Consumer Federation of Kenya (COFEK) (Suing Through its Officials Namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng) v Radio Africa Events/Group & 3 others; Competition Authority of Kenya & another (Interested Parties) (Petition E203 of 2023) [2024] KEHC 8254 (KLR) (Constitutional and Human Rights) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8254 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E203 OF 2023

LN MUGAMBI, J

JULY 11, 2024

BETWEEN

CONSUMER FEDERATION OF KENYA (COFEK) (SUING THROUGH ITS OFFICIALS NAMELY STEPHEN MUTORO, EPHRAIM KANAKE AND HENRY OCHIENG) ..... PETITIONER

AND

RADIO AFRICA EVENTS/GROUP ..... 1ST RESPONDENT

HOMEBOYS ENTERTAINMENT PLC ..... 2ND RESPONDENT

STANBIC BANK KENYA LTD ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

COMPETITION AUTHORITY OF KENYA ..... INTERESTED PARTY

COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY

RULING

Introduction

1. This ruling covers the Notices of Preliminary objections filed by 1st, 2nd and 3rd respondents which are dated the 7th July 2023, 14th July 2023 and 13th July 2023 respectively.

2. These preliminary objections were filed against the instant petition dated the 19th June 2023. The petition ensues from the manner in which Stanbic Yetu Festival was carried out by the respondents to

the prejudice of the rights of participants who were the consumers at the event. The Petitioner allege there was substantial departure from what had been advertised by the respondents who violated the rights of the consumers at the event which is against Article 46 of *the Constitution* as well as sections 5 and 12 of the *Consumer Protection Act*, 2012.

1st Respondent's Case

3. The 1st Respondent's Preliminary Objection relies on the following grounds:

   i. Failure by ticket holders to exhaust internal dispute resolution mechanisms

      a. The application and petition are fatally defective as they relate to a contractual dispute between the individual ticket holder and the 1st respondent that are governed by arbitration to resolve any disputes.

      b. Section 10 of the *Arbitration Act* and Article 159 of *the Constitution* preserves the exclusive jurisdiction of arbitration and alternative dispute resolution and oust the intervention of the court in such matters.

   ii. Constitutional Avoidance and the doctrine of exhaustion

      a. The petition offends the doctrine of constitutional avoidance and the doctrine of exhaustion that demands that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.

   iii. The petitioner lacks locus standi to institute the petition

      a. The petitioner is not a consumer as defined by Section 2 of the *Consumer Protection Act* and lacks locus standi to institute a class action suit in accordance with Section 4 of the *Consumer Protection Act*.

      b. The petitioner has no locus standi to institute the Petition on behalf of the ticket holders as this is a contractual dispute to which it is not privy to.

2nd Respondent's Case

4. The 2nd respondent Preliminary objection is on grounds that:

   i. The dispute before the court is purely contractual in nature.

   ii. The court has no jurisdiction over the matter.

3rd Respondent's Case

5. The 3rd respondent in its reply to the petition opposed it on the basis that:

   > The dispute is purely contractual in nature which this Court has no jurisdiction to determine.

Petitioner's Submissions

6. The petitioner in opposing the respondents' case filed submissions and a list of authorities dated 28th August 2023 through the firm of Mosoti and Company Advocates. Counsel highlighted two issues for determination. First is on whether the petitioner has the requisite locus standi and second is, whether the petitioner failed to exhaust alternative remedies.

7. On the first issue, Counsel submitted that Articles 3(1), 22, 258 and 260 of *the Constitution* expanded the scope of locus standi in matters concerning violation of constitutional rights. The Petitioner cited the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR where the Supreme Court held that:

> " It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. In John Wekesa Khaoya v Attorney General, Petition No. 60 of 2012' [2013] eKLR the High Court thus expressed the principle (paragraph 4): "...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice..."

8. Other cases cited to buttress this point were: *Nairobi Bottlers Limited v Mark Ndumia Ndung'u & another (Civil Appeal 99 of 2018*) [2023] KECA 839 (KLR) and Consumer Federation of Kenya v Toyota Motors Cooperation [2020] eKLR.

