



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 421 OF 2016**

**IN THE MATTER OF ARTICLES 2, 6,10,47,50,159, 165,174,175, 189, 190, 250 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 6 AND 15 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**NAIROBI COUNTY GOVERNMENT.....PETITIONER**

**VERSUS**

**KENYA POWER AND LIGHTING COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**The Parties**

1. The Petitioner is the County Government of Nairobi established under Article 176 of the Constitution as read with the first Schedule thereto and Section 12 of the County Governments Act.<sup>[1]</sup>It avers that it brings this Petition as a matter of public interest, to protect the application of the law, and to secure the rights and freedoms of residents of the City of Nairobi.

2. The Respondent is a public company in which the national government of the Republic of Kenya has a controlling interest. It engages in amongst others the business of providing electricity services.

**The Petitioners case**

3. The Petitioner avers that the Respondent is claiming from it a sum of **Ksh. 732,017,002. 20** in respect of unpaid electricity bills due from the defunct Nairobi City Council. It avers that the Respondent has threatened to disconnect electricity services to facilities it mans among them City Hall, City Hall Annex, Pumwani Hospital, Mama Lucy Hospital, Nairobi City County Depots, Nairobi City Centre Street Light Pillars due to failure to pay the said sum.

4. The Petitioner denies that it inherited the liabilities of the defunct local authority, and avers that hence, the demand for the said sum offends the Constitution, the Transition to Devolved Government Act<sup>[2]</sup> and the Fair Administrative Action Act.<sup>[3]</sup> The Petitioner also avers that it seeks to protect the due process of the law and to secure the protection of the objects and principles of devolved government and

to secure rights to life, care services and security to millions of residents of the City of Nairobi. The Petitioner avers that the liabilities of the defunct local authority were never transited to the Petitioner. As a consequent of the foregoing, the Petitioner cites violation of various provisions of the Constitution and statutory provisions and prays for:-

- a. A Declaration Order that the Petitioner is not the body entitled to pay the outstanding electricity bills amounting to Kshs. 723, 017, 002. 20 as at 30<sup>th</sup> April 2013 due and owing from the defunct Nairobi City Council to the Respondent.
- b. A Declaratory Order that the demand by the Respondent to the Petitioner to pay the outstanding electricity bills owed to the Respondent by the defunct local authority, Nairobi City Council is illegal and therefore null and void.
- c. A Declaratory Order that the Transition Authority or its successor body has the responsibility to prepare and assign an inventory of assets and liabilities of the defunct local authorities and such an inventory would determine organs to settle any liabilities due from the defunct local authorities.
- d. A Prohibitory Order prohibiting the Respondent from disconnecting electricity services to public facilities manned by the Petitioner to wit City Hall, Hall Annex, Pumwani Maternity Hospital, Mama Lucy Hospital, Nairobi City County Depots, Nairobi City Centre Street Light Pillars and any other facilities manned by the Petitioner due to failure to pay the electricity bills accrued by the Defunct City Council.
- e. A Prohibitory Order prohibiting the Respondent from demanding from the Petitioner the payment of electricity bills amounting to Kshs. 723, 017, 002.20 due and owing from the defunct local authority, the Nairobi City Council.
- f. Costs of this Petition.
- g. Any further Relief or Orders that this Honorable Court may deem just and fit to grant.

### **Respondent's Replying Affidavit**

5. **Jude Ochieng**, the Respondent's Chief Legal Officer, Litigation and Prosecutions in his Replying Affidavit avers that failure on the part of power consumers to pay their bills distorts the Respondent's financial obligations. Further, he averred that on 8<sup>th</sup> August 2011, the Respondent wrote to the Permanent Secretary in the Ministry of Energy stating:-

- a. the Respondent had disconnected power supply to City Hall Annex on account of non-payment of disputed bills amounting to **Ksh. 511,261,617/=**; which disconnection had been necessitated by the City Council of Nairobi renegeing on its past agreements to pay its bills; and that the Town Clerk had demanded from it the payment of levies in the sum of **Ksh. 433,653,140/=** being levies for poles and way leaves on the power distribution network before any payment could be made to KPLC;
- b. the Town Clerk threatened to clamp KPLC vehicles and arrest any staff working in the power distribution network if the alleged outstanding way leaves were not paid; and that the issue of way leaves was being handled at Cabinet level; and the bills owed to KPLC were long overdue and payable and the need for the Permanent Secretary to intervene with the relevant Ministry.

