REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E051/2026

TONY GACHOKA AND PROFESSOR FREDRICK ONYANGO OGOLA VS SAFARICOM KENYA PLC LIMITED AND COMPETITION AUTHORITY OF KENYA AND 4 OTHERS

JUDGMENT

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E051 OF 2026

CONSOLIDATED

WITH PETITION NOS. E836 AND E831 OF 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA: ARTICLES 1, 2, 3, 10, 19, 20, 22, 35, 94, 95, 159, 162, 165, 201, 232, 201, 258 & 259

AND

IN THE MATTER OF THE ALLEGED ILLEGAL SALE OF THE UNLAWFUL SALE OF GOVERNMENT OF KENYA 15 % SHARES IN SAFARICOM PLC AT A DISCOUNT TO VODACOM GROUP

AND

IN THE MATTER OF THE COMPETITION IN MARKETS

AND

IN THE MATTER OF THE UNDERMINING THE SOVEREIGNTY OF THE PEOPLE OF KENYA

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT, LAWS OF KENYA

AND

IN THE MATTER OF PUBLIC PRIVATE PARTNERSHIP ACT CAP 430, LAWS OF KENYA

-BETWEEN-

TONY GACHOKA ..... 1ST PETITIONER

PROF. FREDRICK ONYANGO OGOLA ..... 2ND PETITIONER

PAUL MAINA MUGO ....3RD PETITIONER

SAMWEL KAHARA MACHARIA ..... 4TH PETITIONER

-VERSUS-

THE CABINET SECRETARY, THE NATIONAL TREASURY AND ECONOMIC PLANNING ..... 1ST RESPONDENT

THE CABINET SECRETARY, INFORMATION, COMMUNICATION AND THE DIGITAL ECONOMY ..... 2ND RESPONDENT

THE COMMUNICATIONS

AUTHORITY OF KENYA ..... 3RD RESPONDENT

THE COMPETITION AUTHOURITY OF KENYA....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

SAFARICOM PLC ..... 6TH RESPONDENT

VODACOM GROUP .....7TH RESPONDENT

VODAFONE KENYA LIMITED .....8TH RESPONDENT

MINISTRY OF THE NATIONAL TREASURY

AND ECONOMIC PLANNING ..... 9TH RESPONDENT

INFORMATION, COMMUNICATION

AND THE DIGITAL ECONOMY ..... 10TH RESPONDENT

THE PRIVATISATION COMMISSION .....11TH RESPONDENT

VODAFONE GROUP PLC ....12TH RESPONDENT

JUDGMENT

Introduction

1. The consolidated Petition challenges the Government's proposal to sell 15% of its shareholding in Safaricom PLC, of over 6 billion shares to foreign-owned and controlled entities, for approximately Kshs. 204.3 billion as outlined in Sessional Paper No. 3 of 2025. The Petitioners contend that the partial divestiture would reduce the people of Kenya's ownership in Safaricom from 35% to a minority 20%, thereby surrendering controlling interest and majority Board representation to foreign corporations over a critical and most profitable national infrastructure.

2. The petitioners allege severe constitutional and statutory violations, arguing that the divestiture bypasses open competitive bidding, lacks qualitative public participation and improperly relies on non-tax revenue-raising mechanisms outside Article 209 of the Constitution. They further argue that the fixed price of KES 34 per share grossly undervalues the asset, compared to its estimated fair value of KES. 70/= to KES. 80/= per share, exposing the public to massive financial loss.

3. Ultimately, the Petition sought to halt the partial divestiture, arguing that privatizing Kenya's primary telecommunications and mobile money ecosystem, threatens national security, data sovereignty, dissipates the intergenerational equity and is against the public interest.

The Consolidated Petitions

4. The lead Petition is the 1st and 2nd Petitioners' amended Petition dated **22nd April 2026** which seeks the following **RELIEFS**: -

> ***(a) An order of mandamus compelling the 1st and 6th Respondents Safaricom PLC to present before this Honourable Court a complete list of all bidders and Transaction Advisors, with full disclosure of the dates of their appointment and the procedure followed in their appointment.***
>
> ***(b) THAT the Court be pleased to order the 1st and 6th Respondents Safaricom Limited to make full disclosure of all***

liabilities, whether actual or contingent, existing as at the date of the Transaction, and to remain solely liable for the same notwithstanding the Transaction.

(c) A declaration that the Government of Kenya's shares in the 6th Respondent constitute strategic national infrastructure and a symbol of national sovereignty and therefore cannot be sold or alienated to a foreign private entity, including the 7th and 8th Respondents.

(d) A declaration that the proposed sale or alienation of the Government of Kenya's shares in Safaricom PLC to the 7th and the 8th Respondents would compromise national security.

(e) A declaration that the Government of Kenya's shares in Safaricom PLC cannot be sold or alienated without meaningful, qualitative, and quantitative public participation.

(f) A declaration that the proposed sale or alienation of the Government of Kenya's shares in Safaricom PLC would violate the constitutional principles of intergenerational and intragenerational equity and sustainable development.

(g) A declaration that the sale or alienation of the Government of Kenya's shares in Safaricom PLC cannot be initiated or concluded without prior approval of Parliament and conclusive public participation in accordance with the law.

(h) A declaration that the 1st Respondent's revenue raising measures outside of Part 3 of the Constitution of Kenya, while relying on Section 74 of the Privatization Act 2025 and Section 87A of the Public Finance Management Act, is unconstitutional.

(i) An order of certiorari quashing any decision made by the 1st Respondent in favor of the 7th and 8th Respondents and any agreement of whatsoever nature entered into between the 1st and 7th Respondents among the 1st, 7th and 8th Respondents.

(j) A Declaration that the Public Procurement and Asset Disposal Act, 2015 is the only law governing the procurement of public goods and services and the disposal of public assets pursuant to Article 227 of the Constitution.

(k) A declaration that the Government of Kenya's shares in Safaricom PLC are a public asset and not a project and therefore cannot be disposed of under the Public Private

Partnerships Act, 2022.

(l) A declaration that the processes leading to the issuance or acceptance of the offer by the 7th and 8th Respondents are unconstitutional for lack of public participation.

(m) A declaration that the proposed sale of the Government of Kenya's shares in Safaricom PLC to Vodacom Group, the 7th and 8th Respondents violates the constitutional principles of equity, accountability, fairness, sustainable development and public participation.

(n) An order directing the 1st Respondent to undertake a comprehensive analysis and meaningful public participation process in relation to the proposed sale and to consider competitive bidding.

(o) An order of prohibition, prohibiting the 1st Respondent from selling or in any way alienating shares owned by the Government of Kenya in the 6th Respondent.

(p) Any other relief that this Honourable Court may deem fit and just to grant.

(q) Costs of this Petition be awarded to the Petitioner.

The Petitioners' Case

5. The consolidated Petition is premised on the grounds on the face thereof and supported by the affidavit of the 1st Petitioner Tony Gachoka sworn on **27th April 2026, in support of the amended Petition.**

6. According to the Petitioners, the National Treasury presented *Sessional Paper No. 3 of 2025,* proposing a divestiture of 15% of the Government of Kenya's (GoK) shareholding in Safaricom PLC which comprised 6,009,814,200 shares at a price of KES 34 per share, totaling Kshs 204.3 billion, plus Kshs 40.2 billion for advance dividend rights purchase.

7. It is deposed that on 3rd December 2025, the 8th Respondent Vodafone Kenya Limited, through a Press Release announced its intention to acquire 15% of the shares held by the Government of Kenya, through the 1st Respondent, Cabinet Secretary for the national Treasury, on behalf of the Kenyan People in the '6th Respondent (Safaricom PLC).

8. Further, that on 4th December 2025, the National Treasury, instead, submitted Sessional Paper No. 3 of 2025, which clearly named Vodacom Group, the 7th Respondent herein as the proposed buyer and not Vodafone Kenya Limited that had announced the intention to acquire the shares in issue.

9. The Petitioners assert that the proposed purchaser was quietly shifted

between these two foreign entities-Vodacom Group and Vodafone Kenya Limited, without any explanation to the public, procedural clarity or explicit authorization by the National Assembly to sell the shares to Vodafone Kenya Limited. They aver that failure to justify the sudden shift raises suspicion as to the true intentions of the 1st Respondent, the Cabinet Secretary, the National Treasury and Economic Planning.

10. The deponent asserted that the Government of Kenya currently owns thirty-five percent (35%) of the shares in the 6th Respondent Safaricom PLC and that the intended sale would result in the Government's ownership drop from 35% to 20%, thereby reducing Board representation to two seats and eliminating veto power over major corporate decisions in Safaricom PLC.

11. It was also averred that the foreign entity's combined controlling stake increases to 55%, amounts to surrendering national influence over Safaricom PLC, a strategic infrastructure.

12. Further, that the objective of the Sessional Paper No. 3 of 2025 as presented to the National Assembly was to submit a detailed proposal for partial divestiture of GoK's shareholding in the 6th Respondent to raise revenue for what is described as an infrastructure development. However, that the Sessional Paper No. 3 of 2025 fails to provide specific details to which projects the generated revenue will be applied.

13. The petitioners further claimed that the Sessional Paper No. 3 of 2025 lacks transparency, that it uses vague terms like 'etc.', leaving the revenue to be raised, open to potential misuse and misapplication. The Petitioners assert that there is noncommitment on ring fencing of these funds.

14. Further depositions are that on 23rd March 2026, this Court (differently constituted – Hon. Justice L.N. Mugambi) issued a conservatory order directing that *status quo* be maintained and referred the file to the Chief Justice to empanel an uneven bench to hear the Petition. That, despite the subsisting conservatory orders, the National Treasury aggressively and hurriedly pushed the proposal through the National Assembly where the proposed sale was debated and the share sale was approved on 31st March 2026 to take effect 1st April 2026 as evidenced by the Hansard Report of 31st March 2026. According to the Petitioners, the approval was given in direct violation of the court order.

15. It was deponed that the 8th Respondent Vodafone Kenya Ltd. is not named in the approved Sessional Paper as the intended purchaser and was therefore not approved by the National Assembly to be the purchaser of the Government's partial divestiture of 15% shares in Safaricom PLC.

16. According to the Petitioners, revenue-raising powers under ***Article 209 of***

the Constitution are restricted to taxation and charges and that therefore, using asset sales as a routine revenue-generating tool, breaches constitutional boundaries under the ***Privatization Act 2025*** and the ***Public Finance Management Act***.

17. It is asserted that ***Section 163 of the Public Procurement and Asset Disposal Act (PPADA)*** mandates that public assets can only be disposed of if they are unserviceable, obsolete, obsolescent, or surplus and that in this case, Safaricom PLC is a highly profitable, viable performing national asset, generating KES 18 to 20 billion annually for the State.

18. According to the Petitioners, the National Treasury proposed placing divestiture proceeds into an "*Infrastructure Fund*" or managed account where the Cabinet Secretary would act as sole signatory, yet ***Article 206 of the Constitution*** requires all public revenue to be deposited into the Consolidated Fund and be allocated through parliamentary appropriation.

19. The Petitioners consider the price of KES 34 per share price to be a severe undervaluation of Safaricom PLC's estimated intrinsic market value of KES 70 to 80 per share, and that therefore, the undervaluation exposes the public to a potential loss of up to KES 250 billion.

20. The Petitioner contended that the 1st Respondent failed to comply with statutory and constitutional standards, and that specifically, the ***Public Procurement and Asset Disposal Act, the Privatization Act,*** and ***Article 10 of the Constitution*** were violated***,*** emphasizing that the approval from the National Assembly could not be relied upon to conclude the partial divestiture because that approval was obtained through fraudulent misrepresentation.

21. The Petitioners further claimed that the legal, financial, tax and banking Transaction Advisors were handpicked by the Government, without open competitive tender advertisements, thereby violating ***Articles 10, 227, and 232 of the Constitution.*** Further, that there were inflated fee notes and corrupt kickbacks benefiting political cartels.

22. The Petitioners assert that Safaricom PLC handles over half of Kenya's telecommunications traffic, M-PESA digital payments, e-commerce and credit lending. They accordingly aver that; the impugned partial divestiture lacks safeguards on data localization or data security for over 30 million Kenyans and that no national security impact assessment was conducted.

23. Additionally, the Petitioners assert that the process lacked qualitative public participation and excluded local retail and institutional investors from purchasing the shares on the open market.

24. The Petitioners' further deposition are that the National Assembly rushed the approval process despite formal warnings and a detailed advisory

memorandum from the Law Society of Kenya (LSK) submitted to the Clerk of the National Assembly, highlighting critical legal flaws of the transaction.

25. The Petitioners state that the intended partial divestiture violates ***Article 227(1) of the Constitution*** by disregarding principles of fairness, equity, transparency, competitiveness and cost-effectiveness; that it improperly relied instead on ***Section 4 of the Public Private Partnerships Act 2022*** and employed unscientific pricing methods to push through a rushed, undervalued sale.

26. The Petitioners contended that by bypassing competitive bidding and public engagement, the intended partial divestiture threatens national sovereignty by handing a controlling stake in critical national infrastructure, and data to a foreign private firm, while placing public funds at severe risk.

27. They reiterated that the 1st Respondent lacked the authority to sell assets that are not obsolete, unserviceable, or surplus, and that the failure to prepare and submit a proper Privatization Programme, listing Safaricom PLC, represents a deliberate lack of transparency, rendering even Sessional Paper No. 3 legally inadequate for failing to outline strategic policies and goals.

28. In addition, the Petitioners contended that since the 1st Respondent possesses no constitutional or statutory mandate to sell profitable public assets merely to raise revenue, the intended partial divestiture is *ultra vires*, null and void.

29. It was further deposed that the legal mess and disorganization in the proposed sale demonstrated the incompetence and improper advice for the opaquely procured Transaction Advisors. They added that it is in the interest of justice that the Petition be found merited and the reliefs sought be granted.

30. The Petitioners also relied on the further affidavit sworn by Tony Gachoka on 15th April 2026 in response to the 1st Respondent's replying affidavit sworn by John Mbadi Ng'ongo.

31. The Petitioners maintained that the National Assembly's approval of the Government of Kenya's sale of a 15% shareholding in Safaricom PLC to Vodacom Group fails to satisfy constitutional requirements for substantive oversight. They averred that the National Assembly's involvement was a perfunctory, formalistic endorsement rather than an effective and accountable check on the Executive. That while the Respondents rely on ***Articles 95 and 201 of the Constitution*** to justify the involvement by the National Assembly, the mere passage of a resolution does not amount to substantive oversight as envisaged by the Constitution.

32. Further, that the failure by the National Assembly to conduct an accountability check before approving the Sessional Paper No. 3 of 2025 was

attributed to a lack of full disclosure specifically, that the 1st respondent withheld key transaction documents like the full Share Purchase Agreement and the Dividend Purchase Agreements, and that therefore, the public participation conducted by the National Assembly, under Article 118 of the Constitution, was procedurally deficient**.**

33. Additionally, the petitioners asserted that the National Assembly failed to independently interrogate the transaction's valuation, its private nature over a competitive market process and the long-term fiscal impact of the dividend prepayment structure.

34. The deponent highlights that the National Assembly deliberated on the divestiture on 31st March 2026, despite the High Court issuing status quo orders on 23rd March 2026, thereby rendering the proceedings by the National Assembly, *sub judice* under ***Standing Order 89***.

35. The Petitioners accused the National Assembly of failing to heed the caution by the Law Society of Kenya in January 2026 against sacrificing a key strategic asset to finance debt-free infrastructure.

36. Ultimately, the deponent reiterated that the partial divestiture lacks evidence of public value, threatens critical national infrastructure, financial inclusion and public revenue, and that it cannot be legitimized by a procedurally defective parliamentary process, rendering the entire transaction unconstitutional and void.

THE 3RD PETITIONER'S PETITION

37. In his Petition dated 10th December 2025, the 3rd Petitioner Paul Maina Mugo seeks the following reliefs: -

> ***(a) A DECLARATION that the proposed sale or disposal of Government shares in Safaricom PLC without compliance with the Constitution is unlawful and unconstitutional.***
>
> ***(b) A permanent injunction restraining the Respondents from disposing of the said shares except in strict compliance with the Constitution and Statute.***
>
> ***(c) An Order compelling disclosure of all documents, approvals, valuations and agreements relating to the proposed transaction.***
>
> ***(d) Any other relief this Court deems fit and just.***

38. The Petition is supported by a supporting affidavit sworn by the 3rd Petitioner on even date.

39. The 3rd Petitioner challenges the proposed or contemplated sale, disposal or transfer of the Government of Kenya's substantial shareholding in Safaricom PLC and states that these government shares constitute a public asset, making their disposal directly tied to public interest and regulatory compliance.

40. The 3rd Petitioner highlights that public reports and media statements indicate an ongoing effort by the respondents to transfer these shares to foreign or affiliated entities. However, that there was no evidence showing that the intended transaction has complied with key constitutional requirements under ***Articles 10, 201, and 227*** including principles of public participation, transparency, accountability, competitive processes and proper parliamentary oversight.

41. The 3rd Petitioner warns that the proposed transaction presents a significant risk of undervaluing the public's shares in Safaricom PLC, potentially leading to loss of billions of shillings in public resources and violating standards of prudent financial management and good governance.

THE 4TH PETITIONER'S CASE

42. The 4th Petitioner Samwel Kahara Macharia filed his Petition dated **9th December 2025** in which he mostly addressed the issue of interim conservatory orders and asked the Court to grant the final reliefs sought in the Petition. The question of conservatory orders is now spent as the court already rendered its decision vide ruling of 9th June, 2026.

AFFIDAVIT BY MR. IRUNGU NYAKERA

43. The Petition was further supported by the affidavit sworn by Irungu Nyakera on 23rd February 2026 in which he deposed on his academic and professional qualifications and stated that he is a Certified Public Accountant (CPA), a former Investment Banker with Citigroup (New York and London) and former Managing Director of Investments at NIC Bank and Equity Bank. He stated that he had previously advised on the 2007 Safaricom IPO and served as Principal Secretary (Planning and Statistics) and Vice-Chairman of the Public Private Partnerships Committee.

44. The deponent asserts that the proposed sale of a 15% stake in Safaricom PLC by the Government of Kenya to Vodacom Group is a de facto and de jure change of control and merger-equivalent acquisition, rather than a routine shares sale.

45. Explaining that Vodacom previously held approximately 40% stake while the Government held 35%, the deponent stated that Vodacom Group would hold approximately 55% and that the Government shareholding would drop to 20% post-transaction.

46. It was his averment that this transaction eliminates government veto power and reduces its Board influence to a minority position. That the transaction also

requires prior statutory competition approvals under Sections 42–46 of the Competition Act, Articles 23–26 of the COMESA Competition Regulations and Section 13 of the EAC Competition Act.

47. The deponent asserted that there is no public evidence of a merger notification, market dominance assessment, cross-border clearance, or public interest analysis, thereby rendering the transaction illegal and unconstitutional.

48. Highlighting Safaricom PLC's strategic role in national infrastructure, it was deposed that the Independent Electoral and Boundaries Commission (IEBC) relied on Safaricom's encrypted VPN network to transmit election results from more than 46,000 polling stations in 2017 and 2022 to the national IEBC tallying centre at Bomas of Kenya.

49. The deponent requested to be joined as an Interested Party to assist the court with expert financial, competition, and Mergers & Acquisitions insights to address price manipulation, control premiums and market foreclosure.

50. He asserted that he had no personal or pecuniary interest other than constitutional compliance and the public interest. He annexed to his affidavit a summary of his expert opinion as evidence in respect of the impugned divestiture.

RESPONSES TO THE PETITIONS

The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents' Response

51. The 1st, 2nd, 4th, 9th, 10th and 11th who are the State Respondents opposed the consolidated Petitions, relying on the three very detailed replying affidavits sworn by the 1st Respondent, Cabinet Secretary, National Treasury and Economic Planning Hon. FCPA John Mbadi Ng'ongo EGH on 26.3.2026, 8.4.2026 and 25.5.2026.

52. The Cabinet Secretary deposes that the Cabinet and the National Assembly approved the sale of the Government's 15% stake in Safaricom PLC to Vodacom Group at an estimated KES 204 billion, receipt of an upfront advance dividend of KES 40 billion and the retention of approximately 20% Government ownership in the company.

53. He states that the purpose of the transaction was to among others, mobilize non-tax revenue for investment in critical national infrastructure; stimulate economic growth, preserve and optimize national investments and reduce reliance on debt.

54. The Cabinet Secretary gives a brief background of the transaction and asserts that on 3 December 2025, Vodacom Group publicly announced its intention to increase its effective shareholding in Safaricom PLC from about 40% to 55% through its subsidiary, Vodafone Kenya Limited.

55. He further deposes that Vodafone Kenya Limited is a private limited liability company duly incorporated in the Republic of Kenya on 3 February 1998 under

Registration Number C.79550.

56. It is averred that the subject divestiture of shares has been undertaken in accordance with **Section 87A of the Public Finance Management Act,** which provision was introduced through Section 74 of the Privatization Act, 2025.

57. Further averments by the Cabinet Secretary are that the National Treasury prepared a comprehensive proposal for the transaction including an independent valuation report and that the proposal was submitted to Cabinet.

58. It is also averred that following Cabinet approval, a proposal for the divestiture together with the relevant explanatory memorandum and supporting documentation was duly submitted to the National Assembly for consideration and approval.

59. Further deposition is that the transaction was approved by the National Assembly after extensive public participation conducted both during the 2025/2026 budget-making process and specifically in relation to the divestiture proposal itself.

60. It was averred that the National Treasury retained Kenya Commercial Bank Capital as its transaction advisor, which latter conducted an independent valuation that informed and guided the final negotiated price of KES 34 per share.

61. Further, that, thereafter, the National Treasury successfully negotiated a price of KES 34 per share, which represents a premium of approximately 23% over the six-month volume weighted average price of KES 27.50 as of 2 December 2025.

62. It is also asserted that the transaction reflects a fair market value and demonstrates prudent financial management in accordance with ***Article 201 (d) of the Constitution***.

63. The Cabinet Secretary averred that **Sessional Paper No. 3 of 2025** on **Partial Divestiture of Safaricom PLC of 4th December 2025** was handled by the Departmental Committee on Finance and National Planning and the Select Committee on Public Debt and Privatization for joint consideration and reporting to the House. That the Joint Committee engaged 78 stakeholder institutions drawn from government agencies, regulatory bodies, professional associations, private sector entities, civil society organizations, labour representatives and industry players.

64. Further, that the Joint Committee also held 32 sittings comprising both in-house deliberations and stakeholder engagements to interrogate the Sessional Paper and review written and oral submissions. Additionally, the deponent avers that the Joint Committee conducted public participation fora across thirty (30) counties to receive views from members of the public on the proposed

divestiture.

65. It was averred that the Joint Committee formed the view that the negotiated price reflects a premium above the historical market trading levels and aligns with subsequent market movements, mitigating concerns regarding potential undervaluation. In addition, it was deposed that the Joint Committee considered public concerns regarding whether alternative strategic investors had been evaluated prior to engaging Vodacom Group as the proposed purchaser.

66. The Cabinet Secretary further states that the Joint Committee undertook public participation including the placement of an advertisement in the daily newspapers on 21 January 2026 inviting submissions from stakeholders and members of the public.

67. The Cabinet Secretary gave a broad overview of the views formed by the Joint Committee, including- that the negotiated price of KES 34 per share reflected a premium above historical market trading levels and aligns with subsequent market movements; that the negotiation with a strategic investor, Vodacom Group, provided transaction certainty and stability in corporate governance, minimizes execution risk, preserves market confidence and avoids potential governance instability that may arise from introducing a new controlling or influencing shareholder; that alternative disposal methods, including a public offering or cross-listing could have introduced additional market volatility, current risks and potential downward pressure on the share price due to increased supply in the market.

68. The deponent further stated that by a resolution passed on Tuesday 31st March 2026, the National Assembly approved the Sessional Paper No. 3 of 2025 on **Partial Divestiture of Safaricom PLC by the Government of Kenya.** He lists some key policy resolutions, including that: -

> ***(1) The effective date for the approval shall be 1 April 2026 or such later date when all regulatory approvals that form condition precedent in paragraph 4.1 of the Share Purchase Agreement shall have been obtained.***
>
> ***(2) Upon obtaining all regulatory approvals, the Cabinet Secretary shall undertake and complete the transaction through the Block Trade Platform of the Nairobi Securities Exchange.***
>
> ***(3) The Government shall receive Kshs. 40.2 billion as upfront payment in lieu of future dividends on the residual 20% shareholding as per the Dividend Purchase Agreement.***
>
> ***(4) Notwithstanding anything contained in the Share Purchase Agreement and the Dividend Purchase Agreement, the proceeds of the divestiture shall be paid into the National Infrastructure Fund***

(5) To safeguard against loss of jobs for existing staff, there shall be no acquisition-related redundancies in Safaricom PLC.

(6) The Cabinet Secretary shall ensure that within 10 years of the divestiture, there shall be no material change to the current shared prosperity business model in Safaricom PLC dealers, agents and other business partners.

69. The Cabinet Secretary further deposed that the key undertakings that were agreed upon between the National Treasury and the investor include, consultation with the Government prior to any expansion outside Kenya; that the company's Chairman shall be a Kenyan citizen at all times; that majority of the company's independent directors shall be Kenyan citizens; the investor's support of the continued operations of Safaricom and M-Pesa Foundations for the benefit of Kenyans and that majority of the Trustees of the Foundations shall be Kenyan citizens, and all funds utilized for projects within Kenya.

70. On matters relating to data protection, telecommunications, financial services and competition, the Cabinet Secretary asserts that these are regulated by competent statutory bodies and relevant regional and international regulators. He contended that the petitioners' allegation that the transaction violates Article 238 of the Constitution for failure to conduct a national security impact assessment is unfounded.

71. The Cabinet Secretary states that Safaricom PLC is a private limited liability company and that the Government therefore does not exercise operational decision-making. Further, that it is desirable for commercial entities including telecommunication companies to operate independently of Government control, in order to promote efficiency, competition, and effective regulatory oversight.

THE 3RD RESPONDENT'S RESPONSE

72. The 3rd Respondent, Communications Authority of Kenya (CAK) filed its replying affidavit sworn on 2nd June 2026 by its Director General/CEO, Mr. David Mugonyi.

73. He deposed that under ***Sections 5 and 24 of the Kenya Information and Communications Act (KIC Act, Cap 411A),*** CAK, the 3rd Respondent regulates the ICT sector, enforces license conditions; promotes fair competition under Section 84Q and 84R of the Act; and supervises licensee compliance under Sections 27 and 83A of the ***KIC*** **Act.**

74. Mr. Mugonyi averred that the 6th Respondent Safaricom PLC holds a Network Facilities Provider Tier 1 License issued by CAK and that under Condition 18 of that License, any material change or transfer in shareholding requires prior notification and written approval from CAK to ensure market stability and regulatory clearance.

75. The deponent asserts that on 4th December 2025, Safaricom PLC sought approval for the share transfer and that upon reviewing KIC Act requirements and license conditions, the 3rd Respondent found that the legal, regulatory and consumer thresholds were met and it issued a Letter of No Objection on 21st January 2026, annexture '**DM-3'**.

76. The deponent asserts that the 3rd Respondent explicitly concluded that the transaction does not breach data sovereignty or impair network and service access. Further, that it did not attach additional data protection conditions because Safaricom PLC remains strictly bound by existing statutory and license obligations regardless of ownership changes being Condition 14 of the Tier 1 License on the duty to maintain data privacy and confidentiality under ***Section 25(3)(cc) of KIC Act*** and ***the Data Protection Act***.

77. The 3rd Respondent asserts that under ***Section 84T of KIC Act***, the Petitioners were required to lodge any regulatory grievances or complaints with the Communications Authority first and subsequently, appeal to the Communications and Multimedia Appeals Tribunal.

78. According to the 3rd Respondent, since the Petitioners by-passed these statutory fora, this Court lacks jurisdiction and should decline the Petition.

79. The deponent additionally deposes that the partial divestiture is governed by Sections 87A and 89A of the Public Finance Management Act (PFMA) Cap 412A as read together with ***Section 74 of the Privatization Act No. 18 of 2025*** and contends that neither the **Public Procurement and Asset Disposal Act (PPADA) Cap 412C** nor the **Public-Private Partnership (PPP) Act (Cap 430)** applies to the disposal of state shares in government-linked corporations.

80. He further deposes that, shares have ascertainable market values and cannot be classified as "surplus, unserviceable, or obsolete assets" under PPADA. That the transaction is a 15% partial divestiture under **Sessional Paper No. 3 of 2025**, not a complete privatization program under Sections 20 to 24 of the **Privatization Act.**

81. On the issue of Public Participation in Parliament, the 3rd Respondent refutes allegations of a lack of public participation, noting that ***Article 118(1)(b) of the Constitution*** mandates public engagement during Parliamentary consideration, not during the drafting of a Sessional Paper. It is asserted that Parliament initiated a 30-day public input period starting December 2025, conducted stakeholder fora in January 2026, published notices in the daily newspapers on 21st January 2026 and held public hearings across thirty (30) counties before compiling a Joint Committee Report in March 2026.

82. According to the 3rd Respondent, the **Sessional Paper No. 3 of 2025** explicitly outlines that proceeds of the sale of the shares are earmarked to

address three critical economic areas being public debt management, fiscal/budgetary imbalances and economic stimulation through infrastructure investment.

83. The 3rd Respondent contends that the Petitioners offered unsubstantiated claims regarding undervaluation, constitutional violations or loss of control without presenting concrete evidence required under **Sections 107** and **109** of the **Evidence Act**.

84. The 3rd Respondent urged this Court to uphold the doctrine of separation of powers and refrain from usurping the constitutional and legal mandates of the Executive, Parliament and regulatory authorities. The deponent prayed that this Court strikes out the Amended Petition with costs.

THE 6TH RESPONDENT'S RESPONSE

85. The 6th Respondent, Safaricom PLC, filed a Replying Affidavit sworn by Wangechi Gichuki, Head of Legal Services, opposing the initial Petition. She also filed a further Replying Affidavit sworn on 28th May 2026 in response to the Amended Petition of 22nd April 2026

86. The deponent stated that the joinder of Vodafone Kenya Limited as the 8th Respondent introduces no new cause of action, as Vodafone Kenya Limited was always the declared purchaser and that it owns a 40% stake in Safaricom PLC.

87. The 6th Respondent rejected allegations of opacity, explaining that the commercial and legal structuring of the transaction was publicly disclosed during initial announcements in 2025 and that Sessional Papers serve as general policy instruments rather than exhaustive transactional documents specifying acquisition vehicles.

88. Responding to the concerns over public participation and financial management, the 6th Respondent stated that the Sessional Paper underwent proper Parliamentary process and public scrutiny as required under ***Articles 10 and 118 of the Constitution***, pointing out that the 2nd Petitioner himself actively participated in Parliament's public engagement process.

89. Further, that revenue-raising is not constitutionally restricted to taxation under ***Article 209 of the Constitution*** which recognizes diverse revenue sources, including investment income, asset disposals and divestitures. That therefore, restricting government asset management strictly to tax measures would create a governance lacuna and paralyze public finance execution.

90. The deponent asserted that ***Sections 20–24 of the Privatisation Act*** do not apply to the impugned partial divestiture because, the partial divestiture does not constitute a full privatization of Safaricom PLC, which remains a publicly listed company. She averred that instead, the transaction represents a rebalancing of the government's existing shareholding on the secondary market

rather than a transfer of ownership of a state corporation. The deponent contended that similarly, the **Public Procurement and Asset Disposal Act (PPADA)** is inapplicable because the transaction involves capital markets activity rather than the procurement or disposal of standard public goods and services.

