



**Odhiambo v Safaricom PLC; Communications Authority of Kenya  
(Interested Party) (Petition E122 of 2021) [2022] KEHC 11082 (KLR)  
(Constitutional and Human Rights) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11082 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E122 OF 2021**

**HI ONG'UDI, J**

**MAY 31, 2022**

**IN THE MATTER OF ARTICLES 1(10), 1(3) (C), 2(1), 3(1), 10, 19, 20, 22, 23(1), 31, 35(1)(B),  
40(1)(A), 46, 47, 50(1), 159, 165(3)(B), 258(1), 259(1) AND 260 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 10(2)(C), 19(2),  
40(1) & (2) AND 46 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS  
2, 12, AND 15 OF THE CONSUMER PROTECTION ACT, 2012**

**AND**

**IN THE MATTER OF CONSUMER PROTECTION ACT, 2012**

**AND**

**IN THE MATTER OF ACCESS TO INFORMATION ACT, 2016**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**CHRISOGNAS ODERO ODHIAMBO ..... PETITIONER**

**AND**

**SAFARICOM PLC ..... RESPONDENT**

**AND**



JUDGMENT

1. The petition dated 31<sup>st</sup> March 2021 was filed under Articles 1(1), 1(3) (c), 2(1), 3(1), 10, 19, 20, 22, 23(1), 31, 35(1) (b), 40(1) (a), 46, 47, 50(1), 159, 165(3) (b), 258(1), 259(1) and 260 of the Constitution for the alleged contravention of Articles 10(2) (c), 19(2), 40(1) & (2) and 46 of the Constitution. Accordingly the petition seeks the following orders: -
  - a) A declaration that the respondents' decision to unlawfully replace the petitioner's SIM card and change his M-Pesa PIN were both unconstitutional and illegal since they offended Articles 10, 19(2), 40(1) & (2), 46, 47 of the Constitution of Kenya, 2010 and Sections 12 & 15(2) of the Consumer Protection Act, 2012.
  - b) A mandatory order compelling the respondent to furnish the petitioner with the report in line with his demands as encapsulated by his complaint of 24<sup>th</sup> July 2019 and represented through ticket number I-2SCLODVC.
  - c) Special damages for the following costs incurred by the petitioner;
    - i. The sum of Kshs 200 being the costs for purchasing a replacement SIM card; and
    - ii. The sum of Ksh.4110 being the amount spent as courier costs for delivery of the replacement SIM card to the USA.
  - d) General damages against the respondent for losses, injuries and inconveniences suffered by the petitioner owing to their unconstitutional and illegal actions which involved engaging in illegal and fraudulent replacement of his SIM card.
  - e) Costs consequent upon this petition be borne by the respondent.
  - f) Interests on (3) and (4) as per the court rates until full payment.
  - g) The honourable Court do make any such other or further orders as it may deem fair, just and expedient in the circumstances in enforcing violation of the petitioner's.

**Petitioner's case**

2. The petitioner outlined his case in his supporting affidavit dated 17<sup>th</sup> October 2020. He avers that he is a resident of the State of South Carolina in the United States of America. He was issued with Sim card no.0719xxx273 in December 2009 by the respondent. Further that on 17<sup>th</sup> July 2019 he received a message (SMS) from the respondent asking him to keep his phone on so that he could be sent updates on his Mpesa menu.
3. He avers that soon after receiving this communication it became impossible for him to undertake any of the respondent's services such as checking his Mpesa balance, buying airtime, sending messages and making calls. He immediately contacted the respondent's Care Centre on Twitter to have them resolve the problem. He avers that the respondent informed him that it had done a reset on his mobile number. To access the services the respondent instructed him to restart his mobile phone although he was still unable to access the services.
4. He depones that he notified the respondent, who instructed him to issue them with an alternative number for access as they resolved the issue. He supplied them with his United States no



- +1-803xxxx124. Through the respondent's twitter handle team he was informed that the matter had been forwarded for further investigations under Ticket Number 1-2RY3D4N8.
5. He avers that he later received a call from an employee of the respondent on the same day telling him that his Sim card had been fraudulently hijacked and changed by fraudsters. He further avers that on 19<sup>th</sup> July 2019 another employee of the respondent informed him that the fraudulent change had been done by mistake by one of the respondent's employees. He also informed him that the respondent would deactivate the Sim card, which he was advised to replace. The new one would be delivered to him vide the DHL courier and the costs would be reimbursed by the respondent.
  6. He received the sim card sent by his wife on 23<sup>rd</sup> July 2019. He activated the line but he was still unable to access the respondent's Mpesa service. It was at this point that he noted his pin number had been changed and he informed the respondent. Upon perusal of his Mpesa transactions online he discovered that an agent called Servotech Agencies Scowas Enpses (Agent No.33xx62) had made a deposit of Ksh.100. This made him apprehensive.
  7. He further deposes that he sent a detailed complaint to the respondent on 24<sup>th</sup> July 2019 and requested for a comprehensive report of what had transpired. The respondent accordingly notified him that the issue was being dealt with by the Fraud department under Ticket Number 1-2SCL0DVC and he would be alerted when the investigations were completed.
  8. He deposes that when his numerous follow ups with the respondent bore no fruit, he instructed his advocates on 19<sup>th</sup> November 2019 to issue a demand letter to the respondent. When this did not bear fruit he reported the matter to Gigiri Police Station on 14<sup>th</sup> January 2020 where he was issued with O.B. No. 25/14/01/2020.

### **The Respondent's Case**

9. The respondent in opposition to the petition at first filed its preliminary objection dated 18<sup>th</sup> October 2021 on the grounds that:
  - i. The nature of the dispute is an alleged breach of the contract between the petitioner and the respondent and thus not a constitutional dispute.
  - ii. The Terms and Conditions governing the relationship between the petitioner and respondent provides for alternative dispute resolution.
  - iii. The petition is premature as the petitioner has not exhausted the mechanisms for redress under the *Kenya Information and Communications Act* and the *Kenya Information and Communications (Dispute Resolutions) Regulations*, 2010.
  - iv. The petition is therefore an abuse of court process and ought to be struck out with costs to the respondent.
10. Owing to the Court's directions that the respondent files a substantive response to the petition, the respondent filed its replying affidavit dated 19<sup>th</sup> January 2022 sworn by Andronicus Andimu Kihalangwa who works in the respondent's Fraud Investigation Team. He deposes that the petitioner as a subscriber to the respondent's services is subject to and governed by the respondent's terms and conditions for use. He highlighted Clause 1 (1), 8(c) and 12 as some of the key terms in this matter. In addition he avers that the petitioner is also subject to the M-Pesa terms and conditions for use specifically Clauses 2.5, 5.2, 6.2, 6.3, 13.3, 14.3.2 and 15.4.



