



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION 325 OF 2015

BETWEEN

MARK NDUMIA NDUNG’U.....PETITIONER

AND

NAIROBI BOTTLERS LTD.....1ST RESPONDENT

COCA COLA CENTRAL,

EAST & WEST AFRICA LTD.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Yuletide season is now over. One may however easily win a bet that in every family’s shopping list across all income groups during the holidays was the ubiquitous bottle of *soda* – a soft drink of immense popularity among many Kenyan consumers. The drink comes in various brands. Out of the Coca Cola, Krest, Fanta, Sprite and Stoney brands manufactured by the Respondents and packaged in cans as well as plastic and glass bottles, everyone has a favourite picking of flavor and packaging.

2. The Petitioner’s personal preference was, he claims, Coca Cola sold in glass bottles. He, nonetheless, avers that he stopped taking the beverage after he was diagnosed with ulcers and his doctor advised him to stop taking products with acidic content. Upon that advice, the Petitioner’s curiosity peaked in establishing the ingredients and nutritional values of the foods and drinks he consumed, including Coca Cola.

3. He was struck by the discovery of the obvious difference between the information contained on the label of the glass bottle as compared to the plastic beverage bottles. Unlike the plastic bottle, the glass bottle did not have information on the nutritional content of the Coca Cola, Krest, Fanta, Sprite or Stoney beverages as well as any information on customer service telephone and email address or storage directions.

4. The Petitioner as a law abiding citizen, public spirited individual and a strong believer in the rule of law and constitutionalism brings this Petition on his own behalf and on behalf of the Respondents’ consumers. More so, those of the glass bottled *Coke* beverage.

5. The Petition is contested.

The Petitioner's Case

6. The Petitioner submits that the food label on the plastic Coca Cola bottle, for instance, contains the following nutritional information for each 100 ml of beverage: Energy (180 (kilojoules) kj/ 42 (kilocalories) (kcal); Protein 0 g; Carbohydrate 10.6 (grammes) g; Total fat 0 (grammes) g; Dietary Fibre 0 (grammes) g; Sodium 0(grammes)g. The label to the Coca Cola plastic bottle goes as far as indicating that the 500 ml bottle contains 210 kcal forming 11% of the Guideline Daily Amount. The label also provides the customer service phone number together with email contacts as well as the storage directions – in a cool and dry place.

7. Similar information has been provided on the Krest, Fanta, Sprite or Stoney plastic beverage bottles. However, the glass bottles for all the five brands have omitted this crucial nutritional information. Also omitted are the email contacts as well as storage directions.

8. The omission, the Petitioner submits, violates the rights of consumers under Article 46 of the Constitution.

9. The information according to the Petitioner is essential to a consumer's diet. It was the Petitioner's further submission that providing the information on the plastic bottle while omitting the same from the glass bottles is discriminatory of the consumers of the beverage products in glass bottle.

10. The Petitioner contends that the nutritional information that is missing from the glass bottle is essential in enabling consumers to know the benefits derivable from consumption of the beverages. He also submits that the missing email address and phone address are essential to enable consumers give feedback to the Respondents and to make enquiries and complaints and thereby derive optimum benefit from the products. At the same time, the direction that the bottle should be stored in a cool dry place is omitted. This last piece of information according to the Petitioner assists consumers in knowing how to keep the products ideally in the best way possible to retain its freshness and other desired qualities.

11. To buttress his argument on the critical importance of nutritional information on beverages, the Petitioner highlighted the global commitment by the Coca Cola Company and its global and regional partners in the sustainability plans to provide nutritional information on an ongoing basis. He also notes that the Respondents have provided nutritional information on the labels of the Dasani water processed and bottled by the Respondents.

12. The Petitioner submits that due to the difference in pricing between the plastic bottled beverage and the glass bottle option, low income consumers are the most vulnerable to the information differential, since they are most likely to opt for the glass bottled beverage. In this way, the omission gap on the glass bottles is impugned as discriminatory against the consumers of the glass bottled beverage. The case of **Rose Wangui Mambo v Limuru Country Club [2014] eKLR** is cited for the definition of discrimination.

13. The Petitioner urges the court to look at the conduct of the parties and thereby make an award for compensation against the Respondents as was done in **Mary Mwaki Masinde v County Government of Vihiga [2015] eKLR**.