91. Regarding the alleged shares undervaluation, the 6th Respondent refutes claims that the price of KES 34 per share is arbitrary or unscientific, asserting that pricing for listed securities is determined by market dynamics, investor appetite and regulatory constraints. The deponent emphasized that block transactions naturally reflect commercially negotiated pricing, including premiums and pre-paid dividends and that the Court should not substitute its judgment for market forces without evidence of fraud or illegality.

92. Lastly, the deponent swears that allegations regarding national security and sovereignty threats are alarmist, as Safaricom PLC remains a Kenyan-incorporated entity subject to full regulatory oversight, with shareholding, not equating to a loss of regulatory jurisdiction.

93. The 6th Respondent prayed for the dismissal of the petition with costs.

94. In the **Further Replying Affidavit** sworn on **28th May 2026** in response to the Amended Petition of 22nd April 2026, the 6th Respondent urged dismissal of the amended Petition with costs to the 6th Respondent, in the interest of justice.

95. The deponent outlined the corporate background of Safaricom PLC and detailed the structural continuity of the business amid the proposed share transfer, stating that it originated in 1997 as a subsidiary of Telkom Kenya before Vodafone Group PLC acquired a 40% stake in 2000 and the Government executed a public offering in 2008.

96. It was deposed that Safaricom PLC had grown to cover over 99% of Kenya's population with network connectivity and drives financial inclusion for 84% of the adult population through M-Pesa. That out of the company's total 40,065,428,000 ordinary shares, Vodafone Kenya Limited, the 8th Respondent holds the single largest stake at 40%, while the Government of Kenya holds 35%.

97. The Deponent points out that Vodafone Kenya Limited has been the primary shareholder since 2008 and would simply remain the largest shareholder following the transaction, creating no major shift in the corporate ownership structure. She emphasized that the transaction will not alter Safaricom's underlying operational framework or threaten local employment.

98. Further deposition was that under Parliamentary directives from the Joint Report on **Sessional Paper No. 3 of 2025**, the Cabinet Secretary for the National Treasury is mandated to ensure Safaricom PLC maintains its operational model for a mandatory minimum of 10 years. Therefore, that there would be no

direct job losses at Safaricom PLC and that the livelihoods of thousands of nationwide agents dependent on the existing business model would remain protected.

99. Addressing sovereign cybersecurity and data privacy concerns, the deponent asserted that Safaricom PLC operates within strict regulatory frameworks governing critical national infrastructure; that its systems are recognized as critical infrastructure under the Computer Misuse and Cybercrimes Regulations and that all M-PESA servers have been hosted locally in Kenyan data centres since April 2015.

100. Further, that personal, financial and communication data belonging to over 34 million subscribers was never shared with company shareholders, as data protection is a regulatory mandate rather than an internal corporate or shareholder matter.

101. The deponent asserts that Safaricom PLC safeguards subscriber information by maintaining rigorous technical and organizational controls, including role-based access, cryptography, continuous monitoring and global security certifications such as ISO 27001 and ISO 27701.

102. Further, that compliance was actively enforced by regulatory bodies such as the Office of the Data Protection Commissioner, the Communications Authority of Kenya and the Central Bank of Kenya.

103. Additionally, that Vodafone Kenya Limited is an entity incorporated in Kenya, and that it remains fully bound by Kenyan laws.

104. The deponent reiterates that the transaction presents no illegal data exposure and that it remains a Kenyan-regulated entity.

105. The 6th Respondent urges the Court to dismiss the Amended Petition with costs.

THE 7TH, 8TH AND 12TH RESPONDENTS' RESPONSES

106. The 7th Respondent, Vodacom Group, filed **Grounds of Opposition** dated **25th May 2026**. It described itself as a private commercial entity incorporated in South Africa and a long-standing indirect shareholder in Safaricom PLC.

107. The 8th Respondent, Vodafone Kenya Limited filed its **Grounds of Opposition** dated **14th May 2026** and a Replying Affidavit sworn by its director, Raisibe Morathi on 13th May 2026. It described itself as a private limited liability company incorporated in Kenya on 3 February 1998.

108. The 12th Respondent, **Vodafone Group PLC filed Grounds of Opposition** dated **9th December 2025**. It described itself as a public limited liability company incorporated in the United Kingdom.

109. The 7th, 8th and 12th Respondents opposed the consolidated petitions on

broadly common grounds, albeit with some variations. Their common position is that the purchaser in the subject transaction is the 8th respondent, Vodafone Kenya Limited, a separate and independent legal entity from the 7th and 12th respondents.

110. The 7th Respondent asserted that its status as a parent company of the 8th Respondent does not give rise to liability on its part for the acts or omissions of the subsidiary, a separate and independent legal entity. According to the 7th Respondent, no basis for piercing the corporate veil has been established.

111. The 12th respondent explains that it was initially included as a respondent in Petition E831 of 2025 but was neither named, referred to nor implicated in the amended petition in ***Petition E051 of 2026*** or ***Petition E836 of 2025***. The 12th respondent asserts that it was not a party to the share purchase agreement between the Government of Kenya and the 8th Respondent. It also asserts that it is separated from the 8th Respondent through multiple layers within the corporate holding structure and that there exists no direct legal relationship between them.

112. The 7th, 8th and 12th Respondents all contend that the consolidated petitions do not disclose reasonable causes of action against them. They all stated that the petitions do not meet the constitutional threshold set out in ***Anarita Karimi Njeru v Republic*** They also fault the petitioners for seeking to attach public constitutional liability to private entities.

113. They state that the petitioners have not demonstrated any violation of constitutional rights or any personal prejudice directly attributable to them. They further challenge the merits of the reliefs sought against them.

114. Separately, the 8th Respondent, **Vodafone Kenya Limited** states that it was not a party to the Government's price discovery process and that as a willing buyer, in an arm's-length commercial transaction, it agreed to the negotiated price of KES 34.00 per share.

115. The 8th Respondent substantially adopts the positions taken by the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents on the following matters: that although ***Article 227*** outlines the overarching procurement and asset disposal framework, it is not self-executing; that the transaction was a sale of shares by the Government pursuant to ***section 87A of the PFM Act;*** the transaction is excluded from the public procurement and asset disposal regime, by ***section 4 (2) (d) of the PPD Act***; that there was no change of purchaser; that macro-fiscal resource optimization falls within the executive and fiscal discretion; that the court lacks the mandate to override the agreed share price approved by the National Assembly; that the allegations of threats to national sovereignty and infrastructure security are hollow; that regular supervisory, enforcement, and

data control remain permanently vested with the Kenyan institutions.

116. The 8th Respondent further disputes the petitioner's claim that the transaction violated the Capital Markets (Take-Overs and Mergers) Regulations, 2002. It asserts that the Capital Markets Authority (CMA) duly exercised its statutory discretion and granted an exemption from the mandatory takeover obligation.

SUBMISSIONS

117. The Petition was canvassed by way of written submissions which were orally highlighted in Court.

THE PETITIONERS' SUBMISSIONS

118. The 1st Petitioner's submissions are dated 16th June 2026 in which Counsel isolated the following issues for determination: -

> ***(a) Whether the Government can use Part 3 of the Constitution of Kenya and Section 74 of the Privatization Act to raise revenue as per the objective of sessional Paper No. 3 of 2025;***
>
> ***(b) Whether the proposed sale of Government shares in Safaricom PLC violates the Constitution of Kenya, 2010, particularly Articles 1, 10, 201, 227, 232 and 238;***
>
> ***(c) Whether the impugned transaction complied with the mandatory requirements of the Privatization Act, 2023, the Public Procurement and Asset Disposal Act 2015, and the applicable Capital Markets Regulatory Framework;***
>
> ***(d) Whether the transaction unlawfully undervalued a strategic national asset in violation of constitutional principles governing prudent public finance management and protection of public resources;***
>
> ***(e) Whether the intended transfer of effective majority control over Safaricom PLC undermines Kenya's sovereignty, national security, competition framework and data governance architecture; and***
>
> ***(f) Whether this Honourable Court should intervene and grant reliefs sought in the Amended Petition.***

119. Counsel for the 1st Petitioner, submitted that the transaction, outlined in Sessional Paper No. 3 of 2025 and announced via press releases in December 2025, sought to sell 6,009,814,200 shares valued at KES 34 per share to raise approximately KES 204.3 billion for national infrastructure development and that this sale would reduce state ownership in Safaricom from 35% to 20% while increasing Vodacom's total effective controlling stake to roughly 55%.

120. Counsel for the 1st Petitioner argued that the Executive lacks the power under ***Part 3 of Chapter 12 of the Constitution at Articles 209–214*** to raise state revenue through the sale of public assets. That ***Article 209*** strictly limits national revenue-raising mechanisms to taxation, duties, charges, and public debt, meaning, state assets cannot be liquidated as a substitute for tax revenue.

121. To support the argument that revenue-raising legislation must strictly follow constitutional bounds, the Petitioner relied on ***National Assembly & another v. Okoiti Omtatah & 55 others [2024] KECA 876 (KLR)*** and further applied the constitutional interpretation principles established by the Supreme Court in ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others (Advisory Opinion No. 2 of 2013)***, arguing that public asset disposals are exclusively governed by ***Article 227 of the Constitution***.

122. Counsel for the 1st Petitioner argued further that under **Article 227 of the Constitution,** asset disposals must be fair, transparent, and competitive. They cited the case of ***Republic v Public Procurement Administrative Review Board ex parte Syner-Chemie Ltd [2016] eKLR*** in support of this argument.

123. It was submitted that the impugned transaction violates several fundamental constitutional provisions, including ***Articles 1, 10, 35, 73, 75, 201, 227, 232, and 238***. They cited the case of ***Doctors for Life International v Speaker of the National Assembly [2006] ZACC 11*** on constitutional supremacy, and emphasized that alienating a strategic national asset undermines the sovereign power of the people guaranteed under ***Article 1***. It was submitted that the partial divestiture process failed to facilitate meaningful public participation required by ***Article 10,*** as 17 counties were excluded from parliamentary sessions.

124. Drawing on the Guiding Principles on public participation laid down by the Supreme Court in ***British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 5 Others [2019] eKLR***, ***Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR***, and ***Mui Coal Basin Local Community v Permanent Secretary Ministry of Energy and 17 others [2016] eKLR***, the 1st Petitioner's Counsel argued that the alleged public engagement was illusory and selective.

125. Additionally, it was submitted that withholding key valuation and security details violated the right to information under ***Article 35 of the Constitution.*** They relied on ***Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR.***

126. In their view, withholding key valuation and security details breaches the fiduciary and integrity duties under ***Articles 73 and 75*** as well as public finance

principles under ***Article 201.*** They relied on ***Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR*** and ***Institute of Social Accountability & Another v National Assembly & 4 Others [2015] eKLR***.

127. Counsel further argued that the deal breached both the ***Privatization Act 2025*** and the ***Public Procurement and Asset Disposal Act (PPADA), 2015***.

128. It was submitted that under ***Sections 19 to 25 of the Privatization Act 2025***, the Government was required to formulate and submit a formal Privatization Programme to the National Assembly, which was omitted. Further, that mandatory independent valuations under ***Section 35 (2) (e) of the Privatization Act*** were bypassed.

129. Relying on **Section 163 of PPADA 2015**, Counsel submitted that state asset disposal was restricted to assets that are unserviceable, obsolete, obsolescent, or surplus, conditions that do not apply to a highly profitable entity like Safaricom. It was also submitted that the transaction advisors were handpicked without competitive tendering, in violation of ***Section 7(2)(c) of PPADA***.

130. Relying on the financial analysis provided by Mr. Irungu Nyakera, Counsel for the 1st Petitioner submitted that the KES 34 per share price severely undervalued the asset compared to a weighted fair value of Kshs. 57.90 per share, which will cause a public loss of at least KES 143.7 billion, a loss that would expand to KES 277.5 billion if M-PESA was valued independently as a fintech platform.

131. Applying valuation standards acknowledged in ***Prolink Broker Network Inc. v. Jaitley, 2018 ONSC 7577*** and expert testimony principles set in ***Mohamed Ali Baadi & Others v Attorney General & 11 Others***, Counsel for the 1st Petitioner argued that relying on a 6-month Volume Weighted Average Price (VWAP) failed to capture intrinsic enterprise value, control premiums, or M-PESA's transaction volume which equalled 2.3 times Kenya's GDP.

132. It was submitted that public resource management must adhere to trustee obligations. Reliance was placed on **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General.**

133. Counsel for the 1st Petitioner submitted that surrendering majority control to foreign entities threatens national security and data sovereignty under ***Article 238 of the Constitution*** and ***Section 22(2)(d) of the Privatization Act, 2025,*** because no National Security Impact Assessment was performed. It was their position that Safaricom hosts critical systems including IEBC election result transmission, government payment platforms such as the Hustler Fund, Inua Jamii, NHIF and personal data for over 35 million citizens.

134. Counsel highlighted the risks to democratic integrity, privacy under

Article 31 and data sovereignty. He cited the cases of Coalition ***for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR, Schrems v Data Protection Commissioner (Case C-362/14), Digital Rights Ireland Ltd (C-293/12),*** and ***New National Party v Government of the Republic of South Africa 1999 (3) SA 191 (CC)*** in support of the arguments.

135. Further submissions was that, the Capital Markets Authority's decision to exempt the acquirers from making a mandatory takeover offer under ***Regulation 3*** of the ***Capital Markets (Take-Overs and Mergers) Regulations, 2002***, deprived public shareholders of a control premium, constituting an illegal and irrational exercise of administrative power. The case of ***Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300*** was cited in support of this proposition.

THE PETITIONERS' ORAL HIGHLIGHTS

136. Hon. Dr. Kalonzo Musyoka Senior Counsel, representing the 1st Petitioner, acknowledged in their oral highlights that the Court of Appeal had since set aside the conservatory orders granted in this matter and emphasized that the Court of Appeal explicitly preserved this Court's mandate to hear the parties and render a decision in the interest of Kenyans. He argued that proceeding with the hearing and determination of the petition was vital, to prevent the matter from becoming a mere academic exercise, raising concerns over the proposed transaction involving the sale of over six billion shares.

137. Dr. Kalonzo, SC submitted that the impugned sale would reduce the Kenyan Government's shareholding from 35% to 20%, stripping the State of its Board representation, rendering it a minority shareholder and allowing the Respondents, specifically the Vodacom Group, to create a foreign-owned monopoly that jeopardizes local citizens and small-scale traders like *Mama Mboga*.

138. Senior Counsel challenged the validity and lawfulness of the privatization process on several legal, procedural and constitutional grounds. Relying on an expert opinion by Mr. Nyakera, he submitted that the shares were undervalued and that the transaction advisors were irregularly procured without competitive bidding.

139. He submitted further that treating the expected sale proceeds as revenue violates ***Articles 209 through 214 of the Constitution*** and pointed out that statutory breaches included violation of ***Section 22(2) of the Privatization Act***, the Cabinet Secretary's failure to submit a privatization program to the National Assembly and the total absence of mandatory public participation.

140. Senior Counsel highlighted the failure to consider national security

interests as required by ***Section 22(2)(d) of the Privatization Act*** and cautioned that telecom infrastructure is critical for the transmission of election results in the upcoming election year and addressing broader population safety concerns.

141. Counsel Lempaa, appearing alongside Senior Counsel Dr. Kalonzo Musyoka for the 1st Petitioner highlighted that Safaricom, a highly profitable, strategic sovereign asset, was severely undervalued by the state in a rushed divestiture shrouded in secrecy. He argued that while the shares were valued at KES 34, Mr. Nyakera's expert valuation placed the true price at KES 57 per share, representing a potential national loss of over KES. 143 billion. He argued that during the period that the conservatory orders were in place, the Government of Kenya received a dividend of over KES 6 billion.

142. Counsel argued further that the proposed deal attempting to transfer a 15% state divestiture to a shadowy foreign entity introduced via a newspaper advert rather than a formal sessional paper, was contrary to advice from the Law Society of Kenya.

143. Counsel highlighted that using divestiture to raise state revenue was in contravention of ***Article 209 of the Constitutio***n, the constitutional principles of public finance under ***Article 210*** and the national values and principles under ***Article 10.***

144. He argued that the transaction breaches multiple statutory frameworks, including the ***Privatization Act 2025***, the ***Capital Markets Act***, and the ***Public Procurement and Asset Disposal Act***. Counsel argued further that the mandatory public participation was not conducted in 17 counties despite M-Pesa's presence across the country.

145. He emphasized that profitable national assets should not be liquidated and urged the court to consider that if equity is to be floated, it should be structured through a secondary IPO on the Nairobi Securities Exchange (NSE) so that future generations of Kenyans have the opportunity to acquire ownership.

146. Mr. Naku appearing for the 1st Petitioner alongside Dr. Kalonzo SC and Mr Lempaa submitted, reiterating that Safaricom PLC holds very sensitive data of the Petitioners and 50 million Kenyans and that data was tied to shares and is protected under ***Article 31of the Constitution***.

147. Counsel representing the 1st Petitioner submitted that the petitioners, as public-spirited litigants bringing a matter of genuine public interest without pursuing narrow political goals, should not be burdened with costs or penalized for issues of joinder or misjoinder. They argued that Safaricom is a strategic national asset originally funded through the historic sale of Kenya Posts and

Telecommunications and that the procurement of KCB Investment Limited and the Transaction Advisors violated **Article 232 of the Constitution,** while the Cabinet Secretary actively misled Parliament in his Sessional Paper No. 3 of 2025 regarding the intended purchaser.

148. Counsel for the Petitioners contended that the Respondents failed to rebut the financial analysis of Mr. Nyakera, having declined to cross-examine him, and that the Respondents misled the Court of Appeal on the evidence of Mr. Nyakera.

149. Drawing on comparative jurisprudence outlined in their submissions, Counsel rejected the Attorney General's recharacterization of the deal as being purely statutory, maintaining that raising revenue through the divestiture of such a critical asset must comply with the Constitution.

150. The 2nd and 3rd Petitioners did not file any submissions.

THE 4TH PETITIONER'S SUBMISSIONS

151. The **4th Petitioner Mr. Samwel Kahara Macharia** made oral submissions and complained to this Court on 23rd June 2026, that he was never served with relevant documents in the Court of Appeal.

152. He submitted that Safaricom is the country's heritage and that if sold, the country would never get it again. He supported the amended Petition and urged the Court to consider the interests of the 50 million Kenyans, arguing that he represented the interests of all Kenyans.

THE RESPONDENTS' SUBMISSIONS

The 1st, 2nd, 4th, 5th, 9th, 10th and 11th (State) Respondents' Submissions

153. The 1st, 2nd, 4th, 9th, 10th and 11th Respondents filed written submissions dated 24.6.2026. These respondents were represented by Senior Counsel John Ohaga leading Litigation Counsel Mr. Marwa during the oral highlighting of submissions.

154. The 1st, 2nd, 4th, 9th, 10th and 11th Respondents in their introductory remarks acknowledged that without a doubt, Safaricom is a major Kenyan company; that M-PESA is deeply embedded in the economy; that Government shares in a listed company are a public investment and must be dealt with lawfully. They however argued that constitutional seriousness is not the same as constitutional invalidity.

155. They submitted that the Petitioners have built their case on the wrong legal foundation, by inviting this Court to treat a specific statutory share-sale route as if it were taxation, procurement, a PPP concession, a general privatization programme, a land transaction, a national security takeover and a competition merger all at once. This, they contended, is not constitutional

analysis but a statutory overreach dressed as public interest.

156. The 1st, 2nd, 4th, 9th, 10th and 11th Respondents reiterate the contents of their responses to the petitions and state that Parliament enacted a specific mechanism for the sale of Government shares in a government-linked corporation via section 87A of the Public Finance Management Act.

157. That Parliament expressly excluded such sales from the general machinery of the Privatization Act by section 4(c) of that Act and that the Petitioners cannot ignore the special route Parliament created and complain that the Respondents did not follow the general route which Parliament deliberately excluded.

158. They accused the petitioners of abandoning their original petition and introducing a different case in the amended petition, after it became clear that their original complaint was that the Respondents had not followed the route prescribed by Parliament, now that Parliamentary approval had been demonstrated.

159. According to the 1st, 2nd, 4th, 9th, 10th and 11th Respondents, the Petition also fails on the evidence relied on. They assert that they have placed before this Court the Cabinet approval, the Sessional Paper, the National Assembly approval, the public participation record, the transaction adviser's valuation, public announcements, regulatory no-objections and the continuing statutory gates responsible for approving a transaction of this nature.

160. They maintain that the Petitioners' allegations in respect of the divestiture are grounded on suspicion and conjecture.

161. They deny the Petitioners' allegations that the valuation is an afterthought, that Parliament must have been misled, that advisers must have been handpicked corruptly, that regulators must have been bypassed, or that foreign majority shareholding must mean loss of sovereignty.

162. In the view of the 1st, 2nd, 4th, 9th, 10th and 11th Respondents, serious constitutional relief cannot be predicated on conjecture, however loudly stated.

They assert that it is not the function of constitutional adjudication of this Court to invalidate a Cabinet-approved, Parliament-approved, regulator-gated, listed-company transaction on the basis of an alternative economic view about whether Government should hold or monetize a minority stake.

163. They maintained that the Court's role is to police legality, rationality and constitutional safeguards; not to fix share prices, choose purchasers, write fiscal policy, or substitute its preference for the judgment of the Executive, Parliament and specialist regulators.

164. It was submitted that that as at the time of valuation in December 2025, the share price was at a premium and that had the petitioners not interfered

with the transaction, it would have been completed 6 months prior.

165. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents' Counsel submitted that the 8th respondent is a Kenyan company subject to Kenyan law. They pointed out that Kenyan law permits foreign shareholding.

166. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents identified the following key issues for determination and submitted on the same:

> ***(i) What is the correct constitutional and statutory framework governing the sale of Government Shares in Safaricom PLC?***
>
> ***(ii) Whether the National Treasury had constitutional and statutory authority to mobilize non-tax revenue by disposing of a Government Investment***
>
> ***(iii) Whether the transaction complied with Cabinet Approval, Parliamentary approval, public participation, transparency and accountability requirements***
>
> ***(iv) Whether the petitioners have proved under valuation, illegality in valuation or breach of prudent public finance***
>
> ***(v) Whether the petitioners have proved breach of Article 3, Article 65, Article 227, Article 232, Article 238, data sovereignty, national security or competition law***
>
> ***(vi) Whether the reliefs sought, including declarations, mandamus and permanent restraints, are available***
>
> ***(vii) costs***
>
> ***(i) on the correct constitutional and statutory framework governing the sale of Government Shares in Safaricom PLC***

(i) on the correct constitutional and statutory framework governing the sale of Government Shares in Safaricom PLC

167. The 1st, 2nd, 4th, 9th, 10th and 11th Respondents submitted that by inviting the court to treat a specific statutory share-sale route as if it were taxation, procurement, a Public Private Partnership concession, a general privatization programme, a land transaction and a national security takeover, then the amended petition is anchored on the wrong legal foundation. They faulted the petitioners for ignoring that the law provides for special route for the sale of shares by Government, under **section 87A** of the **Public Finance Management Act**.

168. They highlighted that Parliament expressly excluded such sale from the **Privatization Act** under **section 4(c) of the Act**. They submitted that the Petitioners' argument that there was no privatization programme was baseless because the privatization Act was inapplicable. They also contended that the

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checklist that the petitioners say was ignored is pegged upon the criteria under **section 22 (2) of the Privatization Act** that is excluded.

169. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that the statutory question is not whether Safaricom PLC was first listed in a privatization programme but whether Cabinet and the National Assembly approved the **section 87A** proposal.

170. They relied on **Transparency International Kenya & 3 others v Attorney General & 3 others [2026] KEHC 2485 (KLR)**, where the High Court is said to have upheld the constitutionality of the **Privatization Act, 2025** and held that the statute contains adequate checks and balances.

171. They also relied on **Matindi v National Assembly & 2 others [2026] KEHC 2484 (KLR),** to argue that the court rejected the claim that broad **Article 10** values are self-executing legal prohibitions capable of invalidating particular instruments such as the privatization of national government assets automatically invalidate privatization policy choices.

172. Further reliance was placed on **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR** and **Dalton v Specter, 511 U.S. 462 (1994)** to argue that even if the Petitioners could identify some departure from the general privatization machinery, which, for the reasons given, they cannot, a statutory irregularity does not, without more, become a constitutional violation.

173. They maintained that not every breach of the law must be brought before the High Court as a constitutional issue, and that where a statute supplies its own remedy, the Court should exercise restraint and allow that mechanism to operate, in line with the doctrine of constitutional avoidance, as endorsed by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**, arguing that in this case, alleged statutory violations cannot be elevated to constitutional breaches to warrant invalidating the divestiture.

174. Drawing from Comparative jurisdictions, they relied on **FCC v Beach Communications, Inc. 508 U.S. 307 (1993),** a challenge to Congress's decision to regulate some categories of cable television facility while leaving comparable ones unregulated, in which the United States Supreme Court is said to have held that, in areas of social and economic policy, legislative choices carry a strong presumption of validity, and that 'legislative choice is not subject to courtroom factfinding'. The therefore argued that courts should be slow to re-engineer economic line drawing where the Legislature has deliberately created a specific route, and in this case, Section 87A is such a route.

175. They also cited **Vermont Yankee Nuclear Power Corp. v NRDC, 435 U.S. 519 (1978),** where they stated that a reviewing court had set aside the licensing of a nuclear power plant for following procedures the governing statute did not require, and that the Court warned that reviewing courts are 'generally not free to impose' procedures not required by the governing statute. They argued that Kenya's Constitution supplies its own controlling standards under Articles 10, 35, 118, 201 and 227; but that those standards do not entitle the Petitioners to rewrite section 87A into a full Privatization Programme, a PPADA disposal process, or a judicially designed disclosure protocol.

176. On the Petitioners' reliance on the **United States Property Clause**, it was submitted that it is equally unhelpful. They cited **Kleppe v New Mexico, 426 U.S. 529 (1976),** a challenge by a State to Congress's authority to manage wild animals on federal public land, in which the US Supreme Court is said to have described Congress' power over public property as 'complete power' over property entrusted to it. They argued that a comparative lesson is not that Kenya must contain identical constitutional wording; it is that, once Parliament enacts a lawful statutory route for disposal of a public investment, the court applies that route rather than importing a narrower one from another statutory regime.

177. Further relying on **Dalton v Specter, 511 U.S. 462 (1994),** which arose from a challenge to the closure of a naval shipyard on the footing that officials had not followed the governing statute, it was submitted that this case is a useful caution against constitutionalising every alleged statutory disagreement. The Court is said to have drawn a clear distinction between a claim that an official exceeded statutory authority and a true constitutional claim.

178. They submitted that in the present case, even if the Petitioners disagreed with some implementation step, they must prove a constitutional breach and not convert every complaint about advisers, valuation, timing, or disclosure into constitutional invalidity.

179. They impugned the petitioners' argument that **Article 227** of the Constitution and **section 163 of the Public Procurement and Asset Disposal Act** allow disposal only of assets that are unserviceable, obsolete, obsolescent or surplus. They submitted that **Section 163** of the PPADA is a disposal committee provision for ordinary procurement-asset disposal, and not for a sale of Government shares in a listed government-linked corporation.

180. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argued that **Section 4(2)(d) of the PPADA** excludes the acquisition and sale of shares or securities and investments such as shares purchased by public entities. They

added that **Section 4(2)(e)** also excludes transactions governed by the **Public Private Partnership Act, 2021.**

181. They relied on **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR** and submitted that in the cited case, the Court of Appeal treated **Article 227** and the implementing legislation as a unified framework.

182. They maintained that due process was followed and reiterated that the petitioners' reply to the Respondent's evidence is based on suspicion and conjecture, on which serious constitutional relief cannot be predicted.

183. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argued that **Part III of the Constitution** does not prohibit disposal of Government investments as claimed by the petitioners. They further submitted that **Articles 209 to 214 of the Constitution** do not prohibit the State from realising value from an investment. They argued that the petitioners' interpretation of the Constitution is not purposive and that relying on such an interpretation would make section **87A of the Public Finance Management Act** meaningless because, it would mean that the Government could never dispose of minority shares in a listed company unless the Constitution separately listed *"sale of shares"* as a revenue head.

184. They also argued that the petitioner's reliance on **Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others [2024] KESC 63 (KLR)** in support of their submission is misplaced. They relied on the same decision to assert that broad constitutional values and principles are not to be treated as dictating specific actions that ought to be taken, rather as guiding frameworks and optimizing commands. They also relied on **Catalyst Paper Corp. v North Cowichan (District), 2012 SCC 2** where the Supreme Court of Canada is said to have held that elected bodies making fiscal decisions may legitimately weigh broad social, economic and political factors.

185. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents further relied on **Reference re Canada Assistance Plan (B.C.), [1991] 2 SCR 525**, to argue that the court should not substitute its own view of whether the state should hold or monetise a minority investment and **Lincoln v Vigil, 508 U.S. 182 (1993)**, that resource allocation involves a complicated balancing of factors within the public authority's expertise and that the agency is far better equipped than the courts to order priorities.

On whether there was change or confusion in the purchaser

186. On the Petitioner's contention that the purchaser moved mysteriously from Vodacom Group to Vodafone Kenya Limited, and that the National Assembly approved one buyer while another entity is now presented as purchaser, the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that this assertion was the result of a deliberate conflation by the Petitioners of commercial group description with legal acquiring entity.

187. They submitted that the evidence is that Vodafone Kenya Limited is the Kenyan incorporated company which holds the existing approximately 40% shareholding in Safaricom and is the legal acquiring entity, while Vodacom Group is the broader strategic investor and controlling shareholder in that structure.

188. further submission was that the Sessional Paper and public notices made clear that Vodafone Kenya Limited's shareholding would increase from about 40% to about 55% and denied that there was bait-and-switch. They maintained that there was a group transaction involving an existing strategic investor through its Kenyan vehicle.

189. On the Petitioner's allegations that the divestiture would result in the foreign-control of Safaricom PLC, it was submitted that Vodafone Kenya Limited is incorporated in Kenya, is a Kenyan taxpayer, and is subject to Kenyan law, whose shareholding does not exempt Safaricom from the Communications Authority, the Central Bank, the Competition Authority, the Capital Markets Authority, the Office of the Data Protection Commissioner, or any other Kenyan regulator. Further, that the identity of the shareholder does not, in any event, dissolve the law of Kenya.

(ii) On Whether the National Treasury had constitutional and statutory authority to mobilize non-tax revenue by disposing of a Government Investment

190. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that **Part III of the Constitution** does not prohibit disposal of Government investments on the Petitioners' arguments that Articles 209 to 214 exhaust the ways in which the National Government may raise revenue; that sale of shares is not taxation or a charge under Article 209; and that Government therefore cannot sell a public asset in order to raise revenue, it was submitted that that argument is superficially attractive but legally wrong.

191. They argued that Articles 209 to 214 regulate taxation, charges, borrowing, loan guarantees and public debt and that these Articles do not say that the State may never realise value from an investment. They added that Article 209 is, a provision about the power to impose taxes and charges, not a

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closed list of permissible Government receipts.

192. It was argued that a sale of shares is none of those prescriptions under Article 209 because it not an exercise of taxing power, not the imposition of a charge but the conversion of one public asset, a minority equity stake into another form of public value, namely proceeds to be applied through the constitutional public finance framework.

193. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argued further that the fact that the proceeds constitute revenue once received does not mean the transaction is a "tax" which must be located in Article 209. They submitted that the the Constitution does not require every lawful source of Government receipts to be listed in Article 209, adding that Article 206 which establishes the Consolidated Fund recognises that money may be "raised or received by or on behalf of the national government" and it then directs how that money is to be dealt with.

