



REPUBLIC OF KENYA
CONSTITUTIONAL PETITION NO. E001 OF 2025
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E001 OF 2025.

IN THE MATTER OF VIOLATION OF ARTICLE 10(2) (A) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLE 27(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLE 27(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLE 209 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLE 210 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONSTITUTION PETITION BY
KIRINYAGA SLOPES COFFEE BROKERAGE COMPANY LIMITED.....1ST PETITIONER
KIRINYAGA COUNTY CO-OPERATIVE UNION LIMITED.....2ND PETITIONER
NATIONAL COFFEE CO-OPERATIVE UNION LIMITED.....3RD PETITIONER

VERSUS

THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND ECONOMICS
PLANNING.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

THE SPEAKER OF THE NATIONAL ASSEMBLY.....1ST INTERESTED PARTY
THE SPEAKER OF THE SENATE OF KENYA.....2ND INTERESTED PARTY
THE COMPETITION AUTHORITY OF KENYA.....3RD INTERESTED PARTY
THE KENYA BANKERS ASSOCIATION.....4TH INTERESTED PARTY
NAIROBI COFFEE EXCHANGE.....5TH INTERESTED PARTY
CAPITAL MARKETS AUTHORITY.....6TH INTERESTED PARTY

JUDGMENT

Introduction

- [1] The Petitioners are respectively, a Brokerage firm, a Cooperative Union for the cooperative in Kirinyaga County and a national Cooperative Union engaged in various operations in production, processing and sale of coffee on behalf of farmers.
- [2] The 3rd Petitioner was added when it sought to be joined on the ground that it “*has an exact similar cause of action as the subsisting petitioners herein [and] is a Coffee Union with a membership of key stakeholders in the coffee industry and the fees prescribed and directed by the Respondents as per the Coffee Exchange fee Regulations are directly affecting the Union’s operations*” and leave to amend granted on 3/9/2025 when the Court directed that the matter proceed to full hearing of the Petition on 2/10/2025. {There was a preliminary objection dated 25/9/2025 as to the petition by the 3rd petitioner for want of a company’s resolution to institute proceedings, citing ***Steel Formers Limited & another v. Kenya Development Corporation & 2 Others*** [2025] KEHC 3349 (KLR)}
- [3] There are three other petitions which related to this Petition, respectively, Petitions Nos. E002 of 2025 ***Kipkelion Brokerage Co. Ltd. and Bungoma Union Marketing Agency v. The Cabinet Secretary national Treasury & 4 Others*** (formerly Kericho HC Petition NO. E001 of 2025); E006 of 2025 ***Alliance Berries Ltd & 2 Others v. The Cbinet Secretary, National Treasury & Economic Planning & 4 Others*** (formerly Nairobi Milimani HCCHR Petition No. E073 of 2025); and E007 of 2025 ***The Coffee Marketing Agency Ltd & Another v. The Cabinet Secretary National Treasury & Economic Planning & 4 Others*** (formerly Machakos HCCHR Petition E006 of 2025). The petitions were held in abeyance to await the hearing and determination of the present Petition, which was at advanced stage of preparation towards hearing.

Brief background

- [4] The background of this suit is given by the Petitioners as the Kenya Government coffee sector reforms aimed at empowering farmers and removing middlemen and cartels in a framework that would enable coffee farmers to produce, mill and market their own coffee whereupon the coffee farmers in Kirinyaga County through the 2nd Petitioner Union of Co-operatives in the County incorporated the 1st Petitioner Coffee Brokerage firm.
- [5] By Gazette Notice dated 7/2/2024 LN. NO. 9 of 2025, the Capital Markets Authority published the **Capital Markets Act (Coffee Exchange) (Fees) Regulations, 2024** making provisions for among others, the decrease in Brokerage fees to 1% from 2% and the levy of fees for actors in the coffee marketing process – the Nairobi Coffee Exchange and the Bank that facilitates the payment through Direct Settlement System. The petitioners’ primary complaint is that the effect of the Regulations is to

- reduce the incomes to the coffee farmers who are members of the cooperative societies in the Kirinyaga County which are unionized in the 2nd Petitioner, and the financial position and profitability of 1st petitioner Brokerage firm, (which is wholly owned by the 2nd petitioner Cooperative Union of the Cooperative Societies in the County) affecting its ability to service its loans.
- [6] The Petitioners contended that the Regulations are unconstitutional and illegal for, among others, failure to afford the petitioners and other coffee farmers an opportunity for **public participation** and failure to present for **approval by Senate** the Regulations as legislation affecting the functions allocated to the Counties under the **Fourth Schedule** of the Constitution, before the approval of the Regulations and for failure to comply with statutory procedures under the **Statutory Instruments Act** for the preparation of a Regulations Impact Assessment Statement. The petitioners also complain as to the effect of the Regulations in that they are, to the detriment of consumer interest of the petitioners, calculated to favour one commercial bank for the clearing and settlement of the Coffee proceeds at a premium of 0.3% by providing for processing by “**a commercial bank**” in contrast with previous coffee regulations which provided for “**commercial banks**”.
- [7] The Respondents are united in their opposition to the Petition primarily on the grounds that there was adequate public participation in 15 Counties; that the Capital Markets Authority mandate for making Regulations is a national government function and there was no constitutional requirement for presenting the Regulations before the Senate for approval; and it was unnecessary within the provisions of the Statutory Instruments Act to prepare a Regulations Impact Assessment statement for the Regulations in question being “**an amendment of a fee, charge or tax consistent with announced government policy**”, which is exempted by the Statute (section 9 of the Statutory Instruments Act).
- [8] The Cooperative Bank (3rd Respondent), as the Bank which approved by the Capital Markets Authority to provide the Direct Settlement System, was on its application subsequently joined to the Petition by Consent of the parties, and it has opposed the Petition urging that the reference to **a commercial bank** is to be interpreted to mean any qualifying bank.

Amendment of Petition by the 3rd Petitioner

- [9] The 3rd Petitioner upon joinder with leave of court on 3/9/2025 amended the petition and introduced an averment challenging the requirement for direct payment to the farmers saying “18. *The petitioners have been shocked to become aware of the gazettment of the Capital Markets Act (Coffee Exchange) (Fees) Regulations, 2024 which were gazetted on 7th February, 2025 vide Legal Notice no. 9 and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024 all by the 1st respondent.*”

[10] The 3rd Petitioner introduced, by paragraph 28 of the Amended Petition, a pleading on breach of right to privacy based on the requirement for payment through the mobile phone numbers to be disclosed as follows:

“28. The Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Directive dated 18/11/2024 were issued by the 1st Respondent without any consultations or participations by the Petitioners and/or other players in the Coffee Industry which brings the following issues:

a) Why were the petitioners as important stake holders not consulted? b) Why were the coffee farmers who own the petitioners not consulted? c) Where is the dispute resolution provided for in an instance where the grower and the Bank do not agree on payment issued or owed? d) What happens when the grower seeks for advance payment for issues such as school fees, farming inputs and other expenses which are usually advanced by the 2nd and 3rd Petitioners to growers awaiting payment? e) Will the grower be provided for with the correct information with regards to the amount the Coffee is sold including but not limited to the exchange rate that is applicable? f) What will happen to the contract the petitioners have with coffee farmers Cooperative societies and Coffee estates? g) Why is the Government through the 1st Respondent invading the privacy of growers by asking for their personal information including their particulars when no guarantee of safety of the said information has been given to the growers? h) What happens when the Co-operative Societies and Associations upon approval i) j) via an Annual General Meeting agree to seek credit from a regulated Financial Institution and either the County Co-operative Director and/or Commissioner for Co-operatives Development do not approve the same? Does the above mean that the operations of the Co-operative Societies and Associations will be grounded due to lack of funds? What roles do either the County Co-operative Director and/or Commissioner for Co-operatives Development play into the financial operations of Co-operative Societies and Associations when the same is approved by an Annual General Meeting?”

[11] The Petition enumerated the violations of the Constitution at part E of the Petition as follows:

“E. VIOLATION OF THE CONSTITUTION OF KENYA AND OF INTERNATIONAL TREATIES AND CONVENTIONS.

71. VIOLATION OF ARTICLES 26, 40 AND 43 OF THE CONSTITUTION OF KENYA; ARTICLE 4, 14 AND 21 OF THE AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES RIGHTS

AND ARTICLES 6(1) AND 11(1) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS;

a) **The unreasonable, arbitrary and unwarranted reduction of the broker fees adversely interferes with the petitioners (and their shareholders and members) right to property.** It will adversely affect their operations and the members/shareholders standard of living.

b) Failure to have a **regulatory impact statement prepared and published denied the Petitioner and its members' right to ascertain the full anticipated decrease in revenue under the regulations** thereby interfering with their right to property without full information or justification.

72. VIOLATION OF ARTICLES 110 AND 111 OF THE CONSTITUTION OF KENYA.

a) **The Petitioners and their members were not given an opportunity to give their views in regard to the regulations before gazette** They were therefore gazetted devoid of transparency and effective and reasonable public participation.

b) The impugned regulations were not approved by the national Assembly as by Law required and are therefore unlawful and unconstitutional. c) To the extent that the regulations conflict with other regulations as demonstrated here before they go against good order, the rule of law, good governance amongst other national values. d) Under Schedule 4 of the Constitution, Agriculture and Co-operatives are devolved functions which fall under the mandate of County Governments. e) The Senate represents counties and serves to protect the interest of counties and any bill or regulation involving a County Government must be considered by it before approval.

f) In the instant case the Regulations were not forwarded to the Senate for approval and as such the same are unconstitutional, null and void.

73. VIOLATION OF ARTICLE 46 OF THE CONSTITUTION OF KENYA.

a) The impugned regulations blatantly violate the provisions of the competition Act as set out here before to the extent that they kill competition in regard to the bank that will offer direct settlement system.

b) The impugned regulations thereby violate the right to services of reasonable quality thereby infringing on the petitioners' (and their shareholders and members) economic interests.”

Reliefs sought

[12] The three Petitioners by **Amended Petition** dated 12/9/2025 alleged that the making and publication of the impugned Regulations of 2024 violate numerous constitution and legal violations which adversely affect the rights of the Petitioners, as outlined in the Petition and the Petitioners, consequently seek constitutional relief as follows:

“THE PETITIONERS therefore humbly prays that this Honorable Court be pleased to issue the following orders:

- a) A declaration that in gazetting and implementing the Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024, the Respondents violated Articles 26, 40 and 43 of the Constitution of Kenya; article 4, 14 and 21 of the African (Banjul) charter on human and people's rights and Articles 6(1) and 11(1) of the International covenant on economic, Social and Cultural Rights.
- b) A declaration that in gazetting and implementing the Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024, the Respondents violated Articles 10, 73, 118, and 201 of the c) Constitution of Kenya.
- c) A declaration that in gazetting and implementing the Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024, the Respondents violated Articles 96, 110, 111, 112, 113, 209 of the Constitution and the Forth Schedule of the Constitution.
- d) A declaration that in gazetting and implementing the Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024, the Respondents violated Articles 27 and 47 of the Constitution of Kenya; article 3 and 1 of the African (Banjul) charter on human and peoples' right and Articles 2 Land 26 of the International covenant on civil and political rights.
- e) A declaration that in gazetting and implementing the Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024, the Respondents violated Article 36 of the Constitution of Kenya; Article 10 of the African (Banjul) charter on human and peoples' rights and article 22 of the International Covenant on Civil and Political rights.
- f) A declaration that the Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024, and the Directive on Direct Payment of Coffee Sales Proceeds to Individual Growers Bank/Sacco Accounts or Mpesa Mobile Accounts vide a Circular dated 18/11/2024 are unconstitutional, null and void.
- g) Costs of the petition.

[13] The Court granted a conservatory order staying implementation of the Regulations pending hearing and determination of the Petition.

The Petitioners' case,

[14] The facts of the Petitioners' case, as set out in the Petition and supported by the 3rd Petitioner, are as follows:

“The Facts of the Petition are set out as follows:

“FACTS.

11. In 2023 the Republic of Kenya initiated and implemented important Coffee Sector reforms aimed at empowering farmers and cracking down on middlemen and cartels.

12. The government set out a framework that would enable coffee farmers to produce, mill and market their coffee for themselves thereby improving their returns.

13. 121,054 small holder coffee farmers in Kirinyaga County acted with speed so as to take advantage of the good initiative. Through the 2nd petitioner, which is a union of all their Co-operative Societies, they incorporated the 1 petitioner which is fully owned by the 2nd petitioner. Its roles as a coffee broker includes:

a) Cataloguing-preparation of catalogue that facilitates selling of clean coffee at the auction.

b) Auctioneering.

c) Certification.

d) Marketing of clean coffee.

e) Transporting of clean coffee to warehouses.

f) Financing of storage of clean coffee in the warehouse.

g) Deliveries of clean coffee samples. h) Sourcing for clean coffee buyers.

i) Provides services for agronomists to societies.

j. Preparation of clean coffee deductions for remittance to Direct settlement system.

k) Confirmation of sales prices.

l) Setting auction reserve prices for clean coffee.

14. The 1st petitioner has established a coffee mill along Kutus/Kagio main road at Komboinii Location. It mills and markets coffee for the farmers in all constituent Cooperative Societies and for 3 parties. It charges a brokerage fee of 2% as by Law required.

15. In order to build its capacity and improve its services the 1 petitioner borrowed a loan of Kshs.112 Million from Fortune Sacco Society for the following purposes: a) Purchase of additional 6 tonnes milling equipment from Brazil and Export Jute bags from Bangladesh. b) Construction of warehouses. c) Payment of labour force. d) Capacity building of European Union Deforestation Regulation to Coffee Cooperative Societies on behalf of Coffee Farmers (EUDR). e) Setting of certification desk. f) Additional expansion and was bought. g) Purchase of weigh bridge and purchase of ERP system.

16. The borrowing of the said loan was informed by the projected income taking into account the estimated income from brokerage fees. The same would be able to service the said loan.

