



**Mabeya t/a Gynocare Women and Fistula Hospital v Kenya Power and Lighting Company
(Constitutional Petition E024 of 2022) [2023] KEHC 18902 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E024 OF 2022**

RN NYAKUNDI, J

JUNE 15, 2023

**IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER 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 THE CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL FREEDOMS PRACTISES AND PROCEDURAL RULES, 2013**

AND

IN THE MATTER OF CONSUMER PROTECTION ACT, 2012

AND

IN THE MATTER OF KENYA POWER AND LIGHTING COMPANY

BETWEEN

**HILLARY MIRERA MABEYA T/A GYNOCARE WOMEN AND FISTULA
HOSPITAL PETITIONER**

AND

KENYA POWER AND LIGHTING COMPANY RESPONDENT

JUDGMENT

1. The Petitioner is a doctor by profession and runs a hospital by the name Gynocare Women and Fistula Hospital located in Eldoret Town, within Uasin Gishu County.
2. The Respondent commonly referred to as Kenya Power or Kenya Power and Lighting Company, is a public liability company which transmits, distributes and retails electricity to customers throughout Kenya.



3. On 29/9/2021, the Petitioner filed this petition seeking prayers that:
 1. A declaration that the Respondent has violated the petitioner's right to good and services of reasonable quality and gaining full benefit of the said goods and services as prescribed by Article 46 of *the Constitution*.
 2. A declaration that the violation of the Petitioner's rights to goods and services of reasonable quality and the enjoyment of their full benefit thereof has occasioned them loss of money as a resource, time spent following up of the issues he has been raising with the Respondent.
 3. A declaration that electricity supply of Kenya shillings Four Million, Three Hundred and Seventy-Five Thousand, Nine Hundred and Sixty-Seven Shillings (Kshs.4,375,967/=) issued to the Petitioner by the Respondent is without basis and or/justification.
 4. An order be issued for the Respondent to correct and/delete all untrue or misleading information in the electricity bills affect the Petitioners meter account; and
 5. A permanent injunction directed to the Respondent from billing and/or recovering from the Petitioner backdated impugned electricity bill subject of this petition
 6. Costs of and incidental to this petition

The Petitioner's Case

4. The Petitioner deposed that he is a customer of the Respondent and a holder of Account Number xxxxxxxx connected in the year 2017.
5. The Petitioner maintains that he has been dutifully and timely settling and or paying the Respondent's electricity bills from the time when it was connected in his premises Gynocare Women and Fistula Hospital locates in Eldoret Town, within Uasin Gishu County.
6. The Petitioner further deposed that on 3/2/2021, the Respondent issued erroneous and or controversial electricity power supply bill with an inflated electricity supply bill of Kshs.4,375,967/= whereas he had dutifully paid his bills as and when they fell due. Further the Petitioner contends that no basis was laid as to the source of the inflated billed amount.
7. The Petitioner maintains that he has written numerous letters to the Respondent and has made several visits and meetings by himself and his representatives to the Respondent's offices in Eldoret raising concerns in relation to the inflated electricity bill without any satisfactory resolution.
8. The Petitioner contends that despite of the Respondent's acknowledgement of errors in their reading of bill sent to him via its letters, the Respondent has continued to demand for payment of the disputed inflated bill.
9. The Petitioner contends that he runs a hospital which relied on power supply to save lives of the patients on outpatient and inpatient services but the Respondent herein has on several occasions without notice, reason and or unjustifiable cause disconnected power supply in an apparent punitive manner on the said facility which has put the scared lives of the patients at a very high risk.
10. The Petitioner maintains that he has been dutifully paying the Respondent's bill on a monthly basis and has no pending bills to date. The Petitioner contends that the Respondent through its letters and several meetings held between the parties herein conceded that it never accurately billed him when the electricity was supplied and consumed from the year 2017 to 2020. According to the Petitioner the inflated bill is as a result of estimated figures.