194. They argued that the constitutional text thus contemplates, in terms, money "received" by the national government otherwise than through taxation, and provides for its handling, including payment into a public fund established for a specific purpose, in this case, the National Infrastructure Fund. They submitted that the Public Finance Management Act gives institutional effect to that framework.

195. They submitted further that Sections 11 and 12 mandate the National Treasury to formulate macro-economic and financial policies, manage public finances, mobilise resources and promote development while Section 87A specifically authorises the sale of Government shares in a government-linked corporation. They therefore argued that the Petitioners' construction would make section 87A of the Public Finance Management Act meaningless.

196. According to the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents, the mobilisation of non-tax revenue by the orderly disposal of a Government investment falls squarely within that statutory mandate and that it is not a constitutional irregularity requiring a separate taxing power. They faulted the Petitioners' reliance on **Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others [2024] KESC 63 (KLR)** as that case concerned the Finance Act, 2023 and the constitutional process for revenue-raising legislation and did not hold that the State is constitutionally disabled from selling an investment under a statute specifically authorising such a sale.

197. They maintain that the Petitioners' argument is not a purposive interpretation of the Constitution but a disabling one, and if accepted by this Court, would mean that Government could never rationalise its investment

portfolio, never dispose of minority shares in a listed company, never monetise an asset for development, and never alter its public investment strategy unless the Constitution separately listed “sale of shares” as a revenue head, thereby freezing public finance policy in perpetuity.

198. They relied on the Canadian public-finance jurisprudence in support of their distinction, citing **Catalyst Paper Corp. v North Cowichan (District), 2012 SCC 2,** wherein a challenge to a municipal property-tax by law for bearing unreasonably on heavy industry, the Supreme Court of Canada is said to have held that elected bodies making fiscal decisions may legitimately weigh broad social, economic and political factors.

199. In this case, it was argued that the National Treasury and the National Assembly weighed dividends, infrastructure financing, fiscal space, debt pressure, market timing, strategic-investor continuity, and regulatory safeguards. Further reliance was placed on **Reference re Canada Assistance Plan (B.C.), [1991] 2 SCR 525**, which concerned the federal government’s decision to limit the growth of cost-sharing payments to the provinces, and that it recognises that courts may answer legal questions about fiscal measures, but they do not become fiscal supervisors of legislative or executive choices.

200. Further reliance was placed on **Lincoln v Vigil, 508 U.S. 182 (1993),** where an agency is said to have discontinued a regional health programme funded from a lump-sum appropriation and redirected the money, the US Supreme Court is said to have observed that resource allocation involves a ‘complicated balancing’ of factors peculiarly within the public authority’s expertise, and that the agency is ‘far better equipped than the courts’ to order priorities.

201. Applying the above persuasive decisions to this case, it was argued that the National Treasury’s decision to convert part of a listed equity stake into financing for public infrastructure and fiscal stability should not be interfered with by this Court and that court reviewing high fiscal policy should police legality, rationality and constitutional safeguards, not replace the responsible institutions’ public-finance judgment with the Petitioners’ preferred portfolio strategy.

(iii) On the issue of Cabinet Approval, Parliamentary Approval, Public Participation, Transparency and Accountability

202. On the Petitioners assertions that Parliament’s approval of 31 March 2026 was formalistic, misinformed, fraudulent, and in breach of the status quo order of 23 March 2026, it was submitted that none of those allegations are made out for the reasons first, that:- the status quo order of 23 March 2026 did not prohibit Parliament from debating the Sessional Paper; that this Court later

accepted that the order did not injunct Parliament from discharging its constitutional role and that in any event, a court order said to restrain Parliament from exercising its legislative or oversight function must be clear, express and unambiguous, which order was not.

203. Secondly, they submitted that the allegation that the National Assembly approval was procured by fraudulent misrepresentation is pleaded without the necessary particulars, that fraud must be specifically pleaded and strictly proved, not to be inferred from disagreement. It was submitted that the Petitioners had not identified the exact false representation, the person who made it, the document in which it appears, the manner in which the House was deceived, or the evidence that Members relied on that misrepresentation rather than on the committee report, Sessional Paper, public participation record and debate.

204. Thirdly, that the evidence shows that Parliament acted through the constitutional machinery entrusted to it, that the proposal was submitted to the National Assembly under section 87A; it was considered by the relevant committees; public participation was undertaken; the House debated the matter; and the motion was put and carried. Therefore, that whereas a court may review legality, but it should not treat the considered resolution of the people's representatives as a nullity merely because the Petitioners prefer the dissenting views. Reliance was placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** on separation of powers where the Court of Appeal is said to have explained the institutional point applicable here that: -

> ***"There must be judicial, legislative and executive deference to the repository of the function … [separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent."***

205. Paragraphs 49, 55 to 56 of the above case were cited in support of the submission inter alia, that this Court should slow to interfere with a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure, and intervening only upon "a high threshold".

206. Further reliance was placed on **Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40**, to argue that whereas the Constitution permits judicial review of legislative action for constitutional compliance, but that those powers must be exercised with due regard to

institutional boundaries. They maintained that the Petitioners' Standing Order and sub judice point cannot carry the Petition.

207. Responding to the petitioners' allegations that public participation did not take place or meet the constitutional threshold, it was submitted that public participation was undertaken and satisfied the reasonableness standard.

208. They submitted that public participation was undertaken and satisfied the reasonableness standard. They relied on **British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others [2019] KESC 15 (KLR)** on the governing test of reasonableness for public participation. They also cited the case of **Robert N. Gakuru & others v Governor, Kiambu County & 3 others [2014] eKLR** to argue that what matters is that members of the public and interested parties are afforded a reasonable opportunity to know about the issue and to have an adequate say. Further reliance was placed on **Mui Coal Basin Local Community v Permanent Secretary, Ministry of Energy & 17 others [2015] eKLR** in their submission that reasonable public participation requires that views must be received and considered in good faith but that it does not require the decision-maker to accept those views as dispositive.

209. They further relied on **Transparency International Kenya & 3 others v Attorney General & 3 others [supra]** to argue that the Constitution does not require every county to host a physical forum in every national financial matter. They argued that participation is not plebiscitary government, but a constitutional method of informing representative and executive decision-making. They maintained that in this case, the evidence shows that the process was extensive, the transaction was disclosed in the budget making process; the National Treasury presented the Sessional Paper; a newspaper advertisement invited submissions; committee processes were undertaken; the record refers to engagement with seventy-eight stakeholder institutions, fora in more than thirty 20 counties, and thirty-two sittings addressing valuation, employment, governance, competition, consumer protection, data sovereignty and national security.

210. On the Petitioners' complaint that some counties were not physically visited, it was submitted that the Constitution does not require every county to host a physical forum in every national financial matter. They relied on **Transparency International Kenya [2026] KEHC 2485.**

211. On the Petitioner's argument that the Law Society's memorandum was not adopted, it was submitted that the Law Society's concern that the "goose that lays the golden egg" should not be sacrificed was a view which Parliament was entitled to consider and disagree. They argued that public participation

means the public has an adequate say, not that the loudest or most sophisticated submission must prevail.

212. They reiterated that as was held in **Vermont Yankee** case, a court should not graft its own preferred procedure onto a statutory process entrusted to another public institution, in this case, they submitted that **Section 87A** of the PFMA required Cabinet approval, National Assembly approval and an explanatory memorandum. That the section did not require that every memorandum, every commercial agreement, every valuation input and every advisory appointment letter be tabled before the House as a condition precedent to approval.

213. On public interest, reliance was placed on **RJR-MacDonald Inc. v Canada (Attorney General), [1994] 1 SCR 311,** where tobacco manufacturers sought to suspend federal advertising restrictions pending trial, the Supreme Court of Canada is said to have held that public interest may be relied on by either side and that where a public authority acts pursuant to its public mandate, the public interest in that action must be weighed. In this case, the **1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents** argued that the Petitioners do not own the public interest. They accept that it includes accountability, but that it also must include Parliament's approval, fiscal planning, regulatory oversight, infrastructure financing and proper husbandry of public resources.

(iv) On the issue of Undervaluation, Valuation Illegality, Prudent Public Finance and Intergenerational Equity Valuation and price

214. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that the Petitioners have not proved undervaluation, and asked this Court to reject the Petitioner's submission that KES 34 per share is not merely a disputed commercial figure, but a constitutional wrong, for the reason that price is not determined by indignation but by evidence, method and market context.

215. On the Petitioners' reliance on Mr. Irungu Nyakera's alleged expert affidavit to contend that the fair value of Safaricom was approximately KES 57.90 per share, and that if M-PESA is valued as a standalone fintech platform, the value rises toward KES 80 per share, the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents accepted that the evidence deserves consideration, but it does not prove illegality.

216. They submitted that this opinion is one valuation opinion, constructed on its own assumptions, comparators, discounts and growth inputs, which cannot displace the statutory approvals, the listed-market evidence, the transaction adviser's valuation, the negotiated premium, and the commercial judgment of the National Treasury and the National Assembly.

217. They urged that this Court, not being an expert valuation tribunal, its role is to review legality and rationality, not to fix the “correct” share price. They maintained that the Court’s task is to ask whether the process was lawful; whether relevant matters were considered; whether the price was supported by a rational method; and whether the figure is so plainly irrational or arbitrary that it betrays illegality.

218. Reliance was placed on the **BALCO Employees’ Union v Union of India (2002) 2 SCC 333 c**ase, where the Supreme Court of India was dealing with a challenge to a State disinvestment and is said to have held that it was not for the Court to decide whether the price fixed by the evaluation committee was correct; and that the proper judicial-review question was whether proper procedure had been followed and whether the reserve price was arbitrarily low and unacceptable on its face.

219. In this case, it was submitted that the Petitioners must prove arbitrariness, not merely produce a higher number, noting that the **BALCO** case also recognises that disinvestment and pricing involve complex economic factors and that the wisdom of the policy is not for the court. In support of this submission, they urged that the recent Mwamuye J authorities on the Privatisation Act confirm that valuation is a pre-transaction commercial exercise ordinarily performed by valuers, investment bankers and financial advisers; and that therefore whereas the Court may police legality; it should not substitute itself for the professional valuation process.

220. They maintained that the negotiated KES 34 price was above the observable market benchmarks, Safaricom PLC not being a private, opaque asset but a publicly listed company traded on the Nairobi Securities Exchange. That its market price is visible every trading day hence, the quoted market price and the volume-weighted average price are not incidental figures. They argued that these prices are the most reliable available evidence of what willing market participants were prepared to pay for the same class of shares at the relevant time.

221. Responding to the Petitioners’ assertion that the true value was Kes 70 to Kes 80, it was submitted that this was not supported by the market, by the six-month VWAP, by the analyst target-price average, or by the range generated by the transaction adviser’s methodologies. They argued that the fact that one expert can construct a higher intrinsic value does not make the market irrational or the State’s negotiated price unconstitutional.

222. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents further argued that the Petitioners’ preferred valuation depends on unobservable assumptions, unlike the Respondents’ case which begins with an observable market price and

then shows that the State negotiated a premium above it, as supported by the KCB Investment Bank valuation.

223. On the Petitioners' description of the valuation as an afterthought, it was submitted that the National Treasury retained KCB Investment Bank as transaction adviser, whose valuation used recognised methods: market multiples, discounted cash flow, dividend discount methodology and comparable-company analysis; which are, according to the Respondents, e conventional valuation tools and that while the Petitioners may disagree with the assumptions, they cannot say the State acted without a valuation process. They also relied on the Cabinet Secretary's presentation that summarises the valuation outputs and reiterated that the Petitioners' expert evidence is opinion, not proof of illegality. Further, they argued that the purpose of expert evidence is to assist the Court but does not bind the Court.

224. This expert evidence, they submitted, must be weighed against the material presented as a whole: the market price, the transaction adviser's valuation, the public disclosures, the parliamentary review, the regulatory approvals and the commercial context. They maintained that a court does not invalidate a public transaction because one expert, applying different assumptions, arrives at a higher value.

225. Reliance was placed on **Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau** to support the position in law that pleadings and assertions are not evidence and argued that the Petitioners present a competing professional view, which may support a political argument that Government should have held out for more; but that it does not support a constitutional declaration that the transaction is illegal.

226. On the Petitioners' assertion that M-PESA is a national jewel and that it should be valued separately as a standalone fintech platform, the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that M-PESA is not being sold, is not being carved out, is not being transferred out of Safaricom. They argue that the asset being sold is a 15% block of ordinary shares in an integrated listed company. They further submit that a sum-of-the-parts valuation can be useful where a business is being broken up, where a subsidiary is being carved out, or where the transaction itself transfers a discrete business line. They urge that M-PESA remains within Safaricom, that its value, risks, regulatory obligations, revenues, costs, network effects and growth expectations are already reflected in Safaricom's listed market price and in the market's assessment of Safaricom as an integrated telecoms and financial-services business. The Mastercard/MTN MoMo and Airtel Money comparators relied upon by the Petitioners were described as mismatched, since those transactions

are said to have involved separately structured or carved-out fintech vehicles, with their own investment terms, rights and enterprise-value assumptions.

227. In the present case, the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argue that it concerns a secondary sale of a minority block of shares in an already listed integrated company. They submit that the M-PESA argument also ignores the regulatory reality, as the M-PESA's operations remain subject to Kenyan law, the Central Bank of Kenya, the National Payment System framework, data-protection law, competition law and telecommunications oversight. They assert that the transaction does not remove M-PESA from Kenyan jurisdiction. That it changes the percentage shareholding of an existing shareholder in the listed company

228. According to the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents the strategic-investor route explains the premium and avoids market-disruption risk and that the Petitioners assume that a competitive open-market process would necessarily produce a higher price, which assumption is not proved. They relied on the affidavit of the Cabinet Secretary explaining the rationale for the existing-strategic-investor route.

229. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents further submitted that dividend-prepayment of KES 40.2 billion in lieu of future dividends on the residual 20% Government shareholding component strengthens the public-finance case. They relied on the affidavit sworn by the Cabinet secretary, detailing the fiscal logic of the upfront payment of dividends.

230. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents additionally submitted that the pricing evidence defeats the Petitioners' public-finance complaint arguing that Article 201 requires prudent and responsible use of public resources, it does not require Government to hold the same portfolio forever. In their view, prudent public finance may require monetising part of a mature investment, at a premium to market, for deployment into infrastructure and fiscal consolidation, as deposed by the Cabinet Secretary.

231. Regarding Transaction advisers and allegations of handpicking and cartels, it was submitted that these are unparticularised and without evidence. They submitted that if the Petitioners allege that any identified adviser was unlawfully appointed, they must plead and prove the procurement complained of, the date, the procuring entity, the procurement route, the statutory breach, and the relief sought, which they had not. Further submission was that if there was a discrete procurement complaint concerning professional services, the law provides procurement processes and review mechanisms. They argued that Petitioners cannot convert an unparticularised procurement suspicion into a basis for invalidating the entire share sale.

232. Submitting on Articles 10, 201 and intergenerational equity, and responding to the Petitioners argument that selling a profitable asset breaches intergenerational equity because future generations lose dividends, the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that that is a legitimate policy argument and not a constitutional prohibition.

233. Relying on the Supreme Court decision in **Okoiti [2024] KESC 63, 137,** it was submitted that Article 10(2) lists "sustainable development" among the national values, and Article 201(a) provides that "there shall be openness and accountability, including public participation in financial matters", but that the Supreme Court in the above cited case held that they are "optimizing commands" and "guiding frameworks", not "prescribed normative rules" capable of invalidating a policy choice in the absence of a concrete constitutional breach.

234. Further reliance was placed on the High Court decision in **Matindi [2026] KEHC 2484** where the Court is said to have applied that very principle to privatization, holding (at paragraph 58) that the Article 10 values ***"are not self-executing legal prohibitions capable of invalidating particular policy instruments, such as the privatization of national government assets".***

235. It was submitted that State is not constitutionally required to hold every profitable asset forever and that public finance sometimes requires converting one form of public value into another and that the benefits have been demonstrated in this case as deposed by the Cabinet Secretary, that the 15% stake yields about KES 7 billion annually, while the transaction raises about KES 204 billion upfront and an additional KES 40.2 billion dividend 28 related payment, to be deployed into infrastructure and long-term public investment.

236. It was therefore submitted that whether to prefer immediate infrastructure, debt reduction and fiscal space over slower dividend accrual is a policy judgment for Treasury, Cabinet and Parliament, subject to legality review. In their view, the Petitioners' "goose that lays the golden egg" metaphor is not a constitutional test, and that the relevant test is whether the decision was lawful, rational, participatory and accountable.

237. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that they had demonstrated that investing proceeds in energy, roads, water, airports and other productive infrastructure may itself be the more intergenerationally responsible choice as future generations inherit not just shares; they inherit debt levels, infrastructure deficits, fiscal capacity and economic productivity. They relied on the **BALCO** case where the Court is said to have stated that in a democracy, each elected Government is entitled to pursue its economic policy,

and that the wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless contrary to statute or the Constitution.

238. Additionally, it wa submitted that the choice between continued minority shareholding and the monetisation of that stake for infrastructure is a polycentric economic judgment committed to the political branches; not a justiciable constitutional standard. Reliance was placed on **Williamson v Lee Optical Co., 348 U.S. 483 (1955),** to assert that the court need not decide whether the petitioners' preferred options, a sell-down, a public offer, or indefinite retention, are better. It need only decide whether the course taken was lawful, rational and constitutionally safeguarded.

239. They submitted that the Catalyst Paper confirms that fiscal and economic choices are not judged by a single metric. That the National Treasury and Parliament were entitled to weigh a broader set of public considerations consistent with **Megginson and Netter's survey** of privatization literature, which does not treat State ownership as a constitutional virtue.

On Issue No. (V): Article 35, Article 65, Article 227, Article 232, Article 238, Data Sovereignty, National Security and Competition Law .

240. Regarding Article 35, The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents challenged the petitioners' argument that the transaction was conducted in secrecy, claiming that the Petitioners' argument confuses constitutional access to information with unlimited pre-litigation discovery of every commercial instrument in an incomplete transaction. They submitted Article 35 and disclosure are no free-standing right to open-ended discovery of every commercial instrument in a live, regulated transaction.

241. It was submitted that **Access to Information Act, 2016** gives the right its operative machinery and that section 6 exempts from disclosure information whose release would, among other things, "substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained", or prejudice protected commercial or regulatory processes, exemptions self-evidently engaged by a live, market-sensitive, listed-company transaction.

242. They submitted that the remedy of mandamus ordinarily follows a demand for performance of a public duty and a refusal or failure to act as was held in Kenya **National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge [1997] eKLR**. It was submitted that the Petitioners had not shown that they made a proper statutory request for specific information as stipulated in sections 8 and 9 of the Access to Information Act and that the Respondents unlawfully refused it, nor that have they shown that the Constitution requires public disclosure of every commercial instrument before completion of a listed-

company transaction that remains subject to regulatory approvals and market disclosure rules.

243. They argued that the Sessional Paper, public notices, Cabinet/Parliamentary approvals, valuation evidence and regulatory filings were sufficient to inform the constitutional process and that if particular information is lawfully exempt, confidential, commercially sensitive or regulator-facing, Article 35 does not convert it into a public exhibit on demand. They submitted that the **Nairobi Law Monthly** line of authority is therefore distinguishable, as those cases protect the constitutional value of access to information, not abolishing the statutory architecture of access, confidentiality, market regulation and pending commercial negotiations. They argued that transparency is not the same as transaction sabotage.

Regarding Strategic asset, data sovereignty and national security

244. It was submitted that the petitioners' argument on strategic asset and data sovereignty must be tested against the actual regulatory architecture. They submitted that whereas they do not trivialise the arguments by the Petitioners that Safaricom carries mobile connections, M-PESA, Government service delivery, sensitive personal data and electoral connectivity, the error, in their view, is the conclusion the Petitioners draw, that the State must therefore retain a particular equity percentage to preserve sovereignty.

245. They submit that sovereign control in a regulated economy is exercised through law, regulators and enforceable licence conditions and not dependent on the State holding 35% rather than 20% of a listed company. They argue that the Government does not govern telecommunications, payments, data protection, competition, election connectivity or cybersecurity by being a shareholder. That it governs those matters by legislation and regulation. They argued that the petitioners had not shown that any regulator has been stripped of jurisdiction or that any license condition, data protection requirement or competition safeguard has been by-passed.

246. On national security, as defined under Article 238 of the Constitution it was submitted that National security is secured through the Constitution, Parliament, the national security organs established under Article 239, and the licensing, data-protection, payment-system and cyber-security regimes, each of which binds the operator irrespective of the identity or nationality of its shareholders.

247. It was submitted that nothing in Article 238 conditions national security upon the State's retention of any particular equity percentage in a listed company.

248. On data protection as governed by Article 31 of the Constitution and the Data Protection Act. It was submitted that Cross-border transfers are regulated, that Data controllers and processors remain bound by Kenyan law, the Office of the

Data Protection Commissioner retains enforcement authority and that nothing in the transaction transfers personal data out of Kenya, exempts Safaricom from the Data Protection Act, or disables the Data Commissioner.

249. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that those obligations attach to the company by operation of law, irrespective of the identity or nationality of its shareholders. They relied on Sections 48 and 49 of the Data Protection Act, 2019 which permit the transfer of personal data outside Kenya only on the basis of appropriate safeguards, proof of adequacy, necessity, or the data subject's consent and Regulation 26 of the Data Protection (General) Regulations, 2021 (Legal Notice 263 of 2021) which imposes data localisation for the "strategic interests of the State", expressly including "facilitating the conduct of elections" and the administration of civil-registration and identity-management systems, requiring that such data be processed through a server and data centre located in Kenya, or that at least one serving copy be stored in Kenya.

250. They argue that "Data sovereignty", in the constitutional sense the Petitioners invoke, is therefore secured by this statutory regime; not a function of the State's position on a company's share register.

251. On the other hand, they argue that the M-PESA and payment systems are governed by the National Payment System Act and supervised by the Central Bank of Kenya while telecommunications networks are licensed and supervised by the Communications Authority under KICA and that competition issues fall to the Competition Authority and regional competition bodies. They explain that critical information infrastructure and cyber security concerns fall within the statutory framework for cyber security and national security agencies while election transmission is constitutionally and statutorily controlled by the IEBC, not controlled by Safaricom's shareholder. In their view, each of those controls binds the operator regardless of ownership.

252. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents list the various Acts of Parliament and the Regulations since the governing regulatory framework remains operative, the national-security and data-sovereignty allegations are not grounded in law. They relied on **Operation Dismantle v The Queen, [1985] 1 SCR 441** and **TikTok Inc. v Garland, 604 U.S. 56 (2025),** maintaining that the Sovereignty is not measured by the State's percentage shareholding in a listed company, but is secured through the Constitution, legislation, licence conditions, data-protection law, payment-system regulation, competition law and enforceable regulatory oversight.

Regarding Competition and capital markets

253. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argue that the regulatory gates answer the Petitioners' complaints on merger-control and

takeover. They submit that the petitioner's arguments that the Competition Authority has remained suspiciously silent and that the Capital Markets Authority wrongly exempted the transaction from a mandatory takeover offer, are specialist regulatory questions which do not establish that the share sale is unconstitutional.

254. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submit that if the transaction requires merger approval under the Competition Act or regional competition regimes, it cannot lawfully be complete without the relevant approvals and that, that is a statutory safeguard, not a constitutional defect. They argued that the Petitioners cannot use the existence of a regulatory approval requirement as proof that the transaction is unlawful. They rely on Part IV of the Competition Act, and submit that far from being unregulated, a change of control is policed by a dedicated statutory gate, with the COMESA Competition Commission providing one-stop regional clearance where the regional threshold is met; and that there is no evidence of a constitutional wrong.

255. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents also argued that, any challenge to a regulator's decision must be brought through the proper legal framework, against the proper regulator, on the proper record and within the applicable time. They asserted that the Petitioners cannot ask this Court to invalidate the whole section 87A transaction by collateral attack on a Capital Markets Authority exemption while bypassing the technical criteria and statutory review route governing that exemption.

256. They additionally submitted that the mandatory offer argument is factually and legally distinct from the Government's sale of its shares. That the Takeover Regulations protect shareholders in listed companies in defined circumstances and also contain exemption mechanisms. They argued that whether an exemption was properly granted is a regulatory issue; and not proof that the Government lacked power to sell its own shares.

257. Finally, on this point, the 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argued that 25% public float remains on the NSE and that therefore, Kenyans are not locked out of Safaricom PLC which remains listed and its shares remain freely tradable. They submitted that the Petitioners' argument that Kenyans were denied the right to participate in the sale confuses a targeted block sale by Government with the general availability of listed shares on the market.

Regarding Article 65 of the Constitution and foreign ownership

258. It was submitted that Article 65 is about landholding by non-citizens and that the Article is directed at interests in land. That the asset in issue is a block of shares in a listed company, arguing that shares are not freehold land. They submitted that Article 65 cannot be stretched into a general prohibition on foreign or foreign-linked shareholding in Kenyan companies, since Kenyan law permits

foreign investment subject to sectoral and regulatory controls.

259. In this regard, they argued that Vodafone Kenya Limited is incorporated in Kenya and that Safaricom remains incorporated and regulated in Kenya. They submit that the transaction does not confer freehold land on a non-citizen and does not offend Article 65.

Regarding Article 227 and Article 232 of the Constitution

260. It was submitted that there was no proof of procurement or public-service illegality and reiterated that as already contained in Issue No. (i), the sale of Government shares in a listed government-linked corporation is expressly governed by section 87A of the Public Finance Management Act and is excluded from the PPADA by section 4(2)(d). They argue that the allegations concerning transaction advisers do not amount to proof of an Article 232 breach. That Article 232 sets public service values, including accountability, transparency and efficient use of resources, and that it does not convert unparticularised allegations of "cartels" and "handpicking" into evidence.

261. It was submitted that the Petitioners had not identified the impugned procurement, the procuring entity, the procurement method, the legal provision breached, the fee note impugned, or the statutory remedy that they pursued.

262. Citing **Dalton v Specter**, it was submitted that the case cautions that an alleged excess of statutory authority is not, without more, a constitutional claim. They argued that the Petitioners cannot plead procurement language, adviser suspicion and public-service values at a high level and thereby invalidate a share sale unless they prove the actual constitutional breach, the affected procurement, the statutory route, and the causal connection to the divestiture.

263. They also relied on **RJR-MacDonald** I to argue that in constitutional litigation involving public action, a court must weigh the public interest on both sides. That if any discrete disclosure or procurement concern were established, the appropriate remedy would be targeted and proportionate, and that it would not be wholesale invalidation of a Cabinet-approved, Parliament approved and regulator-gated transaction.

264. Further submission was that Academic and policy material supports the Respondents' approach, but does not support an ownership-absolutist model. They dismiss **Pierre Guislain's The Privatization Challenge**, cited by the Petitioners, arguing that the model does not say that every privatization must follow one rigid model, but emphasizes that privatization legislation should set broad strategic lines, provide a mandate, preserve flexibility in privatization technique, and ensure transparent accountable implementation.

265. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents further cited **William Megginson and Jeffry Netter's survey, "From State to Market: A Survey of**

Empirical Studies on Privatization" (Journal of Economic Literature, 2001), and submitted that the survey treats privatization as a policy instrument whose success depends on complementary institutions such as competition, regulation and corporate governance. They maintained that Safaricom's public-interest obligations are secured through regulation, listing rules, payment-system supervision, data-protection law, competition law and telecommunications licensing.

266. They also relied on OECD guidance on state-owned enterprise governance which they submitted, similarly emphasizes separation between ownership functions and regulatory functions, competitive neutrality, and transparent exercise of State ownership and does not require the State to remain a commercial shareholder where regulation can protect the public interest.

267. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents argued further that the Petitioners' model would constitutionalize State ownership which is a policy philosophy, not a legal principle, noting that the Constitution permits State ownership and a lawful divestiture and that, what it requires is legality, accountability, public participation and prudence, requirements which the Respondents submit, have been satisfied.

Issue No. (Vi): The Reliefs Sought, Including Declarations, Mandamus And Permanent Restraints.

268. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents submitted that these reliefs are not available and restated the reasons as contained in their detailed submissions above, arguing that the divestiture fully complied with the applicable law and that no constitutional provision was violated or proved to have been violated. They urged the Court to dismiss the Petition.

Issue No. (Vii): Costs

269. On costs, they relied on Rule 26 of the Mutunga Rules and Section 27 (1) of the Civil Procedure Act to submit that the court has the discretion to award costs. They argued that although in constitutional petitions the guiding principle is that the costs should not ordinarily be used to deter bona fide public interest litigation, they however urged the court to award costs to the participating respondents because the petitioners have made grave allegations of fraud, cartel conduct, undervaluation, foreign capture national security compromise and regulatory failure without proof. They added that the respondents have incurred costs in answering them.

270. In their oral submissions, led by John Olaga SC, the 1st, 2nd, 4th, 9th, 10th and 11th Respondents relied on their replying affidavits and written submissions and highlighted that the petitioners build their case on wrong legal foundation and treat the sale to be under the privatization Act and a procurement matter under the

PPAD Act, arguing that Section 4 of the respective Acts exclude the sale of shares from the ambit of the Acts.

271. They urged the Court to identify the correct statutory root for sale of shares which is section 87A of the Public Finance Management Act, requiring approval by the National Assembly and Cabinet and conclude that the proper statutory route is section 87a of PFMA

272. On the Treasury's role to mobilize non-tax revenue, they argued that the argument by petitioners is misconceived as the Articles cited do not prohibit Government of Kenya raising revenue from an investment and that Article 206 recognizes money received by the National Government should be deposited in the Consolidated Fund, unless the Constitution provides otherwise. Senior Counsel Ohaga highlighted that Sections 11 & 12 of the PFMA gives effect to Article 206. He urged that the Constitution is to be properly interpreted to give effect to its provisions.

273. On Cabinet, Parliamentary approval and public participation Senior Counsel Ohaga submitted that the three replying affidavits sworn by the Cabinet Secretary demonstrate that a sessional paper and explanatory material went to the National Assembly which considered the same, took extensive public participation and the National Assembly passed a resolution. He reiterated that public participation was held in more than 78 fora.

274. He submitted that it is not the law that every objection must have views unconditionally accepted, the test being that of unreasonableness and that the threshold in the BAT case had been met.

275. It was submitted that no particulars of fraud against parliament had been levelled and proven by the petitioners and that fraud must be pleaded with particulars and must be proved.

276. On pricing and valuation, the submission was that the claim is ambitious and not proven, that the Court cannot sit as a valuation tribunal or committee but to assess the legality of the transaction. Further, that the material time was December, 2025. Share pricing is dynamic and affected by numerous factors and that had the Petitioners not interfered with the transaction, the sale would have come 6 months earlier.

277. On the expert's opinion of Mr. Irungu, it was submitted that one expert's opinion cannot be preferred over a valuation commissioned and relied upon by the government, and that the court's role is to check on legality of the sale and whether the price, in the circumstances is so abnormally low as to amount to perversity by

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the Government.

278. It was submitted that Professional transaction advisors were engaged and they took into account all factors before advising the government. That pricing does not disclose any illegality while expert opinion is not evidence of unconstitutionality but a different professional opinion. Further, that Mr. Nyakera presumes that the price would be higher if Mpesa is curved out, yet Mpesa is Safaricom and that it is being sold as one. Senior Counsel maintained that the Petitioners had not proved an undervaluation but a different mode.

