Chisima & another v Kenya Power & Lighting Company Limited & another; Attorney General (Interested Party) (Constitutional Petition E023 of 2022) [2024] KEHC 13491 (KLR) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E023 OF 2022

OA SEWE, J

OCTOBER 7, 2024

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 24, 25, 27, 28, 35, 46, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF CONSUMER PROTECTION ACT, 2012,

AND

IN THE MATTER OF KENYA POWER AND LIGHTING COMPANY LIMITED

AND

IN THE MATTER OF SECTIONS 23(1), (3) & (5), SECTION 24(1) & SECTION 40 OF THE ENERGY ACT, 2019

BETWEEN

LEONARD KOTSE CHISIMA ..... 1ST PETITIONER

RUTH NATASHA ..... 2ND PETITIONER

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... 1ST RESPONDENT

ENERGY & PETROLEUM REGULATORY AUTHORITY ..... 2ND RESPONDENT

AND

THE OFFICE OF THE ATTORNEY GENERAL ..... INTERESTED PARTY

JUDGMENT

1. The two petitioners are Leonard Kotse Chisima (1st petitioner) and Ruth Natasha (2nd petitioner). They filed the Petition dated 6th June 2022 against the Kenya Power, sued as Kenya Power and Lighting Company Limited Co. Ltd (the 1st respondent) and Energy & Petroleum Regulatory Authority (the 2nd respondent), alleging violations of their constitutional rights. They complained that on 11th May 2022 at around midday, employees of the 1st respondent, namely Mr. A.J. Mganda and Mr. Chege, unlawfully disconnected smart meters for their Accounts No. 13402XXXX and 2058XXXX, respectively, thereby leaving them without power supply; yet they had no outstanding bill to necessitate the disconnection.

2. The petitioners stated that they run business entities that require consistent power supply, and were therefore exposed to huge irrecoverable losses by reason of the arbitrary disconnection. Consequent to the disconnection of electric power, they instructed their advocates, Makori Omboga & Company Advocates, to write to the respondents seeking the immediate reconnection of power, but the intervention yielded no positive outcome.

3. In the circumstances, the petitioners filed this Petition praying for the following reliefs:

   (a) A declaration that the 1st respondent has violated the petitioners' guaranteed right to goods and services of reasonable quality and the full benefit of the said goods and services as prescribed by Article 46 of *the Constitution*.

   (b) A declaration that the violation of the petitioner's right to goods and services of reasonable quality and the enjoyment of the full benefit thereof has occasioned them loss of money as a resource and the time spent following up on the issues they have been raising with the 1st respondent.

   (c) That the Court be pleased to issue declaratory orders that Section 23(1) (3) and (5) of the *Energy Act* 2019 is inconsistent with the consumer rights as prescribed under Article 46(1) of *the Constitution*, thus null and void ab initio.

   (d) Exemplary damages.

   (e) Any other relief as provided for under Article 22 of *the Constitution* in support of the petitioners' case.

   (f) The costs of the application.

4. Concomitantly, the petitioners filed a Notice of Motion dated 6th June 2022 seeking the following orders:

   (a) spent

   (b) That the Court be pleased to issue conservatory orders ex parte in the first instance to compel the respondents whether by themselves, their servants, agents or proxies to reconnect the petitioners' power supply in respect to their business premises as prayed pending hearing and determination of the application inter partes.

(c) That the Court be pleased to issue conservatory orders to restrain the respondents whether by themselves, their servants, agents or proxies from interfering with the petitioners' power supply pending the hearing and determination of the Petition.

(d) That the costs of the application be borne by the respondents.

5. The petitioners thereafter filed an Amended Notice of Motion dated 17th June 2022 introducing additional Prayers 2(a) and 3(a) for orders to compel the respondents to reconnect power supply to their premises pending the hearing and determination of the application and the Petition. On the 3rd August 2022, the Court granted interim orders in terms of prayer 2 of the Notice of Motion (as set out in paragraph 3[b] above); whereupon power was restored to the petitioners' business premises pending the determination of the Motion. Those orders were confirmed on 22nd September 2023 pending the hearing and determination of the Petition.

