REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civ. Appli. 1078 of 2007

IN THE MATTER OF: AN APPLICTION BY THE HONOURABLE PETER ANYANG' NYONGO', THE HONOURABLE JAMES OMINGO MAGARA AND THE HONOURABLE MWEANDAWIRO MGHANGA FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE DECISION BY THE GOVERNMENT OF KENYA THROUGH THE MINISTRY OF FINANCE TO OFFER TO THE PUBLIC 25% OF SAFARICOM SHARES THROUGH AN INITIAL PUBLIC OFFER ON THE NAIROBI STOCK EXCHANGE

AND

IN THE MATTER OF: THE PRIVATISATION ACT, ACT NO.2 OF 2005

RULING

The application before the court is by way of a Chamber Summons and is dated 25th September, 2007 and it is brought under sections 8 and 9 of the Law Reform Act (Cap 26) and Order 53 rule 1 of the Civil Procedure Rules.

The prayers sought include:

(a) That the applicants be granted leave to apply for judicial review in the form of an order of certiorari to remove into this Honourable court and quash the decision of government of Kenya through the Ministry of Finance to offer to the public 25% of Safaricom Ltd shares through an initial public offer on the Nairobi Stock Exchange

(b) **That** the applicants be granted leave to apply for judicial review in the form of an order of Mandamus directed at the Minister of Finance requiring him to forthwith appoint the date for coming into force of the Privatization Act No 2 of 2005.

(c) **That** the applicants be granted leave to apply for judicial review in the form of an order of prohibition prohibiting the Government of Kenya from offering to the public 25% of Safaricom Ltd shares through an initial public offer on the Nairobi Stock Exchange either as announced or at all until and unless the Privatization Act, Act No.2 of 2005 has come into force.

(d) **That** the applicants be granted leave to apply for judicial review in the form of an Order of

Prohibition prohibiting the Government of Kenya from proceeding any further with its announced programme of divesture of public Corporations and/or shares until and when the Privatization Act No 2 of 2005 has come into force.

(e) **That** the grant of leave do operate as stay of the proceedings in question ie the Constitution of the process to offer to the public 25% of Safaricom Ltd shares through an initial public offer on the Nairobi Stock Exchange either as announced or at all pending the hearing and determination of the judicial review proceedings herein

(f) **That** all the necessary and consequential directions be given

(g) **That** the costs of and occasioned by this application be costs in the cause.

The application is based on grounds set out in part 3 of the accompanying statement and on the facts set out in the accompanying Verifying Affidavit of the Hounorable Peter Anyang' Nyong'o sworn on 21st September, 2007.

· The case for the applicants is that after the Privatization Act, Act No.2 of 2005 which received Presidential Assent on 13th October 2005 the Minister has refused and/or neglected willfully and unlawfully to publish a notice in the Gazette appointing its commencement date. They seek a court order to compel the Minister to appoint a commencement date

· The long title to the Privatization Act reads:

"**An Act of Parliament to provide for the privatization of public assets and operations including State Corporations, by requiring the formulation and implementation of a privatization programme by a Privatization Commission to be established by this Act and for related purposes."**

· Section 1 of the Act provides that the Act will come into force on such day as may be appointed by the Minister and that the Minister by declining to appoint the commencement date is in violation of Section 58 of the Interpretation and General Provisions Act, cap 2 of the Laws of Kenya

· By failing to appoint a date of the coming into force of the said Act while simultaneously proceeding with the piecemeal patchwork process of privatization, the Government of Kenya and the Minister for Finance are acting in defiance of the collective will of Parliament and the Executive solemn obligation to enforce the law.

· In carrying out the process of privatization not only in defiance to the provisions of the Privatization Act but setting up its own institutions in substitute of those set up by the National Assembly such as the Privatization Commission the Government of Kenya and the Minister for Finance are, in effect unlawfully legislating which is not only ultra vires the powers of the Executive as provided by Section 30 of the Constitution but also in direct contravention of Section 3 of the Constitution.

· The failure of the Executive to appoint a date for the coming into force of the said Act constitutes an egregious violation of the fundamental doctrine of separation of powers.

· The applicants therefore raise serious Constitutional and legal issues affecting the affairs, process and conduct of the privatization process in Kenya and in particular, the legality of the acts of the Minister for Finance following the passing of the Privatization Act, Act No.2 of 2005 by Parliament.

By consent of the parties it was ordered that the application be heard inter-parties on Friday 25th September, 2007. The application was opposed as under:

(1) Vide a replying affidavit sworn on 27th September 2007 by Mr Joseph Kanja Kinyua the Permanent Secretary, Ministry of Finance

(2) Skeleton Arguments filed on 27th September, 2007 by the Attorney General

(3) Skeleton submissions of Safaricom Ltd as an Interested Party filed on 27th September, 2007.

The highlights of the grounds of opposition include:

(i) That the Minister has not disregarded the law in the process of disposal of Public Assets as the disposal of public assets is undertaken subject to the Public Procurement and Disposal of Assets Act 2005 and previously the Public Procurement Regulations.

(ii) No evidence of asset stripping has been availed.

(iii) That it is the policy of the Government that its shares in Safaricom ought to be privatized to enable the members of public to share the success of Safaricom through ownership of shares and not just to contribute to its profits as subscribers.

(iv) That under the Permanent Secretary to the Treasury Incorporation Act the corporation has the power to undertake the sale.

(v) That the applicants allegations regarding the Rift Valley Railways (RVR) were false as there was no agreement for RVR to pay the Government US dollars 25 million in the Kenya Railways Concessionary Agreement. The RVR as per its obligation paid US dollars 3 million.

(vi) That it is perfectly in order for the process of privatization of State Corporations and sale of Government shares in companies to continue under the existing legislation as envisaged in the Transitional arrangements in the Privatization Act 2005.

(vii) That there is a misrepresentation concerning the reasons which led to the stoppage of the 2002 Kenya Re transaction – the correct position being that the correct bid was not attained.