279. On data sovereignty and national security claims, it was submitted that the sale does not dissolve Kenyan Municipal law. That Safaricom will continue to be subject to the law and regulations and this does not depend on shareholding. That the proposed buyer is a Kenyan company and a tax payer subject to Kenyan Law. Further, that the sale will not diminish Safaricom's compliance with the myriad of statutes.

280. He submitted that Article 65 is about land holding which is irrelevant because Kenyan law permits foreign shareholding. Senior Counsel maintained that the petitioner's case as a legal proposition is a disagreement about policy being followed for revenue raising and that no illegality has been demonstrated.

281. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents' Senior Counsel urged the Court to dismiss the amended petition with costs to the participating respondents.

THE 3RD RESPONDENT'S SUBMISSIONS

282. The 3rd Respondent's Submissions are dated 23rd June 2026 which were also highlighted in Court by Counsel, Mr. Muganda. The following issues were isolated for determination by Counsel:

i. Whether the Amended Petition discloses a justiciable cause of action against the 3rd Respondent;

ii. Whether the Amended Petition has merit;

iii. Whether the Petitioners have proven any Constitutional breach by the Respondents; **and**

iv. Whether the Prayers sought by the Petitioners have merit.

283. Counsel submitted that the Amended Petition discloses no cause of action against the 3rd Respondent, as no specific wrongdoing was alleged; no prayer sought to revoke its regulatory Letter of No Objection dated 21st January 2026, which was issued under ***Sections 5, 24, and 25 of the Kenya Information and Communications Act, Cap 411A (KICA***); and that this statutory

clearance did not relieve Safaricom PLC of its ongoing compliance duties regarding data security and consumer protection under ***Section 25(3)(cc) of KICA, License Conditions 14 and 18, and Articles 46 and 47 of the Constitution***.

284. Counsel further submitted that the Petitioners failed to exhaust the mandatory statutory dispute resolution mechanisms under ***Sections 84T and 102A(1)(c) of KICA*** prior to invoking the Court's appellate jurisdiction under ***Section 102G***. In support of this argument, they cited ***Speaker of the National Assembly v Karume [1992] KECA 42*** and ***Mutanga Tea & Coffee Company Limited v Shikara Limited & another [2015] KECA 469.***

285. Counsel for the 3rd Respondent argued that failure to exhaust internal remedies was fatal and the Court should apply the doctrine of constitutional avoidance as affirmed in ***Tirito v Murage [2026] KEHC 3998, Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd [2017] KEHC 9674,*** and ***C N M v W M G.***

286. On the merits, Counsel submitted that the partial divestiture was legally anchored under **Section 87A of the Public Finance Management Act, Cap 412A enacted via Section 74 of the Privatization Act, No. 18 of 2025** and was expressly exempted from the **Public Procurement and Asset Disposal Act, Cap 412C** under ***Section 4(2)(d),*** the **Privatization Act** regime under ***Section 4(c),*** and the **Public Private Partnerships Act, Cap 430** under ***Section 4(1).***

287. It was their submission that Parliament fulfilled its constitutional mandate under ***Articles 1, 10, and 201 of the Constitution*** by facilitating public participation across 30 counties and stakeholder fora, which met the standard of reasonable sufficiency laid down in **Gachagua & 57 others v Speaker, National Assembly & 35 others [2026] KEHC 8198**.

288. Grounded in the doctrine of separation of powers and judicial restraint as articulated in **Pevans East Africa Ltd v BCLB [2018] KECA 332, Speaker of Senate v Attorney General (2013) eKLR,** and **Law Society of Kenya v Attorney General [2020] eKLR**, Counsel submitted that the Court should not interfere with Parliament's legislative mandate under **Articles 94, 95, and 109**.

289. Finally, it was Counsel's submissions that the Petitioners failed to discharge their evidential burden under **Sections 107–109 of the Evidence Act, Cap 80** to prove violations of **Articles 10, 35, 43, 201, 227, 238, or 209–214**. That pursuant to **Kiambu County Tenants Welfare Association v AG [2017] KEHC 8869, Alridge v KU Teaching Referral Hospital [2024] KEHC 6126, Samson Gwer v KEMRI (2020) KLR, Raila Odinga v IEBC**

(2013) eKLR, John Harun Mwau v IEBC (2017) eKLR, and Njeru v LSK [2022] KEHC 380, unproven and contradictory claims cannot support unimplementable reliefs, warranting the Petition's dismissal with costs.

290. In their oral highlighting before the Court on 29th June 2026, Counsel Innocent Muganda representing the 3rd Respondent submitted that they opposed the Petition urging that it should be struck out against the 3rd Respondent because it failed to allege any specific infractions or seek any reliefs against them.

291. Counsel submitted that the 3rd Respondent acted lawfully within its statutory mandate in issuing the no-objection letter, and no subsequent breaches have been alleged.

292. In justifying the 3rd Respondent's actions, Counsel stated that the transaction correctly adhered to **Section 87A of the Public Finance Management Act (PFMA).** That both the **Privatization Act (Section 4) and the Public Procurement and Asset Disposal Act (Section 4(2)(d))** expressly exclude the sale of shares from their application. It was contended that all parties were given an opportunity for public participation and further argued that the Petitioners' requested reliefs were incoherent and that the petitioners improperly side-lined Parliament, ignoring its constitutional legislative powers under **Article 94**.

293. In the oral submissions by Counsel Muganda, he argued that the 3rd respondent was not mentioned on what it is meant to do but not done or any infractions. He urged the Court to strike it off for want of any prayers since the 3rd respondent exercises authority from the statute and that it had not been accused of any breach following the no objection letter. He submitted that the preamble to the Privatization Act and section 4 thereof are clear while Section 4(2) (d) of the PPADA excludes sale of shares from application of the two Acts of Parliament.

THE 6TH RESPONDENT' SUBMISSIONS

294. The 6th Respondent Safaricom PLC's Submissions are dated 24th June 2024 in which learned Counsel opposed the Petitioners' consolidated petitions seeking to restrain the Government of Kenya from divesting its 15% shareholding to Vodacom Group and isolated the following issues for determination:

i. Whether the Petitioners have established Constitutional violation, illegality or non-compliance with any relevant statutory provisions;

ii. Whether the proposed divestiture will interfere with the status of Safaricom PLC as a Kenyan incorporated publicly

traded entity subject to Kenyan laws and regulations;

iii. Whether the Petitioners are inviting this Honourable Court to usurp the mandate of Constitutionally and statutorily established regulatory bodies;

iv. Whether the orders sought are disproportionate in scale and contrary to public interest; and

v. Whether the Petitioner has met the threshold for grant of the reliefs sought.

295. Counsel for the 6th Respondent argued that the proposed transaction was not an asset disposal governed by ***Section 163 of the Public Procurement and Asset Disposal Act, 2015 (PPAD Act) under Article 227 of the Constitution of Kenya***, nor did it fall under the Privatization Act. Instead, the partial divestiture was specifically governed by **Section 87A of the Public Finance Management Act (PFM Act).** Further**,** that **Section 4(c) of the Privatization Act** expressly excluded sales of government shares in government-linked corporations conducted in accordance with the **PFM Act**.

296. Counsel submitted that because **Section 87A of the PFM Act** provides a distinct legal framework enacted by Parliament to regulate such share disposals, the Petitioners could not demand simultaneous compliance with inconsistent statutes. Further, counsel emphasized that the doctrine of separation of powers had to be given deference in light of the legislative framework chosen by Parliament, citing the Supreme Court decision in **Republic v Mwangi [2024] KESC 34 (KLR)** which referenced **Trusted Society of Human Rights v Attorney-General [2012] eKLR**).

297. Counsel rejected the Petitioners' claim that **Part 3 of the Constitution** restricts the Government from raising revenue outside of taxation and public borrowing, submitting that raising public revenue through commercial share sales under **Section 87A of the PFM Act** was entirely lawful. That, the 1st Petitioner's argument against share sales for revenue while simultaneously insisting on disposal under the PPAD Act amounted to impermissible approbation and reprobation. Counsel relied on ***Royal Ngao Holdings Limited v N.K. Brothers Limited [2020] KEHC 2550 (KLR)*** referencing ***Royal Bank of Canada v Hirsche Herefords 2012 ABQB 32)*** to support this position.

298. Counsel argued that ***Section 87A of the PFM Act*** was complied with since Cabinet granted approval; *Sessional Paper No. 3 of 2025* was submitted on 4th December 2025, with full disclosure of financial implications and the ultimate purchaser structure via Vodafone Kenya Limited (8th Respondent); and the National Assembly approved the transaction.

299. It was further argued that meaningful public participation across 30 counties was conducted in accordance with ***Articles 1 and 10 of the Constitution***.

300. Relying on the standards set out by the Court of Appeal in ***Kiambu County Government & 3 others v Gakuru & others [2017] KECA 459 (KLR)*** referencing ***Minister for Health v New Clicks South Africa Pty Ltd CCT 59/04)*** and the Supreme Court in ***British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others [2019] KESC 15 (KLR)*** as cited in ***Haki Yetu Organization v Cabinet Secretary for Roads and Transport & 3 others [2026] KEHC 423 (KLR),*** Counsel submitted that public participation required reasonable facilitation rather than unanimous adoption of public views. It was submitted that public feedback was meaningfully incorporated, resulting in a mandatory requirement that Safaricom maintains its current business model for a minimum of ten years.

301. Addressing allegations regarding data sovereignty, electoral integrity and national security, Safaricom affirmed that as a Kenyan-incorporated entity listed on the Nairobi Securities Exchange, it remained fully subject to Kenyan law regardless of shareholding changes.

302. Counsel submitted further that data protection is strictly governed by ***Sections 25 and 49 of the Data Protection Act,*** under the oversight of the Office of the Data Protection Commissioner and the Communications Authority of Kenya. That subscriber data remained hosted locally in Kenya by Safaricom and M-PESA Africa.

303. Regarding elections, Counsel explained that **Section 44 of the Elections Act** places statutory responsibility for result transmission exclusively on the Independent Electoral and Boundaries Commission (IEBC), rendering telecommunications providers mere ancillary contractual service providers. It was further argued that commercial success did not transform a private corporation into an extension of public administration or a state organ.

304. It was argued further that attempting to treat Safaricom as the alter ego of its shareholders violated the foundational principle of separate corporate personality established in **Salomon v A. Salomon & Co. Ltd [1897] AC 22** and affirmed in **Set and Sit Contractors Limited v Odhiambo t/a Loi Enterprises [2023] KEHC 24731 (KLR)** referencing **Victor Mabachi & Anor v Nurturn Bates Ltd [2013] eKLR)**.

305. Counsel for Safaricom argued that the Petitioners invited the Court to improperly usurp the mandates of specialized statutory regulators, including the National Treasury, the Capital Markets Authority, the Competition Authority of Kenya, and Parliament. Citing **Mumo Matemu v Trusted Society of**

Human Rights Alliance & 5 others [2013] KECA 445 (KLR) referencing **Kenya Youth Parliament & 2 Others v AG & Another [2011] KEHC)** and **Judicial Review principles in Makori v Kenya National Highways Authority [2025] KEHC 4443 *(KLR)*** citing **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300),**

306. Counsel emphasized that courts must exercise restraint and avoid merit review of statutory functions absent clear proof of illegality, irrationality, or procedural impropriety.

307. On the evidentiary standard, Counsel noted that under ***Sections 108 and 109 of the Evidence Act, Cap 80***, as reiterated in ***Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR*** and ***Anarita Karimi Njeru***, the burden of proof rested on the Petitioners to establish specific constitutional breaches with precision.

308. Counsel argued that because the Petitioners relied on speculative claims and failed to demonstrate any actual violation of ***Articles 1, 2, 3, 10, 19, 20, 22, 35, 94, 95, 159, 162, 165, 227, 232, 258, or 259,*** freezing this economic transaction harms the public interest by immobilizing public funds meant for the National Infrastructure Fund Act.

309. In their oral highlighting Counsel Musangi associated himself with the co-respondents' submissions and emphasized that no statutory or constitutional illegality had been established in the transaction and cautioned that the Court was improperly being invited to act as a financial regulator.

310. Counsel also noted that while the petitioners' witness, Mr. Nyakera, is a Certified Public Accountant who failed to participate in the public participation fora, the National Treasury Cabinet Secretary is also a senior CPA, underscoring that valuation claims remain mere subjective opinions.

311. Addressing pricing, Counsel highlighted that market prices for publicly listed companies fluctuated naturally, that this Court lacked expertise in share pricing and that the transaction's valuation incorporated both market price and a dividend prepayment exceeding KES. 2.5 billion.

312. Counsel further refuted claims of disenfranchisement, noting that Gen-Zs and future generations were not barred from buying shares since Safaricom Equity trades openly on the market daily, arguing confirming that the proposed sale would not alter the government's board representation or corporate governance structure.

313. Consequently, Counsel prayed for the dismissal of the consolidated petitions with costs.

THE 7TH, 8TH AND 12TH RESPONDENTS' SUBMISSIONS

314. The 7th, 8th and 12th Respondents filed separate sets of written

submissions dated 24th June 2026, 25th June 2026 and 24th June 2026, respectively.

315. During the highlighting of submissions, the 7th, 8th and 12th Respondents were represented by Counsel Aisha Abdalla, Kevin McCourt, SC and Counsel Ismail, respectively.

316. SC McCourt submitted that the 8th Respondent is a Kenyan company, not a foreign company. He also submitted that no cause of action has been disclosed, associated himself with the submissions of the other respondents and urged that the petition be dismissed with costs to the 8th respondent for suspending the sale.

317. Counsel Abdalla submitted that the 7th Respondent is the majority owner of the 8th Respondent and that there is a distinction between a company and its shareholders. She also asserted that the 8th Respondent is a Kenyan company. However, she contended that there is no bar to sale of shares to a foreigner. She also argued that pricing is subject to market movements.

318. Counsel Ismail associated himself with the submissions of Counsel Abdalla. The 7th Respondent relied on ***DT Dobie & Company (Kenya) Limited v Muchina & another [1980] KECA 3 (KLR)*** on what constitutes a reasonable cause of action. It also relied on ***Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR).***

319. The 7th Respondent submitted that while constitutional rights may in certain instances apply horizontally pursuant to ***Articles 20(1) and 20(5) of the Constitution*** does not transform every commercial transaction into a constitutional dispute.

320. The 7th Respondent urged the Court to decline to determine the commercial transaction issues on a constitutional basis and to find that the amended petition offends the doctrine of constitutional avoidance. It relied on ***SG v Standard Media Group & 3 others [2022] KEHC 13633 (KLR)*** on the nature of a constitutional question.

321. The 7th Respondent argued that the petitioners have neither pleaded nor demonstrated how the specific constitutional provisions apply to it in the circumstances of this case. It relied on ***DB Schenker Limited v Africa Apparels EPZ Limited [2025] KEHC 13877 (KLR)*** and ***Chidhya (Kenya) Limited v Africa Equipment & Engineering Power S.A (AEE Power S.A) [2020] KEHC 4486 (KLR)*** to assert that rights and obligations arising from a contract bind only the parties to it.

322. The 7th Respondent submitted since the National Assembly granted approval of the transaction on 31st March 2026, the petitions have been overtaken by events because the petitioners' case is premised in part on the

alleged lack of parliamentary approval for the impugned transaction.

323. In support of the above argument the 7th Respondent relied on ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (2 December 1999, Institute for Social Accountability & another v National Assembly & 5 others [2022] KESC 39 (KLR)*** on the doctrine of mootness.

324. The 7th Respondent also relied on ***Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)*** to assert that where subsequent events alter the factual or legal landscape, a matter may lose its justiciability. To support the contention regarding the absence of any evidential foundation for the alleged constitutional violations, the 7th Respondent cited ***Otieno v Airtel Kenya Limited [2018] KEHC 9063 (KLR)***

325. Relying on ***Okoiti v Attorney General KECA 112 (KLR), Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party) eKLR (Petition 252 of 2016)***, the 8th Respondent submitted that assigning public constitutional liability to a private purchaser creates an absolute legal mismatch. It was argued that the boundaries setting approach aligned with ***Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others (2021) KESC 34 (KLR),*** on the strict caution against allowing procedural irregularities to undermine established statutory rules.

326. The 8th Respondent relied on ***Cabinet Secretary, National Treasury & Planning v Okoiti Omtatah & 4 others KECA 234 (KLR)*** to support the position that macro-fiscal resource optimization falls within executive and legislative discretion; ***Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others eKLR***, that national security protections must be pursued in strict compliance with the rule of law rather than conjectural pleadings; ***Competition Authority of Kenya v Airtel Networks Kenya Limited & another KECA 144 (KLR),*** that specialized statutory tribunals maintain primary, exclusive jurisdiction over technical market concentration claims; ***Centre for Rights Education and Awareness (CREAW) & another v Speaker of National Assembly & 5 others [2017] eKLR***, that the court must guard against freezing vital state frameworks on pure conjecture, ***and Law Society of Kenya v Attorney General & 4 others (2023) KESC 19 (KLR***) on the doctrine of institutional deference.

327. The 12th Respondent relied on ***Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR***).

328. The 7th, 8th and 12th Respondents relied on ***Salomon v Salomon & Co Ltd [1897] AC 22*** on the principle of separate legal personality and ***Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] KECA 763 (KLR)*** on the circumstances warranting lifting of the corporate veil.

329. The 8th Respondent additionally cited ***Vania Investment Pool Limited v Robinson Kigen & 2 Others (2016) eKLR*** on separate corporate legal personality; ***West Palm Logistics Limited v Amkon (2026) KEHC 3497 (KLR)*** on the threshold for disregarding separate corporate personality, and ***Royal British Bank v Turquand (1856) 6 E&B 327*** on the Doctrine of Indoor Management.

330. On costs, the 8th Respondent relied on ***Section 27 of the Civil Procedure Act*** and ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others KESC 31 (KLR***), for the principle that costs follow the event.

331. The 7th, 8th and 12th Respondents urged the court to dismiss the petitions with costs.

ANALYSIS AND DETERMINATION

Issues for Determination

332. We have considered the consolidated Petition, the responses thereto and the respective parties' rival arguments in their written submissions and oral highlights and find the following issues emerging for determination:

(1 Jurisdictional, Threshold & Preliminary Issues: -

(a) Whether the High Court has the jurisdiction to determine the consolidated Petition.

(b) Whether the Consolidated Petition meets the constitutional threshold set out in the Anarita Karimi Njeru case.

Under this issue we shall also discuss the doctrines of avoidance and exhaustion.

(2 The applicable statutory and constitutional framework for sale of shares in a government linked institution:- Specific legislation under discussion are:

(a) Public Finance Management Act (PFMA Section 87A.

(b) Sections 19–25 of the Privatization Act, 2025 requiring a formal Privatization Programme. Whether applicable

(c) Section 163 of the Public Procurement and Asset Disposal Act (PPADA), 2015.whether applicable

(d) The Public Private Partnerships (PPP) Act. Whether applicable

(e) The purport of Section 4(c) of the Privatization Act, 2025 and Section 4(2)(d) of the Public Procurement and Asset Disposal Act. Whether applicable.

(f) The constitutional modes of raising revenue under Part 3 of the Constitution.

(3 Statutory & Constitutional Process Compliance.

Under this issue we shall discuss: -

(a) Whether the proposed sale of Safaricom PLC shares complied with statutory and constitutional requirements.

(b) the alleged misrepresentation, and concealment of material information in the Sessional Paper No. 3 of 2025 on 31st March 2025 and possible violation of the High Court status quo order of 23th March, 2026.

(c) Whether there was reasonable and meaningful public participation conducted in compliance with Articles 10, 118, and 201 of the Constitution.

(d) Allegations of misrepresentation, concealment of material information such as the identity of the would-be buyer and implication of majority foreign shareholding in Safaricom PLC.

(e) Whether the procurement of the Transaction Advisors was in accordance with Articles 227 and 232 on competitive tendering and transparent fee disclosures.

(4) Financial Prudence, Share Valuation and Pricing, and Inter-generational Equity. Here, we shall interrogate: -

(a) Whether the stated transaction price of KES 34 per share complies with Article 201(d) on use of public money in a prudent and responsible way or whether the impugned pricing represents a rational, market-based premium value or it occasioned a massive public loss.

(b) Whether the valuation methodology was flawed for failing to separately value M-pesa as a standalone fintech platform, or whether M-pesa's value is already an integrated asset of Safaricom PLC's overall market valuation in the listed stock price.

(c) Whether transforming a regular and perpetual income source into a single upfront payment (dividend) and sale of the

shares in Safaricom PLC compromises the principle of intergenerational equity, or whether it constitutes a legitimate executive fiscal/portfolio management choice to fund national infrastructure.

(5) National Security, Data Sovereignty & Market Competition.

Discussions under this issue will encompass: -

(a) The effect of transferring majority control to a foreign entity on national security, data sovereignty, privacy under Article 31 and election integrity on IEBC result transmission architecture under Article 238.

(b) Whether the acquisition breaches merger control regulations under the Competition Act or mandatory takeover offer requirements under the Capital Markets (Take-Overs and Mergers Regulations, 2002).

(6) What reliefs should the Court grant.

(7) What order should the Court make on costs?

Analysis

(1 Jurisdictional, Threshold & Preliminary Issues

(a) Whether the High Court has the jurisdiction to determine the consolidated Petition.

333. Jurisdiction is everything. It is *sine qua non* adjudication by the court of the matter before it. Thus, it must be determined *in limine*. (**Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment).**

334. In **Macharia & another v Kenya Commercial Bank Ltd & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling),** the Supreme Court underscored that jurisdiction is conferred by the Constitution, statute or both. The apex Court stated thus: -

"68.A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant),

Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

335. Jurisdiction of the High Court is derived from **Article 165 of the Constitution**. In particular, **Article 165 (3)** and **(4)** states:

> ***(3) Subject to clause (5), the High Court shall have—***
>
> ***(a) unlimited original jurisdiction in criminal and civil matters;***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and***
>
> ***(iv) a question relating to conflict of laws under Article 191; and***
>
> ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

336. The specific grounds on which the respondents challenge the jurisdiction of this Court to determine the consolidated petition are that: -

(g) The Petitioners failed to exhaust mandatory statutory dispute resolution mechanisms provided under ***Sections 84T and 102A(1)(c) of the Kenya Information and Communications Act (KICA), Cap 411A*** of Laws of Kenya.

(h) The High Court is being asked to usurp the functions of specialized statutory bodies, the Executive and Parliament.

(i) The Petitioners are inviting the Court to act as a commercial regulator and substitute its judgment for market dynamics, specialized regulatory agencies

(j) The consolidated Petition offends the doctrine of constitutional avoidance by attempting to translate an arm's-length commercial transaction into a constitutional dispute.

(k) The National Assembly approved the sale of shares on 31st March 2026 thus, rendering the consolidated Petition moot and non-justiciable.

(l) On the basis of separation of powers, the Court lacks the mandate to perform merit reviews of statutory functions or to fix commercial share prices in the absence of demonstrated illegality, irrationality, or procedural impropriety.

337. The 3rd Respondent (Communications Authority of Kenya – CAK) in its Replying Affidavit sworn on 2nd June 2026 by Mr. David Mugonyi and its written submissions dated 23rd June 2026 contended that this Court lacks jurisdiction because the Petitioners failed to exhaust mandatory statutory dispute resolution mechanisms provided for under ***Sections 84T and 102A(1)(c) of the Kenya Information and Communications Act (KIC Act), Cap 411A***. They contended under the statutory framework, any regulatory grievances regarding telecommunications or spectrum/license approvals ought to have been submitted to the Communications Authority first, with any subsequent appeal lying to the Communications and Multimedia Appeals Tribunal pursuant to ***Section 102G of KIC Act***. Further, that by bypassing these specialized statutory fora, the Petitioners breached the doctrine of exhaustion and constitutional avoidance, thereby rendering the petition premature and non-justiciable.

338. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents (State Respondents) in their Replying Affidavits sworn on 26th March 2026, 8th April 2026 and 25th May 2026 by Hon. FCPA John Mbadi Ng'ongo, and in their written submissions dated 24th June 2026, contended that the High Court is being asked to usurp the functions of specialized statutory bodies, the Executive, and Parliament. They submitted that not every alleged statutory breach or commercial disagreement constitutes a constitutional question warranting judicial intervention by the High Court.

339. Relying on the doctrine of separation of powers and institutional deference, they contended that ***Section 87A of the Public Finance Management Act (PFMA)*** provides a specific statutory route for share disposals, placing fiscal choices and resource allocation within executive discretion. Consequently, that this Court should exercise restraint and allow specialized statutory and regulatory mechanisms to operate without grafting judicial preferences onto polycentric economic choices.

340. The 6th Respondent (Safaricom PLC) in its Replying Affidavit sworn by Wangechi Gichuki on 28th May 2026 and in its written submissions of 24th June 2026 argued that the Petitioners were inviting the Court to act as a commercial regulator and substitute its judgment for market dynamics, specialized regulatory agencies such as the Capital Markets Authority, Competition Authority of Kenya, the Office of the Data Protection Commissioner, and Parliament.

341. Citing principles of judicial review and separation of powers, the 6th Respondent contended that this Court lacks the mandate to perform merit reviews of statutory functions or to fix commercial share prices in the absence of demonstrated illegality, irrationality, or procedural impropriety.

342. The 7th, 8th and 12th Respondents (Vodacom Group, Vodafone Kenya Limited, and Vodafone Group PLC respectively**)** in their grounds of opposition and written submissions argued that the Petition offends the doctrine of constitutional avoidance by attempting to translate an arm's-length commercial transaction into a constitutional dispute.

343. They further argued that specialized statutory tribunals such as the Competition Tribunal or the Capital Markets Tribunal hold primary, exclusive jurisdiction over technical market concentration, merger and takeover claims. Additionally, that because the National Assembly approved the transaction on 31st March 2026, the consolidated petition has been rendered moot and non-justiciable.

344. The Petitioners were of a different view. They submitted that this Court possesses original, expansive and supervisory jurisdiction under Articles 22,

165(3)(b), 165(3) (d) (i), and 258 of the Constitution to address severe, unconstitutional state action, violations of public finance principles, lack of public participation and threats to national sovereignty and data security.

345. They argued that statutory dispute resolution mechanisms were inadequate because the core issue involved direct constitutional violations, *ultra vires* actions by the Executive and the unconstitutional invocation of revenue-raising mechanisms outside Part 3 of Chapter 12 of the Constitution.

346. We have already stated that the question of jurisdiction must be determined before the Court adjudicates over a matter before it.

347. Article 165 (3) (b) and (d) of the **Constitution** vests this Court unlimited original jurisdiction in civil and criminal matters, as well jurisdiction to determine *"the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution."*

348. Under Article 23, this Court has the authority to uphold and to enforce the Bill of Rights. More specifically, under Article 23 (1), the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

349. We now proceed to examine the specific grounds on which the jurisdiction of this Court has been challenged.

The Doctrine of exhaustion

350. The Respondents argue that the Petitioners ought to have utilized specialized statutory avenues such as the **Communications and Multimedia Appeals Tribunal** under **Section 102G** of the **Kenya Information and Communication Act (KICA)**, the **Capital Markets Tribunal**, or the **Competition Authority,** and the **Competition Tribuna**l mechanisms before approaching the High Court.

351. They further argued that these specialized statutory tribunals hold primary, exclusive jurisdiction over technical market concentration, merger and takeover claims.

352. The *locus classicus* on exhaustion of remedies is **Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling)** where the Court of Appeal held:

"15.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

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procedure should be strictly followed. …"

353. The Court of Appeal further explained this doctrine of exhaustion in **Muthinja & another v Henry & 1756 others (Civil Appeal 10 of 2015) [2015] KECA 304 (KLR) (30 October 2015) (Judgment)** PN Waki, RN Nambuye, PO Kiage JJA thus:

"38…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."

354. Article 159(2)(c) of the ***Constitution*** recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms:

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(a)…

(b)…

(c)alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

355. In **Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated)) [2020] KEHC 10266 (KLR) (6 November 2020) (Judgment),** a 5 Judge Bench comprising LA Achode, JM Ngugi, P Nyamweya, E.K.O. Ogola, AC Mrima JJs comprehensively explained the doctrine of exhaustion and stated as follows, regarding its purpose:

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 v 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…"

356. The doctrine of exhaustion is however not absolute; exceptions apply

where a matter raises pure questions of constitutional interpretation, structural unconstitutionality of executive actions, or where statutory bodies lack the jurisdiction to grant the remedies sought or the remedies sought are not available or, remedies and procedures available are inadequate. Therefore, the court must make an enquiry to establish whether one or more of the exceptions exist as was stated by the High Court in **Republic v Independent Electoral and Boundaries Commission (IEBC); Al Ghurair Printing and Publishing LLC & 5 others (Interested Parties); The National Super Alliance (NASA) Kenya (Ex parte Applicant) (Judicial Review 378 of 2017) [2017] KEHC 4663 (KLR) (Judicial Review) (7 July 2017) (Judgment) per** JM Ngugi, GV Odunga, JM Mativo JJ as follows:

> ***"46. 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.***
>
> ***47. 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. Indeed, in the case before us, the alternative statutory forum envisaged in the PPAD Act, namely the Public Procurement Administrative Review Board, in an earlier suit involving at an attempt to award the same tender, referred some of the issues raised to the High Court for hearing and disposition since the Review Board was persuaded that resolution of the issue involved serious questions of constitutional and statutory interpretation. In referring the issues to the High Court in that earlier iteration of this dispute, the Review Board had this to say:***
>
> > ***In matters of election and whether the provisions of the Elections Act and the Elections Laws (Amendment) Act of 2016 [applies], it is only the High Court and the Supreme Court while exercising their original jurisdiction or the***

Court of Appeal while entertaining an appeal from the High Court that are vested with jurisdiction to consider such matters. The Board on the other hand is only vested with powers to deal with procurement disputes although in doing so the Board is bound to consider provisions of the Constitution and any other statute in so far as the same relates to procurement.

48. This approach taken by the Review Board, which is consonant with the one we adopt here is same one suggested by the Court of Appeal in R vs National Environmental Management Authority [2011] eKLR where the Court explained that:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…"[emphasis ours]

357. Section 9 (2) of the Fair Administrative Action Act (FAAA) 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).

358. Under **Section 9 (4),** the FAAA provides:

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.

359. The Petitioners challenge the authority of the Executive to raise state revenue through the liquidation of strategic public assets outside **Articles**

209–214 of the Constitution, the procedural and constitutionality of Sessional Paper No. 3 of 2025 and the alleged lack of public participation under **Articles 10 and 118** among others. These are not mere arm's-length commercial issues. These complaints raise constitutional questions which go beyond mere technical regulatory grievances or market competition disputes.

360. Additionally, statutory bodies like the Communications Authority or specialized tribunals lack the jurisdiction to declare an executive policy to be unconstitutional or to interpret the scope of **Article 209** on revenue-raising powers, or to determine whether Parliamentary approvals complied with **Articles 10 and 118** of the Constitution.

361. These constitutional remedies are not available within the alternative statutory dispute resolution mechanism provided *inter alia,* under the Competition Act, the Capital Markets Act and the **Kenya Information and Communications Act**.

362. We therefore find and hold that the consolidated petition does not offend the doctrine of exhaustion.

Doctrine of Avoidance

363. The Respondents further challenged the Petition for offending the doctrine of constitutional avoidance. The doctrine of constitutional avoidance stipulates that, where a dispute can be determined through another forum without necessarily raising a constitutional issue, this alternative forum ought to be pursued. Thus, where it is shown that there exist alternative, sufficient and adequate avenues for parties to ventilate their grievances, Courts have consistently maintained that when a party has an appropriate forum before which to seek redress, it is incumbent upon them to raise their concerns before that forum as opposed to invoking the constitutional jurisdiction of the Court at the outset.

