



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.503 OF 2014

BETWEEN

BERNARD MURAGEPETITIONER

AND

FINESERVE AFRICA LIMITED..... 1ST RESPONDENT

EQUITY BANK.....2ND RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA.....3RD RESPONDENT

CENTRAL BANK OF KENYA.....4TH RESPONDENT

JUDGMENT

Introduction

1. The basis for this Petition lies on the introduction of a new technology by the 2nd Respondent known as Thin SIM (Subscriber Identity Module) Technology which entails overlaying a SIM card on a pre-existing SIM card belonging to a third party. The thin SIM sits between the microchip of the primary SIM card and the SIM card socket of a mobile handset and allegedly has visibility of all communications taking place between the primary SIM and the mobile handset.
2. The Petitioner, has therefore filed this Petition claiming a violation of **Articles 31(c) and (d) and 46** of the **Constitution** on the grounds that; firstly, the decision to roll out the thin SIM technology has been made in the absence of a data protection law in Kenya and as such there is an apparent fear of uncontrolled transmission of personal data to third parties without the consent of handset and Thin SIM owners. Secondly, that the 1st Respondent is carrying out trial tests that have real possibility of that contamination of data within inter and intra agencies. Lastly, that 2nd Respondent has already entered into contractual engagements of transmission of data with various stakeholders thus raising the risk of data contamination.
3. It is therefore the Petitioner’s case that if the Respondents are not restrained from the roll out of the Thin SIM technology, the security of his personal data would not be guaranteed and in his Petition dated 10th October, 2014, he has sought the following orders;

“(a) This Honourable Court be pleased to issue a declaration that Article 31(c) and 31(d) is in force and is mandatory that for its realization a data protection law be enacted.

(b) A conservatory order be issued restraining the 1st Respondent and 2nd Respondent from rolling out the thin sim technology pending the enactment of a data protection law.

(c) A conservatory order be issued restraining the 3rd Respondent & 4th Respondent from issuing any decision or directive in respect to the thin sim technology rollout by the 1st and 2nd Respondents pending the final determination of this case.

(d) This Honourable Court be pleased to award the Petitioners costs of and incidental to these proceedings.

(e) The Honourable Court be pleased to make any order as it seems just.”

The Petitioner’s Case

4. The Petitioner’s case is outlined in his Petition dated 10th October 2014, his Affidavits sworn on 10th October 2014 and 4th November 2014 as well submissions made on his behalf.
5. He deponed that he is an account holder with the 2nd Respondent and is a member of the public whose personal data is held by the 2nd Respondent. That the Thin SIM technology works by making the Thin SIM sit between the microchip of the primary SIM card and the SIM card socket of a mobile phone handset and has visibility of all communications taking place between the Primary SIM and the mobile handset thus exposing it to man-in-the-middle attacks including personal data contamination and access by third Parties. That the Thin SIM is also capable of remote communication through its contactless communication capabilities, thus enhancing its general capabilities.
6. He also averred that the Global System for Mobile Communication Association (GSMA) is an association and not a regulatory body and therefore the 1st and 2nd Respondents needed to undertake further regulatory measures before the roll out of the Thin SIM and not merely rely on GSMA’s approval of the same. He maintained that the Thin SIM has security vulnerabilities and the 3rd Respondent has placed a tender for consultancy services to undertake evaluation performance and security features on the Thin SIM in appreciation of that fact.
7. It was his further position that the Thin SIM technology has not been used in Countries with large scale money transfer services and in countries where the Thin SIM technology has been used, data protection laws have been enacted. As regards the current money banking services, he stated that the 2nd Respondent has been using existing GSM services and not the Thin SIM technology to provide those services.
8. He also claimed that Countries that have been said to use the Thin SIM primarily use it for voice and data roaming services and not large scale mobile money transfer services as is proposed in Kenya.
9. Further, that the roll out of the Thin SIM technology has been halted by the Parliamentary Committee on Energy and Information and Communication based on privacy and data protection and this Court ought to do the same.
10. Mr. Kirwa presented the Petitioner’s case and submitted that the thin SIM technology as manifested from its functionality, provides a real threat to the Petitioner’s enjoyment of his rights under **Article 31 (c) and (d) of the Constitution** in so far as his personal data is concerned. That his fears are founded on the security vulnerabilities of the Thin SIM which transcends the scope of

the user by making it possible for personal and sensitive data such as PIN numbers and encryption keys to be accessed by third parties, to his prejudice.

11. He also submitted that due diligence was not conducted before introducing the thin SIM and that had that been done, then the issue of the functionality of the thin SIM would have been detected from its patent and use.
12. On the competence of the Petition, he claimed that the issues raised in the Petition are real and not hypothetical as alleged by the Respondents. That this Court has the jurisdiction to defend the Constitution and to inquire into the threat of violation of right to privacy and under international law, Kenya has an obligation to adopt legislative and other measures to give effect to the prohibition against interferences and attacks to the protection of the right to privacy. That in recognition to that role, the Attorney General has published the Data Protection Bill 2012, whose objects are clear but has yet to become law.
13. It was Mr. Kirwa's further submission that Parliament had halted the roll out of the thin SIM technology pending satisfaction as to its security and functionality. That the 3rd Respondent cannot defy Parliament as the latter exercises oversight over it, and further submitted that Parliament was justified in halting the roll out as guardians of public interest.
14. Mr. Kirwa also submitted that the violations of the Petitioner's right to privacy and consumer protection are constitutional issues which this Court is enjoined to safeguard and protect and that recourse for violation of constitutional rights lies to the High Court and not a tribunal as alleged by the Respondents. He thus submitted that the doctrine of constitutional avoidance did not apply in this Petition and that the Court should exercise its powers and strike a balance to ensure that the constitutional safeguards in **Article 31(c)** and **31 (d)** of the **Constitution** are upheld.
15. Mr. Kirwa therefore urged the Court to grant the orders sought in the Petition as prayed.