6. In response to the Petition, the 1st respondent relied on the Replying Affidavit sworn on its behalf of Mr. Mutisya John, the Debt Controller in charge of the 1st respondent's debt collection services in Mombasa. The 1st respondent thereby averred that it is a public utility company within the Ministry of Energy with the mandate to engage in bulk purchase, distribution and retail supply of electricity to the public. It explained that, in the course of its business, it uses electrical cables, poles, transformers and meters to distribute electrical energy to its customers.

7. The 1st respondent confirmed that on the 13th May 2022 it conducted an inspection of the installations on the premises occupied by the petitioners and established that:

(a) The wiring was dangerously connected, as there were live and exposed wires.

(b) Some wires were crisscrossing at both the current meter box and the initial one posing a danger to both human and property.

8. Thus, the 1st respondent confirmed that, in order to protect both human lives and properties, it served the petitioners with an Installation Inspection Report dated 13th May 2024 and proceeded to disconnect the electrical supply of the premises to allow the petitioner to regularize their wiring so as to forestall any hazard. It further averred that, by a letter dated 21st June 2022, it wrote to the petitioners advising them on the necessary action to enable reconnection of power supply to the subject premises.

9. The 1st respondent also deposed that, upon monitoring the electricity accounts of the petitioners, it established that:

(a) As at 28th June 2022, there was an outstanding electricity bill for Kshs. 5,082.00 on the Account No. 2058XXXX operated by the 1st respondent.

(b) As at 28th June 2022, there was an outstanding electricity bill of Kshs. 12,174.00 on Account No. 1340XXXX operated by the 2nd petitioner.

(c) There was an outstanding electricity bill for Kshs. 1,517,863.61 on Account No. 1430XXXX operated by Patrick Mukiri Kabundu as at 21st June 2022.

10. In the light of the foregoing, the 1st respondent denied that it violated the rights of the petitioners under Article 46(1)(c) as alleged and added that it was out to ensure protection of life and property, which is also an imperative of *the Constitution*. Thus, the 1st respondent asserted that it acted in accordance with its mandate as set out in Sections 160, 176 and 185 of the *Energy Act*, 2019 and therefore urged for the dismissal of the Petition.

11. The Petition was canvassed by way of written submissions upon directions being given to that effect on 13th March 2024. Accordingly, the petitioners filed their written submissions dated 27th May 2024 in which they reiterated the factual basis of the Petition as set out in their Supporting Affidavit. They reiterated their assertion that the 1st respondent is explicitly prohibited under Section 24(2) of the *Competition Act* No. 12 of 2010 from:

    (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

    (b) Limiting or restricting production, marketing outlets or marketing access, investment, distribution of technical investment 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 contract; and

    (e) Abuse of an intellectual property right.

12. The petitioner relied on the decision of the Supreme Court of India in Civil Appeal No. 3883 of 2007: National Insurance Co. Ltd v Hindustan Safety Glass Works Ltd and urged the Court to take a pragmatic view of the rights of the petitioners because it is the petitioners who were placed at a disadvantage vis-à-vis the supply of electricity to their premises. Therefore, the petitioners proposed the following issues for determination:

    (a) Whether the 1st respondent violated the petitioners' consumer protection rights under Articles 46, 47 and 48 of *the Constitution*.

    (b) Whether Section 23(1), (3) and (5) of the *Energy Act* is unconstitutional.

    (c) Whether the 1st and 2nd petitioners are entitled to general and exemplary damages.

    (d) Whether the 1st and 2nd petitioners are entitled to other appropriate reliefs as provided for under Article 22 of *the Constitution*.

    (e) Whether the petitioners are entitled to costs of the Petition.

13. With reference to Section 158(1) of the *Energy Act* and Articles 46 47 and 48 of the Constitution, the petitioners submitted that the 1st respondent ought to have sought the consent of the petitioners or given them a written notice of at least 48 hours before disconnecting power supply to their premises. It was further the submission of the petitioners that the 1st respondent's actions contravened Section 160(1)(b) of the *Energy Act* in that the petitioners were not given an opportunity to rectify the alleged defects in installation. They relied on the case of Wekesa v Kenya Power and Lighting Company Ltd & another [2023] KEHC 2900 (KLR) in this regard.