14. The Petitioner then seeks the following declaratory orders and mandatory injunction by way of relief :

A declaratory order that the Respondent's omission of the nutritional value on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottle prejudices the health of consumers as safeguarded in Article 46(1)(c) of the Constitution;

A declaratory order that the Respondents' omission of the nutritional information, directions on storage, customer care mobile number and email address on the Coca Cola, Fanta, Krest, Stoney

and Sprite glass bottle is contrary to Article 46(1)(b) of the Constitution as it denies the Respondents' consumers the right to information necessary to gain full benefit of the products

A mandatory order compelling the Respondents to display the nutritional value, storage directions, customer care email address and phone number on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottles.

A declaratory order that the Respondents' omission of the nutritional information, directions on storage, customer care mobile number and email address on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottle while availing the information on the corresponding plastic bottles amounts to discrimination and the unequal treatment of the glass bottle consumers and is contrary to Article 27(2), (4) and (5) of the Constitution

An order for compensation of the Petitioner for discrimination.

The 1st Respondent's Case

15. The 1st Respondent is a franchisee that bottles and markets the impugned beverages under the license of the Coca Cola Company. Nevertheless, it is the 1st Respondent's perception that the petition is fanciful and the Petitioner did not justify inclusion of the 1st Respondent's name in the petition. It was also the 1st Respondent's submission that the Petitioner is not a consumer of Coca Cola products and is therefore a stranger to the Petition.

16. The 1st Respondent submits that the Coca Cola crown glass bottle caps indeed bear the physical and postal address of the manufacturer brand of trade name, as well as optional ingredients such as carbonated water, sugar, colour, caramel, acidulant, phosphoric acid, flavoring and caffeine.

17. Concerning the difference in price between the beverages packed in glass bottles on one hand and plastic bottles, it was submitted that the difference in pricing is because the glass bottles are re-usable while plastic bottles are not re-usable.

18. In addition, the 1st Respondent submits that the *information necessary for consumers to gain full benefit from goods and services* is provided under section 87 of the Consumer Protection Act, 2012 that regulates any disclosure of information by suppliers to consumers.

The 2nd Respondent's Case

19. The 2nd Respondent is a company duly incorporated in Kenya as a subsidiary of the Coca-Cola Export Corporation an entity incorporated and carrying out business in Atlanta, Georgia, United States of America. The 2nd Respondent's mandate is to market and promote the Coca-Cola Company's brands in Kenya and elsewhere.

20. For its part, the 2nd Respondent opposes the Petition on the principal ground that the Petition does not disclose a valid cause of action against the 2nd Respondent as the 2nd Respondent is a service company mandated with the marketing and promotion of Coca-Cola Company brands and is not involved in the production, manufacture or packaging of any beverage.

21. The 2nd Respondent's response to the question of labeling is four fold. First, that the Petitioner has no cause of action against it. Never mind that the 2nd Respondent admitted that its sole mandate is the promotion and marketing of the 1st Respondent's products including the production and approval of artworks.

22. Secondly, the 2nd Respondent asserts that the food labels on all the respondent's beverage brands in Kenya are in compliance with the food labeling requirements under the Food, Drugs and Chemical

Substances Act, Cap 254. That is because the existing labels provide the brand of trade name, common name of the food, correct declaration of the net contents in weight, volume or number and as well as the name and address of the manufacturer, packer or distributor of the food.

23. Third, in relation to the Standards Act, Cap 496 it is submitted that the Kenya Standard KS EAS 29:200: Carbonated (Beverages) Soft Drinks – Specification require the date of manufacture as well as the best before date in addition to brand of trade name, common name of the food, correct declaration of the net contents in weight, volume or number and as well as the name and address of the manufacturer, packer or distributor of the food; which information was provided.

24. Fourth, the 2nd Respondent contends that the global commitment by the Coca Cola Company to provide nutritional information is not binding on the 2nd Respondent because it is a separate entity.

25. The 2nd Respondent therefore asserts that the Petitioner has wrongly assumed that there is a legal obligation on a manufacturer, packer or distributor of soft drinks to display the nutritional information, email address and storage directions on the food label.

26. The 2nd Respondent's submissions are based on **Kituo Cha Sheria v Central Bank of Kenya [2011]eKLR** that Article 35 is not justiciable in this claim since the Petitioner has not demonstrated that his request for the information had been turned down.