364. The doctrine of avoidance was explained by the Supreme Court in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR** as follows:

> ***"The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:***
>
> > ***I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."***
>
> ***(257) Similarly, the US Supreme Court has held that it would not***

decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v Tennessee Valley Authority, 297 US 288, 347 (1936).”

365. The Court of Appeal, guided by the above cited Supreme Court decision, applied the doctrine of avoidance and highlighted in **Sumayya Athmani Hassan vs Paul Masinde Simidi & Another [2019] eKLR** thus:

“… Where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).”

366. The rationale behind this doctrine of avoidance is two-fold: first, it preserves the sanctity and stability of constitutional interpretation by ensuring that constitutional issues are not unnecessarily adjudicated because constitutional adjudication carries profound consequences, not only for the parties before the court but also for the broader legal system and society at large; and secondly, the doctrine respects the principle of separation of powers by limiting judicial intrusion into matters that can be resolved through statutory or procedural means.

367. Accordingly, where a dispute can be disposed of on narrower, nonconstitutional grounds, the court is obliged to do so, and to decline to adjudicate the constitutional question.

368. We have considered the alternative dispute resolution mechanisms proposed by the 3rd Respondent CAK which is that the Petitioners should have raised their grievances through the statutory framework in **Sections 84T and 102A(1)(c) of the Kenya Information and Communications Act (KICA), Cap 411A** and **Section 102G of KICA.** The said sections provide:

84T. Complaints and investigation by the Commission

(1 The Commission may, on its own motion investigate any licensee who commits any act or omission in breach of fair competition.

(2 Any person having a complaint of a breach of fair competition against a licensee shall lodge a complaint to the Commission and the Commission shall, if it appears that a breach of fair competition has been or is being committed, investigate the act and omission and give written notice to the licensee stating—

(a) that the Commission is investigating a possible

breach of fair competition;

(b) the reasons for the suspicion of contravention or breach, including any matter of facts or law which are relevant to the investigation;

(c) further information required from the licensee in order to complete the investigations; and

(d) where appropriate, the steps to be taken in order to remedy breach.

(3 The licensee issued with a notice under subsection (2) may, within thirty days from the date of the notice, make representations in response to the notice and give to the Commission all information required under the notice.

(4 Any person affected by the contravention or breach of fair competition may similarly make representation to the Commission in relation thereto.

(5 The Commission shall, after considering any representations of the licensee or any other person fix a date on which to make a decision on the matter.

(6 Where the Commission makes a decision that a licensee has engaged in anti-competitive conduct, the Commission may—

(a) order the licensee to stop the unfair competition;

(b) require the licensee to pay a fine not exceeding the equivalent of ten percent of the annual gross turnover of the preceding year, for each financial year that the breach persists;

(c) declare any anti-competitive agreement or contracts null and void; or

(d) impose any other lawful remedial measure to redress this offence.

(7 The provisions of subsection (6) shall not in any way affect the right of any person to make and sustain any claim under any law in force in Kenya for the act or omission which constitutes an offence

under this Act or from being liable under that other written law to any punishment or penalty higher than that prescribed under this Act

(8 Any person aggrieved by the decision of the Commission under this section may appeal to the Tribunal.

(9 The provisions of this section, shall not limit or in any way affect the obligations of a licensee under any condition of a licence.

Section 102A

102A. Complaints

(1 A person aggrieved by—

(a) any publication by or conduct of a journalist or media enterprise;

(b) anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or

(c) any action taken, any omission made or any decision made by any person under this Act,

may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

(2 A complaint under this section may be made—

(a) orally, either in person or by any form of electronic communication; or

(b) in writing, setting out the ground for the complaint, nature of the injury or damage suffered and the remedy sought.

(3 Where complaints are oral, the Tribunal may require them to be reduced in writing within seven days, unless it is satisfied there are good reasons for not doing so.

(4 A complainant shall disclose to the Tribunal—

(a) the complainant's name and address; and

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(b) other information relating to the complainant's identity that the Tribunal may reasonably require.

(5 Despite subsection (4), the Tribunal may—

(a) keep information provided by a complainant confidential if there are special circumstances to do so, or the Tribunal considers it is in the complainant's interests to do so; or

(b) accept an anonymous complaint concerning an issue of public interest or where no clearly identifiable person or group is affected.

(6 The Tribunal may require a complainant to provide more information about the complaint within such reasonable time as the Tribunal may determine.

(7 The Tribunal may, at any time, require a complaint or information provided by a complainant to be verified by the complainant by oath or statutory declaration.

(8 Without prejudice to the functions of the Authority or the Media Council, the Authority or the Council may take up a complaint on its own initiative, and forward the same to the Tribunal for determination where in its opinion the complaint has public interest implications.

102G. Appeals from the decision of the Tribunal

(1 Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.

(2 No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced until the appeal has been determined.

(3 The decision of the High Court on any appeal under this section shall be final.

369. The other dispute resolution mechanisms alluded to by the 7th, 8th and 12th Respondents related to the Tribunals established under the Competition Act and the Capital Markets Act. In particular, **Section 35A of the Capital Markets Act** establishes the **Capital Markets Tribunal** and sets out the matters that can be heard and determined before it.

370. Section 71 of the Competition Act on the other hand establishes the Competition Tribunal and sets out its jurisdiction. On the other hand, the Competition Tribunal (Procedure) Rules at **Rule 9 Clause 9** states:

> ***9. The Tribunal shall have jurisdiction to hear and determine the following matters—***
>
> ***(a) matters referred to it for review of the Authority's decision under section 48 (1) of the Act;***
>
> ***(b) to hear Appeals from the decisions of the Authority;***
>
> ***(c) any other matter arising under the Act; and***
>
> ***(d) any other matter referred to it by a competent court of law.***

371. As to what amounts to what constitutional questions, issues, or matters this was discussed in **M. Fredrick & Others -vs- MEC for Education & Training Eastern Cape & Others [2001] ZACC 6.** The Constitutional Court of South Africa stated:

"[10] As this Court observed in S v Boesak 2001(1) SA 912 (CC)[2000] ZACC 25; ; 2001 (1) BCLR 36 (CC) at para 13, 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 s 172(1)(a) and s 167(4)(a) 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. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), 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."***

372. In **Sisto Muhiato Karonji v Attorney General & 2 others [2017] KEHC 9605 (KLR)** Mativo J (as he then was), citing the above cited case

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stated:

"16. 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.[7] 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 organise an analysis of the nature of constitutional matters arising from the cases before the Court."

373. The learned Judge further, citing Justice Langa in **Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)** stated that: -

"14. 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."

374. Flowing from the above decisions and our reading of the Petitions and the various sections of the law with respect to the alternative dispute resolution mechanisms under the referenced statutes, we find that the regulatory schemes and the dispute resolution mechanisms were not sufficient to address and resolve the constitutional and public interest questions raised in the Petitions.

375. We also reiterate that the said Tribunals are not vested with jurisdiction to deal with constitutional questions of alleged violation or threatened violation of rights or fundamental freedoms in the Bill of Rights or to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution, as stipulated in Article 165(3) (b) & (d)(ii).

376. In view of the above, we find that the consolidated Petition does not offend the doctrine of avoidance.

377. On the basis of our decision in respect of the doctrine of exhaustion and avoidance, we find that the issues raised in the consolidated Petition are justiciable before this Court. Thus, the Respondents' contention that the petition is not ripe for determination is indefensible.

Separation of powers

378. The Respondents relied on the doctrine of separation of powers and judicial restraint to challenge the jurisdiction of the court, arguing that resource allocation and share pricing fall strictly within the executive and

legislative discretion. They further argued that in the absence of demonstrated illegality, irrationality, or procedural impropriety, this Court should exercise restraint and allow specialized statutory and regulatory mechanisms to operate without grafting judicial preferences onto polycentric economic choices.

379. The Petitioners countered this by submitting that the doctrine of separation of powers should not be used to grant executive immunity from judicial review for actions which violate the Constitution and statutes.

380. The doctrine of separation of powers is a cornerstone of our constitutional order and is designed to safeguard democracy by ensuring that each arm of government operates within its assigned mandate while subject to checks and balances. This doctrine is anchored in Article 1(3) of the Constitution, which delegates sovereign power across three distinct state organs: the Executive, the Legislature, and the Judiciary.

381. In **Commission for the Implementation of The Constitution v National Assembly of Kenya, Senate& 2 Others [2013] eKLR**, the court held that the doctrine of separation of powers enables the three traditional arms of government as well as independent commissions to function freely without any direction or control by any other person.

382. A three Judge Bench of the High Court in **Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party) (Petition 518 of 2013) [2014] KEHC 7493 (KLR) (Constitutional and Human Rights) (15 April 2014) (Judgment)** per RM Mwongo, HA Omondi, CW Meoli, M Ngugi, HK Chemitei, citing many other decisions stated as follows on the importance of the doctrine of separation of powers:

"128. We are bolstered in this finding by the decision of the Supreme Court in the matter of Speaker of the Senate and Another v The Hon. Attorney General and 3 others, Advisory Opinion Reference No. 2 of 2013. In that case, the respondents had argued that pursuant to the doctrine of separation of powers, the Judiciary had no legitimate business to intervene in matters falling within the legislative competence of Parliament. Further, that Parliament's business was strictly conducted within its own standing orders which are recognised by the Constitution.

129.The Court recognised the legislative authority vested in Parliament by the Constitution, and said it would be reluctant to question Parliamentary procedures or workings, as long as they did not breach the Constitution. However, where a dispute arises which alleges

violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely be performing its solemn duty under the Constitution.

383. In the **Matter of the Speaker of the Senate & another (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion) (with dissent - N Ndungu, SCJ),** the Supreme Court states as follows, regarding the doctrine of separation of powers:

"61. It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

62.However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. …. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the

Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act….”

384. Courts emphasize that although the Constitution does not expressly codify separation of powers, its influence permeates the constitutional framework, requiring restraint and deference among the branches to prevent overreach, autocracy, or judicial tyranny.

385. At the same time, the High Court is vested with the constitutional authority as the ultimate interpreter of the Constitution. It is entrusted with the responsibility of ensuring that all governmental actions remain within constitutional bounds. This is what we call judicial review power of the Court which draws upon the Constitution and as annotation of the concept of ***judicialization of politics.***

386. Judicialization of politics has been coiled to refer to the rising reliance of judicial review power of the court to address core ethical predicaments, public policy questions, and political controversies under the Constitution, which is a significant road-test and pragmatic application of the Constitution of Kenya, 2010.

387. Under the doctrine of separation of powers, the Courts are in a dual manner both limited to interfere and also empowered to oversight. This ensures that there is a balance between independence and accountability to preserve constitutional democracy.

388. However, tension arises whenever the High court, under **Articles 165** and **23 of the Constitution**, strikes down an executive action or law for being inconsistent with or in contravention of the Constitution. Some see this as a transfer to courts of contentious issues of an outright public policy or political nature and significance. Others consider public policy and political issues to be within the power of the elected representatives of the people where the decision-making is based on the rule of majority and free, public debate amongst equals, rather than judges who are appointed and not elected, yet, make binding decisions on the basis of legal skills, pre-ordained rules, ascertainment of facts and weighing of arguments made by parties with a prospective effect on similar cases in the future (doctrine of judicial precedent).

389. The different ways available to the executive and the legislature in dealing with public policy and political issues is responsible for the diverging understanding of judicial power of review. See **The Judicialization of Politics: A**

World-wide Phenomenon, Torbjorn Vallinder, *International Political Science Review (1994),* Vol. 15 N0. 2, 91-99 and ***OED Vol. VIII, 1989:297.***

390. Of importance, however, is that, most common reactions from the executive and Parliament towards exercise of judicial review power by the court comes in the form of accusation of judicial overreach and breach of separation of powers; and a call for judicial restraint.

391. Without trivializing these concerns, the important safeguard should be the acknowledgement: i) that judicial authority is exercised in accordance with the Constitution; and ii) that application of separation of powers is subject to the idea of inter-dependence, checks and balances created by the Constitution. One of the fundamental checks and balances is judicial scrutiny of public action.

392. We emphasise that, in exercising judicial review power, the court neither usurps the authority of the executive or the legislature, nor supplants the decision by the executive or the legislature. The court is simply concerned with whether the law, the action or omission complained of is consistent with the Constitution and the law.

393. These constitutional transformative prescriptions and developments affect and delimits the application of separation of powers as well as doctrines such as the "political question" doctrine, and mark a transition to what is termed as constitutional sovereignty or supremacy where any law or action or omission that goes against the Constitution is void or invalid. See **Article 2** of **the Constitution** on:

> ***2. Supremacy of this Constitution***
>
> ***(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution.***
>
> ***(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.***
>
> ***(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***
>
> ***(5) The general rules of international law shall form part of the law of Kenya.***

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. [emphasis ours]

394. Therefore, application of Separation of powers should be understood and seen within the constitutional architecture.

395. The consolidated Petition seeks reliefs which are not merely resource allocation and share pricing. Therefore, by determining this petition, the Court will not overreach the territory of the executive and the legislature.

396. Based on our analysis above, we find and hold that this Court has jurisdiction to hear and determine the consolidated Petition, where constitutional breaches, arbitrary actions, or *ultra vires* exercise of statutory power have been alleged, without violating the doctrine of separation of powers.

(b) Whether the consolidated petition meets the constitutional threshold set out in the Anarita Karimi Njeru case.

397. The Respondents challenged the consolidated Petition on the basis that it does not meet the constitutional threshold as set out in the **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 (the Anarita Karimi Case).** The Petitioners maintain that they have provided sufficient particularity of the Petition and that their claim is not based on generalized grievances.

398. The threshold for constitutional petitions as enunciated in the **Anarita Karimi v Republic** (supra) and restated in **Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012(2013)** cases is that the cause of action must be pleaded with reasonable precision, setting out the provisions alleged to be infringed and the manner in which they are alleged to be infringed.

399. We note that the consolidated Petition challenges the proposed partial divestiture of the Government's shareholding in Safaricom PLC (the impugned transaction) on the basis that the process violated both the Constitution and statutory requirements. The specific violations pleaded include: Violation of Constitutional Principles and Values under Articles 1, 10, 35, 73, 75, 201, 227, 232 and 238; Unconstitutional use of public assets to Raise Revenue thereby contravening Articles 201 and 209-214; Non-Compliance with the Privatization Act in violation of sections 19-25 of the Privatization Act; Undervaluation and waste of public resources; Breach of the Public Procurement and Asset Disposal Act; Lack of public participation, and access to information; Lack of transparency regarding the purchaser; concealment of material information; threats to national security and data sovereignty and privacy.

400. We have considered the consolidated Petition. We find that the Petitioners structured their claims around the specific details of ***Sessional Paper No. 3 of 2025.***

401. In our view, the alleged violations or threats of violations of the Constitution by the Respondents as set out by the Petitioners are precise, reasonable, particular and specific thereby meeting the constitutional threshold set out in **Anarita Karimi** (Supra) Case.

402. We are therefore satisfied that the Petition is rightly before us for constitutional consideration.

ISSUE NO. 2

The applicable constitutional and statutory framework for sale of shares in a government linked institution: - provisions under discussion are:

(a) Public Finance Management Act (PFMA) Section 87A.

(b) Sections 19 to 25 of the Privatization Act, 2025 requiring a formal Privatization Programme.

(c) Section 163 of the Public Procurement and Asset Disposal Act (PPADA), 2015.

(d) The Public Private Partnerships (PPP) Act.

(e) The purport of Section 4(c) of the Privatization Act, 2025 and Section 4(2)(d) of the Public Procurement and Asset Disposal Act.

(f) The constitutional modes of raising revenue under Part 3 of the Constitution.

(g) Article 10 of the Constitution- National Values and Principles of Governance,

(h) Article 201 of the Constitution- Principles and Frameworks of Public Finance.

403. The Petitioners argued that revenue-raising powers under ***Article 209 of the Constitution*** are restricted to taxation and charges. They were of the view that, treatment of the expected sale proceeds from the proposed divestiture as revenue, violates **Articles 209 through 214.**

404. According to the petitioners, using asset sales as a routine revenue-generating tool breaches constitutional boundary under the **Privatization Act 2025** and the **Public Finance Management Act.**

405. They further argued that the 1st respondent possesses no constitutional or statutory mandate to sell profitable public assets merely to raise revenue. Therefore, the 1st Respondent's action was characterized as being ultra *vires*, null and void.

406. The petitioners also argued that the proposed partial divestiture of

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Government shares in Safaricom PLC is governed by the constitutional principles of public finance in **Article 201** as well as **Article 10** on National Values and Principles of Governance.

407. On their part, the Respondents argued that **Part 3 of Chapter 12 of the Constitution** on revenue raising powers does not prohibit disposal or realising value from an investment.

408. The respondents faulted the petitioners for treating a specific statutory shares-sale route as if it were a taxation, procurement, a Public Private Partnership concession or a general privatization programme.

409. The Respondents concluded that the transaction herein complies with the provisions of the Constitution, specifically, **Articles, 10 and 201** and relevant statutes.

410. From the rival positions taken by the parties, we now proceed to determine the specific constitutional and statutory frameworks governing the sale of shares in a government-linked institution.

The Constitutional framework

Revenue-raising powers by the national government

411. Part 3 of Chapter 12 of the Constitution provides for the Revenue-raising powers and the public debt.

412. Article 209 (1), (2) and (4) of the **Constitution** provides:

"209. Power to impose taxes and charges

(1) Only the national government may impose—

(a) income tax;

(b) value-added tax;

(c) customs duties and other duties on import and export goods; and

(d) excise tax.

(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).

(3) …

(4) The national and county governments may impose charges for the services they provide.

413. Article 210 is on imposition of tax, **Article 211** is on borrowing by national government, **Article 212** is on borrowing by counties, **Article 213** is on loan guarantees by national government and **Article 214** is on public debt.

414. Although the respondents argued that **Part 3 of Chapter 12 of the Constitution** does not prohibit disposal of Government investments; and that **Articles 209 to 214** do not prohibit the State from realising value from an investment, it appears that the 1st respondent intends to raise revenue through the sale of shares in Safaricom PLC, and in their submissions attempted to suggest that they derive the power or authority to sell the shares from **Article 209**.

415. Clearly, the above constitutional provisions under **Part 3 of Chapter 12** do not expressly provide for a government share divestiture as a means of raising revenue by the national government.

Principles and framework of public Finance

416. Part I of the Constitution is on Principles and Framework of Public Finance. Article 201 provides that: -

The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way; and

(e) financial management shall be responsible, and fiscal reporting shall be clear.

417. Accordingly, the **Principles of Public Finance** in **Article 201** apply to the proposed sale of shares in a government-linked corporation.

National Values and Principles of Governance

418. Article 10 of the Constitution provides**: -**

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

419. Of significance is that, the national values and principles of governance in **Article 10** are justiciable and enforceable immediately and constitute the basis and justification of actions by all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions. [emphasis ours]

420. The sale of shares in a government-linked corporation is a public policy decision. For that reason, the relevance and application of **Article 10** to these

proceedings cannot be gainsaid.

Statutory framework for sale of shares in government-linked corporation

421. The petitioners argued that the partial divestiture of Government shares in Safaricom PLC by the National Treasury did not comply with various provisions of the **Public Procurement and Asset Disposal Act (PPADA) 2015** and the **Privatization Act of 2025.**

422. The preamble to the PPADA states that it is ***an act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.***

423. In particular, the petitioners pointed out **section 163 of the PPADA**, which states that asset disposal is restricted to assets that are unserviceable, obsolete, obsolescent, or surplus. They asserted that Safaricom PLC is a highly profitable, viable performing national asset generating KES18 to 20 billion annually for the State and that its shares ought not to be disposed of.

424. The petitioners also submitted that **Sections 19 to 25 of the Privatization Act** require the Government to formulate and submit a formal Privatization Programme to the National Assembly. The Petitioners however assert that this requirement was not complied with. Further, that the Government bypassed mandatory independent valuations under **Section 35 (2) (e) of the Privatization Act**.

425. The respondents were of a divergent view and submitted that Parliament established a specific mechanism for the sale of Government shares in a government-linked corporation under **section 87A of the Public Finance Management Act**.

426. They submitted that Parliament also expressly excluded such sales from the **Privatization Act** under **section 4(c) of the Act**. According to the Respondents, the checklist that the petitioners say was ignored is based on the criteria excluded under **section 22 (2) of the Privatization Act**.

427. The Respondents also stated that Section **163 of the PPADA** is a disposal committee provision for ordinary procurement-asset disposal, and not for sale of Government shares in a listed government-linked corporation. In their view, **Section 4(2)(d) of the PPDA** excludes the acquisition and sale of shares or securities and investments such as shares purchased by public entities. They added

that **Section 4(2)(e)** also excludes transactions governed by the **Public Private Partnership Act**.

428. The respondent claimed that **Safaricom PLC** is a government-linked corporation under **section 2 of the Privatization Act**.

429. At the outset, we must determine whether Safaricom PLC is government-linked corporation.

430. Section 2 of the Privatization Act defines a "***national government-linked corporation***" to mean ***a corporation in which the National Government or a national government entity is a shareholder with less than fifty per centum of the share capital of the corporation.***

431. According to **Sessional Paper No. 3 of 2025**, the Government's shareholding stake in Safaricom PLC comprised of 35% of the company's total shares. Safaricom PLC is therefore, a government-linked corporation.

432. Section 4 of the Privatization Act provides that the Act shall not apply to sale of shares or any balance sheet reorganisation which may lead to dilution of the percentage of shares held by a public entity.

433. Section 4(2)(d) of the PPADA provides, *inter alia* that, acquisition and sale of shares or securities are not procurement or asset disposal in respect of which the Act applies.

434. From the above provisions, the application of the **Public Procurement and Asset Disposal Act** and **the Privatization Act** to sale of shares are expressly excluded.

435. Moreover, **Section 74 of the Privatization Act** provides that the **Public Finance Management Act** is amended by inserting the following new sections immediately after section 87-

Insertion of new section 87A in Cap.412A.

436. Section 87A of the Public Finance Management Act provides:

> ***87A. Sale of government shares in a government-linked corporation***
>
> ***(1) The National Government may sell or dispose of part or all its shares in a government linked corporation, with the approval of the Cabinet, which approval of the Cabinet, may only be given taking into account any recommendations of the National Treasury regarding the financial implications of the sale of such shares.***

(2) The sale of shares in a government-linked corporation shall only be done with the approval, by resolution, of the National Assembly.

(3)Subject to subsection (2), the Cabinet Secretary shall submit the proposal for sale of shares in a government-linked corporation to the National Assembly for approval.

(4) The request under subsection (3) shall be accompanied by an explanatory memorandum indicating—

(a) a description of the government-linked corporation;

(b) the total number or percentage of shares proposed to be sold;

(c) the benefit to be gained from the proposed sale of shares;

(d) the recommendations of the National Treasury regarding financial implications of such sale; or(e)any other recommendations.

(5) The National Assembly shall consider the proposed sale within twenty-eight sitting days of receipt.

(6) The Clerk shall notify the Cabinet Secretary of the decision of the National Assembly within seven days of the resolution of the National Assembly.

(7) Where the National Assembly declines the proposed sale, the Clerk shall notify the Cabinet Secretary of the resolution of the National Assembly.

437. Section 87A of the Public Finance Management Act particularly provides for ***'Sale of government shares in a government linked institution.'*** Nevertheless, the sale is subject to the entire **Public Finance Management Act,** whose purposes and objects as per its long title are *inter alia* ***'An Act of Parliament to provide for the effective management of public finances by the national [and county] government[s]***...'; [emphasis added]

438. The Respondents also submitted that the transaction is not a concession or project governed by the Public Private Partnerships (PPP) Act, as it is excluded under Section 4(1) of that Act. The said section provides: -

4. Application of Act

(1) This Act shall apply to every project agreement for the financing, design, construction, rehabilitation, operation, equipping or maintenance of a project or provision of a public service undertaken as

a public private partnership.

(2) The provisions of the Public Procurement and Asset Disposal Act (Cap. 412C), shall not apply to a public private partnership.

(3) Without prejudice to the generality of subsection (2), the provisions of the Public Procurement and Assets Disposal Act (Cap. 412C) shall—

(a) not apply to a public private partnership project, if all the monies for the project are from the private party;

(b) apply if there is counterpart funding that is, including public funds, for the public private partnership project.

439. Our understanding of the above provision is that the PPP Act only applies to all agreements made under a Public–Private Partnership (PPP) where a private entity collaborates with government to deliver a project or service. In practice, it covers contracts for financing, designing, building, rehabilitating, operating, equipping, or maintaining public infrastructure, as well as providing public services. In short, it sets the scope of the Act so that every PPP arrangement is regulated by its rules.

440. As to whether this Act is applicable in this matter, our finding is that it was not demonstrated that the sale of government shares in a Safaricom PLC in the proposed divestiture is a project envisaged under the Act, which is tailored specifically to Public-Private Partnership (PPP) agreements, entailing a collaboration between a private entity and the government to finance, design, build, operate, or maintain public infrastructure or services.

441. A divestiture, on the other hand, is a sale and transfer of ownership where the government disposes of its equity stake in a company which is regulated under different legal frameworks. Although both PPPs and divestitures involve private participation in public assets, PPP law governs only service delivery partnerships, not outright sales of government shareholding.

442. Accordingly, we agree with the Respondents' argument that the Public Private Partnership Act is inapplicable in this transaction.

443. The foregoing is the constitutional and statutory frameworks governing the proposed divestiture of the 15% Government shares in Safaricom PLC which forms the functional basis on which the issues in the consolidated petition are examined and determined by this court.

ISSUE NO.3

(3). Constitutional and Statutory Process Compliance.

Under this issue we shall discuss: -

(a) Whether the proposed sale of Safaricom shares complied with constitutional and statutory requirements.

(b) the alleged misrepresentation, and concealment of material information in the Sessional Paper No. 3 of 2025 and possible violation of the High Court status quo order of 23th March, 2026.

(c) Whether there was reasonable and meaningful public participation conducted in compliance with Articles 10, 118, and 201 of the Constitution.

(d) Allegations of misrepresentation, concealment of material information such as the identity of the would-be buyer and implication of majority foreign shareholding in Safaricom PLC.

(e) Whether the procurement of the Transaction Advisors was in accordance with Articles 227 and 232 of the Constitution on competitive tendering and transparent fee disclosures.

444. One of the core complaints by the Petitioners is that the Executive violated **Article 209 of the Constitution** by attempting to raise routine government revenue through the liquidation of public assets. Their argument is that constitutional revenue-raising mechanisms are strictly confined to taxation, duties, charges and public debt, making sale of public assets an improper substitute method for revenue-raising.

445. They argued further that depositing the proceeds of such sale into a specialized "Infrastructure Fund" managed solely by the Cabinet Secretary violates **Article 206**, which mandates that all public revenues be directed into the Consolidated Fund and allocated strictly through parliamentary appropriation.

446. The proposed partial divestiture was also challenged for failing to comply with key statutory frameworks governing public asset disposal and privatization. The Petitioners contended that under **Section 163 of the Public Procurement and Asset Disposal Act (PPADA)**, public assets can only be disposed of if they are unserviceable, obsolete, obsolescent, or surplus which criteria does not apply to a highly profitable national asset like Safaricom. It was their argument that bypassing the PPADA and Article 227 meant avoiding open, competitive bidding, thereby violating principles of fairness, transparency and cost-effectiveness.

447. In response to the above petitioners' claim, the Respondents maintained that the transaction is legally anchored under **Section 87A of the Public**

Finance Management Act (PFMA) which was introduced through **Section 74 of the Privatization Act,** as a specific legal mechanism governing the sale of government shares in government-linked corporations. The Respondents stated that the National Treasury fully complied with this statutory framework by preparing a comprehensive proposal with an independent valuation, securing Cabinet approval, laying ***Sessional Paper No. 3 of 2025*** before the National Assembly, and obtaining Parliamentary approval.

448. The Respondents also addressed claims founded on the Privatization Act, 2025, and were categorical that the requirements for a general Privatization Programme under ***Sections 20 to 24*** of the Act do not apply. They emphasized that **Section 4(c) of the Privatization Act** explicitly excludes share sales conducted pursuant to **Section 87A of the Public Finance Management Act**.

449. The Respondents further contended that because the transaction involves a partial divestiture of listed shares on the secondary market rather than a full privatization or transfer of ownership of a state corporation, the statutory checklist under **Section 22(2) of the Privatization Act** was not required.

450. The Respondents additionally stated that the **Public Procurement and Asset Disposal Act (PPADA), 2015** was inapplicable, arguing that **Section 4 (2) (d) of PPADA** expressly excludes the acquisition and sale of shares, securities, and investments from the public procurement regime. Further, that **Section 163 of PPADA** applies to ordinary disposal committees dealing with physical public assets that are unserviceable, obsolete, or surplus, whereas publicly listed shares have ascertainable market values and cannot be categorized as surplus or obsolete.

451. The Respondents also pointed out that the transaction is not a concession or project governed by the **Public Private Partnerships (PPP) Act**, as it is excluded under **Section 4(1)** of the Act.

452. Regarding sector-specific statutory compliance, the Respondents highlighted that all necessary regulatory thresholds were satisfied.

453. They added that under **Sections 5 and 24 of the Kenya Information and Communications Act (KICA)** and Condition 18 of Safaricom's Tier 1 License, Safaricom PLC formally applied for share transfer clearance, prompting the Communications Authority of Kenya to evaluate the transaction and issue an official Letter of No Objection.

454. In response to takeover concerns, the 8th Respondent stated that the Capital Markets Authority lawfully exercised its statutory discretion to grant an exemption from mandatory takeover offer requirements under the Capital Markets Regulations.

455. We have considered the parties' rival arguments. We note that we have

already determined some of the sub-issues emerging under issue 3.

456. In light of our findings and holding in issue 2, we opine that majority of the Petitioners' contentions based on the **Privatization Act of 2025** and **Public Procurement and Asset Disposal Act** are redundant.

457. We now turn to the contentions on alleged non-compliance with the Constitution particularly **Articles 2(1), 10, 201 and 209** of the **Constitution.**

Whether there was compliance with Articles 2(1), 10, 201 and 209 of the Constitution

458. We reiterate that the proposed partial divestiture in question is a public policy decision made by the Government. The Constitution in Articles 2(1),10 and 201 mandate that official constitutional or statutory or administrative processes and acts undertaken by public or state officers must strictly adhere to the national values and principles of governance, including transparency, accountability, public participation, sustainable development and principles of public finance.

459. Article 201 of the Constitution states: -

201. Principles of public finance

The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

(c) the burden and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way; and

(e) financial management shall be responsible, and fiscal reporting shall be clear.

460. The primary statutory framework governing the proposed partial divestiture is the **Public Finance Management Act,** specifically **Section 87A**

which derives from the Constitution and specifically **Article 201**.

461. The partial divestiture must therefore adhere to the Constitution as well as statutory requirements.

462. We have already established that the Constitution at **Chapter 12 on Public Finance** does not provide for a government shares divestiture as a means of raising revenue.

463. Part 3 of Chapter 12 of the Constitution is on Revenue-raising and the public debt. **Article 209** provides: -

209. Power to impose taxes and charges

(1 Only the national government may impose—

(a) income tax;

(b) value-added tax;

(c) customs duties and other duties on import and export goods; and

(d) excise tax.

(2 An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3)(a) or (b).

(3 A county may impose—

(a) property rates;

(b) entertainment taxes; and

(c) any other tax that it is authorised to impose by an Act of Parliament.

