



**Benjamin v Safaricom PLC & 2 others; Consumers Federation of Kenya (COFEK)  
& another (Interested Parties) (Petition E554 of 2022) [2024] KEHC 14762 (KLR)  
(Constitutional and Human Rights) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14762 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E554 OF 2022  
EC MWITA, J  
NOVEMBER 22, 2024**

**BETWEEN**

**DR MAGARE GIKENYI J BENJAMIN ..... PETITIONER**

**AND**

**SAFARICOM PLC ..... 1<sup>ST</sup> RESPONDENT**

**COMMUNICATIONS AUTHORITY OF KENYA (CAK) ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CONSUMERS FEDERATION OF KENYA (COFEK) ..... INTERESTED PARTY**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**Safaricom’s notice intimating that bonga points have a time span of three years is a threat to violate consumers’ economic interests**

*The matter was a challenge on the notice issued by Safaricom PLC (the 1st respondent) to the effect that all bonga points (loyalty points) more than three years old were to expire on January 1, 2023 and would be unavailable for redemption. The court held that once bonga points were awarded, the points become the customers’ property and that the 1st respondent ceased to have any rights over them. The court further held that the 1st respondent had no right to change or introduce new terms on the points already earned, including an expiry date. The court found that the representation by the 1st respondent to customers that they would earn bonga points if they joined the bonga points programme, conferred on the consumers a legitimate expectation which bound it and it could not turn away to the disadvantage of the consumers.*

Reported by Kakai Toili



**Constitutional Law** – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms – economic and social rights – where a telecommunication service provider introduced expiry dates to its loyalty points that had already been awarded to its customers - whether the loyalty points were the property of the customers and formed their economic interests protected under article 46 of the Constitution on consumer rights – whether the review of terms and conditions relating to loyalty points which led to the introduction of expiry dates could be applied retrospectively - whether a person who ceased to be a customer of a telecommunication service provider was entitled to redemption of loyalty points - Constitution of Kenya, article 46.*

**Constitutional Law** – *doctrine of legitimate expectation – applicability of the doctrine of legitimate expectation – applicability in the context of private law contract - whether the doctrine of legitimate expectation applied and was capable of enforcement in the context of private law contract - whether the introduction of expiry dates for loyalty points by a telecommunication service provider violated the customers’ legitimate expectation to earn and redeem the points for as long as they were subscribers.*

**Constitutional Law** - *institution of constitutional petitions - doctrine of exhaustion - applicability of the doctrine of exhaustion – whether it was mandatory that the dispute resolution procedures in the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, and the Kenya Information Communications (Consumer Protection) Regulations, 2010 be exhausted before invocation of High Court’s jurisdiction - Kenya Information Communication Act (cap 411A), section 66; Kenya Information and Communications (Dispute Resolution) Regulations, 2010, regulations 3 and 4; Kenya Information Communications (Consumer Protection) Regulations, 2010, regulation 7.*

### **Brief facts**

On October 28, 2022, Safaricom PLC (the 1<sup>st</sup> respondent) issued a notice through its website and other media platform to the effect that all *bonga* points more than three years old were to expire on January 1, 2023 and would be unavailable for redemption. Aggrieved, the petitioner filed the instant petition contending that the notice was an ambush to the public and would affect millions of subscribers who would lose *bonga* points worth billions of shillings. The petitioner asserted that the introduction of expiry dates on *bonga* points was done without the input of subscribers, breached their legitimate expectation and duty of care owed to subscribers by the 1<sup>st</sup> respondent. The impugned action was also deemed to be arbitrary, irrational and out of sync with majority of the subscribers, since the notice was issued without consultations.

The petitioner stated that the impugned action violated article 46(1)(b) and (c) of the Constitution on consumer rights because subscribers were never informed that *bonga* points would have expiry dates. The petitioner thus claimed that the 1<sup>st</sup> respondent’s action was tantamount to taking away subscribers’ economic right. The petitioner argued that Communications Authority of Kenya (the 2<sup>nd</sup> respondent) as the regulator charged with the responsibility of protecting customers/consumers in that industry, had failed to intervene regarding the impugned announcement, hence was complacent. The petitioner thus sought declarations of invalidity of the impugned notice and orders of *certiorari* and prohibition against the 1<sup>st</sup> respondent.

### **Issues**

- i. Whether loyalty points awarded by a telecommunication service provider to its customers were the property of the customers and formed their economic interests protected under article 46 of the Constitution on consumer rights.
- ii. Whether the review of terms and conditions relating to loyalty points by a telecommunication service provider which introduced expiry dates could be applied retrospectively.
- iii. Whether a person who ceased to be a customer of a telecommunication service provider was entitled to redemption of loyalty points.
- iv. Whether the introduction of expiry dates for loyalty points by a telecommunication service provider violated the customers’ legitimate expectation to earn and redeem the points for as long as they were subscribers.



- v. Whether the doctrine of legitimate expectation applied and was capable of enforcement in the context of private law contract.
- vi. Whether it was mandatory that the dispute resolution procedures in the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, and the Kenya Information Communications (Consumer Protection) Regulations, 2010 be exhausted before invocation of High Court's jurisdiction.