(viii) The applicants have not identified any decision made by the Minister for Finance see ***NR HC Misc Application 1124 of 2005 The National council for Non Governmental Organisation v Peter Anyang' Nyong'o.***

(ix) That the applicants have not demonstrated any illegality

(x) The formation of a Privatization Steering Committee to implement and co-ordinate the process of divestiture is an internal organization matter to ensure that the process goes smoothly. The said formation cannot be deemed to be illegal as the Privatization Act has not come into operation.

(xi) The collective will of Parliament expressed in the Privatization Act No. 2 of 2005 cannot be implemented before the Act comes into operation.

(xii) There is no unconstitutionality.

(xiii) There is no proof of procedural impropriety

(xiv) No proof of the existence of legitimate expectation. It is trite law that an order of mandamus cannot be issued to compel a Minister to bring an Act into operation see R v Secretary of state ex-parte Fire Brigade Union (1995) 2 All ER 244 at 252.

A provision in a Statute cannot be made operational by applying the doctrine of legitimate expectation when the provision is yet to come into force on a notification issued by the executive Government - see ***R v Director of Public Prosecutions ex-parte Kibeline (1994) All ER 801 at 833.***

The Safaricom challenge was as under:

(a) Decision to list the Safaricom shares is a policy decision on merits and the court has no jurisdiction to intervene in respect of a decision made on merit.

(b)There is no nexus between the alleged failure by the Minister to appoint a commencement date for the Privatization Act 2005 and the Safaricom IPO and therefore the whole application is misconceived.

(c) The shares in question are held by Telkom Kenya Ltd and the Minister for Finance is not responsible for the decision to sell Safaricom shares.

(d)There is no legal basis for stopping the process of privatization of sale of shares – this is ongoing and has not been stopped even by the yet to commence Privatization Act.

(e) The applicants, as members of Parliament helped in incorporating transitional provisions and having made their bed they must lie on it.

(f) Cabinet decisions all over the world are political and not the subject matter of judicial review. Halsburys Vol 8(2) para 402-405.

"**Duty of Cabinet is to make Government policy and deal with issues of crucial importance to the public"**

Any order by the court on policy decisions taken by the Cabinet would be in vain. No valid orders can issue against the entire Government to regulate policy matters.

(g) The complaints of the applicants relate to the exercise of Constitutional power vested in the government. The attempt to bring what is essentially a political battle to the courts is improper use of the judicial review process and the applicants should be shut out for misusing the process of the court.

(h) Timing of the application less than two months before the planned divestiture despite the very public manner in which the transaction has been planned, implies ulterior motive by the applicants since the perceived grounds should have been raised earlier. As it is, the applicants have waited for the conduct of a procurement process for transaction advisors, the completion of that process and the putting in place of a mechanism to complete the transaction in the next two months. Delay disentitles them of a remedy

(i) The Minister has a discretion concerning the date of commencement Sec 9(3) and S 42 of the Interpretation and General Provisions Act – See also Halsburys Vol 1(1) paras 63 and 64.

The applicants suffer no prejudice in view of the transitional provisions.

APPLICABLE LAW

It is clear to the court that although the Privatization Act 2005 is intended to provide for the privatization of public assets and operations including State Corporations, it is quite evident from the title of the Act, it is reckless to suggest that where the government owns shares in a public company (like Safaricom) and which is not a public entity as such or a State Corporation, the Government of Kenya is not bound by the applicable law namely the Companies Act and the Memorandum and Articles governing the operations of the company. It is obviously so bound by the Companies Act and the Memorandum and Articles, otherwise the Government would have had no business venturing into commercial matter. Although the Companies Act does not specifically say so the Government is bound by implication. It would be irrational to hold otherwise. Surely, the core business of any government is governance and not commerce and where it (the Government of Kenya) ventures into commerce it must abide by the Law and rules pertaining to commercial transactions and decisions.

To underpin this point S 2(1) of the Privatisation Act 2005 defines "privatization" as under:

"Privatization" means a transaction or transactions that result in a transfer, other than to a public entity of

any of the following:

(a) "**assets of a public entity including the shares in a State Corporation;**

(b) operational control of assets of a public entity;

(c) **operations previously performed by a public entity."**

Although the Act as held above has not come into operation it is clear from this provision that the sale of shares owned by the Government of Kenya in a public company is not covered by the definition of privatization. Safaricom Ltd is not a public entity only as regards the Procurement and Disposal of Assets 2005. The sale of shares by the Government is well covered by the Permanent Secretary to the Treasury Act Cap 101 Section 3 as reproduced hereinafter. It is not correct in law to state that prior to the Privatization Act there was no law regulating the sale of shares owned by the Government. The claim based on this cannot possibly be arguable. The relevant Acts stare at all of us!

Definition of Public Entity or body:

Section 3(d) of the Interpretation and General Provisions Act defines a "public body" as follows:

"**any authority, board, commission committee or other body whether paid or unpaid which is invested with or is performing, whether permanently or temporarily functions of a public nature"**

It is therefore crystal clear that Safaricom is not a public body but it is a corporate body. It is certainly not embraced by the definition of privatization as set out in the Privatization Act as set out above.

It follows that even if the Act was in operation the impugned intended sale of shares was clearly outside the provisions of the Act. Seeking a restraining order both on the basis of an Act not in operation and also an Act with transitional arraignments or provisions, and therefore an Act which does not regulate the subject matter even on its own provisions is a serious misdirection in law and this again is patently unarguable.

Ownership of Safaricom as a ground of challenge in this Case:-

The applicants contend see paragraph 52 of Nyongo's affidavit that Safaricom has a hidden or secret shareholder. Again it is trite law that such a grievance cannot be resolved in the arena of public law. Shareholding and membership of companies is a mater well regulated by the Companies Act. Such a claim is plainly incompetent in a public law court and cannot possibly be arguable. Safaricom is not a public body. Judicial review orders are invariably directed at public bodies and authorities. As explained by its Counsel Prof Muigai Safaricom Ltd submitted to this court's jurisdiction as a friend of court and its desire to have its shares listed in the Stock Exchange.