The 1st and 2nd Respondents' Case

16. The 1st Respondent, Fineserve Kenya Ltd, in opposing the Petition filed a Replying Affidavit sworn by John Waweru, its Chairman, on 22nd October 2014. The 2nd Respondent, Equity Bank, is a limited liability company registered under the **Companies Act, (Cap 486 Laws of Kenya)** and also duly registered under the **Banking Act (Cap 488 Laws of Kenya)** to carry out banking business. In response to the Petition, it filed a Replying Affidavit sworn by Mary Wangari, its Secretary and Director of Strategy, on 22nd October 2014.
17. Mr. Waweru deponed that the 1st Respondent is a subsidiary of the 2nd Respondent and that the 1st Respondent intends to use the thin SIM technology provided by the 1st Respondent to provide efficient, affordable and convenient banking and communication services targeting low income earners in Kenya. He explained that the thin SIM technology is a culmination of the evolution of technology since the development of the first SIM card in 1991. It works by being placed on top of the primary SIM issued by a mobile network operator (MNO) and that the Thin SIM is designed to work without any interference with the primary SIM and relies on the primary SIM for anchorage and space in the mobile phone. He added that the thin SIM does not have the capacity to interfere or intercept the services or connections of the primary SIM and is incapable of remotely connecting to outside sources for additional information without the knowledge of the user. Further, that the purpose of the Thin SIM is to provide additional services and convenience to users without one having to necessarily carry two phones and it eliminates the need to switch SIM cards or acquire dual SIM phones thus making it more convenient for consumers to use both the thin SIM and the primary SIM, seamlessly.
18. He averred that the thin SIM intended to be used by the 1st Respondent is manufactured by Taisys Holding Corporation of Taiwan (the Corporation) which is a member of GSMA, an association of

mobile operators and related companies devoted to supporting the standardization, deployment and promotion of the GSM mobile telephone system. That the Thin SIM complies with the European Telecommunications Standards Institute requirements and the SIMs have been used successfully for over 8 years by mobile financial services operators in 14 countries across the world including the United Kingdom, United States of America, Denmark and China.

19. In addition, that the 1st Respondent applied to the 3rd Respondent for the issuance of a Mobile Virtual Network Operator's (MVNO) licence so as to enable it to roll out the intended services because the MVNO is a wireless communications service provider that has its own customer base but does not own the wireless network infrastructure which it uses to provide services to its customers and relies on the infrastructure of a Mobile Network Operator to do so. He further stated that the 1st Respondent has in that regard entered into an agreement with Airtel Kenya Ltd which has been licensed by the 3rd Respondent to use its infrastructure. That Airtel Ltd MNO offers network access services at a wholesale price and the 1st Respondent as a MNVO resells the network services obtained from MNO at retail prices. The 1st Respondent will therefore acquire network services from Airtel Kenya Ltd and package them for use by the 2nd Respondent in its mobile banking business.
20. That in order to operate MVNO services, an operator requires an Application Service Provider (ASP) licence and a Content Service Provider (CSP) licence from the 3rd Respondent and the 1st Respondent has already applied for and was issued with the SP and CSP licence by the 3rd Respondent on 8th April 2014. He alleged that in addition to the 1st Respondent, the 3rd Respondent has also licensed two other entities viz. Zioncell Kenya Ltd and Mobile Pay Ltd to operate as MVNOs and it also has a licence to do so.
21. He stated that following the issuance of the MVNO licence to the 1st Respondent by the 3rd Respondent, the action was challenged by a dominant telecommunication provider in Kenya on the basis that the Thin SIM in its operations as a MVNO, may cause interruptions and interceptions of communications on the primary SIM. That those complaints were considered by the 3rd and 4th Respondents and the 3rd Respondent found that the Thin SIM set to be used by the 1st Respondent had complied with all the minimum mandatory international standards and that there was no risk of interception or interruption of communication or data relating to any Primary SIM.
22. Mr. Waweru also stated that the Thin SIMs intended to be used by the 1st Respondent were tested by the China National Computer Quality Supervising Test Centre and by the Bank Card Test Centre of China and the tests showed that the Thin SIM had complied with the applicable International Standards Organization and ETSI standards.
23. Further, That the Thin SIM technology is yet to be rolled out to the mass market and the authorization granted by the 3rd Respondent is for a one year trial period during which the technology will be strictly under the observation of the 3rd Respondent so as to test its strengths and vulnerabilities. That the 3rd Respondent has made it clear that it has begun the process of hiring an internationally reputable firm to conduct a security audit of all SIM cards and in particular the use of the Thin SIM in mobile transfer services and thereafter recommend a framework for regulating the use of SIM cards in Kenya during the one year trial period. He therefore asserted that the Petitioner's fears are premature and baseless and are founded on mere apprehension.
24. He went on to add that before approving the roll out of the Thin SIM technology on a trial basis, the 3rd Respondent considered representations from various stakeholders, including the 4th Respondent, and made its own independent decisions without external influences. That the Petitioner failed to make his representations for consideration by the 3rd Respondent during the