17. The petitioners have been shocked to become aware of the gazettelement of the Capital Markets Act (Coffee Exchange) (Fees) Regulations, 2024 which were gazetted on 7th February, 2025 vide Legal Notice no. 9 by the 1st respondent.

18. There are numerous constitution and legal violations by the said publication which adversely affect the rights of the Petitioners as explained hereunder.

19. The Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 were not approved by the 1 and 2nd interested parties as required under Sections 10 and 11 of the Statutory Instruments Act 20. The petitioner were able to access the Statutory Instruments Tracker (2023-2024) on the 1st interested party's website and confirmed that as at 16h December, 2024 the Capital Markets Act (Coffee Exchange) Fees) Regulations 2024, hereafter referred to as the impugned Regulations, had not been approved. The same had also not been approved by the 2nd interested party. 21. Failure to have the said impugned regulations approved by the 1st and 2nd interested partes renders the same unlawful, unconstitutional, null and void. 22. Regulations I of the impugned regulations define "direct settlement system" to mean a banking facility provided by a commercial bank regulated by the Central Bank of Kenya for the clearing and settlement of Coffee proceeds. 23. The said regulation aims to restrict the operation of the direct settlement system to one commercial bank in contrast to previous regulations. The Capital Markets Act (Coffee Exchange) (Fees) Regulation 2024 and the crops (coffee) (general) regulations, 2019 at regulation 2 defined "direct settlement system" to mean a banking facility provided by commercial banks regulated by the Central Bank of Kenya for clearing and settlement of coffee sales proceeds. Similarly, Regulation 2 of the capital markets (Coffee Exchange) Regulations defines "direct settlement System to mean a banking facility provided by commercial banks regulated by the central bank of Kenya for clearing and settlement of Coffee proceeds.

24. The 1* respondent appears to have unilaterally identified one commercial bank to offer the services which is detrimental to the consumer interest of the petitioners and violates their legal and constitutional rights.

25. The 1st respondent has also provided transaction fee for the commercial bank offering the Direct Settlement System at 0.3% and the same raises 2 important issues:

- a) Why would the recipient of money through a bank be charged?
- b) Is the said levy in addition to banking charges approved by the Central Bank of Kenya?
- c) Has the Central Bank of Kenya approved the said levy?

d) Why were the Coffee Farmers, who are consumers of the said service, not involved before the decision to levy the said fee was gazetted?

26. The impugned regulations have reduced the Broker fees to 1%.

The following issues arise:

a) Why were the petitioners as important stake holders not consulted?

b) Why were the coffee farmers who own the petitioners not consulted?

c) What was the rationale for the reduction of the fee?

d) What will happen to the contract the petitioners have with coffee farmers operative societies and Coffee estates?

e) How will the petitioners service their loans?"

[15] The Supporting Affidavit of Geoffrey Kinyua Munyagia the 2nd Petitioner Union Chairman sworn on 11/2/2025 set out the evidence corresponding to the facts of the case in the petition, and showing the Resolution and authority of the 2nd Petitioner to respond to the impugned gazette Notice by court proceedings.

The Respondents' case

[16] For the 1st and 2nd Respondents, the 1st respondent Cabinet Secretary filed a Replying Affidavit asserting the power granted to him under section 12 of the capital markets Act cap 485A) to enact regulations in rest to fees payable tot eh 1st respondent. He said the that the objective of the impugned regulations as capture in Legal Notice No. 9 of 2025 is to provide the maximum fees for coffee sold at the Nairobi Coffee exchange and for annual membership payments by members to the Coffee exchange, and that the Regulations are meant to protect small scale farmers from excessive fees being levied on them and reduce unnecessary costs on transactions between various stakeholders. The 1st respondent denied the allegations by the Petitioners with regard to public participation and attached the necessary documents submitted under section 11 of the Statutory Instruments Act to the Clerk of the National Assembly following the gazettelement for approval to include:

“(i) Letter to Clerk of National Assembly dated 14-2-2024, attached and marked JMN1.

(ii) Kenya Gazette dated 7-2-2024, attached and marked JMN2

(iii) The Capital Markets (Coffee Exchange) (Fees) Regulations 2024. attached and marked JMN3.

(iv) The Explanatory Memorandum, attached and marked JMN4

(v) Evidence of stakeholder engagement (Rapporteur's report and at en nc registers), attached and marked JMN5.

(vi) Letter of acknowledgement from Clerk of National Assembly dated 25-2-2025 - attached and marked JMN6.”

[17] The 3rd Respondent Bank filed two Replying Affidavits – a Replying Affidavit by Esther Kariuki of 22/7/2025 and a Further Affidavit by David Njuguna of 29/9/2025, responding to the issues raised respectively by the 1st and 2nd Petitioners and the allegations raised by the 3rd Petitioner at to the directive of 18/11/2024 on direct payment of the coffee sale proceeds to farmers.

[18] The Replying Affidavit by the 3rd respondent gave a detailed account as to the introduction of the direct settlement system (DSS) and the competitive process of the appointment of a DSS provider, which was done in 2023 under **The Capital Markets (Coffee Exchange) Regulations of 2020**, whose principal aim was “to establish a transparent, efficient, and accountable framework for coffee trading at the auction [with] the introduction of the Direct Settlement System (DSS), a centralized mechanism ensuring prompt, secure, and traceable remittance of coffee sale proceeds directly to the growers and service providers, addressing persistent issues such as delayed payments, unremitted proceeds and lack of transparency in auction fund handling.” The deponent then relied on the various documentation from National Assembly 1st Interested Party, the National Coffee Exchange (5th Interested Party) and the Capital Markets Authority (the 6th Interested Party) and citing the Supreme Court’s decision in **Senate & 3 Others v. Speaker of the National Assembly & Others** [2025] KESC 11 to respond to the merits of the Petition urging that (1) That the 2024 Regulations were approved by the national Assembly; (2) the 2024 regulations did not involve County Governments and did not require senate Approval; (3) that the 2024 Regulations did not restrict the Operations of the DSS to one commercial Bank; (4) that the appointment of the 3rd respondent as DSS service provider did not violate the Petitioners’ rights; (5) that the 0.3% transaction fee was grounded in the substantial investment required for the development and ongoing operation of the DSS including personnel, systems, cyber security, and risk management protocols; and (6) that there had been public participation between 29 May and 11 July 2024 with extensive stakeholder consultations in major coffee-producing counties namely Kirinyaga, Muranga, Nyeri Machakos, and Kericho by the 3rd respondent in collaboration with the NCE and CMA and he forums were open to a broad range of stakeholders, including farmers cooperatives societies, traders and processors.

[19] On the directive of 18/11/2024, the 3rd Respondent’s Further Replying urged that *“the said directive was not an arbitrary administrative fiat but was issued to give effect to existing law, specifically, the Crops (Coffee) (General Regulations, 2019) and the Capital markets (Coffee Exchange) Regulations 2020 [which] were promulgated to operationalize the recommendations of the National Task Force on Coffee Sub-sector Reforms, a body constituted by the National Government to address structural inefficiencies, payment delays, lack of transparency, and financial indiscipline within the Coffee value chain.”*

[20] It was submitted that the adequacy of the participation leading to the promulgation of the 2019 Regulations had been tested and affirmed in by the Court in **Rwama Farmers Cooperative Society Ltd. & 3 Others v. cabinet Secretary, Ministry of Agriculture , Livestock and Fisheries & 3 Others** [2021] eKLR, and that as judgment in rem, which has neither been set aside, reviewed or appealed against was binding upon the petitioner and could not be re-litigated under the guise of challenge

on the directive. The complaint on the Role of government officers, the involvement of the Commissioner and County Cooperative director, it urged that the 2019 regulations had provided for their role to provide oversight and accountability to safeguard the interests of the coffee growers.

The Interested Parties case

[21] For the 1st Interested Party, the Speaker of the National Assembly, the Clerk of the National Assembly filed a Replying Affidavit of 28/5/2025 raising an objection to the petition that the court lacked jurisdiction as the Petition was filed prematurely when the statutory instrument was pending consideration by the National Assembly and that the Parliamentary Committee on Delegated Legislation had subsequently approved the legislation which was the laid before the National Assembly in accordance with the Statutory Instruments Act.

[22] Mr. Samuel Njoroge Replying Affidavit of 28/5/2025 described the legislative process that the Regulations went through in the following terms:

“4. I swear this affidavit in response and in opposition to the petitioners' petition and application dated 19th February 2025 filed under Certificate of Urgency of even date.

5. This affidavit is derived partly from my knowledge acquired in my capacity as Clerk of the National Assembly and partly from information and advice received from the National Assembly's advocate, Mr. Abraham Cheboryot. I have disclosed the source or ground of any statements based on information or belief, and I verily believe them to be true.

6. There is now shown to me and produced in a paginated bundle marked "Exhibit SN- I", true copies of various documents, which I shall refer to in this affidavit.

(a) The Court lacks jurisdiction to determine the petition and application.

7. The attempt by the Petitioners to come to court as against the 1st Interested Party was premature and speculative as the legislative process was still on-going at the time of filing the suit.

8. The Capital Markets (Coffee Exchange) (Fees) Regulations of 2024 ("impugned regulations" herein) were published on 7th February 2025 and were expected to be transmitted to the Clerk of the ational Assembly within seven (7) sitting days after the publication of the same as required under section 11(1) 0 the Statutory Instruments Act.

*9. This means that the regulations were to be laid before the ational Assembly **on or before 25th February 2025** when the seven (7) days statutory timeline expires, for tabling in the House in accordance with section 11(1) of the Statutory Instruments Act.*

10. The Regulations were transmitted and received in the Office of the Clerk of the National Assembly on 24th February 2025 via a letter from the Cabinet Secretary of the National Treasury and Economic Planning dated 14th February 2025. The letter transmitted a Gazette Notice dated 7th February 2025, the Capital Markets (Coffee Exchange) (Fees) Regulations of 2024, the explanatory memorandum and evidence of stakeholder engagement. Annexed hereto at pages [9-114 7 of the bundle marked as "SN-1" is a copy of the documents transmitted to the National Assembly via a letter dated 14th February 2025.
11. Subsequently, the impugned regulations were tabled in the National Assembly on Tuesday 25th February, 2025. Annexed hereto at pages [115-132 7 of the bundle marked as "SN-1" is a copy of the Hansard dated 25th February 2025.
12. Upon tabling before the National Assembly, the impugned regulations were referred to the Committee on Delegated Legislation for the purpose of reviewing and scrutinizing the regulation per the provisions of section 12 and 13 of the Statutory Instruments Act.
13. The Committee was expected to report to the House **within twenty-eight (28) sitting days after the date of referral of the impugned regulations to the Committee** failure to which the regulations would be deemed to have fully met the relevant considerations and the Cabinet Secretary will be at liberty to operationalize it.
14. Under Standing Order 210(3) of the National Assembly Standing Orders, upon scrutinizing a statutory instrument, the Committee on Delegated Legislation was expected to, pursuant to Standing Order 210(4) either accede to the instrument or recommend to the House that the instrument be annulled in part or in its entirety.
15. The National Assembly proceeded on recess on 14th March 2025 and subsequently, the House was not sitting during the recess. The recess ended on 31st March 2025 and consequently, the sitting days resumed. Annexed hereto at pages [133 1 of the bundle marked as "SN-1" is a copy of the Calendar of the National Assembly for the year 2025.
16. At its sitting held on Thursday, 10th April 2025, the Committee considered and satisfied itself that the Capital Markets (Coffee Exchange) (Fees) Regulations 2024 are in accordance with the Constitution, the Statutory Instruments Act and section 12(1)(ka) of the Capital Markets Act.
17. Subsequently, via a letter dated 11th April 2025, the National Assembly communicated the Committee's resolution acceding to the regulations as per the requirements of the Statutory Instruments Act and Standing Order No. 210(4) (a) of the

National Assembly Standing Orders to the Permanent Secretary, the National Treasury. Annexed hereto at pages 134-135 of the bundle marked as "SN-1" is a copy of the letter.

18. I am therefore advised by the Advocate on record for the 1st Interested Party, which advice I verily believe to be true that given that at the time of filing the petition, the national Assembly had yet to either accede to or annul part or the whole of the impugned regulations, thus, pre-empting the outcome of an ongoing legislative process.

19. I am therefore advised by Mr. Abraham Cheboryot, Advocate on record for the 1st Interested Party, that the Petitioners' claim against the National Assembly was both premature and misdirected, having been filed before the statutory and constitutional legislative process had been concluded. At the time of filing the petition and application, the impugned regulations were still undergoing the necessary scrutiny and consideration by the Committee on Delegated Legislation in line with the Statutory Instruments Act and the Standing Orders of the National Assembly.

20. Furthermore, the National Assembly, through its Committee on Delegated Legislation has since fully discharged its mandate by reviewing the Capital Markets (Coffee Exchange) (Fees) Regulations, 2024, and communicating its resolution of approval to the relevant authority. As such, the legislative process has been completed, rendering the issues raised in the petition against the National Assembly overtaken by events.

21. I therefore contend that the both the petition and the application dated 19th February 2025, in so far as they relate to the National Assembly, have been rendered moot and nonjusticiable, and no valid cause of action now lies against the 1st Interested Party.

Commencement of Statutory Instruments.

22. I am advised by Mr. Abraham Cheboryot, Advocate on record for the 1st Interested Party herein, which advice I verily believe to be true that section 23 of the Instruments Act provides for the commencement of Statutory Instruments as follows:

"(1) A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable."

23. I am therefore advised that the effect of this provision is that a statutory instrument takes effect on the date specified in it for its commencement. **If no commencement date is stated, the instrument will take effect on the date it is published in the official Gazette.**

Further that, the phrase "subject to annulment where applicable" means that the statutory instrument may still be revoked or annulled under specific procedures, such as parliamentary review or other legal mechanisms.

