

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NARIOBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NUMBER E051 OF 2026**

**TONY GACHOKA. .... 1<sup>ST</sup>  
PETITIONER**

**PROF. FREDRICK ONYANGO OGOLA.....  
2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE CABINET SECRETARY,  
NATIONAL TREASURY AND ECONOMIC PLANNING.  
..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY,  
INFORMATION, COMMUNICATION AND DIGITAL  
ECONOMY. 2<sup>ND</sup> RESPONDENT**

**THE COMMUNICATION AUTHORITY OF KENYA. ....  
..... 3<sup>RD</sup> RESPONDENT**

**THE COMPETITION AUTHORITY OF KENYA. ....  
4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL. ....  
5<sup>TH</sup> RESPONDENT**

**SAFARICOM PLC. .... 6<sup>TH</sup>  
RESPONDENT**

**VODACOM GROUP. .... 7<sup>TH</sup>  
RESPONDENT**

**R U L I N G**

1. This morning, this Honourable Court convened to consider several issues, and thereafter issue appropriate directions and/or orders regarding those issues.

2. The issues are: -

- i) The Application dated 17<sup>th</sup> February, 2026 to consolidate this matter with Petition No. E831 of 2025 and Petition No. E836 of 2025 that are also pending before this court filed by Mr. Musangi (SC).***
- ii) Reconsideration of the petitioner's application for conservatory orders filed on 26<sup>th</sup> January, 2026, arising from re-certification of the matter as urgent, necessitated by fast changing circumstances that petitioner states require immediate judicial intervention.***
- iii) The preliminary objection filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents dated 17<sup>th</sup> March, 2026 which the respondent sought to be heard and determined first on grounds that this Court lacks jurisdiction to entertain these matters.***
- iv) The preliminary objection by the 6<sup>th</sup> Respondent in Petition E836 of 2025 dated 4<sup>th</sup> February, 2026 also citing jurisdictional bar of this court to entertain the petition.***
- v) The application by the 7<sup>th</sup> respondent dated 11<sup>th</sup> February, 2026 seeking to be struck out from these proceedings.***
- vi) Certification and empanelment for this matter to be heard by uneven number of Judges appointed by Her Ladyship the Chief Justice.***

3. I have heard oral submissions of the counsel in the matter on all the above issues.
4. To begin with, this Court has been informed by Mr. Marwa for Attorney General that he duly acted on the directions issued by this Court on 12<sup>th</sup> March, 2026 and served all the parties in Petition E831 of 2025 and Petition E836 of 2025 with today's mention notice and pleadings and filed the affidavit of service in that regard.
5. On 12<sup>th</sup> March, 2026, the court had directed thus: -  

***“To facilitate possible consolidation Mr. Marwa to serve the pleadings in this matter to the parties in E831 of 2025 and E836 of 2025.”***
6. Today, the Petitioner in person in Petition E836 of 2025 attended this Court's virtual proceedings and confirmed that was served, further, he is not opposed to the proposed consolidation of the matters.
7. The petitioner in E831 of 2025 has not attended Court despite evidence of service.
8. The rest of the parties present in these proceedings, **have not opposed the proposed consolidation.**

9. **Rule 17 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules 2013**, states:

**Consolidation:**

***“The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.”***

10. As was held in the case of **Nyati Security Guards and Services Versus Municipal Council of Mombasa**, cited with approval in **LAKHAMSHI KHIMJI SHAH & another v AJAY SHANTILAL SHAH & 2 others KEHC (2010) (KLR)**.
11. The main purpose of consolidation is to save time and costs where common questions of law and fact arise or the rights and relief claimed are in respect of, or arise out of the same transaction, and also, to avoid multiplicity of the proceedings.
12. I have reviewed all the three petitions. It is manifest that they all relate to the proposed divestiture of the Government shareholding in the 6<sup>th</sup> respondent and the reliefs sought are significantly similar.
13. No purpose will therefore be served in maintaining separate petitions when all of them raise similar/common questions of law and fact.

