



**Wafula v Safaricom Limited & 4 others (Petition E362 of 2020) [2025] KEHC 229 (KLR)
(Constitutional and Human Rights) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E362 OF 2020
LN MUGAMBI, J
JANUARY 22, 2025**

BETWEEN

MOSES WAFULA PETITIONER

AND

SAFARICOM LIMITED 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

CENTRAL BANK OF KENYA 3RD RESPONDENT

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND
PLANNING 4TH RESPONDENT**

COMPETITION AUTHORITY OF KENYA 5TH RESPONDENT

JUDGMENT

Introduction

1. The Petition dated November 6, 2022 was amended on the 28th of November, 2020 and which again reamended on the 20th of June, 2023.
2. The petitioner states that the Petition is brought on his own behalf and in the interest of all Safaricom phone mobile subscribers, users of government e-services, consumers of all goods and services for which payment is made via MPESA and through the Lipa na Mpesa platform.
3. The Petitioner challenges the constitutionality and legality of the charges that Safaricom Limited levies on users of the pay bill option while making payments for various goods and services where the cost for the service is passed to the end consumer of the M-Pesa pay bill service. The Petitioner prays for the following reliefs:



- a. A declaration that the decision made between the 1st Respondent herein and the Government of Kenya or between the 1st Respondent and any other party to transfer the Lipa na Mpesa Pay Bill transaction costs to the public is unfair, unlawful and offends the provisions of Article 46 of *the Constitution* of Kenya;
- b. A declaration that any vendor contracts between the 1st and 2nd Respondents, or between the 1st Respondent and any other party, associated in any way with the Lipa na Mpesa Pay Bill transactions whereby a leeway is offered to the parties to elect to impose the transaction charged for the service upon the public users are unfair, unlawful, unconstitutional and therefore null and void;
- c. A declaration that the Respondents violated the Petitioner's and the larger public protected rights under Articles 27,40,46 of the Constitutions of Kenya, the *Consumer Protection Act*, and the provisions of Article 3, 9(1), 22 & 27(2) of the African Charter on Human and Peoples' Rights; Articles 7, 22 & 30 of the Universal Declaration of Human Rights; and Articles 2 & 5 of the International Covenant on Economic, Social and Cultural Rights;
- d. An order of judicial review by way of prohibition do issue to permanently debar the 1st Respondent, its privies, agents, affiliated persons, nominees, associates, servants, proxies or whomsoever, from imposing fees/charges, on the Petitioner and other members of the public using the Lipa na Mpesa Pay Bill payment option;
- e. An order of judicial review by way of mandamus compelling the 1st Respondent herein to review all their contracts with other business organisations, and delete the clause that allows the 1st Respondent to charge the public in all their contractual engagements with the governments and the corporates or other business entities and institutions;
- f. A declaration that the 1st Respondent unjustly enriched itself by violating the Petitioner's and the larger public's protected consumer rights;
- g. An order directed to the 1st, 2nd, 3rd, 4th, and 5th Respondents to audit and or direct an audit be conducted on the 1st Respondent to ascertain the 1st Respondent's unjust enrichment from its violation of the Petitioner's and Safaricom subscribers' constitutionalized consumer rights;
- h. An order of restitution directed to the 1st respondent to reimburse to the Petitioner and the larger public up to three years' worth of all audited monies and/or resources unjustly and unconstitutionally obtained from them by the 1st Respondent on account of the illegal charges made on the Pay Bill numbers to the respective members of the public within three months;
- i. Exemplary damages;
- j. This Honourable Court be pleased to issue any other appropriate orders or reliefs as it may deem fit and just;
- k. Costs of and incidental to this Petition.

Petitioner's Case

4. The Petitioner explained that, in June, 2013 the 1st Respondent designed and introduced the Lipa na Mpesa product as a form of cashless payment option for goods and services, payment of salaries, bills, merchant payment collection services, retail distribution, bulk payment and transport solutions. That the Lipa na Mpesa product was presented as being cost effective for the users and it included two



different options: Buy Goods Option and the Pay Bill Option with the Buy Goods option being free to end customers and the Pay Bill option having costs attached to it in form of transaction fees.

