REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI LAW COURTS

PETITION NUMBER 413 OF 2016

BONIFACE ODUOR.....PETITIONER

VERSUS

THE HONORABLE ATTORNEY GENERAL.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

KENYA BANKER'S ASSOCIATION.....1ST INTERESTED PARTY

THE CONSUMER FEDERATION OF KENYA.....2ND INTERESTED PARTY

THE NATIONAL ASSEMBLY OF KENYA.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. This Petition relates to the constitutionality of the interest rate capping and auxiliary provisions of Section 33B of the Banking Act. These provisions were enacted through the Banking (Amendment) Act no. 25 of 2016.

2. The question as to whether or not to have interest rate caps is a matter that has generated national debate in Kenya. Hon. Nzioka J. illustrated the intensity of that national discussion when she certified this matter as raising a substantial question of law under the provisions of Articles 165(4) of the Constitution of Kenya. The Judge observed;-

"12. However as the Court was dealing with this matter it became clear that the matter was generating great public debate (as here below outlined), and it became clear to the Court that this matter is of huge public interest. It also became clear that there are substantial questions of law that will require consideration by more than a single Judge; and this is informed by the fact that the issues raised turns on alleged violation of the Articles of the Constitution, which is the supreme law of the Land.

13. The Recent debate on this issue that has informed the decision of this Court to invoke the power granted to it under Article 165(4) of the constitution is evidenced by the following articles appearing in the Press and/or print media:

i) Could this mark the end of interest rate capping" By Luther Odhiambo, | Published Tue, September 19th 2017 at 12:46, https://www.standardmedia.co.ke/business/article/2001255004/could-this-mark-the-end-of-interest-rate

ii) Treasury plans discussion on interest rate capping law changes ... www.businessdailyafrica.com › Home › Economy: Sep 17, 2017 –

iii) Kenya should maintain cap on loan interest rates By: Tom Published: September 16, 2017

iv) RE: "Interest rate cap on loans will soon be reversed" (The New Times, September 15).

v) Central Bank of Kenya considers reversing interest rate cap law ...https://www.cnbcafrica.com/.../central-bank-of-kenya-considers-rev...Sep 14, 2017

vi) Central Bank of Kenya Governor Patrick Njoroge speaks during a press conference at Villa Rosa Kempinski Hotel in Nairobi on September 13, 2017: The Central Bank of Kenya (CBK) Wednesday gave the clearest signal that it intends to push for a repeal of the year-old law capping interest rates because of the negative effect it has had on the economy.

vii) Interest rate cap a concern for foreign investors – CBK Governor September 13, 2017

viii) Interest rates cap shalves(sic) Sh 26 bn off banks' income - Business Daily www.business daily africa.com › Home › Markets › News Sep 12, 2017

ix) Winners, losers under Kenya's rate caps regime - The East African www.theeastafrican.co.ke › Business Aug 9, 2017 -

x) Pornographic profits' blamed for banks' interest rates: By Kennedy Kangethe, Nairobi, Kenya, Jul 17 – Eliud Kariara, Independent presidential candidate Japheth Kaluyu's running mate,

xi) By Ken Macharia, Nairobi, Kenya, Jul 18 – The Central Bank of Kenya has received 16 requests to increase fees by banks following the implementation of the interest rate capping in September 2016

xii) Banks finally realise that rate cap is here to stay whether they like it or not By Otiato Guguyu | Published Tue, June 27th 2017 at 09:04, Updated June 27th 2017 at 09:10 GMT +3

xiii) Kenya's Largest Bank Expects Rate-Cap Removal in Second Half: By Felix Njini , May 11, 2017, 7:03 AM GMT+3 May 11, 2017, 3:52 PM GMT+3

xiv) Kenyan Economy Suffers Following Interest Rate Cap Apr. 9, 2017 9:22 AM ET".

3. A further testimony that the debate remains current is that just one month before the Petition was argued, there were amendments effected to the interest ceiling legislation.

4. Boniface Oduor (the Petitioner) is a citizen of Kenya and resident of Nairobi. In his Petition presented to Court on 10th October 2016, he joined the Honourable Attorney General (AG), the Central Bank of Kenya (CBK), and Kenya Bankers Association (KBA) as the 1st and 2nd Respondents and 1st Interested Party respectively. In the course of time, the Consumer Federation of Kenya (COFEK) and the National Assembly of Kenya (the National Assembly) were joined as 2nd and 3rd Interested Parties respectively.

5. The AG is a Constitutional office established under Article 156(1) of the Constitution. It is the Principal Legal Adviser of the Government.

6. CBK is established under Article 231(2) of the Constitution. It is responsible for formulating monetary policy and performing

other functions conferred upon it by the Central Bank of Kenya Act (Chapter 491 Laws of Kenya)(hereinafter referred to as "**CBK Act"**).

7. KBA is an association comprising all banks carrying on banking business in Kenya. It represents the banks.

8. On its website, COFEK describes itself as Kenya's independent, self-funded, multi-sectorial, non-political and apex non-profit federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer care issues.

9. Last but not least, the National Assembly is one of the two arms of the Parliament of Kenya established under Article 93 of the Constitution.

The Petitioner's Case

10. The Statutory provisions under attack are Section 33B of the Banking Act (hereinafter referred to as "the Act") at the time of filing the Petition. These provisions were contained in the Banking (Amendment) Act (Number 25 of 2016) which provided as follows:-

"(1) A bank or a financial institution shall set —

(a) the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and

(b) the minimum interest rate granted on a deposit held in interest earning in Kenya to be at least seventy per cent, the base rate set and published by the Central Bank of Kenya.

(2) A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law."

11. Article 231(2) of the Constitution gives CBK the constitutional mandate to formulate monetary policy, promote price stability, issue currency and perform other functions conferred on it by an Act of parliament. Article 231 (3) of the Constitution provides as follows about the independence of CBK:-

"The Central Bank of Kenya 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."

12. The Petitioner's case is that, in so far as the object and effect of the impugned provisions is to cap the interest rate charged by banks and financial institutions for loans, they deprive CBK of its exclusive constitutional mandate to solely formulate and implement monetary policy.

13. He also questions the manner in which the Statute was enacted. He points out that the Memorandum of Objects and Reasons which accompanied the publication of the Banking (Amendment) Bill 2015 stated, inter alia, that the Bill concerned County Governments and affected their powers and functions. He further asserts that failure to present the Bill to Senate for concurrence, resulted in the Statute being unconstitutional.

14. Article 27 of the Constitution is on equality and freedom from discrimination. It declares that every person is equal before the law and has the right to equal protection and equal benefit of the law (Sub-Article 1). The Petitioner contends that the impugned provisions discriminates against banks and financial institutions as no similar restriction on interest rates is placed on mortgage finance institutions, micro finance banks, insurance companies and those dealing with Islamic banking.

15. A second limb of discrimination he has pointed out is in the penalties imposed for contravention of the provisions of the Act.

The Petitioner argues that the Statute is discriminatory as it imposes penalties on banks and financial institutions and their Chief Executive Officers but not on customers.

16. In addition to his argument on penal consequences for contravention, he submits that by only imposing a minimum prison sentence on the Chief Executive Officers of banks and financial institutions, it opens them up to inhuman treatment, abuse of their basic human rights and a denial of their right to fair trial under Articles 25 and 50 of the Constitution.

17. He further contends that the Act deprives banks and financial institutions of their property, the interest in and/or right to deal with their assets in a free, open and democratic society contrary to Article 40 of the Constitution. One such violation he cited is that the Statute interferes with pre-existing contractual rights to receive interest at rates agreed prior to 14th September 2016.

18. In conclusion, he argues that the provisions are vague, ambiguous, imprecise, undefined, incomprehensible and open to contradictory interpretations. Examples of the alleged ambiguity are set out in Paragraphs 69-76 of his Petition.

CBK's and KBA's Cases

19. CBK and KBA support the Petition. CBK filed affidavits in support of the Petition while KBA supported the Petition through written and oral arguments. Both rehashed certain arguments made by the Petitioner.

20. CBK elaborates on its constitutional mandate and statutory functions and powers found in the CBK Act and the Act. It cites Article 231(5) of the Constitution which requires an Act of Parliament to provide for the powers, functions and operations of CBK. That Act is the CBK Act.

21. It submits that Section 4 of the CBK Act directs the bank to formulate and implement monetary policy to achieve and maintain price stability, foster liquidity, solvency and proper functioning of a stable market-based financial system in Kenya.

22. It further cites Section 4D of the CBK Act which establishes the Monetary Policy Advisory Committee (hereinafter referred to as MPAC). It avers that the MPAC has the sole mandate of developing and/or formulating the monetary policy of Kenya. It urges that the setting of applicable interest rates is purely a monetary policy issue and provisions of the impugned Statute are a claw back on CBK's independence and therefore inconsistent with the Constitution.

23. CBK attempts to demonstrate that even without the controversial Statute, the banking sector was adequately regulated in all respects including monetary policy, loans and deposits. In this regard, it cites various provisions of the law. It argues that it is permitted to grant loans and advances to specific banks and microfinance institutions. It further states that it is enjoined by Section 36(4) to publish the lowest rate of interest it charges to those banks and institutions. That rate is known as the Central Bank Rate (hereinafter referred to as the **CBR**).

24. Further it contends that Section 33(4) of the Act empowers it to issue guidelines to institutions especially on standards in conduct of business and the maintenance of stability, efficiency of the banking and the financial system. Pursuant to this power, it states that it has issued Prudential Guidelines on various issues including Consumer Protection (CBK)/PG/2) (hereinafter referred to *"the Guidelines"*). It argues that the Guidelines provide for fairness, reliability, transparency, equity and responsiveness of banks to customers. It is its case that the guidelines on disclosure of information (Clause 3.2.3 of the Guidelines) provide a more detailed framework than Section 31A of the Act which limits disclosure only in relation to loans granted to customers.

25. It also refers to Section 44 of the Act which prohibits institutions from increasing the rate of interest or other charges without its prior approval. It construes the provisions as providing the framework of regulating the increase of rate of banking and other charges but not interest charged on loans which it maintains is purely a contractual arrangement between a bank and its customers.

26. It reaffirms its commitment to lowering rates in the banking sector but laments that the Act has made it difficult for it to discharge its constitutional mandate. That notwithstanding, CBK has issued Circular No. 6 of 2010 of 3rd October 2016 to guide the implementation of the statute under challenge as averred in Paragraph 50 of Affidavit sworn by Kennedy K. Abuga on 21st November 2016.

27. Lastly, it asks the Court to reject the narrative that interest rate capping reduces the cost of credit and increases its access. In this regard, it produced two reports on the potential impact and implications of the statute. These are '***The Banking Amendment Act – Potential Impacts and Implications'*** by Allen Dennis and IMF Kenya County Report No. 17/25.