- many stakeholders fora organized by the 3rd Respondent before the authorization of the Thin SIM technology given that the subject of the Thin SIM has been in the public domain and media coverage for a long time.
25. Mr. Waweru also deponed that the banking service sought to be rolled out by the 2nd Respondent with the help of the 1st Respondent's Thin SIM technology is optional and available only to customers who sign up for the service. That it would be prejudicial to the 1st Respondent's customers to issue an order to stop the roll out without having heard the 1st Respondent or its customers who are in any event not before the Court.
26. He also claimed that the 1st Respondent has already imported the Thin SIM infrastructure and software at a considerable expense and the contract with the Thin SIM supplier, Taisys Holding Corporation, is for a total sum of USD 8 million running for a period of 5 years. That the 1st Respondent has also already manufactured 350,000,00 Thin SIMs which will be at risk of loss if the orders sought are granted.
27. He also deponed that denial of Thin SIM technology will deprive Kenyans of the benefit of innovation as the technology is meant to give consumers a variety of affordable mobile financial products to choose from and it would be in the public interest that the technology is embraced. Further, that the technology enhances competition as it results in better quality services and that it would also help Kenya in achieving Vision 2030 because it squarely falls under one of its the pillar (**Enablers and Macro**) which aims at promoting the use of science, information, technology and innovation in the provision of services including financial and telecommunication services. Lastly, that the Thin SIM technology is already being used widely across the world and Kenya is therefore not alone in embracing it.
28. On her part, Ms. Wamae deponed that the 2nd Respondent offers mobile banking services through all telecommunication networks in the Country. That the decision to use a more advanced technology was made in 2014 and the company settled for the Thin SIM technology which has been in the international market since 2007. The technology is being used in the United Kingdom, United States and China and in none of these Countries has it been reported that information is being transmitted to third parties without the consent of the user and in any event, the advantage of the technology outweighs the misapprehension of the Petitioner.
29. Further, that the Thin SIM technology has been analysed and confirmed by the 3rd and 4th Respondents to have met the regulatory obligations and international standards and in any event, that it is only available to the 2nd Respondent's customers who subscribe to it and not to any other person. That the Petitioner is not an account holder with the 2nd Respondent and his understanding of the operations of the Thin SIM technology is misconceived as there is no real risk of contamination of data and transmission of data to third Parties without the consent of the Primary customer account holder. In any event, that if there are any risks, they are similar to those of other mobile banking services in the Kenyan market and are therefore not unique to the thin SIM.
30. Mr. Kiragu Kimani, Counsel for the 1st and 2nd Respondents, further submitted that there was no proof that the Petitioner was an account holder with the 2nd Respondent and yet the Thin SIM technology is only available to customers who subscribe to it. That the technology is a value added service to already existing services offered by the 2nd Respondent to its customers and given that the Petitioner is not a customer of the 2nd Respondent, he cannot enjoy its services provided through that technology. He thus submitted that the Petitioner does not have any legal interest in the technology capable of protection by this Court and that the burden lies on him to show that the issues raised in the Petition are of public interest. It was also his submission that the Petitioner has filed this Petition in order to agitate for an Act of Parliament and his acts are in violation of the principle of separation of powers and thus submitted that the Petition was an abuse of the Court process.

31. It was Mr. Kiragu's further submission that the Orders sought by the Petitioner have the net effect of impeding the economic and social rights of the 2nd Respondents' customers as provided for under **Article 43** of the **Constitution**. That the technology's main purpose is to make banking transactions easily accessible to the 2nd Respondent's customers who are poor and marginalized and who would otherwise be required to walk/travel varying distances to purchase two mobile phones to access mobile banking.
32. It was his further submission that the technology does not need the enactment of any data protection law as it can be sufficiently regulated by the contract between the 2nd Respondent and its customers as well as the **Kenya Information and Communications Act 1998, The Kenya Information Communications (Act) Amendment Act 2013, The Banking Act, The Central Bank Act and The National Payments Systems Act, 2011**.
33. On the issue whether the Respondents have violated the Petitioner's consumer protection rights as well as his right to privacy, Mr. Kiragu submitted that the Thin SIM is not designed to intercept any data and that it is safe. That before the technology was approved, it went through various regulatory checks by the 3rd and 4th Respondents and it was assessed based on scientific evidence and it has been confirmed that it meets the minimum international standards set by the International Standards Organization (ISO) and the European Telecommunications Standard Institute (ETSI). It has also been tested by the China National Computer Quality Supervising Test Center and by the Bank Card Test Centre and is currently in use in China. It was also his submission that the Petitioner has not proved that his rights to privacy under **Article 31** of the **Constitution** and consumer protection rights under **Article 46** have, in the circumstances, been violated.
34. In addition, it was Mr. Kiragu's submission that the Petition is based on misapprehension and assumptions that have not been scientifically proven and are unlikely to happen because the rolling out of the Thin SIM is only on a trial basis, initially, and there is no threat of transmission of data to third parties during this period. He relied on the case of *Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) e KLR* and *Stephen Nyarangi Onsomu & Another v George Magoha & 7 Others (2014) e KLR* to support his submissions.
35. He further submitted that the Court has no jurisdiction to determine the matters raised because, if the Petitioner was aggrieved by the decision of the 3rd and 4th Respondent to allow the 2nd Respondent to use the Thin SIM technology, he ought to have sought redress in the Appeals Tribunal established under **Section 102** of the **Kenya Information and Communications Act**. That the Court ought not to give a remedy where the procedure for seeking such a remedy is provided for by Statute and had been ignored by the Petitioner. He claimed in that regard that the Constitution is not a general substitute in cases where normal procedures are available elsewhere. It was therefore his position that the Petition is premature and that the Petitioner has not exhausted all the alternative remedies provided by Statute. He referred the Court to the cases of; *Stephen Nyarangi Onsomu & Another v George Magoha & 7 Others (supra)* and *John Harun Mwau v Attorney General & 2 Others (2012) e KLR* in making that submission.
36. In conclusion, Mr. Kiragu claimed that the Petitioner is not entitled to the remedies sought because this Court should not issue orders to affect the rights of two commercial entities duly licensed to carry out business. In addition, that the Court does not have control over the diary of Parliament and it is not clear what may happen to the Data Protection Bill. In any event, that there was no certainty that the Bill would be enacted in its current form. Lastly, that it is not the function of this Court to stop change unless it is shown that the law will be violated by such change.
37. For the above reasons, the 1st and 2nd Respondents prayed that the Petition be dismissed with costs.