5. The objective of the 1st Respondent is to provide an avenue for payment of goods and services to their primary clients and allowing them to state if they will pay the 1st Respondent the requisite fees or charges in exchange for the provision by services by the Respondent.
6. The three options presented by the 1st Respondent with regard to the payment of the requisite fees are: allowing the primary clients to state if they will pay the Respondent's requisite fees, whether the primary client's customers should bear the fees, or whether the costs should be shared between the businesses/government departments/institutions and their customers.
7. That notably all the primary clients have elected that the 1st Respondent recoups its charges from the public which the Petitioner contends is unfair to give its primary clients the discretion to decide since that they will opt to minimise their own costs by passing the resultant costs for the services of the end consumer (public).
8. That the unfairness is palpable when the 1st Respondent offers services to a different person and then asks the person or entity's permission to charge their customers for the same services. The Petitioner avers that allowing the 1st Respondent to charge the end consumers for the Lipa na Mpesa product amounts to a double charge against the public who are already being charged for the services rendered by the businesses or Government and again being charged for the services of the agent, Safaricom Limited. That the objective of the 1st Respondent in introducing the innovative product was to replace an existing funds collection system with a digital one but this should not have been an avenue of transferring the charges to the public or zero rating the funds collection service to the benefit of its primary clients and to the financial detriment of the public.
9. The Petitioner alluded to the agency contract between the 1st respondent, corporate organisations as well as the Government and stated that the public is not represented in the negotiation of the contract hence the unfair and predatory in nature of the contract that ends up binding the public to a contract, they are not privy to.
10. He contends further that since there are no charges to the public on the Buy Goods payment option, then there is no justification why the choice to use either the Pay Bill or the Buy Goods option should not be left to the customer as the latter is cost free considering that the Respondents have limited the Pay Bill option as the only way to pay for essential services such as those at the Attorney General's Office, Huduma Centres, Court Filing fees, Electricity Bills and NTSA service.
11. The Petitioner proposes that the Buy Goods option should be used in these services at no extra charge to the consumers. Additionally, the 1st Respondent should be restrained from allowing their primary client the discretion to elect who should bear the costs of the transactions as it is ultimately citizens who are made to bear the burden whilst they are not a party to such contract. The Petitioner gave examples of companies offering mobile loans to citizens like Zenka Digital Limited trading as Zenka, and MyWagepay Limited trading as FairKash who insist on the Mpesa Pay Bill option as the only mode of repayment of mobile loans without providing any other alternative payment options. That it is not ethically right for the 1st Respondent to collect billions of shillings for some corporations at zero value and assign the costs of such services. That the Respondent has not only zero valued the services rendered to the Government and its agencies but also created a loophole in the law to protect the said contract, which he says is a tender for provision of mobile money services (Tender Number TNT/029/2017-2018) at the cost of Kshs.15/-.



12. That Kenyans are losing a lot of money to the 1st Respondent using the Government as well as big companies who do not display other payment options such as the Buy Goods number. He blames the 3rd, 4th and 5th Respondents for abrogating their regulatory duties leading to the violation of the rights of the end customers with the Central Bank of Kenya failing to regulate the 1st Respondent's business so as to protect public interest hence complicit in the violations.
13. That Petitioner alleges that the Respondents' actions are in contravention of Articles 2, 10, 27, 40, 46, 227(1) of *the Constitution*, the provisions of the *Consumer Protection Act* No. 46 of 2012, the provisions of the *Competition Act* No. 12 of 2010, the provisions of the National Payment Systems Act, the International Covenant on Economic, Social and Cultural Rights, the United Nations Guidelines on Consumer Protection, the Universal Declaration on Human Rights and the African Charter on Human and People's Rights.
14. Concerning the nature of the injuries suffered, it was the Petitioner's case that includes:
 - a. Loss of money incurred by the Petitioner and the general public as a result of the decision by the Respondents to transfer the transaction charges for the Lipa na Mpesa Pay Bill service to the public;
 - b. Exposing the Petitioner and the larger public to unfair trade practices in consumer transactions.