The AG's, the National Assembly's and COFEK's Cases

28. The AG, the National Assembly and COFEK join hands in resisting the Petition and for that reason the Court proposes to state their cases together.

29. It is submitted that the Petition is a threat to the legislative role of Parliament and specifically of the National Assembly under Articles 1(1), 94 and 97 of the Constitution and intends to restrict the National Assembly from carrying out its constitutional mandate derived from Articles 95 and 186(4) of the Constitution. In addition, that by dint of Article 109 of the Constitution, Parliament is the organ vested to enact, amend and repeal any law through Bills pared and assented to by the President.

30. The genesis of the impugned legislation began as a legislative proposal sponsored by Hon. Jude Njomo, the then Member of Parliament for Kiambu. The National Assembly emphasizes that, as required by law, the Bill that led to the statute was subjected to public participation. Among those who presented submissions and memorandum were the National Treasury, KBA, the AG and the Institute of Certified Public Accountants of Kenya. The National Assembly Committee on Finance and National Planning and Trade compiled its report having taken into account the concerns of different stakeholders and the report was laid before the National Assembly on 26th April, 2016. On 28th July 2016, the National Assembly considered and passed the Banking (Amendment) Bill, 2015. On 24th August 2016, the President in exercise of powers conferred to him under Article 115(1)(b) of the Constitution assented to the Banking Bill which commenced on 14th September 2016.

31. The Court was asked to be alive to the provisions of Article 95(2) of the Constitution which mandates the National Assembly to deliberate on and resolve issues of concern to the people of Kenya. The Court was asked to pay heed to the pre-publication scrutiny comments by the Departmental Committee on Finance Planning and Trade that, prior to the challenged law, the interest rates charged by commercial banks in Kenya were some of the highest in the world and therefore an issue of concern to the people. Further, that the primary contemporary objective of interest rate ceiling is to protect those of modest or low income from paying excessively high prices for credit. This policy decision, it is forcefully argued, is within the mandate of the Executive and enacted by Parliament and this Court should decline to make policy decisions which are solely within the realm of other arms of Government.

32. The opposing parties argue that, prior to the statute, the interest rates were uncontrollable, unpredictable and exploitative. The interest rate ceilings were then introduced as a means of consumer protection and their imposition does not deprive the banks the right to property under Article 40 of the Constitution. At any rate, a statute cannot be unconstitutional merely because it does not meet the economic interest of the Petitioner.

33. The Court was asked to find that there is no cogent evidence to prove that capping of interest rates negatively affects the monetary economy and that it in fact outweighs the hiccups faced so far. And in this regard it was pointed out that many countries in both the developed and developing world have interest rate ceilings on consumer credit. These include France, Belgium, Netherlands, Poland, Slovakia, Ireland, some Australian states, Canada, some US states, Brazil, South Africa, Nigeria, Zambia and Japan.

34. Further an argument was made that the Petition does not disclose any threat or violation to the Constitution or demonstrate that the Petitioner's rights have been infringed by the impugned legislation.

35. The trio pitch forcefully for the principle of presumption of constitutionality of legislation enacted by Parliament and the doctrine of separation of powers. They posit that to grant the prayers would be to encroach on the legislative mandate of Parliament and a negation of the doctrine of separation of powers and an interference of Parliament Constitutional Powers by the Judiciary.

36. On whether the legislation requires Senatorial sanction, it was asserted that the law would be found under the 4th Schedule of the Constitution which gives the National Assembly the mandate to legislate on monetary policy, currency, bank (including Central Bank) the incorporation and regulation of Bank, insurance and financial corporations. It was indeed suggested by COFEK that the indication in the memorandum that the Bill concerned Counties in could possibly have been a typographical error.

37. There has been a key development in the course of this Petition which impacts on its outcome. About a month prior to the hearing of the Petition, there was an amendment to Sections 31A and 33B of the Act. These changes were through Section 64 of the Finance Act No. 10 of 2018 which commenced on 1st October 2018 (hereinafter the **2018 Amendment)**. After the amendment Sections 31A and 33B read as follows:

"31A. Information on next of kin

(1) A bank or financial institution licensed under this Act shall, in respect of all accounts operated at the institution, maintain a register containing particulars of the next of kin of all customers operating such accounts, and shall update this register on an annual basis.

(2) A bank or financial institution which contravenes subsection (1) commits an offence and shall be liable, for each account in which there is default, to a fine not exceeding one million shillings.

33B. Powers of Central Bank to enforce interest ceilings

(1) A bank or a financial institution shall set the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the Central Bank Rate set and published by the Central Bank of Kenya.

(2) A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law.

(3) A bank or financial institution which contravenes the provisions of subsection (2) commits an offence and shall, on conviction, be liable to a fine of not less than one million shillings, or in default, the Chief Executive Officer of the bank or financial institution shall be liable to imprisonment for a term not less than one year."

At this juncture we should mention that the regulation on minimum rates for deposits was entirely removed. For that reason, our decision will lay emphasis on the complaints raised in respect to the capping.

ISSUES, ANALYSIS AND DETERMINATION

38. From the respective cases of the parties the Court crafts the following questions for determination:-

i) Do the provisions of Section 33B infringe on the mandate of CBK under Article 231 (2) of the Constitution for formulation of Monetary Policy

ii) Do the impugned provisions concern County Government"

iii) Are the provisions of Section 33B(1) and (2) discriminatory as against banks and financial institutions under the Banking Act"

iv) Do the said provisions infringe on the right to property of Banks and other financial institutions"

v) Whether the impugned section is vague, imprecise and ambiguous"

vi) Are the penal provisions under the impugned Section inimical to the provisions of Articles 27 and 50 of the Constitution"

I. MONETARY POLICY

39. It is emphasized by the Petitioner that in discharging its duties, CBK shall not be under the direction or control of any person or authority. The argument by the Petitioner is that by prescribing an interest rate cap, Section 33(B) is a claw back to CBK's

responsibility of formulating and implementing monetary policy. The Petitioner relies on the Supreme Court Decision In the matter of Advisory Opinion Reference N. 2 of 2014 of the Supreme Court (In the matter of the National Land Commission (2015) eKLR) on the meaning and objective of the Independence clause. There, the Supreme Court held:-

[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences".

40. In supporting that proposition CBK cites Section 4 of the CBK Act and argues that it confers CBK the duty to formulate and implement monetary policy directed at achieving and maintaining price stability, foster liquidity, solvency and proper functioning of a stable market based financial system, support the economic policies of the Government including to foster growth and employment. Further the Bank emphasizes the role of MPAC which is a specialized unit established under Section 4D of the CBK Act. That unit comprises of the Governor, the Deputy Governors, two members of staff from CBK, four person appointed by the Cabinet Secretary of Treasury and the Principal Trade Secretary Treasury or his representative. The unit is mandated to formulate monetary policy of Kenya.

41. CBK also submits on the manner in which the monetary policy is to be formulated. MPAC in this function is to be guided by a monetary program premised on economic growth and inflation targets provided by the National Treasury under Section 4 (4) of the CBK Act. It meets at least one every two months and reviews data and analysis from various sources including CBK departments to enable it decide on any action to maintain or vary its stance.

42. The Court is told that in formulating the monetary policy, MPAC uses several tools or instruments which include cash reserve ratio, discount window operations, open market ratio, Central Bank Rate and forex exchange market operations. In respect to Discount Window Operations, CBK provides secured loans to banks and financial institutions on an overnight basis at a penal rate that is over the Central Bank Rate.

43. CBK provides more information on the importance of the CBR. Under Section 36 of the CBK Act, CBK is permitted to grant short term (not more than six months) loan or advances to banks and microfinance institutions at rates of interest it determines. Section 36 (4) requires CBK to publish the lowest rate of interest it charges on loans to banks and microfinance institutions. This rate is the CBR. CBK's case is that CBR is a critical tool in assisting banks and microfinance banks to determine and cost the interest rates of loans and other facilities in Kenya. A mandate of MPAC is to periodically review and set the CBR.

44. CBK contends that the process of formulating monetary policy is consultative in a three tier process. CBK is required at

intervals of no more than six months, to submit to the Cabinet Secretary a monetary policy statement (hereinafter referred to as MPS) containing a review of the past preceding year, specify the policies and means of achieving policy targets for the next twelve months and reasons for adopting those specific policies. The Cabinet Secretary is enjoined thereafter to lay the MPS before the appropriate committee of the National Assembly. Under Section 4C of the CBK Act, regular consultation is required between the Cabinet Secretary and CBK. CBK asserts that the purpose of these consultations is to ensure harmony in government policy and so as to achieve that harmonization, CBK and the Cabinet Secretary need to cooperate, collaborate, and share information.

45. Having set out that process, CBK makes the argument that there is a clear demarcation of the roles played by the different agencies. CBK formulates the monetary policy in consultation with the CS who lays it before the National Assembly's committee for deliberation. The linchpin of CBK's case is that the National Assembly cannot purport to be the originator or formulator of monetary policy in Kenya. Its mandate is to deliberate on the MPS laid before it by the Cabinet Secretary. Although CBK concedes that the National Assembly has a statutory role in deliberating on the MPS, that is a role, it argues, that comes at the end of the process and periodical and dependent on each MPS placed before it for consideration. CBK posits that the National Assembly cannot give a directive through legislation when there is no MPS before it.

46. The response by COFEK and the National Assembly is that it is within the Constitutional remit of Parliament in exercising its legislative powers to enact, amend or repeal any law. The Court's attention is drawn to Article 186 (4) of the Constitution for the argument that Parliament may legislate for the Republic on any matter. In this regard, it is argued that Article 231 of the Constitution cited by the Petitioner to have been violated does not take away the powers of Parliament to legislate for the Republic on interest rates.

47. We are asked to interrogate the objects and purpose of a given legislation before declaring it unconstitutional. Arguments are made that the primary objective of the interest rate ceiling is to protect those of modest or low income from paying excessively high prices for credit. The Court is asked to note the background to the enactment of the impugned legislation. It is contended that prior to the enactment there was an era of high interest rates which prompted consumer outcry. This necessitated the capping regime.

48. In regard to whether the legislation is a claw back to the mandate of CBK to formulate monetary policy, Mr. Marwa for the AG asks the Court to focus on Sub-Article 5 of Article 231 of the Constitution to find that the amendments was only in respect to operations of the banks.

49. As we turn to consider the arguments it is necessary to give a short history of interest rate regulation in Kenya and the principles that shall guide the Court in resolving this first question. The phenomenon of interest rates regulation is neither new in Kenya nor unique to the Country. Previously, there has been legislative caps to interest rates.