24. I am advised by Mr. Abraham Cheboryot, Advocate on record for the 1st Interested Party herein, that since the impugned regulations were published in the Gazette on 7th February 2025 and did not specify a commencement date, Section 23(1) of the Instruments Act dictates that they came into operation on the date of publication, 7th February 2025. The impugned regulations were validly and lawfully brought into operation in accordance with section 23(1) of the Statutory Instruments Act, and the assertion that they were prematurely operationalized or improperly brought into effect is both factually and legally unfounded. No breach of law or procedure has occurred in that regard."

[23] The 5th Interested Party, who with 6th Interested Party are the principal responders to the claim in the Petition, filed a Replying Affidavit sworn on 6/6/2025 by its CEO Lisper Ndung'u and set out the historical background to the Regulations and justified the fees charged in the Regulations on the basis of expanded role of the Exchange in the Coffee reforms including the introduction of the Direct Settlement System, as follows:

"20. THAT due to constant challenges in the coffee industry, a National Taskforce on Coffee Sub-Sector Reforms was appointed to check into such challenges and resultantly one of their observation was delayed coffee payments to farmers which was addressed by the formulation of the Direct Settlement System (DSS).

21. THAT from the captioned background, NCE has taken more than half a century to establish systematic procedures for the benefit of the coffee industry leading to efficient, prudent and professional running of the auction floor.

Justification for the 0.3% fees.

22. THAT in March 2020, the Capital Markets (Coffee Exchange) Regulations were enacted requiring that the coffee Exchange be licensed and regulated by the Capital Markets Authority as opposed to AFA as provided for under the Crops Act 2013.

23. THAT under the above captioned legislation, NCE is mandated to establish a Direct Settlement System (DSS). This requirement is mandatory under the Capital Markets (Coffee Exchange) Regulations, 2020.

24. THAT under Regulation 41, NCE is required to put in place a Direct Settlement System (DSS) through which all coffee proceeds from the auction are to be channelled. This process

requires putting in place the system and selection of a credible DSS providers.

25. THAT prior to these Regulations, NCE had very minimal operations costs with a total of eight staff and such costs were obtained by charging 0.2% of each coffee sale at the Auction from Brokers and Buyers. 26. THAT the above position has since changed as the Exchange role is no longer limited to running the trading floor with more duties and obligations being placed upon NCE as hereunder; a. Receive and verify before transmission to the DSS provider for settlement all necessary payment particulars from coffee growers or their representatives. b. Receive any relevant contracts of service for which payment will be due from the grower, and any other document showing outstanding liabilities payable by the grower, for purposes of settlement through the system. c. Verify the information provided by the grower is correct and relevant and where incorrect information is forwarded to the DSS provider be held liable for the loss. d. Receive from the Miller and Broker invoices for coffee sold at the exchange for onward transmission to the DSS provider. e. Receive from the DSS provider monthly and annual reports and disseminate such reports to interested parties. f. Receive from service providers in the coffee industry authenticated documents in support of any claim supported with prior agreements between the growers and such service providers for transmission to the DSS provider. g. Maintain and avail to the direct settlement system provider the following records and documents relating to coffee sold at a coffee exchange— i. records of every coffee warrant or warehouse receipt received, or created and the Delivery Notices issued and any cancellations thereof; ii. names of transferors, transferees, and the dates of transfer of the coffee warrant or warehouse receipts as the case may be; iii. records of requests received from and sent to the designated warehouses and clearing house and details of the buyers or roasters.

27. THAT all the above duties have led to ripple effect in the operations cost of the Exchange leading to an increase in its workforce by a huge margin and necessity for more office space as well as other operational costs.

28. THAT in light of the foregoing, **the Capital Markets (Coffee Exchange) Regulations, 2020 did not prescribe the transactional fees previously charged by the Exchange at 0.2% of the coffee sold at the exchange.**

29. THAT on or about 30th January, 2025, The Capital Market (Coffee Exchange) (fee) Regulations, 2024 was published vide Gazette Supplement No 3 of 30th January 2025 by the Cabinet Secretary for the National Treasury and Economic Planning.

30. THAT the said regulation introduced a 0.3% transactional fees to be charged by NCE with the same being necessary for offsetting the operations costs of the Exchange.

31. THAT based on the said Regulations, NCE wrote a circular to all it's stakeholders bringing to their attention the Regulations taking into account 6 that one of it's roles was to receive payment details from all stakeholders for onward processing by the DSS provider.

32. THAT based on the foregoing, the Petitioner herein challenged the Regulations on the basis that the same had not been approved by Parliament.”

[24] The 6th Interested Party responded by a Replying Affidavit sworn by Samuel Kamunyu Njoroge on 28/5/2025 setting out the Background on **The Capital Markets (Coffee Exchange) (Fees) Regulations 2024** and its Regulatory and Policy Context of the Coffee Exchanges Fees as the National Task Force on Coffee Sub-Sector Reforms appointed by the Government to examine the challenges facing the Coffee subsector, which had identified the key problems in the coffee subsector as Low earnings from coffee despite its premium quality; b) Delayed coffee payments; c) Mismanagement and inefficiencies in cooperatives; d) Restrictive coffee laws; e) High costs of production; and lack of access to the trading floor. It was urged tha the Regulations are calculated to address the problems of low earning for the coffee farmers and delayed payments for the sale of their produce.

[25] The 6th IP’s case is encapsulated at paragraphs 57 - 62 of the Replying Affidavit as follows:

“57. THAT the impugned regulations were developed with a view to enhancing market efficiency, lowering the cost burden on growers, and protecting public interest. The petitioners' assertion that their members' rights to property were violated lacks legal basis as no specific proprietary interest is conferred in law to a particular fee percentage, and no evidence has been produced to demonstrate actual loss or deprivation.

58. THAT the 6th Interested Party is aware of the Petitioners' contention that the adjustment of brokerage fees from 2% to 1% (in the contracts with farmers) affects their standards of living and may also affect their ability to service a loan of KES. 112 million which they have talked about in paragraphs 15 and 16 of their petition. This is what the 6th IP has to reply with regards to this:

a) It is trite that private contractual arrangements are subject to the prevailing legal and regulatory framework, especially where matters of public interest and economic policy are concerned. The regulation of brokerage fees in the coffee sub-sector is not an arbitrary interference with private rights, but a lawful exercise of public authority intended to protect smallholder farmers, enhance market transparency, and correct historical imbalances identified in the National Task Force Report on Coffee Sub-Sector Reforms.

b) Private contracts cannot override a law enacted in pursuit of the **greater** public interest, particularly in a sector that has been historically plagued by exploitative pricing, delayed payments, and information asymmetries detrimental to growers.

c) In any event, the 1st Petitioner is a licensed intermediary operating in a regulated commodity market, and their rights and obligations-including fee structures-must conform to the Capital Markets Act and the subsidiary legislation made thereunder d) The 1st Petitioner's inability to service a private commercial loan is not attributable to regulation, but to their own business decisions and risk management.

e) **Regulation** cannot be frozen or avoided merely because it affects the profitability of private contracts.

f) Financial arrangements (including loans) are expected to be factored in regulatory risk in a regulated environment like commodities markets.

g) The said loan is a private commercial obligation, the risk of which lies solely with the Petitioners as licensed market intermediaries.

h) Growers-who bear the cost-stand to gain directly from this change. The policy objective is cost reduction for the grower, not profitability guarantees for brokers like the 1st Petitioner.

i) The regulatory changes were lawfully enacted pursuant to Section 12(1) (ka) of the Capital Markets Act following comprehensive public engagement and bench marking. The fee adjustment reflects the reduced scope of broker responsibilities and is aimed at minimizing cost burdens on coffee growers. The Petitioners have no legal entitlement to a specific fee percentage, and the impugned regulation does not violate any of their rights under Article 40 of the Constitution.

59. **THAT** the impugned Regs are not unconstitutional for failure of passing through parliament because they went through the entire legislative process including parliamentary consideration and approval.

60. **THAT the** Regulations do not encroach on the devolved functions as alleged in the Petition, specifically under paragraph 72(d)(e) and (f). The 6th IP adds:

a) While the Petitioners have alleged that agriculture and co-operatives are devolved functions under Part 2 of the Fourth Schedule of the Constitution, the 6th Interested Party clarifies that the impugned Regulations do not regulate agricultural production or co-operative societies per se. The Capital Markets (Coffee Exchange) (Fees) Regulations, 2024 are sector-specific regulations governing licensed intermediaries and service providers operating within the Nairobi Coffee Exchange, a centralized market infrastructure regulated by the 6th IP, which is a national agency.

b) *These Regulations were made under the express mandate of Section 12(1)(ka) of the Capital Markets Act (Cap. 48SA) and are intended to promote transparency, efficiency, and investor protection within the framework of capital markets regulation - a function reserved for the national government. The regulation of trading infrastructure, exchanges, and financial markets falls squarely under the national government's functions under Part 1 of the Fourth Schedule to the Constitution.*

61. **THAT** the 6th Interested Party notes the Petitioners' allegation that the **Capital Markets (Coffee Exchange) (Fees) Regulations, 2024** violate the provisions of the Competition Act by limiting the Direct Settlement System (DSS) function to a single bank. The 6th Interested Party states as follows:

a) **The 2024 Regulations** do not provide for the selection, approval, or limitation of DSS service providers. The legal framework governing the DSS - including eligibility, selection criteria, and approval process - is established under **the Capital Markets (Coffee Exchange) Regulations, 2020**.

b) Regulation 2 of the 2020 Regulations defines the DSS as a "banking facility provided by commercial banks regulated by the Central Bank of Kenya," and Regulation 41(1) expressly allows any licensed commercial bank, competitively selected by the Exchange and approved by the Authority, to offer DSS services. The Fifth Schedule to the 2020 Regulations sets out detailed selection criteria, including capacity, experience, infrastructure, and national reach.

c) Accordingly, any commercial bank meeting the set criteria and approved through the established process is eligible to provide DSS services. The 6th Interested Party has not excluded any qualified provider and has acted in accordance with the regulatory framework that promotes fair competition, transparency, and efficient service delivery. The current appointment of one bank as the DSS provider resulted from a competitive process initiated by the Nairobi Coffee Exchange under the 2020 Regulations and is not a product of exclusionary policy."

[26] Save for entering appearance through Mr. Libendi, the 2nd Interested Party did not file any response.

[27] Save for an attendance by Ms. Rono for the 3rd IP on the first day of hearing on the 24/2/2025, the 3rd and 4th Interested Parties did not enter appearance or participate in the proceedings.

Submissions

[28] The Counsel for the parties filed respective written submissions and the hearing proceeded by way of the affidavits and submissions in terms of the Rule 20 of the Mutunga Rules as follows:

“Hearing of the petition.

20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of— (a) affidavits; (b) written submissions; or (c) oral evidence. (2) The Court may limit the time for oral submissions by the parties. (3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. (4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision. (5) A person summoned as a witness by the court may be cross examined by the parties to the petition. Evaluating petition for direction.”

[29] The Counsel for the parties, made submissions in highlight of the written submissions as follows, and in view of lapse of time set aside for the oral submissions, the Counsel for the petitioners was allowed to file written submissions in reply to the highlights of submissions by the Respondents and Interested Parties.

Highlighting of submissions

[30] The Counsel for parties highlighted their respective submissions on 2/10/2025 and Judgment was reserved.

[31] For The 1st Petitioner/applicants it was submitted as follows:

Mr. Magee

There was no public participation carried out by the Respondents before the Statutory Instrument was gazetted. We ask the Court to look at the documents by the first Interested Party. The Petitioners were never heard. The supplementary Affidavit - Petitioners demonstrated that they are stakeholders. The Petitioners were not heard. There is no demonstration that there was information on exactly what was to be heard. There is no meaningful public participation.

At the National Assembly - after the conservatory orders, there was no public participation. The Committees of Parliament are also required to carry out public participation under Article 118 of the Constitution.

There was no approval by Senate: The Regulations affect Counties as they relate to agriculture and cooperatives society. Under the Fourth Schedule of the Constitution, agriculture and co-operatives are devolved functions and any Instrument made on them must go the Senate.

There is no Regulatory Impact Statement as required under section 6, 7 and 8 of the Statutory Instruments Act before publication of the Regulations. Section 6 of the SI Act requires that if it imposes significant costs on community there should be a regulatory Impact Report gazetted and published. It was not done. The Regulations will impose costs on Petitioner’s cooperative societies and coffee farmers as the levy of 0.3%

on direct sales. It impacts on coffee growers. There should have been a statement why it is necessary.

The 1st Petitioner has invested heavily by loans and its projection was based on Broker fees at 2% which has been reduced to 1% which affects costs of doing business. The coffee brokerage [fee] is covered by the farmers mainly through their cooperatives. There should have been a Regulatory Impact Assessment Statement/report.

[Counsel cited the case law authorities in support of propositions on public participation and that a Statutory instrument is legislation which must go to the senate for approval if it involves County Government.]

In *Rwame Farmers Coop Society & 3 others v. Cabinet Secretary Agriculture & 3 Others*, paras 120-2 held that Statutory Instruments must go to the National Assembly. The regulations were the Coffee Regulations 2019 which are the previous regulations to the present regulations before the Court and it is not disputed that they have not gone to the Senate.

Mr. Mathoka for the 3rd Petitioner -

Direct coffee payments.

Paragraph 5 of the Amended Petition dated 12/9/2025.

I agree with the submissions of Mr. Magee counsel for the 1 & 2 petitioners.

Paragraph requiring directors to supply their numbers to the Bank when the slated mechanism for the protection of the information has not been provided for or guaranteed that information shared shall not be circulated.

Monies borrowed by Cooperatives.

Even if passed by AGM of the Cooperative shall not be approved unless the same is agreed by the County Director for Cooperatives and Commissioner for cooperative Development. It provides that both have to agree.

It interferes with the financial independence of the cooperatives as once the AGM has passed a Resolution, there is no where for her County Cooperative Director and the Commissioner for Coop development and when either refuses to agree with the borrowing. If one refuse to agree on the credit, the financial operations of the cooperative society shall grind to a standstill.

[32] For the Respondents, it was urged as follows:

Mr. Maalim for the AG

We support the case by the 3rd Interested Party, the Capital markets Authority.