11. The Petitioner further contends that through the estimated bill presented to him, the Respondent has billed the electricity usage as it wishes and the same is contrary to the tariffs set by law.
12. The Petitioner maintains that his rights under the consumer protection as customer enshrined in *the Constitution* have been infringed.
13. The Petitioner contends that his rights and freedoms as set out in Articles have been contravened and or threatened.
14. The Petitioner maintains that the Respondent violated the provisions of Articles 10, 46, 231 and 259 of *the Constitution* of Kenya. When the Respondent issued erroneous and controversial electricity power supply bill of 3rd February, 2021 with inflated electricity supply bill of Kshs.4,375,967/=, making estimates and severally disrupting the power supply in the hospital where he saves lives of patient.
15. In addition, the Petitioner maintains the Respondent contravened the provisions of Article 46 of *the Constitution* on the right to good and services of reasonable quality and to information necessary for him to gain full benefit from goods and services. When the Respondent billed him electricity consumption in disregard to the actual verifiable meter reading, backdating electricity bill from the year 2017 to 2021, several disconnections of electricity supply in his hospital with total disregard to patients fighting for their lives and depending totally on electricity and several demands of backdated consumption of electricity not billed without evidence as when they fell due.
16. Further, the Petitioner contends that the Respondent contravened Article 35 of *the Constitution* to the extent that it issued untrue, incorrect and misleading information.
17. The Petitioner contends that the acts of the Respondent herein of disconnecting electricity in his hospital contravened the right to human dignity.

The Respondent's Case

18. In opposing the petition, Ms. Wanjala filed a Notice of Preliminary Objection dated 17th October, 2022 raising the following grounds;
 1. That this Honourable Court lacks jurisdiction to hear and determine this petition and the application together with all consequential orders should be dismissed with costs as the same offends the provisions of Sections 3,10, 11(e), (f), (i), (k), and (l), 23, 24, 36,40, 42,159(3), 160(3) and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2,4,7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations,2012 as read together with Article 159(2)(c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010 and Sections 9(2) and (3) Fair Administrative Act, 2015.
 2. That the petition and application as against the Respondent is frivolous, vexatious, baseless and scandalous.
 3. That the petition and application as against the Respondent is fatally defective, incompetent, a monumental legally nullity and inconsequential.
 4. That the petition and application only raises private law claims mischievously disguised as issues on infringement of fundamental rights and freedoms.
 5. That the petitioner and application is therefore incongruous, inept and constitutes an abuse of the Court process warranting its immediate dismissal with costs to the Respondent.



19. In opposing the petition, the Respondent also relied on the Replying Affidavit dated 8th November, 2022 sworn by Engineer Peter Njoroge Kamau. He deposed that the principal legislative framework governing the operations of the Respondent is the *Energy Act*, 2019.
20. He further deposed that the Respondent does not produce electricity and it has to purchase the same and pay beforehand to electricity producers such as KenGen and other independent producers. He added that the Respondent's supply of electricity to its customers comes with an obligation on the customers to pay the electricity bills as when they fall due, failure to which the Respondent is entitled by the law to demand payment from a particular customer for the amounts owed or disconnect the supply of power.
21. According to the Respondent at all times there existed and still exists a contractual relationship between it and the Petitioner and that the Petitioner has an obligation to pay the electricity bills as when they fall due upon the supply of electric power.
22. He further deposed that the Respondent maintains that based on the nature of this relationship it billed the Petitioner based on his monthly electricity consumption as it does for the millions of other consumers across the country. He added that the Respondent's bills are ordinarily based on accurate and verifiable meter readings done on individual customers meter installed at their premises and not it does not bill its customers as it wishes as alleged by the Petitioner.
23. He further deposed that Respondent admits that like any other industry, there instances when during the course of its scientific analysis of its clients' account, isolated instances of past incorrect billing is discovered necessitating the taking of remedial action by the Respondent.
24. He further deposed that the Petitioner's metre was installed in October, 2017 and the correct metre readings were obtained by the Respondent's meter reader but wrong resolution of billing anomalies resulted into the readings being edited to a lower figure resulting in under billing from October, 2017 to February, 2021. He added that once the Respondent confirmed the correct readings, the Petitioner's account was rebilled based on the readings and the Petitioner's account was found to have been billed in correctly between the period of October, 2017 to February, 2021 thus necessitating a recalculation of the Petitioner's bill in order to issue the Petitioner a correct bill based on verifiable consumed units of electricity for the period.
25. He further deposed that arising from the recalculation, the Petitioner's bill was found to have been undercharged by 176,466 units during the period afore stated and it was further observed that during the said period the Petitioner's account was not being billed correctly and that the average bill was about Kshs.20,000/= as compared to the average of about Kshs.150,000/= after the anomaly was corrected and that the uncharged units were computed to be Kshs.4,375,967/= and the Petitioner was consequently billed Kshs.4,497,041/= in February, 2021 being the outstanding consumed bill as well as the accrued bill. That the bill of Kshs.4,375,967/= was based on actual readings as recorded by the meter less the units that had already been billed.
26. In addition, he deposed that the Respondent herein further issued the Petitioner an explanation by way of a letter dated 23rd February, 2021 explaining the situation and also requesting for his payment schedule. He also added that the said uncharged consumption relates to previous consumption which had erroneously not been factored in and therefore the allegation that the same is an estimated figure and the Respondent's malicious billing contrary to the tariffs set by the law is incorrect.
27. He further deposed that on 19th October, 2021, the Respondent's representatives held a meeting with the Petitioner's Advocate on record and the Petitioner's manager in which the Respondent substantively explained to the Petitioner's representative the basis of the bill and hoped that the