1st Respondent's Case

15. Daniel Menja Ndaba deponed the 1st Respondent's affidavit dated 28th April, 2021. He deponed that subscription to Safaricom products including Mpesa and Lipa na Mpesa services are voluntary and that in providing these telecommunication services Safaricom is required to comply with the provisions of Kenya Information and Communication Act, 1998 as well as the Regulations thereunder. That the Terms and Conditions for the Lipa na Mpesa are approved by the Communications Authority of Kenya for the various products and services it provides to its customers based on the Standard Subscriber Service Agreements under the Kenya Information and Communications (Consumer Protection) Regulations, 2010.
16. The Respondent deponed that the Petition is premature and that there exists an effective dispute resolution procedure under KICA to deal with disputes regarding tariffs set by a licensed telecommunications service provider, charges, terms and conditions for products and services provided by a licensee such as Safaricom. That the Petitioner ought to have exhausted all the statutory dispute resolution mechanisms before approaching this Court.
17. In answer to the Petition, the 1st Respondent deponed that in light of section 23(2) (a) of KICA, the Communications Authority of Kenya has a duty to protect the interests of all users of telecommunication services in Kenya with respect to the prices charged for and the quality and variety of those services and the Kenya Information and Communications (Consumer Protection) Regulations, 2010. That Regulation 10(1) of the said Regulations requires a licensee such as Safaricom to provide a clear and understandable description of available services, rates, terms and conditions and charges for such services and publish the information within such periods as may be determined by Communications Authority of Kenya. That Safaricom is to submit the standard subscriber service agreement to the Communications Authority of Kenya for approval and must also install a billing system that permits issuance of bills that identify the rates charged to the subscriber.
18. That Lipa na Mpesa is governed by the Lipa na Mpesa Terms and Conditions and Mpesa Customer Terms and Conditions which at clause 12.1 of the latter it provides that the Mpesa Customer is



responsible for the payment of all applicable fees published by Safaricom in information pamphlets, daily newspapers, cash merchant outlets and on the Safaricom website while clause 6 of the Lipa na Mpesa Terms and Conditions provides that the service is subject to the charges and minimum/maximum transaction values appointed from Safaricom from time to time.

19. He explained that the Pay Bill is a cash collection service that allows business entities to collect money on a regular basis from their customers through M-Pesa and that in addition to the Lipa na Mpesa Terms and Conditions, the pay bill is regulated by the M-Pesa Pay Bill Terms and Conditions. That Safaricom revised its Standard Pay Bill and introduced three different tariffs, namely, the Mgao tariff, business bouquet tariff and customer bouquet tariff which tariffs are filed in the C2B Standard Pay Bill Tariffs Rates with the Communications Authority of Kenya in compliance with Regulation 5 of the Kenya Information and Communications (Tariff) Regulations 2010.
20. That Regulation 4(1) of the Tariff Regulations allow a licensee to set tariffs that are just and reasonable which must be sufficiently clear to enable the end-user to determine the description the service, the details relating to the nature of service and charges payable for the service. That the grievances listed by the Petitioner should be dealt with in the manner provided under KICA given that the Communications Authority of Kenya promulgated the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 to regulate disputes between a licensee and another, a consumer and a licensee. That the said Regulations provide that the Communications Authority of Kenya has power to hear and determine such disputes with appeals being referred to the Communications and Media Appeals Tribunal which the Respondent contends is functional and currently handling appeals challenging decisions of the Authority.
21. He reiterates that both Mpesa and Lipa na Mpesa service provided by Safaricom to its subscribers or customers are voluntary and a subscriber who elects to utilize these service is enjoined to comply with the Terms and Conditions associated with such services. That the Government and business entities are the real financial beneficiaries of the Lipa na Mpesa Pay Bill service which does not require users or customers to be at the entities place of business or office in order to carry out the payment. He deponed that this is due to the convenience and low costs of transaction associated with the use of the Lipa na Mpesa Pay Bill. The Respondent stated that e-payment solutions have contributed significantly in the fight against the spread of corona virus because they reduce social interactions. That the Petitioner's decision not to join other business entities in the Petition is an invitation to have this Court condemn them unheard. The 1st respondent urged this Court not to grant the orders in the Petition.