Shareholder and/or the lawful owners of the shares the subject matter of the claim not before this court – Impact of this to the claim

It is common ground that the shares, the subject matter of this claim are owned by Telkom Kenya Ltd. For a sale to be effected, this must be done through the Permanent Secretary to the Treasury for the reasons set out in the Act Cap 101 of the Laws of Kenya, which since 1962 converted the Permanent Secretary to the Treasury as a "corporation" for this purpose. In this regard the Permanent Secretary is a Corporation with perpetual succession – it can sue and be sued – and is for this purpose distinct from the Minister for Finance or any other government organ. Similarly Telkom Kenya Ltd as the name suggests is a company capable suing and being sued. There is no proof that Telkom was ever served.

It follows that since the real owners of the shares are not before the Court the claim is hollow and grossly incompetent. The claim even if it were found to have substance has in law been brought against the wrong parties.

This is perhaps one of the clearest flaws touching on this claim. It is a fatal defect in law because no valid order can issue against parties not before the Court. The claim lacks substance for this reason and is therefore plainly unarguable. It would not have been necessary for the Court to have gone beyond this ground to finally dispose of this matter except for the need to have justice clearly done or seen to be done and manifested due to public nature of the claim.

Additional reason why the mandamus sought against the minister would not lie in law.

In the case of ***R v Kenya National Examinations Council Ex-parte Geoffrey Njoroge and others Civil Appeal 266*** of 1966 at page 47 the Court of Appeal put the issue beyond argument in these terms:-

"**The next issue we must deal with is this. What is the scope and efficiency of an ORDER OF MANDAMUS? Once again we turn to HALBURY'S LAWS OF ENGLAND 4th Edition Volume 1 at page 111 from paragraph 89. The learned treatise says:-**

"**The Order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual"**

At paragraph 90 headed the "mandate" it is stated:

"**The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, gives discretion to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."**

In the circumstances of this matter the Minister has been given the discretion of appointing a commencement date. This is the tail end of the general duty imposed on him under the Privatization Act to put in place the necessary administrative and legal structures eg the appointment of the Chief Executive Officer of the Commission and the recruitment of the Directors of the Commission, including seeking Parliamentary approval. Once the Commission is in place it is in turn mandated by s 17 to formulate a privatization programme for approval by the Cabinet. The Minister's role is clearly a general duty against which a mandamus cannot issue on the high authority of the Court of Appeal in the Kenya National Examinations Council case.

Finally on this point the other reason why a mandamus cannot issue against the Minister is that the affidavit of Mr Joseph Kinyua the Permanent secretary to the Treasury has demonstrated that the Minister has not defied the will of Parliament in that the recruitment of a Chief Executive Officer and the approval by Parliament of the list of the Directors has been sought by the Minister. A mandamus cannot in law issue in the circumstances. It issues where the targeted person or body has failed to perform a statutory duty. It issues in respect of a specific statutory duty which has not been performed. The court has clearly no right to question the merit of the Minister's decision not to give the notice until he is satisfied that the necessary structures under the Act are in place – see my decision on the point in ***REPUBLIC v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No. 1025 of 2003***.

Again as regards an order of prohibition it is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention with the law. As found above the sale of shares is being done pursuant to the existing law and as submitted during the proceedings the Government has done over 105 transactions in the past. It has not been shown what existing law has been or is likely to be contravened in this matter.

Prohibition does not lie in respect of decisions already made.

Similarly an order of certiorari in the particular circumstances of this case would only issue to quash decision made contrary to law. It has not even been shown when the decision to sell shares or to privatize was made and by whom leave alone the non joinder of real owners of the shares including the Permanent Secretary to the Treasury.

In addition to what is laid down in the Republic v Kenya National Examinations ex-parte Geoffrey Njoroge above it is now trite law that our jurisdiction on judicial review has been expanded considerably and covers what has been referred as the three "Is" namely illegality, impropriety of procedure and irrationality. The applicants have not even on a prima facie basis demonstrated any of these grounds to warrant intervention by the court.

NON DISCLOSURE OF MATERIAL FACTS

The applicants failed to disclose material particulars as under:

(i) That there was a request to categorize the Privatization Commission and the terms and conditions of the Chief Executive had been made to the State Corporations Advisory Committee and approved

(ii) The Ministry of Finance has instructed consultants to transparently and competitively identify a suitable candidate for the post of Chief Executive of the Privatization Commission and that the consultants had published advertisements in the Daily Newspapers

(iii) That the Minister had requested Parliament through the Departmental Committee on Finance, Planning and Trade to approve a proposed list of seven Directors as provided in the Privatization Act

(iv) The appointment of independent and expert transactions advisors including the conduct of due diligence as regard Kenya Re including the existence of A Policy paper or Public Enterprise Reform and Privatization since October 1994.

The applicant did not contest the non disclosure even on a [prima facie basis. Surely this is also a major ground for denying leave and stay in judicial review.

(v) Misrepresenting the reasons for the earlier floatation of the Kenya Re shares which was that the Government withdrew for the reason that it was not being offered a competitive price.

SUMMARY CONCLUTIONS

On the basis of the above, I find no arguable points of law apparent on the face of the pleadings I find that the court is entitled to refuse to grant leave to institute judicial review proceedings. Any leave would in my finding be of nuisance value in the face of the above findings even at this stage.

REASONS FOR DECLINING OR REFUSING AN ORDER OF STAY

Even assuming that the court is wrong on the prayer for leave I find that a case for the grant of leave to operate as stay has not and cannot be established for the following reasons:

(1) All the grounds set out above for the refusal of an order for leave

(2) The applicants are guilty of inordinate delay in commencing these proceedings. The Privatization Act was assented to on 13th October 2005 and it has taken them (as members of Parliament who are assumed to have participated in the proceedings in Parliament) two years to commence this suit when the sale of the shares in question is only 2 months to the finishing stretch. No explanation has been given for this delay.