The 3rd Respondent's Case

38. The 3rd Respondent, the Communications Authority of Kenya, in reply to the Petition, filed a Replying Affidavit sworn by Perminus Karungu, the Assistant Director, Licensing, Compliance and Standards, sworn on 3rd November 2014.
39. Perminus Karungu deponed that the 3rd Respondent is charged with the task of allocating frequency spectrum resources used in the establishment of wireless communication networks for the provision of mobile telephony services. That since the spectrum for telephony use is limited, it can only be assigned to a limited number of MNOs and currently they are four; Safaricom, Airtel Kenya, Orange Telkom and Yu Mobile. That there are few entities that can afford the cost of building infrastructure to allow them to roll out mobile telephony services and as such there is need to license MVNOs which fall under the Application Services Provider (ASP) license created under the Unified Licensing Framework (ULF) implemented in 2008. That the ULF was created to avoid multiplicity of licenses and that the 1st Respondent has been licensed to provide MNVO services under the auspices of an ASP license and the said license was predicated on the fact that the 1st Respondent had secured an agreement with Airtel Kenya to act as the 1st Respondent's host.
40. He stated that as a matter of procedure, once an entity is duly licensed as an ASP, it is allocated numbering resources on specified terms and conditions so as to enable it provide the licensed services to end-users while riding on the spectrum of the host MNO. That the 1st Respondent applied for and was allocated the numbering resource prefix 0763 which will be used to provide service to subscribers who may wish to access its services on their mobile phones. He explained that the customers of the 2nd Respondent have two options; either to use a dual SIM phone or use a SIM overlay technology which uses a Thin SIM so that the customers can access the 2nd Respondent's services as well as services provided by the primary SIM. That such a service is purely based on the willingness on the part of the customer and no one is obligated to access the services provided by the 1st Respondent or any other MNVO without their consent. But he observed that it makes more economic sense for any MNVO to opt to use the SIM overlay technology since one will use only one handset to access the service and therefore not incur costs of purchasing a dual SIM capability phone.
41. He stated further that the 3rd Respondent has since received complaints over the Thin SIM technology being rolled out by the 1st Respondent from one of the listed MNOs and the complaint was that the Thin SIM card may cause interruption and interception of communication which may introduce vulnerabilities in the primary network as well as infringe on intellectual property rights of other providers. The 3rd Respondent, pursuant to its statutory mandate, considered the said complaint and engaged both MNOs and MVNOs in a discussion with a view to making the decision on the complaint. It also considered the opinion of Central Bank of Kenya which is the regulator of money transfer services. It went further and obtained the opinion of GSMA on the proposed SIM overlay technology which recommended that the Thin SIM technology should be used in the market but the 3rd Respondent should ensure that its providers give assurances and verification of the modes applied to mitigate any risks; GSMA in doing so, stated that it had analyzed and certified the technology as being free from any functionality capable of undermining the security of users and the mobile phone users should be advised of the potential dangers that could result from inserting unapproved elements in their phones.
42. In addition to GSMA, Mr. Karungu explained that the 3rd Respondent benchmarked against various standards, organizations and regulatory experts and further carried out research to find out the global best practices concerning overlay SIM technology. That it also held a stakeholders' conference at the Authority's offices to which the participants included the four MNOs i.e Safaricom, Airtel Kenya, Yu Mobile and Orange Telkom, the 1st Respondent, 2nd Respondent and

Taisy's Technologies among others. The 3rd Respondent subsequently, having considered all the reports and representations, decided to grant a limited approval for the use of the Thin SIM card as was in tandem with the advice of GSMA. Further, that the decision to give limited authority on the 1st Respondent placed on it a duty to encourage innovation by market players in the industry for the benefit of consumers. That therefore the allegations and innuendos by the Petitioner are unfounded.

43. Mr. Wambua Kilonzo, learned Counsel presented the 3rd Respondent's case and submitted that the Petition as drafted, does not meet the threshold and the test of constitutional Petitions as stipulated in the case of *Anarita Karimi Njeru v Republic (supra)* and *Communications Commissions of Kenya & Others v Royal Media Services Ltd & 7 Others Supreme Court Petition No.14 of 2014*. That the Petitioner has only set out the provisions of the Constitution that have been infringed but has failed to set out with a degree of precision the manner in which they have been violated. It was his further submission that the Petition does not seek to impeach the decision-making process of the 3rd Respondent as being unconstitutional nor does it demonstrate that the trial period of one year is a decision that was not within its mandate and he stated that the Petition is based on hypothetical situations devoid of any real dispute. In that regard, he relied on the decision in *John Harun Mwau v Attorney General (supra)* and *Commission for the Implementation of the Commission on Implementation of the Constitution (2013) e KLR* where it was held that a Court should restrain itself from passing judgment on the basis of hypothetical issues.
44. He further submitted that the Petitioner has other remedies available to him and not a Constitutional Petition and in that regard; firstly, he can pursue the remedy under **Part IX of the Consumer Protection Act, 2012** which has created a mechanism for addressing consumer complaints. Secondly, that **The Kenya Information and Communication (Amendment) Act, 2013** creates a Tribunal with the mandate to receive all complaints in which breaches of the **Act** is alleged. He further claimed that **Regulation 9 of the Kenya Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations, 2012** bars the sharing of a subscriber data by mobile providers without the express authority of the affected subscriber. In such cases, where a consumer's data has been shared without his consent, he has the option of filing a complaint at the Tribunal. It was Mr. Wambua's submission therefore that this Court should not exercise jurisdiction since there are other available remedies available. On that point, he relied on the decisions of; *Isaac Ngugi v Nairobi Hospital & 3 Others (2012) e KLR*, *Emmanuel Safari Yaa v Kenya Power Lighting Co. Ltd (2014) e KLR* and *Four Farms Ltd v Agricultural Finance Corporation (2014) e KLR*. Mr. Wambua therefore urged the Court to exercise the doctrine of constitutional avoidance, based on the fact that there are other ways in which the Petitioner's complaints can be addressed and which have not been invoked and that the Petitioner should first exhaust those remedies before coming to this Court. He referred the Court to the case of *Communication Commission of Kenya & Others v Royal Media Services Ltd & Others (supra)* where the doctrine of avoidance was applied by the Supreme Court.
45. On the issue of enactment of a data protection law, Mr. Wambua submitted that the enjoyment of privacy rights under **Article 31 of the Constitution**, does not depend on the enactment of the said data protection law. Further, that law is not to be enacted by the direction of this Court unless so decreed by the Constitution which is not the case here. That the legislative mandate of the State is exercised by Parliament and the Judiciary can only intervene in very limited circumstances. On that point, he relied on the case of *National Conservative Forum v Attorney General, Petition No. 438 of 2013*.
46. Lastly, Mr. Wambua submitted that the orders sought by the Petitioners cannot be granted and as to whether a conservatory order can issue, he submitted that it would be against public interest and policy for this Court to curtail the development of technology. He therefore urged the Court to dismiss the Petition and award costs to the 3rd Respondent while being guided by the principle that "costs follow the event".