11. He depones that contrary to the petitioner's allegation, there is no record of the respondent sending a text message to him asking him to keep his phone on for the Mpesa Service updates. He makes known that any updates on the M-Pesa service menu are initiated by a subscriber directly and not through the respondent. He states that the respondent comes in once the process has been activated by a subscriber.
12. He avers that once the petitioner made a complaint, he was guided on how to resolve the issue. When the investigations were carried out, it was discovered that the petitioner's line had been swapped by fraudsters. The respondent informed him of this and further let him know that his line would be deactivated in order to resolve the fraudulent sim swap. He was additionally advised to get a Sim card replacement. In view of this he deposes that the respondent actioned his queries promptly and took the necessary steps to help resolve the issue.
13. He further deposes that the respondent has put in place mechanisms to limit potential fraudulent sim swaps. That upon receiving a sim swap request, the respondent's agent usually asks several security questions. This is to ascertain the caller's identity and confirm that the Sim card actually belongs to them. The respondent will then send a message to the subscriber confirming receipt of the sim swap request and ask the subscriber to call its Customer Care if the request was erroneous or made by a third party without the customer's authorization. He notes that it is only after confirming these details that the respondent will proceed to conduct a Sim swap.
14. He avers that the respondent received a complaint of loss of network from the petitioner in July 2017. He points out that the matter was addressed promptly and the petitioner informed of the status of the investigation throughout the process. He denies the petitioner's allegation that one of the respondent's staff stated that the change had been done by an employee. Further that the respondent undertook to reimburse his courier charges. He notes that this is false and not supported by any evidence.
15. He deposes that once the petitioner replaced his Sim card, his line was successfully activated, and the respondent's services available to him. Regarding the Mpesa Pin he states that he was informed that he would require a new start-key in order to get a new MPesa Pin. Once this was done the respondent did not receive any further complaints on the petitioner's inability to access its services.
16. He depones that the respondent constantly advises and sensitizes the public and its customers to watch out for fraudsters by ensuring they report to it any suspicious messages received, confirming that any correspondence allegedly received from the respondent indeed came from the respondent and to avoid sharing information like their Pin numbers with third parties. He notes that while the petitioner in his twitter complaint stated that the message he got before the Sim swap was suspicious, he failed to report the same to the respondent for prompt action to prevent the sim swap by the fraudsters.
17. He further avers that the investigation into the petitioner's complaint was concluded and that he was notified of the findings. He adds that the petitioner was also advised to visit the respondent's offices if his query was not sufficiently addressed, which he failed to do. In conclusion it is the respondent's case that there is no evidence of negligence provided by the petitioner as it discharged its obligations to him.
18. The respondent filed a further preliminary objection dated 8<sup>th</sup> February 2022 on the grounds that:
  - i. The affidavit dated 17<sup>th</sup> October 2020 in support of the petition was deponed to before the petition dated 31<sup>st</sup> March 2021.
  - ii. The supporting affidavit dated 17<sup>th</sup> October 2021 and the supplementary affidavit dated 28<sup>th</sup> January 2022 are incompetent having been sworn in the USA and commissioned in Nairobi.



- iii. The petition herein is incompetent having been supported by an incompetent supporting affidavit.
- iv. The petition is therefore bad in law and ought to be struck out with costs to the respondent.

### **The Interested party's case**

19. The interested party in response to the petition filed its preliminary objection dated 2<sup>nd</sup> July 2021 on the grounds that:
  - i. The jurisdiction of this Honourable Court to adjudicate this matter has been wrongly and prematurely invoked for the reason that the petitioner has not exhausted the available statutory remedies.
  - ii. The Petition as framed fails to set out with a reasonable degree of precision the provisions said to be infringed by the interested party and the manner in which those provisions have been infringed as per the test in *Anarita Karimi Njeru v Republic* [1979] eKLR.
  - iii. The suit discloses no reasonable cause of action as against the interested party. As such, the Interested Party is improperly enjoined in the suit.
  - iv. The suit against the interested party is an abuse of this Court's process.
20. In like manner the interested party filed its replying affidavit dated 29<sup>th</sup> October 2021 sworn by Patricia Muchiri the Assistant Director in charge of Consumer complaints. She deposes that the petitioner has not exhausted the available statutory remedies and therefore, the jurisdiction of this Court to adjudicate the matter has been wrongly and prematurely invoked. This is because the procedure for raising complaints such as those of the petitioner, are spelt out in the *Kenya Information and Communications (Consumer Protection) Regulations* 2010. In particular Regulation 7(9) provides that it is only after the consumer is dissatisfied with the Licensee's complaints handling process that he/she can approach the Authority.
21. Additionally, she deposes that according to the *Kenya Information and Communications (Dispute Resolutions) Regulations*, 2010 an aggrieved consumer may only approach the Court after their complaint has been addressed by the Authority and eventually the Communications and Multimedia Appeals Tribunal (CAMAT). In light of this she avers that the petitioner ought to have raised his complaint against the respondent with the Authority, and if dissatisfied, appeal the Authority's decision to the Tribunal before filing the matter in this Court.
22. She further disposes that in addition to the jurisdictional issues, the petition does not disclose any reasonable cause of action against the interested party. Moreover, that while the petitioner alleges violation of various constitutional provisions, it falls short of particularizing the provisions in the manner in which they are deemed to have been infringed by the interested party. As such she avers that the claim against the interested party is an abuse of this Court's process and so ought to be dismissed with costs to the interested party.

### **The Petitioner's response**

23. The petitioner in opposing the interested party's preliminary objection dated 2<sup>nd</sup> July 2021 filed his grounds of opposition dated 12<sup>th</sup> October 2021 stating that:
  - i. This Honourable court is properly seized of the Petition pursuant to Article 22(1) and Article 23(1) of the *Constitution* of Kenya (2010) as it alleges violation of fundamental rights.



- ii. The interested party is properly enjoined as such in accordance with Rule 2 and Rule 7 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013.
  - iii. He deliberately enjoined the interested party as such and not as a respondent.
  - iv. The petition clearly delineates the interested party's duty in the proceedings as required under Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013.
  - v. A suit need not disclose a reasonable cause of action as against an interested party but only that the interested party has an identifiable stake or legal interest or duty in accordance with Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013.
  - vi. The interested party has misconceived the role and place of an interested party in judicial proceedings.
  - vii. The preliminary objection as set out by the interested party does not meet the test set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696.
  - viii. The preliminary objection is untenable and should be struck out with costs.
24. In the same way, the petitioner in response and opposition to the respondent's preliminary objection dated 18<sup>th</sup> October 2021 filed his grounds of opposition dated 25<sup>th</sup> November 2021 reiterating its grounds of opposition dated 12<sup>th</sup> October 2021, filed his response on the grounds that:
- i. This Court is properly seized of the petition pursuant to Article 22(1) and Article 23(1) of the *Constitution* of Kenya (2010) as it alleges violation of fundamental rights.
  - ii. The alternative dispute resolution mechanisms proposed by the Respondent lack the jurisdiction to determine alleged violation of constitutional rights.
  - iii. The Preliminary objection is untenable and should be struck out with costs.
25. The petitioner filed a further supplementary affidavit dated 28<sup>th</sup> January 2022 in response to the respondent's replying affidavit. He reiterated the contents of his supporting affidavit dated 17<sup>th</sup> October 2020. Additionally he deposes that the respondent's affidavit is mute on whether he made a call to the respondent seeking the sim swap and whether he was put through the said security procedures to ascertain his identity as its customer. He says that he did not place any call to the respondent seeking the sim swap and neither did he receive a phone call from the respondent. Moreover, he states that the respondent is silent on whether the said verification process was conducted when the alleged sim swap was conducted.
26. In light of this he avers that by failing to conduct the said security procedures the respondent acted negligently. This is despite it owing its clients a duty of care and protection from malicious breach of their accounts. It is his case that had the respondent conducted its due diligence through the elaborate procedures outlined in its replying affidavit the sim swap would not have occurred.