50. The first review of interest rates in the post-independence period occurred in June 1974 through the 1974-1978 Development Plan which resulted in a review of interest rates from 3% to 5% in order to encourage savings and discourage speculation and misuse of savings. Minimum saving rate was increased in 1980 to a record 6%. In 1981, the saving rate increased to 10% and in 1982 to 12.5%. The rate was reduced to 11% in 1984 following the decline in inflationary pressure. The maximum lending rate was raised to 16% in 1982 and then dropped to 14% in 1984. Further reviews were made in the late 1980s following the increased inflationary pressure resulting from increased money supply. The savings rate increased to 12.5% and 13.5% in 1989 and 1990 and the maximum lending rate was raised to 18% and 19%.

51. Until 1989, interest rates regulation rested upon the Central Bank of Kenya which published maximum and minimum interest rates to be applied to overdrafts, loans and mortgages. This was done pursuant to the now repealed section 39(1) of the CBK Act which provided as follows:-

"The bank may from time to time acting in consultation with the Minister, determine and publish the maximum rates of interest which specified banks or specified financial institutions may pay for the deposits and charge for loans or advances…."

52. In exercise of this power, the Governor of CBK published gazette notices in 1989 and 1990 which prescribed the maximum interest rate on loans and advances. Later in 1990 however, the Governor purported to remove controls over interest rates through a gazette notice which revoked the previous three notices.

53. Section 39(1) of the CBK Act was repealed with the coming into force on 17th April 1997 of the Central Bank of Kenya (Amendment) Act 1996 which had earlier been passed by Parliament.

54. On 7th August 2001, an amendment to section 39(1) of the CBK Act came into force with retrospective effect from 1st January 2001. Parliament, readopting what looked like its pre-1997 position, passed the CBK (Amendment) Act of 2000 (famously known as the Donde Act), reintroducing the control of the interest rates regime.

Section 39(4) of the Donde Act provided:-

"… A specified bank or specified financial institution which contravenes any of the provisions of this section shall be guilty of an offence under the Banking Act and be liable to such penalty as the Minister may prescribe under section 55 of that Act."

55. What Section 39(4) meant was that even though the Donde Act was enacted on 7th August 2001, the retrospective commencement date of 1st January 2001 meant that the Minister for Finance could levy penalties on banks that contravened any provision of the Donde Act in terms of Section 55 of the Banking Act beginning from 1st January 2001. To this end, the Court in the case of *Kenya Bankers Association and Others v Minister for Finance and Another (2004) 1 KLR 61* ordered that the Donde Act was void in so far as it made criminal and penalized that which was not an offence at the time it took place contrary to Section 77 of the repealed Constitution. Fast forward to the now impugned legislation.

56. As correctly pointed out by the National Assembly there are both first world and developing countries which regulate interest rates. The overarching reason for interest rate capping is to protect consumers from exploitative rates, to increase access to finance and make credit affordable. Samuel Munzele Maimbo and Claudia Alejandra Hanriquez Gallegos writing on ***Interest Rate Caps Around the World: Still Popular, But a Blunt Instrument*** observe as follows:-

"*In this exercise, we found that the main reasons for using interest caps on loans were to protect consumers from excessive interest rates, to increase access to finance, and to make loans more affordable. Most countries regulate interest rates with the broad aim of protecting consumers, as in the case of Spain. Other countries provided more specific objectives, such as protecting the weakest parties (Portugal); shielding consumers from predatory lending and excessive interest rates (Belgium, France, the Kyrgyz Republic, Poland, the Slovak Republic, and the United Kingdom); stopping the abuses arising from too much freedom (Greece); controlling over-indebtedness (Estonia); and decreasing the risk-taking behavior of credit providers (the Netherlands)".*

57. In the debate that preceded the enactment of the impugned statute some concerns were raised about unregulated interest rates. It was noted, for example, that:-

a) High interest rates had resulted in an increase in the costs of doing business in Kenya.

b) While World Bank recommended that market forces should determine interest rates, banks in Kenya seemingly have formed cartels in order to manipulate the rates and further, that CBK had been unable to effectively control the alleged cartels.

These are matters that motivated the National Assembly to legislate section 33B.

58. Article 1 (1), (2) and (3) (a) of the Constitution provides:-

"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution

…..

a) Parliament and the legislative assemblies in the county governments;

…..*"*

59. Article 94 is unequivocal on the role of Parliament in the current Constitutional set up. Sub-article (2) provides:-

"Parliament manifests the diversity of the Nation, represents the Will of the people and exercises their sovereignty".

And Article 95(2) provides:-

"The National Assembly deliberates on and resolves issues of concern to the people".

In addition Article 186 (4) provides:-

"For greater certainty, Parliament may legislate for the Republic on any matter."

60. These Articles are an illustration of the special connection between the people of Kenya and their representatives. 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.

61. Because of this, the Court must show a degree of respect to the decision of the National Assembly and must approach this matter by assuming that the statute is constitutionally sound. In this regard, the Court takes heed of the following words in Pearlberg v Varty **[1972] 1 WLR 534**:-

"*One should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown*".

62. This is reiterated in the case of ***Council of Governors & 3 others v Senate & 53 others [2015] eKLR*** which cited with approval the case of ***Ndyanabo vs Attorney General [2001] EA 495*** a judgment of the Court of Appeal of Tanzania where it was held:-

"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislations should receive such a construction as will make it operative and not inoperative"

We agree, as found by the Court in Ndyanabo, that the principle of presumption of constitutionality is a sound principle."

63. The presumption of constitutionality of statutes is however rebuttable. This is explained by Mativo J. in the case of ***Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR*** where he states:-

"Indisputably, there exists a presumption as regard constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[5] But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits. As Lord Russel of Killowen in Inland Revenue Commissioner vs. Duke of Westminister [6] stated that:-"……The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case"

64. To be emphasized from the principles set out above is that the presumption of constitutionality of a statute is rebuttable and the onus of proof is on the petitioner to cogently demonstrate that indeed the statute violates the Constitution. Once the Court is satisfied that a statutory provision infringes or violates the Constitution then it must declare it so because of the unequivocal provisions of Article 2(4) of the Constitution which provides:-

"*Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of law constitution is invalid*".

65. The jurisdiction of the High Court to determine whether or not any law is inconsistent with or in contravention with the Constitution is expressly provided for in the following Articles:-

Article 1(3) of the Constitution of Kenya provides as follows:-

"Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with the Constitution-

i. ..

ii. ..

iii. *the Judiciary and independent tribunals.*

Article 159(2)(e) of the Constitution provides that:-

"In exercising judicial authority, the courts and tribunals shall be guided by the following principle- the purpose and principles of this Constitution shall be protected and promoted."

Article 165(3)(d)(i) of the Constitution which provides:-

"Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether any law is inconsistent with or in contravention of this Constitution"

66. This mandate was discussed in the Council of Governors & 3 others vs. The Senate (supra) as follows:-

"We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".

67. Further Article 10 (1)(a), (b) and (c) of the Constitution provides that whenever all State organs, State officers, public officers and all persons are applying or interpreting this Constitution, enacting, applying or interpreting any law or making or implementing public policy decisions, they shall be bound by national values and principles of governance as set out in Article 10(2) of the Constitution.

68. These national values and principles of governance include-

i. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

ii. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

iii. good governance, integrity, transparency and accountability; and

iv. sustainable development.

69. Against this backdrop we now determine the question of whether Section 33B infringes on Article 231 of the Constitution which reads:-

"1) There is established the Central Bank of Kenya.

(2) The Central Bank of Kenya shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.

(3) The Central Bank of Kenya 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) Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolise Kenya or an aspect of Kenya but shall not bear the portrait of any individual.

(5) An Act of Parliament shall provide for the composition, powers, functions and operations of the Central Bank of Kenya.

70. A discussion as to whether Section 33(B) is an intrusion to CBK's mandate of formulating and implementing monetary policy begins with understanding what monetary policy entails. This is necessary because there is no agreement amongst the parties as to whether the impugned legislation is a monetary policy issue. The AG argues that the provisions do not touch on monetary policy but are merely on operations of banks.

71. Only CBK made a proposition to Court as to what monetary policy involves. CBK submits that monetary policy consists of decisions and actions that it takes to ensure that the supply of money in the economy is consistent with growth and price objectives set by the Government. The objective of monetary policy is to maintain price stability in the economy. Price stability on the other hand is said to refer to maintenance of a low and stable inflation. This seems to be consistent with the meaning given to monetary policy worldwide. According to the Bank of England, monetary policy is defined as:-

"Action that a country's central bank or government can take to influence how much money is in the economy and how much it costs to borrow. As the UK's central bank, we use two main monetary policy tools. First, we set the interest rate that we charge banks to borrow money from us – this is Bank Rate.

Second, we can create money digitally to buy corporate and government bonds – this is known as asset purchase or quantitative easing (QE)."

72. Neither the CBK Act nor the Act gives a definition of monetary policy. In the article, *Monetary Policy and Economic Policy* published in the Journal of Knowledge Management, Economics and Information Technology, monetary policy is described as follows:-

"Monetary policy is the process by which the government, central bank, or monetary authority of a country controls the supply of money, availability of money, and cost of money or rate of interest to attain a set of objectives oriented towards the growth and stability of the economy"

73. At the hearing, reacting to a question posed by the Court, Mr. Obuya for CBK stated that monetary policy includes setting of interest rates and that it is a specialized and technical function. He asked the Court to give regard to the function of the MPAC in setting the rates. He emphasized the Committee comprises of technical persons and the function should not be relegated to "Ayes" or "Nays" in legislation process.

74. A clear role of CBK in respect to setting of interest rates is in regard to the rate contemplated under Section 36(4) of the CBK Act which provides that:-

"4) The Bank shall publish the lowest rate of interest it charges on loans to banks and microfinance banks, and that rate shall be known as the central bank rate".

75. The CBR is reviewed and announced by the Monetary Policy Advisory Committee (MPAC) every two months. This influences the interest rate that is charged by banks and financial institutions in so far as the impugned Section 33B of the Act pegs the maximum and minimum rates on the CBR. This is by the words of Section 33B of the Act: -

"(1) A bank or a financial institutions shall set-

(a) the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and

(b) the minimum interest rate granted on a deposit held in interest earning in Kenya to at least seventy per cent, the base rate set and published by the Central Bank of Kenya."

76. A question that has received our anxious consideration is whether a framework that provides or regulates the manner in which banks and financial institutions set interest rates for credit to its customers is a function of monetary policy. Put differently, whether formulation of monetary policy ends with the setting of CBR or extends to the interest rate ceiling introduced by Section 33B of the Act.

77. In answering this question, we have given regard to the material placed before us. One of which is the Report by the Departmental Committee of the National Assembly on Finance, Planning and Trade that preceded the enactment of the Bill. The Committee notes as follows:-

"Through the proposed regulation of interest rates, the minimum deposit rate and maximum lending rate will only vary whenever the CBR changes. Given that the CBR setting mechanism is designed to address macroeconomic stability, then the proposed lending rates will likely reflect the CBK perceptions of the broad macroeconomics factors.