27. Moreover, it is submitted that the Petitioner has not set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed, and the manner in which they are alleged to be infringed. Reliance is placed on the case of **Ben Kipeno v Attorney General [2007] eKLR**.

28. Finally, the 2nd Respondent questions the Petitioner's failure to exhaust the following alternative remedies: the consumer complaints mechanism under Part IX of the Consumer Protection Act, 2012; the criminal offences under Part IV of the Food, Drugs and Chemical Substances Act, Cap 254; and the cancellation of a dealer's permit under section 10A of the Standards Act, Cap 496.

Issues for Determination

29. Having considered the petition, the founding and opposing affidavits as well as the submissions filed by the parties, I have isolated the following seven issues for determination:

Whether the Petitioner has standing to bring this Petition;

Whether the Petitioner failed to set out his complaint with a reasonable degree of precision ;

Whether the Petitioner's failure to exhaust alternative remedies, if at all, is fatal to the Petition;

Whether the Petitioner has a right to the nutritional and contact information sought in the Petition;

Whether the difference in nutritional information contained on the packaging of the plastic and glass bottle beverages is discriminatory;

Is the Petitioner entitled to any costs; and

Who should bear the costs of this Petition .

Discussion and Determination

The Petitioner's standing

30. As a preliminary issue, it is urged that the petitioner herein has no locus to institute these proceedings.

The 1st Respondent submitted that the Petitioner was a non-consumer and therefore a stranger without the locus standi to file the Petition.

31. Nothing turns on that assertion. The locus standi or legal standing to institute a claim for enforcement of the Bill of Rights is provided for by Article 22 of the Constitution. Every person has a substantive right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

32. The right also inheres in persons acting in the public interest or on behalf of another person who cannot act in their own name. Also included are persons acting as members of, or in the interest of, a group or class of persons. There appears, in my judgment, no limit in the manner and who can approach the court under Article 22 and a generous approach to the issue of standing must be adopted for the purpose of enforcement of the fundamental rights found in Chapter four of the Constitution.

33. In **Mumo Matemu v Trusted Society for Human Rights Alliance [2013] eKLR** the Court of Appeal noted that the landscape of *locus standi* in re constitutional litigation has been fundamentally transformed since the 2010 enactment of the Constitution. The court, in my view, endorsed the proposition that Article 22 confers practically unlimited locus standi in constitutional litigation.

34. In the case at bar, the Petitioner avers that he brings the Petition as a law abiding citizen, public spirited individual and a strong believer in the rule of law and constitutionalism (*public interest*); on his own behalf (*personal interest*) and on behalf of the consumers of the glass bottled beverages produced by the Respondents (*class interest*).

35. Under the current constitutional framework, a petitioner does not have to show that he has been affected by an alleged violation in order to have standing under Article 22. Therefore, nothing in law prohibits a non-consumer of a product, with an established standing under Article 22(2)(a)-(d), from alleging that any consumer right or fundamental freedom under Article 46 has been denied, violated or infringed or threatened.

36. Article 19(3)(b) is to the effect that the rights and freedoms in the Bill of Rights do not exclude *other rights* and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law. While standing under Article 22 falls outside the Bill of Rights, it is nonetheless a right and can only be limited on reasonable and justifiable grounds under Article 24.

37. In my judgment, the Petitioner has the legal standing to bring this Petition. He has demonstrated sufficient interest to seek the reliefs sought in the Petition.

Of precision in pleadings

38. The 2nd Respondent submits, based on **Ben Kipeno v Attorney General [2007] eKLR** and **Anarita Karimi Njeru v Republic [1979] KLR 159**, that the Petitioner did not set out his complaint with a reasonable degree of precision.

39. A quick reading of the Petition does not lead to any awkwardness. The Petitioner's claim is easily discernible to the court from the Petition and the Affidavits. The relevant Articles have also been identified. They focus on alleged violation of the consumer rights. That the Petition was drafted with a reasonable degree of precision as to enable the Respondents to understand the issues in controversy is also evident from the detailed responses filed by the Respondents.

40. There is therefore no merit in the submission by the 2nd Respondent that the Petition was imprecisely drafted. I decline to accept that argument.