It is significant to note that restraining orders are being sought in the backdrop of the Government seeking the services in respect of the sale as under:

(1) A consortium consisting of Lead Transaction Advisor

(2) Legal Advisor

(3) Reporting Accountant

(4) P R consultant

(5) Advertising Consultant

(6) Receiving Bank accountant

(7) Share Registrar to undertake tasks related to the offer

The services are as per the applicant's own exhibit sought to ensure that the IPO is priced optimally for maximum gain by the Government. It is also common ground that the Safaricom IPO is expected to be the largest in Kenya's history and it is expected to raise approximately 30 billion Ksh and this is turn expected to seal an estimated 109.8 billion budget deficit for the current year. The sale has been in public domain for a long time and has obviously generated a lot of interest from members of the public who would wish to participate in the IPO. It is not therefore in dispute that the IPO has serious financial implications for the country. Refocusing on the issue of delay in seeking earlier intervention by the applicants the court must point out again as it has done before, that speed is the hallmark of judicial review. A party who sits until third parties have come on the scene and acquired some interest including contractual eg the interest of the service providers and the owners of the shares having planned to use the proceeds in a particular manner would not be entitled to an order for stay. Indeed decisions with financial implications must be challenged promptly failing which orders should not lie even where otherwise deserved. Courts of law are not involved in policy and governance issues and cannot hold to ransom public authorities and other bodies who must be allowed to undertake their duties of good public administration without undue delay.

(3) <u>Good Public Administration</u>

Thus, in ***High Court Misc Civil Application No. 1541 of 2005 ex-parte BIVAC R v Kenya Bureau of Standards SA***. I set out factors which constituted good public administration and I would fully adopt that decision to the circumstances of this case as well.

(i) Good public administration is concerned with speed of decision making particularly in the financial field

(ii) Good public administration requires a proper consideration of the public interest

- There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the public interest

(iii) Good public administration requires a proper consideration of legitimate interests.

A shareholder in any commercial venture including ownership of shares expects to sell the shares at some point in time if the circumstances are favourable. Safaricom Ltd is undoubtedly the most profitable company on the East African scene – according to information in the public domain. A stay order would thwart legitimate expectation in view of the time the issue of the sale has been in the public domain.

(iv) Good public administration requires decisiveness and finality unless there are compelling reasons to the contrary

- Granted that the Government is selling "the silver of the house" but unless it is acting illegally it is entitled to do so with finality and without interference in order to realize maximum public benefits. A stay order would militate against this end.

Although the applicants have argued that hardship should not be a bar to the reliefs claimed any stay order would in the circumstances subvert the aims of good public administration in a matter involving huge financial implications to the parties and the entire nation.

4. Orders in judicial review are discretionary:

Even if I were to toss a coin it would be improper to exercise the courts discretion in favour of granting a stay. In this regard it is clear that although the applicants have pursued this matter with zeal they have not given any undertaking as to damages, and quite evidently not addressed the practical implications of the orders sought.

5. The applicants have failed to disclose material facts and/or particulars which have a bearing on the granting of an order for stay, although one source of the undisclosed information was accessible ie in Parliament – such as the requested approval of the list of directors for the Commission. There was nothing to stop the applicants from seeking an order for the information to be provided at the threshold stage.

6. The applicants are eminent members of Parliament and obviously served in some of the important Parliamentary Committees – and who must have taken part in the deliberations of the House before the passage of the Privatization Act 2005. In a rigid separation of powers regime they should not be allowed to again have a second bite at the sherry. There is in existence an obvious contradiction.

PUBLIC PARTICIPATION IN SHAREHOLDING AND THE PRINCIPLE OF SOVEREIGNITY

Turning to the issue of the sale of shares by the Government of Kenya the Court must therefore invoke and interpret the existing law:

(1) Section 2 (2) of the Permanent secretary to the Treasury (Incorporation) Act Cap 101 (Laws of Kenya) states:

"**The Corporation may sue and be sued in its corporate name and shall have perpetual succession and a corporate seal and the seal may from time to time be broken, charged, altered and made a new as the corporation deems fit."**

(2) The powers of the Permanent secretary Corporation are set out in section 3 of the Act as under:

"**The corporation may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey assign, surrender and yield up, mortgage, charge, demise, reassign, transfer or otherwise dispose of or deal with, any movable and immovable property vested in the corporation upon such terms as the corporation deems fit; and in respect of or in connection with the matters aforesaid, or any of them, the corporation may do all such things and acts as bodies corporate may lawfully do."**

It is clear to the court that the of ownership of Government assets including shares is vested in the Permanent Secretary Treasury as a corporation with the power to do all such things and acts as bodies corporate may lawfully do. It is trite company law that a body corporate can buy and sell shares.

Under this provision the Corporation may if it deems it fit sell Government shares and also make commercial decisions concerning any such shares or undertakings and assets intended to be sold,

including entering into contracts for the purpose. It is absurd to suggest that public companies should be restrained from selling their shares provided the sale complies with Memorandum and Articles of Association and any other relevant provisions of the Companies Act.

The Court was informed that although Telkom Kenya owns 60% shares in Safaricom Ltd, Telkom Kenya is in turn 100% owned by the government and that the Permanent Secretary has entered into an agreement with TLK or that Government of Kenya is in the process of entering into a transfer agreement with Telkom K which owns 60% of the shares out of which the government intends to offload 25% to the Public.

The Constitution, Executive Powers and Principle of Separation of powers

The Court has found it fit to set out in extenso the following provisions **of the Constitution:**

Section 23 reads:

(1) "The executive authority of the Government of Kenya shall vest in the President and, subject to this constitution may be exercised by him either directly or through officers subordinate to him

(2) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President."

Section 30 reads:-

"**The legislative power of the Republic shall vest in the Parliament of Kenya which shall consist of the President and the National Assembly"**

Section 1 reads:-

1. Kenya is a sovereign Republic.

As regards Judicial power as first held in the case of ***VISUVALINGAM v LIYANAGE [1983] ISLR 253 Sri Lanka*** and in many decisions of the High Court judicial power, vests in the courts.

The applicant has argued that the Minister for Finance by not bringing the Privatization Act into force is violating the doctrine of separation of powers. To my mind this argument is not tenable for the following reasons:

(a) Parliament gave the Minister the discretion to determine or appoint a commencement date. Parliaments all over the World do this in situations where there are issues to be sorted out or arrangements which must be put in place in order to have an effective implementation and enforcement of the law. This is purely an executive function. This is obviously the case here and the Minister for Finance has by way of affidavit demonstrated that there are some necessary steps which must be taken before he appoints a date. What the Minister has done or is in the process of doing, cannot be said to be unreasonable and in my finding it is well within his discretion. By trying to put in place the necessary structures before commencement of the Act and at the same time going on with the privatization programme as per the 1994 policy paper he cannot be said to be legislating. Instead, he is clearly performing an executive function which is also protected by the S 23 of the constitution. Parliament can only take that discretion away by enacting another law to provide for a commencement date. Fortunately, such a process would be unnecessary in view of the Minister's assurance in Parliament that the Act would be put into operation before the end of the year. Evidence of the Minister's action in putting in place the necessary structures has been exhibited.