## The Parties submissions

### The Petitioner's submissions

27. The firm of Japheth Kenvine Felix & Smith Company Advocates on behalf of the petitioner filed written submissions dated 21<sup>st</sup> September 2021. The following are the issues identified for determination:
- i. Whether the respondent's actions or inaction in the unlawful replacement of the petitioner's Sim card and subsequent change of his M-pesa PIN violated Article 31 (c) (d) of the Constitution on the right not to have information relating to their family or private affairs unnecessarily required or revealed;
  - ii. Whether the respondent's refusal to avail to the petitioner the results of the investigations supposedly conducted by the respondent over the illegal intrusion of the petitioner's SIM Card and M-Pesa account violated the petitioner's constitutional rights guaranteed under Article 35 (1) (b) of the Constitution which grants every citizen the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom;
  - iii. Whether the petitioner's right to acquire and own property guaranteed under Article 40 (1) (a) of the Constitution was violated by the respondent's actions or inaction which led to the petitioner losing access to his SIM card and M-pesa account;
  - iv. Whether the petitioner's consumer rights guaranteed under Article 46 of the Constitution were violated by the respondent's actions or inaction; and
  - v. Whether the respondent violated the petitioner's right to fair administrative action under Article 47(1) of the Constitution.
28. On the first issue, Counsel submits that by effecting the unlawful change of the Sim card's registration status, the respondent's action was tantamount to seizing the petitioner's possessory rights in his Sim card. In support reliance was placed on the case of Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR where it was held that the importance of privacy to an individual and society justifies the conclusion that it is a fundamental social value, which should be vigorously protected in law. Additional reliance was placed on the cases of Samson Mumo Mutinda v Inspector General National Police Service & 4 others [2014] eKLR; Samora Engineering Ltd and Others vs. Kenya Revenue Authority, Nairobi Petition No. 54 of 2011; and Kenya Human Rights Commission vs. Communications Authority of Kenya & 4 others (2018) eKLR.
29. Counsel therefore submits that the petitioner's privacy and possession of his Sim card and M-pesa account were arbitrarily invaded and disabled without his consent. The invasion was done without any justification as provided under Article 24 of the Constitution. As a result the respondent's actions and/or inaction deprived the petitioner of his constitutional right to privacy and the right not to have their possessions seized.
30. On the second issue, Counsel submits that Article 35 of the Constitution provides that every citizen has the right of access to information held by another person that is required for the exercise or protection of any right. He notes this is also reiterated under Section 4 of the Access to Information Act, Act No 31 of 2016. He submits that the respondent did not issue this information. He argues that this was unjustifiable and constituted an outright violation of the petitioner's right to access information. To buttress this point reliance was placed on the case of Coast Legal Aid & Resource Foundation (CLARF)



*v Coast Water Board Services & 2 others* (2021) eKLR where it was observed that Section 4(3) of the Act is categorical that access to information held by a public entity or a private body must be provided expeditiously at a reasonable cost. Further reliance was placed on the case of *Zebedeo John Opore v The Independent Electoral And Boundaries Commission* [2017] eKLR.

31. On the third issue Counsel submits that the respondent's act of replacing the petitioner's Sim card withdrew the petitioner's proprietary rights in and interests over the Sim Card. This in effect violated the petitioner's rights as stipulated under Article 40(1)(a) and 40 (2) (a) as read conjunctively with Article 260 of the *Constitution*. In support reliance was placed on the case of *SDV Transami Kenya Limited and 19 others v Attorney General & 2 others & another* [2016] eKLR where it was noted that the minister's actions to limit the rights of ownership under Article 24 of the *Constitution* was not justifiable. This is because the action must be effected by an Act of Parliament. In this regard, he submits that there is no statute that allows the respondent to limit the petitioner's rights of property over the Sim card.
32. Turning over to the fourth issue, Counsel submits that for a period of eight (8) days, between 17<sup>th</sup> and 24<sup>th</sup> July, 2019, the petitioner was denied access to all of the respondent's services because of the fraudulent hijack of his Sim card. In essence this inaccessibility of services was tantamount to a denial of services by the respondent in violation of Article 46(1) (a) of the *Constitution*. This Article entitles a consumer to services of reasonable quality. Counsel argues that it is clear that the Article guarantees consumer rights to goods and services of reasonable quality. The Article further guarantees the right to necessary information for the customers to benefit from goods and services as held in the case of *Alan E. Donovan v Kenya Power & Lighting Company* [2021]eKLR.
33. In light of this he submits that Article 46 (d) of the *Constitution* entitles every consumer, the right to compensation for loss or injury which arises from defects in goods or services. As such he submits that the respondent's unlawful action involving the mistaken replacement of the petitioner's Sim card, constituted defectiveness in the respondent's service delivery. This in turn compromised the petitioner's ability to meet the financial needs of his wife, children, and father.
34. On the 5<sup>th</sup> issue, Counsel submits that Section 6 of the *Fair Administrative Actions Act*, 2015 provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review. This was appreciated by the Court in the case of *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR which was cited in support.
35. In view of this he submits that the respondent in disregarding the petitioner's enquiries, through Ticket number 1-2SCLODVC and failing to respond to the demand notice dated 19<sup>th</sup> November, 2019 violated the petitioner's right to a lawful, expeditious, efficient, reasonable and procedurally fair decision laid down under Article 47(1) of the *Constitution*.
36. In addition, Counsel notes that when the incident relating to Ticket number 1-2SCLODVC was lodged, the respondent promised to revert back to the petitioner within seven days. This was however not done at the time of filing this petition. He asserts that this is contrary to Section 12 (1) and (2) (h) of the *Consumer Protection Act*, 2012, which prohibits a service provider from making an inaccurate representation.
37. In conclusion, Counsel submits that the petitioner has demonstrated that he is entitled to general and special damages for the violation of his constitutional rights by the respondent. To support this reliance was placed on the case of Kenya Human Rights Commission (supra) where the Court observed that this Court is empowered by Article 23(3) of the *Constitution* to grant appropriate reliefs in any proceedings seeking the enforcement of fundamental rights and freedoms.