Mr. Cheboryot for the 1st Interested Party [National Assembly]

I refer to Replying Affidavit of 28/5/2025 and skeleton submissions of 29/9/2025. We rely also on the AG and 6th Interested Party's responses.

Speaker of the national assembly exercised mandate under sections 10,11 and 12 of the Statutory Instruments Act.

Public participation for National assembly is to look at the statutory Instrument and its compliance with the Constitution. It was to promote the history of the Coffee as development of the County. The Committee is only required to look at the Statutory Instrument vis a vis the Constitution. We had seen documents from the Capital Market Authority that it had done public participation. It would be a double expense. They submitted documents showing that they had done public participation.

Regulations relate to matter falling within the National Government purview under 4th Schedule of the Constitution. Section 12 (1) (k) of the Capital Markets Act to regulate markets for maximum fees payable for coffee at the Coffee Exchange.

I refer to paragraphs 27 and 28. These are functions of the national Government and not a devolved Government. The Regulatory structure on the Coffee Exchange falls outside matters for consideration by the Senate.

The Petitioners now state that Senate should have considered it. It is a national Government function.

We urge the Court to dismiss the Petition.

M. Ondari for 3rd respondent Bank

We filed a Replying Affidavit and Further Affidavit, skeleton submissions of 30/9/2025.

On public participation, I refer to the Replying Affidavit of the CMA of Kamunyu Njoroge which shows that public participation was conducted across the country.

*I refer to the **BAT** Supreme Court decision.*

Regulatory Impact Statement provisions of the Statutory Instruments Act section 9 (i) of the Act. For amendment of fee or charge or tax, regulatory Impact Assessment shall not be necessary. It is a national policy by Government and therefore section 9(1) applies and Regulatory Impact Assessment was not required.

Monopoly on particular Bank. *The 2024 Regulations did not regulate the 2020 Regulations. There is procedure for determining the providers. The Regulations provide for procedure to identify an entity that qualifies. There is no monopoly of the Bank. It is open to any Bank. There is no exclusivity but it gave eligibility.*

Directive by the 3rd Respondent - The Directive of 18/10/2024

The directive was issued under 2020 Coffee Market Regulations as read together with 2019 Regulations, which were submitted to public participation.

*I refer to the decision in **Rwama Farmers Corporation v. Cabinet secretary for Agriculture** case, Petition No. 181 of 2020, upheld the legality of the Regulations.*

The directive only implements the Regulations of 2019. It cannot be declared unconstitutional. The Petition does not invalidate 2019 and 2020 Regulations.

Senate approval – *Section 12 (1) (k) (c) of the capital markets Act gives power to make Rules. The Regulations do not fall under the County Government. It is for the National Government.*

*I refer to the decision of **Speaker of Senate & 3 Others v. Speaker of the National Assembly**, Supreme Court at p. 120, on Amendments to the Capital markets Authority Act and issue whether it regulates it regulates County*

Government. The Supreme Court held that the CMA does not relate to County Government. The Act does not affect the County Government.

Mr. Ngara for the 5th Interested Party

We rely on Affidavit of 6/6/2025 by Samuel Njoroge in support of the 3rd respondent and 1st Interested party.

Mr. Githendu for 6th Interested Party

Skeleton submissions in two parts. I support the submissions of the Respondents and the Interested Parties.

Brokerage fees reduced from 2% to 1%. It is about resources; it's all about money! The rationale and benefit from reduction of fees are set out in paragraph 13-28 of the Replying Affidavit of Kamunyu Njoroge.

Even though the brokers have contracts as the role of the Brokers have shrunk drastically. The Role of the Brokers returned in regulations of 2020.

The financial burden borne by the Brokers has reduced and some have been removed and extinguished. There is need to rationalize fees as they are not proportionate to the Role of the Broker which was inherited from the previous regime.

The 1% [fee] was reached after a comparative study with Tea subsector, which was used by the Respondent's Task Force.

Report of the Task Force refers to the Tea sub-Sector - centralized auctions and their regularized systems. In Tea, Brokers earn 0.75% under Tea Industry Regulations.

I refer to the letter by the Capital markets Authority to the Nairobi Coffee Exchange (NCE) (exhibit 6) in the Bundle of Documents. Analogous with Commodity exchanges in India, Zambia and East Africa Tea Traders Association. That was the basis for the 1% fee.

The exchange is now under jurisdiction of the Capital markets Authority, and the regulation require resourcing. The money goes to oversight.

Contracts which provided for 2%. Contracts with given % are subject to the law. They are licensed by Capital markets Authority CMA. It has been upheld in the **Mayer Duty Free** case. The parties economic and property rights under Article 40 can be lawfully restricted to safeguard the welfare of the farmers. I also refer to the Indian case of **Rosan** where it was held that changes in law can frustrate contract.

Property rights of the brokers under Article 27 (1) of the Constitution are rights that can be limited. I refer to the Supreme Court's **BAT** case. The rights can be limited for the greater good for the Society. I also cite **Anerita Karimi Njeru** on the set out the particulars of the alleged grievances with precision.

Regulatory Impact Assessment. *The objective of the publication were met by public participation which were met under the **BAT** case. We pray for the dismissal of the Petition.”*

[33] In their written submissions in reply dated 13/10/2025, the Petitioners 1 and 2 submitted through counsel as follows:

Written Reply to the Submissions by the Respondents

1. *The applicant challenges the formulation by the National Assembly of the Coffee Regulations and urges violation of Articles 118 of the Constitution which requires public participation in the formulation of laws.*
2. *The applicant buttresses its case by the national values and general principles of governance which bind all state organs, state officers, public officers and all persons.*
3. *Public participation. Citing the Supreme Court in the **BAT** case, the applicant submits that the public participation must be purposive and meaningful, real and not illusory; cosmetic or act of public relations. The components of meaningful public participation are set out at para 96 of the **BAT** case.*
4. *Key concerns:*
 - i. *Lead stakeholders (Kirinyaga accounting for 22% cherry production) are not shown to have been consulted.*
 - ii. *The subject of consultations was not explained to a level it could be understood by the public.*
 - iii. *No record of proposals made, views received and whether taken into account in making the regulations.*
5. **No response for the Senate to the Petition.**
6. **Speaker of National Assembly contended that the regulations did not concern County Governments and therefore could not be tabled before the Senate.**
7. *Regulations were not tabled before the Senate. The Petitioners submit that as the Regulations concern County Government it was mandatory for the Regulations to be tabled before the senate under Articles 110,111,112 and 113 of the Constitution. Fourth Schedule of the Constitution on powers and functions is relied on in urging that Agriculture is developed function and it includes crop and animal husbandry (1(a)) and cooperatives (7(e)).*
8. **Direct impact on coffee farmers –**
9. **The Memorandum on the Regulations show they relate to agriculture and gives impact as-**
 - i. **Supporting coffee sector reforms**
 - ii. **Protection of small farmers from excessive fees ensuring that they receive fair compensation for their produce.**
 - iii. **Contribute to growth and sustainability of Kenyan Coffee Sector.**
 - iv. **Physical engagements in all coffee growing regions**
 - v. **Support government’s initiative on the reforms in the coffee subsector.**

vi. **Rights of farmers to receive their pay for coffee sold**

10. National Task Force on Coffee sub-Sector Reforms – Constitution gives national government power to develop Kenya’s Agricultural policy
11. Cooperative Bank 3rd respondent states that 5th IP the Nairobi Exchange issued invitations to coffee growers and cooperatives for sensitization – some 15 counties’ cooperative unions are shown as exhibit EK12. Clearly, it is submitted the NCE knew that the regulations related to powers and functions delegated to County Governments. Citing **Speaker of the senate & Another v. AG & Anor; Law Society & 2 Ors. (Amici Curiae)** [2013] KESC (KLR) paragraph 144, the Petitioner submits that the Senate is the Constitution’s safeguard for the principle of devolved government, which “purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)]”.
12. The Petitioner also cites **R v. Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & 4 Others ex parte Council of Governors & Another** [2017] eKLR (Odunga, J. as he then was) paras 115-8 and **Kenya Union of Saving & Credit Co-operatives Limited (KUSCCO) v. The Sacco Societies Regulatory Authority (SASRA)** [2019] eKLR (W. Korir, J. as he then was) at para 60, for two propositions, respectively, that a Bill concerning county governments must be considered by Senate and that a statutory Instrument is legislation and if it relates to a devolved function, it must be considered by the Senate.
13. The petitioner urges that the Regulations require the coffee proceeds to be paid through Direct Settlement System through a banking facility provided by **a commercial bank** regulated by the Central Bank as clear evidence that the respondent had identified only one bank will be approved, and rejects the submission by the 3rd Respondent (The Cooperative Bank) that the reference to **a commercial Bank** may mean **Commercial Banks**; and contends that the review of the direct settlement system was calculated at giving the 3rd respondent a Monopoly, a position which offends anticompetition and consumer protection law in terms of Article 46 of the Constitution. Referring to the Rapporteur’s report of the Capital Markets Authority, it was also submitted that the 3rd Respondent participated in conflict of interest, as a principal not stakeholder in the development of Regulations which introduced a 0.3% of proceeds to the DSS system provider, pointing out that the figure is higher than the ordinary transaction fee and begging he question why the coffee sale proceeds would not be paid through the ordinary banking system which as in the past which is cheaper and beneficial to the farmer and other stakeholders.
14. On the merits of the Regulations in response to the Nairobi Coffee Exchange and the Capital Markets Authority, the movers/ makers of the Regulations, Counsel wondered for whose benefit the reduction by 50% of

the fee was introduced as the farmers through their cooperatives are the owners and managers of the 1st Petitioner brokerage.

15. In a pitch for the farmer's interest, the Petitioners urged that-

“33. It is our humble submission that it is not justifiable to reduce the income that would come to farmers directly and through their brokerage companies and in turn introduce fee payable to new cartels and government agencies. The following charges were not payable previously:

(a) DSS – 0.3%

(b) Capital markets – 0.2%

(c) Nairobi Coffee Exchange – 0.3%

We submit that this [is] taking money from the farmer and transferring it to another entity which has nothing to with coffee production.

34. We invite the court to note that capital markets Authority is a public entity funded through tax payers' money where farmers also tax payers. Compelling farmers to pay a fee of 0.2% under the impugned regulations would amount to double taxation.”

16. It was urged that the proposal to pay 0.3 % to the Nairobi Coffee Exchange, the 5th Interested Party, lacked justifiable basis, as no budgetary framework or fiscal study to support such fee had been done.

17. On the requirement of sections 6, 7 and 8 of the Statutory Instruments Act to publish a Regulatory Impact Statement, Counsel responded that the regulatory impact statement was required to be published in the Kenya Gazette and a newspaper with wide circulation before making Regulations if they were likely to impose significant costs on the community.

18. The Petitioner's Counsel concluded by painting a picture of the impact of the Regulations' fees structure on the farmers incomes form proceeds of sale of tehri coffee crop as follows:

“42. We invite the court to take judicial notice of the value of coffee last year which is in public record as Ksh.38.4 billion. If all this went through the Nairobi Coffee Exchange and was subjected to the impugned regulations the costs would be as follows:

- i. DSS (Co-operative Bank) would earn of $0.3\% \times 38.4 \text{ billion} = \text{Ksh.}115,200,000/=$**
- ii. NCE would earn Bank) would earn $0.3\% \times 38.4 \text{ billion} = \text{Kshs } 115,200,000/=$**
- iii. Capital Markets Authority would earn $0.2\% \times 38.4 \text{ billion} = \text{Ksh } 76,800,000/=$**
- iv. The more than 15 brokerage companies would each earn an average of $1\% \times 38.4 \text{ billion} / 15 = \text{Ksh. } 24,000,000/=$**

(This is unfair owing to the fact that the 1st petitioner and other Co-operative Union brokerages are owned by farmers through their co-operatives)

43. It is therefore misleading to suggest that farmers will be benefiting because they will now be charged 1 % (down from 2 %) for brokerage services. In reality, the one percent taken away from brokerages has been redistributed and allocated to the Nairobi Coffee Exchange.

44. As demonstrated here above the said charges run to hundreds of millions of shillings which belongs to coffee farmers. The same clearly imposes significant costs on coffee farmers and a Regulatory impact statement was mandatory.

45. We submit that failure to have the same published rendered them unconstitutional, null and void.”

[34] The Judgment of the Court was reserved.

Issues for determination

[35] *The issues for determination in the consolidated petitions as presented through the pleadings, affidavits and submissions of the parties are as follows:*

- (a) Whether the Regulations subject of the Petition were subjected to public participation in accordance with Articles 10 and 118 of the Constitution.*
- (b) Whether a Regulatory Impact Assessment State was necessary, and if one was prepared before the gazettelement of the Regulations.*
- (c) Whether the Regulations are legislation affecting County Government, which required approval by the Senate in accordance with Articles 109 - et seq of the Constitution, and if so, whether such approval was obtained before gazettelement of the Regulations.*
- (d) Whether the reliefs sought will be granted.*
- (e) Costs of the Petitions.*

[36] **The merits as to the contents of the Regulations are not before this Court, and the Court may not express a view as to the suitability of the policy directions and administrative reforms and remedies sought to be implemented therein.**

[37] As the provisions of the Constitution of Kenya are clear in the areas of inquiry in this petition it has not been necessary to resort to the cited equivalent provisions of the *African Charter on Human and People’s Rights* and the *International Convention on Civil and Political Rights*, even the applicability of the Treaties is beyond doubt under Article 2 (5) of the Constitution.

[38] The High Court has the jurisdiction and powers set out in Article 165 of the Constitution. In its determination herein, the Court aims to discharged its obligation under 259 to interpret the Constitution in a manner that –

- “(a) promotes its purposes, values and principles;*
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*

- (c) permits the development of the law; and
 (d) contributes to good governance.”