(4 The national and county governments may impose charges for services.

(5 The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

464. The first issue raised by the Petitioners is that revenue raising is strictly confined to taxation, duties, charges and public debt and that the Respondents violated Article 209 by utilizing public asset liquidation to finance routine government expenses.

465. We observe that although the Respondents contended that disposal or realisation of value of an investment such as shares is one of the modes of raising national revenue, we have found that Article 209 of the Constitution does not provide for sale of shares as one of the modes of raising revenue by the national government.

466. The second argument by the Petitioners on alleged constitutional

violation is that, depositing proceeds into a specialized 'Infrastructure Fund' under the sole management of the Cabinet Secretary violates **Article 206 of the Constitution,** which mandates all public revenue to be paid into the Consolidated Fund ***unless specifically exempted by Parliament.***

467. In the course of our analysis, we came across the **National Infrastructure Fund Act No. 4 of 2026 (NIF Act)** which was enacted by Parliament and it took effect on 25.3.26.

468. Section 5 of the **NIF Act** establishes the National Infrastructure Fund.

469. We note that the National Assembly in its ***Joint Committee Report on the consideration of the Sessional Paper No. 3 of 2025 on the partial divestiture in Safaricom PLC by Government of Kenya*** at section 5.10 paragraph 510, made reference to the **National Infrastructure Fund Bill No. 1 of 2026,** and at paragraph 515(2)(IV), approved the divestiture ***subject to the proceeds of the sale of 15% of Government shares in Safaricom PLC being deposited in the National Infrastructure Fund, as a way of guaranteeing ringfencing in the use and application of the divestiture proceeds.***

470. We further note that the said Report did not specifically mention the National Infrastructure Fund Act.

471. One of the major issues emerging in the consolidated Petition is the ringfencing of the proceeds of the divestiture.

472. The National Assembly in the Joint Committee Report recommended the ring-fencing of the funds realized from the divestiture by depositing the funds into the National Infrastructure Fund.

473. Part 2 of the Constitution is on other public funds. Under Article 206:

206. Consolidated Fund and other public funds

(1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—

(a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or

(b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

(2) Money may be withdrawn from the Consolidated Fund only—

(a) in accordance with an appropriation by an Act of Parliament;

(b) in accordance with Article 222 or 223; or

(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament.

(3) Money shall not be withdrawn from any national public fund other

than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.

(4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

474. The specific exemption **clause (a) "*except money that is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose*,"** creates a legal exception to the general rule that all money raised or received by or on behalf of the national government must be paid into the Consolidated Fund. Thus, not all government money has to go into the Consolidated Fund, provided Parliament explicitly passes a law to divert or rings-fence those funds for a specific, designated purpose.

475. However, by depositing the proceeds of the impugned divestiture in the National Infrastructure Fund, under the **NIF Act**, the funds are subject to the wide powers of the Board as listed under section 19 of the Act.

476. In our view, this will not serve the priority and critical strategic purposes and projects intended to be funded by the proceeds of the divestiture envisaged by the National Assembly where it proposed ring fencing of the funds realised.

477. Section 19 of the National Infrastructure Fund Act provides:

19. Powers of the Board

(1) The Board may—

(a) invest in projects, including by way of equity investment, or debt based on the bankability of the project, or any other project finance mechanism;

(b) acquire and hold security or a security interest, including, a right in a security, of any kind and in any form for the due discharge of obligations under an investment or agreement that it makes;

(c) surrender the security, security interest or right in the security and acquire and hold, in exchange, security or a security interest, including, a right in a security, of any kind and in any form;

(d) realize the security, security interest or right in the security made, acquired or held by it on the investment or agreement;

(e) exchange, sell, assign, convey or otherwise dispose of, or lease, the investment, agreement, security, security interest or right in a security;

(f) enter into arrangements or agreements with, and act as agent or mandatory for, any

department or agency of the government of Kenya, or any other body or person, for the development of infrastructure projects to, by, on behalf of or jointly with that institution and deliver financial assistance on

their behalf under the arrangement or agreement;
(g) accept any interest or rights in real property or personal property or any rights in immovable or movables as security for the due performance of any arrangement or agreement with the Fund;
(h) determine the form of compensation for services provided by the Fund in the exercise of its powers or the performance of its functions under this Act;
(i) acquire and dispose of any interest or right in any entity by any means;
acquire, hold, exchange, sell or otherwise dispose of, or lease, any interest or rights in real property;
(k) reinvest into the Fund all the proceeds from any exit in an investment;
(l) establish special purpose vehicles, pooled investment vehicles, infrastructure funds or other capital market instruments for purposes of mobilizing private capital;
(m) approve investments and transactions within the approved Investment Policy;
(n) develop the Fund's business plan, approving of annual budgets and the related funding for the Fund;

(o) invest in projects, including by way of equity or quasi-equity, based on the bankability of the projects, in accordance with the Investment Policy of the Fund; and
(p) originate projects in accordance with the Investment Policy.
(2) Without prejudice to subsection (1), the Board shall−
(a) not borrow or take credit against its balance sheet; and
(b) only undertake project financing in accordance with this Act.

478. Differently put, the funds in the National Infrastructure Fund are not exclusively reserved for specific projects and investments for which the divestiture was formulated and approved by the Cabinet and the National Assembly in the **Sessional Paper No. 3 of 2025**.

479. On what ringfencing is, according to the Cambridge Dictionary, Ring Fence is:"**[1]**to make sure that a sum of money is protected and only used for a particular purpose; to protect a particular area of spending so that there is no reduction in the amount spent on it". The Oxford Advanced Learner's Dictionary **[2]** States that "ring-fence something (finance) to protect a particular sum of money by putting limits on it so that it can only be used for a particular purpose.

480. It is for this reason that we agree with the Petitioners that ringfencing

entails specific, identified, costed and located projects.

481. Based on the foregoing, we find that the Respondents, in particular, the State Respondents did not consider or comply with constitutional requirements under **Articles 201 and 206 of the Constitution.**

482. We now consider the arguments by the Respondents that a proposal for an independent valuation was prepared and presented to the Cabinet for approval by the Cabinet Secretary for the National Treasury and Economic Planning and that the Sessional Paper No. 3 of 2025 was tabled before the National Assembly and finally approved by resolution of the National Assembly in full compliance with the constitutional and statutory requirements.

483. Several questions arise from these arguments.

Procurement of Transaction advisers

484. The Petitioners alleged that the transaction advisors were handpicked without open competitive tender advertisements, thereby violating **Articles 10, 227 and 232 of the Constitution.**

485. They further claimed that there were inflated fee notes and kickbacks benefiting political cartels.

486. The Respondents dismissed these claims by the petitioners as unparticularized. More specifically, the 1st Respondent stated that KCB Investment Bank Limited was legitimately retained as the transaction advisor to perform an independent valuation that guided the negotiated price of KES 34 per share, a price representing a 23% premium over the volume-weighted average trading price.

487. We note that, the 1st respondent being a government organ, simply stated that the transaction advisors were ***'legitimately retained'*** to do the assignment.

488. Although the contract made on 31.10.25 was between the State Department for Public Investments and Asset Management and Ms KCB Investment Bank Ltd for the provision of transaction advisory services, and an independent valuation report, no evidence was provided on how the They were procured, yet the 1st respondent is the procuring entity and custodian of the relevant engagement or documents on how they retained the transaction advisors for this particular divestiture.

489. On a *prima facie* basis, evidential burden was created upon the 1st respondent to rebut the claim by the Petitioners that the transaction advisors were handpicked without open competitive tender advertisements, thereby violating **Articles 10, 227 and 232 of the Constitution.**

490. Absent proof of how the transaction advisors were procured or retained, we are unable to accept, in the circumstances of this case where disclosure of

information is one of the reliefs sought, that the 1st respondent could legitimately claim the benefit of the ancient Latin Maxim ***"Omnia praesumuntur rite esse acta,"*** which is loosely translated to mean ***"All things are presumed to have been done rightly."***

491. We therefore find that the petitioners have on a balance of probabilities, pursuant to sections **107 to 109 of the Evidence Act,** discharged their burden of proof that the procurement of the transaction advisors was not in accordance with the **Public Procurement and Asset Disposal Act.**

492. Before we close on this issue, whereas the **Public Procurement and Asset Disposal Act** does not apply to the sale of shares, the procurement of services such as those of the Transaction Advisors is governed by the PPADA.

493. We do not however find any evidence to support the Petitioner's allegations that there were hefty fees and kickbacks to corrupt government officials and politicians.

Alleged Misrepresentation and concealment of material information

494. The petitioners alleged that there was misrepresentation and concealment of material information in the **Sessional Paper No. 3 of 2025,** which go to the root of the process and constitutional requirements relating to the divestiture.

495. In support of these allegations, the Petitioners stated that on 4th December 2025, the National Treasury submitted ***Sessional Paper No. 3 of 2025*** to Parliament, explicitly identifying Vodacom Group, the 7th Respondent, as the proposed buyer. However, according to the petitioners, the proposed buyer was '*quietly shifted*' to Vodafone Kenya Limited, the 8th Respondent without public explanation, procedural clarity, or explicit Parliamentary authorization.

496. The Petitioners argued that the 1st Respondent failed to explain or justify to the Kenyan public why the identity of the proposed buyer changed between these two related but distinct entities, thereby raising severe suspicion regarding the true intentions of the 1st Respondent.

497. The Petitioners further argued that the Cabinet Secretary actively misled Parliament in ***Sessional Paper No. 3*** regarding the true identity of the intended buyer. They alleged that the approval obtained from the National Assembly on 31st March 2026, was obtained through fraudulent misrepresentation as Vodafone Kenya Ltd was not the party named in ***Sessional Paper No. 3*** as the proposed buyer and was therefore never approved by the National Assembly.

498. Another key point raised by the Petitioners in their further affidavit was that National Assembly's approval process was a perfunctory, formalistic

endorsement rather than substantive oversight, caused by a failure of full disclosure by the 1st respondent.

499. According to the petitioners, the Respondents withheld essential transaction documents, specifically the **full Share Purchase Agreements** and **Dividend Purchase Agreements**. Further, that the State Respondents withheld key valuation and security details from the public and the National Assembly, in violation of their right to information under ***Article 35 of the Constitution***.

500. The Petitioners also argued that *the* ***Sessional Paper No. 3 of 2025*** states the objective of the divestiture is to raise revenue for infrastructure development but fails to provide specific details on which exact projects to which the generated revenue will be applied.

501. They also pointed out that the Sessional Paper used vague terms such as 'etc.' when describing project allocations and lacked transparency on whether the funds will be ring-fenced; leaving the KES 204.3 billion raised open to potential misapplication and misuse.

502. The Respondents filed detailed responses denying any wrongdoing and maintained that the transaction was conducted transparently and in full compliance with the law.

503. The 1st, 2nd, 4th, 9th, 10th and 11th Respondents in their Replying Affidavit sworn by the Cabinet Secretary for the National Treasury, along with the 6th Respondent (Safaricom PLC) and the 8th Respondent (Vodafone Kenya Limited), specifically stated that Vodafone Kenya Limited has always been the declared acquiring entity. They explained that Vodacom Group, the 7th Respondent is the broader strategic investor and parent or majority owner of Vodafone Kenya Limited, which has held a 40% stake in Safaricom PLC since 2008.

504. The Respondents also emphasized that both the Sessional Paper and the public notices clearly set out that Vodafone Kenya Limited's shareholding would increase from about 40% to 55%, meaning that the transaction was a rebalancing of existing shareholding rather than a secret change of purchaser.

505. The 7th, 8th and 12th Respondents submitted that assigning public constitutional liability to a private purchaser created a legal mismatch, as corporate entities maintain separate legal personalities.

506. The Respondents refuted claims of withholding documents or concealing information, noting that the National Treasury submitted a comprehensive proposal, including an independent valuation by KCB Investment Bank Ltd to Cabinet and to the National Assembly. They denied breaching **Article 35(3) of the Constitution,** arguing that the Petitioners never sought further

information and confused constitutional access rights with pre-litigation discovery.

507. The Respondents emphasized that the National Assembly's joint committee held 32 sittings, consulted 78 institutions and conducted public fora in 30 counties before approving the Sessional Paper No.3 of 2025 on 31st March 2026.

508. The 1st Respondent and regulators in responding to alleged non-specified allocation of funds and vague project language stated that the partial divestiture aimed to mobilize non-tax revenue for infrastructure, reduce reliance on debt, and spur growth.

509. They stressed that, under National Assembly policy resolutions, all proceeds and dividend prepayments must be paid into the National Infrastructure Fund, ensuring ring-fencing for public infrastructure projects.

510. We have examined the rival positions on alleged misrepresentation and concealment of material information. Our analysis and findings are as below.

Articles 1 and 10 of the Constitution

511. We reiterate our decision on the constitutional and statutory framework governing the subject matter of these proceedings.

512. The allegations of misrepresentation and concealment of material information by the 1st respondent from the people of Kenya and the National Assembly take us to **Article 10 of the Constitution** which requires, inter alia, transparency, accountability integrity and public participation in the making of and implementing public policy.

513. According to the 1st respondent at paragraphs 31, 32 & 33 of the Replying Affidavit of the Cabinet Secretary sworn on 26.3.26, the transaction was approved by the National Assembly after extensive public participation conducted both during the 2025/2026 budget making process and specifically in relation to the divestiture proposal itself.

514. The 1st respondent attempted to pass public participation conducted during the 2025/2026 budget making process regarding alternative financing mechanisms such as privatization as opposed to increased taxation or borrowing, as public participation for the divestiture in question, which latter is an independent policy decision requiring specific public participation.

515. Despite the averment by the Cabinet Secretary, there is no evidence of public participation on the proposed divestiture, during the 2025/2026 budget making process.

516. This violates **Article 10(1)(c) of the Constitution** which mandates public participation when making or implementing public policy decisions.

517. That said, public participation has been set apart as a separate issue and

shall be discussed fully later.

518. The petitioners also alleged misrepresentation and concealment of material information in the **Sessional Paper No. 3 of 2025.**

519. We have examined the **Sessional Paper No. 3 of 2025** dated December 2025 which was produced before this Court both as "JMN-1" and "JMN-6". We note that at page 4 thereof, Vodacom Group, the South African entity and the 7th Respondent herein, is listed as the proposed buyer. The paragraph reads in part:

> ***"ii. Strategic Investor Partnership: <u>The proposed buyer, Vodacom Group</u>, is a long-standing investor in Safaricom, holding approximately 40% through Vodafone Kenya with deep regional experience and a proven track record in capital investment, digital infrastructure, innovation, and financial inclusion…"***

520. In the said Sessional Paper and at para 1.5(iii), it states that Vodacom Group through the transaction has made various commitments including no acquisition related to redundancies within 3 years of the transaction ensuring that the chairman and independent directors remain Kenyan as well as Vodacom's continued support of the Safaricom Foundation.

521. At page 13 of the Sessional Paper, Vodacom Group is identified as an existing partner for the proposed transaction and was to make an upfront payment of KES 40.2 billion to the Government of Kenya in lieu of future dividends.

522. The other express reference to Vodafone Kenya Limited in the Sessional Paper is at page 8 where it is listed as one of the top shareholders (ordinary shares only) of Safaricom PLC as at 31.3.2025.

523. Despite the above distinct and unambiguous revelations in the documents presented before this Court, that Vodacom Group is the proposed buyer, the 1st respondent has averred under oath that the proposed buyer is and has always been Vodafone Kenya Limited.

524. It is apparent from the submissions by the 1st respondent that, the assumption made is that Vodafone Kenya Limited is the proposed buyer, contrary to the documents presented before this Court, showing that both the Cabinet and the National Assembly approved Vodacom group as the proposed buyer.

525. In addition, from the documents provided to the court, it is clear that the 1st respondent concluded **Share Purchase Agreement**, **Dividend Rights Purchase Agreement**, and **Relationship and Cooperation Agreement** with Vodafone Kenya Limited on 3.12.2025. This information is contained in the **Legal Opinion on the Partial Divestiture by the Government of Kenya** in

Safaricom PLC, provided by the Attorney General in the letter reference **AG/CONFIDENTIAL/21/8 dated 25.3.2026.**

526. Similar information is contained in the Transaction Advisory and Valuation Report provided. These matters shall also feature and be discussed below.

Merger, acquisition and other relevant events

527. It is also apparent from the documents provided by the 1st Respondent that, whereas the Government presented the divestiture as a simple sale of shares in a government-linked corporation under section 87A of **the Public Finance and Management Act,** the Government was on the side-lines pursuing merger with, take-over or acquisition of Safaricom PLC. This is evidenced by the **Contract Agreement** between the State Department for Public Investment and Assets Management and Ms KCB Investment Bank dated 31.10.2025- **Annexure JMN11**.

528. Section 9 on appendices, and in appendix A sets out terms of reference, and at paragraph 3 thereof, it clearly states that GoK through the National Treasury was approaching KCB Investment Bank Ltd as the transaction advisor to provide ***full suite of merger and acquisition advisory services.*** We also note that the complete version of the Transaction Advisory Agreement was never supplied to this Court.

529. These matters of merger and acquisition are further discernible from the ***No Objection Letter on Merger and Acquisition Notification*** dated 26.2.2026 addressed to Vodafone Kenya Limited by **Ethiopian Communications Authority**.

530. Another relevant document produced as an exhibit is the **Notice of Approval or Rejection of a Merger or Acquisition-form 5-**dated 20.2.26, in which the **East African Community Competition Authority,** after considering ***the merger or acquisition based on the information submitted, approved the intended merger.***

531. Further, we note that the decision of the **1st Panel Meeting of the Panel Responsible for Determinations on Merger between Vodafone Kenya Limited and Safaricom PLC dated 16.2.2026**- was made after receipt of a ***Notification of a Merger*** between Vodafone Kenya Limited and Safaricom PLC.

532. The above recapitulation brings forth three issues for our determination.

(m) The alleged obscurity of the proposed buyer;

(n) The alleged misrepresentation on the nature of the transaction and the effects thereto and

(o) The alleged non-disclosure of material information to the

public, the Cabinet and the National Assembly.

533. It bears repeating here that, the Sessional Paper No. 3 of 2025 expressly identified Vodacom Group as the proposed buyer. The Sessional Paper further disclosed that through the transaction, Vodacom Group had made various commitments including no acquisition related redundancies within 3 years of the transaction, ensuring the chairman and independent directors remain Kenyan and its continued support of the Safaricom Foundation.

534. The sequence of events leading to the impugned divestiture is that, Cabinet approved Vodacom Group as the proposed buyer. It then submitted the **Sessional Paper No. 3 of 2025** to the National Assembly. Ultimately, the Joint Committee was clear as borne out at paragraphs 484 to 487 of their Report, that the identified buyer is Vodacom Group which was proposed to and approved by the National Assembly.

535. In its undertaking of public participation, the National Assembly presented Vodacom Group as the proposed buyer. This information is contained in the Joint Committee Report.

536. In contrast, the Attorney General's Legal Opinion dated 25.3.2026 confirms that there were three agreements concluded between Vodafone Kenya Limited and the Government of Kenya on 3.12.25. These agreements are- **Share Purchase Agreement**, **Dividend Rights Purchase Agreement**, and **Relationship and Cooperation Agreement.**

537. The information on the change of the proposed buyer from Vodacom Group to Vodafone Kenya Limited was not conveyed to the public, Cabinet and the National Assembly. Neither did it form part of the public participation conducted by the National Assembly.

538. Accordingly, Cabinet and the National Assembly did not approve any divestiture in favour of Vodafone Kenya Limited. The people of Kenya did not also participate in the proposed divestiture transaction between the Government of Kenya and Vodafone Kenya Limited.

539. This violates the national values and principles of governance as well as principles on public finance which require participation of the people in public policy decision-making, transparency and accountability.

540. Also, on the basis of the hallowed company law principle as formulated in **Salomon v Salomon [1897] AC 22; [1896] UKHL 1** that a corporation is a separate legal entity distinct from its shareholders, even if a single individual or a closely related group of individuals owns the majority of the company's shares, it was not legally possible for the Government to substitute the proposed buyer who had been identified and approved by Cabinet and the National Assembly, without following the due process of the law, to wit, public

participation, approval by Cabinet and the National Assembly.

541. Even the doctrine of novation could not apply in the circumstances of this case where the process is strictly regulated by the Constitution and statutes.

542. Equally, where there is a holding-subsidiary company relationship, the principle of law is that the entities remain separate except that the holding company may control management, decision-making and sharing of profits of the subsidiary company.

543. The manner in which the transaction was conducted further compounds the uncertainty of beneficial ownership transparency and visibility especially of a shareholder in Safaricom PLC, Vodafone Kenya Limited which has wholly foreign shareholding by foreign legal persons. In our earlier ruling on the application by Vodacom Group seeking to be removed from these proceedings, the Court noted this fundamental relationship.

544. In light of the evidence placed before this Court by the Respondents, and the *locus classicus* law of **Salomon vs. Salomon** (supra), we do not buy the submissions by the 7th respondent, Vodacom Group, that they have nothing to do with the divestiture of the shares in question and that they should be removed from these proceedings.

545. The above analysis shows the obscurities on the identity of the proposed buyer in the divestiture as stated by the Petitioners.

546. Further, our perusal of the documents filed in Court through the Case Tracking System (CTS) and the hard copies provided to Court, reveal that three key documents namely, **Share Purchase Agreement, Dividend Rights Purchase Agreement** and the **Relationship and Cooperation Agreement** were not produced and, in some instances, only portions of the documents were provided. For example, the first two were not provided and in the case of the latter, only the cover page and pages 12 and 13 were supplied to the Court. This supports the petitioners' complaint of concealment of material information.

547. The Respondents in their submissions argued that the Petitioners did not avail themselves of the statutory mechanisms under Sections 8 and 9 of the Access to Information Act to request for information that they needed and were denied. They further argue that in any event, the Constitution does not require public disclosure of every commercial instrument before completion of a listed-company transaction that remains subject to regulatory approvals and market disclosure rules.

548. In their view, the Sessional Paper, public notices, Cabinet/Parliamentary approvals, valuation evidence and regulatory filings were sufficient to inform the constitutional process and that if particular information is lawfully exempt, confidential, commercially sensitive or regulator-facing, Article 35 does not convert

it into a public exhibit on demand. They argued that transparency is not the same as transaction sabotage.

549. We have considered the above arguments by the Respondents. Article 35 of the Constitution guarantees every citizen the right to access information held by the State and any other person where that information is required for the exercise or protection of any right or fundamental freedom. To give effect to this Article, Parliament enacted Access to Information Act, which provides the procedure for accessing such information, under sections 5, all the way to section 17 including protection of a person making disclosure Section 6 provides for limitations to accessing certain information.

550. However, in our considered view, under **Article 10 of the Constitution**, the Government is obligated to provide all relevant and substantive information forming the basis or core of the public policy during public participation. Within the framing of public participation, **Article 35 of the Constitution** should be seen as an enabler rather than a contraction of public participation obligations. Thus, we form the opinion that, it would not be consistent with the constitutional principle to advance the law, especially in light of **Articles 1(2), 10, 118 and 201**, to limit the state obligation to provide relevant and material information to the public, Cabinet and the National Assembly for purposes of public participation on the divestiture.

551. Therefore, the concealment of material information and documents relating to the divestiture in question is considered within the public participation obligations, not the Petitioners' right and procedures involved in accessing information under the Access to Information Act. Additionally, there is no evidence that the Respondents invoked the limitations under section 6 of the Access to Information Act during the process of developing the policy and or that Cabinet or the National Assembly were alerted that some information was classified and withheld on account of the limitations under section 6 of the Access to Information Act.

552. These identified concealments of material information can also be linked to the concerns raised by the Joint Committee of the National Assembly in its Report, at para 496 of its Joint Report, to wit:

> ***"…that while the partial divestiture will alter shareholding structures it must not compromise compliance with data protection laws or the security of national digital infrastructure. Binding measures should be in place to secure critical data, maintain service continuity, and protect national interests, thereby preserving public trust and mitigating the risk of foreign interference…"***

553. We also note the observation by the Joint Committee at paragraph 512 of its Report that there were **Share Purchase Agreement** and **Dividend Rights Purchase Agreement** between **Vodacom Group** and the **Government of Kenya**, but ***that these Agreements did not contain critical, essential and binding terms and conditions thereby creating a risk that the commitments contained in the Sessional Paper would not be realized for they were not part of the said Agreements.***

554. The risk identified by the Joint Committee is not far-fetched because, whereas in the portion of the **Relationship and Cooperation Agreement** between **Vodafone Kenya Limited and the Government of Kenya** as supplied to this Court, at clause 7, sets out critical undertakings by Vodafone Kenya Limited, the Government of Kenya, at clause 7.2 of the said **Relationship and Cooperation Agreement** acknowledges that those undertakings specifically at clauses 7.1, and 7.3 ***do not bind Vodafone Kenya Limited***.

555. These very undertakings which the Government of Kenya acknowledges that they do not bind Vodafone Kenya Limited are contained in the **Sessional Paper No. 3 of 2025,** and not in the **Share Purchase Agreement** as observed by the Joint Committee in their Report at paragraphs 512 to 514.

556. There is no justification provided as to why the Government of Kenya entered into separate and heavily skewed agreements in favour of, and with two distinct entities in respect of the same divestiture, obscuring all their actions supposedly undertaken pursuant to **Section 87A of the Public Finance Management Act**, and materially vitiating the entire process and substance of the purported divestiture.

557. This amounts to concealment of material information and documents. Concealing or withholding material information and documents during public participation violates constitutional transparency requirements and invalidates the resulting, policies, or projects because it renders public engagement a cosmetic formality rather than a meaningful exercise.

558. As rightly put by the International Commission of Jurists (ICJ Kenya) at page 1 of their Research Paper titled "**Access to Information Law in Kenya: Rationale and Policy Framework.**".

> ***"In a democracy, however, access to information is both a fundamental rights issue as well as a practical sense question. From a governance perspective, an operational representative democracy is one where the public are involved in governance and help shape public policy and public decision-making. To do so requires information so that the participation is informed and***

meaningful. An uninformed public participates in governance based on rumours and guesswork. This is inimical to democracy. On the other hand, an informed society makes governance more enlightened and people-focused. This is because Knowledge educates and empowers. Knowledge forms the basis for the full development of the human personality, enabling people to form opinions, to make informed decisions and to participate fully in public decision making from a position of equality. As Francis Bacon once said, "Knowledge is power."[3]2

559. In the present case, misstating one distinct entity for the other, risked misleading the public, the National Assembly and the regulators about who is advancing funds, acquiring title and exercising control over the partial divestiture. This cannot be equated to a pretrial discovery. Submission of all relevant information was a *sine quo non*-public participation.

560. We accordingly find that the Government of Kenya engaged in unexplained obscurity on the identity of the proposed buyer, made misrepresentations and concealed material information in respect of the partial divestiture in question throughout the process.

561. The nature and effect of the divestiture is also before us for determination. Whilst presenting Vodacom Group as the proposed buyer to the National Treasury, Cabinet and the National Assembly for approval, the transaction was presented as a mere sale of shares. This was reflected in the Sessional **Paper No. 3 of 2025** and it formed the basis for National Assembly discussion and approval.

562. However, the documents produced by the 1st respondent before this Court reveal that approvals were sought for merger or a takeover or acquisition even before the approval of the divestiture was given. Notably, the divestiture was a strict section 87A sale of shares. This takes us to the point where we briefly discuss mergers and take-overs as legal and commercial concepts, processes and outcomes.

563. Regulation 2 of the Capital Markets (Take-Overs and Mergers) Regulations, 2002, provides: -

"merger" means an arrangement whereby the assets of two or more companies become vested in or under the control of one company

"take-over scheme" includes a scheme involving the making of offers for acquisition by or on behalf of a person of such shares in any company which results in an offeror acquiring effective control in an offeree;

"effective control" is where a person or a company makes an offer for

the acquisition of effective control of an offeree which holds shares which together with shares, if any, already held by such person or an associate person or a company or by any other company that is deemed by virtue of being a related company or by persons acting in concert with such person carry the right to exercise or control the exercise of not less than twenty-five percent of the votes attached to the ordinary shares of an offeree which shall be deemed to be a take-over and the provisions of these Regulations shall apply except where that person or associate person or related company or persons acting in concert with the person, already hold shares carrying more than ninety percent voting rights in the offeree;

"*offeror*" *in relation to a take-over scheme or a take-over offer means any person who acquires or agrees to acquire effective control in the offeree either directly or with any associated person or related company or any person acting in concert with the offeror but does not include a person who holds shares carrying more than ninety* percent voting *rights in the offeree;*

564. Mergers, takeovers and acquisitions are governed by a special legal regime under the **Capital Markets Act** and Regulations thereunder as well as the **Companies Act** and Competition laws amongst others, with sufficient safeguards ingrained in the substantive and procedural requirements provided in law. Therefore, if these processes are intended, they must be strictly and clearly stated in the proposal or policy so that the public and all concerned are aware of the matter at hand.

565. We are therefore not surprised that the Capital Markets Authority (CMA) in its letter dated 27.2.2026 annexed as JMN 8a declined to grant approval sought and stated categorically that any such approval would be *ultra vires*.

566. Accordingly, the Respondents' assertions that Vodafone Kenya Limited has always been the declared acquiring entity is not factual or correct because it is clear that the actual intended or proposed buyer is Vodacom Group as the primary investor.

Principles of Public Finance

567. Article 201 of the Constitution on the Principles and framework of Public Finance apply to this transaction. We have already reproduced this Article in the preceding parts of this Judgment.

568. The Petitioners argue that the National Assembly's approval was superficial because essential transaction documents and valuation details were withheld, violating the constitutional right to information. They further contend

that the Sessional Paper lacked specificity on project allocations, ring-fencing of the funds, inter-generational benefits and the whole transaction was shrouded in mystery, misrepresentation and concealment of material information, leaving the KES 204.3 billion intended to be raised, vulnerable to misuse.

569. The respondent took a different view and argued that the transaction was intended to mobilize substantial non-tax revenue to support the government deliver priority infrastructure developments in critical sectors including energy, roads, aerospace, water and digital transformation, reducing reliance on debts and expanding fiscal space for development priorities.

570. Our observations are that the Sessional Paper No. 3 of 2025 is cast in broad and general terms using words such as *priority infrastructure developments in critical sectors including energy, roads, aerospace, water and digital transformation, reducing reliance on debts and expanding fiscal space for development priorities.* Ringfencing of the funds to any particular identifiable project with the attendant costs and location was not demonstrated.

571. Notably, and we have stated this earlier, that depositing the funds in the National Infrastructure Fund is not ring-fencing the funds to specific relevant projects that meet the constitutional threshold on expenditure of public finance especially, revenue so raised as proceeds of the partial divestiture.

572. We have noted that the funds will be subject to the wide powers of the Board in the National Infrastructure Fund Act, and that the Joint Committee mentioned ringfencing of the funds realized.

573. Similarly, sustainable use of public assets is a constitutional imperative under **Articles 10 and 201 of the Constitution** as well as a benefit that must drive realization of public assets and application of revenue under **section 87A of the Public Finance Management Act (PFMA)**.

574. We have also noted from the Report by the Office of Auditor General at pages 45-46 of JMN-9, where it was recorded thus: -

> ***"……. Further, the Auditor General pointed out that while the negotiated sale price and the upfront dividend monetization of 40.2 billion was highly enticing in the short term, it was likely to transform a regular and perpetual income source into a single upfront payment…."***

575. The petitioners' concerns that the sale would deny future generations of such strategic and important investment and asset is not idle talk.

576. Based on our findings on misrepresentation, obscurity, and concealment of material information, the partial divestiture fails the constitutional test in **Articles 10 and 201 of the Constitution**.