The CBK sets the CBR to implement various policy intentions including controlling liquidity and inflation. Government's borrowing through Treasury Bills and Bonds is not fully delinked from monetary operations.

The changes in CBR and consequent effect on the interest rates spread under the proposed amendment will affect the rates on Treasury Bills and Bonds. Under the constrained non market determined interest rates, banks will likely change their lending patterns and one way to increase lending to "low risk" government and the government might use this avenue to offer coupon rates which are favorable to it.

Thus, the proposed interest rates control to some extent might affect government borrowing costs and amounts. This implies that it is possible for the government to alter its borrowing costs (and amounts) by varying the Central Bank Rate (CBR)."

78. To be discerned from these observations is that there is an interplay between how banks and financial institutions charge their customers interest on the one hand and other macroeconomic factors on the other hand. What is less clear is whether the function of fixing interest rates chargeable to customers by the banks and financial institutions is a monetary policy issue.

79. In Paragraphs 54 – 56 of the Petition it is averred as follows:-

"54.Although not obliged by law to do so, since 8th July 2014, MPC also publishes what is termed as Kenya Bankers Reference Rate ("KBRR") every six months; KBRR is based upon CBR and two months moving average of 91 day Treasury bill rate.

55. KBRR was introduced to provide a transparent credit pricing framework amongst banks, and also to explore ways of increasing and enhancing private sector credit and mortgage finance supply in the country. On pages 13 to 15 of the bundle is the press release dated 8th July 2014 issued by MPC after the meeting of the MPC meeting held on the same date, explaining the purposes of KBRR.

56.As is obvious neither CBR nor KBRR has any relationship to the actual cost of funds to banks, nor do they apply to financial institutions. Further, they do not relate to the "costs of funds" of either the banks or financial institutions, which, interest rates paid to depositors, the risk profile of the customer, liquidity in the market, loan loss provisions, margin of profit based on risk reward factors and other open market and competitive considerations."

80. The Petitioner annexed to the Petition a copy of a Press Release by CBK dated 8th July 2014 which reads in part as follows:-

"A notable development in the banking sector during the period was the introduction a Kenya Banks Reference Rate (KBRR) developed as an outcome of discussion between the stakeholders, CBK and lead (sic) by the National Treasury. The KBRR was developed as part of the recommendations to enhance the supply of private sector credit and mortgage finance in Kenya by facilitating a transparent credit pricing framework. It will be the base rate for all commercial banks' lending rates. It will be communicated as an average of the CBR and the weighted 2-month moving average on the 91-day Treasury bill rates. The KBRR will be reviewed and announced by the CBK through MPC Press Release after every six months (if conditions do not drastically change) from the effective date and operationalized through a Banking Circular."

81. On our own, we found a Circular issued by CBK in February 2015 entitled *Facts about the Kenya Banks Reference Rate* whose purpose was to explain the objective of KBRR. The same as is relevant to this discussion states as follows:-

"Monetary Policy Transmission refers to the process through which monetary policy decisions affect the economy in general and the price level in particular. It therefore refers to various channels through which monetary policy alters prices or output in the real economy.

The Kenya Banks' Reference Rate (KBRR) is the base rate for lending by commercial banks and microfinance banks as well as for pricing mortgage products. Since one of the components of the KBRR is the Central Bank Rate (CBR), movements in the KBRR will enhance the monetary policy transmission through the lending rate channel. Studies on the transmission of monetary policy via the lending rate have shown that movements in the CBR, which reflect the monetary policy stance, affect the inflation profile and economic activity."

(emphasis ours)

82. The Circular further states that KBRR was a result of discussions amongst commercial and microfinance banks, mortgage finance institutions, Kenya Bankers Association (KBA), Central Bank of Kenya (CBK), and the National Treasury. KBRR's primary purpose was to ensure that banks are transparent with respect to the cost and pricing of their products. Under the KBRR regime banks were required to disclose and explain to their customers the effective base rate (KBRR) and any additional premium (K) above the base rate.

83. We first need to observe that the regime of Kenya Banks Reference Rate (KBRR) was rendered moot with the enactment of disputed Section 33B of the Act. Yet it helps us understand the relationship between the monetary policy and the interest rates imposed by banks and financial institutions on their customers. The interest rate regime contemplated by KBRR was one computed as an average of a) CBR and b) the two month weighted moving average of the 91 day Treasury Bill Rate. The articles on the KBRR seem to suggest that monetary policy can be transmitted when one component of the lending rate is the CBR as explained in the article set out in Paragraph 78 hereinabove.

84. In addition, the Press Release of 8th July 2014 and the Circular of February 2015 also posit that it is CBR which reflects the monetary policy stance, affects inflation profile and economic activity. Given this scenario, we are left to grapple with the question as to whether in respect to interest rate, monetary policy ends with CBR or extends to its transmission.

85. We have attempted to unravel this question by looking at other material placed before us.

86. In arguing that even without the introduction of interest rates ceilings, the banking sector was adequately regulated in all respects, including in monetary policy, loans and deposits, Mr. Kennedy Abuga, in an affidavit sworn on 21st November, 2016 on behalf of CBK, cited the provision of Section 44 of the Act.

87. Section 44 of the Act provides as follows:-

"No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."

Judicial opinion is divided as to whether these provisions apply to rates of interest and not just bank charges, commissions and rates other than interest. This is not the moment for that debate but noteworthy is that the Court of Appeal in ***Margaret Njeri Muiruri Vs. Bank of Baroda (Kenya) Limited (2014) e KLR*** held that Section 44 is also in respect of rates of interest. Whatever the case Section 44 is in respect of rates of banking or charges which have an impact on the cost of banking or credit.

88. So as to execute his power, under Section 44, the Minister has made the Banking (Increase of Rate of Banking & Other Charges) Regulations, 2006. Under those Regulations, CBK plays an important advisory role in the approval process but the final decision rests with the Minister. This Court is not told that the provisions of Section 44 are a usurpation of CBK's mandate of regulating banks and financial institutions. In much the same way, it can be argued that Statute which places a ceiling on the interest rates charged by banks to their customers does not infringe on the Constitutional mandate of CBK set out under Article 231 of the Constitution. While it can be argued that two wrongs cannot make a right, CBK approbates and reprobates. CBK is happy to argue that the Minister has a role in regulating banking rates and charges imposed by banks under Section 44 of the Banking Act but frowns upon Parliament legislating on a framework that regulates interest rates charged by banks. This does not help the Petitioner to demonstrate the alleged violation of Article 231 of the Constitution.

89. In addition, during the legislative process, stakeholders including CBK and KBA were invited to present their views in regard to the Bill by the Departmental Committee on Finance, Planning and Trade. We have carefully read the reports of the House Committee and have noted that while raising other concerns in respect to the Bill, KBA and CBK did not question its constitutionality. Given the difficulty we have had in resolving whether or not Section 33B of the Act touches on monetary policy, it does not aid the Petitioner's case that CBK and KBA did not explicitly raise what now is controversial. However, this is not to suggest the failure by CBK and KBA to raise the issue before the House barred any party from making representations that the impugned provision is unconstitutional.

90. 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. In arriving at this decision we pay homage to the principle of the presumption of constitutionality. We reiterate the words of Majanja J. in the case of *Susan Wambui Kiguru and Others Vs. Attorney General and another (2012)e KLR*

"I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with our delegated sovereign authority.

The question for the court is to consider whether these laws are within the four corners of the Constitution."

II. AN ACT CONCERNING COUNTY GOVERNMENT

91. We turn to another aspect of the Petition. The Petitioner is emphatic that the Banking (Amendment) Act, 2016 is unconstitutional as it did not receive Senate's concurrence as required by Article 110 (3) of the Constitution. He bases his argument on the fact that the Memorandum of Objects and Reasons provides that:-

"The Bill does concern county governments and it affects the powers and functions of county governments".

It is therefore his contention that the Act is unconstitutional as it is inconsistent with Articles 2 and 110 of the Constitution of Kenya.

92. On its part, the AG submits that Parliament is the only organ in the Republic of Kenya vested with the authority to make laws and/or legislate in line with Article 194 of the Constitution of Kenya. He adds that the enactment of the Banking (Amendment) Act, 2016 was in accordance with the law and that the Petitioner has failed to demonstrate how the amendment violates the Constitution therefore failing to rebut the presumption that all Acts of Parliament are presumed to be constitutional until the contrary was proven. He relies on the cases of *Susan Wambui Kaguru and other Vs. Attorney General and Other(supra); Ndyanabo Vs. Attorney General(supra) ; Coalition for Reform and Democracy Vs. Attorney General and other (2015) eKLR* and *Timothy Njoya Vs. Attorney General and Another (2014) eKLR* to buttress his argument.

93. COFEK is categorical that there is no dispute between the National Assembly and Senate in respect of the enactment of the Banking (Amendment) Act, 2016. It submits that in the absence of any dispute between the two (2) houses, this Court should not engage itself in an academic exercise.

94. The National Assembly is categorical that it complied with the provisions of the Constitution of Kenya before it passed the Banking (Amendment) Act, 2016. It also agrees with COFEK that there is no dispute between it and Senate and that the latter did not question the enactment of the Banking (Amendment), 2016.

95. It adds that the issue of monetary policy falls within the mandate of the National Government.

96. We find ourselves in agreement with both COFEK and the National Assembly that since there is no dispute between the National Assembly and Senate, it would be needless to make a determination on an issue that is not in dispute.

97. Be that as it may, we note that the Petitioner did not demonstrate that the Banking (Amendment) Act no. 25 of 2016 was:-

i. A Bill concerning county government or

ii. A Special Bill in line with Article 111 (1) of the Constitution of Kenya.

98. The bill having failed to meet the above two criteria, it did not therefore require the passing by Senate. What constitutes a bill concerning County Government is well set out in Article 110 (1) of the Constitution of Kenya. Article 110(1) of the Constitution provides that a bill that affects the functions and powers of the County Governments set out in the Fourth Schedule of the Constitution must pass through Senate..

99. The Petitioner's case is substantially anchored on the proposition that the statute touches on monetary policy. Even if we are to agree with that proposition, it is indisputable that matters of and relating to monetary policy fall under Part 1 of the Fourth Schedule of the Constitution which allocates that responsibility to the national government. This is not a function of County Governments. In our view, the Bill was on regulation of banking and fell under Part 1 of the Fourth Schedule. Therefore the Banking (Amendment) Bill, 2015 did not require Senate's approval.