Determination

Preliminary

Preliminary Objection as the competence of the 3rd Petitioner’s case

[39] The Minutes of 15/8/2025 which recorded the new executive of the 3rd Petitioner named Felix M. Mwai- Chairman as the person authorized to sign all legal documents for the Union in terms under Min.01/NACCU/15/08/2025 signing mandate record that - “*Members resolved that the Chairman is mandated to sign all legal documents for the Union.*”

[40] No mention is made of the pending suit or of authority to sue on behalf of the Union in any case.

[41] The traditional position in the decision of ***Steel Formers Limited & Another Kenya Development Corporation & 2 Others*** [2025] KEHC 3349 (KLR) (A. Mshila, J.) relied on by the 6th Petitioner in its objection as to the lack of the authority of the body corporate to file the proceedings has been review by binding judicial authority. (see ***Muthoga & another v Kaiganane*** [2025] KEHC 4335 (KLR) where this Court observed that -

“Recent developments in the law have softened the hard position on the issue of authority to sue in Company’s name as held in ***Bugerere Coffee Growers Ltd v Sebaduka & Anor.*** (1970) 1 EA 147, but there is still requirement to show that the Director has been authorized by the Board. In the ***Wanyiri Kihoro v Konahauthi Ltd*** [2017] eKLR, the Court of Appeal noted these developments as follows:

“The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; ***Bugerere Coffee Growers Ltd v Sebaduka & Anor*** (1970) 1 EA 147. **The court in that case held:-**

“**When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.**”

However, the principle enunciated in the ***Bugerere*** case has since been overruled by the Uganda Supreme court in the case of ***Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000*** where the Court endorsed the decision of the Court of Appeal that the decision in the ***Bugerere*** case was no longer good law as it had been overturned in the case of ***United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998.*** **The latter case restated the law as follows:-**

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is

authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

[42] *The decision has since been applied in Kenyan courts, for example, in **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.***”

[43] However, in this case the general mandate on the director to act on behalf of the company, has not been shown to have been given to Ephantus Maina Muriithi, Secretary of the 3rd Petitioner and the deponent of the Affidavit sworn on 12/9/2025 in support of the Amended Petition but of the Chairman who is an authorized person to sign all legal documents. The Court is constrained to uphold the preliminary objection by the 6th Interested Party to reject the petition/application by the Secretary of the 3rd Petitioner Company in absence of such authority.

Whether the Regulations subject of the petition were subjected to public participation in accordance with Articles 10 and 118 of the Constitution.

Public participation in the making of the Regulations

[44] The Court appreciates that the requirement for public participation pursuant to Article 10 principle of people participation as a national value and principle of governance in the making of a Statutory Instrument is two-phased under the statutory and constitutional regimes. Section 5 of the Statutory Instruments Act makes provision in addition to whatever requirements there may be for stakeholder comments such as exist in the Capital Market Act section 12 (2). Section 5 provides that:

“5. Consultation before making statutory instruments

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to— (a) have a direct, or a substantial indirect effect on business; or (b) restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument. (2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation— (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content. (3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall— (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or (b) invite submissions to be made by a specified date or

might invite participation in public hearings to be held concerning the proposed instrument.”

[45] To make the public participation meaningful, within the elaboration of the principle in the Supreme Court’s *BAT* case, there is the additional requirement under section 6 of the Statutory Instrument Act for preparation and presentation a Regulatory Impact Assessment statement:

“6. Regulatory impact statements

*If a proposed statutory instrument is likely **to impose significant costs on the community or a part of the community**, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.”*

Approval of Statutory Instrument by Parliament

[46] Section 5A of the Act provides for an explanatory memorandum to demonstrate necessary consultation or explain default, as follows:

“5A. Explanatory memorandum

(1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—

(a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;

(b) a brief statement of all the consultations undertaken before the statutory instrument was made;

(c) a brief statement of the way the consultation was carried;

(d) an outline of the results of the consultation;

(e) a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

[Act No. 4 of 2018, Sch.]”

[47] The Rule-making process requires the laying of Statutory Instruments before Parliament under sections 10 and 11 of the Statutory Instruments Act for purposes of scrutiny and approval in accordance with the legislative powers under Article 109 of the Constitution.

[48] Section 11 of the Statutory Instruments Act require the tabling of statutory Instruments before Parliament for Approval as follows:

“11. Laying of statutory instruments before Parliament

(1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of

a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.

*(2) Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of the Constitution, **all regulation making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.***

(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

[Act No. 4 of 2018, Sch.]”

[49] The question before the Court is whether the Regulation were laid before National Assembly in compliance of section 11 of Statutory Instruments Act.

[50] There is evidence that the procedure of section 5A, 10 and 11 as to Laying of statutory instruments before Parliament and the accompaniment of the statutory instrument with an ***Explanatory memorandum*** was complied with.

Participation in the National Assembly

[51] Article 118 of the Constitution is textually clear as follows:

“Public access and participation.

118. (1) Parliament shall—

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

*(b) facilitate public participation and involvement in the legislative and other business of Parliament **and its committees.***

(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”

How is public participation to be achieved in the Committee stage?

[52] The Petition charged that the Statutory Instrument violated section 13 (a) (b) (j) (k) (l) and (o) of the Statutory Instruments Act. Section 13 of the Statutory Instruments Act provide as follows:

“13. Relevant considerations

The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument— (a) is in accord with the provisions of

the Constitution, the Act pursuant to which it is made or other written law; (b) infringes on fundamental rights and freedoms of the public; (c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament; (d) contains imposition of taxation; (e) directly or indirectly bars the jurisdiction of the Courts; (f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; (g) involves expenditure from the Consolidated Fund or other public revenues; (h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; (i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; (j) appears to have had unjustifiable delay in its publication or laying before Parliament; (k) makes rights, liberties or obligations unduly dependent upon nonreviewable decisions; (l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers; (m) inappropriately delegates legislative powers; (n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; (o) appears for any reason to infringe on the rule of law; (p) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and (q) accords to any other reason that the Committee considers fit to examine.”

[53] Upon formulation and gazettelement of such legislation, the Constitutional provisions by the Article 118 (1) (b) provision for public participation at the Committee stage as follows:

“Public access and participation.

118. (1) Parliament shall—

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

*(b) facilitate public participation and involvement in the legislative and other business of Parliament **and its committees.**”*

[54] Could the constitutional provision of Article 118 (1) (b) as regards public participation before Committees of Parliament be an idle proposition? The Court does not think so. No provision of the Constitution is idle; and it must taken to mean what it says. So how does the public participate in the deliberations of a Committee of Parliament? At the very least, there should be a public invitation to comment on the proposed legislation, at this time already published, so as to inform the Committee’s decision whether the subsidiary legislation complies with the constitutional and statutory requirements of public participation.

[55] The **BAT** case prescribes the principles for a meaningful public participation as follows:

“Guiding Principles for public participation

(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”

[56] The substantive provision of the 5-paragraph Regulations is simple enough. They make provision for the deduction of some funds from the proceed of sale of Coffee and the payment to named persons/institutions as follows:

“THE CAPITAL MARKETS ACT

(Cap. 485A)

IN EXERCISE of the powers conferred by section 12 (I) (ka) of The Capital Markets Act, the Cabinet Secretary for the National Treasury and Economic Planning makes the following Regulations-

THE CAPITAL MARKETS (COFFEE EXCHANGE) (FEES) REGULATIONS, 2024

1. These Regulations may be cited as the **Capital Markets Coffee Exchange) (Fees) Regulations. 2024.**

2. In these Regulations, unless the context otherwise requires:

"broker" has the meaning assigned to it under regulation 2 of the Capital Markets (Coffee Exchange) Regulations;

"buyer" has the meaning assigned to it under regulation 2 of the Capital Markets (Coffee Exchange) Regulations;

"coffee exchange" has the meaning assigned to it under regulation 2 of the Capital Markets (Coffee Exchange) Regulations;

"coffee sales proceeds" means monetary consideration received in exchange for clean coffee sold at a coffee exchange or, where applicable, through direct sales;

"direct settlement system" means a banking facility provided by a commercial bank regulated by the Central Bank of Kenya for the clearing and settlement of coffee proceeds: and

"member" means any person who has been admitted as a member a coffee exchange.

3. The object of these Regulations is to provide for- Object of the Regulations.

(a) the maximum fees payable for coffee sold at a coffee exchange; and

(b) the annual membership fees payable by members of a coffee exchange to the exchange.

4. (I) A fee not exceeding one-point-eight per cent of the gross value of coffee sold at a coffee exchange shall be deducted from the coffee sales proceeds through the direct settlement system by the coffee change.

(2) The coffee exchange shall, through the direct settlement system, apportion the fee deducted under subregulation (1) within twenty-four hours of receipt of the funds from the buyer in the proportions set out in the First Schedule.

(3) The Authority may direct the coffee exchange to remedy or mitigate the effect of any breach of subregulation (2).

5. A member of a coffee exchange shall pay an annual Membership fees.

membership fee to the coffee exchange at the rate specified in the Second Schedule.

FIRST SCHEDULE

TRANSACTION FEES

(r.4(2))

S/No. Transaction fees

Percentage of transaction fees to be apportioned

1. Broker fees 1%

2. Coffee exchange fees 0.3%

3. Direct settlement system provider fees 0.3%

4. Capital Markets Authority statutory fees 0.2%

SECOND SCHEDULE**MEMBERSHIP FEES**

S/No. Category Fee (KSh.)

1. Brokers 75,000
2. Category I Buyers - Buying inore than I% of annual coffee 75,000 traded
3. Category 2 Buyers - Buying less than 1% of annual coffee 50,000 traded
4. Warehouse Operators (associate member) 115,000
5. Millers (associate member) 115,000
6. Transporters (associate member) 115,000
7. Export bags providers (associate member) 115,000
8. Input suppliers (associate member) 115,000
9. DSS Providers (associate member) 115,000
10. Other Commercial Banks (associate member) 115,000
11. Any Coffee or Commodity Fund (associate member) 115,000

Made on 23rd December, 2024.

JOHN MBADI NG'ONGO,

Cabinet Secretary for the National Treasury and Economic Planning.”

- [57] The **BAT** standard of meaningful public participation in the circumstances of this case would require especially clarity of the subject matter for the public to understand; structures and processes (medium of engagement) of participation that are clear and simple; opportunity for balanced influence from the public in general; and capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
- [58] Whilst the percentages are small enough, the actual amount runs into millions when it is calculated on the trade volume for the whole country. The Petitioners have assessed on the basis of the past national sale proceeds of 38.4 Billion in the replying submissions, as follows:
- (i) **“DSS (Co-operative Bank) would earn of 0.3%x38.4 billion = Ksh.115,200,000/=**
 - (ii) **NCE would earn Bank) would earn 0.3%x38.4billion = Ksh.115,200,000/=**
 - (iii) **Capital Markets Authority would earn 0.2%x38.4billion = Ksh.76,800,000/=**
 - (iv) **The more than 15 brokerage companies would each earn an average of 1%x38.4billion/15 = Ksh.24,000,000/=”**
- [59] In the RIA it should have been explained the basis and method of calculations to arrive at the costs of the service rendered by the various service providers whose fees are fixed in the Schedule to the Regulations. The affected persons the Brokers, the farmers members of the Cooperative Societies and Unions should have had an opportunity to demonstrate alternative methods of costing that may have given different cost percentages. In line with the professional nature of cost and pricing, there ought to have been information by professional cost assessors with opportunity for the brokers farmers and cooperatives to dispute and present alternative costing before the fees were fixed and legislated in the Regulations.

[60] The Court has noted the evidence offered by the 6th Interested Party as to public participation as follows:

1. A public notice in the newspapers section of MyGov of March 12th 2024 entitled Request for Stakeholder and Public feedback on the draft Capital Markets Trading Regulations 2024. Draft guidelines on financial resource requirements for market intermediaries and Amendments to the Capital Markets (commodity markets regulations 2020) calling for comments to be sent to the 6 interested parties to the Executive Officer, Nairobi Coffee Exchange
2. Letter dated 22/02/2024 from the 6 interested parties to the Executive Officer Nairobi Coffee Exchange directing the conduct public participation on the proposed fee structure within 30 days.
3. Report on stakeholders request for comments by Capital Markets Authority on proposed market fee structure indicating 10 responses from 4 growers, 3 Roasters, 2 Exchange persons and 1 Warehouse man. Of the 10, 2 supported the fee structure and 8 opposed the fee structure with one remarkable comment “The questionnaire is not sufficient, there should be a physical engagement of the trade participants in order to adequately discuss these issues.” I therefore propose that those rates should not be made applicable before these concerns are addressed.
4. Letters in response to the proposed changes ; 8/04/2024 United Eastern (k) Coffee Marketing Agency Ltd , Letter dated 18/04/2024 by Meru Central Coffee Cooperative Union, Letter dated 10/04/2024 Kinya Coffee Marketing Agency Ltd, Letter dated 8/04/2024 by Muranga Farmers Cooperative Union, letter dated 8/04/2024 by Baringo Kawa Brokerage Company, letter dated 19/04/2024 Bungoma Union Brokerage Company, letter dated 19/04/2024 by National Coffee Cooperate Union, letter by Cooperative Bank dated 18/04/2024, letter dated 18/04/2024 by National Coffee Exchange. Apart from 3; Meru Central Cooperative Union and the Cooperative Bank which is the DSS provider and the National Coffee Exchange (who is the 5th interested party) who support the proposed fee structure, all the other were opposed with a common refrain that their prayers were:
 - 1) “Let brokers remain with the charges/fees they have been charging with intrusion.
 - 2) “Let CMA, NCS, brokers and other stakeholders meet and deliberate on the fees to be included apart from the current fees, include all relevant players in the value chain e.g Coffee Board, Coffee Research, County governments and this will add value to the coffee farmers.
 - 3) Brokers support operations of the mills since the milling charges are not enough and the brokers are shown; “Mt. Elgon Mills, Bungoma Mills, Gusii Mills, Kipkelyon Mills, Baringo Mills, Gachatha Farmers, Komothai Mills, Muranga Mills, Kirinyaga Mills, Embu Mills, Tharaka Nithi Mills, Meru Mills, Machakos Mills, Gikanda Mills, Othaya Mills and Rumukia Mills.