6. He also averred that sometimes in 2012, the Petitioner's predecessor, the defunct City Council of Nairobi, after their power supply was disconnected for non-payment, retaliated by uprooting security gates next to Stima Plaza, which gates were a necessary security measure. Further, he averred that on 12<sup>th</sup> October 2015, the Petitioner barricaded the Respondent's offices at Stima Plaza by blocking all entrances with trucks filled with smelling garbage. He also averred that on 18<sup>th</sup> November 2011, the Permanent Secretary, Treasury, wrote to the Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Finance stating *inter alia*:-

- a. that there was an ongoing dispute between the Respondent and the City Council of Nairobi on unpaid bills and way leaves rent and electricity bills, and that the dispute had resulted in unwarranted hostilities which were threatening to interfere with the delivery of key services to the public; and
- b. the need for a meeting on 24<sup>th</sup> November 2011 to discuss the issue amongst the Permanent Secretaries (Treasury, Energy and Local Government as well as the Town Clerk and Managing Director and CEO of the Respondent).

7. **Mr. Ochieng** also averred that the Parliamentary Committee on Local Authorities and Funds intervened in the aforementioned dispute between the Petitioner and the Respondent and directed that a meeting be held between the Permanent Secretaries of the Treasury/Finance as well as Local Government, the Respondent's MD and CEO as well as the Petitioner's Town Clerk. He averred that the meeting was held and resolved that a Joint Committee be set up between the Petitioner and the Respondent to analyze and establish the accuracy of the outstanding bills and agree on the correct payable amounts in respect of the City Council of Nairobi, and determine the amount payable by KPLC in respect of unpaid way leave charges.

8. Further, he also averred that the Joint Committee met on various dates in early 2012 and resolved that the City Council of Nairobi was to pay to the Respondent the sum of **Ksh. 453,361,474.50** in respect of bills which had been confirmed as being an accurate reflection of what had been billed which sum was to be paid by way of monthly payments of **Ksh. 30** million and that the Respondent was to waive **Ksh. 212,098,347.95**, which it did and that the correct sum for unpaid way leave was agreed at **Ksh. 426,167,900/=**.

9. **Mr. Ochieng** further averred that on 27<sup>th</sup> February 2012, the City Council of Nairobi wrote to Respondent stating that it was waiting for the verification of the way leave inventory for power cable services on road reserves. Further, he averred that the findings of the Joint

Committee were endorsed by the then Town Clerk of the Nairobi City Council and the then Respondent's MD and CEO on 8<sup>th</sup> June 2012. He also averred that the City Council of Nairobi undertook to effect a payment of **Ksh. 40** Million per month to cover the outstanding amounts as well as the monthly bills incurred by the City Council of Nairobi. Also, he averred that, the City Council of Nairobi, by a letter of 21<sup>st</sup> June 2012, highlighted its dissatisfaction with the provision of estimated monthly bills. He averred that on 12<sup>th</sup> October 2012, the then Respondent's MD and CEO wrote to the Town Clerk of the City Council of Nairobi highlighting:-

- a. the deliberations he had with the previous Town Clerk regarding the reconciliation and validation of the Council's outstanding electricity debt; that the Respondent had finalized the waiver of **Ksh. 212,098,347.95**;
- b. the balance of the City Council of Nairobi's electricity bill stood in the sum of **Ksh. 575,506,339.34**;
- c. that the City Council's monthly electricity bill was in the sum of **Ksh. 35** million; the inadequacy of the **Ksh. 1.5** million daily remittance by the City Council to cover the entire monthly electricity bill AND the need for the City Council to furnish information on how it intended to address the issue of the outstanding debt which stood in the sum of **Ksh. 575,506, 339.34**

10. Further, **Mr.Ochieng** averred that in accordance with the agreement reached by the Joint Committee, the Nairobi City Council undertook to effect a payment of **Ksh. 30** million per month to cover the outstanding amounts as well as the monthly bills incurred by the City Council of Nairobi; Further, he averred that on 19<sup>th</sup> November 2012, the Respondent received a copy of a letter from the City Council of Nairobi addressed to the Permanent Secretary, Ministry of Local Government stating:-