- Petitioner would settle the outstanding bill. Further that the Petitioner's representative also requested the Respondent not to disconnect the electricity before an agreement was reached.
28. He further maintained that the Petitioner herein failed to settle his monthly occurring bills and thus the Respondent was forced to disconnect power supply to the Petitioner's premises owing to the non-payment of monthly bills and would restore the same once the Petitioner settled the monthly bill. He contends that the Respondent has never disconnected power based on the outstanding bill of Kshs.4,375,967/= owed by the Petitioner to date as alleged.
 29. He added that the disconnection of power supply to the Petitioner's premises was an isolated act based on his monthly electricity consumption billed and settled when required and not related to the outstanding electricity bill for the period in question as alleged.
 30. He further deposed that the Respondent herein only acted within its mandate and has not violated Articles 10, 46, 232 and 259 of *the Constitution* as alleged by the Petitioner. He added that the Petitioner has not tendered any evidence to justify the alleged violations of the constitutional rights and fundamental freedoms.
 31. He further deposed that the petition herein raises private law claims mischievously disguised as issues on infringement of fundamental rights and freedoms.
 32. According to the Respondent, the resolution of energy related disputes is a preserve of either the Energy and Petroleum Regulatory Authority of the Energy and Petroleum Tribunal which derive their powers from the *Energy Act*, 2019 as read with the Energy (Complaints and Disputes Resolution) Regulations, 2012.,
 33. Both the Petition and the Notice Preliminary Objection were canvassed vide written submissions. On 11th November, 2022 the Petitioner through his Advocates, Messrs Munyanga Githaiga LLP filed submissions dated 8th November, 2022 whereas the Respondent through its Advocate Ms. Irene Wanjala on 21st November, 2022 filed its submissions dated 18th November, 2022.

The Petitioner's Submissions

34. Regarding the issue of this Court's jurisdiction, Counsel for the Petitioner argued that the Notice of Preliminary Objection hereon is fatally defective, incompetent and is anchored on clear misapprehension of law. Counsel submitted that the jurisdiction of the High Court is provided for in Article 165 of *the Constitution*. That under Article 165(3) the High Court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine questions as to whether a fundamental right or freedom in the Bill of rights has been denied or violated or infringed or threatened; jurisdiction to hear appeals from decisions of constitutional tribunals save for that set up under Article 144, to hear questions relating to interpretation of *the Constitution* and any other original or appellate jurisdiction conferred by *the Constitution*.
35. Counsel further submitted that the petition now before Court has been brought under a variety of Constitutional provisions being Articles 10, 46, 232 and 259 of *the Constitution*. Counsel contended that the fact that the underlying dispute, being the contravention of a right under *the Constitution* is not a preserve of either the Energy & Petroleum Tribunal or the Energy and Petroleum Regulatory Authority which derives its power from the *Energy Act*, 2019 as read together with the Energy (Complaints and Disputes Resolution) Regulations, 2012.
36. Counsel maintained that by dint Article 2(1) of *the Constitution*, *the Constitution* is the supreme law in Kenya and that all other laws including legislations are inferior or subordinate to it.