14. On the alleged unconstitutionality of Section 23(1), (3) and (5) of the *Energy Act*, the petitioners submitted that in so far as that provision does not provide an option for an immediate relief for an aggrieved party, the same is an affront to Articles 46(1)(c) and 48 of the Constitution. In support of the submission, the petitioners relied on Peema Investments Co. Ltd v Principal Secretary, Ministry of Defence & Another [2021] eKLR as to the purpose of interim measures of protection.

15. The petitioners were convinced that they are entitled to general as well as exemplary damages. They pointed out that they are business entrepreneurs and depend on their respective business undertakings for a living; and that they invested a lot of money in their rented stalls where they pay rent. In their submission, the 1st respondent does not have the right to disconnect electric supply to their premises at will.

16. Consequently, the Petitioners asked to be awarded general and exemplary damages in the discretion of the Court. They relied on Jack and Jill Supermarkets v Victor Maina Ngunjiri [2018] eKLR, contending that the 1st respondent's conduct was not only oppressive, but also unconstitutional. They likewise prayed for costs of the Petition on the basis of Cecilia Karuru Ngayu v Barclays Bank of Kenya & Credit; Reference Bureau Africa Ltd [2016] KEHC 7064 (KLR) in which it was held that costs follow the event.

17. The 1st respondent also filed written submissions dated 24th June 2024 in compliance with the directions of the Court. In the 1st respondent's view, the issues for determination are:

    (a) Whether the petitioners have proved their case.

    (b) Whether the Petition meets the constitutional threshold; and,

    (c) Who should bear the costs.

18. On the burden of proof, the 1st respondent made reference to Sections 107 and 108 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the cases of Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR and Stephen Wasikhe Wakhu & another v Security Express Limited [2006] eKLR to support the submission that the petitioners were under obligation to prove their case to the requisite standard. It was therefore the contention of the 1st respondent that this obligation was not discharged by the respondents.

19. The 1st respondent further submitted that the petitioners merely cited the provisions of *the Constitution* without supplying any particulars of derogation other than the basic assertion that it failed to comply with the provisions of *the Constitution*. The 1st respondent relied on Anarita Karimi Njeru v Republic [1976-1980] KLR 1272, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, Northern Nomadic Disabled Persons Organization (NONDO) v Governor, County Government of Garissa [2013] KEHC 467 (KLR) and Hon. Attorney General and Eliezer Kamau Thiong'o & 2 others v Kenya Airports Authority & another, Interested Party Doshi Ironmongers Limited & 2 others [2015] eKLR to bolster its assertion that the petitioners not only failed to plead their grievances with precision, but also failed altogether to prove their allegations.

20. Consequently, the 1st respondent urged the Court to dismiss the Petition. Reliance was placed on Section 27(1) of the *Civil Procedure Act* and the cases of Kenya Sugar Board v Ndungu Gathinji [2013] eKLR and Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd [2017] eKLR, to support the 1st respondent's contention that it ought to be awarded costs as reprieve because it has expended considerable resources in this matter.

21. In the light of the foregoing, the issues for determination can be summarized as hereunder:

    (a) Whether the Petition meets the constitutional threshold;

    (b) Whether the petitioners have proved that the 1st respondent violated their constitutional rights under Articles 46, 47 and 48 of *the Constitution*.

(c) Whether Section 23(1), (3) and (5) of the *Energy Act* is unconstitutional.

(d) Whether the petitioners are entitled to the reliefs prayed for by them.

(e) What order ought to be made herein on costs.

A. On whether the Petition meets the constitutional threshold:

22. The 1st respondent raised the question whether indeed the Petition was pleaded with requisite specificity as required by Anarita Karimi Njeru v Republic (supra) in which the Court of Appeal held:

> "...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

23. The principle was affirmed by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR as hereunder:

> "(42)...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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> > "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

24. The petitioner also referred to Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, Northern Nomadic Disabled Persons Organization (NONDO) v Governor, County Government of Garissa (supra) and Hon. Attorney General and Eliezer Kamau Thiong'o & 2 others v Kenya Airports Authority & another, Interested Party Doshi Ironmongers Limited & 2 others [2015] eKLR as pointed out herein above. All these authorities underscore the principle laid down in Anarita and Mumo Matemu (supra). For instance, in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra), the Supreme Court held:

> "Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be

> infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

25. I have therefore looked at the Petition as presented and note that the petitioners essentially complied by setting out, not only the provisions of *the Constitution* alleged to have been violated by the respondents, but also the facts in support of the alleged violations. This is manifest at paragraphs 22 to 34 and elsewhere in the Petition. It must be borne in mind that Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

> (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

26. Consequently, I am in agreement with the position taken by Hon. Odunga, J. (as he then was) in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] KEHC 7697 (KLR) that:

> "On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation..."