3rd Respondent's Response

22. Kennedy Kaunda Abuga deponed the replying affidavit dated 2nd October, 2023 on behalf of the 3rd Respondent. He stated that CBK's mandate in relation to the Petition is limited to approving the tariffs with a view to establishing whether they are reasonable from the perspective of the public interest which mandate did not extend to regulating the pricing of payment service instruments and would not be concerned with the issues that have been raised. That the said issues are governed and regulated by the National Treasury and Competition Authority and that the CBK exercises constitutional powers as a regulator are discretionary and neither the Petitioner nor this Court can direct CBK in the exercise of these powers. He deponed further that the Petition involves 3rd Parties who have not been joined as parties to the Petition.
23. He continued to depon that Safaricom is subject to the Kenya Information and Communication [Act No. 2 of 1998](#) as well as the Regulations thereto which have a dispute resolution mechanism in place. That the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 mandates the Communications Authority of Kenya to hears and determine the present dispute with appeals



being referred to the Communications and Multimedia Appeals Tribunal as established under section 102 of the Act. That the present petition is therefore an abuse of the Court process and is contrary to the provisions of Article 46 of *the Constitution* and section 9 of the Fair Administrative Actions *Act, No. 4 of 2015*.

24. The Respondent contends that the setting of tariffs such as the transactions costs associated with the Lipa na Mpesa Pay Bill service is the preserve of the Commission and the CBK's role with respect to the tariffs and charges imposed by the payment service provider such as Safaricom is to determine whether they are reasonable from the perspective of the public interest and not price setting or who bears the costs. That the Petitioner has not proved any of the alleged Constitutional violations or the violations under International Statutes. They urged this Court to find that the petition is unmerited, is an abuse of the Court process and ought to be dismissed with costs.

5th Respondent's Case

25. The 5th Respondent's Replying Affidavit is dated 3rd August, 2023 is deponed by Adano W. Roba. He stated that the 5th Respondent carries out its mandate under section 9 of the *Competition Act* and has not in any way abrogated its duties in protecting the consumers' constitutional rights.
26. That in exercise of the powers in section 9 of the *Competition Act*, the 5th Respondent is empowered to carry out inquiries, studies and research into matters of competition and the protection of the interests of consumers and part IV of the Act provides for regulation of consumer welfare infringements and provides for four main offences: false and misleading misrepresentations; engaging in unconscionable conduct, failure to comply with product safety standards and supplying unsafe goods and failure to comply with product information standards.
27. Like the rest of the Respondents, the 5th Respondent agreed that the Petitioner had not raised a complaint with them against the 1st Respondent and had further failed to exhaust all redress mechanisms set out under the Act before approaching this Court. The Petitioner contends that where there exists a procedure under the law, a party ought to follow and exhaust that procedure to the latter. That the orders that the Petitioner seeks against the Respondent are not within their legal mandate to do and it will be a waste of time and resources for the Petitioner to proceed with the Petition without first according it an opportunity to carry out its statutory mandate with regards to the Petition. The 5th Respondent prayed that the petition against it be dismissed with costs.

Submissions

Petitioner's Submissions

28. The petitioner's submissions are dated 8th February, 2024 and 30th April, 2024. He submitted on two issues:
- a. Whether the petition is barred by the doctrine of exhaustion;
 - b. Whether the Respondents breached their constitutional and statutory obligations to the Petitioner and/or the 1st Respondent's mobile subscribers;
 - c. Who is entitled to the costs of the Petition
29. On the first issue, he submitted that although the Respondents argued that the Petitioner has failed to exhaust other avenues before approaching this Court including the Communications and Multimedia Appeals Tribunal, the Public Procurement Administrative Review Board, the Competition Tribunal and the Tribunal established under the National Payments Systems Act, this Court has original



jurisdiction under Article 165 of *the Constitution* to hear and determine the issues enumerated in this Petition. He relied on the case of Speaker of National Assembly v. Njenga Karume (1992) KLR 21 and submitted that the alternative procedure provided under *the Constitution* or Statute ought to be an efficient and effective redress mechanism in order to oust the jurisdiction of the Court, and listed the following exemptions to the doctrine of exhaustion:

- a. Where the exhaustion requirement would not serve the values enshrined in *the Constitution* or law for instance, where a party pleads issues that verge of constitutional interpretation especially in virgin areas or where an important constitutional value is at stake; and
 - b. Where parties with valid grievances lack adequate audience before a forum created by a statute, or they may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit.
30. He submitted that ousting the jurisdiction of this Court will only leave him and the general public without any effective remedy and without the quality of the audience before the suggested alternative Tribunals. That the issues of violations of the Petitioner's rights under Articles 2, 10, 27, 40, 46 and 227 of *the Constitution* as well as violations of various rights under International Law which can only be determined by this Court.
31. On the second issue, the Petitioner submitted that the Respondents have violated his consumer rights under Article 46 of *the Constitution* by failing to protect the consumer rights of the petitioner and other Kenyans by electing to pass the Mpesa Pay Bill transaction costs for government e-services to the consumers including the Petitioner. He relied on the case of KENYA HUMAN RIGHTS COMMISSION VS. COMMUNICATIONS AUTHORITY OF KENYA & 4 OTHERS (2018) EKLK which required public participation in similar scenarios while none was carried out in the instant case.
32. The Petitioner also submitted that the 1st Respondent has engaged in unfair trade practices by providing misleading and deceptive information relating to the Lipa na Mpesa in violation of sections 12(1), 87(1) and 87(2) of the *Consumer Protection Act* and sections 55 and 56 of the *Competition Act*. That the 1st Respondent has not indicated whether the transaction costs were arrived at upon consultation with any affected parties. That the public was never accorded an opportunity to choose the applicable tariff.
33. The Petitioner also blames the 1st Respondent for engaging in unconscionable conduct by engaging in contracts with its primary clients and which are adverse to the consumers therefore abusing its market dominance by riding on a "zero value" service to the disadvantage of other payment service providers giving the said Respondent an undue advantage which is unfair to other potential payment service providers. He submitted that the Respondents have also violated his property rights under Article 40 of *the Constitution*, as read with paragraphs 11, 12, 14, 16 and 23 of the General Comment No. 24 as well as Article 2(2) and 5 of the ICESCR. He submitted on the violation of his rights to equality and equal protection before the law and stated that despite this right being rooted in Article 27 of *the Constitution*, the Government's failure to regulate the activities of the 1st Respondent, was a violation of this right. That further his rights under Articles 2, 10 and 227 (1) had been violated.
34. The Petitioner concluded by submitting that he had proved the Petition and was therefore entitled to the reliefs sought therein which he urged this Court to grant with costs.



1st Respondent Submissions

35. The 1st Respondent's submissions are dated 26th April, 2024. They submitted on the following issues for determination:
- a. Whether the petition is in breach of the doctrine of exhaustion of remedies?
 - b. Whether the Petitioner's constitutional rights have been infringed by the 1st Respondent.
36. On the first issue, the Respondent relied on the cases of United Millers Limited vs. Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others (2021) eKLR and Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 others (2015) EKLR and submitted that disputes regarding the charges on Lipa na Mpesa Pay Bill option approved by Communications Authority should be dealt with in a manner provided under the provisions of the [Kenya Information and Communications Act](#) (KICA), 1998. That the doctrine of exhaustion mandates that Courts should refrain from adjudicating over matters before them, where there are other alternative mechanisms that can aid or are agreed upon in resolving disputes as encouraged in line with Article 159 of [the Constitution](#). The Respondent submitted further that the Communications Authority of Kenya promulgated the Kenya Information and Communications (Disputes Resolution) Regulations, 2010 with Regulation 3 empowering the Authority to resolve disputes between a consumer and a service provider with appeals being referred to the Communications and Multimedia Appeals Tribunal as established under section 102 of KICA. The Respondent submitted further that although there are exceptions to the doctrine of exhaustion, the Petitioner has not sufficiently established or proven the circumstances. That the Court should disregard the Petitioner's argument that the petition raises novel issues that hinges on constitutional interpretation and urged this to hold that there is no constitutional issue for reserved for determination by this Court.
37. On the second issue, the Respondent relied on the cases of James Kanyiita Nderitu Vs. AG & Another (2019) eKLR, Uhuru Muigai Kenyatta vs. Nairobi Star Publication Limited (2013) eKLR and Revital Healthcare (EPZ) Limited & Another v. Ministry Of Health & 5 Others (2015) eKLR and submitted that the matters pleaded in the Petition can be resolved adequately through the various statutory dispute resolution mechanisms established under KICA, the [Competition Act](#), 2010, the [National Payment System Act](#), 2011 and the [Public Procurement and Asset Disposal Act](#), 2015 and the Regulations made thereunder.