### **Held**

1. Jurisdiction was the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction was a threshold and fundamental question that the court had to promptly determine. If the court found that it had no jurisdiction to hear a matter, that was the end. It should not take any further step, but down its tools.
2. Jurisdiction of the court was provided for in article 165(3) of the Constitution. The court had jurisdiction to, among others, determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened; hear any question respecting the interpretation of the Constitution, including the determination of—the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution. Article 165(3) thus, authorized the court to decide all matters brought before it other than those reserved for other courts as contemplated in article 162(2) of the Constitution.
3. The High Court had wide jurisdiction to hear and determine various matters that may be brought before it. Whether or not the court had jurisdiction to hear and determine the petition must, therefore, be viewed through the prism of article 165(3)(b) and (d) of the Constitution.
4. The doctrine of exhaustion required that where available, administrative remedies be exhausted before an aggrieved party moves to court. In other words, a litigant aggrieved by an agency's action was not allowed to seek redress from a court of law on the impugned action without first pursuing available remedies before the agency itself. There were however, exceptions to that rule, one being that the available alternative remedy must be effective.
5. From a reading of section 66 of the Kenya Information Communication Act, regulations 3 and 4 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, and regulation 7 of the Kenya Information Communications (Consumer Protection) Regulations, 2010 made under the Act; the regulations did not make it mandatory that the procedure in those regulations be complied with before invocation of the court's jurisdiction.
6. The 2<sup>nd</sup> respondent though argued that the petitioner did not exhaust the dispute resolution mechanism in regulations 3 and 4 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, and regulation 7 of the Kenya Information Communications (Consumer Protection) Regulations, 2010, maintained that the complaint on the expiry of *bonga* points of more than 3 years was outside its mandate because its mandate did not involve supervision of marketing strategies employed by the 1<sup>st</sup> respondent. That admission made the argument on non-exhaustion fall flat.
7. For the doctrine of exhaustion to apply, the alternative remedy must be efficacious and capable of producing an effective remedy, a fact the respondents failed to demonstrate.
8. The issue raised centred on whether the decision to introduce time lines on *bonga* points would violate consumers' (customers') rights. Being a claim of violation rights in the Bill of Rights, the issue fell within the jurisdiction of the court under article 165(3)(b) of the Constitution.
9. The petition was brought under article 22 as read with articles 23(1) and 165(3) of the Constitution, alleging what the petitioner perceived to be a constitutional infraction. The respondents had not demonstrated that there existed a clear provision in the Constitution or statute that ousted jurisdiction



- of the court, to make the matter fall outside its jurisdiction. The court had jurisdiction to hear and determine the petition.
10. The 1<sup>st</sup> respondent introduced the *bonga* points scheme with the intention of rewarding loyal customers for buying into and using its services and products, a scheme that had not been solicited for by customers. The reward was not based on any other conditions and had no expiry dates. The 1<sup>st</sup> respondent's customers joined the scheme, used the 1<sup>st</sup> respondent's services and products and were duly rewarded the loyalty points without any other conditions, and continued to do so.
  11. Once a customer was rewarded, the *bonga* points became his property. The customer as a consumer could use the loyalty points under the terms they were acquired. The 1<sup>st</sup> respondent ceased to be the owner of those points as soon as they were awarded to the customer. They formed the consumer's economic interests protected under article 46 of the Constitution.
  12. The 1<sup>st</sup> respondent's argument that it reviewed terms and conditions relating to *bonga* points by introducing expiry dates, could not be correct. Any change on the terms and conditions if reviewed, could not act retrospectively as no action could be taken to affect a right that had accrued prior to such changes.
  13. *Bonga* point rewards created a legitimate expectation on customers. That was, once registered for *bonga* points rewards, customers had a legitimate expectation that they would earn the points for as long as they were subscribers and had no timelines within which they must redeem the points. To some, the points were an investment and the 1<sup>st</sup> respondent had an obligation to facilitate redemption of the points from time to time, but could not impose expiry dates that were not part of the conditions during subscription.
  14. In *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] KESC 53 (KLR) (Par265) the Supreme Court stated that an instance of legitimate expectation would arise when a body, by representation or by past practice, had aroused an expectation that was within its power to fulfil. A party that sought to rely on the doctrine of legitimate expectation, to show that it had *locus standi* to make a claim on the basis of legitimate expectation.
  15. Although the issue in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* was regarding representation made by a Government body, it applied to a representation made by a private body in private contractual arrangement like in the instant case, so long as the private body had authority to make the decision or representation. The 1<sup>st</sup> respondent had authority to make the decision on *bonga* points, made the decision within its scope of authority, the decision was clear, unambiguous and unqualified thus, gave rise to a legitimate expectation for which the 1<sup>st</sup> respondent must be held to its word.
  16. It would be ironical for the 1<sup>st</sup> respondent to insist on customers continuing to sign up to its service with a promise to earn *bonga* points but fail to live up to its undertaking and walk away by introducing expiry dates to the disadvantage of loyal customers. The undertaking having been made in the context of private law contract, the legitimate expectation arising therefrom was sufficiently capable of enforcement.
  17. The 1<sup>st</sup> respondent argued that *bonga* points would expire immediately in the event a user's line was deleted as a result of inactivity. That was not a problem since *bonga* points were awarded to existing loyal customers. Where one ceased to be a customer due to deletion of his line for reason of prolonged inactivity, the contract was deemed to have been terminated and the person who was longer a customer for purposes of redemption of *bonga* points had no right to *bonga* points.
  18. The petition was filed to challenge the decision that *bonga* points of more than three years would expire. The 1<sup>st</sup> respondent had not withdrawn the impugned directive. In the circumstances, the argument that the petition had become moot had no legal basis.