(b) The Kenya Constitution as per the provisions above does not provide for a rigid separation of powers unlike the United States Constitution which is perhaps the only constitution in the world which provides for what appears to be total separation of the three organs of state. The above provisions clearly

provide that the President is both the head of the Executive and a member of Parliament (the Legislature). Where Parliament has vested a discretion in the executive, it must remain there unless and until the law is changed. With respect the Minister has not therefore violated s 30 of the constitution in that he has not legislated at all.

(c) This court's fidelity is to the law as concerning the subject matter. The Privatization Act 2005 has not commenced and it is trite law its provisions cannot regulate the subject matter of the action. Were it to be in force, the Act under s 52 does take care of the past and the future in its transitional provisions. Urging its retroactive application is a serious misdirection.

Pending the coming into force of a law the Executive organ of State must continue with its executive function as per the current law. The applicable law in respect of the 25% shares in Safaricom Ltd is as under:

(i) The Constitution – the sale is being undertaken pursuant to the exercise of the Executive power

(ii) The Permanent secretary to the Treasury Incorporation Act (Cap 101) which allows the Treasury to buy and sell assets both movable and immovable on behalf of the Public. The Permanent Secretary Treasury has not been joined in these proceedings and the Public entity which owns the shares namely Telkom K Ltd has also not been joined. Cap 101 clearly provides that the Permanent Secretary is a Corporation capable of suing and being sued. The Minister is only concerned with policy and the necessary check on issues of policy is done by Parliament. Failure to join the corporation described in Cap 101 of (LOK), is in my view a fatal defect to any orders sought as regards shares. Concerning the date of commencement I have ruled that it is a matter of policy which is well within the executive powers vested in the Executive under the Constitution and the Permanent Secretary to the Treasury Incorporation Act (Cap 101). Judicial review jurisdiction recognizes the need of good public administration and is not directed at executive policy unless, it is clearly demonstrated that an Act of Parliament is being violated. It has not been shown how the respondents law violated the Act

(iii) The Companies Act

(iv) The Capital Markets Act

(v) The Procurement of Assets Disposal Act 2005.

This ruling has taken into account the following:-

(A) <u>Capital Markets Authority</u>:-

The purpose of the Act is to establish a Capital Markets authority for the purpose of promoting and facilitating development of an orderly fair and efficient capital markets in Kenya and for connected purposes.

Section 2 of the Capital Markets Authority Act defines "company" as under:

"A company formed and registered under the Companies Act"

The legitimate aim of the Act is to encourage a capital market and any company wishing to raise capital from the sale of its shares to the public is subject to the provisions of the Act. It must seek and obtain the Capital Market Authority's approval in order to do so. The Authority establishes the criteria for approval in order to ensure transparency and accountability and to protect the public against any possible abuse at the Stock Exchange.

(B) <u>Public Company</u>:-

S 30 of the Companies Act defines a

"**private company"**

as a company which by its articles –

(a) "restricts the right to transfer its shares; and

(b) limits the number of its members to fifty ...

(c) prohibits any invitation to the public to subscribe for any shares or debenture of the company."

Although the Act does not define a public company the learned author of a leading treatise on this subject ***Modern Company Law LCB Gower 2nd Edition*** provides at pg 13:-

(1) "Companies not coming within the definition set out above – ie our Companies Act s 2 are public companies."

(2) "But registered companies whether limited by guarantee private companies or public companies are all subject to the provisions of the Companies Act and to common law.

(3) The large concerns company are designed to raise capital from the public – this is one character of a public company.

From the above analysis Counsel for Safaricom Ltd is correct in describing it as a public company now interested in listing its shares in the Stock exchange. The Companies Act cap 486 does apply and is one of the laws which must regulate the affairs of Safaricom Ltd including the sale of its shares.

(C) <u>What privatization means</u>:-

Blacks Law Dictionary 8th Edition defines the word "Privatization":-

The act or process of converting a business or industry from governmental ownership or control to private enterprise"

Although Telkom Kenya Ltd owns the majority shares ie 60% Safaricom Ltd, the sale of 25% Telkom shares will not result in a conversion of the business or industry into a private enterprise – it will remain a public company not owned by an individual but will be partly owned by the public.

The intended sale is not to a favoured buyer but to the public.

Safaricom Ltd is neither a State Corporation under the State Corporations Act nor a public body. It is however a public entity for the purposes of the Public Procurement and Disposal Act 2005 only.

<u>THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2005</u>

"Public entity" means –

(a) the Government or any department of the government;

(b) the courts;

(c) the commissions established under the Constitution;

(d) a local authority under the Local Government Act;

(e) a state corporation within the meaning of the State Corporation Act;

(f) the Central Bank of Kenya established under the Central Bank of Kenya Act;

(g) a co-operative society established under the Co-operative Societies Act;

(h) a public school within the meaning of the Education Act;

(i) a public university within the meaning of the Universities Act;

(j) a college or other educational institution maintained or assisted out of public funds; or

(k) an entity prescribed as a public entity for the purpose of this paragraph;

Section 2 provides:-

2. The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –

(a) to maximize economy and efficiency;

(b) to promote competition and ensure that competitors are rated fairly;

(c) to promote the integrity and fairness of those procedures;

(d) to increase transparency and accountability in those procedures; and

(e) to increase public confidence in those procedures

(f) to facilitate the promotion of local industry and economic development.

Section 4 provides:-

4.(1) This Act applies with respect to –

(a) procurement by a public entity;

(b) contract management;

(c) supply chain management, including inventory and distribution; and

(d) disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.

