REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 86 OF 2017

In the matter of Enforcement of Human Rights and Protection of Fundamental Freedoms under Articles 19, 20, 21, 22, 23, 258 and 259 of The Constitution of Kenya

In the matter of Violation of Rights to Privacy of Kenyans Protected Under Article 31 of The Constitution of Kenya, 2010

In the matter of Protection and Safeguard of The Consumer Rights Under Article 46 of The Constitution of Kenya, 2010

In the matter Threatened Violation of the Right to Life, guaranteed Under Articles 19 and 26 of The Constitution of Kenya,2010

In the Matter of Violation of Rights to a Fair Administrative Action and the Right to a Fair hearing in fragrant contravention of Articles 47, 50 of the Constitution of Kenya, 2010 and the Fair Administrative Actions Act, 2015

In the matter of the unreasonable and unjustifiable limitation of the Human Rights and Fundamental Freedoms of a person, contrary to the values of an open disregard of the spirit, purported and object of the Bill of Rights

In the matter of the Communications Authority of Kenya Act, 2015

In the matter of Proposed (Impugned) Installation of a System and or Device for Spying, Tapping, Searching, Seizing, Blacklisting, Disconnecting and or otherwise Disabling and or Interfering with Communication and Other Electronic Devices by Communications Authority of Kenya in contravention of the Constitution of Kenya, 2010

In the matter of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013

BETWEEN

Kenya Human Rights Commission.....Petitioner

versus

Communications Authority of Kenya.....1st Respondent

The Attorney General.....2nd Respondent

Safaricom Limited.....3rd Respondent

Airtel Networks Kenya Limited.....4th Respondent

Orange-Telkom Kenya.....5th Respondent

JUDGMENT

Introduction

1. This Petition raises substantially similar issues as those raised in Pet. No. **53** of 2017 in which the first and second Respondents herein have also been named as Respondents while the third, fourth and fifth Respondents' herein are named as Interested Parties in the said Petition. The point of intersection is that both Petitions challenge the intended introduction of a device by the first Respondent herein to be

installed in the networks of the third, fourth and fifth Respondents who are mobile network providers offering various services to their customers, among them mobile telephone, data, internet, and mobile money transfers.

2. The crux of both Petitions is that the said device has the capacity of accessing their subscribers information, which can only be accessed in the manner provided under the law, hence a violation of their subscribers constitutionally guaranteed right to privacy. The two Petitions also challenge the legality of the manner in which the device was introduced. The similarity of the two Petitions is further exemplified by the striking similarity of the Responses and submissions by the parties either in support or in opposition to the Petitions.

3. Ideally, the two Petitions ought to have been consolidated to save judicial time, but the issue of consolidation was raised at a point when the first Petition had substantially progressed even though the two Petitions came up for hearing the same day. Consequently, the two Petitions were heard separately. Inevitably, the judgment will have similarities in terms of the issues considered and determinations. Nevertheless, I summarize below the facts of this Petition.

The Parties

4. The Petitioner, Kenya Human Rights Commission (KHRC), is a non-governmental organization. Its objects include promoting Human Rights, Fundamental Freedoms, Social, Cultural and Economic Rights, Good Governance and Democracy.

5. The first Respondent, Communications Authority of Kenya (CAK), a statutory body charged with the responsibility of licensing and regulating telecommunication as well as collecting levies and license fees on behalf of the government of Kenya.

6. The second Respondent is the Honourable Attorney General, the Principal government legal adviser. Pursuant to Article **156** of the Constitution, he represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.

7. The third, fourth and fifth Respondents are Limited Liability companies offering telecommunication services to their subscribers and are enjoined to keep confidential any information relating to their clients private communications and any information relating to their clients communication gadgets.

The Petitioners case

8. The Petitioner avers that CAK introduced a generic device management system (DMS) for spying on mobile and communication devices of Kenyans without public consultations and or public participation albeit through awareness creation. The Petitioner avers that the DMS will access the networks of the mobile service providers and therefore the devices and device information of the mobile service subscribers. It also avers that the DMS system will have the effect of unduly, unreasonable and without any justification, limiting the Human Rights and Fundamental Freedoms of Kenyans. Further, it avers that CAK does not guarantee the confidentiality of the information accessed and or obtained and states that it is the responsibility of the mobile service providers to keep the subscriber information confidential.

9. The Petitioner also avers that the intention introducing the said system has unconvincingly been stated as blocking fake and duplicate IMEI, yet currently it's possible to ascertain the IMEI numbers of mobile phones without intruding into the privacy of Kenyans. The Petitioner avers that the said system will infringe the Rights of Kenyans guaranteed under Article **31** and that the limitation is unjustifiable and that there are sufficient legal mechanisms to combat the illegal devices.

10. As a consequence, the Petitioner avers that the system will infringe on citizens rights under guaranteed Article **40, 46, 47** and **50** and that the proposal to block the phone gadgets was undertaken without affording the affected persons a hearing. The Petitioner states that many people including lawyers, doctors, counsellors, religious leaders, journalists hold confidential information relating to their clients in electronic devices and these are threatened with violation. As a consequence, the Petitioner seeks the following reliefs from this court:-

a. A declaration that introduction of the impugned system is a violation of human rights & freedoms of subscribers.

b. A declaration that sniffing, eavesdropping, tapping and or otherwise accessing the information in a subscriber's telecommunication device amount to a search that can be carried out with a court order.

c. A declaration that blocking, disabling, deactivating, and or otherwise rendering a device useless or inaccessible to a mobile network amounts to a seizure that, when carried out without a prior court order amounts to invasion on and an unlawful limitation of the enjoyment of the right to property.

*d. A declaration that blocking, disabling, deactivating and or otherwise rendering a device useless or inaccessible to a mobile network amounts to a seizure that when carried without affording the customer a fair hearing is inconsistent with the right to a fair hearing guaranteed under **Article 50** of the Constitution and it is an unjustified interference with the right to property guaranteed under **Article 40** of the Constitution of Kenya.*

e. A declaration that the disguise employed by the 1st Respondent being fighting counterfeit and crime is an usurpation of the statutory mandate KEBS, ACA, KIPI and is not proper or sufficient justification, for spying and sniffing to the mobile networks without the authority of court.

f. A Judicial review order quashing decision of the 1st Respondent to implement the device management system.

g. A Judicial review order of prohibition to restraining the installation of device management system on mobile networks of the mobile service provider.

h. A Declaration that the mobile service providers are the only entity charged with the duty to preserve the confidentiality of mobile and electronic device confidentiality and the 1st Respondent has no mandate to access, spy, sniff or otherwise interfere with the mobile networks and the contents on the mobile networks for whatever purpose or without the leave of court.

i. Any other, further or better relief that this honourable court will think fit and just to give in the circumstances of this case.

j. Costs of this Petition.

First Respondents' Replying Affidavit

11. CAK's Director General Mr. **Francis Wangusi** swore the Replying Affidavit dated **19th** April 2017. He avers that:- **(i)** CAK is a regulatory body for the communication sector in Kenya envisioned under Article **34** of the Constitution and Established under Section **3** of Kenya Information and Communication Act[1](KICA); **(ii)** that CAK is responsible for facilitating the development of the information and communication sectors in Kenya which include broadcasting, multimedia, telecommunications, electronic commerce, postal and courier services; **(iii)** that under KICA and the Regulations thereto, the Responsibilities of CCK include:-*Licensing all systems and services in the communications industry including telecommunications, postal, courier and broadcasting; Managing the country's frequency spectrum and numbering resources; Facilitating the development of electronic commerce; Type approving and accepting communications equipment meant for use in the country; Protecting consumer rights within the communication industry; Managing competition within the sector to ensure a level playing ground for al industry players.*

12. He also averred that mobile communication services were introduced in Kenya in early 2000 and at the time, the worldwide Global System for Mobile Communications (GSM) market was guided by:-

*i. In the year 1985,the European Commission endorsed the Confederation of European Posts and Telecommunications (CEPT) GSM project. In 1989 it adopted the GSM standard proposed by the CEPT. To further the development of the GSM standard, operators in Europe entered into an agreement to form an association to lead such developments. In the year 1995 it was registered as GSM MoU Association (GSMA). It was agreed that in order to identify mobile communication devices that have been manufactured with regard to the GSM standard, the devices had to bear identification mark of quality, a unique **15** digit serial number known as International Mobile Equipment Identity (IMEI) to be issued by GSMA. The GSMA therefore became the custodian of all the IMEI numbers for all GSM devices in the world and to this end the GSMA maintains a global central database containing basic information on the serial number (IMEI) ranges of millions of mobile devices eg. mobile phones, tablets, data cards, etc that are in use across the world's GSM mobile networks and the database is known as the IMEI Database. The GSMA allocates official IMEI number ranges to all manufacturers of compliant devices and records these ranges and device model information in the IMEI Database. The information recorded includes the manufacturer and model names of the device and its main network capabilities (e.g. frequency bands, radio interfaces). Further, the GSMA allocates the first 6 numbers of the IMEI and the remaining 8 digits are allocated by the manufacturer of the mobile communication device while the last digit is a security check digit which is used t verify the whole string of digits.*

