Mweresa & 3 others v Social Health Authority & another; Law Society Of Kenya & 3 others (Interested Parties) (Petition E524 of 2024) [2025] KEHC 8365 (KLR) (Constitutional and Human Rights) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E524 OF 2024

EC MWITA, J

JUNE 13, 2025

BETWEEN

DR CLARENCE EBOSO MWERESA ..... 1ST PETITIONER

DR DARWIN AMBUKA ..... 2ND PETITIONER

DR CHERONO SIELE ..... 3RD PETITIONER

DR BOSIBORI ONDARI ..... 4TH PETITIONER

AND

SOCIAL HEALTH AUTHORITY ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY

THE MINISTRY OF HEALTH ..... INTERESTED PARTY

NATIONAL HEALTH INSURANCE FUND ..... INTERESTED PARTY

FEDERATION OF KENYA EMPLOYERS ..... INTERESTED PARTY

JUDGMENT

Background

1. In October 2023, the National Assembly enacted the Social Health *Insurance Act* (SHIA) which established the Social Health Insurance Fund (SHIF) as one of the three funds to be managed by the Social Health Authority (SHA).

2. The SHIA made it mandatory for every Kenyan citizen to register as a contributor to SHIF. The Act mandated the Cabinet Secretary for Health in consultation with SHA to formulate regulations to determine the rate of contribution to the Fund and the tariffs and benefits to be enjoyed by contributors under the basic care package. The Cabinet Secretary gazetted regulations containing tariffs. The regulations provide, among others, a monthly contribution of 2.75% of every employee's gross salary and 2.75% of unemployed person's household income as determined by a means testing tool.

3. The Cabinet Secretary further designated 1st October 2024 as the date for rolling out SHIF with commencement of the process of registering contributors. As part of the transition, employers were directed to enrol their employees onto SHIF and were to begin deducting and forwarding employees' monthly contributions.

4. The Federation of Kenya Employers (the 4th interested party) directed its members to transfer employees' personal information and effect monthly deductions. Some employers gave notices to their employees requiring them to register with SHIF as a pre-condition to processing and receiving their salaries. The Ministry of Health also directed NHIF to automatically transfer its members' personal data to SHIF.

5. In the meantime, the Cabinet Secretary for Health designated 23rd November 2024 as the date when the SHIF would become effective and NHIF was to be wound up. The NHIF Act was to stand repealed on 22nd November 2024. These developments prompted the petitioners to file this petition challenging the respondents and some of the interested parties' actions

Petitioners' case

6. The petitioners who described themselves as voluntary members of NHIF, filed this petition as public interest litigants for enforcement of rights and fundamental freedoms. The petition is supported by an affidavit and supplementary affidavit. The petitioners asserted that their rights to privacy, freedom from discrimination and equal protection of the law were being violated or threatened with violation. They brought this petition not only on their own behalf and that of other members of the now defunct NHIF, but also persons who work and earn income.

7. The petitioners raised issues which they felt aggrieved them, namely; the relationship between the government's power to tax and the fundamental right to property under Article 40 of *the Constitution*; the extent of the state's power to acquire an interest in private property under Article 40; the limits on transfer of personal data between statutory agencies without the consent of the data subject (owner of the data) under the Data Protection Act; employers' obligation to protect an employee's personal data under the Data Protection Act and employers' obligation to deduct employees' contribution under SHIA and whether any deductions under the Act may be made without the employee registering with SHIF.

8. The petitioners took issue with sections 26(1) and 27(2) of SHIA which they argued, require every Kenyan to register with SHIF and every Kenyan household on registering, would be liable to contribute to the Fund. The petitioners further made reference to section 26(5) which provides that "Any person who is registrable as a member under this Act shall produce proof of compliance with the provisions of this Act on registration and contribution as a precondition of dealing with or accessing public services from a national or county government entities."

9. The petitioners contended that to the extent that the Act would be construed as creating mandatory obligation for all Kenyans to be registered and to be contributors, such construction violates an individual's rights and fundamental freedoms.

10. According to the petitioners, while the Act requires employers to deduct a percentage from the employees' monthly gross salary as contribution, those not in formal employment to make contribution of similar percentage from annual household income determined through a means testing tool, amounts to differential treatment. The Act further confers powers on the Cabinet Secretary for Health in consultation with SHA, to make regulations to determine the rate of contribution and benefits to be drawn from such contributions, the regulations which provide for contributions of 2.75% of every employee' gross monthly income, and 2.75% of every unemployed person's household income as determined by a means testing tool defined by the regulations affect rights of contributors.

11. The petitioners asserted that to the extent that the determination of the contribution under the Act and regulations is based on different parameters for those in employment and the unemployed persons' incomes, this is discriminatory and a violation of the right to equality before the law. This is so, because the regulations again provide for tariffs where the benefits for those contributing the most to SHIF would not match the market value of their contributions, yet the same regulations provide that all persons are entitled to the same essential healthcare services and packages despite the difference in the contribution between the those in employment and those not in employment.

12. The petitioners averred that the mandatory nature of the Fund and contributions that do not translate into equivalent and just value for the contributions violate the contributors' right to property guaranteed under Article 40 of *the Constitution*.

13. It is the petitioners' case, that while the objectives of SHIA are intended to fulfil the state's obligation to guarantee socio economic rights under Article 43 of *the Constitution* to cushion the poor using the contributions made, this duty cannot be collectively transferred to other members of the society in their individual capacity. This is because Article 43 envisages that the obligation would be met fro taxes raised by the state and not by compelling other citizens to take up the state's responsibility.

14. The petitioners asserted that under Article 209 of *the Constitution*, the state is only allowed to collect revenue through taxation and other specific charges for services offered. In that respect, the taxation is only administered through tax laws namely; the Tax Procedure Act, the *Income Tax Act*, the VAT Act, *Excise Duty Act*, *Miscellaneous Fees and Levies Act* and Regulations made under the tax laws.

15. The petitioners took the view, that upon payment of taxes under the tax law regimes; the money left constitutes a person's private property which is protected under article 40 of *the Constitution*. Any other form of revenue collected from citizens can only be levies or charges for the actual services consumed individually by citizen and should be payment for the valuable service rendered. The petitioners asserted that under articles 40 and 209, there can be no lawful regime that compels a citizen to apply his money in a manner that the citizen does not obtain commensurate service for the money paid. The petitioners maintained *the Constitution* does not contemplate a situation where private property can be used to guarantee public goods without valuable consideration.