38. In response to the interested party's preliminary objection counsel filed written submissions dated 29<sup>th</sup> October 2021. He cites the following as the issues for determination:-
- i. Whether this Honourable court has the requisite jurisdiction to determine the petition; and
  - ii. Whether the interested party has been properly enjoined as a party in the Suit and whether the petition ought to have disclosed a cause of action against the interested party.
39. On the first issue Counsel submits that the petition was instituted pursuant to Articles 22, 23, 165 and 258(1) of the *Constitution*. He observes that Article 23 of the *Constitution* clothes this Court with the requisite jurisdiction, pursuant to Article 165, to hear and determine applications for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights. Reliance was also placed on Section 5 of the *High Court (Organization and Administration) Act*, 2015 which echoes the provisions of Article 165 of the *Constitution*.
40. Counsel submits that the petition is founded on allegations of violations of the petitioner's fundamental rights by the respondents. He argues that this is the proper forum to ventilate the petitioner's grievance pursuant to Article 165 of the *Constitution*. He submits that this position was affirmed by the Court in the case of *Katiba Institute v Presidential Delivery Unit & 3 others* (2017) eKLR.
41. In Consideration of this he submits that contrary to the interested party's allegations, the provisions of *Kenya Information and Communication Act* (1998) and its *Regulations* are not applicable to enforcement of constitutional rights. This also includes the doctrine of exhaustion as observed in the case of *Benard Ambasa vs. Institute of Human Resource Management & 3 others; Lilian Ngala Anyango (Interested Party)* (2021) eKLR.
42. On the second issue Counsel submits that the petitioner deliberately enjoined the interested party as such and not as a respondent. The logic being that the petitioner believes that the interested party has an identifiable stake or legal interest in the matter by virtue of the fact that it is the regulator for the communications sector. Secondly that it was enjoined in accordance with Rule 2 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
43. Relying on the opine in the case of *Centre for Human Rights & Mediation vs. County Government of Uasin Gishu & Another; Commission on Revenue Allocation (Pt Interested Party & Another)* (2019) eKLR, Counsel reiterates that at the onset of a constitutional petition, nothing precludes the petitioner from joining an interested party, where it is doubtful whether it has been instituted in the name of the right petitioner and /or the determination of the court may affect the interested party. Supplementary reliance was placed on the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR.
44. Counsel submits that the interested party has completely misconstrued the role of an interested party vis a vis that of a respondent. It is his submission therefore that no cause of action needs to be demonstrated against the interested party as its role is simply to assist the Court in reaching a just decision owing to its interest in the subject matter. Counsel also filed similar submissions dated 25<sup>th</sup> November 2021 in response to the respondent's preliminary objection dated 18<sup>th</sup> October 2021.

### **The Respondent's submissions**

45. The respondent through the firm of Gikera & Vadama Advocates filed written submissions to the petition dated 8<sup>th</sup> February 2022 and identified the following as issues for determination:-



- i. Whether the petition is competent and/or supported by a competent supporting affidavit;
  - ii. Whether the petitioner has any valid claim against the respondent; and
  - iii. Whether the petitioner is entitled to the reliefs sought.
46. On the first issue Counsel submits that an affidavit cannot purport to support a petition that was not in existence at the time it was sworn. Moreover he submits that the petitioner in his supporting affidavit dated 17<sup>th</sup> October 2020 and his supplementary affidavit dated 28<sup>th</sup> January 2022, makes known that at the time of swearing the affidavits he was a resident at 2213 Kingswood Dr. Columbia, SC in the State of South Carolina, within the United States of America. He states that the petitioner did not indicate travelling to Kenya for the purposes of swearing and executing the affidavits. He argues that the logical conclusion is that the affidavits were deponed and commissioned at two different places. Counsel submits that since the affidavits were deponed outside the jurisdiction of Kenya the same ought to have complied with Section 88 of the *Evidence Act*, cap 80 Laws of Kenya as well as notarized by a Notary Public duly authorized to administer oaths in the United States of America (USA).
47. It is Counsel's argument that in law, it is trite that an affidavit be commissioned/notarized by the commissioner/notary before whom it was sworn. He argues that the affidavits were commissioned by a commissioner with no authority. This is because the Commissioner's authority only exists within the Kenyan jurisdiction according to the *Oaths and Statutory Declarations Act*. This he argues, makes the affidavits incompetent.
48. In support he cited the case of *Regina Munyiva Nthenge versus Kenya Commercial Bank Ltd* (2005) eKLR where it was held that the affidavit was irregular and unacceptable, as it was not sworn in the presence of a Commissioner for Oaths and likely the stamp just affixed. As a result the Court observed that it had no alternative but to strike off the replying affidavit since it was not properly commissioned. Further reliance was placed on the cases of *Pastificio Lucio Garofalo S.P.A v Debenham & Fear Ltd* [2013] eKLR; *Mumo Matemo versus Trusted Society of Human Rights Alliance & 5 others*: (2013)eKLR and *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR.
49. It is Counsel's submission that the petitioner failed to comply with the mandatory requirements of the law and prays that this Court finds that the rules requiring commissioning and notarization of affidavits are not merely rules of procedure. Therefore the failure to comply with those rules renders the affidavit irregular and subject to dismissal because the defects cannot be cured by the dictates of Article 159 of the *Constitution*. Similarly, he submits that although there is no obligation under the law that a petition be accompanied by an affidavit, a petitioner can attach documents to support its petition without the need for an affidavit. He however argues that in this case, the petitioner's supporting documents are produced as annexures to the impugned affidavits. To buttress this point Counsel cited the case of *Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others* [2020] eKLR where it was noted that without the affidavit and documents attached thereto, the averments of fact in the petition were incapable of proof. Extra reliance was placed on the case of *Justus Achinga Kebari & 25 others v The Attorney General* [2018] eKLR.
50. Moving on to the second issue, Counsel while relying on his submissions in support of its preliminary objection, maintained that this Court lacks the necessary jurisdiction to entertain the matter. This is because the remedies sought by the petitioner are available as private law remedies before a commercial court. Furthermore that the contract executed by the parties enjoins the parties, to move to the arbitral tribunal for dispute resolution. Lastly that the petitioner failed to exhaust the redress mechanisms provided under the *Kenya Information and Communications Act*.