19. The 2<sup>nd</sup> respondent argued that the issue at hand was not within its mandate. In the event the 2<sup>nd</sup> respondent did indeed issue a no objection letter, it failed to protect customers' economic interest thus, its action was violative of consumers' economic interests.
20. The 1<sup>st</sup> respondent's notice of October 28, 2022 intimating that *bonga* points of more than three years were to expire was a threat to violate consumers' economic interests and violation of their legitimate expectation.

*Petition allowed.*

### **Orders**

- i. *A declaration was issued that the public notice issued by the 1<sup>st</sup> respondent on October 28, 2022 purporting to give effect to the introduction of expiry dates on Safaricom bonga points loyalty programme and non-merchandise bonga redemption (SMS, minutes and mobile data) service of more than three years was a violation of consumer economic interests thus, unconstitutional null and void.*
- ii. *An order of certiorari was issued quashing the notice issued by the 1<sup>st</sup> respondent on October 28, 2022 purporting to introduce expiry dates on Safaricom bonga points loyalty programme and non-merchandise bonga redemption (SMS, minutes and mobile data) service of more than three years.*
- iii. *An order of prohibition was issued prohibiting the 1<sup>st</sup> respondent from giving effect to the public notice issued on October 28, 2022 purporting to introduce expiry dates on Safaricom bonga points loyalty programme and non-merchandise bonga redemption (SMS, minutes and mobile data) service of more than three years*
- iv. *Each party to bear their own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Aluwaala, Daniel Ingida & another v Council of Legal Education & another* Petition 254 of 2017; [2017] KEHC 2775 (KLR) - (Explained)
2. *Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties)* Constitutional Petition 543 of 2022; [2024] KEHC 2999 (KLR) - (Explained)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14,14A,14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)
4. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)
5. *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board* Petition 495 of 2015; [2016] KEHC 5405 (KLR) - (Explained)
6. *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal 108 of 2010; [2010] KECA 164 (KLR) - (Explained)
7. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
8. *MH & 2 others (Suing of their own accord and on Behalf of Oampga - Parents and Guardians of Minor Students Enrolled In O Academy Mombasa) v Nitin Pravinchandra Malde & 5 others (All Sued as Office Bearers of The O Education & Relief Board) & another* Constitutional Petition N30 of 2020; [2020] KEHC 610 (KLR) - (Mentioned)
9. *Muthinja, Geoffrey & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Mentioned)
10. *Oindi, Zaippeline & 39 others v Karatina University & another* Civil Appeal 52 of 2014; [2015] KECA 799 (KLR) - (Mentioned)
11. *Okoti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others* Petition 42 & 27 of 2014 (Consolidated); [2021] KEELRC 2306 (KLR) - (Explained)



12. *Okoiti, Okiya Omtatab v Communication Authority of Kenya & 8 others* Constitutional Petition 53 of 2017; [2018] KEHC 7513 (KLR) - (Explained)
13. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Mentioned)
14. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested parties)* Constitutional Petition 159 of 2018 & 201 of 2019; [2020] eKLR (Consolidated) - (Explained)
15. *Republic v Kenya National Examination Council & 2 others ex-parte LMB & 319 others* Judicial Review Application 3 of 2018; [2018] KEHC 4711 (KLR)- (Mentioned)
16. *Republic v Vice Chancellor Moi University & 2 others ex parte Benjamin J Gikenyi Magare* Judicial Review 1 of 2018; [2019] KEHC 8774 (KLR) - (Mentioned)
17. *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested parties)* [2020] KEHC 10370 (KLR) - (Explained)
18. *Wambui, Shadrack Kinyanjui v Independent Electoral and Boundaries Commission & 2 others* Constitutional Petition 60 of 2017; [2017] KEHC 9133 (KLR) - (Explained)

### **South Africa**

*South African Veterinary Council v Szymanski* [2003] ZASCA 11; 2003 (4) SA 42 (SCA); 2003 (4) BCLR 378 (SCA) (14 March 2003) - (Explained)

### **United Kingdom**

*Entick v Carrington* [1965] EWHC KB J98 - (Explained)

*Ressel v Duke of Norfolk* [1949] 1 All ER 118 - (Explained)

### **Canada**

1. *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 - (Explained)

2. *Canada (Attorney General) v Mavi* 2011 SCC 30 [2011] 2 SCR 504 - (Explained)

### **Regional Court**

*Hardware & Ironmongery (K) Ltd v Attorney General* [1972] 1 EA 275(CAM) - (Explained)

### **Texts**

Fordham, M., (Ed) (2004), *Michael Judicial Review Handbook* London: Hart Publishing 4th Edn p 1007