These respondents indicated that they were members of the National Coffee Cooperative Union with a membership drawn from 31 coffee growing counties in Kenya currently the registered union members are:

Muranga Coffee Farmers – Kiambu Coffee Farmers – Gusii Coffee Farmers – Mt. Elgon Coffee Farmers - Bungoma Coffee Farmers- Meru Coffee Farmers – KipKelion Coffee Farmers – Embu Coffee Farmers – Kirinyaga Coffee Farmers – Baringo Coffee Farmers – Machakos Coffee Farmers – Tharaka Nithi Coffee Farmers – Nandi Coffee Farmers – Nyeri Coffee Farmers – Trans Nzoia Coffee Farmers – Nakuru Coffee Farmers Cooperative Union. Out of the coffee farmers union only Meru Coffee Farmers supported.

[61] It is clear that apart from Cooperative Bank the 3rd Respondent, NCE the 5th interested party who are beneficiaries of the fee structure all the other respondents, except 1 Cooperative Union (Meru), were opposed to the proposed fee structure and they called for further consultations and discussions between CMA, NCE and the whole spectrum of the coffee production value chain. There is no evidence that NCE and CMA ever called for a further meeting to discuss the proposed fee structure. The court has no hesitation in finding that the public participation on the fee structure as shown by the documentation produced by the 5th and 6th interested parties was not sufficient or meaningful for purposes of responding to the proposed fee structure.

[62] As regards the approval and appointment of Co-op Bank Kenya as the provider of the DSS to the NCE, the Court has noted the documentation beginning with the call for expression of interest in April 2023 and the process leading to the appointment on 28/07/2023 subject to no objection by Central Bank of Kenya. The Court notes that the process of appointment of DSS provider was conducted under the CMA (Coffee Exchange Regulations 2020) these regulations are not the subject of this petition and the court does not determine whether the appointment of the 3rd Respondent was properly done.

[63] There need not be consensus; but there ought to be an explanation why despite the opposition, the proposal contained in the Regulations were still the better option. The Regulations Impact Assessment was most necessary in the context of mathematical considerations involved in fixing appropriate the fees in the transactions subject of the Regulations.

Post-gazettement public participation

[64] There was no evidence that the National Assembly Committee on Delegated Legislation ever facilitated a meaningful public participation or at all. The petitioners have demonstrated and the 1st Interested Party has by its Replying Affidavit and submissions confirmed that there was no public participation at the Committee stage of scrutiny by the National Assembly. All the Clerk of the National Assembly deposed was that upon resumption from recess of the sittings of the National Assembly, the Committee considered the Regulations and approved them.

It was urged only that “*The National assembly proceeded on recess on 14th march 2025. Upon resumption, the Regulations were referred to the departmental Committee on Delegated Legislation. The Committee duly considered the 2024 Regulations during its sitting held on 10th April 2025. After deliberation, the Committee concluded that the Regulations were lawful, and consistent with the enabling provisions of section 12 (1) (a) of the Act.*”

[65] Citing ***Consumer Federation of Kenya v. Cabinet Secretary for Petroleum and Mining & 4 Others*** (Constitutional Petition) E219 of 2020 [2023] KEHC 24015 (Constitutional and Human Rights) (26 October 2023) (Judgment), it was submitted that in accordance with section 11 and 23 of the Statutory Instruments Act provides that approval by Parliament is not a condition precedent for the commencement of a published Statutory Instrument. While it is true that the Statutory Instruments comes into effect on the date of publication if no commencement date is given in the Instrument, the subsequent process of scrutiny and approval, where Article 118 (2) requires public participation may lead to nullification as provided under section 23 of the Statutory Instrument Act. Failure to hold public participation in compliance with Article 118 (2) denies the Parliamentary Committee the opportunity to nullify a legislation which might have offended constitutional requirements relevant to its making including the very principle on participation of the people.

[66] The 6th Interested Party urged that despite the want of a RIA, the public participation undertaken on the proposed Regulation had given adequate opportunity for public participation with regard to all the necessary ingredients. The 1st Interested Party also attached documents to show that public participation was conducted among the stakeholders over the proposed reforms in the Coffee Industry and these had been attached to the Statutory Instrument as transmitted to the office of the Clerk of the National Assembly. These included a Rapporteur’s Report entitled “Coffee Growers Sensitization Programs on Regulatory Compliance, Advisory on Reserve Price and the Proposed Fees Schedule (May 28- July 11 2024)”, the background to the exercise which is given in the Report as follows:

“RAPPORTEURS' REPORT

COFFEE GROWERS SENSITISATION PROGRAMS ON REGULATORY COMPLIANCE, ADVISORY ON RESERVE PRICE SETTING AND THE PROPOSED FEES SCHEDULE (MAY 28 JULY 11 2024).

I. BACKGROUND &INTRODUCTION The crops (Coffee) (general)regulations,2019 Regulations, 2020 and the Capital Market (Coffee Exchange) introduced the following pro-grower provisions:

- 1. Enabling growers to participate directly at the auction floor either through their subsidiary brokerage company or an appointed brokerage company of choice.*
- 2. Transforming automated the Nairobi Coffee Exchange from an auction organiser to a full self-regulatory exchange that integrates to a direct settlement system that settles growers' account upon sale of coffee.*

3. *Strengthening the Coffee Research Institute to provide quality seedlings and hence improve productivity per tree to the desired 1.0Kgs/tree.*

4. *Establishing cash kitties such as the cherry revolving fund and commodity fund to increase productivity and liquidity in coffee sector.*

Up to this far, the cooperative Bank was appointed by the Nairobi Coffee Exchange (NCE) on July 28th, 2023 and approved by the Capital Markets Authority to provide the direct settlement system in Coffee subsector. Following this appointment the Nairobi Coffee Exchange opened a clearing and settlement account with DSS on August 11th, 2023. The first auction (sale 30) under the new Regulations took place on August 15, 2023 and was opened by His Excellency the Deputy President.

NCE in liars with cooperative bank, the Capital markets Authority, Agriculture and Food Authority and other sector regulators sought to sensitise coffee growers on the provisions of the new coffee regulatory framework including provisions on the DSS.

The sensitisation forums have been arranged across the coffee growing counties from May to July 2024. The aim is to increase awareness amongst coffee growers. In these sessions, Capital Markets Authority was tasked with the following responsibilities:

a) Regulatory compliance with the Capital Markets (Coffee Exchange) Regulations 2020

b) Advisory on Reserve price Setting

c) Proposed market fee

Taking into consideration sensitization ongoing austerity measures, the Authority leveraged on the workshops organized by the Nairobi Coffee Exchange to sensitize the growers on the above proposals. This opportunity also served to build internal capacity within the directorate on coffee matters.

The following regions will be covered by the sensitizations.”

[67] The Court notes that, according to the Report, and while the present dispute relates to the fees structure not much of the engagement, not much of the deliberations, indicated a discussion on the actual issue of the proposed reduction of fees and imposition of fees for the DSS provider and the Exchange, and no structured explanation and justification for the action on the proposed structure is shown to have been given to the stakeholders to give informed view on the matter. The issue of proposed fees was tangentially and inadequately discussed among the many aspects of the broad reforms in the Coffee Sector, as shown in the comments. One comment said “the proposed fees have been reduced, and the current 2% is already not enough”, and another “criteria followed to give brokers commission as brokers are doing more than they are paid for. Reconsider the fee” (eliciting a remark from the rapporteur that the “the proposed fees are still under consideration and the comment is taken for consideration”).

[68] The Court also notes that the meeting with the farmers only without the brokers and stakeholders at the Coffee Exchange is not complete or sufficient for purposes of

deliberations on the proposed market fees. The meeting on the fees structure ought to have been specially called for the stakeholders/players in the marketing system who would be possessed of the technical know and experience to respond to the proposals. Such meeting had actually been called for the comments from the brokerage companies and the Union of the Cooperative Societies in their responses to the invitation for comment on proposed fees as the subject of the Regulations herein rather than in an omnibus consideration of broad sector reforms. This meant that not sufficient facility for consideration and feedback on the issue before the court, as required in the BAT case for “**capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.**” Without necessary technical information, the stakeholder farmers were left to only indicate wishes as to the fullest recovery of proceeds of with no backing of technical reality as to costs therefor, and the persons with technical knowhow were not shown to have been engaged.

[69] The Court must wonder why it was not possible for the CMA to develop and circulate a detailed information matrix on the proposed scale of fees completely justified on the basis of scope of works done by the respective actors with the comparisons as alleged with other countries and like commercial sectors with Commodity Exchanges of comparable volume of sales such the Tea Sector as alleged by the 6th Interested Party. An opportunity would also have been given for the Brokers and the other stakeholders to respond with rebuttal calculations and counter justifications on the existing or other changes to the proposed fee structure. The CMA would then have developed regulations with scale of fees determined by such collaborative and scientific method for the benefit of all. Such proposals would then have been publicized to the general public for further input at the level of the consideration by the relevant Parliamentary Committee after presentation to Parliament in accordance with the Statutory Instruments Act. That is what the Article 118 (1) (b) provision for public participation at the Committee proceeding of parliament must mean.

[70] When the CMA and NCE dismissed the request by the Brokers and the Coffee Cooperative Unions for further consultative discussions, and proceeded to impose the Regulations disregarding the objections, the result is a tyrannical rule-making which is antithetical of the constitutional legislative procedure. The Court must, therefore, in the exercise of its interpretative jurisdiction under Article 165 (3) (d) (ii) for determination of “*the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution*”, determine that the Regulations made under this deficient procedure of public participation are unconstitutional, null, and void.

[71] At the Committee stage, such memorandum on the costing of the fees should have been published and comments invited from the general public in accordance with Article 118 (1) (b) of the Constitution. The mere report in the 1st Interested

Party's replying affidavit the at the Committee considered the regulations and approved them and subsequently laid them before the National Assembly is not sufficient for purposes of compliance with the requirement for public participation at the Committee stage.

[72] In the absence of evidence as to public participation in the deliberations of the National Assembly's Committee on Delegated Legislation which considered the legislation herein, the Court must find that the National Assembly was in breach of the public participation requirement of Article 118 (1) (b) of the Constitution.

[73] There having been no meaningful participation on the Regulations both prior and subsequent to the publication by gazette, the Court as the adjudicative authority of the State under Article 1 (3) (c) is bound by the Constitution Article 165 (3) (i) and (ii) to declare the legislation, despite the approval by the National Assembly to be invalid for contravention of the relevant provisions of the Constitution.

Whether a Regulatory Impact Assessment State was necessary, and if one was prepared before the gazette of the Regulations.

Regulatory Impact Assessment Statement

[74] Except for the one-liner statement in the Memorandum accompanying the Regulations on transmission to Parliament in terms that "", no technical RIA in terms of section 7 of the Statutory Instruments Act was prepared for notification of the stakeholders prior to the invitations for comment/feedback.

[75] Section 6 of the Statutory Instruments Act provides as follows:

“6. Regulatory impact statements

*If a proposed statutory instrument **is likely to impose significant costs on the community or a part of the community**, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.”*

[76] The provisions of the contents of the Regulatory Impact Assessment are telling on the objective. Section 7 of the SIA provides:

“7. Contents of regulatory impact statements

*(1) A regulatory impact statement shall include the following information about the proposed statutory instrument in clear and precise language— (a) a statement of the objectives of the proposed legislation and the reasons for them; (b) **a statement explaining the effect of the proposed legislation, including in the case of a proposed legislation which is to amend an existing statutory instrument the effect on the operation of the existing statutory instrument;** (c) **a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;** (d) **an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;** (e) **the reasons why the other means are not appropriate;** (f) any other matters specified by the guidelines; (g) a*

draft copy of the proposed statutory rule. (2) The assessment of the costs and benefits shall include an assessment of the economic, environmental and social impact and the likely administration and compliance costs including resource allocation costs. (3) The responsible Cabinet Secretary shall ensure that independent advice as to the adequacy of the regulatory impact statement and of the assessment included in the regulatory impact statement is obtained and considered in accordance with the guidelines.”

[77] Where, as here, the basis and extent of the fees charged are contested, it is incumbent on the rulemaking authority to give to the stakeholders for purposes of meaningful public participation all information in answer to the requirement of section 7 for “**(b) a statement explaining the effect of the proposed legislation, including in the case of a proposed legislation which is to amend an existing statutory instrument the effect on the operation of the existing statutory instrument; (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options; (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; (e) the reasons why the other means are not appropriate.**” Indeed, in the few comments given by the public on the question of fees it was suggested that the fees for the DSS system and the Exchange could be funded elsewhere. And the Cooperative union who responded to the on-line invitation for comments had called for a sit in with the Nairobi Coffee Exchange, the Capital Markets, the DSS provider and other stakeholders. There was a clear case for a detailed presentation on the basis of the formulation of the fees against with computations necessary to arrive at the proposed rate of fees and justification of the costs as the only practical means for achieving the object of funding the activities, as well as the necessity in the case of the Brokers for the reduction of fees against the new alleged roles.