100. It was immaterial that the sponsor of the Bill had in the Memorandum of Object and Reason, stipulated that it was a Bill concerning County Governments, It did not change the nature and character of the Bill as the same did not touch on a matter falling within the function of the County Governments. The erroneous and/or faulty characterization of the Bill as a bill concerning County Governments could not override the provisions of the Constitution. Indeed, a procedural technicality in a memorandum of objects and reasons cannot override the substantive nature or the spirit of the object of the law to be enacted.

101. There was therefore no merit in the Petitioner's submission that the Banking (Amendment) Act, 2016 was unconstitutional because it did not pass through Senate.

III. DISCRIMINATION

102. The Petitioner also submits that the Banking (Amendment) Act, 2016 is discriminatory of banks and financial institutions in denying them equal protection and equal benefit of the law as no restrictions on interest rate capping have been placed on mortgage finance institutions, micro finance banks, insurance companies, banks providing Islamic banking services. It was his case that the

impugned legislation violates the fundamental rights to freedom from economic discrimination under Article 27 of the Constitution of Kenya.

103. A perusal of his written submissions does not show any legal arguments regarding this discrimination. He seems to have limited himself to discrimination between rich persons and traders who will enjoy a monopoly to credit access while average persons will be starved of credit as banks will no longer be able or willing to finance them having regard to their risk profiles and also lack of acceptable securities.

104. On his part, the AG denies that there is any threat or violations to the Constitution. He does not also submit on the issue of discrimination between the banks and other financial institutions as regards the capping or limiting interest rates.

105. CBK supports the Petitioner's argument that mortgage finance institutions are excluded from the provisions of Section 33B of the Banking (Amendment) Act, 2016. It states that despite granting loans, credit facilities secured by a mortgage or charge on land, the interest on loans plus other charges are not regulated under Section 33B (1) (a) of the Banking Act.

106. It adds that Section 33B (2) of the Banking Act seems to include mortgage financial institutions from accepting deposits or making loans without any prescribed rates which institutions were again excluded under Section 33 (B) (1) (a) of the Banking Act.

107. COFEK and the National Assembly did not submit on this issue.

108. The burden of proof in matters concerning fundamental rights was well articulated by the Court of Appeal in the case of *Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR* where it was held as follows: -

"In the Zimbabwean case of Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;

"I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it…[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met".

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party."

109. The Petitioner simply pleaded the allegation but failed to demonstrate to the Court in what way banks are discriminated against under Section 33B of the Act. He leaves the matter to the Court's determination thus failing to discharge his burden of proof. However, given the gravity of the matter before Court, the issue deserves consideration.

110. Section 2 of the Banking Act defines "banking business" as:-

i. *"the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;*

ii. *the accepting from members of the public of money on current account and payment on and acceptance of cheques; and 6 CAP 488 BANKING ACT No. 57 of 2012 No. 57 of 2012;*

iii. *the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money;*

iv. *such other business activity as the Central Bank may prescribe"*

111. The same Section also defines a "financial business" as:-

i. *"the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and;*

ii. *the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money."*

112. While "Financial Institution" is defined as:-

"a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act."

113. Section 33B of the Banking Act talks of a "*A bank or financial institution*".

114. Black's Law Dictionary, Ninth Edition defines "discrimination" as: -

"Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured."

115. The European Court of Human Rights in the case of *Willis vs The United Kingdom, No. 36042/97, ECHR 2002 – IV* described discrimination as:-

"...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society"

116. The Court of Appeal in the case of *Mohammed Abduba Dida v Debate Media Limited & another (supra)* stated as follow:-

"And direct and indirect discrimination was distinguished in the case of Nyarangi & Others vs Attorney General [2008] KLR 688 when it was stated that;

"Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found "to disqualify negros at a substantially higher rate than white applicants".

With regard to differential or unequal treatment it was observed in the case of Kedar Nath vs State of W.B. (1953) SCR 835 (843) that;

"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

117. Hon. Justice John Mativo lends his voice to the distinction between differentiation and discrimination in the case of *Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR* as follows: -

"*94. The clear message emerging from the authorities, both local and foreign, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a*

legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.

95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination."

118. He further stated the test to be employed when determining whether discrimination has occurred is a three step process. He held as follows:-

"In determining discrimination, the guiding principles are clear. The first step is to establish whether the law differentiates between different persons. [57] The second step entails establishing whether that differentiation amounts to discrimination. [58] The third step involves determining whether the discrimination is unfair."

119. Section 54 of the Banking Act exempts the application of the Act on certain institutions. It provides as follows:-

"(1) This Act does not apply to—

(a) the Kenya Post Office Savings Bank established under the Kenya Post Office Savings Bank Act (Cap. 493B);

(b) the Agricultural Finance Corporation established under the Agricultural Finance Corporation Act (Cap. 323);

(c) a society registered as a co-operative society under the Co-operative Societies Act (Cap. 490);

(d) a microfinance bank licensed under the Microfinance Act, 2006.`

(2) Notwithstanding the provisions of subsection (1), where any of the bodies referred to in that subsection is contracted by an institution as an agent to provide banking services on behalf of the institution, this Act shall apply to such body to the extent of the services contracted."

120. We understand the argument by the Petitioner to be that in so far as Section 54 of the Act exempts those institutions that are not regulated by the provisions of Section 33B of the Act, amounts to impermissible discrimination. Yet, so as to examine whether the differentiation is one that is constitutionally acceptable, one has to look at the object for enacting Section 33B of the Act and the nature of institutions that are not covered by the regulation.

121. The object enacting of Section 33B of the Act was to curb the runaway high interest rates by the banks. This is evident from the reports by the National Assembly Departmental Committee on Finance, Planning and Trade and the debates in Parliament annexed to the Affidavit by the National Assembly sworn by Michael Sialia, EBS, on 24th May 2018. There were no complaints regarding the other financial institutions that do not fall under the purview of the Banking Act. In other words the mischief sought to be addressed was not perpetrated by the institutions excluded by Section 54.

122. The institutions in Section 54 of the Banking Act are exempted by virtue of the fact that they have been established to meet specific needs or for a particular group of people. Co-operative Societies are for promotion of members' welfare whose principles are set out in Section 4 of the Cooperative Societies Act. Kenya Post Office Savings Bank is to encourage members of public to save their monies. AFC is to grant loans to farmers. It is limited to the agricultural industry. The core business of insurance companies is to cover risks at a premium. Banks dealing with Islamic banking are excluded because they do not charge interest as this goes against Sharia law.

123. These institutions have not been granted consent of CBK to act as banks, but if they were to provide banking services then by virtue of Section 54 (2) of the Banking Act, they would bound by the provisions of Section 33B (1) of the Banking Act.

IV. VIOLATION OF RIGHT TO PROPERTY

124. The Petitioner submits that the impugned provisions curtail the fundamental rights of Kenyans to freely deal with property. In the Petition, he pleads as follows:

"The resulting Act, namely the Banking(Amendment) Act (number 25 of 2016) is unconstitutional and null void and or no legal effect, inter alia, as it is inconsistent with following constitutional provisions: The Act deprives banks and financial institutions (and also other persons) of their property, the interest in and or right to deal with their assets in a free, open and democratic society contrary to Article 40"

125. He elaborates by emphasizing that in relation to banks there has been an infringement of the rights enshrined under Article 40 of the Constitution as the provisions brought to an end to existing contractual rights of interest rates as at 14th September 2016, being the date of commencement of the Statute.

126. Other than COFEK, no other party made submissions in respect to the alleged violation. COFEK reiterates that interest rate ceiling is a means of consumer protection and does not deprive the Petitioner of the right to property.

127. The Petitioner in his arguments does not go into any detail as to the manner in which the impugned provisions violate the right to property. He only argues that Article 40 which protects the acquisition and utility of property without interference has been abridged because the provisions do not allow Kenyans to freely deal with property.

128. The right to property is protected under Article 40 of the Constitution as follows:-

"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".

Under the provisions of Section 259 on the interpretation and construction of the Constitution, property is defined to include any vested or contingent right to, or interest in or arising from money, choses in action or negotiable interest. Choses in action include rights under a contract (see 10th Edition Black's Law Dictionary). Money, a loan or credit facility of any type is without doubt a property.

129. Although a right to property can be limited, Article 24 delineates the permissible limitation. Article 24 reads:-

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content".

130. It is argued by COFEK that the interest rate ceiling is a means of consumer protection. Both at Committee level and the floor of the House, the stated purpose of impugned provisions was that it was to protect Kenyan borrowers from exploitative and unpredictable interest rates.

131. On our part the provisions do not appear to prevent banks and financial institutions from lending or borrowers from accessing credit. What it does is to cap the rate of interest on borrowing. It sets interest rate parameters within which parties can interact. Given that the overall objective of the Statute is to protect consumers, we are unable to find that by regulating interest rates the Statute imposes an impermissible limitation on lending or borrowing. Lenders and borrowers are free to deal with their property within the parameters that parliament has set.

132. In respect to the pre-existing contracts, we do not have before us any specific contract which may have been affected. Unlike the other grievances in the Petition, the allegation that the impugned Statute has interfered with contracts required evidence of the specific contracts. In addition, it is those who were directly affected by the alleged breach who should have moved the Court for remedy. In this regard we have noted that KBA which is the body representing the bankers did not find it necessary to support the argument. As the issue is not raised in regards to any specific contract and is not a live issue before us, we say no more on it.

V. VAGUENESS OF SECTION 33B OF THE BANKING ACT

133. COFEK and the National Assembly did not submit on this issue. As will be seen hereinbelow, the Petitioner, CBK and KBA make common arguments. On the other hand, the AG is emphatic that the Petitioner's arguments are not merited. This Court deemed it necessary to set out each party's arguments for the sake of clarity of the several issues that have been raised.

134. The Petitioner argues that the Banking Act is unconstitutional, null and void and of no legal effect as it is vague, imprecise, incomprehensible and its provisions are undefined and open to various contradictory interpretations for the reason that material facts are not defined in the Banking Act or in other related legislation. He has raised several issues in this regard. The same are that:-

i. the proposed Section 31A of the Banking Act only applies to a *"loan"* while Section 33B of the Banking Act applies to *"credit facility"* only. It is his further contention that use of the terms *"loan", "credit facility", "base rate"* are not defined in Section 2 of the Banking Act.

ii. He faults the provision for not clarifying whether the base rate is CBR or the KBRR on the ground that CBK does not set any base rate yet on the other hand he states that it is also not clear whether the *"base rate"* is the base rate that is set by CBK when a facility is availed or if it is the one that is set from time to time by CBK. This appears to be a contradictory argument.

iii. It is his averment that it is not clear whether the words *"at no more than four per cent, the base rate"* mean four (4%) per cent of the base rate or whether the same means four (4%) percent of the CBR.

iv. He also contends that it is not clear from the Act whether the four (4%) percent is per annum or month or day or whether such interest can be compounded monthly as is the custom in Kenya.

v. He adds that it is not clear what the words *"at least seventy percent" mean*.

vi. It is also his averment there is confusion as to whether credit facility applies to mobile money.

vii. He also submits that there is no indication in the Act whether the interest rate *"chargeable"* is in respect of an existing facility or one to be granted in future. He argues that there is no definition of the said word leading to some banks applying interest on both existing and future facilities while others have contended that the same applies to future facilities.

viii. Further, he avers that the term *"granted"* seems to suggest the past which implies that it did not apply to future deposits and that the words *"deposit held in interest earning in Kenya"* are incomprehensible as they are not defined and do not clarify whether the same is in respect of current or saving deposits thus causing a division of opinion as regards the same.

ix. It is also his contention that Section 33(B) (2) of the Banking Act prohibits *"any person"* and not just banks and financial institutions from entering into any contract to *"borrow or lend"* at interest rates in excess of what is prescribed in the Act.

x. He argues that is not clear what is to be borrowed or lent. He questions whether the word *"borrow"* includes taking of deposits or if the Section applies to interbank lending or to CBK lending to banks or if it is confined to lending and borrowing in Kenya or if the same is also applicable to private banks.

