REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. E513 OF 2024

IN THE MATTER OF ARTICLES 3(1), 22, 23, 48, 50(1), 162(2)(a), 165(5), 258, AND 259(1) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3(1), 10, 73, 94, 95, 96(2), 112(1)(a), 113, 201, 226(2), 227, 232 AND 259(1) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 24, 25(a), 26, 27, 28, 29(d & f), 31, 40, 43, 46, 47, 53, 54, 56, AND 57 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 3, 4, 5, 6, 15 AND 16 OF THE DIGITAL HEALTH ACT (NO. 15 OF 2023); SECTIONS 4, 5, 6, 7(1), 14(2, 3, 4, 5 & 6), AND 31 OF THE SOCIAL HEALTH INSURANCE ACT (NO. 16 OF 2023); SECTIONS 2, 3, 4, 44, 45, 46, 47, 48, 52, 53, 58, 60, 61, 63, 66, 68, 69, 70, 72, 74, 78, 79, 84, 87, 88, 92, 93, AND 94 OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT (CAP.412C); SECTIONS 4, 5, 24 AND 56 OF THE PUBLIC PRIVATE PARTNERSHIP ACT AND SECTIONS 3, 4, 18 AND 19 OF THE STATUTORY INSTRUMENTS ACT (CAP. 2A).

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF SECTION 57 OF THE FINANCE ACT, NO. 15 OF 2017; SECTION 114A OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015 (PPADA); SECTIONS 20, 25 AND 28 OF THE SOCIAL HEALTH INSURANCE ACT; AND SECTIONS 15(2) AND 23(1) OF THE STATUTORY INSTRUMENTS ACT (CAP 2A).

AND

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE PURPORTED PROCUREMENT AND AWARD BY THE GOVERNMENT OF KENYA THROUGH THE MINISTRY OF HEALTH, STATE DEPARTMENT OF MEDICAL SERVICES, TO SAFARICOM CONSORTIUM, OF TENDER NO.MOH/SDMS/ADM/SPPP/005/2023-2024 FOR PROVISION OF INTEGRATED THE HEALTHCARE INFORMATION TECHNOLOGY SYSTEM (IHITS) FOR UNIVERSAL HEALTH CARE (UHC).

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF LEGAL NOTICE NOS. 48, 49, 146 AND 147 OF 2024.

AND

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF ROLLING OUT THE SOCIAL HEALTH INSURANCE FUND USING SUBSIDIARY LEGISLATION NOT APPROVED BY THE PARLIAMENT.

AND

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF ROLLING OUT THE SOCIAL HEALTH INSURANCE FUND (SHIF) BEFORE ENSURING ALL PERSONS COULD ACCESS HEALTH CARE SERVICES UNDER SHIF.

BETWEEN

OKIYA OMTATAH OKOITI...1ST PETITIONER

ELIUD KARANJA MATINDI...2ND PETITIONER

DR. MAGARE-GIKENYI BENJAMIN..3RD PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF HEALTH.........................1ST RESPONDENT

THE PRINCIPAL SECRETARY, MEDICAL SERVICES..........................2ND RESPONDENT

THE HON. ATTORNEY GENERAL..3RD RESPONDENT

THE PUBLIC PROCUREMENT

REGULATORY AUTHORITY...4TH RESPONDENT

THE SOCIAL HEALTH AUTHORITY..5TH RESPONDENT

SAFARICOM PLC...6TH RESPONDENT

KONVERGENZ NETWORK SOLUTIONS LIMITED............................7TH RESPONDENT

APEIRO LIMITED...8TH RESPONDENT

APEIRO KENYA TECHNOLOGIES LIMITED....................................9TH RESPONDENT

THE CABINET SECRETARY,

THE NATIONAL TREASURY AND PLANNING..............................10TH RESPONDENT

THE NATIONAL ASSEMBLY..11TH RESPONDENT

THE DATA PROTECTION COMMISSIONER.................................12TH RESPONDENT

THE DIGITAL HEALTH AGENCY...13TH RESPONDENT

AND

LAW SOCIETY OF KENYA..1ST INTERESTED PARTY

KATIBA INSTITUTE...2ND INTERESTED PARTY

KENYA NATIONAL

COMMISSION ON HUMAN RIGHTS....................................3RD INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION..............................4TH INTERESTED PARTY