- a. that further to the meeting held at the treasury on 24<sup>th</sup> November 2011, the Bills owing to the Petitioner and the Respondent had been reconciled and the Joint Resolution on debts was forwarded to him and requested the Permanent Secretary was requested to:-
  - i. De-gazette the way leave charged to the respondent that came to effect on 4<sup>th</sup> December 2001;
  - ii. Compensate the City Council of Nairobi for the annual revenue loss at the rate of **Ksh. 54** million as a result of the annulment of the way leave charges; and
  - iii. Make arrangements to release **Ksh.426,167,900** for the outstanding way leave charges owed to the City Council of Nairobi by the Respondent so as to enable the City Council settle the outstanding power bills amounting to **Ksh. 453,361,424**.

11. He also averred that on 30<sup>th</sup> April 2013, the Respondent's then MD and CEO wrote to the Governor of the Nairobi City County stating that:-

- a. the issue of the outstanding debt owed by the former city Council of Nairobi which stood in the sum **Ksh. 723,017,002.20** as at 30<sup>th</sup> March 2013 and that the Parliamentary Committee on Local Authorities and Funds intervened to resolve the standoff between the Petitioner and the Respondent and in so doing summoned the Permanent Secretaries of the Treasury/ Finance as well as well as Local Government, the Chief Executives of the Petitioner, the Respondent as well as of the Mombasa Municipal Council and directed the Parties to resolve and reconcile the amounts owed to each other in way leaves and electricity bills and get back to the Committee in two weeks of December 2011;
- b. the National Treasury undertook to address issues regarding Kenya Power and all councils on poles and way leaves by December 2011;
- c. A joint Committee of the Petitioner and the Respondent met and in their findings resolved that the City Council of Nairobi was to pay the Petitioner the sum of **Ksh. 453,361,474.50** and the Respondent was to waive **Ksh. 212,098.95** from the City Council of Nairobi electricity bills which the Respondent did;
- d. the Town Clerk of the City Council of Nairobi as well as the Respondent's MD and CEO herein had appended their signatures to the Committees Report of 8<sup>th</sup> June 2012;
- e. Kenya Power had honoured its obligations under the Report, however, the City Council had not fulfilled its end of the bargain as a result of which the bills had accrued and escalated the debt from **Ksh. 453,361,474.50** to **Ksh. 723,017,002.20** in 16 months;
- f. the MD and CEO sought the Honourable Governor D. Kidero's intervention in having the issues resolved;

12. He further averred by a letter dated 24<sup>th</sup> July 2013, the Petitioner's Chief Finance Officer stated that at meeting held on 18<sup>th</sup> and 19<sup>th</sup> July 2013, it was agreed that:-

- a. the Nairobi City County ensures payment of **Ksh.1.5** million per day to offset the monthly electricity bills and the balance thereof be paid after the Nairobi City County receives its funding from the Central Government on or before 15<sup>th</sup> October 2013; and a weekly payment of **Ksh. 5** million be made for a period of two months so as to reduce the accumulated debt;
- b. the amount payable by the Nairobi City County was calculated and agreed at **Ksh. 181** million.
- c. Further, it was agreed that on 22<sup>th</sup> January 2015, the Nairobi City County Government entered into an agreement with the

Respondent in connection with its outstanding electricity bill which was in the sum of **Ksh. 577** million.

13. Further, he averred that in the said agreement, the Nairobi City County Government agreed to effect payment at **Ksh. 3** million per day and a one off payment of **Ksh. 20** million which would translate into a payment of **Ksh. 80** million per month for a period of one year from January 2015, which amount was to clear both the outstanding electricity bills as well as the monthly bills. He averred that the Nairobi County Government honoured this agreement for the period between January to April 2015 when it started defaulting, which default necessitated a further meeting held on **16<sup>th</sup>** June 2015 in which the Nairobi County Government requested for review downwards from **Ksh. 3** million to **Ksh.1.5** million per day, which request the Respondent agreed and was to be made for the months of July, August and September 2015, and thereafter, payment would be in the sum of **Ksh. 2** million per day for the months of October, November and December 2015.

