



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 309 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES

1, 2, 3, 10, 19, 20, 22, 23, 24, 25, 27, 28, 35, 46, 232, 258 AND 259

AND

IN THE MATTER OF: VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

(PROTECTION OF FUNDAMENTAL FREEDOMS PRACTICES AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: CONSUMER PROTECTION ACT, 2012

AND

IN THE MATTER OF: THE KENYA POWER AND LIGHTING COMPANY

BETWEEN

ALAN E. DONOVAN.....PETITIONER

VERSUS

KENYA POWER AND LIGHTING COMPANYRESPONDENT

JUDGEMENT

PETITION

1. The Petitioner through a Petition dated 7th September 2018, supported by affidavit in support sworn by Alan E. Donovan on even date seeks the following prayers:-

a) A declaration that the Respondents have violated his guaranteed right to goods and services of reasonable quality and gaining full benefit of the said goods and services as prescribed by Article 46 of the Constitution.

b) A declaration that the violation of his right to goods and services of reasonable quality and the enjoyment of their full benefit thereof has occasioned him loss of money as a resource, time spent following up on the issues he has been raising with the Respondents.

c) A declaration that Electricity Supply bill of Kenya Six Hundred and Sixteen Thousand and Six Hundred Kshs.616,600/- on the 18th of June 2018 to the Petitioner is without basis and or justification.

d) An order directed at the 1st Respondent to bill the Petitioner based solely on the actual meter readings on the tariffs set and approved by Law.

e) An Order directed at the 1st Respondent to correct or delete all untrue or misleading information in the electricity bills that affects the Petitioner, and

f) A permanent injunction directed to the 1st Respondent from billing or recovering from the Petitioner backdated electricity bills based on the Kshs.10.1 billion contained in their Annual Report and Financial statements for the year ending 30th June 2017.

g) Any other reliefs that the Court may deem fit and just to grant.

h) Costs.

RESPONDENT'S RESPONSE

2. The 1st Respondent is opposed to the Petitioner's Petition and in doing so filed a Replying Affidavit sworn by Emily Kirui, Chief Legal Officer, Litigation and prosecution in the employment of the Respondent dated 1st October 2018.

PETITIONER'S CASE

3. The Petitioner herein is a customer of the 1st Respondent and holder of Account No. 0317403 connected in 1973 and a dutiful payer of the Respondent's bills since connection. The Respondent is a limited liability company that transmits, distributes and retails electricity to consumers nationwide.

4. It is Petitioner's contention that since 2008 the 1st Respondent has been issuing the Petitioner with erroneous and controversial electricity power supply bills as a result of their making estimates, an issue which the Petitioner has for the longest time complained to the 1st Respondent about. It is asserted that the 1st Respondent has been aware of the numerous complaints raised by the Petitioner via letters and personal visits by himself and his representatives to the 1st Respondent's Nairobi South offices in Kitengela. That despite the Respondent's acknowledgement of errors on bills sent to the Petitioner, and the subsequent guarantee to rectify the same via letters sent to the Petitioner, the 1st Respondent has and continues to issue erroneous and controversial bills to-date. It is stated that the Petitioner on 18th June 2018 received a customer billing statement from the 1st Respondent dated 7th of May 2018 with inflated Electricity Supply bill of Kenya Six Hundred and Sixteen Thousand and Six Hundred Kshs.616,600/- while he had dutifully paid his bills as and when, they fell due.

5. The Petitioner further urged that since June 2018, he has formally raised his concerns relating to the inflated Electricity Supply bill of Kenya Six Hundred and Sixteen Thousand and Six Hundred Kshs.616,600/- with the 1st Respondent without any satisfactory resolution. The Petitioner proceeded to swear an Affidavit in support of the submissions filed in Constitutional & Human Rights Petition No. 6 of 2018 (withdrawn) narrating his unfortunate plight of the 1st Respondent's misconduct of sending erroneous and inflated bills to him since 2008.