37. Counsel maintained that the dispute before is not about over billing but rather it is about issuing bills that have no basis in law hence a contravention of Article 46 of [the Constitution](#) on Consumer rights.
38. On whether the Petition herein raises Constitutional issues, Counsel cited the case of *Evans Ladtema Muswabili V Vibiga County Public Service Board & 2 Others; Marley Ezekiel Ayiengo (Interested Party) [2021] eKLR and the South African case of Fredericks & Others Vs. MEC for Education and Training, Eastern Cape & Others*.
39. Counsel argued that it is the Petitioner's averments that the Respondent's acts of issuing erroneous and controversial electricity power supply bills on 23rd February, 202, with inflated electricity bill supply of Kshs.4,375,967/= whereas the Petitioner had dutifully paid his bills as and when they fell due and as a result of it making estimates and severally disrupting the power supply in the hospital where the Petitioner saves lives contravenes his rights as provided under Article 46 of [the Constitution](#).
40. Counsel further submitted that the Respondent's acts also infringed on the Petitioner's fundamental right to information as guaranteed under Article 35 of [the Constitution](#) when it issued untrue, incorrect and misleading information.
41. On whether the Respondent breached the Petitioner's rights under Article 46 of the Constitution, Counsel submitted that the Respondent herein is enjoined as a licensee distributing electricity supply as is subject to and bound by the [Energy Act](#), 2019 particularly part IV and Section 117-131.
42. Counsel further submitted that the Respondent is also strictly bound by the provisions of Sections 145-147 (Metering of Electrical Energy), Sections 153-166, The Energy (Complaints and Dispute Resolution) Regulations 2012, Legal Notice No.42, Kenya Gazette Supplement No. 49 (Legislative Supplement No.15) of May 25, 2012, The Energy (Electricity Licensing) Regulations, 2012, Legal Notice No.44, Kenya Gazette Supplement No.49 (Legislative Supplement No.15) on May 25, 2012 and therefore the Respondent does not have a free will to bill its consumers as it wishes contrary to the tariffs set by law but in exercising its duties as the Respondent is subject to the [Consumer Protection Act](#) 46 of 2012.
43. Counsel further submitted that on 3rd February, 2022, the Respondent issued erroneous and /or controversial electricity power bills of Kshs.4,375,967/= whereas the Petitioner had dutifully paid the bills as when they fell due as evidenced in the annexed statement printed on 9th June, 2021 marked as "HM2" in the Petitioner's supporting affidavit.
44. Counsel further submitted that vide a letter dated 17th February, 2021, the Petitioner protested the bill noting that it was not only misleading, inaccurate but also exaggerated and unreasonable. Further that in response to a letter dated 23rd February, 2021, marked as "HM4", the Respondent admitted that the account did not record correct metre from the year 2017 to 2021. That the respondent further indicated that even the amounts billed during the said period were estimates and the actual. However, no reason was advanced as why the correct meter readings were not taken and information has never been supplied.
45. Counsel argued that despite the Respondent acknowledgement of errors in their reading of bills, the Respondent continued to issue erroneous and controversial bills, which prompted the Petitioner to request for the tabulation of the monthly bills on several occasions for the affected period running from the 2017 to February, 2021 but none was given and or issued to the Petitioner. Counsels further argued that failure to issue, give and or supply the required information is a grave violation of the Petitioner's right to access information and further a violation of his consumer rights as enshrined under Article



46 of *the Constitution* and the Consumer Act 46 of 2012. In case of Alan E. Donovan V Kenya Power & Lighting Company [2021] eKLR.

46. Counsel urged the Court to adopt a pragmatic approach to find that the Petitioner was disadvantaged and further urged the Court to also find that the Respondent breached and contravened the Petitioner's rights to goods and services of reasonable quality contrary to Article 46 of *the Constitution*.