16. The petitioners maintained that the directive by the Cabinet Secretary that employers deduct and pay employees' contributions to SHIF without employees having registered with the Fund is unlawful and contradicted the Act and the regulations as there is no requirement for automatic deduction of contributions by employers without the employee first registering with the Fund.

17. The petitioners also took issue with the Ministry's directive that NHIF transfers all its members' personal data to the SHIF. They asserted that the automatic transfer of personal data as if members had registered with SHIF, violates the provisions in SHIA and the regulations; the Data Protection Act; the right to privacy and the international principles on data privacy.

18. According to the petitioners, sections 25 and 26 of the Data protection Act provides for the principles of data protection and rights of a data subject, including the right to object to the processing of any data, while section 32 of the same Act provides for conditions for consent. The petitioners asserted, therefore, that any processing of personal data received from NHIF without consent of the data subject is unlawful.

19. The petitioners were of the view, that by implementing SHIF through mandatory registration; imposing a fixed percentage rate of contribution from an employees' gross income and in providing for unequitable payments to the Fund, the Ministry constructively converted the contribution into an income tax and Parliament unlawfully delegating the power to tax to the Cabinet Secretary. According to the petitioners, the directive by the Cabinet Secretary to employers to enrol employees with SHIF and deduct contributions from their salaries was done in disregard of section 27 of SHA which requires that employees voluntarily register before making contributions under the Act.

20. Responding to the contention that the petition is both res judicata and sub judice, the petitioners argued in the negative. They took the position that the cases relied on related to the formulation of the regulations while this petition is on the implementation of the regulations. Parties in the petitions are also different. In the petitioners' view, the primary concern in the decision in Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties) (supra) (the Aura Case) was not the mandatory nature of registration, but the potential discrimination of persons who fail to register.

21. According to the petitioners, regulation 5 of the Social Health Insurance (Amendment) Regulations, 2024 was an afterthought and an overreach. It was introduced after Kenyans raised concerns over SHIF and purports to grant the executive power to handle data and limit the right to privacy outside the provisions of SHA.

22. The petitioners maintained that the replying affidavit did not disclose the specific interest to the data subject, or the specific public interest or legal obligation that justified the processing of personal data without consent. In any case, they argued, Kenyans only received message from SHA purporting to have transferred their personal data from NHIF.

23. Flowing from the above concerns, the petitioners sought the following relief:

    SUBPARA i.

    Spent

    ii. Spent

    iii. Spent

    iv. Spent

    v. Spent

    vi. Spent

    vii. Spent

viii. That upon hearing of the petition, the court find and a declaration be issued that the registration to the Social Health Insurance Fund is not mandatory.

ix. That upon hearing of the petition, the court find and a declaration be issued that to the extent that the Social Health *Insurance Act* prescribes a contribution of a percentage of gross salary from salaried persons, and a percentage of income as defined by a means testing tool for other unemployed but income earning persons is unlawfully discriminatory.

x. That upon hearing of the petition, the court find and a declaration be issued that to the extent that the regulations prescribe a mandatory post-tax contribution of a percentage of a person's income to the fund is unconstitutional for violating the person's right to property.

xi. That upon hearing of the petition, the court find and a declaration be issued that to the extent that the regulations prescribe a mandatory contribution of a person's post-tax income to the fund in the public interest without a just equitable benefit of valuable consideration is unconstitutional for unlawfully infringing the person's rights under article 40.

xii. That upon hearing of the petition, the court find, and a declaration be issued that the income of any person after payment of income tax under the *Income Tax Act* is absolutely the person's private property and is protected under the constitutional right to property.

xiii. That costs of this petition be provided for.

Respondents and 2nd and 3rd interested parties' case

24. The respondents and the 2nd and 3rd interested parties, (herein respondents, for ease of reference), opposed the petition through grounds of opposition and a replying affidavit sworn by Elijah Gichanga Wachira (Mr. Wachira).

Grounds of opposition

25. In the grounds of opposition, the respondents contended that the petition is both res judicata and sub judice as the issues and prayers sought are pending determination in Civil Appeal No. E565 of 2024- Cabinet Secretary, Ministry of Health v Joseph Enock Aura & 13 others. The petition is also intended to defeat the orders issued by the Court of Appeal.

26. The respondents stated that this court cannot determine the nature and amount of contribution because the implementation of the provisions of the Social Health Insurance (General) Regulations, 2024 (*Legal Notice No. 49 of 2024*) is directly in issue in High Court Petition E513 of 2024 (Okiya Omtatah v The Hon. Attorney General and others).

27. The respondents asserted that the petition is premature and offends the doctrines of separation of powers and exhaustion. According to the respondents, the petitioners ought to have raised their concerns with Parliament pursuant to articles 94(6), 118 and 119 of *the Constitution* as read with Part IV of the *Statutory Instruments Act*.

28. It was the respondents' position that the petition invites this court to interfere with the principles in article 20(5)(c) of *the Constitution*; the government's obligation under article 43 of *the Constitution* and policy decisions. The respondents maintained that public interest lies in upholding the presumption that all laws enacted by Parliament are constitutional.

29. It is the respondents' further position that this court lacks jurisdiction to determine the mandatory nature of contributions and the rate of contributions because the petitioners are barred by the

doctrines of res judicata and sub judice owing to Civil Appeal No. E565 of 2024- Cabinet Secretary, Ministry of Health v Joseph Enock Aura & 13 others pending before the Court of Appeal. The issues further relate to policy decisions of the executive and legislature and resonate with the provisions of article 24 of *the Constitution*.

Replying affidavit

30. The respondents asserted through the replying affidavit, that SHA was enacted to fulfill article 43 of *the Constitution* and ensure the realization of the Universal Health Coverage through the establishment of the three Funds, namely: the Primary Healthcare, SHIF and Emergency, chronic and Critical illness Fund.

31. Pursuant to the transitional clauses, the petitioners stated, all NHIF obligations and assets moved to SHA as provided for in SHIA. The effect of paragraphs 2 and 3 of the First Schedule to the Act was to assets, rights, duties and powers in NHIF in SHA, including the databases.

32. The respondents maintained that in line with articles 21(1) and (2) and 43(1) (a) of *the Constitution*, the Authority has upheld the constitutional rights to health through its efforts to operationalize SHIA through the development of a benefit package for each of the Funds and tariffs for each of the benefits that will accrue to members of the Authority.

33. According the respondents, SHIA established the Primary Healthcare Fund to purchase primary health services from health facilities; the SHIF and the Emergency, Chronic and Critical Illness Fund to defray costs of management of chronic illness after depletion of the social health insurance cover and to cover the cost of emergency treatment. The three Funds are managed by SHA.