6. The Petitioner stated that his action of supporting the Nairobi High Court Constitutional Petition No.6 of 2018 was as a result of the Advocate's plea to the public to forward their issues and complaints for purposes of illustrating to the Court how the Respondent's misconduct of issuing inflated bills was not only systemic but widespread. He further asserted that his electricity power supply, was without notice, reason and/or justifiable cause, disconnected in an apparent punitive and retaliatory manner by the 1st Respondent on the 4th of September 2018. He reiterated that he has been dutifully paying the 1st Respondent's bills on a monthly basis while being closely guided by previous monthly payment estimates and has no pending unsettled bills as periodically confirmed by Short Messaging Services (SMS) from the 1st Respondent. He has in addition urged that the 1st Respondent has conceded that it never accurately, billed the Petitioner, when the electricity was supplied, consumed and fell due for payment for a period of twenty-one (21) calendar months from November 2016 to March 2018. It is in addition stated that the entire period from November 2016 to March 2018 when the 1st Respondent's claim it under billed the Petitioner, Electricity Bills were dutifully paid by the Petitioner and the resultant billing statements generated by the 1st Respondent indicated lack of any arrears.

THE 1ST RESPONDENT'S CASE

7. The 1st Respondent contended that in carrying out of its routine activities, it found, that the Petitioner's account had been billed incorrectly over the period November, 2016 to March, 2018 thus necessitating a recalculation of the Petitioner's bill in order to issue the Petitioner a correct bill based on verifiable consumed units of electricity, for the period, arising from the recalculation as stated, the Petitioner's bill was found to have been undercharged by 28,758 units during the period afore stated.

8. The 1st Respondent asserted, that the uncharged units were computed to be Kshs.584,749 and the Petitioner was issued with a bill of Kshs.616,600 in June, 2018, being the outstanding consumed bill as well as the accrued bill as per the computation for the undercharged units as at 7th May, 2018. The 1st Respondent further issued the Petitioner an explanation by way of a letter dated 6th June, 2018 together with an analysis table explaining the situation and also requesting for his payment schedule. The Petitioner disputed this and filed this matter alleging that his Constitutional rights had been violated.

ANALYSIS AND DETERMINATION

9. Upon consideration of the pleadings herein, parties rival submissions, I find that the following issues arise for consideration:-

a) *Whether the Petition raises Constitutional issues.*

b) *Whether the Respondent breached or contravened the Petitioner's right to goods and services of reasonable quality contrary to Article 46 of the Constitution.*

A. WHETHER THE PETITION RAISES CONSTITUTIONAL ISSUES.

10. The 1st Respondent contended, that every case has a constitutional underpinning, be it criminal case, civil or commercial. However it is urged, that it is important to point out that not every dispute ought to be filed in the Constitutional Division of the High Court unless it raises purely constitutional issues. It is further urged, that it is well settled principle that a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute.

11. The 1st Respondent further urged, that the issues raised in this petition are issues that can be resolved by interpreting the facts and the relevant statute governing billing procedures by the Respondent to wit, the **Energy Act, 2019, Energy (Complaints and Disputes Resolution) Regulations 2012** as well as the **Kenya Electricity Grid Code** which guides the billing of the Respondent. The laws above provide for the resolution of such disputes either in normal Courts or before the relevant tribunals, where if, any party is dissatisfied with the outcome of the tribunal, one can approach the Constitutional Court or Judicial Review Court for redress.

12. It is further stated, that the bills in respect of all the 1st Respondent's customers, including the petitioner are ordinarily based on accurate and verifiable meter readings done on individual customer's meters installed at their premises and not estimates as alleged by the Petitioner. In case of disputes arising, the law provides that the aggrieved party has recourse in the relevant tribunals as well as the ordinary Courts of law for appropriate relief.