9. Counsel thus maintained that the petitioner has the requisite locus standi to file this suit if breach of Article 46 of *the Constitution* and the *Consumer Protection Act*, 2012 occurs as both *the Constitution* and the Act protect consumer rights in private and public sector and can attract both statutory and constitutional remedies besides a contractual relationship and the issues at hand call for the interpretation of *the Constitution*. In support of this Petition, counsel relied on CIS (Suing as Parents and Guardians of students minors currently schooling at Crawford International School) v The Director, Crawford International School and 3 Others [2020] eKLR.This was also echoed in Bernard Murage v Fineserve Africa Limited and 3 others [2015] eKLR.

10. The Petitioner's counsel argued that the doctrine of exhaustion and constitutional avoidance can only apply where the remedy sought is sufficient to redress an aggrieved party's circumstances. He placed reliance on Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another [2018] eKLR in which the Court held thus:

> " A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint... The government's assertion of non-exhaustion of local remedies will therefore be looked at in this light... a remedy is considered available only if the applicant can make use of it in the circumstance of his case."

11. It was thus the Petitioner's submission that the doctrine of exhaustion would only arise if the alleged mechanism is available, efficient and adequate, a fact that the respondents failed to establish. In like manner, the Petitioner argued that the question of a contractual relationship is matter of fact. The petitioner denied ever entering into any contractual relationship with the respondents and argued that a preliminary objection cannot be raised if there is an opposition to facts. The Petitioner relied on Oraro v Mbajo [2005] 1KLR to buttress this point.

> " Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed."

12. For the above reasons, the Petitioner urged the Court to dismiss the three Preliminary Objections.

1st Respondent's Submissions

13. Wamae and Allen Advocates on behalf 1st respondent filed submissions dated 8th August 2023. On alleged failure by ticket holders to exhaust internal dispute resolution mechanism, Counsel stated that the ticket holders who purchased the tickets had agreed to the attendant Terms and Conditions which bound them. The 'Terms and Conditions under Clause 20' provided for dispute resolution mechanism between the parties. In this regard, it was argued that the jurisdiction of this Court was not properly invoked since this is a contractual dispute between each ticket holder and the 1st respondent.

14. In support Counsel cited the case of Jeremiah Memba Ocharo v Evangeline Njoka & 3 others [2022]eKLR where it was held that:

> " The doctrine of exhaustion may be a complete bar to the jurisdiction of a Court if the exceptions thereto do not apply."

15. Counsel further asserted that the petitioner had failed to reveal the Terms and Conditions subscribed to in the event or produce any tickets it issued to the third parties to demonstrate privity of contract. Reliance was placed in Unicom Limited v Diamond Trust Bank & another [2020] eKLR where it was held that:

> " a. The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge.
>
> b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries."

16. It was submitted that the petitioner cannot canvass constitutional issues when what is issue is a breach of contractual obligations that provide for a dispute resolution mechanism. Reliance was placed in *KKB v SCM & S Others (Constitutional Petition 014 of 2020*) [2022) KEHC 289 (KLR) (22 April 2022) where it was held that:

> " Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

17. Similar reliance was placed on C.N.M vs. W.M.G [2018] eKLR and Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR.

18. On the final ground, petitioner's locus standi, Counsel submitted that owing to the contractual nature of the issues herein, the doctrine of privity of contract precludes conferring of rights or imposing of obligations on any person other than the parties to the contract as a contract can only be enforced amongst the parties. It was the 1st Respondent's submission that besides not being privy to the contract, the petitioner is not a consumer as per Section 2 of the *Consumer Protection Act* hence lacks locus standi to institute a class action suit in accordance with Section 4 of the Act.

19. Reliance was placed in Re Estate of Mungiria M'Runguchi (Deceased) [2022]eKLR where it was held that:

> " It is important in this matter for the court to determine whether the applicants have 'Locus Standi '. The term 'Locus Standi' connotes the right of a party to bring an action. It seeks to determine whether a party has properly brought an action or is properly before the court. Such interest must be vested legal interest giving the party a right to enforce the claim by way of a lawsuit."

2nd Respondent's Submissions

20. The firm of Hamilton Harrison and Matthews filed submissions dated 7th August 2023. Counsel submitted that it was apparent that the issue was based on the contract between the event goers and the 1st respondent. For this reason, it was submitted that the dispute is purely contractual in nature hence this court lacks jurisdiction to determine it.