13. He also averred that the first, second and third interested parties are all members of GSMA which represents mobile operators and they have access to the GSM IMEI Database. Further, he states that theft of mobile devices and proliferation of counterfeit devices or illegal devices became a concern for regulators and in 2011, at the East African Communications Organizations (EACO) congress, (for which Kenya is a member and the interested parties participated in), it was agreed that the mobile service operators in the member countries would implement an equipment Identification Register (EIR), a database that contains a record of all the Mobile Stations served by the mobile network owners which is divided into a white-list (a list of mobile stations allowed to access services), a black-list (a list of mobile stations which have been reported lost or stolen),a grey-list (a list of mobile stations of questionable nature) and that the EIR was to aid in the control of stolen mobile devices.

14. He also averred that it was resolved by EACO that the mobile network owners and other mobile service operators will maintain a blacklist containing reported stolen or lost devices and the mobile service providers will deny service to such devices and that the interested parties have installed and currently run their own individual EIRs and as paying members of the GSMA they have access to the IMEI Database.

15. He stated that in 2012, a total of **1.89** million illegal mobile handsets were denied service and Urban IT consulting Ltd was with the approval of CAK, handset vendors and mobile service providers including the first, second and third interested parties to offer handset verification system in strict adherence to confidentiality. He averred that the above switch off was unsuccessfully challenged in court,[2]but the purveyors of counterfeit phones resulted to methods that made detection harder such as problems encountered in international calls whereby they are reflected as local calls resulting in loss of revenue.

16. **Mr.Wangusi** averred that to address the challenges enumerated above, it was necessary to create a centralized EIR which is the DMS and that the implementation of the device is within the constitutional and statutory mandate of the CAK. He averred that CAK engaged the mobile service providers including the first, second and third interested parties in various stakeholders meetings commencing with the meeting of **20th** January 2016 in which it was agreed that there was need to detect all devices, isolate illegal devices and deny them service and mop-up illegal devices in Kenya and the first, second and third interested parties and various providers signalled that they were in support of the DMS project. He states CAK embarked on a search by way of open tender, of a supplier who could implement the DMS and create a DMS system that can define a white list of devices that should access GSM services, identify counterfeit devices and substandard goods, reported lost or stolen devices and instances of SIM boxing operations.

17. He also averred that to achieve the above, it was imperative that the DMS would have access to IMEI, the serial number of a mobile device which identifies the device attempting to access a network. He states that the DMS will have access to the IMEI's in the operators EIR and the IMEI Database operated by the GSMA to compare with the devices in Kenya, International Mobile Subscriber Identity (IMSI)-the number assigned to a mobile by CAK for uniquely identifying the subscribers, Mobile Station Integrated Subscriber Directory number (MSISDN), a number assigned to each subscriber by a mobile service provider on behalf of the authority, that is the subscribers mobile number.

18. **Mr.Wangusi** also averred that access to IMEI, IMSI and MSISDN does not create automatic access to CAK to the call data records (CDR) or content of such call concerning any mobile number and that access sought by CAK to the mobile network operators EIR's and or home location register is only for the purposes of identifying the IMEI, IMSI and MSISDN for each device. He also averred that CAK is permitted by law to work with and hold consultations with the Kenya Bureau of Standards (KBS), Anti-Counterfeit Agency, the Kenya Revenue Authority (KRA) and the National Police Service.

19. Further, he also stated after competitive bidding, the authority contracted the second Respondent to design, supply, deliver, install and commission the DMS and that mobile service providers were invited to nominate persons from their organization to the committee on the implementation of the DMS as agreed in a meeting held on **20th** January 2016. He also stated that some of the mobile service providers nominated persons from their organizations to the Committee on the implementation of the DMS while others sought more consultations.

20. He also averred that CAK held further consultations with the various mobile service providers and other stakeholders and that the design annexed to the Petitioners' supporting affidavit was not a final design. Further, he averred that the scope of data required by DMS was to be defined and shared with operators. Also, he states, CAK would enter into discussions to align the overlapping type approval with the KBS. Also, he averred CAK formed working groups as follows, Technical, Regulatory and Consumer Affairs. He stated that the DMS is at the design stage, hence, this Petition is premature, and that CAK did not attempt to access the mobile service providers databases. Also, he stated that CAK is yet to respond to issues raised in response to its letter dated **2nd** February 2017, and that CAK is currently in discussion with various stakeholders and no decision has been taken.

21. He further averred that CAK has mandate to monitor compliance with KICA and that DMS is not a new policy but a continuation to control or stop proliferation of illegal devices. Also, he averred that DMS can only access information on a mobile service provider network that it is authorized to access by the mobile service providers and that it is a clean-up process of illegal devices which commenced way back in 2011 and that CAK has been in talks with stakeholders.

22. He averred the Petitioner did not demonstrate the alleged illegal intention of CAK, the alleged violation of constitutional rights, and stated that the Petitioner has not demonstrated how the DMS will limit fundamental rights or has breach of subscriber information. He further averred that the contents of paragraph **12** of the Petition are factually wrong. He denied the allegations of snooping and stated that the DMS is part of a regulatory process that has been ongoing since 2012.

23. Responding to the allegation that CAK is performing functions of other bodies, he averred that it has an obligation to collaborate with other bodies in order to counter the menace of illegal devices and insisted that the DMS is a centralized equipment identification register, that each mobile network operator has installed an EIR and the information is already available to CAK under its regulatory functions, and that the information available on the DMS must be information authorized by the mobile network operators, and CAK that has set up the law and regulations governing the DMS.

Second Respondents' grounds of opposition

24. The Hon. Attorney General filed grounds of opposition stating that the prayers sought if granted will undermine the statutory functions of CAK; that the Petition is speculative and hypothetical; that the DMS is for the safety that and security of all consumers, and it is within the statutory mandate of CAK.

Third Respondents' Replying Affidavit

25. **Mercy Ndegwa,** the third Respondents' head of Regulatory and public policy-Corporate Affairs Division swore the Replying Affidavit filed on **16th** June 2017. She avers that:- **(i)** the third Respondent is a leading Communication company in East and Central Africa with over **25.1** Million subscribers; **(ii)** It offers various services among them voice calls, data and Mobile Cash Transfer (M-pesa) and from its subscribers to subscribers of the fourth and fifth Respondents; **(iii)** that the third Respondent is irregularly named as a respondent in this Petition and in any event there are no orders sought against it and it has no power to install the system complained of; **(iv)** She admitted that the third interested party received the letters marked **DED1** in the Petitioners' Affidavit.

26. She avers that on **20**th January 2016, CAK invited the third Respondent to discuss the proliferation of counterfeit handsets in the country and to her knowledge on the day of the meeting, CAK had an International Tender (No. CA/PROC/OIT/27/2015-2016) for the Design, Supply, Delivery, Installation, Testing, Commissioning and Maintenance of a Device Management System and that she was aware that the second Respondent was awarded the tender in partnership with a third party entity, Invigo Off-Shore Sal of Lebanon.

27. She also avers that on **10th** October 2016, CAK wrote to the second, third and fourth Respondents' Parties stating that it intended to install a DMS on mobile cellular networks to combat the proliferation of illegal communications end-user terminals including sim boxes, and that between January 2016 and October 2016, CAK did not convene any meeting or engage the third interested party on the design of the system, but rather only opted to communicate the specifications and design through the letter dated **10th** October 2016.

28. She also averred that the third Respondent through its Chief executive Officer Mr. Bob Collymore responded vide a letter dated **17th** October 2016 raising among other issues, the privacy, confidentiality and consumer concerns arising from the fact that its consumer's

personal information shall be in the custody of a third party. The letter also raised security concerns on the installation of the DMS, which would have to be addressed prior to the commencement of the project. In response, she avers, CAK called a pre-implementation meeting which took place on **26th** October 2016 where the third, fourth and fifth Respondents were present. In the said meeting, she states, CAK proposed two committees to discuss the matter, namely, technical and regulatory. Further, she avers, the third, fourth and fifth Respondents proposed a consumer meeting which would among others engage the public and consumer organizations on consumer related concerns such as privacy and consumer awareness.