13. The 1st Respondent therefore urged that issues raised herein do not raise a constitutional question at all. The Respondent averred that the issues in the Petition are those, that can be determined without invoking **Article 46 of the Constitution** or even the **Consumer Protection Act**. It is urged that this is an issue to do with the electricity meters and the 1st Respondent's billing system. It is 1st Respondent's assertion that this is an **issue that must be proved by way of evidence and facts to ascertain the veracity of the issues** raised by the Petitioner. It averred that this requires prove that the alleged problem in billing arose out of negligence, willful conduct, omission or inexcusable mistake or error on the part of the 1st Respondent or its agents. On conclusion that 1st Respondent contended that there can never be any constitutional issues in such facts.

14. In determining this issue, I have to consider the pleadings and the question of what constitutes a constitutional question. **Constitutional question** was ably illuminated in the South African case of **Fredericks & others vs. MEC for Education and Training, Eastern Cape & Others** cited with approval in **C N M V. W M G [2018 eKLR** in which Justice O'Regan recalling the Constitutional Court's observations in **S vs. Boesak** noted that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of ...the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....the interpretation, application and upholding of the Constitution are also constitutional matters. So too...is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

15. Looking at the Petitioner's Petition and affidavit in support of the Petition, the Petitioner does not clearly allege without evidence, violation of consumer rights under **Article 46 of the Constitution** contrary to the 1st Respondent's averments. Under **Article 165(3)(b)** this Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. The Petitioner urged that the inflated bill is a violation of **Article 46 of the Constitution** that guarantees consumer the rights to goods and services of reasonable quality and to gain full benefit from goods and services. The Petitioner urges, that the 1st Respondent infringed on his fundamental right to information as guaranteed under **Article 35 of the Constitution** and further contravened his fundamental rights to fair administrative action as guaranteed under **Article 47(1) and (2) of the Constitution**. Further The Petitioner urged, that he has a right to equal protection and equal benefit of the Law under **Article 27 of the Constitution** and that he has been subjected to degrading treatment contrary to **Article 25 of the Constitution**. It is stated that the Court has jurisdiction to enforce the protection of fundamental rights and freedoms under the Constitution and grant reliefs to remedy the contravention thereof.

16. In view of the pleadings in the Petition and considering **Article 165(3)(b) of the Constitution**, I find the Petition as drawn and filed clearly raises constitutional issues as the dispute thereto relates, as to whether any law or conduct is inconsistent or is in violation of the constitutional rights of the Petitioner herein. I find this Petition is properly before this Court as it requires constitutional interpretation of the issues raised in the Petition and alleged constitutional violation of the Bill of Rights in respecting of Petitioner's rights. I therefore decline to strike out the Petition as sought by 1st Respondent.

B. WHETHER THE RESPONDENT BREACHED OR CONTRAVENED THE PETITIONER'S RIGHT TO GOODS AND SERVICES OF REASONABLE QUALITY CONTRARY TO ARTICLE 46 OF THE CONSTITUTION.

17. The Petitioner contended, that the 1st Respondent is enjoined as a licensee distributing electricity supply as is subject to, and bound by the **Energy Act (2019) in particular Part IV (Licensing) Sections 117 – 131, (Retail Supply of Electrical Energy)**. It is urged that the 1st Respondent is strictly bound by the provision of the Sections 145 – 147, (Metering of Electrical Energy), Sections 153 – 166, The Energy

(Complaints and Dispute Resolution) Regulations 2012, Legal Notice No. 42, Kenya Gazette Supplement No.49 (Legislative Supplement No. 15) of May 25, 2012, The Energy (Electricity Licensing) Regulations, 2012, Legal Notice No. 44, Kenya Gazette Supplement No. 49 (Legislative Supplement No. 15) on May 25, 2012.

18. In view of the above the Petitioner argued, that the 1st Respondent does not have a free will to bill consumers as it wishes but is strictly subject to tariff regulations as provide for in **Section 45 of the Energy Act** and in particular to this instant Petition to the **Kenya Gazette Special Issue Vol CXX-91 No.8043, 9th August, 2018** (Approval of the Schedule of Tariffs set by the Energy Regulatory Commission for Supply of Electrical Energy and the prior Tariff Regime. Further in exercising its duties the 1st Respondent is subject to the **Consumer Protection Act 46 of 2012**.