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 2(1); 2; 3; 10; 19; 20; 23; 27; 28;34; 35; 43; 46; 47; 165(2)(3)(5)(6)- (Interpreted)
2. Consumer Protection Act (cap 501) section 3(4) - (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 7(2) - (Interpreted)
4. Kenya Information and Communications (Consumer Protection) Regulations, 2010 (cap 411A Sub Leg) regulation 7- (Interpreted)
5. Kenya Information and Communications (Dispute Resolution) Regulations (cap 411 Sub Leg) regulations 3, 4 - (Interpreted)
6. Kenya Information Communication Act (cap 411A) section 66 - (Interpreted)

### **Advocates**

None mentioned



## JUDGMENT

### Petitioners

1. On October 28, 2022, Safaricom PLC (the 1<sup>st</sup> respondent) issued a notice through its website and other media platform to the effect that all Bonga points more than 3 years old were to expire on January 1, 2023 and would be unavailable for redemption. The petitioner then filed this petition contending that the notice was an ambush to the public and would affect millions of subscribers who would lose Bonga points worth billions of shillings.
2. The petitioner stated the 1<sup>st</sup> respondent's action would affect many Kenyans because of the vast geographical background of Kenya, high illiteracy levels in the country, lack of internet in most areas, among other factors.
3. The petitioner asserted that the introduction of expiry dates on Bonga points was done without the input of subscribers, breached their legitimate expectation and duty of care owed to subscribers by the 1<sup>st</sup> respondent. The impugned action was also deemed to be arbitrary, irrational and out of sync with majority of the subscribers, since the notice was issued without consultations. Subscribers were therefore, condemned unheard contrary to article 47 of the *Constitution*.
4. The petitioner further stated that the action violated article 46(1)(b) and (c) of the *Constitution* because subscribers were never informed that Bonga points would have expiry dates. The 1<sup>st</sup> respondent's action was tantamount to taking away subscribers' economic right. According to the petitioner, the 1<sup>st</sup> respondent was required to act within the law; its unilateral actions of introducing the expiry dates on Bonga points contravened consumer protection rights under article 46 of the *Constitution* and was meant to entrench unfair gain to he 1<sup>st</sup> respondent.
5. The petitioner maintained that the 1<sup>st</sup> respondent's subscribers having been loyal to the company and accumulated Bonga points, acquired an economic interest. They could, therefore, redeem their Bonga points as and when they deemed it necessary without being forced to redeem the points immediately or they risked losing the points. Reliance was placed on *Republic v Vice Chancellor Moi University & 2 others, Exparte Benjamin J Gikenyi Magare* [2019] eKLR.
6. The petitioner again argued that the 1<sup>st</sup> respondent's action would discriminate against persons with disabilities especially those visually impaired who could not read the notice. It was the petitioner's case, therefore, that the respondents' action was an affront to articles 2(1) & (2), 3, 10, 19, 20, 27, 28, 43, 46 and 47 of the *Constitution*.
7. The petitioner argued that Communications Commission of Kenya (the 2<sup>nd</sup> respondent) as the regulator charged with the responsibility of protecting customers/consumers in this industry, had failed to intervene regarding the impugned announcement, hence was complacent.
8. The petitioner maintained that the 1<sup>st</sup> respondent acted contrary to the common law principle established in *Entick v Carrington* [1965] EWHC KB J98 and *Hardware & Ironmongery (K) Ltd v Attorney General* [1972] 1 EA 275(CAM); that the action was outside the law and relied on article 23 of the *constitution* and the decision in *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested parties)* [2020] eKLR to urge the court to grant an appropriate relief.



9. Relying on the long title to the *Consumer Protection Act* and section 3(4) thereof, the petitioner contended that the Act promotes and advances social and economic welfare of consumers such as the issue at hand. Introduction of expiry dates was thus, an economic loss to subscribers as consumers. He relied on the decision in *MH & 2 others (Suing of their own accord and on Behalf of Oampga - Parents and Guardians of Minor Students Enrolled in O Academy Mombasa) v Nitin Pravinchandra Malde & 7 others (All Sued as Office Bearers of The O Education & Relief Board) & O Academy Mombasa* [2020] KEHC 610 (KLR)
10. The petitioner took the view, that the 1<sup>st</sup> respondent's action amounted to abuse of its dominance in the telecommunications market; violated articles 46(1)(b) and (c) and 47 of the *constitution*; was against the rule of business loyalty and breached legitimate expectation of customers. He relied on the decision in *Oindi Zaippeline & 39 others v Katarina University & Moi University* [2015] KECA 799 (KLR).
11. The petitioner sought declarations of invalidity of the impugned notice and orders of *certiorari* and prohibition against the 1<sup>st</sup> respondent.