29. She further avers that on **23rd** November 2016, the first and only technical committee meeting was held between CAK, the third, fourth and fifth Respondents, and in the said meeting, the third, fourth and fifth Respondents raised the same concerns on privacy and consumer awareness of the project and upon conclusion of the meeting it was the third Respondents understanding that the DMS design and requirements were subject to further discussions on the issues raised. She further stated that on **13th** January 2017, CAK wrote a letter to the third Respondent in reference to the meeting held on **23rd** November 2016 indicating they would supply the third Respondent with a network block diagram showing how the DMS would interconnect with the core network.

30. She further avers that on **25th** January 2017, a regulatory meeting was held between CAK and the third, fourth and fifth Respondents whereby it was agreed that a regulatory discussion of the project cannot be done without the conclusion of the technical discussion of the project. Further, she states, contrary to what was agreed in the said meeting, on **31st** January 2017, CAK wrote a letter to the third Respondent stating that its DMS technical team shall visit the third Respondent's facility on **21st** February 2017 to survey the integration of the DMS to the third Respondents' network, and to discuss the same with the third Respondents' technical team.

31. She avers that before the said visit, CAK wrote a letter dated **6th** February 2017 stating that it had commenced the DMS Project installation and integration and requested the third Respondent grants a third party company namely; Broadband Communications Networks Ltd access to its site for installation of DMS. She states that the third Respondent responded to the said letter vide a letter dated **17th** February 2017 stating that a technical assessment was still required to be done prior to installation so as to pave way for the Legal, Regulatory and Consumer Affairs Committees to discuss the impact on the networks and consumers and also requested for a meeting to discuss *inter alia* an alternative design that would address the issue of counterfeit devices, but the letter did not elicit a response. She avers the third Respondent raised the concerns listed in paragraph **24** of her affidavit among them whether a third party entity will have unfettered access to the consumers' call data records, location information, credit card and M-PESA information, identification information and SMS information, which basically equates to all the records of any consumer with a registered mobile device. She deposes that CAK has failed to adequately address the said concerns, leading to the conclusion that its subscribers are at risk of having their personal details, telecommunications, short message services, social media messaging and data exchanges being subject to interference by installation of the said DMS device.

32. As a consequence, she the third Respondent is apprehensive that their subscribers shall desist from using their devices, in effect reversing the progress made in making communication easier for subscribers. She also avers that the decision to install the device without consultation is arbitrary, and, that the law does not grant CAK power to arbitrarily interfere with communication devices by tapping, listening to, surveillance or intercepting communications related data. Hence, she avers that CAK's actions are contrary to Article **10 (2)** of the Constitution, and that CAK does not state the current measures currently in place to curtail counterfeit devices taking into account the Anti-Counterfeit Act, the KBS or stopping the items at the points of entry. She avers that the installation of DMS requires consultations in line with rights under Article **31**, **47** and **40** of the Constitution.

Fourth and Fifth Respondents

33. The fourth Respondent did not file any response nor did it participate in the proceedings. The fifth Respondent did not file any Response or submissions, but its advocate, **Mr. Karani** relied on the affidavits and submissions filed by the third Respondent and supported the Petition.

First Respondents' Further Affidavit

34. Mr.Wangusi in a further affidavit filed on **5th** October 2017 disputed the contents of the third Respondent's Replying affidavit and insisted that the third Respondent is a necessary party in this Petition. He also avers that at a meeting held on **20th** January 2016, CAK briefed participants on efforts undertaken to combat counterfeit devices and provided details on how DMS would interact with relevant government agencies including the Anti-counterfeit agency and the mobile network owners. Further, he avers that roaming subscribers would be exempted from DMS. He states that Mobile Network Operators suggested that the project be implemented in phases and that the mobile network owners would forward nominees to the project committees to facilitate implementation of the DMS project.

35. He also avers that the minutes of the said meetings were confirmed by all the participants, and on the allegation that it had already granted the tender, he averred that CAK had only advertised for the tender. Further, he averred that the third, fourth and fifth Respondents were aware and were involved in the discussions on the DMS project as early as the initial meeting of **20th** January 2016 as evidenced by the minutes marked **FW5** annexed to his Replying Affidavit. Further, he avers that the letter dated **10th** October 2016 explained the purposes of identifying the information that would be sought by the DMS system, the expected points of connectivity or interaction between the DMS and the Mobile Subscribers Operators Systems, and that the letter identified the contractor undertaking the work.

36. He also averred that in undertaking its regulatory functions, CAK is not required to engage the third Respondent and that it only undertook the procurement process of the DMS and that the issues of privacy were discussed in a stakeholder meeting held on **20th** January 2016 and subsequent meetings in which the need for continuous consultations was agreed. He further avers that setting up a link is not the same as installation, and that a meeting had been planned by the time CAK was served with the interim orders issued in this Petition. He avers that all the concerns raised have been addressed.

Issues for determination

37. From the facts enumerated above, I find that the following issues fall for determination, namely:-

*a. Whether the DMS system threatens or violates the Right to privacy of the subscribers of the third, fourth and fifth Respondents.' If yes, whether the limitation meets the Article **24** analysis test;*

b. Whether the installation of the DMS falls within the statutory mandate of the CAK;

c. Whether the process leading to the decision to the acquisition and installation of the DMS system in the first, second and third Interested Parties Mobile Net works was subjected to adequate public participation;

d. Whether CAK violated the Petitioners Right to a fair Administrative Action;

e. Whether the impugned decision violates consumer rights of the subscribers of the third, fourth and fifth Respondents;

f. What are the appropriate orders regarding costs;

g. What the appropriate reliefs (if any).

Whether the DMS system threatens the Right to privacy of the subscribers of the third, fourth and fifth Respondents' or their Consumer Rights. If yes, does the limitation meets the Article 24 analysis test?

38. **Mr. Mwangi** for the Petitioners submitted that the impugned system violates or threatens the right to privacy of the Kenyan citizens and mobile phone users. He anchored his arguments of the provisions of Article **31 (a), (c)** and **(d)** of the Constitution, Section **31 (b) & (c), 27 (2) (b)** and **27A (2) (c)** of the Kenya Information and Communications Act. He submitted that the right to privacy is violated the moment unauthorized third parties access confidential information. He also submitted that it is not necessary for the third party to put the information to any use or to further violate other constitutional guarantees of the subscribers for a cause of action to arise.

39. Counsel for the third Respondent **Mr. Wilson** supporting the Petition argued that the DMS System in a bid to curb the alleged illegal devices and sim boxing, will have access to individual's mobile number, their call records which information can only be accessed with the consent of the Mobile Network Operator. He pointed out that such information entails telephone conversations and financial statements, yet the subscribers and the mobile service operator have valid contracts. He also pointed out that National Police Service, Anti-Counterfeit Agency and the Kenya Bureau of Standards also have access to the DMS system. He argued that the dignity and freedom of the individual cannot be ensured if his communication of a private nature, be they written or telephonic are deliberately, consciously and unjustifiably intruded upon or interfered with.[3]

40. Citing *Coalition for Reform and Democracy (CORD) & 2 Others, vs Republic & 10 Others*[4] he submitted that intercepting communication is a violation of the right to privacy and added that a telecommunication operator is required to keep in secure and confidential manner and not to disclose the subscribers details as provided under Section **27A (3)** of the Act. He also submitted that Regulation **15** of the Kenya Information and Communications (Consumer Protection) Regulations, 2010 protects consumer privacy by requiring the operator not to monitor, disclose or allow any person to monitor or disclose the content of any information of any subscriber transmitted through the licensed systems by listening, tapping, storage or other kinds of interception or surveillance of communications and related data. Hence, the third Respondent is required to protect the right to privacy of its subscribers communications.

41. **Mr.Karani**, counsel for the fifth Respondent supported the Petition and adopted submissions by the third Respondent.

42. **Mr.Kilonzo,** counsel for the first Respondent submitted that the Petitioner has failed to state in clear terms the alleged violations[5] of constitutional rights. In particular, he submitted that the Petitioner is required to state with reasonable degree of precision that which is complained of, that the Petitioner must set out the provisions said to have been infringed and the manner of infringement.[6] He argued urged the court to be guided by the principles laid down in the South Africa case of *Mistry vs Interim Nationa Medcal and Dental Council of South Africa**[7]*** quoted in *Roshanara Ebrahim vs Ashleys Kenya Limited & 3 Others*[8] namely, whether the information was obtained in an intrusive manner, whether it was about intimate aspects of an applicant's personal life, whether it involved data by an applicant for one purpose which was the used for another purpose and whether it was disseminated to the press or general public or persons from whom an applicant could reasonably expect that such private information would be withheld. **Mr.Kilonzo** also submitted that it has not been demonstrated that CAK intends to obtain any information for unlawful purpose and that a general accusation cannot be a basis of allegation of infringement of Article **31**.