Section 87A of Public Finance Management Act

577. We emphasise that **Section 87A of Public Finance Management Act** is subject to the Constitution.

578. Section 87A of Public Finance Management Act provides: -

87A. Sale of government shares in a government linked corporation

(1 The National Government may sell or dispose of part or all its shares in a government linked corporation, with the approval of the Cabinet, which approval of the Cabinet, may only be given taking into account any recommendations of the National Treasury regarding the financial implications of the sale of such shares.

(2 The sale of shares in a government-linked corporation shall only be done with the approval, by resolution, of the National Assembly.

(3 Subject to subsection (2), the Cabinet Secretary shall submit the proposal for sale of shares in a government-linked corporation to the National Assembly for approval.

(4 The request under subsection (3) shall be accompanied by an explanatory memorandum indicating—

(a) a description of the government-linked corporation;

(b) the total number or percentage of shares proposed to be sold;

(c) the benefit to be gained from the proposed sale of shares;

(d) the recommendations of the National Treasury regarding financial implications of such sale; or

(e) any other recommendations.

(5 The National Assembly shall consider the proposed sale within twenty-eight sitting days of receipt.

(6 The Clerk shall notify the Cabinet Secretary of the decision of the National Assembly within seven days of the resolution of the National Assembly.

(7 Where the National Assembly declines the proposed sale, the Clerk shall notify the Cabinet Secretary of the resolution of the National Assembly.

579. We have found that the partial divestiture fails the constitutional test. We have also found that there was no public participation during the making of the policy on the partial divestiture by the Executive; that there were misrepresentations made to Cabinet and to the national Assembly, and that there was concealment of material information by the 1st Respondent.

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580. We emphasise that the approval by the National Assembly was also procured through misrepresentation and concealment of material information as found above.

581. Therefore, despite the approval of the partial divestiture by the National Assembly, we find that the divestiture did not comply with **Section 87A of**

Public Finance Management Act and After the fact events

582. The Respondents produced a Legal Opinion dated **25th March 2026** by the Hon. Attorney General who is the Principal Legal Advisor to the Government. Of notable concern is that the Legal Opinion states that all the necessary agreements had been concluded on **3rd December, 2025**. Thus, the Agreements had been negotiated and concluded before the Legal Opinion was given and as earlier stated, even before the National Assembly received for tabling on 4th December, 2025, consideration and subsequent public participation and approved of the Sessional paper No. 3 of 2025. The Legal Opinion reads in part: -

> ***"2. The Legal Opinion is issued pursuant to the conditions precedent contained in Clause 4.1.2. of the SPA between the Government of Kenya and Vodafone Kenya Ltd. ('SPA') Clause 4.1.3. of the Relationship and Cooperation Agreement between the GOK and the VKL ('RCA') and Clause 4.1.1. of the Dividend Rights Purchase Agreement concluded between the Government of the Republic of Kenya and Vodafone Kenya Ltd ('DRPA') all concluded on 3rd December 2025.***
>
> ***3. The SPA stipulated that the transaction is subject to the fulfilment of several conditions precedent, including the issuance of a written legal opinion by the AG of the Republic of Kenya confirming certain matters relating to the legality of the transaction and the authority of the Government to enter into the transaction agreements.***
>
> ***4.This Opinion is therefore issued for the purposes of satisfying the relevant conditions precedent contained in the SPA, RCA, and the DRPA."***

583. There is another startling observation which is, in the said Legal Opinion dated **25.3.2026**, it adverted to the fact that the National Assembly had approved the transaction on **31.3.26.** that was not true because the National Assembly was yet to approve the Sessional Paper as at the date of giving of the Legal opinion**.** To our minds, the Attorney General's Legal Opinion in this context should have preceded conclusion of any formal agreement on the partial divestiture.

584. We are guided by the Attorney General's constitutional role under **Article 156** to advise the Government on the legal implications of complex legal transactions before commitments are made, ensuring legality, authority and public interest compliance.

585. Taken together, these omissions point to concealment of material information which eroded the Respondents' assertions of transparency through the National Assembly sittings and public fora.

586. In the absence of full contractual and transaction disclosures, and clarity on employment and control guarantees observed by the National Assembly in its Joint Committee Report, there was a real risk that the approval process was based on incomplete and misleading information, amounting to deliberate misrepresentations by omission and commission.

587. We restate that from the material availed to this Court by the Respondents, the entire process starting with the development of the public policy on the partial divestiture to Sessional Paper No. 3 of 2025 to the approval by the National Assembly were all undertaken after the Government had already concluded a Share Purchase Agreement, complete with an agreed share price of KES 34 per share and the Dividend Rights Purchase Agreement with the would-be buyer. Yet, the Government did not disclose full and material information in that respect or on the nature of the transaction, its effect, implications of majority foreign shareholding of Safaricom PLC after the sale, on corporate controls and diminished government influence, redundancies, to mention but a few.

588. We are thus in consonance with the Petitioners that material information and documents were concealed from the public, the Cabinet and the National Assembly. In the circumstances, it is difficult to expect the public, Cabinet or the National Assembly to have evaluated the proposed divestiture objectively and substantively.

Sub judice and contempt of court

589. Finally, under this issue, we have considered whether the approval by the National Assembly was in violation of this Court's Conservatory orders issued on 23rd March 2026, by Hon. Justice L.N. Mugambi, directing that *status quo* be maintained, when he referred the file to the Chief Justice to empanel a bench.

590. The petitioners contend that despite the subsisting status quo order, the National Treasury aggressively and hurriedly pushed the divestiture proposal through the National Assembly where it debated and approved the share sale on 31st March 2026 to take effect on 1st April, 2026 in direct violation of the court order.

591. The Petitioners deposed in their further affidavit that because the National Assembly deliberated on and approved the divestiture while status quo orders were active, the parliamentary proceedings violated the ***sub judice*** doctrine under Standing Order 89.

592. The 1st Respondent (Cabinet Secretary for the National Treasury) and State Respondents maintained that the National Assembly acted lawfully under its constitutional and statutory mandates in **Articles 1, 95, 201, and 210 of the Constitution; Sections 12, 50, 203, and 204 of the PFM Act** when it passed the resolution approving Sessional Paper No. 3 of 2025 on 31st March 2026.

593. The Respondents argued that the Court should exercise restraint and respect institutional boundaries, invoking the doctrine of separation of powers to contend that courts should not interfere with a duly passed resolution of the National Assembly.

594. The 7th Respondent (Vodacom Group) argued that because the National Assembly granted its approval on 31st March 2026, the Petitioners' claims regarding a lack of parliamentary or procedural compliance had been altered by subsequent events and rendered moot.

595. We have already determined that this Court has jurisdiction to adjudicate upon the consolidated petitions. More specific to the last submissions by the respondents, we find and hold that, the fact that the National Assembly gave its approval to the divestiture does not render the consolidated petitions moot, for the petitions challenge the constitutional foundations of the transaction leading to the approval. Similarly, that the consolidated petitions do not violate the doctrine of separation of powers.

596. We now address the question of whether the Respondents violated the *sub judice* rule under Standing Order 89. The information before this Court as contained in The Hansard Report is that these proceedings and the *status quo* order were brought by Hon. Caroli Omondi to the attention of the Speaker of the National Assembly, warning of a possible contravention of the *sub judice* rule.

597. The essence of the *sub judice* rule is fundamentally a procedural mechanism designed to prevent concurrent litigation of the same substantive dispute before multiple judicial or quasi-judicial fora. It does not, however, operate as an absolute constitutional bar to restrict Parliament from executing its core, independent legislative and oversight mandates under ***Articles 1, 95, 201, and 210 of the Constitution***.

598. Be that as it may, Parliament has its rule on *sub judice* and when brought to its attention, a prudent sense of constitutional loyalty would compel that it

deals with the issue within its procedures.

599. For purposes of this decision, it suffices to find that the approval by the National Assembly was given during the subsistence of the *status quo* orders. As we make this finding, we acknowledge that the National Assembly is not a party to these proceedings, and as earlier held in the Ruling on conservatory orders, the order did not injunct Parliament.

Issue 3b

Whether there was reasonable and meaningful public participation conducted in compliance with Articles 10, 118 and 201 of the Constitution. (Issues of misrepresentation, concealment of material information such as the identity of the would-be buyer and implication of majority foreign shareholding in Safaricom PLC shall be discussed).

600. The Petitioners contended that the impugned proposed sale or divestiture of GoK's shares in Safaricom PLC could not be initiated or concluded without meaningful, qualitative, quantitative and conclusive public participation. They alleged that the process lacked qualitative public participation and excluded local retail and institutional investors from purchasing the shares on the open market.

601. They argued that the National Assembly's approval was a perfunctory, formalistic endorsement rather than an effective accountability check. They also stated that the National Assembly undertook the exercise without full disclosure by the 1st Respondent specifically, the alleged withholding of key transaction documents like the full Share Purchase and Dividend Purchase Agreements which rendered the public participation procedurally deficient under ***Article 118*** of the Constitution.

602. Senior Counsel Dr. Kalonzo Musyoka for the 1st Petitioner emphasized that the process failed to facilitate meaningful public participation as required by ***Article 10*** because 17 counties were completely excluded from parliamentary sessions. Citing ***BAT Kenya PLC v. CS Ministry of Health, Robert N. Gakuru*** **and** ***Mui Coal Basin,*** they submitted that the public engagement conducted was illusory and selective. Senior Counsel also highlighted that mandatory public participation was not conducted across 17 counties, despite M-Pesa's presence across the entire country.

603. The 3rd Petitioner (Paul Maina Mugo) asserted that there was no evidence showing that the intended transaction complied with key constitutional requirements under ***Articles 10, 201, and 227,*** which mandate public participation, transparency and accountability.

604. The Respondents vehemently opposed these assertions for several reasons.

605. The 1st, 2nd, 4th, 5th, 9th, 10th and 11th Respondents asserted through the 1st Respondent, the Cabinet Secretary for the National Treasury and Economic Planning in his deposition that the transaction was approved after extensive public participation was conducted during both the 2025/2026 budget-making process and specifically regarding the divestiture proposal itself. He stated that public participation satisfied the "reasonableness standard" set out in ***BAT Kenya PLC v. CS Ministry of Health, Robert N. Gakuru*** and ***Mui Coal Basin*** cases, which requires that members of the public be given a reasonable opportunity to know and have a say, without requiring decision-makers to treat every view as dispositive.

606. The Cabinet Secretary for the National Treasury averred that the Sessional Paper was handled jointly by the Departmental Committee on Finance and National Planning and the Select Committee on Public Debt and Privatization. That the Joint Committee held 32 sittings, engaged 78 stakeholder institutions including government agencies, regulatory bodies, civil society and industry players, published newspaper advertisements on 21st January 2026, inviting submissions and conducted public participation fora across 30 counties to collect public views.

607. They relied on ***Transparency International Kenya & 3 others v General & 3 others; General & 3 others (Interested Parties) (Petition E747 of 2025) [2026] KEHC 2485 (KLR) (Constitutional and Human Rights) (19 February 2026) (Judgment)*** and submitted that the Constitution does not mandate hosting a physical forum in every single county for every national financial matter.

608. The Respondents denied failing to provide information under ***Article 35(3),*** noting that the Petitioners made no formal request for additional information and failed to participate in the public engagement fora conducted by the National Treasury and the National Assembly.

609. The 3rd Respondent (Communications Authority of Kenya) also refuted allegations of a lack of public participation and stated that ***Article 118(1)(b) of the Constitution*** mandates public engagement during Parliamentary consideration rather than during the internal drafting of a Sessional Paper. The CAK asserted that Parliament initiated a 30-day public input period starting in December 2025, published notices in daily newspapers on 21st January 2026, held stakeholder fora and conducted public hearings across 30 counties before compiling its Joint Committee Report in March 2026. They relied on ***Gachagua & 57 others v Speaker, National Assembly & 35 others (Constitutional Petition E565 of 2024 & Petition E550, E570, E572, E013, E014, E015, E522, E506, E509, E525, E528, E537, E541, E567, E576 & E598 of 2024***

(Consolidated)) [2026] KEHC 8198 (KLR) (Constitutional and Human Rights) (8 June 2026) (Judgment) to argue that the public participation undertaken met the legal standard of reasonable sufficiency.

610. The 6th Respondent (Safaricom PLC) deposed that ***Sessional Paper No. 3 of 2025*** underwent proper Parliamentary process and public scrutiny pursuant to ***Articles 10 and 118 of the Constitution.*** They noted that the 2nd Petitioner (Prof. Fredrick Onyango Ogola) himself actively participated in Parliament's public engagement process.

611. The 6th Respondent's Counsel highlighted that public feedback was meaningfully incorporated into the final transaction, directly resulting in a parliamentary directive requiring Safaricom PLC to maintain its current shared-prosperity business model for a mandatory minimum of 10 years to protect staff, dealers, and agents. Relying on ***Kiambu County Government & 3 others v Gakuru & others (Civil Appeal 200 of 2014) [2017] KECA 459 (KLR) (30 June 2017) (Judgment)*** **British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Ltd (Affected Party) Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment),** Safaricom PLC argued that public participation requires reasonable facilitation rather than unanimous adoption of all public views.

612. Overall, the Respondents maintained that public participation met the constitutional threshold of sufficiency, having engaged 78 stakeholder institutions, conducted public fora across 30 counties, published invitations in national dailies and meaningfully incorporated public feedback into the final transaction framework.

613. Public Participation is one of the cornerstones of a democratic society. It entails exercise of residual authority of the people in decision-making process as stipulated in **Article 1(2) of the Constitution.**

614. Articles 10 and **118 of the Constitution** expressly provides for Public Participation.

615. Article 10 states as follows: -

10. National values and principles of governance

(1 The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2 The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

616. Article 118 of the Constitution provides: -

118. Public access and participation

(1 Parliament shall-

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

(b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(2 Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

617. The Supreme Court categorically underscored the importance of public participation and linked it to the sovereign authority of the people under Article 1 of the Constitution. In **British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Ltd (Affected Party)** (supra**) Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment)** the apex Court highlighted thus: -

"96. From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments..."

618. Public participation is never a mere view-gathering event. It is a peremptory occasion for the people to participate in the public decision making and governance where their contribution is considered.

619. Therefore, as a mandatory constitutional requirement, public

participation entails clarity of the subject matter, provision of clear, all relevant and material information, the substance and content of the engagement under consideration must be delineated, absent opaqueness.

620. Some of the respondents submit and contend that public participation is restricted to the parliamentary or legislative process. Article 118(b)(b) of the Constitution commands Parliament to: '**Facilitate public participation and involvement in the legislative and other business of Parliament and its committees. [emphasis ours ours].**

621. Most importantly, **Article 10 of the Constitution** provides a wide scope of public participation when one: **- a) applies or interprets this Constitution; b) enacts, applies or interprets any law; or c) makes or implements public policy decisions.**

622. From the above Article, public participation is **required when making or implementing public policy decisions** such as this subject divestiture**.**

623. We will therefore, consider public participation during the making of the policy on this divestiture all through to the National Assembly's approval.

624. On what constitutes proper and meaningful public participation, we will cite the relevant judicial pronouncements.

625. In **British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Ltd (Affected Party) (supra)**, the Supreme Court held thus: -

> ***"87. Since the promulgation of the Constitution 2010, the question of the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts. The High Court in this matter appraised itself of the various decisions on the same, which appraisal the Court of Appeal readily endorsed. In the Matter of the National Land Commission, the Supreme Court placed the principle of public participation at the core of the concept of checks and balances in governance in the execution of their functions by the various arms of government, when we stated:***
>
> > ***"[308] The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in article 10 of the Constitution: in particular, the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability. It is to be noted that, the very essence of checks-and-balances touches***

on the principles of public participation, inclusiveness, integrity, accountability and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity, transparency, good governance and accountability…"

88.The Retired Chief Justice, Dr. Willy Mutunga, in his concurring opinion expounded on the principle and traced the place of the People in the Constitution making process thus:"

[320] In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.

89. The Rtd Chief Justice drew from caselaw on the principles for public participation in various court decisions including Speaker of the Senate & another v. Attorney General & 4 others Sup. Ct. Advisory Opinion No 2 of 2013; [2013] eKLR; Thuku Kirori & 4 others v. County Government of Murang'a Petition No 1 of 2014; [2014] eKLR; Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others Petition No 418 of 2013; [2013] eKLR; and Robert N. Gakuru & others v. Governor Kiambu County & 3 others, Petition No 532 of 2013 consolidated with Petition Nos. 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No 61 of

2014;[2014] eKLR [Robert Gakuru case](Most of these cases were also referred to by the High Court in this matter). He also referred to the jurisprudence from the South African Constitutional Court decision, Doctors for Life International v. Speaker of the National Assembly and others[2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) which also considered the role of the public in the law-making process. It in part stated as follows: -

> ***"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."***
>
> ***116. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy"***

90.Earlier on, the Supreme Court had reiterated the centrality of public participation as regards the issue of digital migration, in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others,[2014] eKLR. We stated inter alia: -

> ***"Public participation is the cornerstone of sustainable development and it is so provided in the Constitution…[381] Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that***

the Kenyan citizenry is adult enough to understand what its rights are under article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.""

626. The Supreme Court further delimited the framework for public participation at paragraph 96 as follows: -

"96...

Guiding Principles for public participation

(i) a constitutional principle under article 10(2) of the Constitution, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfil' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

627. The Respondents asserted that these are mere guidelines and not mandatory requirements for public participation. They however did not provide the alternative route for public participation, other than that given by the apex Court in its elaborate interpretation of this very important national value and principle of governance in the **BAT** Case. In summary, public participation requires clarity of subject matter; clear and simple structures; opportunity for balanced influence; inclusive and effective representation; transparency and integrity of the process; and public sensitization.

628. The Supreme Court in the **BAT (supra)** case was clear that public participation must be **both quantitative and qualitative**. Quantitative refers to the breadth of engagement that is, how many fora were held and how many stakeholders were reached; while qualitative refers to the depth and substance of that engagement, ensuring that those consulted are genuinely able to influence the outcome.

629. The 1st Respondent Cabinet Secretary's response to the guiding principles espoused in the **BAT (supra)** case, addressed the ***quantitative dimension*** of public participation. They cited 32 National Assembly Committee sittings, engagement with 78 stakeholder institutions, publication of newspaper notices, and fora across 30 counties which on the face of it demonstrate the breadth of outreach and satisfies the requirement of reasonable notice and

opportunity, on the part of the National Assembly.

630. The Supreme Court in the **BAT** (supra) case nonetheless, added, citing with approval **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others,Civil Appeal No 224 of 2017; [2017] eKLR** where the Court of Appeal held that:

"165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained."

631. Applying the principles espoused in the above cited decisions we have examined **Annexure 'JMN-10': *The Joint Report on: The Consideration of the Sessional Paper No. 3 of 2025 on the Partial Divestiture in Safaricom PLC by the Government of Kenya,*** prepared by the **Departmental Committee on Finance and National Planning and the Select Committee on Public Debt and Privatization** at pages 83 to 108, paragraphs 312 to 455, where it is stated that the Joint Committee conducted County Public Hearings across 30 counties to collect views on the proposed divestiture which enlists all the counties that were sensitized. This is proof of the quantitative aspect of the public participation exercise by the National Assembly.

632. We however note that the petitioners claimed that there was no public participation in 17 counties. This Court appreciates the countrywide reach of Safaricom PLC and that the company hosts data for many Kenyans.

633. It would be most reasonable that such public policy decision to sell the publicly owned shares which constitutes a critical, strategic and profitable public asset receives the benefit of as wide public participation in the counties as possible. This does not necessarily unsettle the quantitative coverage obtained herein by the national Assembly.

634. The qualitative aspect of the public participation by the National Assembly has been questioned. We are alive to the fact that the National Assembly is not a party to these proceedings. Nevertheless, the National Assembly conducted public participation on the basis of the information

provided by the Government in the Sessional Paper No.3 of 2025 and documents provided in relation thereto.

635. We have already found that the GoK through the National Treasury Ministry committed acts of unexplained obscurity as to the identity of the proposed buyer, misrepresentation and non-disclosure of material information, all of which vitiate the qualitative vitality of the public participation conducted by the National Assembly. The ***BAT*** (supra) case stressed that participation must be qualitative that is real, purposive, and meaningful.

636. The guiding principles for public participation as enunciated by the Supreme Court in the ***BAT*** (supra) case also require clarity of the subject matter. The Petitioners' concern was that despite the extensive sittings and fora, critical transactional documents such as the full **Share Purchase Agreement** and **Dividend Rights Purchase Agreement** and the **Relationship Cooperation Agreement** between the Government of Kenya and Vodafone Kenya Ltd or with whomsoever was the proposed buyer were not disclosed or provided to the public for scrutiny and response during the aforesaid public participation. We emphasise that notably, from the evidence availed to this Court, the aforesaid critical agreements were concluded and signed prior to the public participation being conducted by the National Assembly. This is so, noting that the Cabinet approved the partial divestiture and presented the Sessional paper No. 3 of 2025 to the National Assembly on 4th December, 2025 which was a Thursday. However, by that time, the National Treasury had already concluded the Share Purchase Agreements, the RCA and the DRPA with the buyer, on 3rd December, 2025, as evidenced by the Legal Opinion given by the Attorney General dated 25th March, 2026.

637. There was no evidence that these critical documents were provided to the public so as to elicit a reasonable and informed response by the public during the said public participation exercise conducted by the National Assembly. Elsewhere, in this Judgment, we have stated that there is no evidence that the Respondents ever sought to rely on the limitations under section 6 of the Access to Information Act, on disclosure of information and therefore, they cannot be heard to plead that in court, yet they did not disclose that to the Cabinet and or to the National Assembly. We have also emphasized that the information required was necessary for purposes of public participation and not to be confused with pretrial disclosures.

638. We underscore that the divestiture is a public policy decision which is subject to **Article 10(1)(c)** of the **Constitution** requiring public participation from the making to implementing the public policy decisions. As pronounced by the Supreme Court in the ***BAT*** (supra) case, **Article 10(2) of the**

Constitution *'is justiciable and enforceable immediately.'*

639. On this point, the Supreme Court in the **BAT** (supra) case stated: -

"The appellate court in others, Civil Appeal No 224 of 2017; [2017] eKLR held that article 10(2) and the principles therein are for immediate realization, thus:

"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10 (2) of the Constitution is justiciable and enforceable immediately.

For avoidance of doubt, we find and hold that the values espoused in article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles.

We agree with this pronouncement and reiterate that the principle of public participation as anchored in article 10 of the Constitution is alive and the same is equally justiciable before our courts."[emphasis ours]

640. According to the 1st Respondent at paragraphs **31, 32 & 33** of the Cabinet Secretary' replying affidavit sworn on 26.3.26, the transaction was approved by the National Assembly after extensive public participation conducted both during the 2025/2026 budget making process and specifically in relation to the divestiture proposal itself.

641. Despite these averments, there is no evidence of public participation on the proposed partial divestiture prior to the approval of the Sessional Paper No. 3 of 2025 for tabling before the National Assembly. The Sessional Paper No. 3 of 2025 ought to have been the product of prior public participation.

642. The 1st Respondent attempted to pass public participation conducted during the 2025/2026 budget making process regarding alternative financing mechanisms such as privatization as opposed to increased taxation or borrowing, for public participation for the divestiture in question. The latter was an independent policy decision requiring specific public participation.

643. We reiterate that there was no evidence of public participation in relation to the partial divestiture and that what the National Assembly did was vitiated by matters discussed in this Judgment. This omission violates **Article 10 of the Constitution** which mandates public participation when making or implementing public policy decisions as mandated by **Article 10(1)(c) of the Constitution.**

644. We also reiterate that the divestiture and the process leading to the Sessional Paper No. 3 of 2025 as tabled before the National Assembly was riddled with and vitiated by unexplained yet blinding obscurities on the proposed buyer, misrepresentations, concealment of material information from

the public, Cabinet and the National Assembly. The public participation by the National Assembly was therefore conducted upon and a product of the already fatally vitiated process.

645. We have observed further that the partial divestiture involved complex corporate structures involving parent and subsidiary relationships, dividend substitution and cross border financing. We note that the State Respondents did not explain why they settled for the proposed buyer without competitive selection for identifying a potential buyer who would yield much needed protections and guarantees which were highlighted by the National Assembly in its Joint Committee Report on the partial divestiture.

646. Our observation is fortified by annexture ***'JMN-9':*** **The Joint Committee Report** at page 45: Office of the Auditor General (OAG). Paragraph 139 where it is stated: -

"Specifically, the stakeholders submitted that the Sessional Paper did not provide adequate justification for the identification of the Vodacom Group as the strategic investor and whether other investors and divestiture alternatives might have been considered in the process of securing the best possible outcome for the Government of Kenya."

647. In the said Joint Committee Report, the National Assembly also admitted that competitive selection criteria would be ideal, except, they did not apply it to the divestiture but left it ***"for future engagements."***

648. We also reiterate that the Guiding Principles for public participation as set out by the Supreme Court in the **BAT** (supra) case require that public participation must be evaluated in light of the peculiar circumstances of each case.

649. In this case, the lack of transparency on critical contractual and financial details undermined the integrity of the process and the public participation was undertaken on the basis of the obscurities, misrepresentations and concealment of material information and documents. These shortcomings also support the Petitioners' contention that the National Assembly's approval was based on misleading information, was rushed and was illusory; justifying a conclusion that the public participation was not reasonable and meaningful as required under Articles **10, 118, and 201** of the **Constitution**.

650. In light of our findings above, we hold that there was no reasonable, meaningful and purposive public participation in respect of the divestiture, thus, violating **Articles 10 and 118 of the Constitution.**

ISSUE NO. 4

Financial Prudence, Valuation & Intergenerational Equity

1. Whether the transaction price of KES 34 per share violates

Article 201(d) of the Constitution on prudent use of public resources by occasioning a massive public loss or whether it represents a rational, market-based premium value.

2. Whether the valuation methodology was fundamentally flawed for failing to value M-pesa separately as a standalone fintech platform, or whether M-pesa is an integrated asset of Safaricom PLC whose intrinsic value is already captured in the listed stock price.

a. Whether the transaction price of KES 34 per share violates Article 201(d) of the Constitution on prudent use of public resources by occasioning a massive public loss or whether it represents a rational, market-based premium value.

651. The petitioners asserted that the KES 34 per share price is severely undervalued compared to Safaricom PLC's estimated intrinsic market value of KES 70 to 80 per share. They further averred that relying on a 6-month Volume Weighted Average Price (VWAP) failed to capture intrinsic enterprise value, control premiums, or M-PESA's transaction volume which equalled 2.3 times Kenya's GDP.

652. According to the petitioners, the respondents employed unscientific pricing methods to push through a rushed, undervalued sale, exposing the public to a potential loss of up to Kshs 250 billion.

653. The petitioners also faulted Parliament for alleged failure to independently interrogate the transaction's valuation, its private nature over a competitive market process and the long-term fiscal impact of the dividend prepayment structure.

654. The petitioners relied on ***Prolink Broker Network Inc. v. Jaitley, 2018 ONSC 7577*** where the Ontario Superior Court is said to have applied valuation standards. The case involved successful breach of contract claim, and the only issue was the assessment of damages for the value of the shares.

655. Conversely, the respondents argued that it is not the court's role to fix share prices. They submitted that the transaction reflects a fair market value and demonstrates prudent financial management in accordance with ***Article 201 (d) of the Constitution***.

656. The respondents stated that the National Treasury retained **KCB Investment Bank Limited** as its Transaction Advisors and that ***an independent valuation*** was conducted, which valuation informed and guided the final negotiated price of KES 34 per share.

657. The respondents further submitted that the Petitioners' expert evidence is an opinion and not proof of illegality. They contended that the assertion by the Petitioners that the true value of the shares was KES 70 to 80 is not supported by

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the market. The respondents questioned the Petitioners' expert's preference for a valuation including separate treatment of M-pesa, arguing that the sale comprises sale of a minority block of listed shares in Safaricom.

658. The respondents further stated that the National Treasury successfully negotiated a sale price of KES 34 per share, which represented a premium of approximately 23% over the six-month volume weighted average price of KES 27.50 as of 2 December 2025.

659. The respondents pointed out that the Joint Committee Report of the National Assembly opined that the negotiated price of KES 34 per share reflected a premium above historical market trading levels and aligns with subsequent market movements.

660. The 6th Respondent contested the Petitioners' claim that the price of KES 34 per share is arbitrary or unscientific. It asserted that pricing for listed securities is determined by market dynamics, investor appetite and regulatory constraints. It explained that block transactions naturally reflect commercially negotiated pricing, including premiums and pre-paid dividends. It thus urged that the Court should not substitute its judgment for market forces or the National Assembly without evidence of fraud or illegality.

661. The petitioners have raised two key concerns regarding: -

(1) whether the stated sale price of KES 34 per share represents a rational, market-based premium value or whether the price violates Article 201(d) on prudent use of public resources by occasioning a massive public loss; and

(2) whether the valuation methodology was fundamentally flawed for failing to value M-pesa separately as a standalone fintech platform, or whether M-pesa is an integrated asset of Safaricom PLC whose intrinsic value is already captured in the listed stock price.

662. Article 201 of the Constitution provides for the principles that shall guide all aspects of public finance. The Article states:

201. Principles of public finance

The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

(c) the burden and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

(d) public money shall be used in a prudent and responsible way; and

(e) financial management shall be responsible, and fiscal reporting shall be clear.

663. The two sub issues relate to the choice of methodology of company worth valuation and share pricing.

664. The petitioners and the respondents have divergent views on the appropriate methodology on company worth valuation and share pricing, and whether M-pesa ought to have been valued separately as standalone **fintech platform**.

665. This Court acknowledges that the process of company worth valuation and share pricing is a highly specialized exercise requiring professional training in finance and market analysis. As observed by the Transaction Advisor at page 5 of its Report dated 21st November, 2025, by its very nature, valuation work is not an exact science and the conclusions arrived at will of necessity be subjective and dependent of individual judgment.

666. We acknowledge that the CS Mbadi and Mr. Irungu Nyakera are experts in their own right, in this field. However, their respective independent opinions are divergent on this issue of valuation of the share.

667. In **Kenya National Examinations Council v Republic Exparte Kemunto Regina Ouru [2010] KECA 21 (KLR),** the Court of Appeal declined to suggest a different and untested system for handling of alleged examination irregularities on account that the Court did not possess the requisite technical expertise. The Court of Appeal also observed that it could only interfere in cases of cancellation of examination results if satisfied either that the procedure adopted was unfair to the applicant or that the decision under challenge was unreasonable.

668. In light of the divergent expert opinions on the issues raised regarding the company's worth and share pricing, and their technical nature, and the caselaw cited in **Kenya National Examinations Council v Republic Exparte Kemunto Regina Ouru (supra),** this Court is not in a position to conclusively determine the alleged undervaluation. Similarly, on the question of whether Mpesa ought to have been valued separately, as a standalone fintech Platform, on the material placed before this Court we are unable to reach a conclusion that settles this issue.

669. The respondents in their submissions also urged that this Court, not being an expert valuation tribunal, its role is to review legality and rationality, not to fix the "correct" share price. They maintained that the Court's task is to ask whether the

process was lawful; whether relevant matters were considered; whether the price was supported by a rational method; and whether the figure is so plainly irrational or arbitrary that it betrays illegality.

670. This Court however observes that in the present petition, although the Government of Kenya retained **KCB Investment Bank Ltd** to undertake the Transaction Advisory and Valuation exercise of the shares in the proposed divestiture and to obtain the best Fair Market Value for the shares, in the terms of reference contained in the Contract and Letter of engagement annexed as JMN-11 to the 1st Respondent's replying affidavit, in that very Letter of Engagement, the GoK had already set the price at KES 34 per share, prior to retaining of the Transaction Advisory and the pricing services.