### 1<sup>st</sup> respondent's case

12. The 1<sup>st</sup> respondent opposed the petition through a replying affidavit sworn by Gideon Mumo Kimende and written submissions. The 1<sup>st</sup> respondent stated that by dint of section 66 of the *Kenya Information Communication Act, 1988* as read with regulations 3 and 4 of the *Kenya Information and Communications (Dispute Resolution) Regulations 2010*, the court does not have jurisdiction to hear and determine the petition on account of exhaustion.
13. The 1<sup>st</sup> respondent relied on the decisions in *Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd* [1989] eKLR; *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR and *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested parties)* [2020] eKLR.
14. The 1<sup>st</sup> respondent further stated that in the spirit of innovation and customer appreciation, it resolved to award its customers loyalty points (Bonga points) as part of customer loyalty program available to all pre-pay and post-pay subscribers. Bonga points would be redeemed for rewards such as, minutes of talk time; data bundles; MMS; SMS bundles and goods and services redeemable at select retail outlets.
15. The 1<sup>st</sup> respondent contended that customers participating in the scheme consented to and expressly accepted to be bound by terms and conditions for Bonga Loyalty Programme and Non-Merchandise Bonga Redemption service which might be updated from time to time. The Bonga points scheme was not mandatory and customers may choose to opt into the scheme as they please.
16. The 1<sup>st</sup> respondent argued that it updated the terms and conditions for Bonga points programme and non -merchandise Bonga redemption service on June 28, 2022. Effective January 1, 2023, all Bonga points older than 3 years were to expire and would be unavailable for redemption. The Bonga points would also expire immediately in the event a user's line was deleted as a result of inactivity.
17. The 1<sup>st</sup> respondent further asserted that it publicized the change of terms and conditions to the public through its website and other media outlets. Before making the update, the Communication Authority of Kenya (2<sup>nd</sup> respondent) was notified and issued a no objection letter
18. The 1<sup>st</sup> respondent took the view, that the petitioner had failed to specify and /or prove whether the specific demographic of Kenyans he was referring to were affected by the update terms of service. The 1<sup>st</sup> respondent thus, contended that it had acted within the scope of its statutory and obligations to consumers and took all necessary steps to ensure that consumer rights were respected.



19. According to the 1<sup>st</sup> respondent, the 360-degree cross-segment campaign explained to the public how they could use the points while also highlighting an updated redemptions rate that was to run from 15<sup>th</sup> December to December 23, 2022. The 1<sup>st</sup> respondent took the position, that implementation of the Bonga points validity period was part of its strategy to help customers survive difficult economic times by redeeming their points for basic goods and services from several of its partners. To that end it gave customers a list of all partner outlets where they could redeem their Bonga points for goods and services.
20. The 1<sup>st</sup> respondent Asserted, therefore, that in setting up its customer loyalty programme and reviewing its terms and conditions from time to time, it was acting as a commercial entity, publicly listed on the Nairobi Stock Exchange and was not exercising any quasi-judicial functions.
21. The 1<sup>st</sup> respondent maintained that the decision to introduce Bonga Point expiry dates was rational and reasonable because: first, maintaining Bonga points program was costly. Second, the low usage of Bonga points prompted it to explore several use cases in order to encourage subscribers to use their points. The decision was thus, intended to encourage Bonga Points use- cases and reduce cost of maintaining them. It acted within its legal and contractual rights; complied with all regulatory requirements; provided sufficient notice to customers regarding the change and had the right to introduce expiry dates to minimize the cost of maintaining the Bonga Points program which customers voluntarily opted into.
22. The 1<sup>st</sup> respondent stated that it has to date not implemented the updated Bonga points Terms of Service and hence no basis for the allegations in the petition; that participation in the Bonga Points Loyalty program was voluntary; customers opted into the program and were not mandated to participate. This voluntary arrangement reflected a contractual agreement between the 1<sup>st</sup> respondent and its customers on the terms of the program, including the possibility of future changes which were outlined.
23. In the 1<sup>st</sup> respondent's view, introduction of expiry dates was a reasonable modification of the loyalty program's terms and conditions. Loyalty programs, by their nature, operated under specific terms that might evolve over time, including adjustments to point redemption timelines. It therefore acted within its contractual mandate to modify the program, and provided ample notice to customers.
24. According to the 1<sup>st</sup> respondent, implementing expiry dates for points or rewards was not a unique practice, but reflected a common business model aimed at maintaining financial sustainability while offering incentives to customers. It also complied with the provisions of articles 35 and 47 of the [Constitution](#). The 90 days-notice gave customers ample opportunity to make informed decisions about the use of redeemed points before the expiry dates. Multiple redemption points, including store outlets and digital platforms were given to facilitate easy redemption of the points.
25. The 1<sup>st</sup> respondent argued that introduction of expiry dates was a private business decision that did not require public consultation under the [constitution](#) or any statute. It relied on [Kenya Human Rights Commission & Others v Non-Governmental Organizations Co-ordination Board & Another](#) [2016] eKLR.
26. The 1<sup>st</sup> respondent again placed reliance on section 7(2) of the [Fair Administrative action Act](#) and the decisions in [Okiya Omtatab Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others](#) [2021] eKLR and [Republic v Kenya National Examination Council & another](#) [2002] eKLR, to urge for the dismissal of the petition.