51. Be that as it may Counsel submits that the respondent discharged all its obligations towards the petitioner in accordance with the governing terms and conditions. He points out that the petitioner's assertions are contradictory as at one point he says his complaints were not responded to while in another part acknowledges the respondent's correspondence to his complaints. Additionally, he observes that the petitioner has failed to demonstrate that the alleged report ought to take a particular form notwithstanding the fact the respondent issued him with the findings of its investigations.
52. Counsel further submits that while the respondent is faulted for the fraudulent Sim swap, there is no evidence presented to corroborate the petitioner's allegations. In view of the foregoing it is submitted that there is no evidence presented by the petitioner to demonstrate that his right to privacy was breached by the respondent. Counsel submits that according to the terms and conditions the respondent retains the property in the Sim card. As such the respondent did not deprive the petitioner of his property to warrant invocation of Article 40 of the Constitution. He contends that if a party signs contractual documents containing an exemption clause, he is bound by it even though he has not read the terms. This is unless he signed the documents through fraud or misrepresentation as held in the case of Securicor Courier (K) Ltd v Benson David Onyango & another (2008) eKLR.
53. In relation to the allegation of violation of Article 47 of the Constitution, Counsel relied on the case of Anthony Mwangi Ngigge t/a Tiindab Online Shop v Safaricom Limited [2021] eKLR where it was held that the applicant ought to have first exhausted the available dispute resolution mechanism before seeking the court's intervention. Similarly on the allegation of infringement of the petitioner's consumer protection rights, he submits that the petitioner has failed to substantiate his claim to the required standard since no evidence has been tendered to prove the respondent's culpability in the alleged violations. To support this reliance was placed on the case of Leonard Otieno v Airtel Kenya Limited (2018) eKLR.
54. On the last issue Counsel submits that the court's jurisdiction was invoked prematurely. Considering this he submits that the petitioner is not entitled to the remedies sought. In support he relied on the Court of Appeal case of Margaret Wanjiru Ndirangu & 4 Others -vs-A.G (2020) eKLR where it was held that if the party seeking judgment in a suit fails to avail evidence, or to avail evidence to the required standard, then such a party would fail to obtain judgement.
55. In support of the respondent's preliminary objection dated 18<sup>th</sup> October 2021, the respondent's advocates filed written submissions dated 8<sup>th</sup> November 2021 stating the issues for determination to be:
  - i. Whether the petition has met to constitutionality test;
  - ii. Whether there is a valid disputes resolution clause;
  - iii. Whether the petitioner has exhausted the mechanisms for redress under the Kenya Information and Communications Act, 1998.
56. On the first issue Counsel submits that not every dispute that raises or touches on constitutional provisions automatically gives rise to a constitutional claim as held in the case of Anthony Mwangi Ngigge t/a Tiindab Online Shop v Safaricom Limited [2021] eKLR. In view of this Counsel submits that the petitioner's claim is based on an alleged breach by the respondent and is therefore a civil claim couched as a constitutional claim.
57. On the second issue he submits that as a subscriber of the respondent, the petitioner is subject to the respondent's terms and conditions of service for its various services. Counsel additionally notes that the terms and conditions outline the rights and obligations of the parties and forms a binding agreement



between them. As such he submits that Clause 12 of the conditions provides that disputes arising between parties are to be settled by arbitration.

58. In this regard Counsel submits as held by the Court of Appeal case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001]eKLR that a Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved. Additional reliance was placed on the case of *Vibar Construction Company Limited v Uhani Limited* (2015) eKLR. Counsel submits that the issues raised in this petition can be properly addressed through the arbitration forum which the parties voluntarily agreed to submit to. This was also the observation by the Court in the case of *Charles Nzioki Kanyaa & 2 others v Cytonn Real Estate Project Notes Llp & 2 others* (2021) eKLR. He urges this Court to find that the petitioner ought to have first pursued the alternative dispute resolution mechanism stipulated in the Parties Agreement first as guided by Article 159 (2) (c) of the *Constitution*.
59. On the third issue Counsel submits that the petition offends the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in Court. He notes that the petitioner is also subject to the provisions of *Kenya Information and Communications Act*, 1998 and its Regulations. Accordingly without exhausting the alternative dispute resolution mechanisms available in the said *Act*, this petition is premature. Similar observations were made in the cases of *Charles Apudo Obare & another v Clerk, County Assembly of Siaya & another* (2020) eKLR; *Cleophas Malala & another v Speaker of the Senate & 2 others; Stewart Madzayo & another (Interested Parties)* (2021) eKLR and *Republic v Speaker of the Nairobi County Assembly & 4 others Ex parte Maurice Otieno Gari* (2021) eKLR which were cited in support.

### **The Interested party's submissions**

60. The firm of G & A Advocates LLP on behalf of the interested party filed written submissions dated 7<sup>th</sup> February 2022 in opposing the petition. The issues identified for determination are:
- i. Whether the petitioner has a cause of action against the interested party; and
  - ii. Whether the interested party has an identifiable stake in these proceedings.
61. On the first issue Counsel submits that the interested party is unable to adequately respond to the petition as there is no specific reasonable cause of action meted against it as emphasized in the case of *DT Dobie & Co. (K) Ltd v Muchina* [1982] KLR cited with authority in *Susan Rokib v Joyce Kandie & 6 others* [2018]eKLR. Counsel notes that the petitioner has neither disclosed nor particularized any violation of his constitutional rights by the interested party either in his petition or his submissions. Counsel further submits that the petitioner has not demonstrated that he lodged a complaint with the Authority concerning the respondent as required under Section 102A (c) of the *Kenya Information and Communications Act*. The petitioner has also not shown that the interested party failed to take action or made a decision that was not satisfactory.
62. Counsel additionally submits that the petitioner failed to demonstrate how he arrived at the decision to enjoin the interested party as required per the test laid down in *Werrot and Company Ltd and others vs Andrew Douglas Gregory and Others*, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 [1998] LLR 2848, cited with approval in *Wilson Waitbaka Gitau v Kenya Winston Company Limited* [2014] eKLR. In that case the Court held that in determining so there must be a right to some relief against such party in respect of the matter involved in the proceeding in question and that it should not be possible to pass an effective decree in the absence of such a party.