3rd Respondent Submissions

38. The 3rd Respondent filed both its submissions and supplementary submissions on the 29th of April, 2024. The Respondent submitted that the gravamen of the petition against it is that it failed in its capacity as a regulator to sufficiently regulate the Lipa na Mpesa pay bill service pursuant to its obligations under the National Payment Service Act and the [Central Bank of Kenya Act](#) and stated that even though it is indeed one of the regulators of financial services, it does not regulate the Lipa na Mpesa services offered by Safaricom save that it authorises payment service providers such as Safaricom to conduct their business in compliance with the provisions of the National Payment Service Act. That the duty is the preserve of the Communications Authority of Kenya.
39. Like the 1st Respondent, the Respondent equally submitted on the doctrine of exhaustion and stated that the National Payment System (Regulations) the Kenya Communication (Dispute Resolution) Regulations (2010), the [Public Procurement and Asset Disposal Act](#) and the [Competition Act](#) provide alternative dispute resolutions mechanisms. They relied on the case of Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others (2014) eKLR and state the kernel



of the grievance by the Petitioner should have been raised before the dispute resolution mechanisms under *Kenya Information and Communications Act*. The Respondent submitted that this Court lacks jurisdiction to handle the petition and ought to be dismissed with costs.

5th Respondent Submissions

40. The 5th Respondent's submissions are dated 28th April, 2024 and it submitted on its statutory mandate and on the doctrine of exhaustion. On the first issue, it submitted that the Competition Authority is charged with the legal mandate to promote and safeguard competition in the national economy and protecting consumers from unfair and misleading market conduct. That its mandate as provided under sections 7 and 9 of *Competition Act* do not extend to the approval of charges, prices, levies and underlying terms and conditions imposed by payment service providers for their services. That this mandate falls under the Communications Authority of Kenya and where one regulator is seized of the matter the said regulator should be allowed to handle the matter to its conclusion.
41. On the second issue, the 5th Respondent submitted that the Petitioner has not exhausted all the mechanisms set out under the *Competition Act* in complete disregard of the doctrine of exhaustion and if he pursued the said redress mechanisms. He relied on the case of *Okoiiti & 2 Others vs. Attorney General & 14 Others (2023) eKLR* and urged this Court to dismiss the prayers against them with no orders to costs.

Analysis and Determination

42. After a thorough review of the pleadings, submissions and the applicable law I find the following to be the issues for determination in this Petition:
 - a. Whether the doctrine of exhaustion remedies applies in respect of this Petition
 - b. Whether the Petitioner's rights and those of other Kenyans have been infringed upon by the Respondents;
 - c. Who should bear the costs of this Petition?

Whether the doctrine of exhaustion remedies applies in respect of this Petition

43. The Respondents opposed the Petition on account that the Petitioner has not exhausted the available statutory mechanism for redressing the grievance hence the Court is barred from considering this matter under the doctrine of exhaustion of remedies. The Petitioner on the other hand argued that the mechanisms alluded to by the Respondents are inadequate and cannot therefore provide sufficient remedy for the dispute that this Petition presents and urged the Court to consider that they are excepted.
44. The exhaustion doctrine provokes jurisdictional question as the Court will give deference to the statutory or a regulatory regime to first resolve a dispute if one exist as opposed to take it up in the first instance. That principle given Constitutional anchor under Article 159 of *the Constitution* which requires that in exercising judicial authority, courts and tribunals shall be guided by the principles stipulated which include 'alternative forms of dispute resolution...'
45. Courts have consistently affirmed that where other forms of reliefs exist in legislation or regulatory regime parties must first alternative mechanisms before invoking Court's intervention. In *John Githui vs Trustees, Nakuru Golf Club [2019] eKLR* the Court held thus:

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“25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants’ suit in the following words:

This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:-

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before *the Constitution* of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others* [2015] eKLR, where the Court of Appeal stated that:-

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and 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. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

We have read these cases carefully and considered the salutary decisional rule of law they announce.....