27. The position had the support of the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] KECA 445 (KLR) when it held that:

> ...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

28. Accordingly, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR in which it was held that:

> "We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case..."

29. Bearing all the foregoing in mind, it cannot be said that the Petition is lacking in specificity as to the constitutional provisions alleged to have been infringed by the respondent. In the same vein, it has not been shown that the issues raised do not amount to constitutional issues. Indeed, in Fredricks & others v MEC for Education and Training, Eastern Cape & others [2002] 23 ILJ 81 (CC), the Constitutional Court of South Africa held:

> "*The Constitution* provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: ...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 issues. So too...is the question of the interpretation of any legislation or the development of the common law that promotes the spirit, purport and object 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..."

B. On whether the petitioners have proved that the 1st respondent violated their constitutional rights under Articles 46, 47 and 48 of *the Constitution*:

30. In all matters concerning the construction of the various provisions of *the Constitution*, it is instructive for the Court to bear in mind the provisions of Article 259 of the Constitution, which state:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) ...

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

31. Hence, in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR it was held:

> 91. "*The Constitution* has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
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> 92. We are also guided by the provisions of Article 159(2) (e) of *the Constitution* which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of *the Constitution*.
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> 93. Thirdly, in interpreting *the Constitution*, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) where he stated that:
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> > "*The Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and ... aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of *the Constitution* must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."

94. Further, the Court is required, in interpreting *the Constitution*, to be guided by the principle that the provisions of *the Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other: see Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3).

32. A similar position was articulated in Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR, as follows:

> ...In interpreting *the Constitution*, this court is bound by the provisions of Section 259 which requires that *the Constitution* be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. ...
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> > ...In interpreting *the Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of *the Constitution* must be read together in order to get a proper interpretation. In the Ugandan case of Tinyefuza vs. Attorney Genaral, Constitutional Appeal No. 1 of 1997, the court held as follows:
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> > > "The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."

33. Lastly, in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court provided the following insight with particular reference to the unique aspects of *the Constitution* of Kenya:

> (54) Certain provisions of *the Constitution* of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

34. By dint of Sections 107(1), (2) and 109 of the *Evidence Act*, the legal burden rests on the petitioners. Accordingly, in *Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019* (Consolidated))

[2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) the Supreme Court held:

> 66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See Deynes Muriithi & 4 others v Law Society of Kenya & another, SC Application No 12 of 2015; [2016] eKLR.
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> 67. In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act* on the burden of proof. The provision stipulates:
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> > 107. 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> > 2.When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> In addition, section 109 of the *Evidence Act* elaborates on the onus of proof by stipulating that:
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> > The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

35. Hence, it matters not that no rebuttal evidence was presented on behalf of the 2nd respondent. In Wamwere (supra) the Supreme Court pointed out that:

> 69. ...even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others, SC Petition No 12 of 2019; [2020] eKLR.

36. This requirement is more so in constitutional litigation. Hence, in Leonard Otieno v Airtel Kenya Limited [2018] eKLR it was emphasized that:

> "It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be in a factual vacuum. To attempt to do so would trivialize *the Constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses."

37. I have given due consideration to the assertions made by the petitioners in their Petition, the responses thereto and the submissions made on their behalf by learned counsel. Article 46 of the Constitution essentially provides for the protection of cconsumer rights in the following terms:

(1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

38. The petitioners did not allege that the respondents provided them with poor quality services; or that they were not supplied with information necessary for them to gain full benefit from the services offered by the respondents. Likewise, it was not the contention of the petitioners, and indeed no evidence was adduced by them, to show that that as a result of the services offered by the respondents their health, safety and economic interests were adversely affected. In essence, their complaint was the disconnection of their power supply.

39. One of the reasons proffered by the 1st respondent for the disconnection was that the petitioners had pending bills for electricity consumed. In particular, the 1st respondent averred that:

(a) As at 28th June 2022, there was an outstanding electricity bill for Kshs. 5,082.00 on the Account No. 2058XXXX operated by the 1st petitioner.