34. The respondents contended that in order to ensure that beneficiaries continued to access healthcare services, the Cabinet Secretary prescribed an essential health care benefits package that would be accessed by every registered member as provided in section 31(1) of SHIA which was done on 8th March 2024 through The Social Health Insurance Regulations 2024 (Legal Notice No 49).

35. In addition to the benefits, the respondents stated, the Authority also published Tariffs vide Legal Notice No. 146 published on 20th September 2024. In order to access the prescribed benefits, beneficiaries have to be registered members of SHIF as required by section 26 of SHIA. In that respect, therefore, SHIA provides for a reliable, predictable and essential benefit package that addresses the needs of the people of Kenya. There is assurance of contributions for households with low-income levels (or no income) by the state; all Kenyans are guaranteed an optimal health package with a similar and standard level of care and the SHIF benefit package is expanded and has additional benefits compared to the benefit packages that were offered by NHIF.

36. The respondents contended that during registration, a person is required to provide all particulars requested by the Authority, including documentary proof of identification and fingerprints or other biometric data in line with Regulation 66 of the Social Health Insurance Regulations 2024. The data provided is used by the Authority for the provision of healthcare services to members and to administer the healthcare services within the limits provided in the benefits package applicable to each member.

37. The respondents maintained that access to these benefits was to commence on 1st October 2024 in line with regulation 11(1) of the Social Health Regulations 2024 that were amended by Social Health Insurance (Amendment) Regulations 2024. To ensure timely and seamless access to benefits by beneficiaries, the Authority transitioned NHIF members to SHIF upon verification of their data by the Authority using existing relevant government databases.

38. The respondents asserted that before the transition, the Authority through the Social Health Insurance (Amendment) Regulations 2024, informed the public of its intention to transition all NHIF members to SHIF through Legal Notice No. 147 published on 20th September 2024. In the view of the respondents, sections 28(2) and 30(1) of the Data Protection Act provide for incidences when automatic transfer of data can be done, as was the case here.

39. The respondents further asserted that pursuant to regulation 68(1) (c) of the Social Health Insurance Regulations, 2024, members of the Authority can access their data that was transitioned upon request and can amend any misleading information or object to the sharing of all or part of their personal data without their consent. No objection was received objecting to the automatic transfer of data. According to the respondents, contributions to the Fund will enable the Authority acquire benefits from health care providers under SHIF. This can only be achieved through members' monthly contributions and annual contributions from self-employed persons.

40. The respondents maintained that the 2.75 % contribution from both the employees and the self-employed is not discriminatory. Contributions made under the SHIA is not also a tax. It was the respondents' position with regard to compulsory contributions, that the Court held in the Aura case that the requirement met the test in article 24 of *the Constitution*.

Submissions

41. This petition was disposed of through written submissions with oral highlights.

Petitioners' submissions

42. The petitioners argued, highlighting their written submissions, that the petition is neither res judicata nor sub judice since the subject matters in the petition are different from the previous petition. They argued that the subject matter in petition E513 of 2024- Okiya Omtata v Attorney General & Others, is unknown to them while Civil Appeal E565 of 2024 which is an appeal from High Court Petition E 473 of 2023, the petition related to the validity of the Digital *Health Act*, The Social Health *Insurance Act* and the Primary Health Care Act.

43. The petitioners submitted that this petition impugns the respondents' interpretation and implementation of SHIA, the overreach of the regulations which goes beyond the scope of the Act, and the state's authority to alienate individuals' post tax income without equitable value. The regulations had also not been promulgated when the previous petition was determined. The petitioners relied on the decision in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) and Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) on res judicata.

44. The petitioners further relied on sections 26, 27 and 50 of SHIA to argue that the Act does not provide for automatic transfer of data or automatic registration of persons by SHIF. The petitioners argued that mandatory registration and contribution provided for under sections 26(5) and 27(4) of SHIA would offend the law on non-discrimination, if registration and contribution were made mandatory for all persons, yet the services would only be available to those who had contributed. They further argued that the Act ought not be construed as compelling any person to only obtain healthcare services through the SHIF because section 34 of the Act gives the leeway to healthcare provider the option to either be contracted or decline to be contracted with the Fund.

45. The petitioners took the view, that construing registration with the Authority as mandatory as the respondents have, violates the *Competition Act* and turns the Authority into a monopoly in healthcare.

They relied on Article 260 of *the Constitution* to argue that a laborer's salary and a person's income is personal property.

46. The petitioners asserted that post taxation, the state has no right outside of the provisions of Article 40 to determine how a person will lawfully apply his property or interest in the property. The petitioners therefore took issue with the 2.75% contribution from a person's gross monthly income and argued that the import is that higher income earners would contribute more than lower earners yet the benefits would be the same, a phenomenon that should not be allowed.

47. The petitioners submitted that in prescribing a fixed rate of contribution is not justifiable and rational. Making contribution mandatory for all-natural persons with an income and further making the contribution unequitable, the Cabinet Secretary unlawfully abrogated to himself taxation powers and purported to make contribution an income tax.

48. The petitioners took the position that the regulations made pursuant to section 27 on contributions by salaried and non-salaried persons are discriminatory and put those in formal employment at a disadvantage because their gross income includes income that must be used to meet other obligations before the surplus can be used for household needs. On the other hand, estimates from the means testing instruments make use of household items which is the net income after a person has spent on other obligations/necessities.

49. The petitioners again argued that the benefits outlined in the regulations and deemed as Tariffs are inequitable, unjust and disproportionate to the contributions collected. Although the tariffs are the purported benefits a household will receive upon contributing to the Fund, the contributions are to be received for each member of a household who is over 18, regardless of whether or not they earn income thus, limiting the right to health.

50. On data protection, the petitioners reiterated that public interest requires that processing of personal data conform with article 24 of *the Constitution* and the law. They relied on the decision in Kenya Anti-Corruption Commission v Deepak Chamanlal Kamari & 4 others [2014] eKLR.

51. It was the petitioners' position, that the Data Protection Act does not transfer any duty to the data subject to object to data processing. They reiterated that they were notified of data transfer through SMS that had no return address. It was the petitioners' further position, that the 1st respondent contravened article 31 (c) of *the Constitution* as SHIA expressly delineated that registration to the Fund is through a prescribed form yet information regarding families, beneficiaries, list of ailments, personal and private affairs and much more had been transferred from NHIF without express consent.

52. The petitioners maintained that reliance on amended regulations allowing transfer of data was fatal in law since the regulations could not go beyond the scope of the primary legislation. They urged the court to allow the petition.