63. Accordingly, Counsel submits that the petitioner has neither demonstrated how the orders sought in his petition will require the interested party's intervention, nor sought any relief against the interested party. This he argues amounts to an abuse of this Court process.
64. Submitting on the second issue, Counsel states that that the petitioner ought to have demonstrated that the interested party either has an identifiable stake, legal interest or duty in the proceedings as set out in the case of *Kenya Medical Laboratory Technicians & Technologists Board & 6 others v The Attorney General & 4 others* [2017]eKLR. Additional reliance was placed on the case of *Joseph Njau Kingori v Robert Maina Chege & 3 Others*[2002] eKLR cited with approval in *Kenya Railways Corporation v Development Bank of Kenya; Erdemann Property Limited & Ano. (Interested Parties)* [2019]eKLR. Considering this he submits that its joinder as an interested party in these proceedings by the petitioner did not meet the guiding principles of enjoining an interested party.
65. In support of the interested party's preliminary objection Counsel filed written submissions dated 14<sup>th</sup> July 2021. He identified the issues for determination as:
- i. Whether the jurisdiction of this honourable Court has been invoked properly; and
  - ii. Whether the interested party is properly enjoined in this suit.
66. On the first issue Counsel submits that, this Court's jurisdiction has been wrongly and prematurely invoked for the reason that there is an existing internal mechanism under statutory law which ought to be pursued at the first instance. Counsel makes known that the interested party executes its mandate in accordance with its establishing statute, the *Kenya Information and Communications Act*, 1998. In this regard he submits that the petitioner failed to disclose whether the interested party violated any provisions of the Act or constitution. He notes additionally that the petitioner failed to institute the suit in line with Section 98(a) of the *Act* which requires the interested party to be given written notice of any suit against it.
67. Counsel in view of this submits that since the dispute revolves around a consumer and service provider, the *Kenya Information and Communications (Dispute Resolutions) Regulations*, 2010 delineates a framework for settling such disputes. In particular he informs that Regulation 3(a) expressly states that an interested party shall have power to resolve among other disputes those between a consumer and a service provider. What is more Regulation 8(6) provides that a party that is dissatisfied by the decision of the interested party can make an appeal to the Appeals Tribunal. Counsel in light of this submits that a party's rights to access the courts may be taken away or restricted by statute as held by the Court of Appeal in the case of *Eliud Wafula Mailo vs. Minister of Agriculture & 3 others* [2016]eKLR.
68. Counsel further submits that Courts speaking on the doctrine of exhaustion have observed that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy be pursued first. In support of this view he relied on the cases of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited* [2019] eKLR and *Rich Productions Limited v Kenya Pipeline Company & Another* [2014]eKLR. It is on this premise that Counsel argues that the petition offends the doctrine of exhaustion.
69. On the second issue, Counsel reiterates what has been captured at paragraphs 61, 62 & 63 of this Judgement. He has further referred to the cases of:-
- i. *Communications Commission of Kenya & 4 others v. Royal media Services Ltd & 7 others* [2014] eKLR



- ii. [\*Fredrick Otieno v. Public Service Commission & 3 others\*](#) 2020 eKLR; among others

### **Analysis and determination**

70. Having considered the parties pleadings, the rival submissions, cited authorities and the law it is my humble view that the issues for determination are twofold; preliminary and substantive. It is apparent as a result that the substantive issues as raised in the petition can only be determined if the preliminary issues fail. From the foregoing the issues that arise for determination are classified as follows:
- i. Preliminary issues:
    - a) Whether this Court has jurisdiction to entertain this petition.
    - b) Whether the interested party is properly enjoined as a party in this suit.
    - c) Whether the petitioner's supporting and supplementary affidavits are competent.
  - ii. Substantive issues:
    - a) Whether the petitioner's constitutional rights under Articles 35(1)(b), 40(1)(a), 46 and 47 were violated by the respondent.
    - b) Whether the petitioner is entitled to the reliefs sought.

### **The Preliminary issues**

#### **a) Whether this Court has jurisdiction to entertain this petition**

71. The jurisdiction of this Court was challenged by the respondent and the interested party in their preliminary objections dated 18<sup>th</sup> October 2021 and 2<sup>nd</sup> July 2021 respectively. The respondent pegs this assertion on the ground that its relationship with the petitioner is contractual in nature and as such governed by its terms and conditions. In this regard the respondent makes known that the petitioner overlooked the dispute resolution procedure set out in the terms and conditions and the dispute mechanism spelt out under the [\*Kenya Information and Communications Act\*](#). On the other hand the interested party challenged this Court's jurisdiction on similar grounds pointing out that the matter had been wrongly and prematurely filed owing to the doctrine of exhaustion.
72. It is settled in law that jurisdiction is everything and without it a Court cannot exercise its power, so much so that the Court of Appeal in the case of [\*Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd\*](#) [1989] eKLR while granting guidance on the vitality of jurisdiction addressed its mind as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



73. Likewise, the Supreme Court addressing its mind on the issue of jurisdiction in the case of *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others* (2012) eKLR opined as follows:

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

74. Once the jurisdiction of the Court is challenged in a suit the Court of Appeal in the case of *Owners and Masters of Motor vessel “Joey” v Owners and Masters of Motor Tugs “Barbara” and Steve “B”* (2007) eKLR offers guidance on the steps to be taken thereafter as follows:

“..the underlying principle is contained in the two previous decisions of this Court in the cases of *The Owners Of The Motor Vessel “Lilian S” V. Clatex Oil (kenya) Ltd* [1989] KLR 1, and *Roy Shipping Sa & All Other Persons Interested In The Ship “Mama Otan” vs. Dodoma Fishing Company Ltd*, Civil Appeal No. 238 of 1997 (unreported). In the *Lilian S*, the Court, consisting of the late Mr. Justice Nyarangi, the late Mr. Justice Masime, and Mr. Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as *The River Rima* [1987] 3 ALL E.R 1, *The I Congreso del Partido* [1983] 1 AC 244 and such like cases, held that the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties.”

75. Turning over to the issue at hand, Counsel for the interested party relying on a number of authorities noted that courts had deemed it desirable that where a statutory dispute mechanism exists the same should first be exhausted. A plethora of cases were also cited by the respondent in support of this view. The petitioner in both of his grounds of opposition denied this notion stating that the doctrine of exhaustion was not applicable in matters seeking enforcement of violation of constitutional rights.
76. The doctrine of exhaustion was expounded on by a five Judge bench in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where they opined as follows:-

“52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the



protection of his own interest within the mechanisms in place for resolution outside the Courts...”

77. The Court went on to outline the exceptions to the rule as follows:

- “ 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR
62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

78. From the foregoing, it is my considered view that while the doctrine of exhaustion does affect the justiciability of a matter when raised by either party and proved, the Court must thereafter grapple with the question whether the circumstances justify an exemption to the rule. To ascertain this, an examination of the facts of this case is necessary.

79. To begin with, the petitioner through his petition makes known that he is one of the subscribers of the respondent’s service. The respondent on the other hand states that to be able to use its service there exist terms and conditions which the parties are bound by. This in essence creates a contractual relationship between the parties.

80. According to the respondent’s Conditions of use of the Safaricom services with reference to dispute resolution, Clause 12 of the contract provides as follows:-

12. Dispute Resolution

- a) Save as may otherwise be provided herein, all questions in dispute arising between the Parties and all claims or matters in such dispute not otherwise mutually settled between the Parties shall be referred to arbitration.
- b) Arbitration shall be by a single Arbitrator to be appointed by agreement between the Parties or in default of such agreement within fourteen (14) days of such notification of such dispute by either Party to the other, upon application by either Party to the



Chairman for the time being of Kenya Branch of Chartered Institute of Arbitrators of the United Kingdom and any Arbitration proceeding shall take place in Nairobi.