19. The 1st Respondent asserted, that at all times there existed and still exists a contractual relationship between the Petitioner and the 1st Respondent whereby, the Petitioner is required to meet his contractual obligations with respect to the payment of Bills as and when they fall due upon the supply of electric power, to its premises by the 1st Respondent. The 1st Respondent acknowledges that based on the nature of the relationship between the Petitioner and itself, it has at all times billed the Petitioner based on his monthly electricity consumption as it does for the millions of other consumers across the country. This billing has always been based on actual and verifiable meter readings from the Petitioner's account number 0317403.

20. It is further stated by the 1st Respondent that the uncharged consumption relates to previous consumption which had erroneously not been factored in, and therefore the allegation that the same is malicious and not based on any current electricity supply meter reading is incorrect. It is contended that when the Petitioner failed to settle his bills, or offer an explanation, as to his preferred repayment plan, the 1st Respondent was forced to disconnect supply to the Petitioner's premises owing to the non-payment of outstanding bills in respect of power consumed.

21. The 1st Respondent urged that it acted within its mandate and has not violated either **Article 25, 27, 46 or indeed 47 of the Constitution** as alleged and there is no credible evidence led by the Petitioner to justify the allegations of violation of the Constitution or his fundamental rights and freedoms. It is further submitted that the Petitioner's residence doubles up as a social place, whereby, he specializes in show casing the African heritage and culture and it is therefore expected that, despite him being indisposed due to an illness as averred, the business will go on and as a result, electricity will be consumed. It is contended therefore it is not enough for him to state that he was ill and therefore electricity supply ought to have been less while his business went on during the period. Further it is contended that disconnection of the power supply to the Petitioner's premises was an isolated act based on his electrify consumption and not related to the proceedings in Nairobi High Court Constitutional Petition Number 6 of 2018 as alleged. It is further urged that it is admitted that his only basis for filing this suit is as a result of disconnection of electrify supply to his premises which has since been restored and that the substantive issues he sought to have resolved were contained in Nairobi High Court Constitutional Petition Number 6 of 2018 where the Petitioner is a party and/or deponed an affidavit in support, which Petition the 1st Respondent contended has since been determined vide consent Judgment entered on 2nd October 2018.

22. The 1st Respondent urged, that since, that the issues by Petitioner are similar to those contained in Petition 6, which has since been determined vide a consent, then the Petitioner has no substantive claim, as the issues referred to in the Petition were similar to those contained in the said Petition. The 1st Respondent further submitted, that in view of the above, the Petitioner is invited to take up the issue with the 1st Respondent's concerned offices and he should therefore elect which matter he wishes to proceed with as he admits having only filed this Petition, when his power supply was disconnected, a fact that has already been dealt with as he continues to enjoy uninterrupted power supply.

23. The Petitioner urged that contrary to the 1st Respondent's submissions, the 1st Respondent has been abusing its dominance in supply of electricity with a negative impact on the Petitioner. The particulars of abuse by the 1st Respondent that impacted on the consumer rights of the Petitioner are as follows:-

i. Issuing erroneous, misleading and deceptive representation and information relating to Electricity supply billing that caused the Respondent constant complaints of the same.

ii. Engaging in unconscionably conduct that is deliberates, harsh and oppressive, and that goes beyond what is reasonably required to protect consumer rights.

iii. Exerting undue influence by exploiting a positon of power in relation to the consumer so as to apply pressure in a way which significantly limits the consumers' ability to make an informed decision.

iv. Without notice, Back billing the Petitioner without providing any electricity Bill with itemized charges.

v. Without notice, unlawfully disconnecting supply power to the Petitioner to arm twist and coheres him to pay a global non-itemized bill.

24. Looking at the provisions of **Article 46 of the Constitution** it is clear, that it guarantees consumer right to goods and services of reasonable quality and to information necessary for them to gain full benefit from goods and services. It is therefore important to note, first, there is an obligation to provide goods and services of reasonable quality. At the same time there is an obligation to avail to the consumer, any information necessary for the consumer to gain full benefit from any goods or services. Additionally, a manufacturer, promoter or marketer, has an obligation to ensure the protection of consumer's health, safety, and economic interests.