Respondents' submissions

53. The respondents argued that that the public notice issued to employers was lawful. They urged the court to take cognizance of the fact that the roll out of the three Health Laws; the Primary Health Care Act; the Digital *Health Act* and SHIA have been in force since 1st October 2024.

54. According to the respondents, operationalization of the three Acts has faced legal challenges. The High Court declared the Acts unconstitutional. That decision was challenged in the civil appeal (Civil Appeal No. E565 of 2024-Cabinet Secretary, Ministry of Health v Joseph Enock Aura &others), which is pending. The Court of Appeal stayed execution of the judgment of the High Court, effectively permitting the roll out of the Fund from 1st October 2024. According to the respondents, the

communication was not meant to create a directive beyond that contemplated by the law, but was to aid a smooth roll out of SHIF.

55. The respondents argued that the transfer of data from the defunct NHIF to SHIF did not violate the provisions in SHIA. The communication on the transfer of the data was based on sections 26 and 50 of the Act and Regulation 5 of the Social Health Insurance (Amendment) Regulations, 2024 as read with paragraph 3 of the First Schedule to the SHIA.

56. The respondents urged the court to note that the petitioners had not challenged the constitutionality of regulation 5 of Social Health Insurance (Amendment) Regulations, 2024 which is in accord with Paragraph 3 of the First Schedule to the Act. According to the respondents, since the basis of the petition was the alleged forced or automatic transfer of data without legal basis or enabling legislation, the petitioners are bound by their pleadings and cannot raise an issue regarding the scope of section 50 of SHIA. They relied on the decision in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR.

57. The respondents maintained that section 50 (1) of SHIA empowers the Cabinet Secretary to make regulations for the better carrying out of the provisions of the Act. Clause 2 (g) enables the Cabinet Secretary to prescribe such regulations on anything which is required for the better giving effect to the provisions of the Act. Further, that at the time of data transfer, the amendment was deemed constitutional.

58. It was the respondents' position that the right guaranteed under article 31 of *the Constitution* is not absolute and can be limited within the purview of article 24 of *the Constitution*. In that regard, they argued, sections 28(2) and 30 of the Data Protection Act provide for circumstances under which the right to data can be limited. The respondents relied on the decisions in Justice K.S. Puttaswamy (Retd) v Union of India AIR 2018 SC (SUPP) 1841; O' Hartigan v Department of Personnel 118 Wn. 2d 111 (1991) and Ministry v Interim National Medical and Dental Council and Others (1998) (4) SA 1127 (CC), to submit that the transfer of data was informed by law and was necessary as a transition mechanism to ensure seamless access by beneficiaries to benefits under the Fund, hence was lawful.

59. The respondents asserted that section 47(4) of the Social Health *Insurance Act* and sections 3 and 4 of the Digital *Health Act* provide for additional safeguard to private information in the custody of the Authority (SHA). Furthermore, the transfer was done in line with section 25(f) of the Data Protection Act and Regulation 5 of the Social Health Insurance (Amendment) Regulations 2024. The data subject was given an opportunity to update relevant personal data.

60. The respondents argued that having previously consented under the defunct NHIF Act and the purpose for which consent was obtained remained the same, it was not necessary to obtain additional consent in light of regulation 5 of the Social Health Insurance (Amendment) Regulations, 2024 and paragraph 3 of the First Schedule to SHIA. No complaint was received from any data subject regarding alleged breach of right to privacy by virtue of the transfer.

61. The respondents asserted that allegations that construction of registration and contribution to the Fund as being mandatory offends *the Constitution*, and that the mandatory contribution of 2.75 % pegged on gross income amounts to converting the contribution to an income tax; are barred by the doctrine of res judicata and sub judice, as the issue was determined in the Aura case. The issue is also pending in the civil appeal (No. E565 of 2024-Cabinet Secretary, Ministry of Health v Joseph Enock Aura & others) making the issue not only res judicate but also sub judice. Reliance was placed on the decisions in Kenya Hotel Properties Limited v Attorney General & 5 others [2022] KESC 62 (KLR) and Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested parties) [2023] KEHC 19534(KLR).

62. The respondents reiterated their position that contribution of 2.75% is not a taxation contemplated under article 209 of *the Constitution*. By dint of section 3 of SHIA, it is not meant to raise public revenue but to support individual household healthcare and enhance the pooling of resources and risks based on the principles of solidarity and equality.

63. On the alleged discrimination, the respondents submitted that the correct legal position under sections 27 of SHIA, is household whose income is derived from salaries for those employed; household whose income is not derived from employment salary and households in need of financial assistance as determined by the means testing instrument thus, there is no discrimination. The respondents relied on the decision in John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR to contend that the law recognizes differential treatment to different categories of persons if the circumstances so dictate. In this case, the only differentiation is on the means of identifying income and excusing those who cannot afford, which does not amount to discrimination. According to respondents, the scheme of section 27 of SHIA is to bring everybody on board.

64. Regarding the contention that pegging contribution at a flat rate of 2.75 % means higher earners will contribute more than low-income earners yet they all get the same benefit, the respondents argued that the issue is res judicata and sub judice following the decision in the Aura case. The issue is also addressed by section 3 of SHIA.

65. Section 3 provides for the objects of the Act, being; to provide a framework for improved health outcomes and financial protection in line with the right to health and universal health coverage; realign healthcare systems, processes and programs for responsiveness, reliability and sustainability of healthcare in Kenya; enhance the pooling of resources and risks based on the principle of solidarity equity and efficiency so as to guarantee access to health care services and promote strategic purchasing of healthcare services.

66. The petitioners contended that the issue regarding section 34 on empaneling and contracting healthcare facilities was not raised in the petition. Counsel however submitted that limiting provision of essential healthcare benefits package under the Universal Health Care or SHIF scheme to registered or contracted healthcare facilities is proportionate and informed by public interest regulatory considerations.

67. The respondents argued that under section 31(2) of SHIA, a beneficiary is not precluded from taking private health insurance cover. Additionally, empanelment and contracting of health facilities or health providers under sections 33 and 34 of the Act is premised on section 32(1) of the Act. They urged the court to dismiss the petition with costs.

68. The 1st and 4th interested parties did not take part in these proceedings.

Determination

69. Upon considering arguments by parties and the decisions relied on, the issues that arise for determination are; whether the petition is res judicata and sub judice, and depending on the answer to the above issues, whether the petition should be granted.

Res judicata

70. The respondents argued that this petition is res judicata because the issues raised therein were determined by a bench of this court in the Aura Case. The petitioners took the opposite position, arguing that the petition is not res judicata. In the petitioners' view, the issues in the Aura case were on

the validity of the SHIA the Primary Health Care Act, 2023(PHA) and the Digital Health Care Act, 2023, (DHA), a different issue from those raised in the present petition.