26. The existence of the doctrine is not in question. What is in question is whether it is applicable in the case at hand It is instructive that the Respondent does not state what the local remedies which should have been exhausted are...”

46. Correspondingly in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR the 5-judge bench 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...”



47. However, as was argued by the Petitioner, there may be exceptional circumstances that the Court that may justify non-application of the doctrine as was observed by the Court in *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR where the Court held as follows:

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“22. For this proposition the appellant called in aid this Court’s finding in the case of *Speaker of National Assembly vs Njenga Karume* (1990-1994) EA 546 where the Court expressed itself in relevant part as follows:-

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

48. The issue here is thus to consider the doctrine of exhaustion applies in the light of the facts raised in this Petition and the available statutory mechanism or not. As I undertake this inquiry, I will also be guided by the articulate and powerful words of the Supreme Court in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment) in which the Court stated:

“118. In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

119. Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for



the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”

49. The main issue in this Petition is the legality/constitutionality of the charges imposed on users of Lipa na Mpesa pay bill service offered by Safaricom and used by the Government, parastatals and other private organisations in the payment of the services offered by the respective organisations.
50. The *Kenya Information and Communications Act* No. 2 of 1998 makes provision for electronic transactions such as those offered by the 1st Respondent, Safaricom. The Kenya Information and Communication Regulations 2010 also makes provisions for tariffs, charges, prices and the terms and conditions imposed by a licensee for the services provided.
51. The Act through the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 assigns the Communications Authority the power to hear and determine disputes in matters covered under the Act. Regulation 3 provides:
- The Commission shall have power to resolve disputes between—
- a. a consumer and a service provider;
 - b. a service provider and another service provider; or
 - c. any other persons as may be prescribed under the Act.
52. Regulation 4 sets out the procedure for initiating of a complaint under the Regulations by providing thus:
- (3) A party shall notify the Commission of a dispute under paragraph (1) by the presenting to the Commission a letter or Memorandum of Complaint together with the prescribed fees.
 - (4) The letter or Memorandum of Complaint shall set out concisely, the grounds of complaint and the facts upon which the complaint is based on, and shall be accompanied by documentary evidence supporting the complaint.
 - (5) The letter or Memorandum of Complaint shall be signed by the party presenting it if the party is an individual, and where the party is a corporation, by an agent or authorized officer of the corporation.
53. Regulation 8(6) provides for appeals from the decision of the Communications Authority to the Communications and Media Appeals Tribunal as provided under section 102 of the *Kenya Information and Communications Act*.
54. The present dispute revolves around tariffs or charges levied on consumers of mobile telephone services whenever they use the Pay bill option under Lipa na Mpesa services to pay for services given by organisations, business entities or the government. In my view, the nature and scope of the dispute perfectly falls within the competence of the Communications Authority of Kenya. There is an appellate machinery whereby if dissatisfied, the Petitioner can lodge an appeal to the Appeals Tribunal established under *Kenya Information and Communications Act*.
55. Though the Petitioner argued that the mechanisms are inadequate, upon careful evaluation of the essence of the complaint, I am not persuaded that it is not beyond the reach of the Communications



Authority of Kenya to adequately determine and provide sufficient remedies if need be. I am guided by dicta of the court in this case *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR. The Court stated:

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

56. The present petition is thus barred by the doctrine of exhaustion. I need not determine any other issue as at this point, I am bound to down my tools.
57. The Petition is hereby dismissed. Considering that it was filed in public interest, the order is that each party shall bear its own costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

L N MUGAMBI
JUDGE