The Respondent's Submissions

47. Counsel submitted that the issues raised by the Petitioner as against the Respondent are private law claims mischievously disguised as issues on infringement of fundamental rights and freedoms.
48. With regard to the jurisdiction of this Court, Counsel submitted that this case is premised on the supply of electricity by the Respondent mainly touching on the consumption, billing and alleged disconnection on the Petitioner's premises; Gynocare Women and Fistula Hospital located in Eldoret Town within Uasin Gishu County, Account Number 88602279 Metre No.62223580.
49. Counsel cited Section 3(1) of the *Energy Act*, 2019 that deals with the issue of conflict of law and Regulation 4 of the Energy (Complaints & Dispute Resolution) Regulations 12 that deals with the nature of disputes that ought to be heard by the Authority. Counsel maintained that Section 36 (3) of the *Energy Act*, 2019 grants the Tribunal original civil jurisdiction on any dispute between the licensee and a third party. In view of the foregoing provisions, Counsel argued that the doctrine of exhaustion imposes an obligation parties to exhaust any alternative dispute resolution mechanisms before embarking on Court process as envisaged under Article 159 (2) of *the Constitution*. To buttress her submissions, Counsel relied on William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others; Muslim for Human Rights & 3 Others (Interested Parties) [2020] eKLR that extensively dealt with the doctrine of exhaustion.
50. Counsel maintained that the case herein is purely about the supply of electrical energy billing and disconnection as set out in the *Energy Act*. Counsel argued that pursuant to the provisions of Section 5 of the *Civil Procedure Act*, 2010 the dispute at hand ought to be referred to the energy and Petroleum Regulatory Authority or in the alternative to the Energy & Petroleum Tribunal. To buttress her submissions Counsel cited the case of Amy Kagendo Mate Vs. Prime Bank Credit Reference Bureau Africa Ltd [2013] eKLR.
51. Counsel submitted that Article 169(1)(d) of *the Constitution* makes provision for the establishment of other Courts or local tribunals by an Act of Parliament, other than the Courts established pursuant to Article 162(2).
52. Counsel argued that Sections 3, 9,10,11(e), (f), (i), (k), & (l),23, 24, 36,40,42,159(3), 160(3),167.168 and 224(2)(e) of the *Energy Act*, 2019 as read with Regulations 2,4,7 and 9 of Energy (Complaints and Disputes Resolution) Regulations, 2012 gives the Authority jurisdiction to handle disputes similar to the one that the Plaintiff has filed herein.
53. Counsel further submitted that Section 9(2) and (3) of the *Fair Administrative Action Act*, 2015 further illustrates the appropriate forum for resolution of disputes.
54. Counsel contended that in filing this petition the Petitioner knowingly and deliberately by-passed the Energy & Petroleum Regulatory Authority and also the energy & Petroleum Tribunal in total disregard of the laid down statutory provisions.
56. On whether the petition raised any Counsel maintained that the issues herein do not raise a constitutional question at all. According to Counsel the issues raises herein can be determined without



- invoking Article 46 of the Constitution. Counsel submitted that a cursory look at the Petition and the supporting affidavit shows that the petition merely alleges, without evidence, violation of consumer rights under Article 46 among other provisions without any further details.
57. Counsel further submitted that the petition herein does not meet the threshold laid down in the Case of Anarita Karimi Njeru V Republic 1979 KLR 154. Counsel contends that a petition cannot be anchored on hearsay and or mere allegations without proof. Counsel argued that the Petitioner herein has not demonstrated how the billing was wrong neither has he justified why he should not settle the outstanding balance that is due and owing. Counsel argued that he who alleges must prove. Counsel also cited the case of Mumo Matemo V Trusted Society of Human Rights alliance [2014] eKLR.
58. Counsel argued that for Petitioner to succeed in any constitutional petition, the law require him to demonstrate that his constitutional rights have actually been denied or violated or are threatened with denial or violation.
59. Counsel maintained that in this case is not disputed that the petition is premised on an issue of supply of electrical energy, billing of electrical energy and disconnection of power between the Petitioner and the Respondent. That the Petitioner is a customer of the Respondent and has contractual obligations to perform under the supply contract in order to enjoy supply of electricity. According to Counsel the petition herein is premised on a claim based on contractual dispute between the two parties and therefore clear the claim herein squarely falls in the realm of contract law. Counsel added that the Energy Act, 2019 provides for remedies to the Petitioner in the event of a dispute. Counsel relied on the findings in the case of Uhuru Muigai Kenyatta V Nairobi Star Publications Limited [2013] eKLR that elucidated the principle that private law claims should not form the basis of constitutional petitions and should instead be resolved by filing of a civil suit.
60. On whether the Respondent breached or contravened the Petitioner rights under Article 46 of the Constitution, Counsel submitted that all material times there existed and still exist a contractual relationship between the Petitioner and the Respondent, whereby the Petitioner is required to meet his contractual obligations with respect to payment of bills as and when they fall due upon the supply of electric power to his premises. Counsel further submitted that the Respondent acknowledged that based on the nature of the relationship between itself and the Petitioner, it has at all times billed the Petitioner based on his monthly electricity consumption as it does for the millions of other consumers across the country. Counsel argued that this billing has always been based on actual and verifiable metre readings from the Petitioner's account and metre number.
61. Counsel argued that the uncharged consumption relates to previous consumption, which had erroneously not been factored in and therefore the allegation that the same is an estimated figure and that the Respondent malicious billing contrary to the tariffs set by the law is incorrect. Counsel argued that when the Petitioner failed to pay his monthly occurring bills, the Respondent was forced to disconnect power supply to the Petitioner's premises owing to the non-payment of the monthly bills. Counsel argued that once the Petitioner settled the monthly bills the Respondent would reconnect power supply. Counsel contended that the Respondent has never disconnected power based on the outstanding bill of Kshs.4,375,967/= owed by the Petitioner to date as alleged.
62. Counsel added that the Respondent simply acted within its mandate and has not violated either Article 10, 46, 232 or indeed 259 of the Constitution as alleged and further that there is no credible evidence led by the Petitioner to justify the allegations of violation of the constitution or his fundamental rights and freedoms.