Notwithstanding the above definitions Safaricon Ltd is a public entity only for the purposes of the application of the Public Procurement and Disposal Regulations 2006 – see Regulation 3(c) which reads:-

"Any body in which the Government has a controlling interest"

The definition of "assets" in Regulation 2 includes "***shares***".

It is clear to the court on the basis of the evidence before it that the issues of accountability and transparency are very well taken care of by the Procurement Act and the Regulations and in any event there is no evidence of any under-sale of the shares or any undervaluation or under-pricing of the shares. The intention is to sell them through the Stock Exchange both local and international and the entire process will be managed by experts in the relevant field. It is significant that the intended sale is not to a favoured buyer but to the public at large. Finally it has not been shown that the respondents have violated any of the existing laws on disposal of public assets as enumerated above.

The argument that the sale should have been regulated under the Privatization Act 2005 cannot be right under our laws in that, under our law an Act that has not come into operation cannot govern anything unlike the English situation where the enactment of an Act brings to an end any prerogative powers hitherto relied on. In addition Parliament is supreme in the United Kingdom. In our situation it is the Constitution which is supreme. The applicable law at any given time is what is in force or has commenced except as regards the annual taxation measures which come into force immediately before the annual Finance Acts are enacted under the Provisional Collection of Taxes Act. The Courts in Kenya must therefore ascertain what the law is concerning every subject matter using Judicature Act in this order:

(1) The Constitution

(2) Written laws

(3) Doctrines of common law and equity statutes of general application in England as at 12th August 1897 (the Reception date)

In other words the powers of government have been allocated by the Constitution to each organ as set out in the Constitutional provisions and the court decision cited earlier. Similarly checks and balances must be clearly spelt out in the law. The powers so alienated to the three organs are generally inalienable – which means one organ cannot transfer its function to another or exercise a power not allocated to it under the Constitution. The power or discretion to bring the Privatization Act into operation was delegated to the Minister by Parliament and the Minister is exercising the power as a member of the Executive.

Under our Constitution sovereignty is in the People see Section I. Sovereignty in my view includes the power of government, fundamental rights and franchise and the sovereignty of the people is exercised by the three organs in their respective spheres. The executive power vested in the President is not personal but should be seen at all times as the power of the people, the same position prevail as regards the Legislature. The checks included in the Constitution and given to the organs are aimed at achieving a fine balance as struck by the Constitution. The checks are not aimed at resolving conflicts that may arise between the custodians of power or for one to tame and vanquish the other – they are aimed at achieving a constitutional balance.

The other way of looking at it is that power that constitutes a check, attributed to one organ of Government in relation to another has to be seen at all times and exercised where necessary in trust for the people. This is so because the fundamental principle in public law is that power is held in trust for the people. Section 1 of the constitution gives the principle a firm constitutional base from a Kenyan perspective.

Thus the Courts before accepting an invitation to intervene by way of judicial review it should be informed by the important principle set out in the Administrative Law, by Wade and Forsch 8th Edition 200p 356 as follows:

"**Statutory power conferred for public purpose is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."**

The second principle to keep in focus, are the three meanings of the rule of law and the meaning I choose is that in ***DICEY IN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 1885:***

"**it means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the Government. Englishmen are ruled by law and by the law alone ---**

The third principle which the Court has considered was well set out by BHAGWATI J who later became Chief Justice of India and the Chair of the United Nations Human Rights Committee – in the Indian case of ***GUPTA v UNION OF INDIA AIR 1982 SC 149 at 197*** where the learned judge stated:

"**if there is one principle which runs through the entire fabric of the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of law and thereby making the rule of law meaningful and effective."**

It follows therefore from the above that the sovereignty of the people as set out in section 1 of the Constitution can only be exercised only in the context of the separation of powers as set out in the Constitution and this exercise must only be done by the respective organs of Government.

Turning to the facts of the case and applying the above principles the power or discretion to appoint a commencement date was vested in the Minister who is in the Executive organ and the Court is being asked to intervene because the delay from the date of assent of the Privatisation Act 2005 13th October 2005 to-date is inordinate. The decision to appoint a commencement date must in my view turn on policy considerations to be taken into account by the Minister otherwise there was no need to have provided for the operations of the Act by notice if those considerations were not envisaged by Parliament. The Minister has described the practical steps which he has put in place as per Mr Kinyua's affidavit in order to appoint a commencement date when the necessary structures are finally in place. He has not been faulted on this eg recruitment of a suitable Chief Executive Officer, the appointment and approval of a list of Directors by Parliament – all this is ongoing. My finding is that the court cannot justifiably take over the above functions including the appointment of a specific date of commencement. Indeed it would be impossible for the court to supervise the coming into place the necessary structures and it would be impracticable for the court to appoint a date because it is trite law that a court of law never acts in vain and it should avoid situations where it cannot effectively supervise the implementation of its orders. Policy considerations which impact on the appointment of a commencement date is a function conferred on the Executive by both the Constitution generally and also as empowered by section 1 of the Privatization Act ie the Minister to appoint a commencement date by notice in the Gazette. The courts cannot in my view allocate to themselves executive powers because this would be plainly unconstitutional to assume jurisdiction in such matters. Heavens would fall if a Permanent Secretary were to purport to exercise judicial power to adjudicate cases! Even in the exercise of the court's jurisdiction it is extremely important to always maintain and encourage the principle of institutional deference which is aimed at maintaining the constitutional balance of power and harmony. Constitutional power is not under the Constitution alienable to any other organ of government under the Constitution and granted that our Constitution has no rigid separation the separation between the Judiciary and the other two namely the Legislature and the Executive is total. As between the Legislature and the Executive there is an overlap in that Ministers are also legislators and Legislators are also in the Executive. All the same on the ground Ministers are answerable to Parliament on policy matters hence this Minister's assurance to Parliament that he will appoint a commencement date by December. The checks of the executive by the Legislature and the Judiciary are aimed at ensuring that there is a responsible Government at any given time. Unlike the English who do not have a written constitution in Kenya the courts first duty in every situation is to check if the exercise of power is in accordance with the Constitution. Appointing a date of commencement is a matter of policy and it would be usurpation of constitutional power vested in the Executive for the court to purport to exercise the power under the guise of judicial review. In Kenya the only recognized Constitutional review is the supervisory jurisdiction over subordinate courts in civil and criminal matters under s 65 of the Constitution.