71. Section 7 of the *Civil Procedure Act* provides that "No court shall try any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally determined by such court."

72. Res judicata bars further litigation on issues that have been previously litigated between the same parties in a court of competent jurisdiction and the court determined the issue with finality. That is, the doctrine of res judicata protects finality in litigation over similar issues between the same parties in courts of competent jurisdiction.

73. In Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another (Motion No 42 of 2014) [2016] eKLR, the Court of Appeal stated with regard to the essence of res judicata:

> Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.

74. The Supreme Court of Kenya had occasion to deal with the issue of res judicata in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR). At para 57, the Supreme Court cited the words of Wigam V-C in Henderson v Henderson (1843) 67 ER 313 thus:

> Where a given matter becomes the subject of litigation, in and adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation, and which parties, exercising reasonable diligence, might have brought forward at the time.

The Supreme Court then stated:

> (58) [W]henever the issue of res judicata is raised, the court will look at the decision claimed to have settled the issue in question; the entire pleadings and record of that previous case and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.

75. For the plea of res judicata to succeed, it is important that issues in the previous case and the new suit be similar; parties in the two cases be the same or litigating under the same title and issues in the former suit should have been finally determined by a court of competent jurisdiction. In making that determination, the court dealing with the plea of res judicata should look at the pleadings and prayers sought in the two suits, the parties named in the suits, the issues raised and the decision of the court

in the previous suit to ascertain whether the matter was before a court of competent jurisdiction and the issues were indeed, determined with finality.

76. A perusal of the Aura case, shows that the petitioner in that petition was different from the parties in the present petition. However, the Attorney General was a respondent in the Aura case and still is a respondent in the present petition. The Cabinet Secretary for Health was also a respondent in that case but the Ministry of Health has been named as an interested party in the present litigation.

77. Regarding the relief/prayers sought in the Aura case, the petitioner sought several declarations; of importance and relevance to the present matter, were declarations that sections 26(5); 27(1)(a) 27(4) 38 and 47(3) of SHIA are unconstitutional; that the enactment of the entire SHIA; PHA and DHA are unconstitutional for lack of public participation and an order of prohibition restraining the respondents from giving effect to, enforcing, or taking any steps to enforce or in any way implement or continue implementation of the three Acts.

78. The issues in the previous petition were not only on the constitutionality of some specific sections of SHIA, but also the constitutionality of the entire Act which includes all its provisions. There was also a specific prayer for an order of prohibition, not only prohibiting implementation and enforcement of the three Acts, but also restraining further implementation and enforcement of those Acts.

79. A 3-judge bench of this court (A Mabeya, R K Limo and F G Mugambi, JJ.) heard the petition and pronounced itself on the issues in a judgment delivered on 12th July 2024. Regarding constitutionality of the entire Acts, the court agreed with the petitioner and declared the Acts unconstitutional for lack of public participation. The court also found sections 26(5), 27(4) and 38 of SHIA unconstitutional.

80. Section 26(5) provides that "Any person who is registrable as a member under this Act shall produce proof of compliance with the provisions of this Act on registration and contribution as a precondition of dealing with or accessing public services from the national government, county government or a national government or county government entities." Section 27(4) provides that "A person shall only access healthcare services where their contributions to the Social Health Insurance Fund are up to date and active" while section 38 provides that "All receipts, earnings and accruals to the Authority and the balance of the Funds at the close of each financial year shall remain with the Authority for the purposes of the Funds."

81. The court considered the petition and held that sections 26(5) and 27(4) of SHIA generally met the reasonable test in article 24 of *the Constitution*, stating:

> (167) The objectives of section 26(5) and 27 of SHIA are therefore noble. They are aimed at bringing solidarity and equity in terms of subscription and contribution to the Fund and at the same time ensure that the benefits are spread across the population and is both sustainable and a reality.
>
> (168) In our view therefore, applying the principle of limitation in article 24 on the reasonableness, the nature of the right, the extent of the limit and the proportionality, we find that the proposed limitation under article 6(3) and 12(1) is reasonable, justifiable and proportionate.

82. The court, however, invalidated the two sections to the extent that the provisions did not take into account situations where a person may require emergency healthcare services which were only to be accessed by those registered and contributing. The court also invalidated section 38 of SHIA but did not pronounce itself regarding the constitutionality of section 27(1)(a) of the Act. Overall, the

court declared the entire SHIA; DHA and PHA unconstitutional for lack of meaningful public participation.

83. In the present petition, the petitioners sought the following relief; a declaration that the registration to SHIF is not mandatory; a declaration that to the extent that the SHIA prescribes a contribution of a percentage of gross salary from salaried persons, and a percentage of income as defined by a means testing tool for the unemployed but income earning persons is discriminatory and unlawful; a declaration that to the extent that the regulations prescribe a mandatory post-tax contribution of a percentage of a person's income to the Fund is unconstitutional for violating the person's right to property.

84. The petitioners further sought a declaration that; to the extent that the regulations prescribe a mandatory contribution of a person's post-tax income to the Fund in the public interest without a just equitable benefit of valuable consideration is unconstitutional for infringing the person's rights guaranteed under article 40 and a declaration that the income of a person after payment of income tax under the *Income Tax Act* is the person's private property and is protected by *the Constitution* as a right to property.

85. Considering the relief that were sought in the Aura Case alongside those sought in this petition, it is clear that whereas the Aura case sought specific declarations of invalidity of specific provisions of the Act(s), the petitioners in the current petition made general averments and sought what appear to be general declarations based on one's interpretative view of the matters raised. That is not to say the decision in the Aura case did not make orders that have a bearing on this petition. In that case, some of the issues in this petition would to some extent be res judicata. However, since there is an appeal against the judgment in the Aura case, therefore, it cannot be said that the issues have been determined with finality to make the petition res judicata.

Sub judice

86. The respondents again argued that this petition is sub judice, for the reason that the issues raised in the petition are pending determination before the Court of Appeal in Civil Appeal No. E565 of 2024-Cabinet Secretary, Ministry of Health v Joseph Enock Aura & 13 others. The respondents further argued that the petition is intended to defeat the orders issued by the Court of Appeal allowing implementation of the three statutes.

87. It was also the respondents' position that this court cannot determine the nature and amount of contribution because the issue of implementation of the provisions of the Social Health Insurance (General) Regulations, 2024 (*Legal Notice No. 49 of 2024*) is directly in issue in petition E513 of 2024 which is still pending in court.