## 2<sup>nd</sup> Respondent's Case

27. The 2<sup>nd</sup> respondent opposed the petition through a replying affidavit sworn by Matano Ndaro and written submissions. The 2<sup>nd</sup> respondent asserted that the complaint relating to cancellation of Bonga points was outside its mandate and therefore, it was not complacent as alleged.
28. The 2<sup>nd</sup> respondent stated that the Kenya Information and Communications Act, 1998 was amended to align it with articles 33 and 34 of the Constitution to provide for freedom of expression and freedom of the media and it derives authority from the Act. According to the 2<sup>nd</sup> respondent, its duty of care extended to the service being provided to the consumers but does not involve supervision of marketing strategies employed by the 1<sup>st</sup> respondent.
29. The 2<sup>nd</sup> respondent maintained that the petitioner did not exhaust the dispute resolution mechanism available under regulation 7 of the Kenya Information and Communications (Consumer Protection) Regulations 2010. The 2<sup>nd</sup> respondent cited article 46 of the Constitution, regulation 3 of the Kenya Information and Communications Act (Consumer Protection Regulations) and Kenya Information and Communications Act for the argument that its role as the moderator in information and communication sector was only limited to matters of ICT.
30. According to the 2<sup>nd</sup> respondent, Bonga Points were an optional loyalty programme run by the 1<sup>st</sup> respondent started out of goodwill to attract, motivate and retain customers. For that reason, the programme did not fall within the purview of consumer rights and it was therefore not obliged to intervene on such matters. The 2<sup>nd</sup> respondent denied the argument that consumer rights were infringed. It relied on *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 and Michael Judicial Review Handbook; 4<sup>th</sup> Edn. (at page 1007).
31. The 2<sup>nd</sup> respondent again relied on *Ressel v Duke of Norfolk* [1949] 1 All ER (at 118) and Daniel Ingida Aluwaala and another v Council of Legal Education & Another [2017] eKLR, that Bonga points were promotional offers provided by the 1<sup>st</sup> respondent where a consumer only acquired the said points according to their usage of credit. The underlying value accrued in form of points could be redeemed to acquire both ICT and Non-ICT products and services. This excluded the Bonga Points services from its purview and thus, could not be enforced by it.
32. The 2<sup>nd</sup> respondent further placed reliance on the decisions in Okiya Omtatab Okoiti v Communication Authority of Kenya & 8 others [2018] eKLR and Kenya Revenue Authority v Menginya Salim Murgani [2010] KECA 164 (KLR)
33. The 2<sup>nd</sup> respondent took the overall view, that the 1<sup>st</sup> respondent's directive had not been implemented as at March 1, 2024 and, therefore, the matter was moot, non-justiciable and overtaken by events. Reliance was placed on Shadrack Kinyanjui Wambui v Independent Electoral Boundaries Commission & 2 others [2017] eKLR and urged for the dismissal of the petition with costs.
34. The 3<sup>rd</sup> respondent and interested parties did not file responses, or submissions and did not take part in these proceedings.

## Determination

35. Upon considering the petition, responses and arguments by parties, two issues arise for determination, namely; whether this court has jurisdiction to determine this petition and whether the 1<sup>st</sup> respondent's action violated consumer (customers') rights.



## Jurisdiction

36. The respondents argued that this court has no jurisdiction to hear and determine this petition. Their argument was based section 66 of the Kenya Information Communication Act, as read with regulations 3 and 4 of the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#) as well as regulation 7 of [Consumer Protection Regulations, 2010](#) citing the doctrine of exhaustion.
37. Jurisdiction is the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction is a threshold and fundamental question that the court has to promptly determine. If the court finds that it has no jurisdiction to hear a matter, that is the end. It should not take any further step, but down its tools. (See [Owners of Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Limited](#) (*supra*)).
38. In [Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others](#) [2012] eKLR, the Supreme Court stated:
- (68) A court’s jurisdiction flows from either the [Constitution](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...without jurisdiction, the court cannot entertain any proceedings...Where the [Constitution](#) exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.
39. [In re the Matter of the Interim Independent Electoral Commission \(applicant\)](#), Constitutional Application Number 2 of 2011; [2011] eKLR, after referring to [Owners of Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Limited](#) (*supra*), the Supreme Court again stated:
- [30] The *Lillian ‘S’* case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the [Constitution](#).
40. Jurisdiction of this court is provided for in article 165(3) of the [Constitution](#). This court has jurisdiction to, among others, determine the question whether (b) a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) hear any question respecting the interpretation of the [Constitution](#), including the determination of—(ii) the question whether anything said to be done under the authority of the [Constitution](#) or of any law is inconsistent with, or in contravention of, the [Constitution](#).
41. Article 165(3) thus, authorises this court (High Court) to decide all matters brought before it other than those reserved for other courts as contemplated in article 162(2). That is, matters reserved for the exclusive Jurisdiction of the Employment and Labour Relations Court and Environment and Land Court, or restricted by article 165(5) and (6) of the [Constitution](#).
42. From the sweep of the constitutional authorisation given to the High Court, the court has wide jurisdiction to hear and determine various matters that may be brought before it. Whether or not this court has jurisdiction to hear and determine this petition must, therefore, be viewed through the prism of article 165(3)(b) and (d). The question here is whether section 66 and the regulations cited deny or restrict this court’s jurisdiction.