I must however point out that it is the role of the court to keep every organ of the state within the limits of law. Under the Constitution the courts weapons to do so are clearly defined in s 123(8), s 1 and s 1A pf the constitution. The courts have the power under the sections to make sure that all the organs of State respect the principles of transparency and accountability. In respect of the intended sale in Safaricom Ltd Government intentions are apparent from the expression of Interest exhibited by the applicant and the Government of Kenya considers itself bound by:

(1) The Procurement Act 2005

(2) The Capital Markets Authorities Act

(3) The Companies Act

(4) Policy Paper on Public Enterprises the Reform and Privatisation – October 1994.

In addition this being a sale of shares in a public company all the necessary services will be undertaken by professional experts in this field. A due diligence on Safaricom is likely to be undertaken if not done already to ensure that the shares in question fetch the best price attainable in the market. The applicants have not alleged any intended under-sale of the shares. There is also an additional safeguard. This being a public issue the market forces are likely to reign supreme on the issue of what a fair price is.

The Executive and its powers

Under our Constitution as indicated elsewhere the executive powers are vested in the President. The Executive is the organ of government responsible for effecting and enforcing laws. As the Blacks Law Dictionary states the executive branch is sometime said to be the residue of all Government after subtracting the judicial and legislative branches.

Although the Constitution does not define what executive powers is, it is generally accepted that it is the power to see that the laws are fully executed and enforced. But it does also include the formulation of policy and its executiion. If there is any similarity between our Constitution and the United states Constitution it is the vesting of Executive power in the President. The President may as in the case of the American President issue an executive order to Government officials and parastatal heads. The order is intended to direct or instruct their actions or to set policies for the executive branch to follow. The President may exercise the power directly or through his Ministers and other officials.

Under the doctrine of separation of powers the courts are prohibited by the constitution from encroaching on the exercise of the power except where it is being exercised unconstitutionally.

It is therefore clear even from the definition of executive power why the court cannot intervene with the Executive, handling of the two major issues raised in this matter namely the intended sale of shares and the discretion concerning the appointment of the commencement date for the Privatization Act 2005.

Caselaw

(1) The applicants have cited the case of ***R v Somerset County Council ex-parte Fewings*** and others 1995 ALL ERL 513 QBD at 524 to the effect that a public body has no fettered discretion and that the principle which applies to a public body as opposed to an individual who has unfettered discretion subject to his not breaking the law – a public body has no heritage of rights and any action to be taken by it must be justified by positive law.

(i) I have applied this principle in my two recent decisions with a different set of facts. My finding is that this principle cannot apply to the Minister because the discretion conferred on the Minister is specific and made deliberately by Parliament to enable him to put in place the structures required under the Act. He had to seek approval from third parties including Parliament for example concerning the list of Directors of the proposed Privatization Commission and he has had to use a private recruiting agent for recruitment of its Chief Executive Officer. He has already reported to Parliament. Although his discretion is not necessarily unfettered a court of law cannot involve itself with issues such as third parties consultations and the giving of time limits on them and what is to be done. A court of law cannot give orders whose implementation it has no capacity to supervise. The core business of courts is adjudication. The second reason why the principle does not apply to the facts in the case is that the Minister is in taking his time is acting pursuant to a positive law though not in force – namely s 2 of the Privatization Act.

(ii) The Statutory Interpretation Fourth Edition – FAR Bennion – as highlighted acknowledges that one of the reasons for the postponement of an Act is to enable officials to prepare for the work entailed in

administering the Act.

While the commentary indicates, that a postponement of two to three months these are Departmental Instructions by the Management and Personnel office in England and have no backing of the law.

The same commentary cites the official doctrine concerning commencement of statutes as follows:

"**If the Act states that it shall come into force on a date to be fixed by order made by the Minister, and provides no more than that, it is within the discretion of the Minister as to when he brings the Act into force. Parliament may of course bring pressure to bear on him and require him to justify any inactivity. But short of another Act, there is no way in which the Minister can be compelled by Parliament to bring that Act into operation.**

The commentary adds:

"**This statement must be literally true but it overlooks the possibility that there might be another remedy namely an application to the High Court for judicial review."**

The important point which is repeated in our s 58 of Interpretation and General provisions Act is that whether the Act uses the mandatory word "shall" or "may" the duty must be performed within a reasonable time and that there is no reason in principle why a matter of public law should be treated as withheld from the supervisory jurisdiction of the High Court. Thus in the case of ***R v Secretary of State for Home Department ex-parte Fire Brigade Union 1995 1 ALL ER 888*** judicial review jurisdiction was invoked by the House of Lords where instead of bringing into force the Criminal Justice Act 1988 s 108 to 117 and subsection 6 and 7 (repealed) which provided for compensation for crime victims the Home Secretary introduced a non statutory scheme made under the royal prerogative and intended to be permanent. He produced a White paper which clearly stated that the statutory provisions "will not now be implemented." It was held that the Home Secretary's actions were unlawful. He had a duty to keep under consideration from time to time the question whether or not the situation had arrived when it was appropriate to bring the statutory provisions into force, so he could not lawfully decide that they would never be implemented .

Although the applicants have relied on the case to seek a judicial review order the facts in the current case are different. Firstly, in the English case the Home Secretary had categorically refused to bring the provisions into force and never intended to do so and went on to produce a white paper containing the unlawful refusal. In our situation the Minister has not expressed any such intention instead he has shown that he has set in motion measures to administer the Act as per the statutory discretion conferred on him by Parliament.

I find that a mandamus would not lie in the circumstances and the court cannot purport to direct the Minister what to do and when. The other important point of departure from the English is that executive power in the case of Kenya is vested in the Executive under the Constitution and such an intervention would be plainly unconstitutional as violating the principle of separation of powers. The English do not have a written constitution and it is not right for our courts to blindly apply English decisions hook, line and sinker. When an Act is enacted under the English system it automatically replaces prerogative power previously in existence on the point. In our case as was held by a Constitutional court in the DEEPAK KAMANI CASE, the coming into force of the Constitution put an end the English Prerogative.