14. I thus order that the three Petitions be consolidated, that is Petition E051 of 2026, E831 of 2025 and E836 of 2025. As to which Petition should be the lead file, ordinarily that should have been the 1<sup>st</sup> matter to be filed. However, this is not a command of the law hence can be discretionally assigned depending on the circumstances.
15. The petitioner in E831 of 2025 though served with the mention notice to appear before this Court has failed to do so. In designating the lead file, this Court has taken into account the demonstrated level of interest and active participation in the proceedings before it by the respective parties so far. Consequently, despite the fact that Petition E051 of 2026 is the most recent to be filed, I shall designate it to be the lead file and the Deputy Registrar shall accordingly cause the list of the re-arrangement of the Parties as they appear in the consolidated Petition and send it out to the Parties Advocates.
16. I turn on to consider the issue of certification and empanelment. I shall thereafter revert to address the other remaining issues.
17. I am aware that the issue of empanelment was first orally raised by Mr. Lempaa for the Petitioner but he did not file a

formal application. Today, the court invited the parties to address the issue in their oral submissions.

18. Dr. Stephen Kalonzo Musyoka (SC) and Mr. Lempaa were emphatic that this matter satisfies the threshold for certification and empanelment of an uneven bench under Article 165(4) pointing that the matter is of great public and national importance since it affects the most profitable public asset whose sale will have substantial ramification on the lives of Kenyans yet the process is being unconstitutionally implemented in violation of Articles 1, 10, 201, 227, 238(1) among others.
19. Listening to the respondents and even the Petitioner in Petition No. E836 of 2025, it did not come out that any of them is seriously opposed to the certification and empanelment of an uneven bench to hear and determine these matters.
20. Under Article 165(4), for a matter to qualify for certification for empanelment, it must satisfy the following conditions:
  - i) It should be on an issue that falls under Article 165(3) (b) or (d) of the Constitutional, and***
  - ii) That it raises a substantial question of law.***

21. As to the 1<sup>st</sup> limb, having perused the pleadings, the court can now confirm that the issue that these petitions pertain **falls under Article 165(3) (d) (ii)** of the Constitution as they raise questions as to:

***“Whether anything said to have been done under the constitution or any other law is inconsistent with, or in contravention of the constitution.”***

22. Clearly, this first limb is established, and so, I will now move to the next question, i.e. whether those issues meet the threshold of ‘*substantial question of law*’.

23. Substantial question of law was defined in the celebrated Indian Case of **Sir Chunilal Vs. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co. Ltd. [1962] SC 1314** as follows:

***“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by Supreme Court, privy council or Federal Court or which is not free from difficult or which calls for discussion of alternative views. If the question is settled by the highest court, or general principles to be applied in determining the question are well settled, and there is more question of applying those principles or that the plea raised is probably absurd, the question would not be substantial”***

24. The Supreme Court in the case of **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione [2013] eKLR** reiterated and elaborated this principle.
25. The question thus becomes, are there substantial constitutional questions raised in these petitions?
26. The respondents in the Preliminary Objections do not think so, in fact the respondents argued that the petition are veiled attempt to constitutionalize a commercial dispute and invited the court to throw them out based on the doctrine of constitutional avoidance.
27. I have very carefully examined these pleadings, particularly the Petitions and, I very humbly and respectfully disagree with the contention by the respondents.
28. The Petitioners have unequivocally identified core constitutional questions pertaining the process that has attracted significant public interest hence it behooves this Honourable Court to address and determine those concerns, not only to resolve the current dispute, but to ensure future processes will not attract constitutional litigation as constitutional parameters for such processes will have been judicially clarified.