43. **Mr. Sekwe** for the Honorable Attorney General supported the submissions by the first Respondents counsel and reiterated the principles laid down in the *Anarita Karimi* case relied heavily by the first Respondents counsel and argued that the Petition is speculative and alluded that the petitioner was not acting in good faith.[9]

44. **Mr. Kilonzo** submitted that the limitation is not justifiable under Article 24[10]of the constitution as it is designed for the proper purpose of and it is a necessary regulatory tool in the face of the technological challenges in the communication sector and is of immense benefit to the public.

45. In the identical Petition mentioned earlier, I had occasion to address a similar issue arising from similar facts. In view of the similarity I propose to not to re-invent the wheel, but to reproduce what I stated in the said case as much as it is relevant to the issues under consideration.

46. It is convenient to start by stating that Article **2 (4)** of the Constitution provides that any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Article **259** of the Constitution provides that the Constitution shall be interpreted in a manner that promotes it's purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistently with this, when the constitutionality of legislation or any act or omission is in issue, the court is under a duty to examine the objects and purport of the legislation, the act or omission and to read the provisions of the legislation, the conduct or omission so far as is possible, in conformity with the Constitution.[11]

47. I find it necessary to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The *first* principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[12]In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[13]Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.'[14]It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[15] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[16] *Secondly*, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[17]

48. It is common ground that two letters exhibited to the Petitioners supporting Affidavit dated **6th** January 2017 and **31st** January 2017 triggered these proceedings. CAK did not dispute writing the said letters. The third Interested Party was emphatic that it received the letter(s) from CAK, thus settling the question of the origin of the letters.The letter dated **6th** February 2017 states in part:-

> *".....We are in the advanced stages of setting up the connectivity links between DMS and your network.*
>
> *In this regard, kindly facilitate our principal contractor, M/S Broadband Communication Networks Limited, to access your site and install the link at the data-centre or Mobile Switching Room. The link should terminate close to the core network element that shall integrate to the DMS solution. The DMS Bock Diagram and Integrated Requirements for this setup was shared with your technical team..."*

49. The letter dated **31st** January 2017 reads in part:-

> *"The purpose of the visit is to survey and discuss with your technical team the integration of the DMS and your network. The key highlights of the visit will be on the following matters:*
>
> *i. technical architecture of connectivity between the DMS and your system to access information on the IMEI, IMSI,MSISDN and CDRs of the subscribers on your network;*
>
> *ii. the point(s) of connection for the dedicated link between your system and the central DMS servers located as CA Centre Waiyaki Wy;*
>
> *iii. rack space to install the DMS node at your premises and clean power supply; and*
>
> *iv. any other technical matters that may arise."*

50. The words to note in the letter dated **31st** January 2017 are:- *"...to access information on the IMEI, IMSI,MSISDN and CDRs of the subscribers on your network."* These words warrant no explanation. Section **2** of KICA defines "access:- as follows:- "access" in relation to any computer system", means instruct, communicate with, store data in, retrieve data from, or otherwise make use of any of the resources of the computer system." The Act defines data as follows:- "data" means information recorded in a format in which it can be processed by equipment operating automatically in response to instructions given for that purpose, and includes representations of facts, information and concepts held in any removable storage medium."

51. The Act defines electronic record to mean a record generated in digital form by an information system, which can be transmitted within an information system or from one information system to another and stored in an information system or other medium. It defines telecommunication system as a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of— (i) speech, music and other sounds; (ii) visual images; (iii) data; (iv) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sound, visual images or data; or (v) signals serving for the activation or control of machinery or apparatus and includes any cable for the distribution of anything falling within (i) to (iv) above.

52. Privacy is a fundamental human right, enshrined in numerous international human rights instruments.[18] It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private sphere" with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals.[19] Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.[20]

53. A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions.[21] Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Equally, new challenges have to be dealt with. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analyzed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. Our constitution protects privacy as an elemental principle, but the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

54. Data protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars (information) is being processed by another person or institution (the data user). Processing of information generally refers to the collecting, storing, using and communicating of information. The processing of information by the data user/responsible party threatens the personality in two ways:[22] *a) First, the compilation and distribution of personal information creates a direct threat to the individual's privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity.*

55. The modern privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights[23]which was aptly described by Professor Richard Lillich as the *"Magna Carta of contemporary international human rights law*." It is expressly premised on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family.*"[24]

56. The right to privacy is also dealt with in various other international instruments. The African Charter on Human and Peoples' Rights [25] provides that *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind...."*

57. Article **19** of the Constitution stipulates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Article **31** provides the Right to Privacy of the person, home or property searched. It recognizes the right of every person to privacy, which includes the right not to have their person searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed. The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance.

58. The European Court of Human Rights Court has long recognized the intrusiveness inherent in government interception of the content of communications. It held that "*telephone conversations"* are "*covered by the notions of 'private life' and 'correspondence'*[26] referred to in Article **8** of the European Convention on Human Rights. Since, then the advent of the internet and advancements in modern technologies have revolutionized the way we communicate. The ECHR has acknowledged these developments, expanding the scope of Article **8** protection to include "*e-mail communications.*"

59. Today many citizens live major portions of their lives online. Citizens use the computers and cell phones to conduct businesses, to communicate, impart ideas, conduct research, explore their sexuality, seek medical advice and treatment, correspond with lawyers, communicate with loved ones and express political and personal views. Citizens also use the internet to conduct many of their daily activities, such as keeping records, arranging travel and conducting financial transactions. Much of this activity is conducted on mobile digital devices, which are seamlessly integrated into the citizens personal and professional lives. They have replaced and consolidated fixed-line telephones, filing cabinets, wallets, private diaries, photo albums and address books.

60. As innovations in information technology have enabled previously unimagined forms of collecting, storing, and sharing personal data, the right to privacy has evolved to encapsulate state obligations related to the protection of personal data.[27] A number of international instruments enshrine data protection principles, and many domestic legislatures have incorporated such principles into national law.[28]The internet has also enabled the creation of greater quantities of personal data. Communication(s) data is information about a communication, which may include the sender and recipient, the date and location from where it was sent, and the type of device used to send it.

61. The following excerpt from a decision of the European Court of Human Rights is relevant:-[29]

> *"59. Communications data is the digital equivalent of having a private investigator trailing a targeted individual at all times, recording where they go and with whom they speak. Communications data will reveal web browsing activities, which might reveal medical conditions, religious viewpoints or political affiliations. Items purchased, new sites visited, forums joined, books read, movies watched and games played – each of these pieces of communications data gives an insight into a person. Mobile phones continuously generate communications data as they stay in contact with the mobile network, producing a constant record of the location of the phone (and therefore its user). Communications data produces an intrusive, deep and comprehensive view into a person's private life, revealing his or her identity, relationships, interests, location and activities.*
>
> *60. Moreover, the costs of storing data have decreased drastically, and continue to do so every year. Most importantly, the technical means of analysing data have advanced rapidly so that what were previously considered meaningless or incoherent types and amounts of data can now produce revelatory analyses. Communications data is structured in such a way that computers can search through it for patterns faster and more effectively than similar searches through content.*
>
> *61. The intrusiveness of communications data is further reflected by … "[a]aggregating data sets can create an extremely accurate picture of an individual's life, without having to know the content of their communications, online browsing history or detailed shopping habits. Given enough raw data, today's algorithms and powerful computers can reveal new insights that would previously have remained hidden."(foot notes omitted)*

62. Threats to individual privacy are greater now than ever envisaged. Global technologies and convergence facilitate the dissemination of

information but, at the same time, pose enormous threats to individual (and corporate) confidentiality. A comprehensive personal dossier can now take minutes to compile electronically and a digital camera or mobile phone can record images in an infinite variety of ways and circumstances.

63. A persons' right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions. Information protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars are being processed by another person or institution. Processing of information generally refers to the collecting, storing, using and communicating of information.

64. 'Privacy,' 'dignity,' 'identity' and 'reputation' are facets of personality. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

65. Technological change has given rise to concerns which were not present several decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible bearing in mind its basic or essential features. Like other rights which form part of the fundamental freedoms protected by the Bill of Rights, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.

66. Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. The right of privacy is a fundamental right. It protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

67. The letter dated **31st** January 2017 referred to earlier clearly states the purpose of the DMS system, that is to "to access information." Accessing such information can only be lawful if it falls within the permitted parameters of Section **27A** of KICA. Accessing mobile telephone subscribers information in a manner other that as provided under the law inherently infringes the right to privacy, a fundamental right guaranteed under the constitution. It follows that for the DMS system to lawful, the reason given must not only be lawful, but it must meet the Article **24** analysis test in that it must be reasonable and justifiable in a open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

68. The reason cited by CAK is that the device will help in combating illegal devices. The question is whether the said reason is a limitation that is reasonably justifiable in a democratic society. Human rights enjoy a *prima facie*, presumptive inviolability, and will often 'trump' other public goods,' Louis Henkin wrote in *The Age of Rights*:-[30]

> *"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."*

69. In this regard, the above question should be answered with reference to the standards of review laid down by courts when the validity of a statute is challenged which include two main standards:-

> *a. The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;*
>
> *b. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."*

70. It is important for the court to determine whether the reason offered is "reasonably related" to a legitimate purpose, that is to enable CAK fulfill its statutory mandate. I will examine this later while determining whether combating illegal devices falls within the statutory mandate of CAK. In determining reasonableness, relevant factors include:-**(a)** whether there is a "valid, rational connection" between the limitation and a legitimate public interest to justify it, which connection cannot be so remote as to render the decision arbitrary or irrational. **(b)** the second consideration is whether there are alternative means of exercising the asserted right that remain open to the first Respondent.

71. A common way of determining whether a law or a regulation or decision that limits rights is justified is by asking whether the law is proportionate. The test of proportionality has been established to the following:-*Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?;Are the means in service of the objective rationally connected (suitable) to the objective?; Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?**[31]***

72. A limitation of a constitutional right will be constitutionally permissible if **(i)** it is designated for a proper purpose; **(ii)** the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; **(iii)** the measures undertaken are

necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally **(iv)** there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.'

73. It is worth borrowing the words of the Canadian Supreme Court in the case of *R vs Oakes*[32] where Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

> *a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.**[33]***
>
> *b. Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'**[34]***

74. When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. This kind of test resembles those employed in European Union law and in Canada.[35]

75. Talking of a less restrictive means, the illegal devices are not manufactured in Kenya. There are laws governing importation of goods. There are laws governing counterfeit goods. The Kenya Bureau of Standards monitors standards. We have the Kenya Revenue Authority. We have the National Police Service. All the points of entry are manned. These laws and the institutions they create have not been shown to be insufficient. It is also admitted that in the past **1.89** Million illegal devices were switched off. The Mobile Network Owners are able to identity and block black listed devices. This can be used to effectively combat the illegal devices by denying them access as was successfully done in the past. All these are lawful and less restrictive means.

76. Subscribers data held by the first to the third Interested Parties can only be released under the circumstances permitted by the law, and in particular Section **27A** of KICA. There is no argument before me to demonstrate that the DMS fits any of the circumstances contemplated under the said section. Nor is there a strong argument by CAK rebutting the position taken by the Petitioner and Safaricom on the capabilities of the DMS. In any event the letter dated **31st** January 2017 which triggered this Petition stated in clear terms that the DMS was meant to *"...to access information on the IMEI, IMSI,MSISDN and CDRs of the subscribers on your network*. Such informationn can only be accessed inconformity with Section **27A** of the Act. There is nothing to demonstrate that DMS falls within the said provision.

77. Further, for the DMS system to pass the Article **24** analysis test, the decision introducing it must be lawful. In the next issue I will discuss whether decision was adopted in a manner consistent with the law. For now, it will suffice to say that it can only pass the Article **24** analysis test if it was adopted legally, which has not been shown o be the case.

78. Further, for the decision to be legal, the object cited, namely, combating illegal devices must be within the statutory mandate of CAK. I will address this issue later. For now, it suffices o state that the mandate of combating illegal devices does not fall within the statutory mandate of CAK.

79. As demonstrated above, there are other statutory bodies mandated to combat counterfeits, to ensure standards and curb their importation into the country which are all less restrictive means. In my view, the conclusion becomes irresistible that the DMS system does to satisfy Article **24** analysis test.

Whether the installation of the DMS system falls within the statutory mandate of the CAK

80. The third Respondents' counsel supporting the Petition argued that the capabilities of DMS duplicate the functions of the Anti - Counterfeit Agency and the KBS which are charged with the responsibilities of fighting counterfeits. The reasons offered by the CAK is that it is enforcing DMS system to combat counterfeit and illegal devices.

81. The Anti-Counterfeit Act[36] is an Act of Parliament to prohibit trade in counterfeit goods, to establish the Anti-Counterfeit Agency, and for connected purposes. Section **3** of the Act establishes the Anti-Counterfeit Agency whose functions are stipulated under section **5** thereof being to enlighten and inform the public on matters relating to counterfeiting; combat counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with the Act; devise and promote training programmes on combating counterfeiting; co-ordinate with national, regional or international organizations involved in combating counterfeiting; carry out any other functions prescribed for it under any of the provisions of the Act or under any other written law; and perform any other duty that may directly or indirectly contribute to the attainment of the foregoing.

82. The Kenya Bureau of Standards is established under the Standards Act.[37]Its main **functions** are stipulated under Section **4** of the Act. These include Promoting standardization in industry and commerce, Providing facilities for examination and testing commodities manufactured in Kenya, Test goods destined for exports for purposes of certification, Prepare, frame or amend specification and codes of practice.

83. From the above provisions, it is clear the mandate of combating counterfeit goods is vested in the Anti-Counterfeit Agency and not the CAK. The mandate of promoting standardization is vested to the KBS. A statutory body can only perform functions vested to it by the law.In *Daniel Ingida Aluvaala and another vs Council of Legal Education & Another,*[38]I observed that:-

> *"Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.*
>
> *As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-*
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> > *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[39]***
>
> *Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.**[40]** The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent is constrained by that doctrine... by ensuring that its decisions conform to the relevant provisions of the law...*
>
> *The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law and Regulations.... "*

84. It is my view combating counterfeit goods is a function of the Anti-Counterfeit Agency. The KBS examines the standards. Thus, CAK purporting to perform the functions clearly vested by the law to other statutory bodies which actions are not expressly provided for under its enabling statute is *ultra vires* its functions. CAK argued that under the Regulations, it has the mandate of *"Type approving and accepting communications equipment meant for use in the country."* My understanding of this provision is that CAK is mandated to approve and accept equipment meant for use in Kenya, but to hold that it grants it mandate perform the functions which are not in its enabling statute and which are expressly vested by the law to other bodies would in my view amount to unduly straining the provisions prescribing its objects contained in its enabling statute. Had Parliament intended that to be the case, it could have done so in clear terms. In any event the Regulations cannot override the egress provisions of a statute.

Whether the process leading to the decision to the acquisition and installation of the DMS system in the first, second and third Interested Parties Mobile Net works was subjected to adequate public participation;

85. Counsel for the third Respondent, supporting the Petition argued that CAK invited it on **20th** January 2016 to discuss the proliferation of counterfeit handsets in the country, but as at the date of the meeting, CAK had an international tender for the Design, Supply, Delivery, Installation, Testing, Commissioning and Maintenance of a Device Management System which was awarded to a third party company in partnership with another entity. Further, he argued that meetings held between CAK and third, fourth and fifth Respondents all concluded that there was need to discuss privacy, security and consumer related issues.

86. To buttress his argument on absence of public participation, he cited *Law Society of Kenya vs A.G & 2 Others.*[41] He also cited several decisions of our superior courts[42]and argued that Section **5A(2)** of KICA requires CAK to be guided by national values and principles of national governance stipulated in Articles **10** of the Constitution. Also, he argued that that public participation is an indispensable ingredient and that Section **23** requires CAK to have regard to the values and principles of the constitution. He also submitted that there was no proper consultation[43]between the CAK, the third, fourth and fifth Respondents and members of the public and in any event consumer education was referred to in the correspondence in future tense.

87. Counsel for the first Respondent did not identify the question of public participation as an issue in his submissions even though it was raised substantively by counsel for the third Respondent who supported the Petition. He however relied on contents of the Replying Affidavit of **Mr. Francis Wangusi** who averred that CAK held meetings with stakeholders, hence, there was adequate public participation. He also submitted that consultations are ongoing.

