

CONSUMER RIGHTS AND UNFAIR PRACTICES IN KENYA

THE CONSUMER PROTECTION ACT, 2012



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Consumer rights in Kenya are fundamental rights afforded to consumers provided for under the Bill of Rights in the Constitution of Kenya (2010). Article 46(1) (TCK) provides that consumers have certain rights in respect of goods and services offered by public entities or private persons:-

- 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.

The purpose of the Consumer Protection Act, 2012 (“the Act”) is to promote and advance the social and economic welfare of consumers in Kenya including providing for the protection of the consumer and preventing unfair trade practices in consumer transactions.

WHO IS A CONSUMER?

The term consumer is defined in the Act as meaning:-

- a person to whom particular goods or services are marketed in the ordinary course of the supplier’s business;
- a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act;
- a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods and services; and
- a franchisee in terms of a franchise agreement, to the extent applicable in terms of the Act.

The Act additionally defines the term, consumer agreement as meaning an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment.

THE RIGHTS

The term consumer is defined in the Act as meaning:-

- The right to commence class action or join in such action;
- The right to the protection under the Sale of Goods Act, shall apply with necessary modifications and any provision whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the Sale of Goods Act or any condition or warranty under the Act is void.
- In respect of the amount quoted in an estimate under a consumer agreement, the supplier shall not charge the consumer an amount that exceeds the estimate by more than 10%;

- Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under the Act shall be interpreted to the benefit of the consumer.
- The protection from being charged for any protection under the Act save for where a person discloses the entitlement's existence and direct availability to the consumer and the cost before the consumer agrees to pay the charge.
- Protection against demand of payment by suppliers from making any representation that suggests that a consumer is required to make payment in respect of any unsolicited goods or services;
- No person shall advertise an internet gaming site that is operated contrary to any written law.

WHAT CONSTITUTES AN UNFAIR PRACTICE?

1. False representation

A few of the “representations” that are construed as false, misleading or deceptive representations include the following:-

- That the goods or services have attached thereto sponsorship, performance, characteristics, or qualities, which do not exist.
- That the goods or services are of a particular standard, quality, grade, style or model, when not;
- That the goods have been used to an extent that is materially different from the fact;
- That the goods or services are available for a reason that does not exist;
- That the goods or services have been supplied in accordance with a previous representation, if they have not;
- That the goods or services are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed;
- That the goods or services will be available or can be delivered or performed within a specified time when this is incorrect;
- That a service, part, replacement or repair is needed or advisable, if it is not;
- That a specific price advantage exists, if it does not;
- A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement;
- A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer;

- A representation that misrepresents the purpose of any charge or proposed charge;
- A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers;

2. Unconscionable representation

The Act sets out without limitation, what may be taken into account in determining whether a representation is “unconscionable”:-

- That the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;
- That the price grossly exceeds the price at which similar goods or services are readily available to like consumers;
- That the consumer is unable to receive a substantial benefit from the subject-matter of the representation;
- That there is no reasonable probability of payment of the obligation in full by the consumer;
- That the consumer transaction is excessively one-sided in favor of someone other than the consumer;
- That the terms of the consumer transaction are so adverse to the consumer as to be inequitable;
- That a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or
- That the consumer is being subjected to undue pressure to enter into a consumer transaction.

3. Renegotiation of price

The Act further provides that it is an unfair practice for a person to use his, her or its custody or control of a consumer’s goods to pressure the consumer into renegotiating the terms of a consumer transaction.

REMEDIES

In any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

Where rescission is not possible, a consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both

Each person who engaged in an unfair practice will be liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under Section 16 of the Act

The Act provides that a court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

Should you have any queries or need any clarifications, please do not hesitate to contact Vikram C. Kanji or Ruby Njenga at A.B. Patel & Patel Advocates, Mombasa.



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