21. Reliance is placed in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, where the Supreme Court held that:

> " I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

22. Counsel as consequence submitted that the dispute can be properly determined on another basis highlighting the principle of constitutional avoidance. For this reason, Counsel urged the petition to be dismissed with costs.

3rd Respondent's Submissions

23. On 1st August 2023, Miller and Company Advocates filed submissions in support of its preliminary objection. In like manner it was submitted that the dispute involves a contract between the 1st respondent and the event goers as per the terms and conditions attendant to the said tickets. As such, the dispute falls squarely in the Commercial Courts.

24. It was thus submitted that this court lacks jurisdiction to determine this matter based on the principle of constitutional avoidance. Reliance was placed in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others v Eric Cheruiyot &, 16 Others where the Court of Appeal held that:

> " Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it."

25. Other cases cited in support were: Owners of the Motor Vessel "Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1 and the case of Communications Commission of Kenya (supra).

Analysis and Determination

26. After a careful perusal of the parties' pleadings and submissions, it is my considered view that the issues for determination in this ruling are:

    i. Whether the three Preliminary Objections raised meet the legal threshold for a Preliminary Objection, and;

ii. Whether the preliminary objections are merited.

The legal threshold of a preliminary objection

27. A preliminary objection is raised to draw the Court's attention to an important matter of law which has a real prospect of disposing of the case without the need for the Court going into the merits of the case.

28. The intrinsic features of a preliminary objection were firmly laid in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969]EA 696 and later emphasized by the Supreme Court in the Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others[2014]eKLR as follows:

> "(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd v West End Distributors [1969] EA 696:
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> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

29. Discussing the inherent characteristics of a preliminary objection in Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] eKLR, the Court held:

> "A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
>
> It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence...."

30. Similar observation was sustained in Oraro v Mbaja (supra) where the Court stated:

> "A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....."

31. The main substance in the three preliminary objections is that the dispute herein is a contractual in nature hence this Court lacks jurisdiction to determine the matter as a Constitutional petition under

the doctrine of constitutional avoidance and the doctrine of exhaustion of remedies since the contract between ticket holders and dispute resolution the 1st respondent had a defined mechanism which was contained in the 'Terms and Conditions' of the tickets sold out to the ticket holders.

32. The argument, that there exists a contractual relationship is legally problematic. For a preliminary objection to be successfully raised, it must be anchored on uncontested facts. The Petitioner has clearly stated that it was not privy to any contract between it and the 1st Respondent. If the Respondents insists such a contract existed, there will be the need to prove existence of contractual relationship between the petitioner and the respondent.

b) Whether the petitioner has the requisite locus standi to institute this Petition

33. The other ground of objection was based lack of locus standi on the respect of the petitioner. According to the 1st respondent, the petitioner is neither privy to the contract between the 1st Respondent and the ticket holders nor is the petitioner a consumer as defined by the *Consumer Protection Act* hence is ineligible to file this petition.

34. This petitioner however contested this assertion and argued that *the Constitution* permits the Petitioner to file this Petition pursuant to Articles 3(1), 22, 258 and 260 of *the Constitution* which has expanded the scope of locus standi when it comes to violation of *the Constitution*.

35. The meaning of the term locus standi was explained in the case of Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR as follows:

> "...In the case of Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that;-
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> "Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and Others v City Council of Nairobi [1982] KAR 229, the Court also held that;-
>
> "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".
>
> It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'..."

36. With the coming in force of *the Constitution* in 2010, the principle of locus standi has acquired an enlarged meaning beyond the narrow range it used to apply to. The Court of Appeal elucidated on this milestone in the case Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR as follows:

> "While Article 48 of *the Constitution* recognizes the importance of access to justice as an essential instrument for the protection of human rights, it must, at the same time be borne in mind that "...the rights and fundamental freedoms in the Bill of Rights...belong to each individual and are not granted by the State". See Article 19 (3) (a). Taken together with Articles 22, and 258 these Articles are a stark departure from the narrow scope of Section 84 of the former Constitution in so far as the concept of locus standi is concerned. The former Constitution and the cases decided during its reign provided and held in no uncertain terms that only a party aggrieved and whose interests were directly affected could institute proceedings for protection, under the Bill of Rights..."