Finally the other dispute is that the Minister in putting in place a Privatization Steering Committee to steer what is being objected to is acting pursuant to positive laws namely the Procurement. and Disposal of Assets Act, the Permanent Secretary to the Treasury Incorporation Act, the Capital Authority Act and the Companies Act.

In the case of ***R v Director of Public Prosecutions ex-parte Kebeline*** (1999) 4 ALL ER 801 (HLI). It was held that a provision in a statute cannot be made operational by applying the doctrine of legitimate expectation when the provision is yet to come into force on a notification issued by the executive

Government.

I therefore find that the applicants have no basis of a legitimate expectation even on their own authorities. An attack on the Ministers decision to implement the Privatization Act is clearly directed at the merit of his decision.

The answer to this is a clear "NO" see Halsbury's Laws of England 4th Edition Vol (1)(1) para 60:

"**Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself. It is different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he is subjected. It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power."**

In the context of Kenya where we have a Constitution the transfer of power from one Organ of State to another is not permitted. Constitutional power is inalienable. Yes the Judiciary must hold the Executive accountable under the Rule of law and also ensure (on peoples behalf) that Government takes place on a constitutional basis and under the law. Policies of the Executive must be both made and implemented within the parameters prescribed by the Constitution and by other laws. This statement of the general principle in the LUSAKA STATEMENT Journal of African Law No.138 No.2 1994 pg 201-203 as contended by the applicant is correct but there is no proof of a constitutional contravention in the allegation or a violation of any law both as regards the Minister" discretion and the sale of shares both of which are being implemented under the existing laws. Under s 3 of the Constitution it is not only the laws which are inconsistent with the Constitution which are void, but all actions and practices which violate the Constitution.

The case of ***INS v CHADHA 462 US 919 (1983)*** would be relevant in this case if the applicants had demonstrated that the Minister was acting contrary to an existing and enforceable law. The exercise of his discretion is not inconsistent with any law to warrant an intervention by the court.

In taking steps to have the shares sold the Government has adhered to the existing and applicable law and procedures and therefore the ***CLINTON, PRESIDENT OF THE UNITED STATES ET AL v CITY OF NEW YORK*** (1998) a case which held that the power to enact statutes may only be exercised in accord with a single finely wrought and exhaustively considered procedure has not been violated. The Privatization Act has been enacted in terms of section 30 of the Constitution and the Minister has not legislated at all.

The eloquent holding in the American case of Youngstown & Company v Sawyer 343 US 579 is good law in principle but there is no contravention in the case before the court. The holding states:-

"**With all its defects, delays and inconveniences, men have discovered no technique for long preserving free Government except that the Executive be under the law and that the law be made by Parliamentary deliberations. Such institutions may be destined to pass away. But it's the duty of the court to be last not first to give them up."**

There is plainly no proof that the Executive has acted outside the law or that it has exercised authority without law in the circumstances. Again – the United States Constitution contains no sharing of power but in our situation, the Legislature does authorize the Executive to make subsidiary legislation and Parliament may permit the vesting of Executive power on other persons apart from the President. Concerning arguments on the existence or non existence of a decision capable of being quashed, it is common ground that the Government of Kenya wants to sell the shares and this is supported by a Policy paper exhibited. It has been shown that a decision to sell shares has been made by Government of Kenya. However the shares are in the name of TKL who have not been made parties. There is no

decision before the court from TKL. Similarly there is no decision by the Minister – refusing to bring the Act into operation. Judicial orders cannot issue for the above reasons.

Again the analysis of the case-law cited or relied on does not even on a prima facie basis constitute an arguable case.

CONCLUSION

By allowing the participation of the public in the largest IPO the country will possibly have for a long time, the government has not only discharged its constitutional mandate under s 1 of the Constitution by virtue of which it holds power in trust for the people, but it is also the most eloquent and practical manifestation of the sovereignty of the people. In a constitutional Government such as ours, power must be held in trust for the people and must be exercised to manifest their sovereignty. In the ***REFERANDUM*** case this court declined to restrain the exercise of that sovereignty of the people – their Constituent power. In this case it must similarly decline to restrain the participation of the people in the largest public offer. Thus, participation is an assertion by the people of that sovereignty.

The claim before me is patently incompetent. It is grounded on misdirection in many ways. It has no legs and it cannot lift itself from this threshold stage and crawl to the next stage for the above reasons. Leave and stay should not be given where the proper parties are not before the court and where serious misdirections on the applicable law are apparent in the face of the pleadings.

Finally the doctrine of separation of powers enshrined in our constitution must be taken to be a dynamic principle to serve the people. It is no doubt a valuable principle which has stood the test of time. At this time and age it must be given contemporary meaning by the courts in order to serve the ever changing needs of our society and in order for it to ensure the existence of a responsible government at any given time. It need not tie us to the ghosts of the past. We must breathe into it a new spirit. A new spirit inspired by the need to execute the constitutional power vested in us in trust for the people. Our Constitution has in it, the Lancaster House spirit of the framers but we must free ourselves from any past fetters under the guise of the spirit of its framers which sometimes demands of us to do nothing. Instead we should embrace some of the Canadian jurists who have criticized the American jurists' total loyalty to the spirit of the framers. They have quite rightly in my view called the American practice "ancestral worship". We cannot afford to worship the past. We have the present to manage. We have a responsibility to develop a jurisprudence that liberates our people.

We should interpret our Constitution in a manner that gives our people the benefit of their sovereignty. They make Constitutions and it is this act of the people which makes our Constitution supreme. The best interpretation is what gives the people the fullest expression of that sovereignty – the return to them by the Government of their "silver" being the transfer of shares in the most profitable public company in which the Government had invested which was all the time held in trust for them.

I decline to grant leave and an order of stay.

The application dated 25th September, 2007 is dismissed with costs to the Respondents and the Interested Party.

DATED and delivered at Nairobi this 3rd day of October 2007.

J.G. NYAMU

JUDGE

Advocates

Mr Orengo/Aulo for the applicant

Miss Kimani/Ombayo, Mr Cherogony' for the respondents

Prof Githu Muigai/Monari for the IP – Safaricom Ltd