A question of alternative remedies

41. The 2nd Respondent submits that the Petitioner did not exhaust alternative remedies before approaching the court. This omission according to the 2nd Respondent, violates the rule in **Speaker of the National Assembly v James Njenga Karume [1992]eKLR** 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.

42. It is trite law that where there is an efficacious or alternative remedy a dispute ought to be resolved in accordance with the alternative procedure: see **Charles Otieno Opiyo v Orange Democratic Movement Party [2017] eKLR**.

43. Paragraph 9 of the **CESCR General Comment No. 9: The Domestic Application of the Covenant** requires that alternative remedies should be *accessible, affordable, timely and effective*. According to the decision of the African Commission on Human and Peoples' Rights (ACmHPR) in **Dawda K Jawara v Gambia 147/95-149/96** concerning availability of effective alternative remedies, it was held that:

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

44. If the availability of a remedy is not evident, it cannot be invoked to the detriment of a Petitioner. Thus, where a party argues that a Petition is inadmissible before this court because alternative remedies have not been exhausted, that party bears the burden of demonstrating the existence of such remedies and that they have not been exhausted. The onus was on the 2nd Respondent to demonstrate that the Petitioner did not exhaust alternative remedies.

45. In the case at bar, a close examination of the proposed alternative remedies indicates that the 2nd Respondent’s assertions about the existence of efficacious or alternative remedies are misleading. How would prosecution by the Director of Public Prosecutions or withdrawal of a license under the Standards Act be an answer to the constitutional questions raised by the Petitioner about the interpretation of Articles 27 and 46 of the Constitution in relation to consumer rights?

46. Equally, under the s.90 of the Consumer Protection Act, 2012, the closest the Kenya Consumers Protection Advisory Committee can get to an alternative remedy is in the following ways:

...

(e) providing advice to consumers on their rights and responsibilities under appropriate laws, and making available to consumers general information affecting the interest of consumers;

(f) creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues, and where appropriate, referring the complaint to the appropriate competent authority and ensuring that action has been taken by the competent authority to whom the complaint has been referred;

(g) working in consultation with the Chief Justice, County governors and other relevant institutions on the establishment of dispute resolution mechanisms; [emphasis]

47. There is no condition precedent in the Act making reference to the Committee a condition precedent to invoking the jurisdiction of this court. I hold that this court is competent to hear and determine the issues raised in the Petition.

Whether the Petitioner has a right to the nutritional, storage directions and contact information sought in the Petition

48. The Petitioner contends that consumers have a right to nutritional information, storage directions and customer service mobile number and email address under Article 46. The 1st Respondent submits that there is no obligation to display the information. As a result, the question for the court's resolution is whether there is a constitutional duty on suppliers to supply the information in contest.

49. In settling the question, this court is beholden under Article 20(3)(a) to develop the law, including in the Food, Drugs and Chemical Substances Act, Cap 254 and the Standards Act, Cap 496, to the extent that these laws do not give effect to consumer rights. Equally, it behooves the court to adopt an interpretation that most favours enforcement of consumer rights. The charge to develop the law through constitutional interpretation is repeated in Article 259(1)(c).

50. Similarly, Article 20(1) and (2) decree that the Bill of Rights *applies to all law* and *binds* all State organs and *all persons*, and that every person is entitled to enjoy such rights to the *greatest extent possible* consistent with the nature of the right or fundamental freedom. Further, Article 21(1) obliges this court to *observe, protect, promote, respect and fulfill* the rights of consumers under Article 46.

51. Notably, the theory of a holistic interpretation of the Constitution mainstreamed by the Supreme Court requires an interpretive approach that takes into account, alongside a consideration of the text and other provisions in question, non-legal phenomenon such as Kenya's historical, economic, social, cultural, and political context: see **In the Matter of the Kenya National Human Rights Commission [2014]eKLR at [26]**

52. The implication to this petition is that this court in resolving the consumer rights question raised must take judicial notice of and remedy the prevalence of non-communicable and nutrition-related diseases including malnourishment and obesity – which are some of the country's most challenging health concerns.

53. It must be noted that the enjoyment of the highest attainable standard of physical and mental health is a right under Article 12(1) of the International Covenant on Economic, Social and Cultural Rights and Article 43(1)(a) of the Constitution. Yet another significant consideration is the fact that under United Nations Sustainable Goal Number 2, Kenya has committed to end all forms of hunger, food insecurity and malnutrition by 2030, making sure all people – especially children – have access to sufficient, *safe* and *nutritious* food all year round.