The 4th Respondent's case

47. The 4th Respondent, the Central Bank of Kenya, opposed the Petition through points of law raised by its Counsel, Mr. Amoko. He submitted that the Petitioner had failed to provide any evidence of vulnerabilities of the Thin SIM technology and that in any event, no one has been compelled to subscribe to the technology.
48. It was also his submission that the Petition as drafted has not presented a precise complaint capable of adjudication by this Court. That it is not enough for a party to cite provisions of the Constitution that have allegedly been breached, but a Court must examine the matter to ensure that it presents a Constitutional issue capable of adjudication. On that point, he relied on the case of ***Naomi Gitinga Wangechi & Others v IEBC & Others, Supreme Court Civil Appeal No. 2 of 2014.***
49. It was his further submission that even if the Court were to find that his Petition was properly before the Court, none of the Petitioner's rights under **Article 31** of the **Constitution** have been violated because there is no added vulnerability that has been established in relation to the Thin SIM technology since 2005 when it was first unveiled. That the introduction of the Thin SIM technology without Data Protection Law is a Parliamentary initiative while the Thin SIM technology is a policy decision made by an independent body acting within its mandate.
50. He also claimed that no allegation has been made against the 4th Respondent and it was therefore improperly enjoined in these proceedings and no challenge has been made about the licence it issued to the 1st and 2nd Respondent.
51. Mr. Amoko therefore urged the Court to dismiss the Petition with no order as to costs.

Determination

52. Before I turn to determine the merits or otherwise of this Petition, I recall that the issue of jurisdiction was raised extensively by the Respondents and specifically the 2nd and 3rd Respondents. It is a well settled principle that when the issue of jurisdiction is raised, it is incumbent upon the Court to deal with that question first and as was correctly observed by Nyarangi JA, jurisdiction is everything and without it a Court of law must down its tools - See **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1.**

Whether there is another dispute resolution mechanism for the issues raised in the Petition.

53. The Respondents submitted that this Court has no jurisdiction to determine the Petition because the dispute herein is one which ought to be determined by the Appeals Tribunal created under the **Kenya Information and Communication (Amendment) Act, 2013** and also the dispute resolution mechanism established under the **Consumer Protection Act, 2012.**
54. The Appeals Tribunal is established under **Section 102(1)** of the **Kenya Communications Act** which provides as follows;

“There shall be established an Appeals Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act and such matters as may be referred to it by the Minister”.

55. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425,** where it held that;

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

The same principle has been underlined in the cases of *Kipkalya Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others* (2008) 3 KLR (EP) 291, *Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others* Petition No.356 and 359 of 2012.

56.I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. In that regard the words of the Court in *Harrkinson v Attorney General of Trinidad and Tobago* [1980] AC 265, hold true today as they did then;

“The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.”

The Court concluded thus;

“The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

I am in complete agreement and in the instant case, while I recognize that the aforesaid general principle, must be respected, I must also bear in mind the nature of the dispute before me *viz-a-viz* the jurisdiction vested in the Appeals Tribunal under the **Kenya Communication and Information Act**.

57.I am also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of *Damian Belfonte v The Attorney General of Trinidad and Tobago* C.A 84 of 2004 that where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court stated that;

“The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words:

“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court’s process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power.

Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights”.

58. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant’s grievance. In that regard, the Petitioner has filed this Petition pursuant to the provisions of **Articles 22, 23 and 165(3) (b)** of the **Constitution** which grants every person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated or is threatened with an infringement. That right, to access this Court, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra)**.

59. What is in issue in this Petition? It is not, as suggested by the Respondents, whether the roll out of the Thin SIM technology is proper or not but whether that action would violate the Petitioner’s rights under **Articles 31 and 46** of the **Constitution**, (right to private and consumer rights, respectively). The mandate and jurisdiction to determine that question lies in this Court under **Articles 22, 23(3) and 165(3)(d)** of the **Constitution**. I say so because the Appeals Tribunal established under the **Kenya Information and Communication Act** does not have the jurisdiction to determine alleged violations of the Constitution - See **Wananchi Group (Kenya) Ltd v The Communications Commission of Kenya Petition No.98 of 2012**. To hold otherwise would leave the Petitioner without a remedy to ventilate his grievances. In fact, I do not hold this view alone because Majanja J in **Isaac Ngugi v Nairobi Hospital and Another Petition No.461 of 2012** stated as follows;

“For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly.” (Emphasis added)

I agree with the learned Judge wholly – See also **Four Farms Ltd v Agricultural Finance Corporation (supra)**.

I am satisfied therefore that for the above reasons that the Petition is properly before this Court.

Whether the Petition is Academic and Hypothetical

60. Related to the question of the Court’s jurisdiction is a second issue; whether there is a real issue or controversy for determination by the Court. In answer to that question, it is now a well-established principle that the Court will not engage in determination of a matter for academic reasons and that there must be a real controversy or dispute before the Court for it to exercise its jurisdiction. In the case of **John Harun Mwau & Others v The Attorney General (supra)**, it was observed that the jurisdiction vested in the High Court to interpret the Constitution is not exercised in a vacuum; that there must be a real controversy or dispute between parties before the Court in order for it to exercise its jurisdiction. Similar findings have been made in the cases of **Rev. Timothy Njoya v Attorney General Petition No.479 of 2013** and **International Centre for Policy and Conflict 7 Others v Attorney General Petition No.552 of 2012**. It is clear therefore that judicial power will be used to determine actual controversies arising between adverse litigants and that power cannot be exercised in instances where the questions for determination are abstract and hypothetical. To do so would mean that the Court would merely be issuing advisory opinions or be involved in an academic exercise at the peril of genuine litigants who have clogged the

judicial system with genuine cases for determination.