88. However, the Replying Affidavit by the third Respondent paints a picture of in adequate consultations. She avers that a decision made to implement the DMS system before the negotiations were concluded. Further, it also averred that the public were not engaged and that there were pending issues which were never addressed.

89. There a catena of foreign and local court decisions holding that an analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government."[44] All these decisions are in agreement that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is also an established jurisprudence that any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.[45]

90. The question that follows is, is whether in the circumstances of this case, CAK undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Differently put, what was the threshold for public participation which would have been appropriate for this exercise? As Justice Sachs observed *"... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**[46]* (Emphasis added)

91. Even though the information under threat belongs to the subscribers, there was no attempt to engage them or the public. In the ***Mui***

***Basin Case*[47]** a three-judge bench of the High Court after an in depth consideration of the relevant case law, international law and comparative jurisprudence on public participation culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

> *a) **First,** it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*
>
> *b) **Second**, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*
>
> *c) **Third,** whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya** (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*
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> > *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*
>
> *d) **Fourth**, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*
>
> *e) **Fifth**, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*
>
> *f) **Sixthly,** the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

92. Considering the same subject in *Okiya Omtata Okoiti vs Commissioner General, KRA & Others***[48]** this court observed that there are at least two aspects of the duty to facilitate public involvement. The *first* is the duty to provide meaningful opportunities for public participation in the process. The *second* is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.[49]In *Doctors for Life International vs Speaker of the National Assembly and Others*,[50] the court held that in determining whether there was public participation in any particular case, the Court will consider what has been done in that particular case. The question will be whether what has been done is reasonable in all the circumstances. When a decision, a policy or legislation is challenged on the grounds that it was not adopted in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question or adopting the policy or decision, the State agency exercising it gave effect to their constitutional obligations.

93. It is an elementary principle that the primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[51] What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation a State agency in exercising powers is it required to fulfil. Article **10 (1)** of the constitution provides that "The national values and principles of governance 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*.

94. Sub-article **(2) (a)** and **(c)** provides that "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; **(*c*)** good governance, integrity, transparency and accountability. Article **10** expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

95. Emanating for the above constitutional dictate is Section **5 (2)** of KICA which provides that in fulfilling its mandate, the Authority shall be guided by the national values and principles of governance in Article **10.**Also central to the issue under consideration are the values and principles of public service prescribed in Article **232 (1)** of the Constitution which include involvement of the people in the process of policy making and accountability for administrative acts

96. In *Okiya Omtata Okoiti vs Commissioner General, KRA & Others***[52]**this court observed that *"Kenyans were very clear in their intentions when they entrenched Article **10** in the Constitution.**[53]** They were singularly desirous of insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article **10** be enforced in the spirit in which they included it in the Constitution. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must adhere*

*to Article **10** of the Constitution. In order to justify their exclusion in matters falling under Article **10**, the burden is indeed heavy on the person desiring to do so considering that Article **10** is one of the provisions protected under Article **255** of the Constitution whose amendment can only be achieved by way of a referendum."*

97. The essence of public participation was also powerfully enunciated in the case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others*,[54] in the following terms:-

> *"...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."*

98. The above Constitutional and statutory provisions and the cited jurisprudence interpreting the said provisions are all in agreement that public participation must apply to policy decisions affecting the public though the degree and form of such participation will depend on the peculiar circumstances of the case. In the case at hand, millions of subscribers and the general public whose records are held by the Mobile Network Owners were not involved in the consultations at all. Pertinent issues were raised by the third, fourth and fifth Respondents touching on the privacy and security of their information. The said issues were never addressed at all nor were the millions of subscribers involved in the consultations. third Evidence tendered shows that as at the time the letters which triggered this Petition were written, the issues had not been addressed. The first Respondent admits that consultations were still ongoing and alludes that this Petition was filed pre-maturely. To me, this a clear admission that what had been done so far in terms of engagement with stakeholders was insufficient or there were outstanding issues. It was also averred and even submitted on behalf of the CAK that no decision had been made, hence this Petition was pre-mature. However, the letters that triggered this Petition suggest otherwise. The letters are clear that CAK was seeking to *integrate the DMS and the networks of the third, fourth and fifth Respondents.* The foregoing leads to the conclusion that the decision to install the DMS system and the purported implementation was done before undertaking any meaningful stakeholder engagement. It follows that the decision to install the DMS system and the purported implementation is incapable of being read in a manner that is constitutionally compliant.

99. The key consideration here is **whether the CAK acted reasonably in the manner it facilitated and engaged the third, fourth and fifth Respondents in the particular circumstances of this case and the failure to engage the subscribers and the general public. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the policy or decision, and the intensity of its impact on the public. The public whose data is held by the third, fourth and fifth Respondents and whose constitutional right to privacy is at risk in the event of breach must as of necessity be involved in the engagements. Thus, the process must be subjected to adequate public participation wide enough to cover a reasonably high percentage of affected population in the country. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect CAK to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.**[55] **In the circumstances of this case and applying the above considerations, the conclusion becomes irresistible that there was absolutely in adequate public participation prior to the attempt implement the DMS system.**

Whether CAK violated the Petitioners' Rights to a Fair Administrative Action

100. Counsel for the Petitioner submitted that the impugned decision affects the rights and fundamental freedoms of many Kenyans provided under Article 47 in that the subscribers were not heard and also a violation under Article 46 of the Constitution and the Consumer Protection Act.

101. Counsel for the third Respondent supporting the Petition argued that the DMS system violates consumer rights under Article **46**. He submitted that CAK's action is an administrative action as defined under Section **2** of the Fair Administrative Action Act.[56]He submitted that administrative action includes the powers, functions and duties exercised by authorities or quasi judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

102. He further submitted that Section **4(3)** of the Fair Administrative Action Act[57] requires every person has the right to be given written reasons for any administrative action that is taken against him or her where the administrative action is likely to adversely affect the rights of any person. Counsel also cited Section **5** of the Act which provides that where a proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator is to issue a public notice of the proposed administrative action inviting public views in that regard, consider al views submitted in relation to the matter before taking the administrative action, consider all relevant and material facts and here the administrator proceeds to take the administrative action proposed in the notice give reasons for the decision of administrative action taken, issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal and specify the manner and period within which such appeal shall be lodged. He submitted that failure to comply with the above provisions is a violation of Article **47** of the Constitution and the Fair Administrative Action Act.[58]

103. Mr. Kilonzo for the first Respondent submitted that in order to found a claim for unfair administrative action or lack of a hearing, the Petitioner must demonstrate with sufficient facts and evidence that he has the right to and has actually sought the administrative action from the Respondent, that the Respondent failed and or rendered the impugned decision, that the impugned decision was rendered without giving reasons, that he is prejudiced, and as a result of the prejudice e has suffered loss.[59] He further submitted that the reasons informing the DMS are lawful, that is to curb illegal devices, hence not to the detriment of the consumers.

104. Article **47** of the Constitution provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The *Fair Administrative Action Act*[60] was enacted to illuminate and expand the values espoused under Article **47** of the Constitution. Section **4(3)** of the Act provides the broad parameters which bodies undertaking administrative action have to adhere.

105. In ***Judicial Service Commission vs. Mbalu Mutava & Another*** ***[61]*** **cited by Mr. Kilonzo,** the Court of Appeal held that:-

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."***

106. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*** ***[62]*** where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> ***"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"***

107. **It must always be remembered that the court is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court.**

108. **Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and functions or acting outside of their jurisdiction.** Section **7 (2)** of the Fair Administrative Action Act[63]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

109. From the evidence tendered in this Petition, it is clear the subscribers or the general public were not engaged at all, yet the law demands otherwise. In light of the principle of legality which requires the CAK's actions must conform with the law, I find that failure to engage the public and the subscribers offends the provisions of the Fair Administrative Action Act.[64] Put differently, the question is whether, properly construed, the manner in which the DMS system was implemented conforms to the above sections and the constitution.

110. When the constitutionality or legality of a decision made by a public body in the exercise of its statutory mandate is questioned, the duty of the court is to determine whether the impugned decision is capable of being read in a manner that is constitutionally compliant or as in the present case whether it can be read in a manner that conforms to the relevant statute. Every act of the state or public bodies must pass the constitutional test. Put differently, it must conform to the principal of legality.

111. A contextual or purposive interpretation of the challenged decision must of course remain faithful to the actual wording of the statutes, namely the Fair Administrative Action Act,[65]the Constitution, KICA and the Regulations made there under and the Consumer Protection Act.[66] The challenged decision must be capable of sustaining an interpretation that would render it compliant with the constitution and the statutes, otherwise the courts are required to declare it unconstitutional and invalid.