[78] Asserted by the Petitioners, the necessity for preparation of a regulatory Impact assessment Statement was contested by the Respondents and the Interested Parties. Section 9 waiver of Regulatory Impact Assessment Statement is in the following terms:

9. Where regulatory impact statements may be unnecessary

A regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legislation only provides for, or to the extent it only provides for—

(a) a matter that is not of a legislative character, including, for example, a matter of a machinery, administrative, drafting or formal nature;

(b) a matter that does not operate to the disadvantage of any person (other than a government entity) by—

(i) decreasing the person’s rights;

(ii) imposing liabilities on the person;

(c) an amendment of statutory instrument to take account of the prevailing Kenyan legislative drafting practice;

- (d) the commencement of an Act or subordinate legislation or a provision of an Act or statutory instrument;*
- (e) an amendment of statutory instrument that does not fundamentally affect the legislation's application or operation;*
- (f) a matter of a savings or transitional character;*
- (g) a matter arising under legislation that is substantially uniform or complementary with legislation of the National Government or any County;*
- (h) a matter advance notice of which would enable someone to gain unfair advantage;*
- (i) an amendment of a fee, charge or tax consistent with announced government policy."**

- [79] Section 9 does not outlaw preparation of the Impact Assessment in the cases specified in the provision it only permissive that the assessment need not be prepared for what is really menial changes in Statutory Instruments, and where it does not affect private rights and where it is an amendment to a fee consistent with government policy. Of course, such government policy must have been itself subject to public participation in accordance with the law.
- [80] There was not shown that there was a government policy on the amount of fees as percentage of the sale proceeds being implemented, and was it was shown that such a policy had itself subjected to public participation in its development?
- [81] In this case, while was urged by the Capital Markets Authority that the Regulations are an amendment of a fee in accordance with government policy, no policy of government to increase any fees has been shown to have been passed with the requisite public participation. More importantly, the regulations are not only about the changes in fees, they also significantly affect private rights by reducing the net incomes accruing to petitioners and their members the Coffee farmers whose revenues/ incomes from coffee sales will be eaten up by the increased fees at the Exchange and also introducing new charges for the settlement system.
- [82] A Regulatory Impact Assessment Statement is, in these circumstances, necessary so that the public participation is informed of the impact of the changes in the fees, the payment/settlement system and the reduction of the net incomes from the sale of Coffee as would permit the public to meaningfully participate in the decision for the approval, approval with amendment or rejection of the proposed regulations. The explanations as to the need to cater for increased operations cost following the introduction of the Direct Settlement System DSS, and its perceived benefits, as set out in the Replying Affidavit filed herein on behalf of the Nairobi Coffee Exchange sought to have been given in such Regulatory Impact Assessment report. Where is the evidence that the elaborate reasoning and justification for the increase in the Coffee Exchange transactional fees from 0.2% to 0.3% of the Coffee sold at the exchange; the DSS provider fees of 0.3% and the 0.2 % of the Capital markets Authority, all which may be shown to be reasonable, was put to the Coffee farmers represented by the petitioners before the enactment of the legislation?

[83] So too the explanation by the 6th Interested Party Capital Markets Authority giving the rationale and benefit of the prompt payment through the Direct Settlement System and proposed fee structure therefor while explaining like the 5th Interested Party that the fees aligned to enhanced scope of work for CMA and NCE, and the reduction of the functions of brokers with comparisons with the Tea Sector as well as the net effect being a saving for the farmers. The information should have been communicated in a Regulation Impact Assessment report. Hence the need for the Regulation Impact Assessment Statement.

[84] From the affidavit of the CEO Nairobi Stock Exchange, the communication of the new rate of transactional fees was made after the Regulations had been gazetted, as she says:

“29. THAT on or about 30th January, 2025 The Capital Market (Coffee Exchange) (fee) Regulations, 2024 was published vide Gazette Supplement No 3 of 30th January 2025 by the Cabinet Secretary for the National Treasury and Economic Planning.

30. THAT the said regulation introduced a 0.3% transactional fees to be charged by NCE with the same being necessary for offsetting the operations costs of the Exchange.

31. THAT based on the said Regulations, NCE wrote a circular to all it's stakeholders bringing to their attention the Regulations taking into account that one of it's roles was to receive payment details from all stakeholders for onward processing by the DSS provider.

32. THAT based on the foregoing, the Petitioner herein challenged the Regulations on the basis that the same had not been approved by Parliament.”

[85] In consequence, therefore, the Court must find that the Regulatory Impact Assessment Statement was necessary in this case, and the default of the Capital Markets Authority to prepare and notify the stakeholders of a Regulatory Impact Assessment Statement denied the public, especially the affected Exchange stakeholders/ brokerage firms and the coffee farmers they represented, their cooperatives and cooperative unions of information and facility necessary for meaningful public participation. The failure to prepare and notify a Regulations Impact Assessment Statement in breach of the requirements of section 6 of the Statutory Instruments Act, makes the Regulations invalid, and their approval by the National Assembly untenable.

Whether the Regulations are legislation affecting County Government, which required approval by the Senate in accordance with Articles 109 - et seq of the Constitution, and if so, whether such approval was obtained before gazettment of the Regulations.

Approval by the Senate

Regulations not concerning counties do not require senate approval.

[86] Articles 96 (2) and 109 of the Constitution require Senate approval in the circumstances where Bills/legislation **concerning counties**, as defined in Article 110 to mean **“a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule”**.

[87] A Statutory Instrument is a legislation, which is subject to approval by the Senate if, in terms of Articles 96 (1) (2) of the Constitution, it concerns county governments, as follows:

“Role of the Senate.

96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.”

[88] The legislative process for laws concerning Counties is provide for under Article 109 (1) – (4) of the Constitution as follows:

“Exercise of legislative powers.

109. (1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.”

[89] Article 110 (1) and (2) of the Constitution, as relevant, defines a Bill concerning a County Government –

“Bills concerning county government.

110. (1) In this Constitution, “a Bill concerning county government” means—

(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

(b) a Bill relating to the election of members of a county assembly or a county executive; and 65 Constitution of Kenya, 2010

(c) a Bill referred to in Chapter Twelve affecting the finances of county governments.

(2) A Bill concerning county governments is—

(a) a special Bill, which shall be considered under Article 111, if it

—

(i) relates to the election of members of a county assembly or a county executive; or

(ii) is the annual County Allocation of Revenue Bill referred to in Article 218; or

(b) an ordinary Bill, which shall be considered under Article 112, in any other case.”

Not being a special Bill involving election of members of County Assembly or county executive, an ordinary bill should be considered in the manner prescribed under Article 112 requiring approval by both Houses of Parliament.

[90] The Court’s duty is to determine whether the law in question in this case contain **“provisions affecting the functions and powers of the County Governments set out in the Fourth schedule.”** The Regulations making provision of charges on the coffee marketing is driven by the Capital Markets Authority. The requirement for Senate approval is tied to the functions and powers of the County Government.

[91] The Fourth Schedule of the Constitution provides for the functions and powers of the National and County Governments. Two relevant functions and powers of the County Government under the Fourth Schedule are –

“1. Agriculture, including—

(a) crop and animal husbandry;

....

7. Trade development and regulation, including— (a) markets;

(b) trade licences (excluding regulation of professions); (c) fair trading practices;

(d) local tourism; and

(e) cooperative societies.”

The question for the Court is whether the Regulations affect the function and powers relating to “*crop husbandry*” under Agriculture function and under the Trade development function and power “markets; and cooperative societies.”

[92] The court should agree with the 3rd respondent citing ***Nairobi Metropolitan PSV Saccos Unio Ltd & 25 Others v. County of Nairobi Government & 3 Others*** 2013) eKLR that public participation is not the same thing as saying that public view must prevail as the constitution requires consultation not consensus. However, that the requirement for public participation would not be served if all that could be shown is a cosmetic consultation, where despite negative feedback and comments by the public the decision maker proceeds to make the decision against which numerous views have ben expressed and without any explanation as to why the views expressed in the decision are superior or more suited than those of the commenting public.

[93] However, the 3rd Respondent misread the Supreme Court decision ***Senate & 3 others v Speaker of the National Assembly & 10 others*** [2025] KESC 11 (KLR) in submitting that the Court had affirmed that “legislation only concerns counties if, in its ***pith and substance***, it directly affects county functions, powers, or finances under Part 2 of the Fourth schedule.”

[94] To the contrary, by the said decision *Senate & 3 others v Speaker of the National Assembly & 10 others*, supra, the Supreme Court overruled the *pith and substance* (nature of the Bill) test and guided as to how to determine whether a Bill/legislation concerns counties as follows:

“115. The contestation on the constitutionality of the impugned Acts revolves around whether they fall under the first category of Article 110(1) (a) that is ‘a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule’. This is a textual signal that the two Speakers of Parliament have a duty to satisfy themselves, and the courts in case of litigation, that a contested Bill had provisions affecting the functions and powers of County Governments.

116. It is notable from the language of the Constitution that the determination is focused on “provisions” of a Bill. This means that the inquiry has to be focused on the existence or non-existence of provisions that have an impact on the functional areas listed in the Fourth Schedule. As Dr. John Mutakha Kangu correctly notes in *Constitutional Law of Kenya on Devolution* (2015, Strathmore University Press) at page 362:

“The reference to provisions means that the requirement is not for the whole Bill to affect the functions and powers of the county governments. A few provisions ... [are] sufficient to lead to a classification of a Bill as concerning counties, depending on its impact on the county government functions and powers.”

117. This approach aligns with the constitutional framework. **Accordingly, we hold that in determining whether a Bill contains provisions affecting the functions and powers of County Governments as outlined in the Fourth Schedule under Article 110(1)(a), the inquiry must focus on the impact of the Bill's provisions on these functions and powers. The critical question is: to what extent do the provisions of a Bill affect the functions and powers of County Governments? This assessment focuses on evaluating the degree to which a Bill's provisions influence the functions and powers of County Governments.** Indeed, this is evident from our approach in *Institute for Social Accountability & another vs. National Assembly & 3 others & 5 others* [2022] KESC 39 (KLR) where at paragraphs 71 and 72 we interrogated the provisions of the CDF Act to determine if they have an impact on the functions and powers of County Governments.

118. Turning to the approach adopted by the Court of Appeal in the present matter, we note that the Court of Appeal, at paragraph 148 of its judgment, formulated the test to be used as follows:

“As discerned earlier, it is only bills concerning counties that mandatorily require to be subjected to the concurrence process. Whether or not a bill concerns the counties is a matter for interpretation of the nature of the bill, having regard more particularly to, those constitutional provisions dealing with enactment of legislation by the two Houses,

which provisions as stated above, are to be found under Part 4 of the Constitution.” [Emphasis added]

119. In addition, at paragraph 149, the Court of Appeal rendered itself thus on the appropriate test:

“Having discerned that the Constitution provides for different categories of bills and also specifies the manner of their enactment, we must now scrutinised (sic) each of impugned Acts to ascertain their true nature, at all times bearing in mind that it is only bills concerning county governments that are liable to be subjected to the concurrence process. At the core of our analysis is an examination of the different Acts, to discern first, their objects, second, their intent and purpose by applying the “pith and substance” test” [Emphasis added]

120. As is apparent, the test as formulated by the Court of Appeal moves away from the language of Article 110(1)(a) which is “provisions affecting the functions and powers of county governments” and instead shifts to “the nature of a bill”. **We therefore, hold that the Court of Appeal ought to have adhered to the language of the Constitution and focused its inquiry on whether the provisions of the impugned Acts had an impact on the functions and powers of County Governments. In taking this position, we reiterate the stance taken by this Court in Attorney-General & 2 others vs. Ndi & 79 others; Dixon & 7 others (Amicus Curiae) [2022] KESC 8 (KLR) that courts ought to give effect to the explicit language of the Constitution in interpretation and not import concepts or doctrines extraneous to the text of the Constitution.** The foregoing analysis paves way for us to consider whether the provisions of the impugned 15 statutes affected the functions and powers of county governments as set out in the Fourth Schedule.

....

122. On the Capital Markets (Amendment) Act No. 15 of 2018, the Court of Appeal held that the Act concerned the function of securities regulation which fell within the domain of the National Government’s functions and powers. We have reviewed the eleven provisions of the Act and find that they are aimed at strengthening regulatory operations of issuers of securities, to ensure that licensed and approved persons and entities devise and maintain systems of internal accounting controls, sufficient to provide reasonable assurances that transactions are recorded and permit preparation of financial statements in conformity with the International Financial Reporting Standards. Also created under the Act were offences relating to insider dealing, or the obtaining of financial or personal gain by fraud. Assessed as against the Fourth Schedule of the Constitution, the provisions would fall within the rubric of ‘Monetary policy, currency,

banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations’ which lies in the domain of the National Government. Therefore, we find that the provisions of this Act did not affect the functions and powers of County Governments.”

[95] The Court is guided by the Supreme Court *ibid* that “**in determining whether a Bill contains provisions affecting the functions and powers of County Governments as outlined in the Fourth Schedule under Article 110(1)(a), the inquiry must focus on the impact of the Bill’s provisions on these functions and powers. The critical question is: to what extent do the provisions of a Bill affect the functions and powers of County Governments? This assessment focuses on evaluating the degree to which a Bill’s provisions influence the functions and powers of County Governments.**”

[96] In this case, I do not find that the variation or imposition of market fees for trading at the Coffee Exchange affects the functions and powers of agriculture crop husbandry or cooperatives. The **County Governments** are still able to exercise **the functions and powers** over agriculture and cooperatives unaffected by the trading costs imposed on the stakeholders at the Coffee Exchange.

[97] From the object of the Regulations as set out in Regulation 3 to be “**to provide for (a) the maximum fees payable for coffee sold at the Coffee exchange; and (b) the annual membership fees payable by member of a coffee exchange to the exchange**”, it appears that the Regulations do not concern the County Governments within the meaning of that term under Article 110 of the Constitution. The Regulations do not affect the functions and powers of the County Government as set out in the Fourth Schedule, because, as relevant, there is no effect on the County Government’s function and power of, or ability to manage or control, crop husbandry or cooperatives (respectively under Fourth Schedule Clauses 1 (a) and 7 (a) and (e)).

[98] If the monies had been going to the County Governments and by its reduction had so impoverished the County Governments that they had no capacity to implement the functions and powers in crop husbandry and cooperatives, which are allocated to the County Governments under the Fourth Schedule, the Regulation may have been held to affect the functions of the Counties.

[99] In the respectful view of this court, the making of the Regulations which prescribe for the charges to be paid from the proceeds of sale of Coffee at the Nairobi Coffee Exchange to the Broker at 0.1%, the Bank through which the payment processing is done at 0.3% and to the Exchange itself at 0.3% does not affect the functions and powers of the County Government over coffee crop husbandry and co-operative societies under clauses 1 (a) and 7 (e) of the Part II of the Fourth Schedule.