61. Having so said, as I understand it from the Petitioner's pleadings and submissions, he is seeking the Court's determination of the issue whether the introduction of the Thin-SIM technology is a threat to the constitutional safeguards in **Articles 31 and 46** of the **Constitution**. It is not contested that **Article 22** of the **Constitution** grants a party the right to Petition the High Court alleging that, "**a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**" I am also aware that **Article 258** of the **Constitution** grants a party similar right to approach the Court claiming, "**that this Constitution has been contravened, or is threatened with contravention.**" The jurisdiction of this Court to determine the issues of contravention of the Constitution stems from the provisions of **Article 165 (3)** of the **Constitution**, which provides that;

(1) ...

(2) ...

(3) **Subject to clause (5), the High Court shall have-**

a. ...

b. **jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

c. ...

d. **jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –**

(i) **the question whether any law is inconsistent with or in contravention of this constitution.** (Emphasis added)

62. After due consideration of the law above, I am satisfied that the words of the Constitution, taken in their ordinary meaning, are clear that a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution. The High Court has held previously in the case of **Coalition for Reforms and Democracy v Attorney General Petition No.630 of 2014** as follows on the same point;

"We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another..." The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent."

63. I am in agreement with the above findings and it is therefore enough that the Petitioner has alleged that a right in the Bill of Rights has been infringed or threatened with violation. The word 'threatened', in my view, was included in **Article 22** of the **Constitution** to make it clear that an applicant may also approach a Court to obtain an interdict to prevent a future violation of a right. Whether or not such an applicant will be successful depends on other considerations, but **Article**

22 makes it clear that such an applicant will have standing to seek relief in such circumstances although no actual violation exists.

64. I have already said that the Petition before me has sought the enforcement of the right to privacy under **Article 31** and consumer rights under **Article 46** of the **Constitution**, the larger question being, whether those rights have been violated. In my view, the issue of threats to the violation of the fundamental rights and freedoms does not require a real and live case for this Court to intervene. In any event, the impugned Thin SIM technology is out there on a trial basis and this Court cannot deny the Petitioner an avenue to ventilate his grievances in regard to the use of that technology.

Whether the Petition has met the Constitutional threshold of proof.

65. It was the Respondents' contention that the Petitioner did not plead with reasonable precision how the Constitution has been violated and the manner in which the alleged violations were committed and to what extent.

66. In that regard, it is now a determined principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision that of which he complains of, the provisions said to have been infringed and the manner in which it has been infringed - See *Annarita Karimi Njeru v Republic (supra)* and *Trusted Society of Human Rights v Mumo Matemu and Another Petition No.279 of 2012*.

67. I agree with the Respondent to that extent and the said principle is well articulated and guides the arena of constitutional litigation in this Court. The question I must therefore ask is whether the Petitioner has fulfilled that requirement. Looking at the Petition before me, it is clear that the Petitioner has set out what he considers to be violations of **Articles 31** and **46** of the **Constitution** in great length and I need not repeat those allegations here as they are stated clearly elsewhere above and I will also refer to them shortly. In any event, it is against that understanding that the Respondents responded to the Petitions filed against them. To recap, the Petitioner challenges the introduction of the Thin SIM technology by the 1st and 2nd Respondent as it allegedly violates his right to privacy and consumer rights and those of the 2nd Respondent's customers.

68. I have already held that this Court has jurisdiction to determine whether the Petitioner's rights have been violated as alleged. However, looking at the Petition again, it is not clear how the consumer rights of the Petitioner under **Article 46** of the **Constitution** have been violated. Consumer rights were barely touched on, even in submissions, and I am not certain that there was anything said of that subject save a mere mention in pleading. In the circumstances and following the principle restated above, where a party is unable to plead with some precision how a right or fundamental freedom has been violated, a Court ought not to speculate and make findings based on conjecture. For those reasons, I will only determine the extent to which the Petitioner's rights to privacy have been violated or threatened with violation due to the introduction of the Thin SIM technology. However, before that, I recall that the 1st and 2nd Respondents claimed that the Petitioner was not properly before the Court and I now turn to determine that issue.

Whether the Petitioner is a proper party in these proceedings

69. It was Mr. Kiragu's submission that the Petitioner does not have any interest in the rolling out of the Thin SIM technology capable of protection by this Court. That he is not an account holder with the 2nd Respondent and as such he will not be affected by the said Thin SIM technology.

70. The Petitioner in answer to that contention stated that he is an account holder with the 2nd Respondent, but he failed to provide particulars and details of his account allegedly held at any branch of the 2nd Respondent. For instance, I do not have evidence as to his account name, or even

the branch the said account is alleged to be held. In absence of such evidence, I am constrained to believe the 2nd Respondent on that issue. However, **Article 258(2)** of the **Constitution** is to the effect that a person need not act on his own behalf to institute Court proceedings claiming that the Constitution has been contravened. It provides as follows;

1. ...

(2) In addition to a person acting in their own interest, courtproceedings under clause (1) may be instituted by—

- a. ***a person acting on behalf of another person who cannot act in their own name;***
- b. ***a person acting as a member of, or in the interest of, a group or class of persons;***

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

71. In the totality of evidence before me, while I am inclined to find that the Petitioner is not an account holder with the 2nd Respondent, under **Article 258 (2)** he can institute Court proceedings claiming a violation of the Constitution generally and even in the public interest. He alleged in that regard that the present Petition has been filed on behalf of all account holders with the 2nd Respondent and whose information/data is subject to compromise and contamination through the use of the Thin SIM technology. If that is the case, I do not see any valid reason as to why I should find that the Petitioner is not the right party in these proceedings.

Having disposed of all preliminary issues, I shall now determine the only substantive issue left.

Whether the right to privacy is threatened with violation

72. If I understood the Petitioner's case well, it appears to me that he does not challenge the issuance of the license to the 1st and 2nd Respondent and does not even challenge powers of the 3rd and 4th Respondents over the Thin SIM technology. In fact I did not hear even him to be accusing the 4th Respondent of any wrong doing. His case must therefore be seen through the prism of the alleged threat of right to privacy as provided for under **Article 31** of the **Constitution**.