54. Another interpretational guidepost is Section 3(1) of the Consumer Protection Act, 2012 which stipulates that the Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4) of the Act, including the improvement of consumer awareness and information and encouragement of *responsible* and *informed* consumer choice and behavior.

55. Within this context, Article 46 outlines the rights of consumers of any goods or services, such as the Petitioner in the following terms:

46. Consumer rights

Consumers have the right—

to goods and services of reasonable quality;

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

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

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

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

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

56. A close reading of Article 46(1) discloses at least three different obligations imposed on public and private manufacturers, promoters or marketers of any consumer product or service. First, there is an obligation to provide goods and services of reasonable quality. At the same time there is an obligation to avail to the consumer, any information necessary for the consumer to gain full benefit from any goods or services. Additionally, a manufacturer, promoter or marketer has an obligation to ensure the protection of consumers' health, safety, and economic interests.

57. To implement and promote Article 46(2), Parliament has enacted the Consumer Protection Act, 2012. Section 87 outlines the disclosure obligation of suppliers as follows:

87. Disclosure of information

If a supplier is required to disclose information under this Act, the disclosure shall be clear, comprehensible and in accordance with the standards set under the Standards Act.

If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be understood by the consumer.

58. Though the 1st Respondent submitted that the *information necessary for consumers to gain full benefit from goods and services* is already provided under section 87, I find that this section does not demand any specific kind of information, but merely relates to the quality, clarity, and utility of such information. The section obliges suppliers to provide *clear and comprehensible* information in accordance with the Standards Act. The information must be provided in a form in which is *understandable* to the consumer.

59. The Respondents however correctly observe that Regulation 4 of the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations, 1978 requires food labels to state the brand of trade name, common name of the food, correct declaration of the net contents in weight, volume or number as well as the name and address of the manufacturer, packer or distributor of the food.

60. The Respondents products comply with this Regulation though such compliance was not a point raised in the Petition. The same goes for the Kenya Standard KS EAS 29:200 (Carbonated (Beverages) Soft Drinks – Specification, 2000) prescribed under section 9 of the Standards Act, Cap 496.

61. The specification requires labels to contain the date of manufacture as well as the best before date. The labels should also contain brand of trade name, common name of the food, correct declaration of the net contents in weight, volume or number and as well as the name and address of the manufacturer, packer or distributor of the food.

62. Different from that, the nub of the Petitioner's case is that nutritional information, storage directions and customer service mobile number and email address over and above the mandatory requirements of the Food, Drugs and Chemical Substances Act, Cap 254 and the Standards Act, Cap 496, amount to information necessary for consumers to gain full benefit from beverages under Article 46(1)(b). The omission of this information from the glass bottles in his view is therefore not only a violation of consumer rights under Article 46, but is also discriminatory of the consumers of the glass bottled beverages under Article 27.

63. As submitted by the Petitioner the labels on the plastic beverage bottles contain nutritional, contact and storage information. The Coca Cola brand plastic bottle, as a sample, contains the following nutritional information for each 100 (milliliters) ml of beverage: Energy (180 (kilojoules) kj/ 42 (kilocalories) (kcal); Protein 0 g; Carbohydrate 10.6 (grammes) g; Total fat 0 (grammes) g; Dietary Fibre 0 (grammes) g; Sodium (grammes) g.

64. The Coca Cola brand plastic bottle goes as far as indicating that the 500 ml bottle contains 210 kcal forming 11% of the Guideline Daily Amount. The label also provides the customer service phone number together with email contacts as well as a storage direction – cool and dry place. All this information is omitted from the glass bottles be it for Coca Cola, Krest, Fanta, Sprite and Stoney.

65. Turning to the question of the constitutional necessity of nutritional information on food labels, the World Health Organization (WHO) defines ‘food labeling’ as inclusive of ‘*any written, printed or graphic matter that is present on the label, accompanies the food, or is displayed near the food, including that for the purpose of promoting its sale or disposal*’.

