the Petitioner could be regulated by CBK as a payment service provider.

The Court affirmed that section 4A (1)(d) of the Central Bank of Kenya Act **empowers CBK to implement policies as best to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems in the interest of the integrity of the payment system under the** National Payment Services Act.

⁴¹ Constitution of Kenya, 2010, Articles 10, 40, 47 and 7; Leadership and Integrity Act, section 7; National Payments Services Act, section 19; National Payments Systems Regulations, Regulation 4; Central Bank of Kenya Act, Cap 491, section 4A; Banking Act, section 33.

The court further found that the petitioner had not demonstrated how the CBK had acted *ultra vires* in discharging this supervisory mandate by insisting on a business continuity plan or in directing banks to connect directly to SWIFT in view of the risks to the payment system associated with connecting through the Petitioner's network.

Conclusion

The Court agreed with the CBK that the circular issued to banks was in line with the CBK's mandate as the supervisory authority of the banks. The circular did not in any way direct the banks to unsubscribe from the petitioner's service as a third party to SWIFT.

The court declined to interfere with the powers and functions of the CBK as the same are outlined in law and were carried out in accordance with the law and constitutional principles.

It was therefore held that the CBK did not violate the Petitioner's rights under articles 10, 40, 47 and 73 of the Constitution but rather acted within its constitutional and statutory mandate.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/241633/>

3.8 CENTRAL BANK INDEPENDENCE

The section below discusses a recent litigation against the CBK with implications on its independence.

xxii. Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR, Petition No. 404 of 2017

Brief Facts

In this case, it was alleged that the Chief Executive Officer of the Non-Governmental Organizations Co-ordination Board had written to various agencies and entities, including the Governor of the Central Bank of Kenya, advising him to freeze the bank accounts of the 1st Petitioner (Kenya Human Rights Commission) for non-compliance.

Issues and the Relevant provisions of law⁴²

The following were among the issues determined by the Court:

- a. Whether the 1st Respondent acted ultra-vires in advising the Governor of the CBK to freeze the bank accounts of the Petitioner.
- b. Whether the 1st Respondent violated the Petitioner's right to fair administrative action by cancelling its certificate of registration.

⁴² Constitution of Kenya, 2010, Articles 1, 19, 47 and 260.

Non-Governmental Organization Co-Ordination Act, sections 3, 7, 10 and 16

Held

The Court found that the CEO of NGO Coordination Board had taken upon himself roles that are placed upon independent institutions and purported to advise or direct other independent institutions such as the CBK. Referring to article 231(3) of the Constitution which states that the Central Bank of Kenya is not to be under the direction or control of any person or authority thereby affirming its independence, the Court found the CEO's actions as ultra vires and illegal.

Conclusion

This decision reinforced and affirmed the independence of the CBK as a constitutional institution.

You may access the judgment on the following link: <http://kenyalaw.org/caselaw/cases/view/147166/>

4. LESSONS FROM THE RECENT LITIGATION

As a country, Kenya has made great strides in legislating on the functions, autonomy, and mandate of the Central Bank. The Courts on their part, have played a key role in interpreting and making pronouncements on the relevant legislation, which has served to better define the mandate the Central Bank in Kenya.

However, the financial environment is dynamic. Especially in the recent times of financial technology innovation, and the fast pace in global financial and economic trends. Even in these changing times, the Law continues to speak. This has served to anchor and entrench the operations and autonomy of the Central Bank in legal jurisprudence.



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