135. He is further emphatic that the marginal notes reading that *"power of Central Bank to enforce interest ceilings"* in Section 33B of the Act are not necessary as the said provision does not give powers to CBK to impose the ceiling on interest rates chargeable, the same already having been capped and or limited by the legislature.

136. His submission is that the National Assembly has enacted a Statute that is completely vague in its substance and interpretation and its unfairness and prejudice cannot be overemphasized. He argues that the Statute criminalizes acts that may be done due to misinterpretation of the provisions and threatens punishment that could result to a maximum of life imprisonment or any amount of a fine.

137. He places reliance on the case of *Aids Law Project vs. Attorney General & 3 Others (2015) eKLR* that has also been cited by the AG, CBK and KBA, in which it was held that the vagueness of a statute amounts to invalidity of the same. The Court rendered itself thus:-

"…***Therefore where a statutory provision offends the constitution, the court is duty bound to declare it unconstitutional."***

138. He also refers this Court to the case of *Keroche Industries Limited vs Kenya Revenue Authority & 5 Others (2007) 2 KLR 240* where the Court expressed itself as follows:-

"One of the ingredients of the rule of law is certainty of law. Surely the mist focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards to ensure that certainty and regularity of law. This is a vision and value recognized by our Constitution and it is an important pillar of the rule of law."

139. The Court is also asked to give regard to the *Treatise on Universal Justice* quoted in *Coquiellette* by Sir Francis Bacon on pp 244 and 248 which posits:-

"For if the trumpet gives an uncertain sound, who shall prepare himself to battle" So if the law gives an uncertain sound, show shall be prepared to obey it" It ought therefore to warn before it strikes…Let there be no authority to shed blood or let sentence to be pronounced in any court upon cases, except according to a known law and certain law…Nor should a man be deprived of his life, who did not know first that he was risking it."

140. He also relies on the cases of *Grayned vs City of Rockford [1972] 408 US 104*, *Black- Cawson International Limited vs Papierwerke Waldhof- Aschaffenberg AG [1975] AC 591*, 638, *Shaw vs DPP (1961) 2 All ER 446* and *R vs Rimmington [2006] 1 AC at 481* where the common thread is that a law must be certain for it to be obeyed.

141. He urges this Court to follow precedent and strike out the impugned Section for violation the Constitution of Kenya. In this respect, placed reliance on the cases of *Speaker of the Senate vs Attorney- General & 4 Others [2013] eKLR* , *Institute of Social Accountability & Another vs National Assembly & 4 Others [2015] eKLR* and *Robert N. Gakuru & Others vs Governor Kiambu County & 3 others* [2014] eKLR where the Division of Revenue Act, 2013 (Act No 31 of 2013), Constituencies Development Fund Act , Act N 30 of 2013 and Kiambu Finance Act, 2013 respectively were all struck out for violating various provisions of the Constitution of Kenya.

142. CBK and KBA have rehashed the Petitioner's arguments that the Act is vague and imprecise and that it creates and imposes criminal sanctions.. They submit that in interpreting provisions of statute, Courts look at the intention and/or purpose of the statute as expressed in the plain and literal meaning of the words contained in the statute itself and that a statute must be clear in its plain meaning so as to be obeyed.

143. On its part, CBK has referred this Court to the cases of *Geoffrey Andare vs Attorney General & 2 Others [2016] eKLR, Aids Law Project vs. Attorney General & 3 Others(Supra) , Shaw vs DPP (Supra) and R vs Rimmington (Supra)* to buttress its arguments.

144. KBA argues that the CBK MPS of 8th July 2014 sets out the development of the KBRR and its relation to CBR but that what is clear is that neither of these is a *"base rate"* set and published by CBK. It adds that although Section 36(1)(A) of the CBK Act requires CBK to publish certain information including the weighted average lending and deposit rates for all banks, there is nothing in the provision that would be regarded as a *"base rate."*

145. KBA also adds that it is not clear whether or not Section 33B(1)(a) of the Act applies to hire purchase agreements and if so,

how the changes in the *"base rate"* are to be implemented. It is its further contention that it is not clear from the provisions of the Act if the same apply to credit facilities and deposits in Kenya Shillings or whether they apply to foreign currency credit facilities and deposits.

146. On his part, the AG has taken the position that the assumption to be made whenever a statute is passed, is that it is constitutional unless the law is inconsistent with the Constitution and thus declared as null and void pursuant to Article 2(4) of the Constitution of Kenya. His submissions placed great emphasis on the presumption of constitutionality of a statute. He relies on the cases of *Timothy Njoya vs Attorney General & Another (Supra)* and *Council of Governors & 3 Others vs Senate & 53 Others [2015] eKLR* where a similar conclusion was arrived at.

147. He has gone on to argue that the obligation to rebut the presumption of constitutionality lies with the Petitioner who has to demonstrate how the impugned amendments violate the constitution. In this regard, he cites the cases of *Ndyanabo vs Attorney General (supra)* and *Coalition for Reform and Democracy (CORD) vs Attorney General & Others (Supra)*.

148. It is his further argument that the Court is under an obligation to interrogate the objects and purposes of the Act before declaring it unconstitutional. In this respect, he relies on the case *Institute of Social Accountability & Another vs National Assembly & 4 Others (Supra)* where it was held as follows:-

"This ***court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights that contributes to good governance. In exercising its judicial authority, this Court is obliged to under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution…."***

149. He points out that the common principle behind both vagueness and over breadth is the requirement that laws must have a minimum degree of certainty. In this regard, he further refers to *Aids Law Project* case *(Supra)* in which the court cited with approval the case of *Marbury vs Madison, 5 U.S (1 Cranch) 137 (1803)* Chief Justice John Marshall observed that:-

"…It would be an "absurdity" to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution ….So, if a law be in opposition to the Constitution, if both law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case…."

150. It is his submission that in the case of *Aids Law Project vs Attorney General & 3 Others (Supra)*, the Court found that Section 24 of the HIV and AIDS Prevention and Control Act No 14 of 2006 was unconstitutional for being vague or lacking in certainty.

151. It is his argument that if a law is vague or overboard, it is not a valid law. It must be clear enough to be understood. He points out that the Petitioner has not demonstrated how the wording of the Banking (Amendment) Act, 2016 is imprecise in its wording and thus submits that the Petition lacks merit.

152. Notably, the Petition herein was filed on 10th October 2016. Subsequently, the National Assembly through the Finance Act No 10 of 2018 made amendments to the Banking Act which affected Sections 31A and 33B. The Court finds that the amendments have provided clarity on some of the concerns that the Petitioner has raised. So as to demonstrate this, we juxtapose the provisions prior and after the 2018 Amendment.

153. After the Banking (Amendment) No 25 of 2016, Section 33B read as follows: -

"(1) A bank or a financial institution shall set —

(a) the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and

(b) the minimum interest rate granted on a deposit held in interest earning in Kenya to be at least seventy per cent, the base rate set and published by the Central Bank of Kenya.

(2) A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law."

154. The said Section was amended by the 2018 Amendment. Section 33B of the Banking Act and now reads as follows:-

"(1) A bank or a financial institution shall set the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the Central Bank Rate set and published by the Central Bank of Kenya.

(2) A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law."

155. Although this Court noted the arguments in respect of the ambiguity of the clause of *"at least seventy per cent, the base rate"* , it did not find it necessary to analyse the same for the reason that the 2018 Amendment deleted the clause of *"at least seventy per cent, the base rate"* by removing Section 33B(1)(b) of the Banking Act. In respect to the CBR, this shall be discussed in greater detail later in this decision.

156. Further, although the provision of Section 31A of the Banking (Amendment) Act, 2016 was not pleaded in the Petition, it would therefore not be the focus of this decision. Submissions have nonetheless been made in respect to some aspects of that provisions to demonstrate ambiguity in Section 33B of the Act. However, the 2018 Amendment changed the provisions of Section 31A which may have impacted on the arguments the Petitioner has made. Before the 2018 Amendment, Section 31A provided as follows:-

"A bank or financial institution on loans shall, before granting a loan to a borrower disclose all the charges and terms relating to the loan."

157. Post the 2018 Amendment, Section 31A of the Banking Act now provides as follows:-

"(1)A bank or financial institution licensed under this Act shall, in respect of all accounts operated at the institution, maintain a register containing particulars of the next of kin of all customers operating such accounts, and shall update this register on an annual basis.

(2) A bank or financial institution which contravenes subsection (1) commits an offence and shall be liable, for each account in which there is default, to a fine not exceeding one million shillings."

158. Whereas, the Petitioner submits that the word *"loan"* , which appeared in Section 31A prior to the 2018 Amendment and the term *"credit facility"* that is to be found in Section 33B are different terminologies and could cause a confusion, this Court found the said argument to have been overtaken by events for the reason that the word *"loan"* no longer appears in the current Section 31A of the Act.

159. Having said so, , the 2018 Amendment was not a panacea to all the difficulties Section 33B (1) of the Act. . As our analysis hereinbelow shows, the Section as currently worded still lacks clarity and is open to different interpretations.

160. The term *"credit facility"* appears in various Sections of the Banking Act. On occasion it appears alongside the word *"loan"*. However, neither has been defined in the interpretation provision of Section 2 of the Banking Act. Further, the two terms are not defined in the Interpretation and General Provisions Act (Cap 2 Laws of Kenya), which is a statute *inter alia* in regard to the construction, application and interpretation of written law. Nevertheless, reference of the two (2) terms has been made in Section 44A (5)(b) of the Act as follows: -

"loan" includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person;

161. To be noted, is that the meaning assigned to the word *"loan"* under Section 44A(5)(b) is specific for that section. Therefore, for purposes of Section 33B (1), the phrase *"credit facility"* has no statutory definition.