63. Counsel maintained that the disconnection of power supply to the Petitioner's premises was an isolated act based on his monthly electricity consumption billed and settled when required and not related to the outstanding electricity bill in question as alleged.
64. Counsel further submitted that the Petitioner herein instead of following up with the Respondent to address the issues agreed upon in its meeting of 19/10/2021, he has failed and or neglected to do so and continues to pursue this matter and thus guilty of abuse of Court process.
65. In addition, Counsel submitted that this instant petition has no semblance to a constitutional petition and that the same is a general pleading on breach of statutory provisions capable of redress in a normal civil suit and not through a constitutional petition. Counsel further argued that it is trite law that he who alleges must prove. Counsel maintained that the onus on the Petitioner to establish violation of the alleged consumer right is not a mere formality. Counsel relied on the case of *Hakizimana Abdoul Abdoukarim V Arrow Motors (EA) Ltd & another* [2017] eKLR to buttress his arguments on the issue.
66. With regard to the issue of costs, Counsel submitted that costs must always follow the event. Counsel argued that the Petitioner being fully aware of the laid out mechanisms put in place for parties to pursue reprieve in instances such as there and to ventilate issues raised in the petition elected to prematurely drag the Respondent to Court. Counsel argued that the Respondent has expended considerable resources in this matter and thus ought to be awarded costs as reprieve.

Determination

67. Before delving into the merits or otherwise of this petition, it is only prudent that I first address the Notice of Preliminary Objection dated 17th October, 2022 that has been raised by the Respondent herein, objecting to this court's jurisdiction to entertain this case on grounds that the Petition offends the provisions of sections 3, 10, 11(e) (f), (i) (k) & (i), 23, 24, 36, 40, 42, 159 (3), 160(3) and 224 (2)(e) of the *Energy Act* together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read with Article 159 (2) (c) and 169 (1) (d) and (2) of the Constitution and sections 9(2) and (3) of the Fair Administrative Action Act, 2015.
68. It is worth noting that the preliminary objection if allowed may dispose off the entire suit without giving parties the opportunity to be heard. Therefore, this has to be done with caution that the Court has a duty to hear all parties and determine the case on merit.
69. The definition of a preliminary objection is well set out in the case of *Mukisa Biscuits Manufacturing Co. ltd vs West End Distributors Ltd* (1969) EA 696.

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

Ojwang, J (as he then was) expressed himself as follows in *Oraro vs. Mbaja* [2005] 1 KLR 141: -

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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....The principle is abundantly clear. 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 information, which stands to be tested by normal rules of evidence.”