[100] The Court respectfully accepts the submission by the Capital Markets Authority that “*the fees Regulations do not regulate farming or cooperatives but govern licensed intermediaries at the Nairobi Coffee Exchange, a national market infrastructure.*”

- [101] The Regulations are, consequently, not subject to approval by the Senate. Consequently, the Court finds in terms of Articles 96(2) and 109 of the Constitution, the Regulations as a law **need not** be presented to the Senate for approval being as “*a bill containing provisions affecting the functions and powers of the County Government set out in the Fourth Schedule.*”
- [102] I must respectfully agree with Korir J. as he then was in ***Kenya Union of Saving & Credit Co-operatives Limited (KUSCCO) v. The Sacco Societies Regulatory Authority (SASRA)***, supra, that exempting the Subsidiary legislation from the requirement for tabling before the Senate as required of Bills concerning Counties under Article 109 and 110 of the Constitution would too narrow to restrict the role of the Senate in legislation affecting Counties for which the Senate as the guarantor of devolved government. In view of the Court’s finding on the impact of the legislation as not affecting the functions and powers of the County Government nothing turns on this.

The Petitioners’ Rights have been violated and whether the reliefs sought will be granted

Merit of Regulatory fees on Farmers’ Incomes

- [103] A valid legislation passed in accordance with the constitutional and statutory provisions does not violate property rights of the persons. This position is a necessary outcome of a law which has been enacted in accordance with the Constitution and the law. It is when an invalid law is put in place that the rights of the person are violated or threatened with violation by the implementation of such a law.
- [104] The Court accepts that the private contracts cannot stem the legislative function and the decision of the Court of Appeal in ***Kenya Pipeline Company Ltd. v. Glencore Energy (UK) Ltd*** (2015) eKLR cited by the 3rd respondent is on point that pre-existing contracts must conform to the law which comes into effect after the parties had entered into the private contracts. The property rights of the petitioners, as the brokers or farmers in the cooperatives, would only be violated or threatened if it were shown that the law was invalidly made in breach of applicable constitutional and statutory law-making procedures.
- [105] The Court’s duty then is to examine the Petition and the evidence in support and in opposition to determine whether the impugned law was validly made, and the Court accepts the judicial position, urged by the 1st Interested Party citing ***Susan Wambui Kaguru & 4 Others v. AG & Another*** [2012] eKLR and ***Kenya Water sanitation Civil Society Network and 38 Others v. Kenya Wildlife Service; County Government of Mombasa & Another (Interested Parties)*** [2024]KEHC 1098 (KLR) that in accordance with the doctrine of separation of powers there is, and there ought to be, a presumption of validity of law made by the legislative arm of the

- Government, and the burden of proof of invalidity is on the petitioner who seeks to invalidate a certain law.
- [106] However, as the Court cannot abdicate from its responsibility under Article 165 (3) (d) of the Constitution to make the determinations in the specified areas of jurisdiction.
- [107] The Court refuses to be drawn into allegations of violation of consumer interest by virtue of appointment of the 3rd Respondent as the DSS provider as a monopoly and denying them competitive choice in the service. The Court has noted from the Regulations subject of this Petition that it had no provision for the appointment of the DSS provider and that this was the subject of the 2020 Regulations, which are not before the Court. All the 2024 Regulations have done is to fix the fees payable for the different services at the Coffee Exchange and the process of appointment of the DSS provider or providers is not subject of the Petition.
- [108] In addition, the challenge on the alleged directive of the 3rd respondent of 24/11/2024 for the provision of mobile phone and contact details of the farmers is not, (even if the deponent on behalf of the 3rd Petitioner had requisite authority to sue in the name of the company), properly taken up in this petition which merely challenges the promulgation of the 2024 Regulations.
- [109] The alleged outcome of an improvement in the net income or increased incomes for the farmers is a good thing. However, as the farmers as cooperators are the owners of the cooperative societies which have formed Unions which wholly own the brokers as in the case of the 1st and 2nd Petitioners, there is need for full participation of all the stakeholders in the issue of the fixing of the per centages of the fees to the sale proceeds.
- [110] In addition, the percentages earned by the other fee earners, apart from the Broker's fees, – the marketing Coffee Exchange, the Direct Settlement DSS payment provider and the Regulator Coffee Market Authority also need to be fixed with full participation in an informed manner by the stakeholders.
- [111] Consequently, the only constitutional rights of the petitioners the Court would find established and threatened is Article 40 right to property, not because of affecting the private contractual rights, which are subject to legislation, but the reduced incomes of the farmers who are members of the cooperative union and whose revenues are reduced by the fees levied on their sale of produce through the Coffee Exchange. Of course, the fees could have been justified in a meaningful public participation, which would lead to a validly legislated Regulations on Fees.
- [112] The violation of rights, or threat thereof, is the product of the invalidity of the promulgation process by want of public participation. Once the legislation is passed in compliance with the constitutional and statutory provisions, there cannot be a violation of rights because the Rule of Law is one of the national values and principles of governance.

[113] The petitioners' private contracts rights need not be protected from legal reform in public interest. However, the Petitioners are by the constitutional principle of the rule of law under article 10 entitled to expect that in making the legal changes will be made in full compliance with the rule making procedure under the Constitution and statute. In other words, there is legitimate expectation as to subsidiary legislation whether affecting private contract or not should comply with the law-making provisions of the Statute and the Constitution. The existence of a private contract as to loans taken on expectation of a 0.2% brokerage fee is a demonstration of the substantial loss that may be incurred by the Petitioner on account of the change in the fees structure.

CONCLUSION

[114] In the end, the Petition partially succeeds.

[115] The subsidiary legislation did not concern counties and therefore did not require to be presented to the Senate for approval. The contention of discrimination and violation of consumer rights as to the appointment of the 3rd respondent Bank as the Direct Settlement System provider was not proved, having been done outside the provisions of the 2024 Regulations subject of this Petition.

[116] The Question taken up by the 3rd Petitioner (which was not properly before the Court in view of want of resolution on authority to sue for the Company) as to the necessity of approvals by Commissioner of Cooperatives and County Director for Cooperatives for purposes of securing credit/loan should properly have been the subject of public participation by the stakeholder cooperative societies and unions under the relevant 2020 regulations. The issue of the two officials' participation in the financial operations of the cooperative society, which was explained by the 3rd respondent as guarantee for financial integrity is the proper subject of the 2020 Regulations, which are not under challenge before this Court.

[117] Public participation principle both prior and post formulation and gazettelement under Article 118 (1) (b) of the Constitution was violated. In addition, the facilitative Regulatory Impact Assessment Statement, which is important for effective public participation was not done and the National Assembly Committee on Delegated Legislation did not facilitate public participation at its proceedings.

[118] A meaningful public participation should show the method of calculating the percentages to be paid to the respective actors in the Coffee sale chain. It should also show the magnitude of the payments in actual amounts of money. The alternatives of achieving the same result and the reason for the choice of the option would give the public/stakeholders a reasonable information to make informed choice in approving/disapproving the proposal.

[119] The Petitioners challenged the reduction of their broker's dues, the payment to the bank for DSS facility and the payments to the Exchange/Capital Markets Authority. The fixing of fees payable for the various services is undoubtedly a technical and professional engagement, which would require public participation that

permits such technical engagement for the discussion and eventual ascertainment of the fees. The **BAT** case recognized that public participation would vary with the circumstances of the case “**the mode, degree, scope and extent of public participation is to be determined on a case to case basis**”.

[120] The Court will, therefore, find the 2024 regulations are invalid for want of adequate public participation and as such threaten to violate the Petitioners and other farmers property rights to the incomes for the sale proceeds of their Coffee.

Appropriate relief in accordance with Article 23 of the Constitution

[121] The High Court has interpretative jurisdiction under article 165(3) (d)(i) and (ii) of the Constitution as follows:

“(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) **the question whether any law is inconsistent with or in contravention of this Constitution;**

(ii) **the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;”**

[122] Under Article 23 (3) of the Constitution the Court is empowered to give appropriate relief including an order, as sought by the Petitioners herein, of a declaration of invalidity of a law that violates or threatens a right or fundamental freedom.

[123] In fashioning an appropriate remedy, the court considers the primacy and urgency of the development of Regulations as part of the implementation of the Government’ Coffee Sector reforms for the establishment of a ***framework that would enable coffee farmers to produce, mill and market their own coffee***, which the Petitioners themselves concede was a good development.

[124] *Nullification, Stay or suspension of the regulations pending necessary consultations and public participation possible? For how long?* The Supreme Court in ***Senate & 3 others v Speaker of the National Assembly & 10 others*** [2025] KESC 11 (KLR) also affirmed the judicial policy that “**suspension of invalidity is one such remedy that courts ought to consider in fashioning appropriate remedies.**” See for example in ***Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another*** [2017] KEHC 4133 (KLR), where (Odunga, J. as he then was) granted judicial review orders to take effect only in default of the remedial action that the court directed on ***The Coffee (General) Regulations, 2016***.

[125] The Court considers that the defect of want of public participation may be cured by remedial steps to facilitate such participation complete with the necessary information with regard to the Regulatory Impact assessment, and that an outside

- period of six (6) months is sufficient to conduct meaning consultation on the Regulations with the Coffee Industry players and practitioners.
- [126] As provided in section 24 of the Statutory Instruments Act, the exercise of powers to make a statutory Instrument such the subsidiary legislation in issue before the Court includes a power to amend a Statutory Instrument as follows:
- “(3) Where an enactment confers a power to make a statutory instrument it shall be deemed also **to include a power exercisable in the like manner and subject to the like conditions (if any) to amend, repeal or replace any the statutory instrument.**”*
- [127] So, depending on the outcome of the public participation, the CMA may amend, repeal or replace the Regulations. Accordingly, the order that commends itself to the Court is one for suspension of the Regulations to accommodate intensive public participation and further action as necessary. In the meantime, the declaration of invalidity of the Regulations will be held in abeyance.
- [128] In accordance with established judicial practice (see *Senate & 3 others v Speaker of the National Assembly & 10 others*, supra), the Court will, therefore, stay or suspend the operation of the Statutory Instrument subject of this Petition for a period of six (6) months, which the Court considers sufficient for a suitable programme of public participation in accordance with the Constitution and statute to be carried out leading either to validation of the Regulations, the amendment of the Regulations or the presentation of a new Statutory Instrument incorporating the outcome of the public participation exercise, as the case may be.
- [129] Consequently, while issuing the declaration of invalidity of **The Capital Markets (Coffee Exchange) (Fees) Regulations 2024** as presented on account of want of public participation, the grant of a stay of the legislation for a period of six (6) months should permit the Respondents to arrange for the meaningful public participation on the gazetted Regulations necessary in the matter of this importance and the taking of necessary steps for approval by Parliament in accordance with the applicable law.
- [130] For confirmation of this compliance, the Petitions shall be mentioned for directions on closure on a date to be fixed.

Costs

- [131] The Court is aware of the guiding principles applicable in the exercise of that discretion as enunciated in *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows:
- “[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the*

judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation....

Although there is eminent good sense in the basic rule of costs—that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

[132] The public interest in this case challenging **The Capital Markets (Coffee Exchange) (Fees) Regulations 2024** made to regulate the Coffee industry’s sale proceeds system is obvious, for all the acts in the industry from the coffee farmers, the cooperatives, the brokerage firms and the participating banking payment systems, the government Ministry in charge of agriculture sector and, as is usual policy and practice of courts, the costs should not be awarded so as to hinder access to the Court by persons challenging, defending or otherwise interested in such public interest causes. The Court shall, consequently, direct that each party bears its own costs.

ORDERS

Reliefs Granted

[133] Accordingly, for the reasons set out above, the Court finds the Amended Petition to be partially merited and makes the following orders:

1. *A Declaration is issued that the process of legislation of the **The Capital Markets (Coffee Exchange) (Fees) Regulations 2024** violated the constitutional provisions on public participation under Article 10 and 118 of the Constitution and sections 5 and 6 of the Statutory Instruments Act.*
2. *A Declaration that **The Capital Markets (Coffee Exchange) (Fees) Regulations 2024** are null and void for the contravention of the Constitutional provisions on public participation.*
3. *A Declaration that **The Capital Markets (Coffee Exchange) (Fees) Regulations 2024** are null and void for violating or threatening, by an invalid legislation, the Petitioners’ rights to property in the incomes from their sale of Coffee.*
4. *In view of the public interest in the matter of the Coffee marketing regulation and reforms in the subsector, **the Court suspends the declaration of invalidity and does not invalidate the Regulations outrightly but will give leave of court to***

regularize the situation by affording ample opportunity for public participation on The Capital Markets (Coffee Exchange) (Fees) Regulations 2024, which may lead to a validation of the said Regulations, or the amendment of the Regulations or the preparation of new Regulations in lieu, as necessary.

5. *Consequently, The Capital Markets (Coffee Exchange) (Fees) Regulations 2024 are suspended to await public participation on the matter, and the declaration of invalidity is held in abeyance for said period of six (6) months. For avoidance of doubt, this order of the Court does not authorize the implementation of the Regulations in the meantime.*
6. *The matter shall, consequently, be mentioned before the Court for further directions and closure on Wednesday 20/5/2026.*

Costs

[134] As the Petitioners have only partially succeeded and there is a public-interest aspect of the right to public participation, the Court does not make any orders as to the costs of the Petition. Consequently, each party shall bear their own costs.

Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI
JUDGE

APPEARANCES:

Mr. Magee for the Petitioners.

Ms Mbilo for Mr. Mathoka for 3rd Petitioner.

Mr. Kiongo for 1 & 2 Respondents.

Mr. Karori with Ms Waihiga and Mr. Ondari for 3rd Respondent.

Mr. Cheboryot for 1st IP.

Mr. Lubendi for the 2nd IP.

Mr. Vitalis Omuleku for Ms Rono for the 3rd IP.

N/A for the 4th IP.

Mr. Ngara with Mr. Malonza for the 5th IP.

Mr. Githendu for the 6th IP.