(b) As at 28th June 2022, there was an outstanding electricity bill of Kshs. 12,174.00 on Account No. 1340XXXX operated by the 2nd petitioner.

(c) There was an outstanding electricity bill for Kshs. 1,517,863.61 on Account No. 1430XXXX operated by Patrick Mukiri Kabundu as at 21st June 2022.

40. The 1st respondent annexed copies of the electricity statements for the petitioners in proof of the outstanding bills (see Annexures MJ-3, MJ-4 and MJ-5). This evidence was not displaced by the petitioners.

41. It was further the contention of the 1st respondent that, upon inspection, it found out that the electricity connection to the petitioners' premises had been improperly done. In this regard, the 1st respondent produced an Installation Inspection Report dated 13th May 2022 as an annexure to its Replying Affidavit. The document was addressed to the petitioners, among others. It states that the power disconnection was effected because the installation was found to be defective. The report further notified the petitioners that:

> "You are required to contact KPLC to regularize the account within 14 (fourteen) days from the date hereto failure to which we shall disconnect power supply to the premises."

42. It is manifest from the above excerpt that the disconnection of 13th May 2024 was prematurely effected on account of the alleged defective installation. I say so because it was not until the 21st June 2022, long after the disconnection, that the 1st respondent wrote to the petitioners as follows:

> "Please note that the installation above was found to be defective on 13/5/2022. The wiring is disorderly, dangerously done as there were live and exposed wires. Some wires were

crisscrossing at both the current meter box and the initial one. This posed danger both to human life and property.

Therefore, the whole premise was isolated to make it safe and secure for re-wiring to be done. Consequently, you were issued with an Installation Inspection Report No. C/LF/29955 communicating the same.

However, to date you have not submitted any wiring completion certificate to Kenya Power so that the supply can be restored. Therefore, it is both dangerous and irresponsible for the supply to be restored under those conditions.

Kindly note that as per the *Energy Act* 2019, you will be liable for any consequences arising from your acts that are both a danger to yourselves and the public..."

43. That communication appears to have been an afterthought, granted the explicit requirements of Section 160(1)(b) of the *Energy Act* that:

(1) A licensee shall not, except for reasons beyond the licensee's control, reduce, discontinue or refuse the supply of electrical energy to any consumer, unless—

...

(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 been communicated to the consumer in writing;

44. The foregoing notwithstanding, there was no rebuttal of the 1st respondent's evidence as to unpaid bills for electricity consumed by the petitioners. It is a cardinal principle that the incidence of the burden of proof keeps shifting depending on the issues in contest and the evidence adduced in respect thereof. In Halsbury's Laws of England, 4th Edition Volume 17 it is opined that:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the fact and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

45. Similarly, in Mbuthia Macharia v Annah Mutua Ndwiga another [2017] eKLR the Court of Appeal held:

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

46. It is manifest therefore that the 1st respondent had a valid reason for disconnecting electricity supply to the petitioners' premises. That action was in perfect accord with Section 160(1)(a) of the *Energy Act*, which states:

(1) A licensee shall not, except for reasons beyond the licensee's control, reduce, discontinue or refuse the supply of electrical energy to any consumer, unless—

(a) the consumer has failed to pay charges for consumption of electrical energy or instalments relating to deferred connection costs, 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 other premises:

Provided that 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 Authority.

47. Since the reference made by the petitioners to the 2nd respondent pursuant to Section 23(1) of the *Energy Act* was only submitted after the disconnection, the proviso aforementioned cannot avail the petitioners. I am therefore satisfied that the 1st respondent was justified in disconnecting electricity supply to the petitioners' premises for non-payment of overdue bills.

48. The petitioner also contended that the 1st respondent is explicitly prohibited under Section 24(2) of the *Competition Act*, No. 12 of 2010 from:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

(b) Limiting or restricting production, marketing outlets or marketing access, investment, distribution of technical investment 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 contract; and

(e) Abusing an intellectual property right.

49. Again, no evidence was adduced by the petitioners to prove these allegations and therefore not much turns on them. They are accordingly dismissed as mere allegations.