88. Section 6 of the *Civil Procedure Act* provides that "No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

89. Sub judice, as a principle, is the opposite of res judicata. Unlike res judicata which requires that the previous suit should have been finally determined by a court of competent jurisdiction, sub judice, requires that proceeding or litigation in the subsequent suit should be pending in a court of competent jurisdiction. In that respect, sub judice is a fundamental legal principle that prevents re-litigation of issues that are pending before another court of competent jurisdiction. This principle is intended to avoid multiplicity of suits so that different courts seized of the same matter between the same parties

over the same issues do not render contrary decisions. That way, sub judice serves to uphold the principles of judicial efficiency, fairness, and the rule of law.

90. The import of sub judice is that once a matter has been instituted in a court of competent jurisdiction, no other court should subsequently entertain a suit or issue in which the matter in dispute is directly and substantially in issue in an earlier suit pending in another court. The overarching objective of sub judice is to prevent multiplicity of proceedings, ensure the finality of judicial decisions and promote judicial economy and certainty in the legal system.

91. In Satyadhyan Ghosal v. Deorajin Debi & Anr. 1960 SCR (3) 590; 1960 AIR 941, the Supreme Court of India elucidated the concept of "directly and substantially in issue" under section 10 of the Indian Civil Procedure Code (Code of Civil Procedure) which is the equivalent of our section 6 of the *Civil Procedure Act*. The Court held that for sub-judice to apply, it is not necessary that the entire subject matter of the subsequent suit should have been directly and substantially in issue in the former suit. Rather, it suffices if the matter in issue was relevant for the determination of the former suit.

92. In Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR), the Supreme Court of Kenya had occasion to pronounce itself on the doctrine of sub judice, and stated:

> (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

(See also Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex-parte Law Society of Kenya [2020] eKLR.

93. Sub judice thus, upholds the principles of fairness and equity by ensuring that parties are not subjected to vexatious and oppressive litigation; provides finality to judicial decision- making process; fosters certainty in legal processes and instils public confidence in the judicial system.

94. To determine whether or not a matter is sub judice, one has to look at the facts of the latter suit or proceedings, including the prayers sought, visa vis the facts of the former suit, the prayers sought therein as well as the parties in the two suits. In other words, cases must be civil in nature; must have been filed at different times; matters in issue must be substantially similar; courts should have jurisdiction over the subject matters; parties should be the same or litigating through their representatives or same title and the suits or proceeding should be pending.

95. The reason for the respondents' argument that this petition is sub judice was, in their view, because the issues raised in the petition are pending before the Court of Appeal in Civil Appeal No. E565 of 2024-Cabinet Secretary, Ministry of Health v Joseph Enock Aura & 13 others. (The Civil Appeal).

The Civil Appeal pending before the Court of Appeal, arose from the decision of a 3-judge bench of this court delivered on 12th July 2024 in the Aura Case. The bench declared, in the main, the entire SHIA; DHA and PHA unconstitutional.

96. Following that decision, the Cabinet Secretary (through the Attorney General) lodged the civil appeal in the Court of Appeal. The Attorney General also filed an application seeking stay of execution of the High Court decision. In a ruling delivered on 20th September 2024, the Court of Appeal granted stay of execution of the declarations of invalidity of the three statutes pending the hearing and determination of the civil appeal. The civil appeal has not been determined. It was for that reason, that the respondents argued that this petition is sub judice as the issues raised in the civil appeal are pending before the Court of Appeal.

97. The respondents further argued that the challenge directed at the implementation of the provisions of the Social Health Insurance (General) Regulations, 2024 (*Legal Notice No. 49 of 2024*) is directly in issue in High Court Petition E.513 of 2024 which is also pending.

Civil Appeal

98. There is no dispute that the constitutionality of the three health statutes was determined by the High Court when it declared the statutes constitutionally infirm. The High Court made that definitive determination after hearing the petition and invalidated the statutes as decreed by Article 2(4) of *the Constitution*. The court also declared some sections of SHIA unconstitutional, namely; section 26(5) and 27(4) to the extent that they did not take into account those who may require emergency treatment, as well as section 38. Although the petitioner had sought to invalidate section 27(1)(a) of SHIA, the court did not pronounce itself on the section. That issue may therefore fall for determination by the Court of Appeal.

99. There is further no dispute that following the High Court decision, the civil appeal was lodged in the Court of Appeal. An application for stay of execution of the High Court decision was filed and the Court of Appeal granted stay of execution of the High Court decision pending the hearing and determination of the civil appeal. The effect of the stay order was that the declarations of invalidity were suspended allowing implementation of the three statutes. It was for that reason that the Cabinet Secretary formulated regulations for purposes of implementing SHIA.

100. The fact of the matter is that what is pending before the Court of Appeal is determination of whether the three statutes are unconstitutional. That is, whether the Court of Appeal will affirm or reverse the High Court decision declaring the statutes and some sections unconstitutional.

101. Indeed, this petition has something to do with implementation of SHIA through the regulations formulated by the Cabinet Secretary for Health, following the Court of Appeal orders staying the High Court decision declaring the statutes and some sections unconstitutional. This petition also somewhat ingenuously seeks interpretation of sections 26 and 27 of SHIA. Although parties in this petition and those in the Appeal are not the same, the Aura case, the subject of the civil appeal, was filed by a public interest litigator on behalf of the public and so was this petition. The Cabinet Secretary for Health who lodged the civil appeal now pending in the Court of Appeal, is not a party in this petition but the Attorney General is a party both in the civil appeal and this petition.

102. In that respect, it cannot be argued that this petition is absolutely sub judice because of the pending appeal. However, determination of some issues in the civil appeal will have a direct bearing on this petition. For instance, the issue of the constitutionality of sections 26 and 27 is pending before the Court of Appeal. So is the issue of data privacy. As the Supreme Court of India observed, it is not necessary that the entire subject matter of the subsequent suit be directly and substantially in issue in

the former suit. It suffices if the matter in issue is relevant for the determination of the former suit. (Satyadhyan Ghosal v. Deorajin Debi & Anr. 1960 SCR (3) 590.)

103. Determination of the civil appeal would be relevant to the present petition. Were the Court of Appeal to affirm the decision of the High Court that the three statutes are unconstitutional and therefore invalid, that would mean the petitioners' concerns in this petition would have lost substratum. In that respect, I agree with the respondents that this petition is sub judice in so far as the Court of Appeal is yet to pronounce itself on the constitutionality of SHIA, an issue that is pending in the civil appeal.