14. He also averred that on **14<sup>th</sup>** October 2014, the then Chief Officer of Health, Nairobi City County wrote to the Respondent forwarding a copy of a schedule containing the list of Health Sector facilities in the Nairobi County which were to be included in the Memorandum of Understanding between the Petitioner and the Respondent. He deposed that on **19<sup>th</sup>** February 2015, to the the Petitioner enclosing a copy of the agreement reached on **22<sup>nd</sup>** January 2015 in which it had been agreed that the County would pay **Ksh. 80** million per month comprising of the daily remittances by the County of **Ksh.3** million per working day which would translate to **Ksh.60** million per month; AND the balance of **Ksh. 20** million would be paid in one cheque on **10<sup>th</sup>** day of every subsequent month, effective from **10<sup>th</sup>** February 2015; and that the amount would cover the monthly bills and settle part of the arrears respectively, subject to monthly billing remaining consistently below **Ksh. 30** million. He averred that it was agreed that the agreement superseded any other agreement in place, and that the agreement was effective from **1<sup>st</sup>** January 2015 for a period of one year to **31<sup>st</sup>** December 2015 by which time the debt of **Ksh.577** million should have been settled.

15. He further averred that the Respondent on **3<sup>rd</sup>** June 2015, wrote to the Petitioner highlighting the fact that the Petitioner had in the month of May 2015 to June 2015 deviated from the agreement to effect the regular payment of **Ksh. 3** million in accordance with the agreement of **22<sup>nd</sup>** January 2015 leaving a shortfall of over **Ksh. 55** million and called for the payment of the said sums. Further, he averred that on **5<sup>th</sup>** June 2015, the Petitioner received a letter from the Petitioner stating that its officers had met the Respondents officers and agreed on the outstanding electricity bill of **Ksh. 430** million and way leave charges of **Ksh. 500** million. He further averred that the Petitioner had agreed to effect payment of **Ksh. 80** million per month to cater for subsequent monthly bills and arrears. Also, he averred that the Petitioner was requesting for a review downwards of the daily remittance to **Ksh. 1.5** million per month down from the **Ksh.3** million agreed. He also stated that the County bills had reduced consistently from **Ksh.30** million to **Ksh.19** million thereby warranting a review. He also stated that the Petitioner stated that it was still committed to the agreement and asked the Respondent to stop the power disruptions.

16. Mr. Ochieng also averred that on **6<sup>th</sup>** July 2015, the Respondent received a letter from the Petitioner requesting the severing of the meter for the Nairobi City County Assembly and City Hall. Further, he averred that on **15<sup>th</sup>** July 2015, the Respondents MD & CEO wrote accepting the Petitioners request to pay reduced monthly instalments of **Ksh. 1.5** million. Also, he averred that the Petitioner's Acting Chief Finance Officer wrote to the Respondent on **30<sup>th</sup>** September 2015 admitting their inability to pay and referred to several correspondence relating on the agreed mode of payments and the persistent default. Further, he averred that the Petitioner barricaded the Respondents premises demanding **Ksh. 605,636,600** in respect of unpaid way leave charges prompting the Respondent to successfully sue the Petitioner in High Court Petition No. **91** of 2016.

17. He also averred that this Court lacks jurisdiction on grounds that this is a commercial dispute and that the Petition does not raise any constitutional issues.

#### **Issues for determination**

18. Upon analysing the facts as presented by the parties and the respective advocates submissions, I find that the following issues fall for determination, namely:-

- a. Whether the doctrine of estoppel applies against the Petitioner in the circumstances of this case;
- b. Whether this Petition raises constitutional issues.
- c. Whether the Petitioner is entitled tony of the reliefs sought in the Petition.

#### **(a) Whether the doctrine of estoppel applies against the Petitioner in the circumstances of this case;**

19. As demonstrated by the numerous documents presented by the Respondent which have not been denied, it is beyond dispute that the Petitioner admitted the debt in question and not only agreed to pay, but made a repayment proposal which was agreed upon by the parties herein. In fact a repayment plan/agreement was entered into and pursuant thereto, the Petitioner made repayments. The Petitioner after some time sought for the reduction of the instalments which was acceded to and even made payments. There are numerous discussions on the repayment including the initial meetings whereby the amounts due were agreed upon.

20. The Respondents counsel submitted that the Petitioner herein in 2016 demanded **Ksh. 500** million for way leave for all the electricity poles in the County of Nairobi from the Respondent prompting the Petitioner to file Petition No. **91** of 2016. In the said case the Petitioner even admitted paying the said debts, which he actually continued paying. The Respondent's counsel argued that the Petitioner is estopped from denying that it is responsible to pay the said debt.