70. To understand the basis of the objection herein it is worth highlighting the genesis of the issues herein. From my analysis of the pleadings before this Court, it is not disputed that the Petitioner herein operates a medical facility. The premises is supplied with electricity by the Respondent vide Account No. xxxxxxxx and Meter No.62223580. The Petitioner maintains that he has been dutifully and timely paying the Respondent’s electricity bills since its connection at the hospital premises. However, the Petitioner claims that on 3rd February, 2022 the Respondent issued erroneous and or controversial electricity bill of Kshs.4,375,967/= whereas he had dutifully paid his bills as when they fell due. The Petitioner then vide a letter dated 17th February, 2021 protested the said bill noting that it was not only misleading, inaccurate but also exaggerated and unreasonable. In a response vide a letter dated 23rd February, 2021 the Petitioner deposed that the Respondent admitted that the said account did not record correct meter readings from the year 2017 to 2021 and that the amounts billed during the said period were estimates and not actual and that no reasons was ever advanced as to why the correct meter readings were not taken.
71. As a result of the Respondent’s actions, the Petitioner alleges that his rights under Articles 10, 46, 232 and 259 have been infringed by the Respondent.
72. In support of the preliminary objection, counsel for the Respondent maintained that this case is purely about the supply of electrical energy, billing and disconnection as set out in the *energy Act*, 2019 and thus ought to be referred to the Energy & Petroleum Regulatory Authority or in the alternative to the Energy & Petroleum Tribunal. Counsel also relied on the provisions of Article 159(2)(c) and Article 169(1)(d) of *the Constitution* of Kenya in highlighting the place of tribunals in Kenya. Counsel also relied on the provisions of Section 9(2) and (3) of the *Fair Administrative Action Act*, 2015 and argued that the said provisions are couched in mandatory terms which strips this Court its jurisdiction.
73. In opposition to the Preliminary Objection, the Petitioner’s counsel argued that this instant Petition raises constitutional questions which fall within the exclusive jurisdiction of this court because the Petition involves contravention of Articles 10, 46, 232, and 259 of *the Constitution*. He argued that this court has jurisdiction under Article 165(3) of *the Constitution* to determine the issues raised. He submitted that the mere existence of the Energy & Petroleum Regulatory Authority or the Energy & Petroleum Tribunal cannot oust the Court’s jurisdiction on issues of contravention of a right under *the Constitution*. He argued that the tribunal has no jurisdiction to determine constitutional questions.



74. With the foregoing in mind it is clear that the only issue for determination at this juncture is whether this court is divested of jurisdiction by the doctrine of exhaustion of remedies. The exhaustion doctrine serves the purpose of ensuring that where the law establishes a forum for dispute resolution outside the Court, then a party is not allowed willingly, to disregard that forum and to approach the Court as the first port of call.
75. A 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR elaborately dealt with the doctrine of exhaustion. The Court stated 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
42. This doctrine 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.
43. 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.
76. This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:
77. 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.
78. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -
59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte



The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.
79. Section 9 (2) of the Fair Administrative Action Act provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2)



have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

80. The Fair Administrative Action Act defines an “administrative action” as follows: - includes— (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The impugned decision is an administrative action as envisaged in the above definition, therefore section 9 (2) (3) of the Fair Administrative Action Act applies.
81. However, Section 9 (4) of the Fair Administrative Action Act which provides that: -
82. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, on application by the applicant, the court may grant the exemption. The Petitioner never sought the exemption prescribed by the above section.
83. The question that begs for an answer is whether the dispute resolution mechanism established under the Act and the Regulations is competent to resolve the issues raised in this Petition. The dispute as disclosed in the Petition is a contested electricity bill which the Petitioner describes as exorbitant. There is nothing to show that the forum established under the enabling statute cannot resolve issues relating to a disputed bill. In fact, the said forum is the best suited fora to determine how the bill was arrived at. It has the benefit of the required expertise. The attempt to describe a disputed bill as a constitutional question is to say the least a mockery of *the Constitution*. As case law suggests, our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute. The Petitioner has not demonstrated that it cannot get an effective remedy resolving the contested bill before the said forum. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in *the Constitution* and our law.
84. The Petitioner argues that this case raises constitutional issues which can only be resolved by this Court. In particular, the Petitioner invoked Articles 10, 46, 232 and 259 of *the Constitution* and this Court’s jurisdiction under Article 165 (3) of *the Constitution*. This argument brings to fore two important and closely interrelated concepts. These are the doctrine of ripeness and the doctrine of constitutional avoidance.
85. These two doctrines were discussed by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR. The Court observes as follows: -
- [105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:
- “The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”
- [106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:



[256] ..The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

While speaking to Ripeness doctrine the Learned Judges stated as follows: -

107. The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:
The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made
108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.
109. The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:
 - (72) The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where *the Constitution* stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.
 - (74) Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which *the Constitution* has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.
110. In *National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others* [supra] the Court of Appeal held:
 - (73) Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDF.
111. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:
 - (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.