73. In that regard, he claimed that the rolling out of the Thin SIM technology will violate his right to privacy as it is suspect to interception and contamination of the primary SIM data. That was the issue that ran throughout his submissions and all other issues raised rotated around that singular complaint.

74. The right to privacy is provided for under **Article 31** of the **Constitution** in the following manner;

Every person has the right to privacy, which includes the right not to have –

- a. ***Their person, house or property searched;***
- b. ***Their possessions seized;***
- c. ***Information relating to their family or private affairs unnecessarily required or revealed; or***
- d. ***The privacy of their communications infringed.***

75. The Irish Supreme Court in **Kennedy vs Ireland (1987) I.R 587**, for example, in addressing the said right, held that phone-tapping violated the right to privacy. Hamilton J made it clear in that case that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view;

“The dignity and freedom of an individual in a democratic society cannot be ensured if

his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”

76. Further, the High Court in ***CORD v Attorney General (supra)*** held that surveillance and intercepting of communication violated the right to privacy. The Court expressed itself as follows;

“We are clear in our minds that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone.”

With the above principles in my mind, I now turn to determine whether the right to privacy in regard to the Thin SIM technology has been threatened with violation.

77. In my view, the starting point would be the Affidavit of Perminus Karungu where he explained that the Thin SIM technology entails the issuance of a paper Thin SIM card that is embedded with a chip whereby users thereof would overlay it on their primary SIM card, regardless of network and has the capability of a dual SIM phone without having an actual dual SIM phone. The 1st and 2nd Respondents also averred in the Affidavit of John Waweru that the Thin SIM only relies on the primary SIM for anchorage and space in the mobile handset and does not technically have the capacity to interfere or intercept the services or connections of the Primary SIM. Further, that it is incapable of remotely connecting to outside sources for additional resource without the knowledge of the user.

78. As can be seen from the pleadings summarized elsewhere above, each of the parties before me has made out facts on how the Thin SIM technology works. But what is the true and factual position? In answering that question, this Court would resort to the answers given by the 3rd Respondent since it is the body established under the **Kenya Information and Communication Act**, to undertake licensing and regulation of telecommunication as well as radio communications and postal services in Kenya.

79. In that regard therefore, the Authority has already dealt with the issue now before me regarding the vulnerabilities or otherwise of the Thin SIM which allegedly allows the interruptions and interceptions of data.

80. In addressing that issue, the 3rd Respondent engaged licensed MNOs and MVNOs in a discussion with a view to making a decision on the matter; It also enjoined the 4th Respondent in the discussion due to the complaint touching on mobile money transfer services. In addressing the said issue it also scrutinized the Taiwanese Company, Taisys Technologies Company Ltd which manufactures the Thin SIM. It went further and obtained the opinion of GSMA which recommended that before the Thin SIM card could be used in the market, the 3rd Respondent should ensure the following;

“(a) Promoters and issuers of the thin SIM card should provide assurances on verification of the modes applied to mitigate the risks.

(b) That the overlay SIM technology should have been independently analyzed and certified as being free from any functionality capable of undermining the security of users and issuers of the small original SIMs; and

(c) Mobile phone users should be advised of the potential dangers that could result from inserting unapproved elements in their devices and they should be provided with assurances pertaining to approved solutions.”

81. Following the above opinion, the 3rd Respondent benchmarked the Thin SIM against various

standards, organizations and regulatory experts and carried out research to find out the global practices concerning the overlay SIM technology. Mr. Karungu explained that it established the following;

- “(a) [The] SIM overlay technology was developed nearly 10 years ago in China as a multi-operator access solution and it was primarily designed to avoid roaming fees;***
- (b) As a roaming tool, the Thin SIM card will elect to become the primary SIM card while roaming thus interfacing with local carriers at rates far better than the primary carrier;***
- c. The Canadian company, Roamly and American Company, Know Roaming, use the same technology presently to offer a low cost roaming service for their customers;***
- d. In China particularly the technology is additionally being used for financial services;***
- e. Research showed that the SIM overlay technology used in mobile banking was safe since it used the SMS channel as opposed to the modern mobile applications over internet; and***
- f. Further, it emerged that the technology is operational in both smart and functional phones thus easily available to low income clients.”***

82. Following the above report, the 4th Respondent held a stakeholder conference at the Authority’s offices and the participants included the four MNOs in Kenya i.e Safaricom, Airtel Kenya, Yu Mobile and Orange Telkom, the 1st Respondent, the 2nd Respondent and Taisy’s Technologies among others. It was observed in that stakeholder conference that;

- “(i) The Thin SIM complies with all minimum mandatory international standards pertaining to the manufacturing of the Thin SIM;***
- ii. No major complaints particularly none on interception of traffic of the primary SIM card has been reported so far;***
- iii. Tests conducted on Taisys Thin SIM by China National Computer Quality Supervising Test Center as well as the Bank Card Test Centre of China show that the Thin SIM complies with applicable ISO and European Telecommunications Standards Institute standards; and***
- iv. Based on the opinion of GSMA, save for the inherent vulnerabilities of all SIM cards, there are no specific and confirmed vulnerabilities arising from the use of the Thin SIM.”***

On the basis of the above findings, the 3rd Respondent decided as follows;

- “(a) There were no sufficient grounds that can hinder the entry of the Thin SIM into the Kenyan market.***
- b. The Authority will allow the use of the Thin SIM technology under strict observation for a period of one year. During this period, only Taisy’s Thin SIM will operate in the Kenyan market;***
 - (c) The Authority will hire an internationally reputable firm to conduct a security audit on all SIM cards and in particular the use of the Thin SIM in mobile money transfer services, and recommend a framework for regulating the use of SIM card in Kenya during this period;***
 - (d) During the one year testing period, if any vulnerability is discovered from the use of***

Taisy's Thin SIM card, then operations of the Thin SIM card in the Kenyan market will cease immediately pending the final recommendations from the security report; and

(e) Operators intending to use the Thin SIM for mobile money transfers must obtain authorization from Central Bank of Kenya."