Referring to Articles 22, 258 and 260 of *the Constitution*, the Court elucidated:

> " ...Each of the first two Articles starts with the phrase "Every person has the right to institute court proceedings." They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court case of Mumo Matemo (supra), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights. The above decision arose from the judgment of this Court in Civil Appeal No. 290 of 2012, Mumo Matemo v Trusted Society of Human Rights Alliance and another, in which the Court, like the Supreme Court emphasized that;s
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> "27 Moreover we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broad context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution* ...
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> 28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves...Today by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, ..."

37. Guided by the authority above, it is clear that the petitioner who is convinced that consumer rights of ticket holders consumer rights were violated by being given a raw deal from a highly publicized event can move this Court to determine if there was infringement of consumer rights under Article 46 by invoking Article 22, 48 and 258 of *the Constitution* to appropriate court. The Court cannot deny the Petitioner opportunity to ventilate the grievance about the alleged violation of the constitutional rights in public interest through narrow criterion directly affected. Consumer rights are protected by *the Constitution* and the Statute, over and above being any contractual obligations.

a. Whether the principle of constitutional avoidance applies

38. According to the respondents', the nature of the dispute is contractual hence the Court is barred from hearing the petition under the principle of constitutional avoidance. The 1st respondent argued that it issued tickets to the persons who attended the Stanbic Yetu Festival. It is their argument that each ticket was issued based on the Terms and Conditions that were specified hence is purely a contractual relationship.

39. The petitioner argues that consumer rights are beyond contractual relationship as they are both statutory and constitutional obligation remedies that attach to them.

40. What is referred to as the principle of constitutional avoidance was expounded on by the Supreme Court in the case of Communications Commission of Kenya (Supra) is as follows:

> " (256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
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> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue,that is the course which should be followed."
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> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936]."

41. In C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] eKLR the Court expounded:

> " 11. Similarly, in Papinder Kaur Atwal v Manjit Singh Amrit Nairobi Petition No. 236 of 2011where after considering several authorities on the issue, Justice Lenaola remarked as follows:
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> "All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof."
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> 12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307:
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> "The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62).
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> 13. It was further observed in the case of Minister of Home Affairs v Bickle & Others [1985] LRC Const (per (Georges C.J);

> "Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

42. Correspondingly, in Council of County Governors v Attorney General & 12 others [2018]eKLR the Court expressed itself as follows:

> " 59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
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> 60. In the South African case of S v Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936], the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of."

43. What is clear from the examination case law in the foregoing is that the doctrine constitutional avoidance precludes a court from entertaining as a constitutional dispute, if the case that can conclusively be resolved by application of a statute law or any other legal basis or principle. For the Court to find that the relationship is contractual, it must be convinced that there was a contract that governed the relationship between the parties to the Petition. Already, petitioner has said it was not privy to the contract with the 1st Respondent. And even if the Respondent were to insist, it would mean marshalling evidence which is outside the confines of a preliminary objection. Further, as ably argued by the petitioner, the rights of consumers are also statutory and Constitutional and in regard to the said event the court is being invited to determine if constitutional standards are met.

Whether the doctrine of exhaustion of remedies applies

44. The of exhaustion of remedies doctrine was discussed by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others[2015] eKLR which stated thus:

> " 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

45. However, the Court of Appeal in Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR noted there may be exceptions:

> "
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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 v 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."

(See also Krystaline Salt Limited v Kenya Revenue Authority [2019] eKLR on this point).

46. The contractual procedure would only apply and bind parties to a contract. It has not been determined if the Petitioner and the 1st Respondent have that kind of a relationship, it is subject to proof. The issue cannot be squared out through a preliminary objection. Moreover, the court is being invited to consider and determine if the consumer standards as defined by *the Constitution* were violated.

47. From the foregoing analysis and guided by the cited law and principles, it is my humble take that the respondents' preliminary objections have not met the legal threshold of preliminary objection hence they must all fail and are hereby dismissed.

48. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF JULY, 2024.

.....

L N MUGAMBI

JUDGE