25. It is interesting to note, that to implement and provide provisions of **Article 46 (2) of the Constitution**, Parliament enacted the

Consumer Protection Act, 2012 to give effect to the above Article. **Part Two of the Act** provides Consumers Rights while **Part Three** prohibits unfair practices. It is evident that **Article 46(3) of the Constitution** provides, that the Article applies to goods and services offered by the public entities or private persons. This indeed includes goods and services provided by the 1st Respondent herein.

26. It is further noted that Parliament enacted the **Competition Act No. 12 of 2010**; being an Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.

27. From the above there is no doubt that the 1st Respondent is explicitly prohibited under **Section 24(2) of the Competition Act No. 12 of 2010** from the following:-

- a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b) Limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- c) Applying dissimilar conditions to equivalent transactions with other trading parties;
- d) Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; and
- e) Abuse of an intellectual property right.

28. The 1st Respondent in issuing the Petitioner with erroneous and controversial electricity bills as a result of it making statements and acknowledging the errors on bills sent to the Petitioner and subsequent guaranteeing to rectify the same vide its letters sent to the Petitioner, the 1st Respondent has continued to issue erroneous and controversial bills. This is contrary to its contention that its bills are based on actual and verifiable meter reading from the Petitioner's Account No. 0317403, such reading cannot in my view result in consumption that is not factored in. I find from the admissions of the 1st Respondent, in its letters annexed to Petitioner's affidavits annexure AD-16, AD 2(a), AD 3 amongst others; that the 1st Respondent in furnishing the Petitioner with estimated bills and not actual metered bills, acted with illegality, irrationality and impropriety of procedure laid down to the abuse of dominance in the supply, backdated billing and demand of electricity payments to the Respondent by the Petitioner.

29. In urging an electricity consumer falls within the definition of a **"customer"** and supply of electricity is **"service"** that if not supplied in time will cause deficiency, the Petitioner sought reliance in the case of **Karnataka Power Transmission Corporation v Ashok Iron Works Pvt Ltd (2009) 3 SCC 240**, where the Supreme Court of India arrived at a finding that **"an electricity consumer falls within the definition of a 'consumer' and that the supply of electricity is indeed a service, if not provided in time, would constitute a service deficiency."**

30. The Petitioner herein urges this Court to adopt a pragmatic approach to find that the Petitioner was disadvantaged where the Respondent as averred in paragraph Eleven (11) of the Petitioner's Affidavit dated 7th September 2018 in support of the Petition, where his representative one Tom Otieno on a routine follow-up on electricity supply bills, was ambushed by the representatives of the 1st Respondent with a **"handwritten"** demand for payment of Kenya Shillings Six Hundred and Sixteen Thousand (616,600/-). It is urged by the Petitioner that the 1st Respondent has not disclosed or offer any evidence relating to the Discovery of the **"error"** in billing or incorrect billing and even upon correction as alluded does not provide evidence with a valid bill as provided for in the law.

31. I find that the Petitioner herein from, his Affidavit evidence, he has demonstrated that at all material times the 1st Respondent had access to Petitioner's premises to verify electricity power consumption. Further there is no contention that the alleged billing error was due to lack of access to read the meter on part of the 1st Respondent nor is there any evidence that the bills were estimates. I note the 1st Respondent contended that all its bills to the Petitioner were based on actual and verifiable meter reading No 0317403. The issue of the alleged consumption which were not factored before has not been demonstrated by adducing the various bills between 2006 – 2018. This is not justified by the 1st Respondent to claim there were outstanding arrears.