112. A contextual interpretation of the impugned decision, therefore, must be sufficiently clear to accord with the rule of law. Mindful of the imperative to read the challenged decision in conformity with the Constitution and the relevant statute, I find and hold that the DMS was introduced in a manner not inconformity with the law and is tainted by illegality.

113. Section **6** of the Fair Administrative Action[67] provides that *"Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5."* Sub-section **2** of Section **6** of the Act***[68]*** provides that the information referred to in subsection **(1),** may include- the reasons for which the action was taken, and any relevant documents relating to the matter.

114. Though the short title to Section **6** is entitled *"Request for reasons for administrative action"*, the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.[69] The information, which must be supplied in writing within three months, may include reasons for the administrative action and any relevant documents relating to the matter.[70] Where an administrator does not give an applicant reasons for an administrative decision, there is a rebuttable presumption that the action was taken without good reason.[71] However, the Act provides that an administrator may be permitted to depart from the requirement to furnish adequate reasons if such departure is reasonable and justifiable in the circumstances.[72]The administrator must inform the person of such departure.[73]

115. From the facts of this case, it is clear that the impugned decision falls within the definition of an administrative action as contemplated under the act. The decision affects the subscribers and the public generally, that the subscribers and the general public were never involved at all nor where they supplied with reasons for the decision, hence it is my conclusion that CAK violated the provisions of Article **47** and the Fair Administrative Action Act.[74]

Whether the impugned decision violates consumer rights of the subscribers of the third, fourth and fifth Respondents;

116. Counsel for the third Respondent supporting the Petition argued that the third Respondent has an obligation to its consumers and that implementation of the system would lead to limitation of consumer rights under Article **46** of the Constitution which protects the consumers. Counsel also submitted that consumer rights are also protected under Regulation **3 (1)** of the Kenya Information and Communications (Consumer Protection) Regulations, 2010 which guarantees privacy to customers. He argued that consumer issues enumerated at paragraph **48** of his submissions have never been addressed.

117. **Mr.Kilonzo,** in response to the above submissions argued that the Petitioner only made a general claim infringement of the Consumer Protection Act.[75] Citing Article **46** of the Constitution, Regulations **3 (2)** and **6 (1)** of the Kenya Information and Communications (Consumer Protection) Regulations, 2010, he submitted that the consumer is expected to make informed choices, and to use an appropriate device. He argued that the DMS protect the consumer from the menace of illegal devices.

118. Article **46(1)** of the Constitution provides that consumers have the right to the protection of their right, safety, and economic interests. To give effect to the Article, Parliament enacted the Consumer Protection Act.[76] Part Two of the Act[77] provides for Consumers Rights. Article **46 (3)** provides that the Article applies to goods and services offered by the public entities or private persons.

119. The South African Constitution and the South African Consumer Protection Act have provisions similar to the Kenya Constitution and our statute law protecting consumer rights. Hence decisions from South Africa Courts on the subject may offer useful guidance. The South African Court in *Natal Joint Municipal Pension Fund vs Endumeni Municipality,**[78]* interpreting their Consumer Protection Act laid down the applicable principles. It stated that the Court is to consider the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being,'...a sensible meaning is to be preferred to one that leads to insensible or un-businesslike results. . .'[79] and that that the interpretative process involves ascertaining the intention of the legislature.[80]

120. The long title of the Act provides that it is *"An Act of Parliament to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto*." The Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in Section **3** which provides for the Interpretation and purposes of Act. It reads:-

> *(1) This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4).*
>
> *(2) When interpreting or applying this Act, a person, court or the Advisory Committee may consider—*
>
> *a) appropriate foreign and international law; and*
>
> *b) appropriate international conventions, declarations or protocols relating to consumer protection*

121. Section **4** provides that the the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya. From the definition in section **2** of the Act and the Preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.[81]

122. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[82]

123. In peremptory terms, the constitution imposes an obligation on all courts to promote ?the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others**[83]*the S.A. constitutional court observed: ?

> *"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."*

124. In line with the dictates of the constitution, this court will reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to protection of consumer rights. Article **46 (3)** provides that the Article applies to goods and services offered by the public entities or private persons. First, the consumers were never involved in the discussions, hence, they were never provided with information on the device. This is a breach of their constitutional and statutory rights. Second, as held above, their constitutionally guaranteed right to privacy. I find and hold that the DMS was introduced in a manner that was inconsistent with the constitutionally and statutory guaranteed rights of the consumers nd or subscribers of the third, fourth and fifth Respondents.

What is the appropriate order regarding costs?

125. The Petitioner invites the Court to grant the reliefs enumerated in the Petition while counsel for the first Respondent urged the Court to dismiss the Petition with costs against the Petitioner and the third Respondent.[84]

126. I have in numerous decisions addressed the subject of costs in public interest litigation,[85] and I can do no better than repeat myself here. What is significant is that this is a constitutional Petition seeking to enforce constitutional Rights and obligations and brought in public interest. It is common knowledge that courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights brought in public interest.

127. Discussing costs as a barrier to Public Interest Litigation, I am reminded of the phrase *"Justice is open to all, like the Ritz Hotel"*[86]attributed to a 19th Century jurist. Costs have been identified as the single biggest barrier to public interest litigation in many countries.[87] Not only does the applicant incur their own legal fees; they run the risk of incurring the other side's. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. Should the fear of costs prevent an issue of public importance and interest from being heard? **Lord Diplock's** dictum comes to mind:-

> *"... it would, in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the lawful conduct stopped...".* ***[88]***

128. There is little point opening the doors of the Courts if litigants cannot afford to come in, in the fear, if unsuccessful, they will be compelled to pay the costs of the other side, with devastating consequences to the individual or group bringing the action, which will inhibit the taking of cases to court.[89]The rationale for refusing to award costs against litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[90] The court was quick to add that this is not an inflexible rule[91] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[92]

129. The rationale for the deviation was articulated by the South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

> *"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."* ***[93]***

130. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

> *"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.*
>
> *Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.*
>
> *Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."* ***[94]***

131. Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*[95] cited by the Respondents' counsel in the relevant paragraph that dealt with public interest the court observed that:-

> *"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs…"*

132. The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[96]The "nature of the issues" rather than the "characterization of the parties" is the starting point.[97]Costs should not be determined on whether the parties are financially well-endowed or indigent.[98] One exceptions which can justify a departure from the general rule, is where the litigation is frivolous or vexatious.[99] That has not been demonstrated in this case nor was it alleged.

133. This Petition is brought in public interest. According to Black's Law Dictionary[100] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.[101] Public interest litigation is a highly effective weapon in the armoury of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns. There was no

suggestion that this Petition is frivolous or vexatious. I find no reason to depart from the generally accepted jurisprudence discussed above.

What are the Appropriate reliefs in this case?

134. In view of my conclusions herein above, I find that this Petition succeeds. I have however considered the reliefs the Petitioner has invited this court to grant. However, I think this is a proper case for this court to fashion appropriate reliefs as the justice and circumstances of the case demand. This Court is empowered by Article **23 (3)** of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others*[102]thus:-

> *"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."*

135. I fully adopt this definition of "appropriate reliefs" and shall deploy it in my disposition of this suit.

136. Arising from the findings of evidence, conclusions of facts and law, constitutional and statutory interpretations and various pronouncements of law, I have reached above, I make the following orders:-

> *a.* ***A declaration*** *be and is hereby issued that policy decisions or Regulations affecting the Public must conform to the Constitution and the relevant statute in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, Regulation or guideline invalid.*
>
> *b.* ***A declaration*** *be and is hereby issued decreeing that the decision, policy or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the provisions of the Constitution, Section* ***5 (2)*** *of KICA and the Consumer Protection Act, hence the said decision, policy and or regulation is null and void for all purposes.*
>
> *c.* ***Further and or in the alternative a declaration*** *be and is hereby issued decreeing that the decision, policy and or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the Constitution, Section* ***5 (2)*** *of KICA and the Consumer Protection Act in that there was no adequate public participation prior to its adoption and implementation with the first, second and third interested parties and further the subscribers of the first, second and third Interested Parties were not engaged at all in the public consultations, hence the same is null and void for all purposes.*
>
> *d.* ***A declaration*** *be and is hereby issued decreeing that the first Respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process leading to the decision, policy and or regulation or implementation of the DMS System.*
>
> *e.* ***A declaration*** *be and is hereby issued declaring that the first Respondents request and or purported intention and or decision and or plan contained in its letter dated* ***31st*** *January 2017 addressed to the first, second and third interested parties seeking to integrate the DMS to the first, second and third interested parties networks to inter alia create connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void.*
>
> *f.* ***A declaration*** *be and is hereby issued declaring that the first Respondents decision to set up connectivity links between the DMS and the first, second and third Interested Parties networks communicated in its letter dated* ***6th*** *February 2017 is unconstitutional, null and void to the extent that it was arrived at unilaterally, without adequate public participation and that it a threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights..*
>
> *g.* ***An order of prohibition*** *be and is hereby issued prohibiting the first Respondent, its servant or agents from implementing its decision to implement the DMS system to establish connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network.*
>
> *h. That this being a public interest litigation there will be no orders as to costs.*

Orders accordingly.