43. Section 66 of the Act permits the Minister in consultation with the Commission to make regulations to guide how to deal with some matters and postal items. The section has nothing to do with the jurisdiction of this court. Regulation 3 of the Kenya Information Communication (Dispute Resolution) Regulations 2010, provides that The Commission shall have power to resolve disputes between—(a) a consumer and a service provider;(b) a service provider and another service provider; or (c) any other persons as may be prescribed under the Act.
44. Sub regulation (3) states that The Commission may; for the purpose of resolving any dispute hold hearings, inquiries and investigations, it considers appropriate in the discharge of its functions under the Act. Further, sub regulation 4 states that (4) The Commission shall not emphasize on technicalities or rules of procedure in resolving disputes filed under these regulations and may waive any rule or requirement where necessary.
45. On the other hand, regulation 7 of the [\*Kenya Information Communications \(Consumer Protection\) Regulations 2010\*](#), is on handling of complaints. Under sub regulation (2), a customer who wishes to lodge a complaint shall reduce the complaint in writing and lodge it within six months from the date of the incident that the complaint arises from. (3) A licensee shall acknowledge the receipt of a complaint filed with it. (5) A licensee shall resolve all complaints made by its customers within a reasonable time.
46. The doctrine of exhaustion requires that where available, administrative remedies be exhausted before an aggrieved party moves to court. In other words, a litigant aggrieved by an agency's action is not allowed to seeks redress from a court of law on the impugned action without first pursuing available remedies before the agency itself. There are however, exceptions to this rule, one being that the available alternative remedy must be effective.
47. I have read both section 66 of the Act, regulations 3 and 4 of the dispute resolution regulations and regulation 7 of the Consumer Protection Regulations made under the Act. First; the regulations do not make it mandatory that the procedure in those regulations be complied with before invocation of this court's jurisdiction. Even if that was to be the case, the 2<sup>nd</sup> respondent though argued that the petitioner did not exhaust the dispute resolution mechanism in regulations 3 and 4 of the dispute resolution regulations and regulation 7 of the consumer protection regulations, maintained that the complaint on the expiry of Bonga points of more than 3 years was outside its mandate because its mandate does not involve supervision of marketing strategies employed by the 1<sup>st</sup> respondent. This admission makes the argument on non-exhaustion fall flat.
48. In any case, for the doctrine of exhaustion to apply, the alternative remedy must be efficacious and capable of producing an effective remedy, a fact the respondents failed to demonstrate.
49. In the present petition, there is no doubt that the issue raised centres on whether the decision to introduce time lines on Bonga points would violate consumers' (customers') rights. Being a claim of violation rights in the Bill of Rights, the issue falls within the jurisdiction of this court under article 165(3)(b) of the [\*Constitution\*](#). In this respect, the court's observation in [\*Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others \(Interested Parties\)\*](#) [2024] KEHC 2999 (KLR) is material that:
- (22) Where a party moves this court under article 22 of the [\*Constitution\*](#), the court has jurisdiction in terms of article 23(1) as read with article 165(3)(d) to determine the petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedoms and the relief sought must be aimed at redressing that violation.



50. It is clear to this court, that this petition was brought under article 22 as read with articles 23(1) and 165(3) of the Constitution, alleging what the petitioner perceives to be a constitutional infraction. The petitioner wanted this court to exercise its jurisdiction under article 165(3)(b) to investigate and determine whether there was infringement, or threat to infringe customers' rights in the Bill of Rights. The respondents have not demonstrated that there exists a clear provision in the Constitution or statute that ousts jurisdiction of this court, to make the matter fall outside its jurisdiction. I, therefore, find and hold that this court has jurisdiction to hear and determine this petition.

### **Violation of Rights**

51. The next issue is whether the impugned action is violative of customers' rights. The petitioner argued that it did, while the respondents took the opposite view.

52. The 1<sup>st</sup> respondent introduced Bonga points to reward its loyal customer. Customers are awarded points for using the 1<sup>st</sup> respondent's products and service. The points are then redeemed and used to purchase select items at select outlet stores at values per unit point fixed by the 1<sup>st</sup> respondent. At the commencement of Bonga points, there were no timelines. However, on October 28, 2022, the 1<sup>st</sup> respondent informed its customers that all Bonga points of more than 3 years old would expire on January 1, 2023 and would cease to be unavailable for redemption.

53. This petition was thus, filed to challenge introduction of expiry dates on Bonga points as having been done without subscribers' input; was arbitrary, irrational; violated customers' legitimate expectation and was contrary to articles 46(1)(b)(c) and 47 of the Constitution.

54. The 1<sup>st</sup> respondent contended that it resolved to award its customers loyalty points (Bonga points) as part of a customer loyalty programme available to all pre-pay and post-pay subscribers, in the spirit of innovation and customer appreciation. Bonga points would be redeemed for rewards such as, minutes of talk time; data bundles; MMS; SMS bundles and goods and services redeemable at select retail outlets.

55. According to the 1<sup>st</sup> respondent, customers participating in the scheme consented to and expressly accepted to be bound by terms and conditions for Bonga Loyalty Programme and Non-Merchandise Bonga Redemption service which may be updated from time to time. The Bonga points scheme was not mandatory and customers could choose to opt into or out of the scheme as they pleased.

56. The 1<sup>st</sup> respondent introduced the Bonga points scheme with the intention of rewarding loyal customers for buying into and using its services and products, a scheme that had not been solicited for by customers. The reward was not based on any other conditions and had no expiry dates. The 1<sup>st</sup> respondent's customers joined the scheme, used the 1<sup>st</sup> respondent's services and products and were duly rewarded the loyalty points without any other conditions, and continue to do so. Once a customer is rewarded, the points become his property. The customer as a consumer, can use the loyalty points under the terms they were acquired. The 1<sup>st</sup> respondent ceases to be the owner of those points as soon as they are awarded to the customer. They form consumer's economic interests protected under article 46 of the Constitution.