C. On whether Section 23(1), (3) and (5) of the *Energy Act* is unconstitutional:

50. In E G & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), a three-judge bench discussed the principles guiding statutory interpretation and held:

> ...The technique of paying attention to context in statutory construction is now required by *the Constitution*. As pointed out earlier, *the Constitution* introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.'
>
> 348. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. The often quoted dissenting

judgment of Schreiner JA eloquently articulates the importance of context in statutory interpretation thus:-

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."

349. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation, which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required to declare the legislation unconstitutional and invalid. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it.

350. It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that the law be articulated clearly and in a manner accessible to those governed by the law. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

351. Mindful of the imperative to read legislation in conformity with *the Constitution*, but only to do so when that reading would not unduly strain the provisions, we turn to an analysis of the impugned provisions..."

51. Likewise, in Law Society of Kenya v Attorney General & another [2019] eKLR, the Supreme Court held: -

37. At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with *the Constitution*. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend *the Constitution*, courts must therefore subject the same to an objective inquiry as to whether they conform with *the Constitution*. That is why in Hamdarddawa Khana vs Union of India and Others 1960 AIR 554 it was stated thus;

> "Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

(38) In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself. We thus observed as follows:

> "In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:
>
> > "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

(39) Therefore intention is construed by scrutinising the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary..."

52. The Supreme Court went on to quote the Supreme Court of India thus:

(41) On interpretation, specifically of a statute or even *the Constitution* itself, the Supreme Court of India in Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. {1987} 1 SCC 424 and others observed that: -

> Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

53. On the alleged unconstitutionality of Section 23(1), (3) and (5) of the *Energy Act*, the petitioners submitted that in so far as that provision does not provide an option for an immediate relief to an aggrieved party, the same is an affront to Articles 46(1)(c) and 48 of the Constitution. In support of the submission, the petitioners relied on Peema Investments Co. Ltd v Principal Secretary, Ministry of

Defence & Another [2021] eKLR as to the purpose of interim measures of protection. With specific reference to Section 7 of the *Arbitration Act*, the Court held:

> "The above provision has been interpreted to empower court to grant interim orders for purposes of preserving the subject matter and or maintaining the status quo so as to ensure tranquility before the hearing and determination of the dispute. The primary objective of the court when intervening under Section 7 is to ensure that the subject matter of the arbitration proceedings is not jeopardized before an award is issued, thereby rendering the entire proceedings nugatory."

54. The *Energy Act*, like several other statutes, has inbuilt dispute resolution mechanism for benefit of aggrieved parties in respect of services governed by the Act. This is intended to complement the dispute resolution services offered by the Judiciary. It is therefore a constitutional imperative under Article 159(2)(c), that in exercising judicial authority, the courts and tribunals shall be guided by, among others, the principle that:

> "alternative forms of dispute resolution including reconciliation, *Constitution of Kenya, 2010* mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);"

55. To this end, Section 23 of the Act merely provides that:

(1) The Authority shall within sixty days from the date of receipt of a request by an applicant, make its decision on any matter before it.

(2) A decision of the Authority shall be in writing and any order given and reasons thereof shall be served upon all parties to the proceedings, and may be published in the Gazette as prescribed by regulations.

(3) The Authority shall, within seven days of making a decision, communicate such decision to the parties involved.

(4) All orders of the Authority shall become effective on the date of entry thereof, and shall be complied with within the time prescribed therein.

(5) Where the Authority does not make a decision as provided in subsection (1) the appellant may appeal to the Tribunal within seven days of the expiry of the prescribed period.

56. Where a party is dissatisfied with the decisions of the Authority, there is a right of appeal to the Energy and Petroleum Tribunal; a tribunal created under Section 25 of the Act. In respect of the said Tribunal, Section 36 of the Act states:

(1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.

(2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.

(3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.

(4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

(5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

(6) The Tribunal shall hear and determine matters referred to it expeditiously."

57. I therefore find misconceived the submissions by the petitioners that Section 23(1), (3) and (5) are unconstitutional. In any case, the ADR system created thereby being complementary mechanisms, are no bar to parties from seeking interim relief from the courts or tribunals, where necessary; which is what is done in the case of arbitral matters that the petitioners cited as a benchmark. It flows from the foregoing observations that the petitioners are not entitled to any of the reliefs sought by them.

58. In the light of the foregoing, I find no merit in the Petition dated 6th June 2022. The same is hereby dismissed with an order that each party shall bear own costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF OCTOBER 2024

OLGA SEWE

JUDGE