Signed, Dated, Delivered at Nairobi this 19th day April 2018

John M. Mativo

Judge

[1] Supra

[2] HCCC No. 257 of 2012; Omar Guled vs CCK & Others

[3] Counsel cited Kennedy vs Ireland {1987} I.R 587 cited in Bernard Murage vs Firestone Africa Ltd and 3 Others, Pet. No. 503 of 2014 {2015} eKLR

[4] Pet. No. 628, 630 of 2014 {2015}eKLR

[5]Anarita Karimi Njeru vs The Republic (1976-1980) eKLR

[6] Ibid

[7] {1998} (4) SA 1127 (CC)

[8] {2016} eKLR

[9] Counsel cited Mumo Matemu civil appeal no. 260 of 2012

[10] Counsel cited Kenya National Commission on Human Rights & Another vs A.G & 3 Others {2017}eKLR and Geoffrey Andare vs A.G & 2 Others Pet. No. 149 of 2015 {2016}eKLR

[11]Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[12]S v Acheson 1991 NR 1(HC) at 10A-B

[13]Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A

[14] Id at 340B-C

[15]See the South African Constitutional Court cases of *S v Makwanyane* 1995 (3) SA 391 (CC) at Para [9] footnote 8; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 17.

[16]*Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 20E-H; *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) at116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at 269B-C.

[17]*Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *S v Heidenreich* 1998 NR 229 (HC) at 234

[18] Universal Declaration of Human Rights, art 12; United Nations Convention on Migrant Workers, art 14; Convention on the Rights of the Child, art 16; International Covenant on Civil and Political Rights, art 17; African Charter on the Rights and Welfare of the Child, art 10; American Convention on Human Rights, art 11; African Union Principles on Freedom of Expression, art 4; American Declaration of the Rights and Duties of Man, art 5; Arab Charter on Human Rights, art 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8; Johannesburg Principles on National Security, Free Expression and Access to Information; Camden Principles on Freedom of Expression and Equality.

[19]Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 2009, A/HRC/17/34.

[20] See Universal Declaration of Human Rights, art 29; Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9; Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988; see also, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin 2009.

[21] Neethling J, Potgieter JM & Visser PJ ***Neethling's Law of Personality*** Butterworths Durban 2005, National Media Ltd ao v Jooste 1996 (3) SA 262 (A) 271-2.

[22] **Ibid** at 270-1. Other personality rights, especially the right to a good name or fama, which are infringed through the communication of defamatory data (cf eg ***Pickard v SA Trade Protection Society*** (1905) 22 SC 89*;* ***Morar v Casojee*** 1911 EDL 171; ***Informa Confidential Reports (Pty) Ltd v Abro*** 1975 (2) SA 760 (T)) may obviously also be relevant.

[23] Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948.

[24]Richard B. Lillich, The Human Rights of Aliens in Contemporary International Law, 41 (Manchester University Press 1984); Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., Supp. No. 13, at 71,U.N. Doc. Al810 (1948).

[25] Article 2

[26]Klass and Others v. Germany, Application no. 5029/71

[27] Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy).

[28]See the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Organization for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data; Guidelines for the regulation of computerized personal data files (UN General Assembly Resolution 45/95 and E/CN.4/1990/72). As of December 2014, over 100 countries had enacted data protection legislation: David Banisar, National Comprehensive Data Protection/Privacy Laws and Bills 2014 Map, 8 December 2014, available at http://ssrn.com/abstract=1951416 or http://dx.doi.org/10.2139/ssrn.1951416

[29] 10 Human Rights Organizations -vs- The United Kingdom, APP. NO. 24960/15

[30] Louis Henkin, The Age of Rights (Columbia University Press, 1990) 4.

[31]G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[32] R v Oakes [1986] 1 SCR 103 [69]–[70].

[33] R v Oakes [1986] 1 SCR 103 [69]–[70].

[34] Ibid

[35] Ibid

[36] Act No 13 of 2008

[37] Cap 496, Laws of Kenya

[38] Pet No. 254 of 2017

[39] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC).

[40] National Director of Public Prosecutions vs Zuma, Harms DP

[41] Pet No 318 of 2012

[42]Counsel cited Laws Society of Kenya vs A G, Pet No.3 of 2016, Nairobi Metropolitan PSV Saccos Union & 25 Others vs County of Nairobi Govt & 3 Others, Robert Gakuru & Others vs Governor of Kiambu & 3 Others, Pet. No 532 of 2013 {2014} eKLR,

[44]See Pevans East Africa Limited vs Chairman Betting Control and Licensing Board & Others, Pet No. 353 of 2017 consolidated with Pet No 505 of 2017 and Okiya Omtata Okoiti vs Commissioner General, KRA & Others, Pet 532 of 2017

[45] See e.g. Daly v SSHD [2001] UKHL 57 §§24-32 and ACCC/C/2008/33

[46] In the South African case of *Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others* 2006 (2) SA 311 (CC), at para 630.

[47] In the Matter of the Mui Coal Basin Local Community {2015} eKLR

[48] Pet 532 of 2017

[49] Ibid

[50] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)

[51] Section 165(2) of the Constitution.

[52] Supra

[53] Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others, Petition No. 229 of 2012

[54] CCT 86/08 [2010] ZACC 5

[55]See **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**

[56] Act No. 4 of 2015

[57] Ibid

[58] Ibid

[59] Counsel referred to JSC vs Mbalu Mutava & Another {2015}eKLR

[60] Act No. 4 of 2015

[61] **{2015} eKLR,** Civil Appeal 52 of 2014

[62](CCT16/98) 2000 (1) SA 1, at paragraphs135 -136

[63] Act No. 4 of 2015

[64] Act No 4 of 2015

[65] Supra

[66] Act No. 46 of 2012

[67] Ibid

[68] Ibid

[69] Section 6(1)

[70] Section 6(2)

[71] Section 6(4)

[72] Section 6(4)

[73] Ibid

[74] Supra

[75] Supra

[76] Ibid.

[77] Ibid

[78] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[79] Ibid

[80] Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) 518 para 27.

[81] Estate Agency Affairs Board vs Auction Alliance (Pty) Ltd 2014 (4) SA 106 (CC) para 69.

[82] Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ

[83] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[84] To support his argument counsel cited Jasbir Singh Rai & 3 Others vs Tarlocham Singh Rai & 4 Others {2014}eKLR

[85] See Petition NO.532 o 2017, Okiya Omtata Okoiti vs KRA & 2 Others, Ruling delivered on 22 November 2017

[86] Sir James Matthew, 19th Century jurist

[87] 2 Mel Cousins BL (2005) Public Interest Law and Litigation in Ireland, Dublin: FLAC, October 2005 and see Stein R. & Beageant J., "R (Corner House Research) v the Secretary of State for Trade and Industry" (2005) 17(3) Journal of Environmental Law 413

[88] R (ex parte National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue Commission [1981] UKHL 2.

[89] Toohey J.'s address to the International Conference on Environmental Law, 1989 quoted in Blue Mountains Conservation Society Inc v Delta Electricity [2009] NSWLEC 150 [19].

[90]Hotz and Others vs University of Cape Town [2017] ZACC 10, citing Biowatch Trust v Registrar, Genetic Resources [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch).

[91] Ibid

[92] See, for example, AB vs Minister of Social Development [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para

329; Minister of Home Affairs vs Rahim [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35;

Sali vs National Commissioner of the South African Police Service [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[93] {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138

[94]Biowatch Trust v Registrar, Genetic Resources [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch)

[95] Supra note 4

[96] Supra note 32

[97] Ibid

[98] Ibid

[99] Supra Note 32

[100] Sixth Edition

[101]Public Interest Litigation: Use and Abuse, http://lawquestinternational.com/public-interest-litigation-use-and-abuse-0

[102] (2002) 5 LRC 216 at page 249