- c) Every award made under this clause shall be made in accordance with the provisions of the Arbitration Act 1995 (Act No. 4 of 1995) or other Act or Acts for the time being in force in Kenya in relation to Arbitration. To the extent permissible by law the determination of the Arbitrator shall be final and binding upon the Parties.
- d) Notwithstanding these Arbitration provisions, the Parties shall not be precluded from seeking urgent injunctive relief, in which case the Parties submit to the exclusive jurisdiction of the High Court of Kenya.

81. Similarly, the Mpesa customer terms and conditions provides under Clause 15 of the Contract as follows:-

15. Dispute Resolution and Governing Law

15.1 You may contact Safaricom Customer Care (line 234) for any disputes, claims or to report Account discrepancies. Safaricom Customer Care shall handle the report in accordance with Safaricom's standard complaint handling procedures.

15.2. In certain circumstances Safaricom in conjunction with participating merchants may provide for dispute resolution mechanisms. You agree to abide by such mechanisms as may be advised by Safaricom or the participating merchants/businesses from time to time.

15.3. Any dispute arising out of or in connection with this Agreement that is not resolved by Safaricom Customer Care may be brought to the attention of the Safaricom Manager responsible for the operations of the M-PESA Services for resolution.

15.4. Any dispute arising out of or in connection with this Agreement that is not resolved by the Safaricom Manager responsible for the operations of the M-PESA Services shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 60 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Chartered Institute of Arbitration (Kenya Chapter). Such arbitration shall be conducted in the English language in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.

15.5. To the extent permissible by Law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.

15.6. Nothing in this section shall be deemed to exclude any legally recognised dispute resolution body from receiving, hearing and determining the dispute.

15.7. This Agreement shall be governed by and construed in accordance with the laws of the Republic of Kenya.

82. Speaking to an analogous complaint regarding the Safaricom Service, the Court in the case of *Anthony Mwangi Ngigge t/a Tiindab Online Shop (supra)* noted as follows:-

“ 50. It is noted, Clause 15.4 of the terms and conditions provides;

“Any dispute arising out of or in connection with this Agreement that is not resolved by the Safaricom Manager responsible for



operations of the M-PESA Services shall be referred to arbitration by a single arbitrator to be appointed by agreement between parties or in default of such agreement within 60 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Chartered Institute of Arbitration (Kenya Chapter)”

51. A Court of law is estopped from rewriting a contract between the parties but is required to apply the terms and conditions of contract between the parties. In reliance of this Respondent referred to the case of *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Limited and Another*, where the Court of Appeal held:-

“...a Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved.”

52. Considering the case law and facts of this case, I find that the parties are bound by the terms of their contract. In the present petition herein, Clause 15.4 provides for arbitration which parties have first to exhaust. I find therefore the Petitioner ought to have pursued the alternative Dispute Resolution Mechanism stipulated in the Parties Agreement first and which this Court is constitutionally obligated to promote as provided under Article 159 (2) (c).”

83. Turning over to the second issue, the preamble of the *Kenya Information and Communications Act* discloses that the purpose of the Act is to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce, to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.

84. In view of that, the *Act* provides for the regulation of telecommunication services such as those rendered by the respondent under Part III. With reference to disputes, the Act under Section 102(1) establishes a Tribunal known as the Communications and Multimedia Appeals Tribunal. This Tribunal is charged with the mandate to hear grievances as envisaged under Section 102A. This Section provides as follows:-

- (1) A person aggrieved by—
  - (a) any publication by or conduct of a journalist or media enterprise;
  - (b) anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or
  - (c) any action taken, any omission made or any decision made by any person under this Act, may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

85. Further, Section 102G of the *Act* provides for appeals from the decision of the Tribunal as follows:-

- (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.



86. The respondent's terms and conditions under Clause 15.6 recognize this authority and state that the dispute resolution body can also determine disputes brought under the terms and conditions.
87. My interpretation of the language of the Act as guided by the case of *Samuel Kamau Macharia & Another (supra)* is that the jurisdiction of this Court to entertain matters under the Act, is appellate in nature. As such a party seeking to invoke the High Court's jurisdiction must do so as a last resort.
88. From the material placed before this Court it is observed that the petitioner made a complaint to the respondent. The petitioner did not however invoke the procedure set out in the respondent's terms and conditions when aggrieved in the manner his complaint was handled. In the same way, the petitioner did not also pursue the dispute resolution mechanism provided under the *Kenya Information and Communications Act*. If he did so the same is not submitted as evidence before this Court.
89. It is apparent that the root of this matter is contractual in nature. Similarly, it is clear that there are set contractual and statutory dispute resolution mechanisms by the respondent. The final question to answer therefore is whether the circumstances of this case warrant an exemption from the doctrine of exhaustion.
90. To answer this question it is prudent to determine whether the issues raise real constitutional questions. I am guided by the decision in the case of *CNM v WMG* [2018] eKLR where the Court observed at paragraph 20 as follows:-
- “...When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.”
91. To my mind an analysis of the petition discloses that the issue for determination does not revolve around the question of interpretation of the *Constitution* but the breach of the contract between the petitioner and the respondent. It is my considered view accordingly that the petitioner's question is framed as a constitutional issue when at its core it is contractual in nature. From the foregoing this Court appreciates that where there is a clear procedure for redress of a particular grievance prescribed by the *Constitution* or statute, that procedure should be followed first.
92. In this case the respondent's terms and conditions provide arbitration as the set dispute resolution mechanism. Where a party is dissatisfied with the respondent's and arbitrator's decision, the aggrieved party is at liberty to pursue the dispute resolution mechanism in law as prescribed by the *Kenya Information and Communications Act*. In the circumstances, I find that this is a classic case that warrants application of the doctrine of exhaustion.

**b) Whether the interested party is properly enjoined as a party in this suit**

93. According to the interested party, the petitioner did not disclose any cause of action against it when it enjoined it as a party herein. Additionally, the interested party asserted that the petitioner did not ascertain its legal stake in this suit. The petitioner correctly noted that the interested party was not enjoined in the suit for the purpose of seeking a relief against it. Instead it joined the interested party by virtue of it being the regulator for the communications sector. On this premise he noted that the interested party has an identifiable stake or legal interest in the matter.
94. The law on addition of an interested party in constitutional petitions is set forth under the *Mutunga Rules*. Rule 2 defines an 'interested party' as 'a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'.