86. The doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause. The exceptions to the application of the doctrine of constitutional avoidance are: - (a) where the constitutional violation is so clear and of direct relevance to the matter; (b) in the absence of an apparent alternative form of ordinary relief, and, (c) where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.
87. From a cursory look at the issues presented in this Petition there is no doubt that the Petitioner's grievance if any can effectively be addressed in the forum created by the statute and or in a civil suit. To me, this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the matter as I hereby do.
88. The Petitioner herein has argued that this petition raises issues of contravention of his fundamental rights as envisaged in *the Constitution*. The definition of a constitutional question provided in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* cited by the Petitioner does not support the Petitioner's argument that before this Court is constitutional Petition. Courts abhor the practice of converting every question into a constitutional question which amounts to trivializing *the Constitution*. The dispute presented in this case arising from a contested electricity bill can be resolved without resorting to *the Constitution*.
89. The contextual element of interpretation on the infringement of the Bill of rights goes hand in hand with Article 27 (1) and (4) of *the constitution* which deals with the concept of equality before the law and the protection of the law which has been considered in various case law within our jurisdiction. What is required of the court before finding in favour of the petitioner for a breach in any of the provisions clustered as fundamental rights and freedoms is that he or she must demonstrate circumstances of uneven hand in the application of the same law. As a consequence of this petition the burden is upon the petitioner to show that the Act or conduct of the respondent was in violation of the Republican constitution. That is in so far as the contract for supply of electricity is concerned by the Respondent to the Petitioner. Undoubtedly, the contractual rights agreed upon by both parties formed the integral part of the contract. The question therefore is can such infringement by the respondent be founded or manifested in *the constitution*. In the instant case, as a matter of general principle purely on breach of contract by the respondent such a petitioner is entitled to be put into the position in which he could have been if the disconnection of electricity had not been committed. The question here is simply whether on the hypothesis outlined in the petition under consideration the petitioner suffered loss which should be compensated in more than nominal damages. The purpose of damages for breach of contract is to compensate the victims of civil /commercial wrongs for the loss and damage that the wrongs have caused. This is in contrast to when the court is exercising constitutional jurisdiction concerned to uphold, or vindicate the constitutional right which has been contravened. In *Robinson v Harman* (1848) 1 Exch 850, Parke B Said: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed"
90. Leaving aside the findings on the preliminary objection the source of this petition arises out of the primary legal obligations upon each party to procure electricity supplier as promised by the respondent and that it will be done within the conditions enforceable by both parties. Hence the hallmark principle that the contract however, is just as much the source of secondary obligations as it is of primary obligations...."Every failure to perform a primary obligation is a breach of contract. The secondary



obligations on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach (See Photo production Ltd vs Securicor Transport Ltd (1980) AC 849

91. What is significant is that the essential elements appropriate to describe *the constitution* as furnishing enforceable remedies under Article 23 in favour of the petitioner in particular factual context remains moot. Moreover, the petitioners violations or and infringements could have been entirely addressed in another forum of conveniens.
92. With the foregoing in mind, I find and hold that Respondent's Notice of Preliminary Objection succeeds. This suit offends the doctrine of exhaustion of remedies. The Petition as drawn does not raise any constitutional questions at all. Mere recitation of Articles of *the Constitution* is not enough. The Petition must demonstrate how the Articles or fundamental rights have been violated or threatened. The dispute at hand emanates from a contested electricity bill as opposed to violation of any of the Articles cited. The Petitioner save for drafting a couple of correspondences has not demonstrated to this Court that he has in fact exhausted all the laid out dispute resolution mechanisms in place.
93. Accordingly, I hereby allow the Preliminary Objection and dismiss the Petitioner's Petition dated 4th October, 2022 with costs to the Respondent.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE 2023

In the Presence of:

Mr. Mbugua for Githaiga Advocate

.....

R. NYAKUNDI

JUDGE

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