21. The Respondent's counsel cited *Motilal Padampat Sugar Mills Co (P) Ltd vs State of Uttar Pradesh & Others* [4] where the Supreme

Court of India held that where the Government makes a promise knowing or intending that it would be acted upon by party, and in fact, the party, acting on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the party, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract.

22. Counsel also cited *Union of India vs Godfrey Philips Limited*<sup>[5]</sup> where it was held that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. He argued that so long as the person making the representation is authorized to do so and is acting within his scope, the public authority will be bound.<sup>[6]</sup> Counsel submitted that based on the Petitioners representations from 2013 to 2016, the Respondent supplied and continues to supply to the Petitioner with power and on the basis of the Petitioners representations, the Respondent opted not to exercise its powers and disconnect the supply. He argued that the Respondent acted on the representations made by the Petitioner who for four years made payments.

23. Despite the fact that estoppel is a fairly dispositive issue, the Petitioner's counsel did not address it at all in his submissions.

24. It is convenient to state that estoppel generally means "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."<sup>[7]</sup> There are three kinds of estoppels:- **(a)** by deed; **(b)** by matter of record; and **(c)** by matter in *pais* (by conduct).<sup>[8]</sup>

25. Estoppel by deed "prevents a party to a deed from denying anything recited in that deed..."<sup>[9]</sup> Estoppel by record means that "when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again..., so long as judgment or decree stands unreversed. Estoppel by conduct,<sup>[10]</sup> is the principle by which a party who knows or should know the truth is absolutely precluded ... from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed.<sup>[11]</sup>

26. The whole doctrine of equitable estoppel is a creature of equity and is governed by equitable principles."<sup>[12]</sup> Equity in its turn denotes fairness and justice. This parallel between justice and equitable estoppel is very important. This concept evolved as a tool to prevent fraud and injustice and must serve this purpose. When claiming that the doctrine of equitable estoppel should be applicable to the facts and circumstances of a particular situation, no matter whether in private or administrative law, the following elements of the doctrine must be proved:- **(a)** conduct that amounts to a false representation or a concealment of material facts and **(b)** the person knows or should know the real facts and **(c)** intends or expects the other party to act upon such representation, **(d)** there must be another party who does not know the truth and who in fact acts in good faith in reliance upon such representation, **(e)** results in his detriment. All these elements must be present and proved to establish the applicability of the doctrine of equitable estoppel. If any of these elements is missing, the equitable estoppel cannot be asserted.

27. A study of the above statement indicates that the doctrine's elements can be phrased in three separate questions:- **(i)** Was there a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? **(ii)** Did the promise induce such action or forbearance? **(iii)** Can injustice be avoided only by enforcement of the promise?

28. Broadly speaking, there must:- **(a)** exist some form of legal relationship or is anticipated between the parties; **(b)** a representation or promise by one party; **(c)** Reliance by the other party on the promise or representation; **(d)** The party relying on the promise must suffer a detriment; **(e)** Unconscionability. A party seeking to raise estoppel must make out a clear case and show that it would be unconscionable for the promisor to go back on their promise. Unconscionability is really the backbone of estoppel.

29. Lord Cairns summarized the doctrine of estoppel in the following words:-

"It is the first principle upon which all Courts of Equity proceed if parties, who have entered into definite and distinct terms involving certain legal results . . . afterwards by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties."<sup>[13]</sup>

30. This principle of equity laid down by Lord Cairns made sporadic appearances in stray cases now and then but it was only in 1947 that it was disinterred and restated as a recognized doctrine by Justice Denning (as he then was) in *Central London Property Trust Ltd vs High Trees House Ltd* <sup>[14]</sup> (or the *High Trees case*) in which he held that estoppel is applicable if:-

"... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on."

31. The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

32. Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the Petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into

and even performed its part of the agreement. The Respondent in reliance of the said agreement and commitment not only agreed to the arrangement and acted in reliance of the same. In short, the tests discussed above for the application of the doctrine of estoppel do exist in this case. Accordingly, I find and hold that the answer to the issue under consideration is in the affirmative.