95. The Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR echoed this provision by stating that:-
- “ 17. Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.
  18. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”
96. The applicable principles in an application to be an interested party in a suit were set in the Supreme Court decision of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR. The Court underscored the principles as follows:-
- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
97. The manner in which one can be added as an interested party in a suit is provided for under Rule 7 of the *Mutungu Rules*. This Rule states as follows:-
- (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
  - (2) A court may on its own motion join any interested party to the proceedings before it.
98. This Rule can be contrasted with that of joinder of parties under Rule 5. Whereas Rule 5(a) allows joinder of any party to the proceedings as far as whom redress should be sought, Rule 7 limits such an addition with regard to an interested party. In fact for one to be joined as an interested party they must satisfy through their application that the set principles in the cited authorities have been fulfilled. Moreover such an application can only be done with the leave of the Court if it is not *suo muto*.
99. An examination of the record before this Court divulges that the entrance of the interested party was done at the filing of the petition by the petitioner. The petitioner did not make any application to this effect and neither is it perceived that leave was sought from this Court. Additionally the petitioner in no way demonstrated that the addition of the interested party satisfied the principles set out by the Supreme Court. On the flipside, the interested party in the suit did not make an application to be joined in the suit and has fervently opposed its enjoinder.



100. In my humble view, the circumstance under which the interested party was added in this suit was improper. This is because the petitioner failed to adhere to the set guidelines under Rule 7. In my understanding Rule 7 seems to suggest that the entry of an interested party in a suit is not spontaneous as seen under Rule 5. This entry should be by application by the interested party with the leave of Court or suo muto. Accordingly it is my finding that the interested party ought not to have been unilaterally enjoined as a party.

**c) Whether the petitioner’s supporting and supplementary affidavits are competent**

101. The instant petition is supported by the petitioner’s supporting affidavit dated 17<sup>th</sup> October 2020 and a further supplementary affidavit dated 28<sup>th</sup> January 2022 where the averments and annexures are relied upon to support the assertion that the respondent violated the petitioner’s rights under Articles 35(1) (b), 40(1)(a), 46 and 47 of *Constitution*. The respondent challenges these affidavits on two fronts, first that the supporting affidavit was filed earlier than filing of the petition and secondly that the affidavits were deponed in the United States yet commissioned in Kenya.

102. I will begin with the first contention. the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules) is silent on this issue. The Courts have held that this Court can consult and refer to the *Civil Procedure Rules*, 2010 where there is a lacuna in the *Mutunga Rules*. The *Civil Procedure Rules* under Order 19 which deals with the rules of affidavits provides under Rule 8 as follows:-

‘Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.’

103. This view has long been appreciated by the Courts as can be seen in the case of *Mohamed Moin Ahmad Malik v Joseph Muiruri Gitbongo* (2006) eKLR where it was held that:-

“In my response to the arguments before me I wish to start with the argument that an affidavit not dated the same date as the application is liable to be struck out. Order XVIII Rule 9 provides:

“Unless otherwise directed by the court an affidavit shall not be rejected because it was sworn before the filing of the suit concerned.”

That means that the defendant could possibly have relied in this case on an affidavit sworn in the year 2002 even though this case was filed in 2003. For the court to direct that affidavit sworn before the filing of the suit, cannot be relied upon there has to be material information laid before the court. No such information was put before me by the plaintiff. The defendant explained the difference in the date of the application and the date of the affidavit. The plaintiff prayer for the striking out the affidavit has no basis and the same is rejected.”

104. It is my humble finding therefore that the petitioner’s supporting affidavit cannot fail on the basis that it was filed earlier than the petition. It is prudent to take note also that the requirement of an affidavit while filing a petition is not a mandatory requirement under Rule 19 of the *Mutunga Rules*. It states as follows:-

“A formal application under these rules shall be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit.”



105. Moving on to the second assertion, the respondent further opposed the affidavits on the ground that they had been deponed in the United States of America where the petitioner resides and commissioned in Kenya. The respondent contends that this was erroneous since the Commissioner of oaths from Kenya did not have authority to do so.
106. The Court in the case of *Jason Edward Matus & another v Summit Geblot & another; National Environment Authority & 2 others (Interested Parties)* [2021] eKLR while considering the competency of an affidavit deponed in the United States observed as follows:-
50. Owing to the fact that the said supporting Affidavit was taken outside the commonwealth, the provisions of Section 88 of the *Evidence Act* chapter 80 Laws of Kenya, therefore ought to have been complied with.
  51. My reading of the foregoing provision of the law drives me to the conclusion that, any document that is taken or made and sworn in the United Kingdom and which is generally submissible before the England Court of Justice, would be admissible in the court of Kenya without proof of authentication or submission of the public body or the Commissioner of Oath from whom the document was taken.
  52. To the contrary, where the document or Affidavit was not sworn in the commonwealth countries, the United States of America not being a common wealth country, the proof of such Affidavit and/or declaration in the United States of America must therefore be verified by an Affidavit and/or signature of the notary public must be legalized.
  53. Be that as it may the Affidavit in support of the further amended Petition though taken and/or sworn at Montgomery County, Maryland, United States of America, the execution there over has not been verified by an Affidavit, certificate or otherwise.
  54. On the other hand, the signature of the notary public, before whom the Affidavit was taken and/or sworn has similarly not been legalized, either as required under the law or at all.
  55. Consequently, it is my finding and holding that the Affidavit in support of the further amended Petition, is therefore invalid and unlawful, to the extent that same is in breach of a substantive position of the law, namely, the provisions of Section 88 of the *Evidence Act* chapter 80 of the Laws of Kenya.
  56. For clarity, the provisions of Section 88 of the *Evidence Act*, Laws of Kenya provides as hereunder:
    - “88. When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed—
      - (a) the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and
      - (b) the document shall be admissible for the same purpose for which it would be admissible in England.”



107. The petitioner averred in the affidavits that at both times he was a resident at South Carolina, in the United States of America. His affidavit does not reveal whether he travelled to Kenya within the period of this suit. Counsel for the petitioner while submitting orally informed the Court that the petitioner had travelled to Kenya at the times the affidavits were sworn. This assertion was however not buttressed by any evidence. In my humble view the petitioner following the respondent's preliminary objection dated 8<sup>th</sup> February 2022 should have undertaken to discharge the burden of proof in this regard. Production of the air travel tickets for the stated periods would have sufficed. Considering this I do not think it is judicious for this Court to base its determination on an unproved fact. This is because the submitted affidavits clearly indicate that the petitioner was a resident in the United States of America throughout and so it was his duty to demonstrate otherwise.
108. The undeniable conclusion that I come to is that the petitioner's supporting affidavit and supplementary affidavit did not comply with the statutory requirements of commissioning and notarization of affidavits, under the Laws of Kenya. This accordingly renders them fatally defective.
109. From the foregoing analysis and guided by the law and relevant authorities, I am persuaded that the preliminary objections as filed by the respondent and interested party have merit and as such should be upheld. It is apparent therefore that this Court has to down its tools at this juncture. Even if the preliminary objections would have been unsuccessful, there is no material placed before this court to prove any violation of the petitioner's rights. The respondents attended to and answered his queries. He was guided accordingly but he decided to come to court instead of following the set up dispute resolution processes by the respondent, under their contractual agreement.
110. All in all I find that the petition lacks merit and is dismissed with costs.
- Orders accordingly.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31<sup>ST</sup> DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