162. Ordinarily, where there is no statutory definition of a word, then it ought to be construed in its plain and simple meaning. In general parlance, *"credit facility"* has been defined as:-

"……a type of loan made in a business or corporate finance context, including revolving credit, term loans, committed facilities, letters of credit and most retail credit accounts." (sourced from Investopedia.com)

163. In Cambridge dictionary a *"credit facility"* is described as:-

"An arrangement between a bank and a business that allows the business to borrow a particular amount of money for a particular period of time."

164. Yet there are authors who postulate that there are differences between a loan and a credit facility. For instance on the BBVA website <https://m.bbva.es/eng/general/.finanzas>, some of the differences highlighted are that:-

i. A loan provides access to all of the requested money at once when the loan is granted while a credit facility can be raised whenever a need for liquidity arises.

ii. On interest, the borrower of a loan pays interest on all the capital loan while on the other hand, interest on a credit facility is paid only when the money has been used.

iii. In regards to repayment, loans have longer repayment periods.

165. The term *"credit facility"* are open to different subjective interpretations. One could construe the term *"credit facility"* in its ordinary meaning while another could choose to give it a meaning similar to that assigned in Section 44A(5)(b). If the former, a loan is a type of credit facility, and if the latter, a credit facility is a type of loan. That interpretation is conflicting. To remove the possibility of conflicting construction of the phrases, it is necessary that the term *"credit facility"* for purposes of Section 33B (1) be explicitly defined. In the alternative, the terms *"credit facility", "loan", "advance*" and *"financial guarantee"* could be defined in the interpretation provisions of the Act. Arguments such as whether the Section as currently worded covers loans such as mobile loans and hire purchase facilities would be avoided.

166. One spill-over effect of the ambiguity in the meaning of *"credit facility"* can be seen on the reading of Section 33B (2). The Petitioner's, CBK's and KBA's arguments that what is to be borrowed or lent is not clear found favour of this Court in so far as the words "credit facility" used in Section 33(B)(1) were not defined.

167. The 2018 Amendment has provided some clarity on the base rate referred to in Section 33B(1)(a) of the Banking (Amendment) Act, 2016. The amendment clarifies that the base rate is the CBR that is set and published by CBK. But that clarification may not be sufficient. The reference of the role by CBK to set and publish CBR appears only in Section 33B in the entire Banking Act. So as to establish the CBR referred to in Section 33 B (1), it is necessary to read that Section with Section 36(4) of the Central Bank Act which provides as follows: -

"The Bank shall publish the lowest rate of interest it charges on loans to banks and microfinance banks, and that rate shall be known as the central bank rate."

168. The failure by Section 33B (1) of the Banking Act to make specific reference to the provisions of the CBK Act in respect to the setting and publication of the CBR could open the provisions of Section 33B (1) to various interpretations. If left as worded, one could argue that the CBR referred to in Section 33B need not necessarily be that contemplated under the CBK Act. In our view, clarity can be given to those provisions if they specified that the CBR in Section 33B is the CBR contemplated under Section 36(4) of the Central Bank Act. Just to demonstrate how that clarity can be achieved, we pick on Section 34(6)(b) of the Banking Act, which provides as follows:-

"(6) For the purposes of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the institution of its depositors and other creditors and the declaration of a moratorium shall—

(a) ……..…..

(b) limit the maximum rate of interest which shall accrue on deposits and other debts payable by the institution during the period of the moratorium to the minimum rate determined by the Central Bank under the provisions of section 39 of the Central Bank of Kenya Act (Cap. 491) or such other rate as may be prescribed by the Central Bank for the purposes of this section provided that the provisions of this paragraph shall not be construed so to impose an obligation on the institution to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case;" (emphasis ours)

169. Given that the contravention of Section 33B of the Act attracts penal consequences the Statute should be unequivocal that the CBR referred to therein is that contemplated in the CBK Act. This would be in consonance with good legislative practice that definitions appearing in one statute ought to appear in related statutes for clarity and to avoid inconsistencies and ambiguity when dealing with a related issue. All laws relating to the same issue must bear the same meaning as they would have the potential of the same words being assigned different meanings and interpreted differently depending on the statute under consideration. Each statute must be interpreted in line with all the provisions contained therein.

170. Further, we find that the use of the words *"four percent, the CBR set and published"* in Section 33(B)(1)(a) of the Act are imprecise, uncertain and falls short of what would be termed a good piece of legislation that is easily understood by *"Wanjiku."* In an attempt to clarify this ambiguity, CBK in its Banking Circular No. 4 of 2016 gave the following guideline, ***"For purposes of section 33B (1) (a) which sets the maximum interest rate chargeable for a credit facility "at no more than four percent, the base rate set and published by the CBK", the cap will be set at four percentage points above the CBR."***

The provision is not clear whether the word *"of"* was intentionally left out by the drafters of the legislation. Could the words *"at no more than four percent, the base rate"* mean four percent above the CBR set and published by CBK" There could also be a mischievous interpretation of the words *"at no more than four percent, the base rate"* to mean below the CBR. Unfortunately, the ambiguity persists even after the 2018 Amendment. There is need for clarity on the issue because left as it is, it is open to different interpretations.

171. The Section is also vague as to the period the four (4%) per cent interest is applicable. It does not specify whether it is to be charged per day, per month or per annum. This ambiguity is apparent as CBK felt it necessary to provide the following guideline in Banking Circular No. 4 of 2016, *"The interest rates indicated in the Banking (Amendment) Act 2016, will apply on an annual basis."*

We add that the attempt to clarify the meaning through circulars/guidelines is not sufficient because it has to be remembered that non-compliance with the Section 33B comes with penalties and criminal proceedings. In any event, any valid law must be self-explanatory. It must and should not be qualified by explanations to be found outside of the statute.

172. KBA argues that the Section does not specify whether the cap applies to various currencies other than Kenya Shillings. This was raised for the first time in its submissions. It does not elaborate this argument. It is our considered view that since the Petitioner did not raise the said issue in his Petition and is bound by his pleadings, it would be improper to analyse and determine the same. In addition, doing so in the face of paucity of detailed argument raises the likelihood of this Court making a determination without the advantage of full argument.

173. It is now appropriate for us to address the purpose of Section 57 of the CBK Act in so far as Section 33 (B)(1) of the Act is concerned. The said provision stipulates that:-

"The Bank may make regulations, issue guidelines, circulars and directives for the purpose of giving effect to the provisions of this Act and generally for the better carrying out of the objects of the Bank under this Act,"

174. It is clear from the aforesaid provision that CBK is empowered to make regulation, circulars and directives for the purpose of giving effect to the Act. In giving effect to the Act, CBK issued Circular No 4 of 2016 on 13th September 2016.

175. CBK issued guidance in an attempt to clarify and harmonise the interpretation of the Sections. The fact that CBK issued the Circular to clarify several issues was evidence of the ambiguity of the impugned Section. It is clear to this Court that in the absence of that guidance, there would have been anarchy in the banking industry.

176. Any words that have the potential of causing confusion must be clearly defined. The Legislature should not assume that the meaning of material words can be inferred. It must make it easy for everyone, including a lay person to understand the meaning of a provision. In our view, Section 33B lacks the minimum degree of certainty that is required of legislation that creates criminal offences. There is no option but for the provision to be struck out for being vague, ambiguous and being in contravention to Article 29 of the Constitution which provides as follow: -

"freedom of every person not to be deprived of freedom arbitrarily without just cause."

177. We fully associate ourselves with the decision of Mumbi J in ***Geoffrey Adare –Vs- Attorney General & 2 Others [2016] eKLR*** where the Learned Judge was called upon to consider whether **Section 29** of **The Kenya Information and Communication Act** was constitutional. In the pertinent part of her holding, she held thus:

"77. I have considered the words used in the section. I note that there is no definition in the Act of the words used. Thus, the question arises: What amounts to a message that is "grossly offensive", "indecent" "obscene" or "menacing character"" Similarly, who determines which message causes "annoyance", "inconvenience", "needless anxiety"" Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of the matter.

78. It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences. In making these findings, am guided by the words of the case of Sunday Times –Vs- United Kingdom Application No.65 38/74 para 49, in which the European Court of Human Rights stated as follows:

"(A) norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen regulates his conduct: he must be able –if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequence which a given situation may entail.""

178. We are further persuaded by the decision of Lesiit, Kimaru and Mutuku, JJ In the case of *Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR* where they held as follows;

"We have examined Sections 295, 296(1)and (2) and 297(1) and (2) of the Penal Code and have come to the conclusion that the said Sections of the Penal Code are ambiguous and are conflicted to such an extent that it violates an accused person's right to fair trial as provided under Article 50 (2)(b) of the Constitution and Article 27 of the Constitution that requires accused persons, who are a special category of persons facing criminal trial, to be given equal treatment and to be accorded equal protection and equal benefit under the law. We have found that although Section 295 of the Penal Code gives the definition of the offence of robbery, the definition is inadequate and insufficient in its scope and application so that the penalty Sections provided under Section 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not set out in required detail that meets the constitutional threshold that requires certainty and clarity of the offence charged to enable an accused person to prepare and conduct their defence. This lack of clarity and presence of ambiguity evident in the said sections has resulted in persons being charged with either offence under sub-sections (1) and (2) of Sections 296 and 297 of the Penal Code based on similar facts and circumstances, with consequent miscarriage of justice to those accused persons convicted of the aggravated offences. The said sections of the Penal Code do not distinctively clarify and differentiate the degrees of aggravation of the offence of robbery and attempted robbery with sufficient particularity as to enable those accused to adequately answer to the charges and prepare their defences."

179. As can be seen from the aforesaid analysis, no person should be punished for disobeying a law that is uncertain. He must understand in clear terms the law he is required to obey. As drafted, Sections 33B(1) and (2) of the Act are open to different interpretations which could lead to some offending CEOs suffering prejudice while others would go scot free depending on the interpretation that different courts would make.

180. We are therefore persuaded that the provision of Section 33(B)(1) and (2) of the Act violate the Constitution in so far any person contravening the same risks facing criminal liability without the benefit of understanding what s[he] was supposed to comply with. The penalties for contravention of Section 33 B (c) are fairly severe and banks, financial institutions and their respective CEOs risk suffering severe penalties for failure to comply with unclear laws.

181. On that basis this Court finds and holds that there is merit in the Petitioner's, CBK's and KBA's submissions that Sections 33B(1) and (2) of the Banking Act are invalid by virtue of ambiguity, imprecision and indefiniteness. The arguments made in this respect are not a quibble!