32. The 1st Respondent slapped the Petitioner with a bill of Kshs.616,600/- notwithstanding that there is no evidence of existing unpaid bills on monthly basis by the Petitioner. No is there cogent evidence that has been advanced why such a colossal sum was being demanded as arrears without supportive bills. Secondly the same was demanded when the Petitioner lodged a complaint with the 1st Respondent. It is Petitioner's contention that the demand of such colossal sum was an afterthought and a justification by the 1st Respondent in producing a billing statement (AD-6) where the contested, Bill was first disclosed as OTCharge (Transaction Type) Reference 2018050 (000207175) Reference Type, Bill number. The 1st Respondent however has not demonstrated that at that juncture, there was information on record from the 1st Respondent, on the period the demand related to, nor what were the units. It is urged by the Petitioner what the 1st Respondent produced was just an intransigence demand for global sum from the Petitioner which had no evidence in support.

33. It is of great importance to note, that the subsequent justification of the demand by the 1st Respondent, of the amount in question, related to **"recalculation's"** following the alleged incorrect billing. The Petitioner urged this was an afterthought and that the actual bill number Reference 201805OC000207175 dated 7th May 2018 was never availed to the Petitioner and has not been produced before Court by the 1st Respondent. Indeed there is no evidence before this Court as regards the Reference 201805OC000207175 nor the period covered nor units consumed. There is no cogent demonstration that indeed the Petitioner was supplied with the units in issue and is supposed to meet the bill in question.

34. It is trite that the burden of proof lies with he who alleges. The 1st Respondent were under duty and obligation to satisfy this Court that the units claimed were consumed by the Petitioner are worth the sum of Kshs.616,600/- and were indeed consumed by the Petitioner during what period. I find that the 1st Respondent has failed to demonstrate that a valid electricity supply bill exists, for the duration in question, providing for all elements charged in a standard bill to wit;

a) Balance brought forward – these are the arrears on the meter according to the previous bill.

b) Fixed charge – this is the standard charge towards footing costs incurred in the distribution, vending and billing process. These costs include installation, maintenance and other customer service carried out by KPLC. The current fixed charge for a domestic consumer is Kshs.150.

c) Consumption – Cost of electricity utilized by the user over the month. The basic principle of consumption billing is the heavier your usage, the higher your bill. Other than consumption rate, there are other variants to consumption billing i.e. type of consumer, time of token purchase/energy use (peak/off-peak) and some surcharges in form of levies to various regulatory bodies & affiliates. As of March 2018 a domestic user was charged a basic consumption charge of Kshs.2.50 for the first 50 units (KWh). As consumption exceeds 50 Units (up to 1500KWh), the charge rises to 12.75KWh. Consumption exceeding 1500KWh is deemed heavy and charged at kshs.20.57 per unit. Additional charges factored in to determine the net consumption charge as of March 2018 were:

i. Fuel Cost Charge (FCC) – Ksh/KWh (Reflects cost of fuel based electricity generation incurred by Kengen or other Independent Power Producers)

ii. Foreign Exchange Rate Fluctuation Adjustment (FERFA) – (Sum of foreign costs incurred by the Respondent)

iii. Inflation Adjustment (IA) – (A cost pegged on a relation between domestic and internal costs of supplying).

iv. Water and Resources Management Authority (WARMA) levy-Ksh/KWh (Pegged on the amount of hydro generated electricity)

v. Energy Regulatory Commission levy (ERC) –Ksh/KWh tariff charge

vi. REP levy –Ksh/KWh (0% of the basic charge of consumption)

To determine the net charge, the above levies are added to the basic consumption charge and a VAT of 16% is imposed on the amount (WARMA, ERC and REP levies are exempt).

d) Fuel cost charge-The amount charged to foot costs incurred in thermal generation of electricity, a process that utilizes fossil fuels. During times of drought, a fluctuation in hydroelectric production results in higher charges.

35. I find from the evidence on record that the cumulative conduct of the 1st Respondent towards the Petitioner as evidenced in the supportive affidavit and annexures thereto, contravened provision of **Article 46 of the Constitution** by Respondent's failure to provide a breakdown and justification of the demanded payment for purported supplied electricity power to the Petitioner. I further hold even where the 1st Respondent would have with evidence, justified such big billed payment, many years back, the good governance infrastructure in **Article 10 of the Constitution** would, in my view, prohibit one from back billing for a period of 12 calendar months proceeding, as this would be contrary to the National Values, Principles Of Good Governance, Integrity, Transparency and Accountability and sustainable Development.