57. The 1<sup>st</sup> respondent's argument that it reviewed terms and conditions relating to bonga points by introducing expiry dates, cannot be correct. Any change on the terms and conditions if reviewed, could not act retrospectively as no action can be taken to affect a right that had accrued prior to such changes.



## Legitimate Expectation

58. Bong point rewards also created a legitimate expectation on customers. That is, once registered for bonga points rewards, customers had a legitimate expectation that they would earn the points for as long as they were subscribers and had no timelines within which they must redeem the points. To some, the points are an investment and the 1<sup>st</sup> respondent has an obligation to facilitate redemption of the points from time to time, but cannot impose expiry dates that were not part of the conditions during subscription.
59. In *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] KESC 53 (KLR) (Par265) the supreme court stated that “an instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, to show that it has *locus standi* to make a claim on the basis of legitimate expectation.”
- (See also *South African Veterinary Council v. Szymanski* 2003(4) SA 42 (SCA).
60. In *Canada (Attorney General) v Mavi*, 2011 SCC 30 [2011] 2 SCR 504, the Supreme Court of Canada stated:
- (68) Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite...It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking.
61. In the above decision, although the issue was regarding representation made by a government body, it applies to a representation made by a private body in private contractual arrangement like in the present case, so long as the private body has authority to make the decision or representation. The 1<sup>st</sup> respondent had authority to make the decision on bonga points, made the decision within its scope of authority, the decision was clear, unambiguous and unqualified thus, gave rise to a legitimate Expectation for which the 1<sup>st</sup> respondent must be held to its word.
62. It would be ironical for the 1<sup>st</sup> respondent to insist on customers continuing to sign up to its service with a promise to earn Bong points but fail to live up to its undertaking and walk away by introducing expiry dates to the disadvantage of loyal customers. The undertaking in this case, having been made in the context of private law contract, the legitimate expectation arising therefrom is sufficiently capable of enforcement.
63. The 1<sup>st</sup> respondent also argued that Bonga points would expire immediately in the event a user’s line is deleted as a result of inactivity. That is not a problem since bonga points are awarded to existing loyal customers. Where one ceases to be a customer due to deletion of his line for reason of prolonged inactivity, the contract is deemed to have been terminated and the person who is longer a customer for purposes of redemption of bonga points has no right to bonga points.
64. The respondents also argued that the directive on the expiry of bonga points had not been implemented and, therefore, this petition had been rendered moot, non-justiciable and overtaken by events. This petition was filed to challenge the decision that bonga points of more than 3 years would expire. The 1<sup>st</sup> respondent has not withdrawn the impugned directive. Counsel for the 1<sup>st</sup> respondent also confirmed



as much during the hearing that the notice communicating that directive had not been withdrawn. In the circumstances, the argument that the petition had become moot has no legal basis.

65. The 1<sup>st</sup> respondent also maintained that it received a no objection letter from the 2<sup>nd</sup> respondent on its intention to introduce an expiry date bonga points that were more than 3 years. As already pointed out, the 2<sup>nd</sup> respondent argued that the issue at hand was not within its mandate. Having taken that stand in these proceedings, how could it issue a no objection letter if the issue did not fall within its mandate? In the event the 2<sup>nd</sup> respondent did indeed issue a no objection letter, it failed to protect customers' economic interest thus, its action was violative of consumers' economic interests.

### **Conclusion**

66. Having considered the petition, responses and arguments by parties, I come to the following conclusions. First, this court has jurisdiction to hear and determine this petition. Second, once bonga points are awarded, the points become the customers' property and the 1<sup>st</sup> respondent ceases to have any rights over them. The customers as consumers are entitled to the rights and privileges accruing therefrom. The 1<sup>st</sup> respondent has no right to change or introduce new terms on the points already earned, including an expiry date.
67. Third, the representation by the 1<sup>st</sup> respondent to customers that they would earn bonga points if they joined the bonga points programme, conferred on the consumers a legitimate expectation which binds the 1<sup>st</sup> respondent and from which it cannot turn away to the disadvantage of the consumers. The 1<sup>st</sup> respondent's notice of October 28, 2022 intimating that bonga points of more than 3 years were to expire was a threat to violate consumers economic interests and violation of their legitimate expectation.

### **Disposal**

68. Based on the above conclusion, the court makes the following declarations and orders which it considers appropriate:
1. A declaration is hereby issue that the public notice issued by Safaricom PLC on October 28, 2022 purporting to give effect to the introduction of expiry dates on Safaricom Bonga points loyalty programme and non-merchandise Bonga Redemption (SMS, minutes & mobile data) service of more than 3 years was a violation of consumer economic interests thus, unconstitutional null and void.
  2. An order of certiorari is hereby issued quashing the notice issued by Safaricom PLC on October 28, 2022 purporting to introduce expiry dates on Safaricom Bonga points loyalty programme and non-merchandise Bonga redemption (SMS, minutes & mobile data) service of more than 3 years.
  3. An order of prohibition is hereby issued prohibiting Safaricom PLC from giving effect to the public notice issued on October 28, 2022 purporting to introduce expiry dates on Safaricom Bonga points loyalty programme and non-merchandise Bonga redemption (SMS, minutes & mobile data) service of more than 3 years
  4. This being a public interest litigation each party will bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024**

**E C MWITA**

**JUDGE**