104. For that reason, if the Court of Appeal were to agree with the High Court that the three statutes are constitutionally infirm, this court would have acted in vain whatever its decision. Further, it is not clear what the Court of Appeal will say regarding the constitutionality of sections 26 and 27 which will also have a bearing on the petitioners' arguments in this petition that registration and contribution to the Fund is not mandatory.

Petition E513 of 2024

105. The respondents again argued that this petition is sub judice because petition E513 of 2024 on the implementation of the regulations is pending. The petitioners contended that petition (E513 of 2024) is on the formulation of the regulations while this petition is on the implementation of the regulations thus, it is not sub judice.

106. I have perused pleadings in petition E513 of 2024 and the relief sought. The petition was filed by Okiya Omtata Okoiti, Eliud Karanja Matindi and Dr. Magare-Gikenyi Benjamin against the Cabinet Secretary Ministry of Health; Principal Secretary, Medical Services; Attorney General; Public Procurement Regulatory Authority; Social Health Authority and Safaricom PLC. The Attorney General and Social Health Authority are respondents in both petitions (E513 of 2024 and this petition.) Whereas the Cabinet Secretary, Ministry of Health is a respondent in E513 of 2024, it is the Ministry of Health that is named as an interested party in this petition.

107. In petition E513 of 2024, the petitioners sought several declarations and orders. Of relevance to the present petition, is prayer (iii) which seeks a "Declaration that the decision to roll out the Social Health Insurance Fund without subsidiary legislation approved by Parliament was unlawful, and therefore, invalid, null and void ab inition; and prayer (xi) which seeks "An order voiding Legal Notice Nos 146 of 2024 and 147 of 2024. The petitioners also seek to nullify the tender awarded to Safaricom LPC as well invalidation of sections 15(2) and 23(1) of the *Statutory Instruments Act*.

108. In that petition, (E513 of 2024) the petitioners pleaded that formulation of *Legal Notice No. 146 of 2024* and coming up with the tariffs was done without public participation and input. According to the petitioners, the blanket nature of the tariffs and limits set under Legal notice 146 of 2024 violate the duty of the state to take additional steps to protect specific vulnerable groups in society thus, violated the principles in, among others, articles 10(2)(b), 20(5)(b).

109. The petitioners further raised concerns regarding regulations in Legal Notice Nos 146 of 2024 and 147 of 2024. They argued that legal Notices 48 of 2024 and 49 of 2024 having been nullified by the Senate on 30/7/2024, the respondents could not purport to base Legal Notices 146 of 2024 and 147 of 2024 on Legal Notices that had been nullified. The petitioners argued, therefore, that the impugned Legal Notices published on 19/9/2024 and 20/9/2024, respectively became effective despite not having been approved by Parliament and it is not given that they would be approved.

110. Petitioners in petition in E513 OF 2024 are different from those in this petition. However, the Cabinet Secretary for Health and the Attorney General as well, as Social Health Authority are respondents in

the former petitions while the Attorney General and Social Health Authority are respondents in this petition. The Ministry of Health was named as an interested party.

111. Although Petition E513 of 2024 deals with the legality of the regulations implementing SHIA and the Fund, determination of that petition will no doubt have a bearing on this petition. It is not necessary that the entire subject matter of this petition be directly and substantially in issue in petition E513 of 2024 to be sub judice. The position in law is that it suffices if the issues before court are relevant for the determination of the former petition. (Satyadhyan Ghosal v. Deorajin Debi & Anr. 1960 SCR (3) 590). In that respect, it will be inappropriate for this court to deal with regulations whose legality is not yet settled otherwise it would amount to putting the cart before the horse.

112. In this petition although the petitioners did not plead the specific regulations and Legal Notice(s) they wanted the court to deal with, they must have had in mind the Social Health Insurance (General) Regulations, 2024 (*Legal Notice No. 49 of 2024*) (and Legal Notice 48) which according to petitioners in E513 of 2024, were nullified by the Senate on 30/7/2024 and could not, therefore, be the basis of any other subsequent regulations, including Legal Notices 146 and 147 of 2024 or any amendments to *Legal Notice 49 of 2024*. The issue of whether indeed, there are regulations in the first place, is therefore directly in issue in petition E513 of 2024.

113. In that regard, since this petition raises issues regarding implementation of regulations formulated for purposes of the enforcement of SHIA and SHIF, the legality or lawfulness of those regulations which is at the core of petition E513 of 2024 must be resolved first. The issue of how tariffs were arrived and any associated limitations is also raised in that petition and in this petition where it is argued that the tariffs are inequitable, unjust and disproportionate. In that regard, overlooking petition E513 of 2024 would likely create an avenue for not only the possibility of conflicting decisions, this court may also pronounce itself on regulations that may eventually be found not to exist.

114. I, therefore, find and hold that to the extent that some of the issues raised in this petition are pending in the civil appeal and in petition E513 of 2024, it would be appropriate to defer to the courts dealing with those matters.

This petition

115. In the event I am wrong, should this petition be allowed? The petitioners sought several prayers based on various arguments. For instance, they urged this court to issue a declaration that registration to SHIF is not mandatory. According to the petitioners, to the extent that sections 26 (1) and 27(2) of SHIA are to be construed as creating obligations for all Kenyans to register and contribute, such construction violates individuals' rights and fundamental freedoms. The same argument was made against the impugned regulations.

116. The petitioner's argument that registration under SHIA cannot be mandatory cannot be determined in the manner this petition is pleaded and presented. The petitioners' arguments are based on their views regarding how they would want those provisions interpreted rather than raising specific constitutionality questions for the court's decision.

117. This being a constitutional litigation, the petitioners were required to raise specific issues regarding the constitutionality of any specific provisions of the Act to enable the court respond appropriately.

118. Phillips & others v National Director of Public Prosecutions [2005] ZACC 15; 2006(1) SA 505(CC), the Constitutional Court of South Africa stated;

> The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that all interested parties have an opportunity to make representations;

that the relevant evidence, if necessary, be led, and that the requirement of separation of powers be respected.

119. In Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, the Supreme Court emphasised (at para 349) the importance of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement, which plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

120. In this petition, the petitioners did not challenge the constitutionality of any of the provisions in SHIA that they consider inconsistent with, or in contravention of, *the Constitution* so that the court could exercise its jurisdiction donated by article 165(3) (d) (i) and(ii), inquire into and determine whether those sections are indeed, inconsistent with, or in contravention of, *the Constitution*; And if found to be infirm, call the aid of article 2(4) of *the Constitution* and invalidate and void them.