29. Some of the core constitutional questions that these Petitions raise include:

**a) Whether the 6<sup>th</sup> respondent constitutes a strategic national infrastructure such that its divesture by the Government of Kenya leading to transfer of control to a foreign entity (7<sup>th</sup> Respondent) threatens undermining Kenya's national security interests under Article 238 (1) of the Constitution including national economic stability, prosperity and transformation thereby rendering the said transfer unconstitutional and unlawful.**

**b) Whether the divestiture threatens to undermine intergenerational equity which the State is constitutionally bound to guarantee, by denying future generations equitable access to sustainable benefits from a profitable digital national infrastructure and depriving them the transformative impact of digital and technological advancement associated with it thereby violating Article 10 (2) (d) and the Preamble of the constitution.**

**c) Whether the process of issuance of offer of divesture of the Government of Kenya shares in the 6<sup>th</sup> Respondent complied with the constitutional principles of equity, accountability, transparency, fairness, prudent and responsible use of public resources, competitive and cost-effective and public participation as enshrined in Article 10, 201 and 227 of the Constitution.**

30. In my view, these issues are weighty and transcend the interest of the parties in the present dispute.

31. I am, therefore satisfied the Petitions raise substantial questions of law necessitating the certification to be Chief Justice to constitute uneven number of Judges to hear and determine them.
32. I need to reiterate that certification need not even involve the parties. As long as the court is satisfied that the matter meets the threshold under Article 165(4) of the Constitution, it can refer the matter to the Chief Justice even *suo muto*. That was the holding of this Court in **Estate Sonrisa Limited v Leperes & 2 others (Petition E557 of 2025) [2025] KEHC 12266 (KLR)** where the court stated:
- “The judge may, prior to making the decision, seek the involvement of the parties to enrich the court’s decision but that does not translate into a mandatory requirement or that such failure will lead to invalidation of the judge’s independent ex parte assessment.”***
33. I am satisfied, that even on my own independent assessment, that this is a matter deserves to be certified for empanelment of an uneven bench by the Chief Justice under Article 165(4) of the Constitution.
34. The next question is what happens between now and the time the Chief Justice empanels a bench?

35. Despite the respondent insisting this matter is before Parliament, the document that the petitioner annexed while seeking recertification application shows otherwise.
36. It is apparent that Parliament has now dealt with the matter and granted its approval which will take effect **on '1<sup>st</sup> April, 2026 or later.'** This implies that if the other regulatory approvals are granted, nothing stop the respondents from completing the process despite these Petitions that question the constitutionality of that process.
37. That in my view would render the substratum of these petitions nugatory.
38. I must confess that this Court is constrained and is unable to deal with all the issues fully due to the limited time it has in its hands before proceeding on transfer.
39. For instance, it emerged that 7<sup>th</sup> respondent was unable to respond to the re-certification application because of the short time it had to file a response and this Court would not want to disadvantage this party by determining the application without giving it a chance to file a response and submissions for the fair determination of the issues.
40. I will thus, give opportunity to the 7<sup>th</sup> respondent and those who had not responded to the recertification application to do so within the next 7 days.

41. This Court is also cautious so that whatever directions or orders it makes do not prejudice the decision the bench might eventually reach.
42. The immediate overriding concern that the Court must therefore address is ensuring the Petition is preserved pending the appointment of the Bench to ensure the subject matter of these Petitions is not dissipated before even the Her Ladyship the Chief Justice acts on this recommendation.
43. Accordingly, the balance of justice is in favour of granting immediately an order that the status quo to be maintained until the Bench is appointed by Her Ladyship the Chief Justice is seized of the matter.
44. The bench shall then be at liberty to give such further directions it considers appropriate in relation to the hearing of the Application for conservatory order, the petition including discharging or refusal to extend this order, if need be, varying or issuance of any other order it deems fit in this matter.
45. This order shall therefore last and expire on the date the Bench is constituted and has given its directions in the matter regarding further management of the case including the application to struck out the 7<sup>th</sup> Respondent and any

other aspects of preliminary objections that this court might not have considered in the instant Ruling.

46. The file is thus forwarded to the Chief Justice for empanelment of an uneven bench to hear and determine the Consolidated Petition.

47. The parties or the advocates for the parties will be notified by the Deputy Registrar of this Court once the Hon. Chief Justice has constituted the uneven Bench to hear the matter.

***Dated, signed and delivered virtually at Nairobi this 23<sup>rd</sup> day of March, 2026.***

.....  
**L N MUGAMBI**  
**JUDGE**