66. In this regard, **Nelene Koen** in ‘**Food and Nutrition Labelling: The Past, Present and The Way Forward**’, a scholarly article published in [2016] 29 South African Journal of Clinical Nutrition 13 notes that:

In general, food labels inform consumers about the composition and nature of products to avoid confusion and protect the consumer against misuse, risk and abuse. Marketing information, including the selling price, brand name and commercial offers, is provided as well as information on the safe storage, preparation and handling of the food product. Information on ingredients, nutrition and the declaration of potential allergens and nutrition and/or health claims, helps consumers to make an informed decision. There has been an emphasis in recent years on food safety and the protection of the health of the consumer as one of the main objectives of food legislation.

67. I have no hesitation in holding that nutritional information contained in food labels, in three ways, - guarantees the rights of consumers under Article 46. It assures them of products of reasonable quality, it provides information necessary for them to gain full benefit from goods and services; and finally, it ensures the protection of consumers’ health, safety, and economic interests.

68. I therefore find and hold that providing information to consumers, on ingredients, nutrition claims and declaration of potential allergens as well as nutrition or health claims, food warnings and labels inform consumption by enabling consumers to make informed decisions. Under Article 46, nutritional information provided on labels should be truthful and must not mislead consumers. No food should be described or presented in a manner that is false, misleading or deceptive. This obligation is replicated in the Consumer Protection Act.

69. I agree with the Petitioner that the Respondents have an obligation to provide consumers with nutritional information on their beverages to enable consumers gain full benefit from the beverages. The consumers most likely to benefit from the nutritional information are those with an interest in health and diet, particularly those with medical conditions or specific dietary needs.

70. Indeed, the 1st Respondent has, as part of its sustainability framework, voluntarily provided the nutritional information claimed in this petition on the food labels attached to their plastic beverage as well as the Dasani water bottle.

71. On the question of storage information, the 1st Respondent callously submitted that it is a matter of local notoriety that sodas are served cold or warm. My view is that information on safe storage, preparation and handling of food products is of critical importance to consumers and must be provided by the suppliers on the food label.

72. I hold that information on safe storage, preparation and handling of food products can assure consumers of food products of reasonable quality, protect their health and safety, and safeguard their economic interests. The Respondents have an obligation to supply consumers with the storage directions. The Respondents as a matter of fact have already made available storage information on the plastic beverage bottles as well as the Dasani brand water bottles.

73. I however find that there is no specific legal obligation to provide an email or phone address to

consumers. The Food, Drugs and Chemical Substances Act, Cap 254 as well as the Standards Act, Cap 496 merely require the name and address of the manufacturer of beverages. The Respondents' glass bottles and crown bottle caps are in compliance as they contain the Respondents' address.

74. Nonetheless, the Respondents have supplied their mobile phone number on the plastic bottles and omitted this from the glass bottles. I find and hold that it is discriminatory to supply customer service mobile numbers and email addresses to a class of consumers while denying the same to a different class of consumers of the same product. Where a supplier opts to avail its customer service mobile number and email address to consumers of a product, it must do so uniformly to all consumers of that product without distinction.

75. In its submissions, the 2nd Respondent's argued that it is not bound by Article 46 because it does not manufacture the beverages in question. It further averred that the undertakings of the Coca Cola Company are not binding on it.

76. The 2nd Respondent however admitted that it is a subsidiary of the Coca Cola Company and the one whose sole mandate is *marketing* and *promoting* the impugned beverages. In this regard, the Consumer Protection Act, 2012 defines "supplier" to mean a person who is in the business of selling, leasing or *trading* in goods or services or is *otherwise in the business of supplying goods or services*, and includes an agent of the supplier and *a person who holds himself out to be a supplier or an agent of the supplier*. I therefore find and hold that as a self-confessed promoter and marketer of the beverages in question the 2nd Respondent is a supplier and owes the burden of the obligations in Article 46 to consumers.

77. At the same time, the Petitioner's claim under Article 35 attempts to further ground his petition on Article 35 lacks merit since there is no evidence that he sought and was denied the information prior to filing the action. It is trite that coercive orders of the court should only be used to enforce the Constitution where a request has been made to the person holding the information and such request has been declined: see the case of **Nairobi Law Monthly Limited v Kenya Electricity Generating Company Ltd [2013]eKLR**

Whether the difference in consumer information contained on the packaging of the plastic and glass bottle beverages is discriminatory

78. Article 27 of the Constitution entitles all persons to equal benefit and protection of the law as well as freedom from discrimination. Article 27(4) forbids any person from discriminating directly or indirectly against another person on any of the ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

79. In this case, plastic *soda* bottles contain nutritional, customer contact and storage information which is missing from the glass bottles of equivalent quantity and brand. The Petitioner contends that the omission of particularly nutritional information from the glass beverage bottles is therefore discriminatory. The 1st Respondent's answer to the claim of discrimination is that the difference in pricing arises from the fact that glass bottles are re-usable while plastic bottles are not re-usable.