121. The petitioners' arguments and prayers as I see them, were in form of general suggestions which could not be answered in the absence of a prayer targeting specific provisions as being constitutionally invalid. For instance, there being no prayer urging this court to declare any of the sections of SHIA unconstitutional for making registration and contribution mandatory, it would difficult for the court to act in the manner the petitioners wanted by responding to a general suggestion on the interpretation of such sections.

122. That notwithstanding and to answer the petitioners' concerns, one has to purposively read sections 26(1) and 27(1) of SHIA for their full intent and effect regarding registration and contribution. Section 26(1) provides that every Kenyan shall register as a member of the Fund (Social Health Insurance Fund). The section demands that every Kenyan do register by using the word "shall" thereby making registration compulsory. That is the plain and ordinary meaning to be ascribed to section 26(1) of the Act.

123. Further, section 26(2) provides that a person who being Kenyan and ordinarily resident in Kenya, shall be eligible for registration as a member of the Social Health Insurance Fund. The section again makes every Kenyan ordinarily resident in Kenya eligible for registration with the Fund thus, requiring resident in Kenya to register with the Fund.

124. Regarding contribution to the Fund, section 27(1) of the Act provides for the persons liable to contribute to the Fund, including, every Kenyan Household. Section 27(2) provides the manner of contribution by both those in salaried employment and otherwise.

125. As already pointed out, the petitioners did not challenge the constitutionality of these sections which are critical on the issue raised. I must also point out that in the Aura Case, the petitioner challenged the constitutionality of sections 26(5); 27(1)(a) and 27(4). While the bench pronounced itself on sections 26(5) and 27(4), it did not determine the issue regarding constitutionality of section 27(1)(a). That decision having been appealed against, this court will not say more since those provisions are likely to feature in the civil appeal.

126. The petitioners again raised concerns regarding contributions to the Fund. They sought a declaration to be issued that to the extent that SHIA prescribes a contribution of a percentage of gross monthly from one's salary, and a percentage of incomes as defined by a means testing tool for those unemployed but income earning persons, it is discriminatory thus, unlawful.

127. As already stated earlier, contribution to the Fund is provided for in section 27(2) of the Act. The section does not, however, provide for percentage contribution. That aspect is provided for in the

regulations. The petitioners did not challenge the constitutionality of section 27 (2) which provides that Kenyan households contribute to the Fund, or the specific regulation that requires households to contribute a percentage of their gross monthly income from their salaries to the Fund.

128. The petitioners took issue with the 2.75% contribution from one's gross income whose import, they argued, was that higher income earners would contribute more than lower earners yet the benefits would be the same, a phenomenon that should not be allowed as it brings an element of discrimination.

129. The petitioners further urged this court to declare that to the extent that the regulations prescribe a mandatory post-tax contribution of a percentage of a person's income to the Fund is unconstitutional for violating the person's right to property. These regulations are the subject of Petition E513 of 2024. That petition raises an argument that the Fund has been rolled out without regulations dully approved by Parliament. That petition challenges everything that has been done this far as being unlawful. It is therefore, proper that the issue of whether regulations exist or not, be determined otherwise this court may be dealing with what may not legally exist.

130. The petitioners again argued and asked the court to declare that to the extent that the regulations prescribe a mandatory contribution of a person's post-tax income to the Fund in the public interest without a just equitable benefit of valuable consideration, is unconstitutional for infringing the person's property rights protected under article 40. Further, that the income of a person after payment of income tax under the *Income Tax Act*, is protected private property.

131. What I find troubling from the petitioners' arguments, is the concern that after income tax, what remains is net, a personal property which is protected under article 40 of *the Constitution* and should not be subjected to further gross percentage statutory deductions as contribution to the Fund.

132. I must point out here, that the mandatory 2.75% percent contribution to the Fund is indeed, problematic. Every citizen is required to pay income tax under the *Income Tax Act*, being a percentage of the person's gross income. Income refers to money a person earns for doing work, or money received from one's investments. Income tax is paid from the person's gross income and after paying income tax from that gross income, what remains is net.

133. In that respect, gross income being the total amount of money a person receives for doing work or from investment and is received once, there is only one gross income. There can be no other gross income from which the person can again contribute 2.75% to the Fund under SHIA and the regulations made thereunder. Any subsequent or other statutory deduction(s) based on the person's gross income after income tax, is undoubtedly double taxation, charge or levy because the same gross income will have been taxed more than once-under the *Income Tax Act* and the regulations made under SHIA as contribution to the Fund.

134. In that regard, by providing that a person contributes 2.75% of his/her gross income to the Fund after paying income tax from the same gross income, the regulation introduces a negative element of taxation which is double taxation and would, as a result, make such a regulation unlawful. However, since the issue of the legality of the regulations is pending in petition E513 of 2024, I will not say more on the issue.

135. Regarding automatic transfer of personal data from NHIF to SHIF, the petitioners did not demonstrate that the regulations on transfer of data violated the parent Act or *the Constitution* and how. This is important because the issue of constitutionality of the DHA is also pending before the Court of Appeal.

136. In any event, automatic transfer of personal data of members of the defunct NHIF to SHIF is sanctioned by regulation 5 of the Social Health Insurance (Amendment) Regulations, 2024. (*Legal*

Notice No 147 of 2024). Regulation 5 amended regulation 13 of the Social Health Insurance (General) Regulations, 2024 (principal regulations-*Legal Notice No. 49 of 2024*) by introducing a new sub regulation, providing that:

> 1. All members of the National Health Insurance Fund under the repealed National Health Insurance Fund Act shall be transitioned to the Social Health Insurance Fund upon verification of their data by the Authority using the existing government databases.
>
> The petitioners did not challenge the constitutionality of this regulation. Their only argument was that the Social Health Insurance (Amendment) Regulations, 2024, were an afterthought.

137. In the end, a perusal of the pleadings and prayers in this petition as well as the pleadings and prayers in petition E513 of 2024, shows that the issues raised in the two petitions are crosscutting. Determination of the issues in the former petition on the legality of the regulations would have a direct bearing on the outcome of this petition. This requires this court to defer to the court handling that petition.

Relief to grant

138. That leads to the issue of what would be the appropriate relief to grant in this petition. Considering the outstanding issues in the civil appeal and petition E513 of 2024, namely: the constitutionality of the Social Health *Insurance Act*, 2023, the Digital Health Care Act, 2023 and the Primary Health Care Act, 2023 that is yet to be determined, as well as the issue of the legality of the regulations raised in Petition E513 of 2024, it is the view of this court that the appropriate course to take is to decline this petition so that the issues pending in the civil appeal and petition E513 of 2024 can be resolved.

139. Consequently, and for the above reasons, this petition is struck out. As this is public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2025

E C MWITA

JUDGE