36. **Article 10 of the Constitution** clearly and in no ambiguous terms lays down the values of Governance, which binds all State Organs, Public Officers and all persons whenever any of them applies the Constitution or any other law to wit:- the Rule of Law, Human Right, Human Dignity, Transparency and Accountability. These constitutional principles, in **Article 10 of the Constitution**, are with all due respect, on increasing norm for the conduct of public affairs and the maintenance of a free and democratic society. The principle would apply to a dominant market player like the 1st Respondent whose shareholding substantially comprises of the State.

37. Further **Article 19 of the Constitution** provides, that the bill of rights is an integral part of Kenyan's democratic state and is the framework for social, economic and cultural polices and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. **Article 19(3)(a) of the Constitution of Kenya** provides, that the rights and fundamental freedoms in the Bill of rights belong to each individual and are not granted by the State.

38. In addition **Article 20 (1), (2) of the Constitution of Kenya** provides that the Bill of Rights applies to all law and binds all State Organs and all persons and that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundament freedom. **Article 20(3) of the Constitution of Kenya** requires that in applying provisions of the Bill of Rights, a Court shall develop the law to the extent that it does not give effect to a right or fundamental freedom; and Rights and fundamental freedoms and adopt the interpretation that most favours the enforcement of a right or fundament freedom. Further by virtue of **Article 21 (1) of the Constitution of Kenya** the State and every State Organ is mandated to observe, respect, protect, promote and fulfill the rights and fundament freedoms in the Bill of Rights.

39. **Article 21(1) of the Constitution of Kenya** provides that the State and every State Organ is mandated to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Further **Article 22(1) of the Constitution of Kenya** provides that, **"Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has**

been denied, violated or infringed, or is threatened.”

40. In the instant Petition, a cursory glance at the Petition reveal that the Petitioner alleges **“that his right to goods and services of reasonable quality and to information necessary for him to gain full benefit from goods and services had been and was being contravened”** owing to the, unwarranted backdated billing of electricity supply, disconnection of electricity supply and continued demands of alleged backdated consumption of electricity supply not billed when they fell due for payment.

41. In dealing with a dispute concerning a consumer, the Court is supposed to take pragmatic view of the rights of the customer as it is the customer who is placed at a disadvantage vis-à-vis the supplier of services or goods. In support of the above proposition reliance is placed in the **Supreme Court of India Civil Appellate Jurisdiction Civil Appeal No. 3883 of 2007 National Insurance Co. Ltd. Versus Hindustan Safety Glass Works Ltd**, where the Honourable Judges observed:

“in our opinion, in a dispute concerning a consumer, it is necessary for the courts to take a pragmatic view of the rights of the consumer principally since it is the consumer who is placed at a disadvantage vis-à-vis the supplier of services or goods. It is to overcome this disadvantage that a beneficent legislation in the form of the Consumer Protection Act, 1986 was enacted by Parliament.”

42. Equality and freedom from discrimination is provided for under **Article 27(1) of the Constitution** where it is provided, that every person is equal before the law and has the right to equal protection and equal benefit of the law. **Article 27(4) of the Constitution of Kenya** provides that the State shall not discriminate directly or indirectly against any person on any ground. Further **Article 28 of the Constitution of Kenya** provides that every person has inherent dignity and the right to have that dignity respected and protected. In addition **Article 35 of the Constitution of Kenya** gives every citizen the right of access to information held by the State; and information held by another person and required for the exercises or protection of any right or fundamental freedom, the right to the correction or deletion of untrue or misleading information, that affects the person and require the State to publish and publicize any important information affecting the nation.