#### **b. Whether this Petition raises constitutional issues**

33. Citing Article 165 (3)(d) of the Constitution, the Petitioner's counsel submitted that the dispute presented in this Petition raises constitutional issues, namely, whether the Petitioner, is the body contemplated under the Constitution to be the successor of the Nairobi City Council, and hence, it is to take over the liability of the defunct City Council among others. Also, counsel argued that the question whether or not enforcing the debt contravenes Article 47 of the Constitution, and whether it offends the Transition to Devolved Government Act<sup>[15]</sup> and the Intergovernmental Relations Act.<sup>[16]</sup> Counsel argued that the Petitioner does not challenge the amounts claimed, hence, the dispute is not commercial.

34. He also submitted that the question of devolution of assets and liabilities of Council Governments was contemplated under the Constitution, 2010, hence the enactment of the Transition to Devolved Government Act<sup>[17]</sup> to streamline the transition as provided in Section 3 of the Act, further, he argued that the act acknowledged existence of liabilities.<sup>[18]</sup> He also argued that the Transitional Authority is under an obligation to provide for a mechanism for the transfer of government net assets and liabilities to national and County Governments, and further that the Respondents' ought to submit their claim to the Intergovernmental Relation Technical Committee to prepare an inventory of assets and liabilities to be transferred to the County Government, which had not been prepared by the transitional authority by the time its term expired.

35. Alternatively, counsel argued that the County Government is a completely new entity under the 2010 Constitution and cannot be held liable for liabilities of the defunct Nairobi County Government, hence the liabilities ought to be inherited by the National Government.<sup>[19]</sup> He also argued that the Local Authorities were agencies of the government, hence the debts ought to be inherited by the National Government.

36. Counsel also argued that the threat to disconnect electricity puts to risk the right to health, fair administrative action of millions of city residents who rely on the targeted facilities, and a violation of Articles 26, 43 (1) & 47 of the Constitution,<sup>[20]</sup> sections 7 (e) (h) of the Fair Administrative Action Act and offends section 35 of the Transition to Devolved Government Act.<sup>[21]</sup>

37. The Respondents counsel cited lack of candour on the part of the Petitioner. He submitted that upon coming into existence, the Petitioner agreed to an arrangement whereby it effected payment of the historical electricity debt as well as the current/recurring monthly debt incurred by facilities it had taken over from the defunct City Council of Nairobi, in particular Schools, Hospitals, and various infrastructure, electricity lights and poles. He submitted that upon coming into existence, the Petitioner took over the running of Schools, Hospitals and various infrastructure, electricity lights and poles in Nairobi County.

38. The Respondent also cited its statutory mandate under section 61 of the Energy Act which grants it power to disconnect electricity supply on account of non-payment. He argued that he who takes the benefit must take the burden.<sup>[22]</sup> He argued that the heart of this Petition is not constitutional, but a debt which is a commercial dispute and that the Petition does not raise constitutional issues.<sup>[23]</sup>

39. It is beyond argument that the core issue here is an accrued debt in respect of power supplied to the defunct City Council of Nairobi which is described as "historical debt" which continued to accrue even after the Petitioner came into existence. The debt is not disputed at all. More fundamental is the existence of undisputed minutes and numerous correspondent and a repayment agreement. The Petitioner made a repayment proposal, which it honoured for some time. At its request the instalments were reduced. It paid for sometime but defaulted. Also relevant is the fact that the Petitioner took over all the institutions and facilities in respect of which the bill arose and continues to arise. Do these facts really raise a constitutional question?

40. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.<sup>[24]</sup> I am not satisfied that the issues herein raise a constitutional question at all. As stated above, there is an outstanding bill. It is not disputed that the services were rendered. The Petitioner had admitted the Bill and even negotiated to pay by instalments. The parties agreed on mode of payment.

41. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.<sup>[25]</sup> The attempt to clothe this dispute with alleged violation of some constitutional rights does not breathe life into the case.

42. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*<sup>[26]</sup> in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*<sup>[27]</sup> notes that:-

*“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”*<sup>[28]</sup>

43. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.<sup>[29]</sup> At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

44. This Petition does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.

45. Courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another*<sup>[30]</sup> underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

“Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

46. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.<sup>[31]</sup> A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.<sup>[32]</sup> When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.<sup>[33]</sup>

#### **c. Whether the Petitioner is entitled to any of the reliefs sought in the Petition.**

47. The Petitioner invites this Court to declare that it is not the body entitled to pay the outstanding electricity bills amounting to **Ksh. 723,017,002.20** and a further declaration that the demand by the Respondent for the said sum is illegal. I have already held above that the doctrine of estoppel operates in this case against the Petitioner. Even without the application of the said doctrine, the Petitioner has not demonstrated that it is under no obligation to pay the said debt nor has it offered any evidence to demonstrate that the Respondent's act of demanding the said sum is illegal. The law permits the Respondent to not only demand the charges for electricity supplied but also to disconnect the supply. There is nothing illegal in the Respondent demanding the said sum.

48. The Petitioner asks this Court to declare that the Transitional Authority or its successor body has the responsibility to prepare and assign an inventory of assets and liabilities of the defendant local authorities and that such an organ would determine organs to settle any liabilities due from the defunct local authorities. Unfortunately for the Petitioner, it took over the running of the schools, hospitals and the installations in question. It assumed the benefit. It agreed to pay the debt and even made payment for a considerable period. The Petitioner cannot turn round and deny the same debt it had acknowledged.

49. The Petitioner also seeks orders of prohibition, prohibiting the Respondent from disconnecting the electricity services to the Petitioner's facilities. The Respondent is legally entitled to demand the payment. Disconnecting power supply in the event of default in paying the accrued bill is a lawful process provided under the law. The Court cannot issue an order of prohibition to stop a lawful process.

50. Perhaps I should mention that the grant of the prerogative orders of *certiorari*, *mandamus* and *prohibition* is discretionary. The court is entitled to take into account the nature of the process against which the order is sought and satisfy itself that there is reasonable basis to justify the orders sought. Further, the Court is guided by sound principles of evidence and the law before granting such prerogative writs.

51. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the Petitioner has not established any basis for this Court to grant any of the orders sought. The effect is that this Petition fails in its entirety. I hereby dismiss it with no orders as to costs.

Orders accordingly.

**Dated at Nairobi this 16<sup>th</sup> day of May, 2018**

**John M. Mativo**

**Judge**

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<sup>[1]</sup> Act No. 17 of 2012

<sup>[2]</sup> Act No. 1 of 2012

- [3] Act No. 4 of 2015
- [4]{1979} 2 SCR 641.
- [5] {1985} 3 SCR 123.
- [6] Counsel cited Lever Finance vs Westminster (City) London Borough Council {1971} 1 Q.B. 222 at p. 230-231, Lord Denning .
- [7]Bryan A. Garner, Ed. In Chief, Black's Law Dictionary, Seventh Edition (St. Paul, Minnesota: West Group, 1999)
- [8] Henry Campbell Black, Black's Law Dictionary, Sixth Edition (St. Paul, Minnesota: West Publishing Co., 1990).
- [9] Supra note 8
- [10] Ibid
- [11]American Jurisprudence, vol. 28 (Escrow to Estoppel and Waiver), Second Edition, 1966; Estoppel and Waiver 27, pp. 627-628.
- [12] J. F. Johnson Lumber Co. vs. Magruder, 218 Md 440, 147 A2d 208
- [13] **Hughes vs. Metropolitan Railway Co. 1877 2 AC 439**
- [14] {1947} KB 130
- [15] Act No.1 of 2012
- [16] Act No. 2 of 2012
- [17] Supra
- [18] Counsel cited County Government of Busia & Another vs Julius Orina Manwari & 12 Others, Pet No. 2 of 2014
- [19] Counsel cited Mutunga SCJ in Speaker of the Senate & Another vs A.G & 4 Others, Advisory Opinion
- [20] Counsel cited Garissa County Government vs National Land Commission & 3 Others, Petition No. 401 of 2014
- [21] Supra
- [22] Lord Miller in McFarlane vs Tayside Health Board {1999}4ALLER 961 {HL}.
- [23] Counsel cited Harikkiddon vs A.G of Trinidad & Tobago {1980}AC PC
- [24]<http://www.yourdictionary.com/constitutional-question>
- [25]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)
- [26] {2002} 23 ILJ 81 (CC)
- [27] {2001} (1) SA 912 (CC)
- [28] 2001 (1) SA 912 (CC)
- [29] Supra note 5 at paragraph 23
- [30] {2016} eKLR
- [31] See Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014
- [32]<http://www.yourdictionary.com/constitutional-question>
- [33]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)