83. Perminus Karungu therefore deposed that the 3rd Respondent's authority to grant a limited approval for the use of the Thin SIM card was also in tandem with the advice of GSMA in the following manner;

i. ***Allowing the use of the Thin SIM cards manufactured by Taisy's Technologies as the same has been independently verified and found to comply with the standards required for use in the banking industry.***

ii. ***Its use will be under strict observation of internationally reputable financial security firm; and***

iii. ***All the entities that will use the Thin SIM card are required to provide assurances that they have put in place the requisite security measures and to that end, it has made it mandatory for the said entities to provide an undertaking indemnifying not only the authority for any liabilities that may be confirmed but also, the entities are required to meet any liabilities suffered by consumers who experience manipulation or blocking of communications of the Primary card."***

84. I have reproduced the above matters verbatim to demonstrate that the 3rd Respondent, as a regulator, has already resolved a complaint similar to the one before me regarding the use of Thin SIM technology. I must also state that the 3rd Respondent as the regulator of MNOs and MNVOs and the 4th Respondent as the regulator of mobile banking in Kenya are the best judges to determine the merits pertaining to the complaint made now by the Petitioner and not the Court. Parliament has set out the law and the power of formulating policy in respect to regulating communication and has conferred such power to the 3rd Respondent and mobile banking to the 4th Respondent and it would be wrong, in my view, for this Court to intervene as to the merits of the decision already made by the 3rd and 4th Respondents as the Regulators. This Court can only intervene in very limited circumstances and in the clearest of cases for instance where it is being alleged that there is abuse of discretion, or that the decision makers have exercised their discretion for an improper purpose or have acted unfairly or in excess of their statutory mandate, which is not the case here - See ***Republic v The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported)***.

85. To my mind therefore, it has not been demonstrated that the 3rd Respondent exercised its powers arbitrarily. On the contrary, I am satisfied that the decision it reached was made pursuant to its mandate which is within the letter, the purpose and objects of the **Kenya Information and Communication Act** including the applicable Regulations. That being so, this Court has no reason to intervene in a manner that interferes with the merit of a decision clearly falling within the relevant statutory agency without allegations of any irregularities on its part.

86. It therefore follows that from the findings of all the technical bodies named above, the Thin SIM technology is relatively safe in banking as proposed and any risks would be dealt with by the relevant bodies. Further, I do not therefore see how the right to privacy of the Petitioner has been violated or is threatened with violation and that is a categorical finding on my part. But suppose I am wrong and the Thin SIM technology is in fact susceptible to the risks claimed by the Petitioner and he is at risk of her privacy being invaded?

87. I would arrive at the same decision given that I have already held that based on the totality of the evidence before me, the Petitioner is not a customer of the 2nd Respondent. It is also not in dispute that the Thin SIM will be used by those customers that expressly consent to it. To my mind, there

cannot be a violation of privacy where a party has consented to the alleged act that may infringe on a particular right. In addition, I bear in mind that the 3rd Respondent in regard to the use of the Thin SIM technology has made a resolution to roll out the technologies for a one year of trial period with the following conditions;

“(i) Its use will be under strict observation of internationally reputable financial security firm; and

- ii. ***All the entities that will use the Thin SIM card are required to provide assurances that they have put in place the requisite security measures and to that end, it has made it mandatory for the said entities to provide an undertaking indemnifying not only the authority for any liabilities that may be confirmed but also, the entities are required to meet any liabilities suffered by consumers who experience manipulation or blocking of communications of the Primary card.”***

As can be seen from the above conditions, it is clear that the trial period that the Petitioner is apprehensive about is under strict regulation and surveillance made by the 3rd Respondent. Further, there is contemplated a mechanism in which any person who suffers liability out of the use of the Thin SIM would be compensated.

88. Having expressed myself as I have above, I therefore find that the alleged threat to right of privacy has not been proven and the Petitioner’s complaints in that regard are dismissed.

89. However, before I conclude this Petition, I am also alive to the submission made by Mr. Wambua and the deposition of Mr. Waweru in his Affidavit as regards the importance of the Thin SIM technology. I am convinced to find that the alleged innovation will enhance competition in the provision of services and will be beneficial to those who subscribe to it. I therefore do not see why this Court should intervene and block the roll out of the technology, the subject of this Petition.

90. I recall I was also urged by the Petitioner to consider the concerns of Safaricom Ltd regarding the technology. My answer to that submission is simple; I do not have those concerns on record and even if I had, Safaricom is not a party to this Petition and it would be against the law for it to agitate its case through third parties or agents without saying so.

91. Lastly, I do not see any reason and I have said why above that I should halt the roll out of the Thin SIM technology pending the enactment of the Data Protection Bill into law. This Court can only interfere with the legislative process of Parliament especially before Parliament has concluded its deliberations on a Bill in very rare cases. The issue whether a data protection law is necessary as a safeguard to the use of the Thin SIM is not one such case. This Court cannot order Parliament to make specific laws but only test both the process leading to those laws and their contents against the constitutional muster. What has been placed before this Court is a Bill and in that case it is not clear what the end result of that Bill would be and I will therefore exercise judicial restraint and avoid making any orders in that regard.

Final Orders

92. I have come to the end of this judgment, and looking at the prayers the Petitioner has sought, prayers (a) to (c) cannot be granted for reasons stated elsewhere in this judgment. I therefore have only one prayer remaining; that of costs. The Respondents sought an award of costs while Mr. Kirwa submitted that the Court should refrain from granting Costs to any party. Noting the nature of the Petition before me the only attractive order to make is that each Party should bear its own costs.

93. In the end the Petition is dismissed and each Party shall bear its own costs.

94. Orders accordingly.

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Kirui holding brief for Mr. Kirwa for Petitioner

Miss Okimam holding brief for Mr. Kilonzo for 3rd Respondent

Mr. Kiragu for 1st and 2nd Respondents and holding brief for Mr. Anoko for 4th Respondents

Order

Judgment duly delivered.

Copies to be supplied to Parties.

ISAAC LENAOLA

JUDGE

29/5/2015