43. Looking at **Section 61 of the Energy Act** it is clearly, provided, when supply of electrical energy may be refused or discontinued and provides as follows:-

(1) A licence shall not, except for reasons beyond his control, reduce, discontinue or refuse the supply of electrical energy to any consumer, unless –

a) The consumer has failed to pay to the licensee any costs of installation or instalments thereof payable under Section 57(2), or charges for consumption of electrical energy, whether such charges are due to the licensee for the supply of electrical energy to premises in respect of which such supply is demanded or in respect of to the premises:

Provided that – (i) such charges have not been referred to the licensee by the consumer for resolution in accordance with the licensee’s complaint handling and dispute resolution procedures approved by the Commission;

b) The consumer fails or neglects to make good any defects in his installation:

Provided that, - those defects and the period within which such defects are to be rectified, have bene communicated to the consumer in writing;

c) The consumer uses or permits to be used such supply for any purpose or deals with or permits such supply to be dealt with in any manner so as to interfere unduly or improperly with the efficient supply of electrical energy by the licensee to any person, or endangers public safety;

d) The consumer contravenes the provisions of subsection (5) or (10) of Section 58;

e) The consumer denies the licensee access to the electric supply lines or any meters on the premises under the control of the consumer;

f) The premises of part thereof is the subject of an order for demolition made at the instance of a public or local authority; or

g) The supply of electrical energy is prohibited by law to such premise or part thereof.

(2) Where a person has given a licensee a deposit as security for payment for the supply of electrical energy, the licensee may, at any time, while any such charge or other sum remains unpaid and after giving that person not less than fourteen days notice in writing –

a) Discontinue the supply of electrical energy to such person; or

b) Apply the deposit for the electrical energy consumed and if any part of such charge or other sum remains unpaid thereafter, discontinue the supply of electrical energy to such person, until such charge or other sum together with any expenses incurred in disconnecting such supply and any lawful charges for or incidental to the reconnection thereof have been paid.

(3) If any dispute arises as to –

- a) Any charges; or
- b) The application of any deposit; or
- c) Any illegal or improper use of electrical energy; or
- d) Any alleged defects in any apparatus or protective devices; or
- e) Any unsuitable apparatus or protective devices, it shall be referred to the Commission

(4) Where any dispute referred to in subsection (3) has been referred to the Commission, or has otherwise been taken to court before a notice of disconnection has been given by the licensee, the licensee shall not exercise any of the powers conferred by this section until final determination of the dispute:

Provided that, - the prohibition contained in this subsection shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Commission, in addition and without prejudice to any other deposit the licensee is entitled to require, or the amount of the charge or other sum in dispute, and the consumer has failed to comply with the request within forty-eight hours of the request having been made.

44. In the instant Petition, the 1st Respondent proceeded to discontinue supply of power to the Petitioner without complying with **Section 61 of the Energy Act**, notwithstanding existing dispute on the charges.

45. In view of the conclusion that I have come to, I find that the Petition is meritorious and I proceed to make the following orders:-

- a) **A Declaration be and is HEREBY issued that the 1st Respondent has violated its guaranteed right to goods and services of reasonable quality and gaining full benefit of the said goods and services as prescribed by Article 46 of the Constitution.**
- b) **A declaration be and is HEREBY issued that the violation of the Petitioner’s right to goods and services of reasonable quality and the enjoyment of their full benefit thereof has occasioned him loss of money as a resource, time spent following up on the issues he has been raising with the Respondents.**
- c) **A declaration be and is HEREBY issued that Electricity Supply Bill of Kenya Shillings 616,600/- on the 18th of June 2018 to the Petitioner is without basis and or justification.**
- d) **An order be and is HEREBY issued directed at the 1st Respondent to bill the Petitioner based solely on the actual meter readings on the tariffs set and approved by Law.**
- e) **An Order be and is HEREBY issued directed at the 1st Respondent to correct or delete all untrue or misleading information in the electricity bills that affects the Petitioner.**
- i) **An order be and is HEREBY issued that a permanent Injunction directed to the 1st Respondent from billing or recovering from the Petitioner backdated electricity bills based on the Kshs.10.1 billion contained in their Annual Report and Financial statements for the year ending 30th June 2017.**
- f) **Costs to the Petitioner.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE, 2021.

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J. A. MAKAU

JUDGE