VI. CONSTITUTIONALITY OR OTHERWISE OF THE PENAL PROVISIONS OF SECTION 33B(3) OF THE BANKING ACT

182. Although the Petitioner's pleadings would have been more elegant, we discern three facets in respect to his grievance on the penal section of the impugned law. One, is that the provisions are discriminatory for failing to prescribe any punishment for a customer who contravenes those provisions. Second, that the law is unconstitutional for failing to impose a maximum sentence. Lastly, that because the law imposes a minimum sentence, the important aspect of mitigation in sentencing is rendered meaningless.

183. The Petitioner, KBA and CBK argue that by Section 33B (3) imposing a minimum fine of not less than one million or in default the Chief Executive Officer shall be liable to an imprisonment for a term not less than one year is unconstitutional. The Petitioner in particular contends that the Section provides for a minimum sentence but fails to provide for a maximum thereby leaving it to the discretion of the judicial officer. The argument by the Petitioner is that the maximum sentence should be prescribed and should be not left to the discretion of the Court; so that a party charged under the Section would know what sentence is likely to be imposed. He further argues that the impugned provision violates fair trial by denying any convicted persons the right of mitigation before sentencing. He stated that this also imperils the property of such convicted persons which is now at the mercy of the Courts, without any controls on limitation whatsoever.

184. CBK argues that Section 33B (3) of the Act is discriminatory since it only punishes the bank, financial institution and their respective CEOs for contravention and not the other persons who have entered into these agreements.

185. KBA further argues that Section 49 and 50 provide for penalties under the Banking Act. It states that the two Sections recognize the need for some culpable behaviour by an officer of the bank or financial institution before s[he] is found guilty of an office. It argues that Section 33B (3) takes away this protection as the CEO of the bank or financial institutions is not convicted of any offence but will be punished for the failure by the bank to the fine imposed. It contends that the CEO is not subject of any criminal proceedings, is not given a chance to be heard and is not given an opportunity to mitigate. It further contends that the mandatory minimum sentence removes the discretion from court to impose a punishment appropriate to the facts of the particular case, therefore are unconstitutional.

186. The AG, National Assembly and COFEK did not submit on the issue.

187. In respect to sentencing, the Judiciary has published Sentencing Policy Guidelines to equip Courts and bring consistency, accountability, equity and transparency in sentencing. The Guidelines have been recognized by the Supreme Court in the *Francis Karioko Muruatetu & another v Republic [2017] eKLR* case, as being an authoritative guide in sentencing in Kenya.

188. The principles underpinning sentencing are as follows: -

i. Proportionality

ii. Equality, uniformity, parity, consistency and impartiality.

iii. Accountability and transparency.

iv. Inclusiveness.

v. Respect for Human rights and fundamental freedoms.

vi. Adhere to domestic and international law with due regard to recognised international and regional standards on sentencing.

189. In respect to the first issue, Section 33B(2) provides as follows:-

"*A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law."*

190. From the wording of the provision, the offender can either be the bank or the customer. However, Section 33B (3) provides a penalty for the bank and the CEOs only. The customer has been left out. It is not clear to us why only the bank and not the customer should be punished yet they would both be contravening the provisions of the law. This anomaly is evident when one compares this provision with the provisions of Section 49 of the Act which is the general penalty section. It provides as follows;

"49. Penalties for offences

Where any institution or other person contravenes any of the provisions of this Act—

(a) if it is a body corporate, it shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings; and

(b) every officer of that institution or person shall be guilty of an offence and liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding two years or to both unless he proves that, through no act or omission on his part, he was not aware that the contravention was taking place or was intended or about to take place, or that he took all reasonable steps to prevent it taking place."

The provisions of Section 49 covers all offenders and is not discriminatory. We agree with the submissions by the Petitioner, CBK and KBA that anyone who does not comply with Section 33B should be subjected to the same treatment in regards to penalty. By failing to do so, this provision of the law is discriminatory and therefore unconstitutional.

191. On the issue of discretion, the Supreme Court pronounced itself in the case of Francis Muruatetu (supra) as follows;

"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right"

192. In the above case, the discussion before the Court was the issue of discretion being taken away from the Court on sentencing. The circumstances of that case was that the Court's hands were tied to imposing a particular sentence. What was declared as unconstitutional by the Supreme Court is the mandatory aspect of the death sentence. In that situation, the judicial officer had no option but to impose the death sentence upon conviction and so mitigation was otiose.

193. Here, the provision that is being challenged provides for a minimum fine of Kenya Shillings one million with a default penalty of a minimum imprisonment for a year. It cannot be said that the discretion of a judicial officer is completely impaired or that mitigation is worthless because under the provisions of Section 33B the Court can impose a higher penalty than the minimum prescribed. The Court has opportunity to consider mitigating factors and impose an appropriate sentence as per the Sentencing Guidelines.

194. In respect to the complaint that the impugned provision does not provide a maximum penalty and this can be abused to impose unreasonably harsh and disproportionate penalties, it is expected that in sentencing a judicial officer will act responsibly and exercise discretion judiciously. One of the objects of the Sentencing Guidelines is to assist a judicial officer in identifying relevant factors so as to arrive at an appropriate and judicious sentence. It cannot therefore be correct to say that the imposition of a severe

sentence including life imprisonment is unconstitutional if the same is proportionate and reasonable and circumstances of the case. If, however, a party is aggrieved by a sentence, then s[he] retains the right to challenge it by way of appeal.

195. From the foregoing, it seems to us that the only unconstitutional aspect of the penal section of Section 33B is that it discriminates against the banks and its CEOs.

196. Perhaps we need to add that if eventually the Court was to declare as invalid Section 33B, we take the view that there is no lacuna in the law as Section 49 of the Act provides for general penalties for offences under this Act.

VII. CONCLUSION

197. Before we conclude, we reiterate that the provisions of Section 33 B of the Act as introduced by the Banking (Amendment) Act 2016 was amended by Section 64 of the Finance Act 2018. The effect of the amendment in respect to Section 33 B was limited to sub-section 1. Although, the issues raised in the Petition are in respect to the provisions of the law before the 2018 amendment, they remain relevant for consideration in these proceedings. The prayers that this Bench will have to reflect this changed position.

198. We are now able to answer the questions posed by the Petition: -

(i) Do the provisions of Section 33B of the Act infringe on CBK's constitutional mandate of formulating monetary policy" NO.

(ii) Are the provisions of Section 33B matters concerning County Government" NO.

(iii) Are the provisions of Sections 33B(1) and (2) discriminatory against banks and financial Institutions under the Banking Act contrary to Articles 27 of the Constitution" NO.

(iv) Do the said provisions infringe on the right to property of Banks and other financial institutions contrary to Article 40 of the Constitution" NO

(v) Are the provisions of Section 33B of the Act vague, imprecise and ambiguous" YES.

(vi) Are the penal provisions under the impugned Section 33 B (1) and (2) inimical to the provisions of Articles 27, 29 and 50 of the Constitution" YES

204. Before we make any orders herein, we feel inclined to make one observation. A lesson to be drawn from the provisions of Sections 4B, 4C and 4D of the Central Bank Act is that an integral feature of formulating monetary policy; it is a consultative process between CBK and the Executive (through the Cabinet Secretary, Treasury). It is also a process in which the National Assembly has an input when the monetary policy statements are placed before its appropriate committee for deliberation. Although CBK has the ultimate constitutional authority to formulate monetary policy, the collaborative involvement of the other two organs is testimony of the importance of matters of this nature and therefore the need to have the input of not only the Executive but Parliament, the peoples' representative. One organ cannot act in isolation.

205. Although we have found that the provisions of Section 33B are of matters that may be outside monetary policy, we think that a framework that regulates interest rate charged by banks and financial Institutions have far reaching consequences. For that reason, the setting of an interest rate cap or any other regulations on interest rates could be enriched by a consultative and/or collaborative framework that draws input from stakeholders not in the least CBK. We see merit in the argument by CBK that the fixing of interest rates caps and we may add the entire regulatory framework, should not be arbitrary. But of course these are matters within the remit of the National Assembly and we can only make our observations.

206. We have considered what remedies to grant in view of our findings. We are aware that thousands of contracts have been entered by borrowers and lenders on the basis of the impugned provisions of Section 33B. We have come to a conclusion that although the provisions generally have constitutional underpinning, some aspects are unconstitutional. The remedies we shall grant take into account the possible disruption that invalidating everything done under the unconstitutional aspects of the provisions may

have on existing contracts. The possible harm should not be disproportionate to the harm that may result if we were to give the law a temporary respite. The Supreme Court has endorsed this approach, where appropriate, and in Suleiman Shabhal vs. Independent Electoral Boundaries Commission & 3 others held: -

"*[42] The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of "prospective annulment". Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands."*

207. This is the approach we shall take for the provisions that we have found to be vague, imprecise and ambiguous. Indeed, if the striking out of the provision is not temporarily suspended, there is the risk of throwing the entire banking industry in turmoil. The Circular no. 4 of 2016 dated 13th September 2016 by CBK has brought some measure of certainty amongst stakeholders. This in our view must subsist before a new provision can be enacted.

208. The Court appreciates the discomfort of waiting a little longer but it must be understood that the duty of the court to interpret the law and give remedies that are in line with Article 10 of the Constitution and leave it to the Legislature to debate whether a law that it has enacted is really in tune with the Constitution.

209. In respect to the penal provisions of Section 33B which have been found to be unconstitutional, the immediate invalidation is mitigated by a fallback to the general penalty provision of Section 49 of the Act.

DECLARATIONS AND FINAL ORDERS

210. These are our final orders:-

1. The provisions of Section 33B of the Banking Act (Cap. 488 Laws of Kenya) do not infringe on CBK's constitutional mandate of formulating monetary policy stipulated under Article 231 of the Constitution.

2. Sections 33B(1) and 33B(2) of the Banking Act (Cap. 488) Laws of Kenya be and are hereby declared unconstitutional, null and void for being vague, ambiguous, imprecise and indefinite.

3. In view of the consequences of Declaration 2 above, Declaration 2 above is suspended for a period of twelve (12) months from the date of delivery of this judgment for the National Assembly to consider making appropriate amendments to the impugned sections.

4. In default of order 3 above, the declaration of invalidity in Declaration 2 above shall take effect.

5. Section 33B (3) of the Banking Act is hereby declared unconstitutional, null and void for being discriminatory contrary to Articles 27 and 29 of the Constitution and infringement of fair hearing under Article 50 of the Constitution.

6. As this is a public interest matter, each party shall bear its own costs.

211. It is so ordered

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of March, 2019.

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F. TUIYOTT **J. KAMAU** **R. BIOMNDO NGETICH**

JUDGE **JUDGE** **JUDGE**

PRESENT:-

Oduor h/b Bwire for Petitioner

Ouma h/b Ochieng for 2nd Respondent

Keriba h/b Fraser for 2nd Respondent

Kurauka for 2nd Interested party

N/a for Attorney General

N/a for the 3rd Interested party