671. This is evidenced in the **Contract signed on 31st October, 2025 and Letter of Engagement** annexed as JMN-11 which provides as follows: -

> ***"…. the plan proposes divesting 6,009,814,200 shares, representing 15 percent of Safaricom, while retaining 8,012,758,380 shares, equivalent to 20 percent. The partial sale is expected to generate roughly shs 204.3 billion (1.5 billion) based on a shs 34 share price, a 17 percent premium over the six-month average.***
>
> …..
>
> ***(a) Strategic Planning and Valuation Analysis***
>
> ***The Transaction Advisor will develop a detailed valuation model and supportable valuation range to ensure that GoK is getting a fair value. This phase includes benchmarking the Company against comparable telecom operators, discounted cashflow analysis and analysing precedent transactions to frame realistic value expectations. The transaction Advisor will continuously update the analysis based on feedback from the market and due diligence findings, ensuring the best possible advise on value thorough the process."*** [emphasis ours]

672. Based on these facts derived from the documents filed through the Case Tracking System and supplied to the Court in hard copies by the State Respondents, it is clear that the subsequent 'independent valuation' settled for the predetermined pricing which later became the agreed price between the buyer and the Government of Kenya.

673. The above observation finds further support in the Valuation Report by the Transaction Advisors, dated 21st November, 2025 in which, at page 8 stated that:

> ***"However, there is no requirement or obligation that the acquiring Investor will pay a premium for acquiring Safaricom's Shares.***
>
> ***Managing the negotiation process carefully is the best way for GoK to capture some or most of that value. It will be up to the management of***

both the buyer and GoK. To agree upon a precise price/ premium…"

674. Accordingly, we find that the transaction as regards pricing, fails the rationality test. The pricing was arbitrary.

ISSUE NO. 4 (c)

Whether trading future dividend flows and sale of the shares thereto breaches the principle of intergenerational equity, or whether it constitutes a legitimate executive fiscal/portfolio management choice to fund national infrastructure.

Intergenerational equity

675. The petitioner's arguments are that whilst asset sales may generate non-tax revenue, they are intended for exceptional or strategic identified and specific purposes, not as a substitute for recurrent or planned revenue streams for expenditure which has not been clearly specified, costed and determined to be strategic without compromising the benefit to future generations.

676. They further argued that routine reliance on asset disposals erodes intergenerational equity by depleting resources meant to serve both present and future generations. They maintained that it also bypasses the safeguards of transparency and legislative oversight embedded in the Constitution.

677. The petitioners contended that the shares divestiture disregards the principles of equity. They posited that Safaricom PLC is part of the national heritage and represents a key asset for both the present and future generations which should not be sold. They also contended that Gen-Zs could not participate in the initial public offering (IPO) of 2008. They urged that a secondary public offering would provide an opportunity for their acquisition by the wider public and that this would preserve the opportunity for the future generation to buy the shares.

678. The petitioners prayed for a declaration that the transaction is in breach of the principles of intergenerational and intragenerational equity. They urged that the court stops the sale of the shares.

679. The Respondents contended that the claims of disenfranchisement were improper because Gen-Zs and future generations were not barred from buying shares since Safaricom Equity trades openly on the market daily.

680. The Respondents acknowledged that the proposition that the sale of a profitable asset breaches intergenerational equity because future generations may lose dividends, though a legitimate policy argument, is not a constitutional prohibition. The Respondents argued that the sale proceeds will be used for infrastructure which constitutes intergenerational assets. They submitted that the principles under Article 10 and 201 (a) are guiding frameworks and not prescribed

norms that prescribe what must or must not be done.

681. The respondents further submitted that the Government is not required by the Constitution to hold every public asset forever. They urged that the proper approach is that the court should not interfere with government economic policy unless the policy is contrary to the Constitution or statute.

682. Learned Counsel Mr. Musangi representing the 6th Respondent, Safaricom PLC submitted in Court that the claims of disenfranchisement were improper because Gen-z's and future generations were not barred from buying shares since Safaricom Equity trades openly on the market daily.

683. We have considered this counter-argument by Counsel Musangi, and find it to be missing the constitutional concerns raised by the Petitioners whose argument is not about access to Safaricom PLC shares in the stock market, but about the State's duty under **Articles 209** and **Article 201** to manage public assets and finances prudently and equitably across generations.

684. This argument by Counsel Musangi is also oblivious of the fact that the 15% government shares in Safaricom PLC are not being sold to the public or open to public access or acquisition in the stock market. They are being sold to a particular foreign corporate entity to own a majority shareholding in the most profitable, strategic and critical infrastructure.

685. We now turn to the substantive issue whether the divestiture violates intergenerational equity.

Sustainable development: inter-generational and intra- generational equity

686. Sustainable development is one of the national values and principles of governance espoused in Articles 10 (2) (d), 201 (c) of the Constitution and section 87A of the Public Finance Management Act.

687. Sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See ***Our Common Future; Brundtland Report 1987: Intergenerational and intragenerational equity.***

688. The principle of intergenerational equity is the foundation of sustainable development. According to **Professor Edith Brown Weiss,** in her writings **'In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (1989),** the principle of intergenerational equity emphasizes the moral obligation of the current generation to ensure that future generations have the same opportunities and resources available to them as the present generation. On the other hand, the principle of intragenerational equity concerns equity among people of the same generation. See **Waweru v Republic**

(Miscellaneous Civil Application 118 of 2004) [2006] KEHC 3202 (KLR) (Civ) (2 March 2006) (Judgment) on intergenerational equity.

689. We noted from the Joint Committee Report which captures the Report by the Office of Auditor General, at pages 45-46 of JMN-9 that:

> ***"…Further, the Auditor General pointed out that while the negotiated sale price and the upfront dividend monetization of 40.2 billion was highly enticing in the short term, it was likely to transform a regular and perpetual income source into a single upfront payment…."***

690. Drawing from the concerns raised by the Office of the Auditor General, while the negotiated sale price and the upfront dividend monetization of 40.2 billion was highly enticing in the short term, it was likely to transform a regular and perpetual income source into a single upfront payment, thereby denying future generations of the benefits of this public asset (shares), and the dividends on the shares.

691. We note that the Respondents acknowledged that the proposition that the sale of a profitable asset breaches intergenerational equity because future generations may lose dividends, is a legitimate policy argument. Except, they contended that it is not a constitutional prohibition.

692. Our response to the latter argument by the Respondents is that it is not in consonance with the Constitution. In particular, Article 201 (c) which explicitly provides: -

> ***(c)the burden and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations.***

693. It is not therefore the question of the principle of intergenerational equity being a constitutional prohibition but whether the divestiture complied with the Constitution.

694. A component of the **Agreement Between the Government of Kenya and Vodafone Kenya Limited** is the purchase of future dividend flows. Vodafone Kenya Limited was to purchase the Government's right to receive future Safaricom dividends on its 20% residual shares for Kshs. 40.7 billion.

695. It bears repeating that, the loss of long-term sovereign control over critical infrastructure cannot be regained whether or not individuals and future generations can still purchase shares in Safaricom PLC in the stock market. In other words, the issue is not disenfranchisement of citizens in trading opportunities, but the erosion or denial of intergenerational equity and national sovereignty when the State diminishes its stake in strategic assets without proper safeguards.

696. Based on the analysis above, we find that the divestiture removes long-term sovereign control over critical infrastructure, transforms regular and perpetual dividend income into an upfront single payment, dissipates public asset in the

shares sold thereby compromising the right of future generations from benefitting from the public assets.

697. This is a violation of Articles 10 and 201 of the Constitution, and section 87A of the Public Finance Management Act.

698. We have already found that the decision by the Government of Kenya to disinvest in the Safaricom PLC shares is a public policy decision subject to **Article 10(1) (c)** of the **Constitution**.

ISSUE NO. 5:
National Security, Data Sovereignty & Market Competition. Under this, we discuss:

(a) The effect of transferring majority control to a foreign entity on national security, data sovereignty, privacy under Article 31 and election integrity on IEBC result transmission architecture under Article 238.

National Security and Elections Integrity

699. In challenging the proposed partial divestiture of the Government of Kenya's (GoK) 15% shareholding in Safaricom PLC to foreign-controlled entities, the Petitioners raised significant national security, data sovereignty and public interest concerns. They contended that surrendering majority control of Safaricom PLC to foreign entities threatens national security and data sovereignty under ***Article 238 of the Constitution and Section 22(2)(d) of the Privatization Act, 2025***.

700. The Petitioners pointed out that no National Security Impact Assessment was conducted prior to the transaction. They argued that Safaricom PLC hosts critical national systems, including the Independent Electoral and Boundaries Commission (IEBC) election result transmission network, government digital payment platforms such as the Hustler Fund, Inua Jamii and NHIF, as well as the personal data of over 35 million citizens. Highlighting these risks, they argued that transferring effective majority control to a foreign private firm jeopardizes democratic integrity, individual privacy rights under ***Article 31*** and overall data sovereignty.

701. In response to these allegations, the 1st Respondent the Cabinet Secretary for the National Treasury and Economic Planning asserted that the Petitioners' claims regarding a violation of ***Article 238 of the Constitution*** for failing to conduct a national security impact assessment were unfounded noting that Safaricom PLC is a private limited liability company where the

Government does not exercise operational decision-making.

702. The Cabinet Secretary further pointed out that specific undertakings were agreed upon with the investor to protect national interests, including mandating that the company's Chairman must be a Kenyan citizen at all times, a majority of independent directors must be Kenyan citizens and that the Government must be consulted prior to any expansion outside Kenya.

703. The 6th Respondent, Safaricom PLC, dismissed the national security and sovereignty claims as alarmist, stating that it remained a Kenyan-incorporated entity subject to full regulatory oversight and that a change in shareholding did not reduce regulatory jurisdiction.

704. Regarding elections, Safaricom PLC emphasized that ***Section 44 of the Elections Act*** places statutory responsibility for result transmission exclusively on the IEBC, making telecommunications providers mere ancillary contractual service providers.

705. The 8th Respondent, Vodafone Kenya Limited, similarly submitted that allegations of threats to national sovereignty and infrastructure security were hollow, noting that regular supervisory, enforcement and data control mechanisms remain permanently vested with Kenyan statutory institutions.

706. The significant question for our determination here is whether the transfer of effective majority control of a critical national asset hosting critical national data to a foreign entity violates national security and election integrity under ***Article 238 of the Constitution.***

707. The principles governing national security are encapsulated under ***Chapter 14 of the Constitution***. In particular, ***Article 238*** states: -

238. Principles of national security

(1) National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.

(2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—

(a) national security is subject to the authority of this Constitution and Parliament;

(b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

(c) in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and

(d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

708. The core of the Petitioners' argument is that transferring majority control of Safaricom PLC to foreign entities compromises Kenya's ability to safeguard critical infrastructure.

709. It was not controverted that Safaricom hosts sensitive systems such as the IEBC's election transmission network, government cash transfer programs and personal data of millions of citizens.

710. Article 238 cited above establishes that national security must be pursued in strict compliance with the law and with full respect for sovereignty, democracy and the rights of the people. This means that any governmental action affecting critical infrastructure must be preceded by lawful safeguards that ensure Kenya retains sovereign control over its essential systems.

711. Safaricom PLC, by virtue of hosting election transmission networks, government payment platforms and the personal data of millions of citizens, is not just a commercial enterprise but a strategic national asset and infrastructure. Therefore, transferring majority control of such an entity to a foreign shareholder without first conducting a National Security Impact Assessment undermines Government's constitutional obligations on security of the people, data and property, election transmission networks, government payment platforms and the personal data of millions of citizens, is not just a commercial enterprise but a strategic national asset and infrastructure.

712. We state so because, this divestiture creates a 55% foreign majority shareholding in Safaricom PLC placing the buyer in control of management, assets, data and decisional control of the business operations, infrastructure and systems of Safaricom PLC.

713. As we have noted that security of the people, property, election transmission networks, government payment platforms and the personal data of millions of citizens, are matters of national sovereignty and security.

714. Therefore, the potential of eroding or compromising personal security, and national sovereignty and security is real especially where, management and decisional control of Safaricom PLC is in the hands of foreign owners.

715. As such, there is absolute necessity for the State to safeguard its democratic processes, data integrity and critical infrastructure in Safaricom PLC without relying on the already identified non-binding guarantees or undertakings by foreign owners. This risk was observed by the National Assembly in its Joint Committee Report as alluded earlier, and it proposed measures to safeguard personal security and data, national sovereignty and security.

716. More concerning is that there is no evidence that the observations and the recommendations made by the National Assembly were implemented especially by including them in the Share Purchase Agreements.

717. Even where the safeguards were provided for, like in the Relationship and Cooperation Agreement, with Vodafone Kenya Limited (RCA), we noted that the Government expressly acknowledged that ***the buyer was not bound by the undertakings*** as already determined. See clause 7.2 of the Relationship and Cooperation Agreement.

718. The Respondents argued that regulatory regimes such as the Office of the data Protection Commissioner, Central Bank of Kenya, Communications Authority of Kenya sufficiently protects critical infrastructure regardless of foreign majority shareholder identity.

719. Through this divestiture, the buyer obtains majority control of management, assets, data and decisional control of the business operations, infrastructure and systems of Safaricom PLC.

720. Furthermore, the Office of the Auditor General at page 47 of the Joint Committee Report observed that the proposed divestiture of Safaricom PLC shares involved the disposal of critical national infrastructure, given the company's dominant role in telecommunications, mobile money, and data services such as M-PESA, which are deeply integrated into Kenya's economic and social systems. The Office of the Auditor General warned that increasing foreign ownership could pose serious risks to national security, data sovereignty, cybersecurity, and financial stability, particularly if governance frameworks were not strengthened following the divestiture.

721. No evidence was placed before us, to mitigate the risks identified by the Joint Committee and the Office of the Auditor General.

722. Furthermore, the constitutional requirement under **Article 238** is not satisfied merely by retaining regulatory jurisdiction or appointing Kenyan directors. In any event, there is nothing to show that these guarantees were included in the SPA and RCA.

723. The essence of **Article 238** is proactive protection, ensuring that national security risks are identified and mitigated before the State relinquishes control. With such identified unmitigated security risks, we find that the divestiture violates Article 238 of the Constitution.

724. In the circumstances, even with regulatory safeguards, there is no guarantee that would prevent foreign and external influence or interference with the governance systems, personal security and data.

725. The Court is also cognizant of the centrality of Safaricom PLC systems in the National and county elections. Any perception of external control or

influence over the transmission of election results risks undermining public confidence in democratic integrity.

Issue 5 (b)

Whether the divestiture breaches merger control regulations under the Competition Act or mandatory takeover offer requirements under the Capital Markets (Take-Overs and Mergers Regulations, 2002)

726. The petitioners contended that the transaction undermines fair competition. They argued that the proposed transfer of effective control over such infrastructure transcends ordinary commercial transactions and raises profound constitutional questions touching on competition policy.

727. The petitioners submitted that no competition impact assessment was released. That the failure to conduct the assessment before transferring effective control is constitutionally fatal.

728. They submitted that the transaction further violated the **Capital Markets (Take-Overs and Mergers) Regulations (2002)**, in particular, regulation 3 which requires that where a person acquires shares resulting in effective control of a listed company, a mandatory takeover offer must be extended to remaining shareholders at an equitable price.

729. The petitioners underlined that the purpose of the regulation is to protect minority shareholders from exclusionary control transactions and to ensure equal treatment during transfers of effective control.

730. The State Respondents asserted that matters relating to financial services and competition are regulated by competent statutory bodies.

731. They further recognized that Safaricom PLC's shareholding does not exempt Safaricom from the Competition Authority and the Capital Markets Authority.

732. They argued that the petitioners have not shown that any regulator has been stripped of jurisdiction or that any license condition, or competition safeguard has been bypassed. They asserted that competition and takeover concerns are subject to specialist regulatory mechanisms.

733. As earlier noted, the evidence presented before this Court by the Sate Respondents demonstrate that the divestiture entailed not just the acquisition of the Government's 15% stake in Safaricom PLC but the internal reorganization of **Vodafone Kenya Limited.** The internal reorganization of **Vodafone Kenya Limited** encompassed the purchase of Vodafone **International Holdings BV**'s 12.5% stake in Safaricom PLC.

734. That the transaction would result in the increase of Vodafone Kenya Limited's stake in Safaricom from 39.9% to 55% and Vodacom Group's acquisition of **Vodafone International Holdings BV's (Netherlands).** The implication is that **Vodafone Kenya Limited** would acquire the effective control of **Safaricom PLC and Vodacom Group's** stake in **Vodafone Kenya Limited** would increase to 100%.

735. The other implication is that the transaction would result in majority foreign ownership of Safaricom PLC because Vodafone Kenya Limited is wholly owned by foreign companies. This is further supported by the letter written by the Communications Authority of Kenya.

736. Regulation 2 of the Capital Markets (Take-Overs and Mergers) Regulations, 2002, provides that: -

> **"*merger*" *means an arrangement whereby the assets of two or more companies become vested in or under***
>
> **"*take-over scheme*" *includes a scheme involving the making of offers for acquisition by or on behalf of a person of such shares in any company which results in an offeror acquiring effective control in an offeree;***
>
> **"*effective control*" *is where a person or a company makes an offer for the acquisition of effective control of an offeree which holds shares which together with shares, if any, already held by such person or an associate person or a company or by any other company that is deemed by virtue of being a related company or by persons acting in concert with such person carry the right to exercise or control the exercise of not less than twenty-five percent of the votes attached to the ordinary shares of an offeree which shall be deemed to be a take-over and the provisions of these Regulations shall apply except where that person or associate person or related company or persons acting in concert with the person, already hold shares carrying more than ninety percent voting rights in the offeree;***
>
> **"*offeror*" *in relation to a take-over scheme or a take-over offer means any person who acquires or agrees to acquire effective control in the offeree either directly or with any associated person or related company or any person acting in concert with the offeror but does not include a person who holds shares carrying more than ninety percent voting rights in the offeree;***

737. From the above, the divestiture involved the acquisition of effective control.

It was a takeover. This detail of information was not disclosed to the public. It was also neither included in the Sessional Paper No. 3 of 2025 approved for tabling before the National Assembly nor during public participation by the National Assembly.

738. Additionally, the public announcement issued by **Vodafone Kenya Limited** on 3 December 2025 **was** pursuant to **Regulation 4(3) of the Capital Markets (Take-Overs and Mergers) Regulations, 2002,** made under the **Capital Markets Act.**

739. Vodacom Group Limited, described as the ultimate offeror, further indicated that via **Vodafone Kenya Limited,** it intended to apply for an exemption from the **Capital Markets Authority**, pursuant to **Regulation 5(1) of the Take-overs and Mergers Regulations**.

740. The basis for the application was that it intended to maintain Safaricom's listing on the **Nairobi Securities Exchange (NSE)** following completion of the share acquisitions. It indicated that the purpose was a strategic investment in a listed company tied up with management or any other technical support relevant to the business of such company.

741. Vodafone Kenya Limited acknowledged that the share acquisitions were subject to approvals from regulatory and government authorities in Kenya, Ethiopia and South Africa including **COMESA Competition Commission** and a fairness opinion in terms of the **JSE** Listing Requirements.

742. Therefore, from the public announcement, there was a recognition by Vodafone Kenya Limited and Vodacom Group that the transaction was a takeover.

743. Regulation 3 (1) of the said Regulations provides that: -

> ***"(1) No person shall make an offer to acquire shares or voting rights of a listed company which together with shares or voting rights if any held by such person or by persons acting in concert or by associated person or related company entitle such person to exercise effective control in the listed company without complying with the take-over procedure provided for under regulation 4."***

744. Regulation 4 (3) of the Capital Markets (Take-Overs and Mergers) Regulations, 2002 provides that: -

> ***"(3) Where a person has acquired effective control in a listed company and has no intention of making a take-over offer, that person shall make***

a public announcement containing information that is specified in paragraph (2) including the broad reasons for exemption, immediately after having served the notice in writing to the parties specified in paragraph (1) and shall apply to the Authority for exemption from the take-over requirements under regulation 5."

745. The documents filed in the CTS by the State respondents also contain the letter dated 17 February 2026 from the Chief Executive Officer, Capital Markets Authority exhibited by the Cabinet Secretary, ambiguously stating that exemptions were granted. In the letter, the Chief Executive Officer had difficulties in understanding the nature of the application and declined to grant an approval for the transaction stating that there was no eexplicit requirement in the legal framework and that any approval would be *ultra vires*.

746. In our considered view, the Capital Markets Authority letter lacked clarity on the specific exemptions that were granted and is therefore open to divergent interpretations. The actual letter or certificate of exemption was not produced in evidence.

747. In the letter dated 18 February 2026, the Chief Executive Officer of the Nairobi Securities Exchange (NSE) noted that the Capital Markets Authority had granted an exemption from the obligation to make a mandatory takeover offer, subject to the fulfilment of the conditions precedent.

748. From the above correspondences, an exemption may have been issued in compliance with **Regulation 4** of the **Capital Markets (Take-Overs and Mergers Regulations, 2002)**.

749. The transaction was also subject to the **Competition Act** which governs the safeguarding of competition in the national economy and the protection of consumers from unfair and misleading market conduct.

750. Section 41 of Competition Act defines merger as:-

> **"*merger*" *means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover;***

751. Section 42 of the Competition Act provides in part that: -

> ***"(2) No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is—***

(a) approved by the Authority; and

(b) implemented in accordance with any conditions attached to the approval.

(3) No merger as described in section 41 carried out in the absence of an authorizing order by the Authority, shall have any legal effect, and no obligation imposed on the participating parties by any agreement in respect of the merger shall be enforceable in legal proceedings."

752. In his submissions before the Joint Committee, the Director General of the Competition Authority of Kenya submitted that: -

(1) The transaction would reduce the State's shareholding to 20% and increase Vodacom's effective holding to 55% resulting in control.

(2) The proposed divestiture is likely to result in a change of control, but it is not expected to adversely affect competition or market structure.

(3) The proposed transaction had not yet been formally notified to the CAK.

(4) Upon formal notification, the Authority will conduct a full merger review and issue its determination in accordance with the law.

(5) Applicability of Rule 8 of the Competition (General) Rules 2019 concerning COMESA notification requirements.

753. The Cabinet Secretary National Treasury also exhibited the decision of **The 1st Panel Meeting of the Panel Responsible for Determinations regarding the Merger between Vodafone Kenya Limited and Safaricom PLC 16 February 2026** by the **COMESA Competition and Consumer Commission (CCCC).**

754. We note that on 16 January 2026, the **COMESA Competition and Consumer Commission** received a notification regarding the **merger** between **Vodafone Kenya Limited ("Acquiring firm")** and **Safaricom PLC "Target"** pursuant to **Regulation 42 (1) of the COMESA Competition and Consumer Protection Regulations 2025.**

755. At page 3 of the decision, the **COMESA Competition and Consumer**

Commission noted various submissions by the parties: -

> ***(1) Vodacom Group and Safaricom each has a 50% shareholding in M-Pesa Global Services Limited ("M-Pesa JVCo") a joint venture established to acquire and manage the M-pesa brand, technology platform and related support assets previously held by Vodafone;***
>
> ***(2) Mpesa JVCo provides platform, licensing and support services to the Safaricom and Vodacom groups which operate the customer facing mobile money businesses in various countries; and***
>
> ***(3) Mpesa JVCo represents an existing vertical link between the parties' mobile financial service operations, and Vodacom Group's acquisition of control over Safaricom would internalize this relationship within a single corporate group.***

756. The **COMESA Competition and Consumer Commission** then issued its decision of 16 February 2026 to the effect that **the merger** was not likely to substantially prevent competition in the Common Market or a substantial part of it, nor will it be contrary to public interest.

757. Subsequently, the **COMESA Competition and Consumer Commission** issued a certificate dated 20 February 2026 of ***approval of the acquisition of a 15% shareholding in Safaricom by Vodafone Kenya, a subsidiary of Vodacom Group, together with the associated intra-group restructuring by Vodafone International Holdings BV of its interest in Vodafone Kenya since the transaction is not likely to substantially lessen competition and will not be contrary to public interest in the Community.***

758. The above notwithstanding, there is no evidence that there was a formal notification or request for approval by the Competition Authority of Kenya or that the Authority approved the Merger or takeover. For that reason, that transaction has no legal effect as per **section 42 (3) of the Competition Act** reproduced above.

759. We reiterate that the effect of the divestiture was never provided to the public during public participation by the National Assembly.

760. Accordingly, we find that the **acquisition, camouflaged as a simple sale and transfer of shares** breached merger control regulations under the Competition Act.

Issue 6: What reliefs the court should issue and who bears the costs?

Conclusions and Reliefs

761. We have found and held that this court has jurisdiction under **Article 165** of **the Constitution** to hear and determine this petition. The specific jurisdiction is ***'to hear any question respecting the interpretation of this Constitution including the determination of— (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.'***

762. Based on our analysis, findings and holdings in respect of the various issues identified for determination, we are satisfied that the petitioners have proved on a balance of probabilities that the divestiture in question was undertaken and procured in contravention of the Constitution and the law. It was therefore invalid, null and void.

763. We are guided by **Article 2 of the Constitution** that ***'…any act or omission in contravention of this Constitution is invalid,'*** as well as the landmark case of **Benjamin Leonard MacFoy v United Africa Co Ltd [1961] 3 All ER 1169; [1962] AC 152; [1961] UKPC 49,** where Privy Council established the fundamental rule that:

> "***If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado… And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.***" **(Denning L.J).**

764. In light of our finding of violation of the Constitution and the law, we also find it necessary to note that an order for certiorari has been prayed for by the petitioners.

765. Certiorari quashes an illegality or something done without jurisdiction or with procedural impropriety or in an unconstitutional manner. We shall consider the prayer, *inter alia*, in exercise of supervisory jurisdiction as well, under Article 165(6) and (7) **of the Constitution.**

766. The framing of Certiorari can be found in Order 53 Rule 2 of the Civil Procedure Rules as follows:

> ***…an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed,***

767. Grounding of reliefs will not be complete without noting the apt observation by the Court of Appeal in **Cabinet Secretary, National Treasury and Economic Planning & 5 Others vs. Gachoka & 9 Others [2026] KECA 1218(KLR),** citing with approval its earlier decision in **Attorney General & Anor vs Nafula & Others [2021] KECA 647 KLR** where the it held thus: -

> ***"45. Nor are we persuaded by the opposing respondents' arguments, strongly and persuasively put though they were, that the consequences of the challenged sale, even were it to be concluded by the time the pending petition is finalized, would be irreversible. All the parties herein are within the jurisdiction of our courts and the shares of Safaricom PLC will remain capable of being restored to the relevant party with appropriate refunds being made, should those be the order that may be ultimately issue.'***

768. This Court will therefore, grant appropriate reliefs as permitted under Article 23 of the Constitution and premised on issues proved by the petitioners and based on our findings.

769. Consequently, the Court grants the following reliefs and orders: -

> ***(a) A Declaration is hereby made that the decision leading to the divestiture of 15% of the Government of Kenya's shares in Safaricom PLC is a public policy decision subject to the Constitution and in particular, Articles 10 and 201.***
>
> ***(b) A Declaration is hereby made that the divestiture of 15% of the Government of Kenya's shares in Safaricom PLC was formulated, undertaken and approved by Cabinet and the National Assembly without any/ or reasonable, meaningful, quantitative and qualitative public participation mandated by Articles 10 and 118 of the Constitution.***
>
> ***(c) A Declaration is hereby made that the divestiture of the 15% of the Government of Kenya's shares in Safaricom PLC was marred with obscurities on the proposed buyer, misrepresentations and concealment of material information on the nature and effects of the partial divestiture, in violation of the principles of integrity, transparency, openness and accountability in financial matters enshrined in Articles 10 and 201 of the Constitution.***
>
> ***(d) A Declaration is hereby made that the divestiture of the 15% of the Government of Kenya's shares in Safaricom PLC was marred by obscurities, misrepresentations and concealment of material information to the Cabinet and the National Assembly, to the effect that the partial divestiture was presented as shares sale, yet it was a***

merger, acquisition and takeover of Safaricom PLC, giving effective control to majority foreign shareholding by a single entity at 55%, thereby violating the Capital Markets Act, the Capital Markets (Take-Overs and Mergers) Regulations, 2002 and the Competition Act and principles of integrity, transparency, openness and accountability in financial matters enshrined in Articles 10 and 201 of the Constitution.

(e) A Declaration is hereby made that the divestiture of the 15% of the Government of Kenya's shares in Safaricom PLC violates the constitutional principles of intergenerational and intragenerational equity, and sustainable development provided under Articles 10 and 201 of the Constitution.

(f) A Declaration is hereby made that the divestiture of the 15% of the Government of Kenya's shares in a camouflaged merger or acquisition and takeover of Safaricom PLC is in contravention of the Constitution and the law, to wit, Articles 10, 118, 201 and 206 of the Constitution, and the Public Finance Management Act, the Capital Markets Act, the Capital Markets (Take-Overs and Mergers) Regulations, 2002 and the Competition Act, and therefore invalid, null and void.

(g) A Declaration is hereby made that the transaction advisors Ms KCB Investment Bank Limited, for the subject divestiture of the Government of Kenya's 15% shares in Safaricom PLC were procured in contravention of Article 227 of the Constitution and the provisions of the Public Procurement and Assets Disposal Act.

(h) An order of Certiorari is hereby issued to remove into this Court for purposes of being quashed and we hereby quash the decision contained in the Sessional Paper No. 3 of 2025 and approved by the National Assembly on the divestiture of the 15% of the Government of Kenya's shares in Safaricom PLC together with all approvals, exemptions or no objections issued thereto, agreements entered into between the 1st respondent, the 7th and/ or 8th respondents or with any other person or entity in respect of the divestiture.

(i) An order of Certiorari is hereby issued to remove into this Court for the purpose of being quashed and we hereby quash any merger, acquisition or takeover of Safaricom PLC by the 7th and/ or 8th Respondents or by any other person or entity, together with all approvals, exemptions or no objections issued in respect thereto, in respect of the divestiture.

(j) A Declaration is hereby made that the 15% of the Government of Kenya's shares in Safaricom PLC, subject of the divestiture, having been transferred in contravention of the Constitution and the law, are hereby restored to the ownership of the Government of Kenya on behalf of the people of Kenya.

(k) Any relief sought by the Petitioners which is not expressly granted herein is accordingly denied.

770. On costs, these being public litigation proceedings, we order that each party shall bear own costs.

771. Orders accordingly.

Dated, Signed and Delivered at Nairobi through Microsoft Teams online application this 15th Day of September, 2026

F. GIKONYO M.

JUDGE(PRESIDING)

R.E. ABURILI

JUDGE

T.W. OUYA

JUDGE

FOOTNOTES

[1] accessed from <https://dictionary.cambridge.org/dictionary/english/ring-fence>

[2] accessed from

[3] The Latin phrase ‘Ipsa Scientia Potestas Est’ can be found in Bacon’s Meditationes Sacrae (1597) quoted at http://www.quotationspage.com/quotes/Sir_Francis_Bacon.

SIGNED BY/FOR:

THE JUDICIARY OF KENYA

HON. LADY JUSTICE OUYA TABITHA WANYAMA
HON. JUSTICE FRANCIS GIKONYO
HON. LADY JUSTICE R. E. ABURILI
Milimani High Court
High Court Constitution and Human Rights
Date: 2026-09-16 20:11:46