80. The 9th edition of Black's Law Dictionary , defines discrimination as follows:

"...the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

81. Equally, in **Andrews v Law Society of British Columbia [1989] 1 SCR 143**, McIntyre J of the Canadian Supreme Court defined discrimination as:

“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society.”

See also **Peter K Waweru v Republic [2006]eKLR.**

82. It is apparent that a practice, policy or law can be discriminatory either as a result of its motive or arising from its effect on the identified class or category. The former would constitute direct discrimination and the latter indirect discrimination.

83. In **Mohamed Fugicha v Methodist Church in Kenya [2016] eKLR** the Court of Appeal held that the Constitution proscribes both direct and indirect discrimination. As a result, a complaint of discrimination requires the court to enquire whether a rule, policy or action that appears neutral and inoffensive on the face nonetheless has a discriminatory effect in its operation.

84. Turning to the facts of this case, it is not disputed that there is a difference in consumer information provided on the plastic bottles from that on the glass bottle. Specifically while the plastic bottles have information on the nutritional content of the Coca Cola, Krest, Fanta, Sprite or Stoney beverages there is no such information provided on the glass bottle. Also missing are email contacts as well as storage directions. The effect of this is that whereas consumers of the beverages in the plastic bottles can readily know and tell the nutritional content of the beverages they are consuming, consumers of the beverages in the glass bottles are denied this benefit.

85. I therefore find and hold that in so far as the Respondents confer the privilege of adequate nutritional information and consumer contact addresses to consumers of the plastic bottled beverages while denying the same privilege to the consumers of glass bottled beverage without reasonable distinction, the same is discriminatory, unconstitutional and unlawful.

86. Having found that the practice is discriminatory, the obligation under Article 24(3) shifts to the Respondents to justify why the same should be held as reasonable and justifiable in an open and democratic society. They have not done this.

87. In the totality of the foregoing, and having analysed the facts and evidence in the Petition and bearing in mind the submissions on the issues for determination and the applicable law, the inevitable conclusion is that the Petitioner has proved his case on the balance of probabilities and must succeed.

Is the Petitioner entitled to any damages?

88. I dispose of this issue shortly.

89. The Petitioner in my view has not laid any basis for damages. The petition was largely a public interest litigation and I would find it odd that the Petitioner seeks to fetch an alleged untoward conduct of the Respondents to claim damages for himself.

Who should bear the costs of this Petition?

90. I have already indicated that in my view, this was largely a public interest case. The Petitioner is largely been successful. I do not however find it suitable that the costs be borne by the Respondents. I will not exercise my discretion in his favour however.

Final Orders and Disposition

91. I must first apologize to the parties for the delay in rendering this decision. The circumstances were simply beyond my control .

. I make the following orders by way of disposal:

A declaration be and is hereby issued that omission of nutritional information and storage directions on Coca Cola, Fanta, Krest, Stoney and Sprite brands glass bottles constitutes a violation of consumer rights under Article 46(1)(a), (b) and (c) of the Constitution

A declaration be and is hereby issued that the Respondents' selective provision of nutritional information, directions on storage, customer care mobile number and email address on the Coca Cola, Fanta, Krest, Stoney and Sprite brands plastic bottles while omitting that information from the corresponding glass bottles amounts to discrimination and unequal treatment of consumers contrary to Article 27(2), (4) and (5) of the Constitution.

A mandatory injunction be and is hereby issued directing the Respondents to provide nutritional information, storage directions and customer care mobile number and email address on all of their Coca Cola, Fanta, Krest, Stoney and Sprite brands glass bottles within six (6) months of the date of delivery of this judgment.

Each party shall bear its own costs of the Petition.

Dated, signed and delivered at Nairobi this 30th day of January, 2018.

J.L.ONGUTO

JUDGE