TRANSPARENCY INTERNATIONAL.....................................5TH INTERESTED PARTY

THE SENATE...6TH INTERESTED PARTY

THE DATA PRIVACY & GOVERNANCE

SOCIETY OF KENYA (DPGSK)..7TH INTERESTED PARTY

KENYA AIRLINE PILOTS ASSOCIATION (KALPA)....................8TH INTERESTED PARTY

JUDGMENT

"Public health is a powerful tool to level that playing field, to bend the arc of our country away from distrust and disparities and back towards equity and justice."

— Leana S. Wen

INTRODUCTION

1. The Amended Petition dated 16th December 2024 revolves around constitutional and statutory controversies touching on one of the most basic human concerns, healthcare. Within it, the Petitioners, Respondents, and the Interested Parties have all articulated positions that weave a complex tapestry involving the right to healthcare, public procurement law, the integrity of the legislative process, and the stewardship of public finances, and many more.

2. The Petitioners, describing themselves as public-spirited citizens and human rights defenders, have approached this Court to impugn two closely related governmental undertakings. The first concerns the procurement process culminating in the award of Tender No. MOH/SDMS/ADM/SPPP/005/2023–2024 by the Ministry of Health to the consortium of the Safaricom PLC (6th Respondent), Konvergenz Network Solutions Limited (7th Respondent), and Apiero Limited (8th Respondent), collectively the *'Safaricom Consortium'* for the establishment and operation of an Integrated Healthcare Information Technology System (IHITS) intended to support the implementation of Universal Health Care (UHC) through the Social Health Insurance Fund (SHIF).

3. The Petitioners' second concern is an extension of the first, and it relates to the legal and constitutional propriety of the rollout and operationalization of the Social Health Insurance Fund (SHIF) under the Social Health Insurance Act, No. 16 of 2023.

4. The genesis of this dispute lies in the Fifth Administration's ambitious healthcare reforms aimed at achieving Universal Health Coverage, a key pillar

of the Bottom-Up Economic Transformation Agenda (BETA). Since the dawn of the Republic, each National Administration has struggled with the veritable gordian knot that is the challenge of providing nationwide, accessible, high-quality public healthcare in a sustainable manner that also factors in our nation's rising population and dynamic health concerns.

5. Various attempts have been made towards this end, with the relative success or failures of each being a matter for discussion by analysts and not the Bench. It is safe to say, however, that centrality of public healthcare has been a consistent theme of each Administration's plans.

6. The First Administration situated the newly independent Kenya as facing three conjoined evils; poverty, ignorance, and disease. In that regard, President Jomo Kenyatta's Administration established the National Hospital Insurance Fund (NHIF) in the year 1966/67 as a department within the Ministry of Health.

7. The Second Administration took the baton from the First, and drove a sustained expansion in the number of health facilities across Kenya. Of concern to this Petition was President Daniel Toroitich arap Moi's Administration transformation of NHIF from a department into a fully-fledged state corporation which was achieved through the enactment of the National Hospital Insurance Fund Act (Chapter 255, as it then was, of the Laws of Kenya) in the year 1998.

8. In the Third Administration, President Mwai Kibaki's seminal 'Kenya Vision 2030' contained a Social Pillar which emphasized health as a critical sector for improving the lives of all Kenyans. In particular, the Third Administration sought to modernize infrastructure and equipment within public hospitals, all against a backdrop of expanding the ambit and benefits of NHIF.

9. The Fourth Administration took the Kenya Vision 2030 platform and developed various policies to drive public healthcare to new levels. In addition to celebrated public health initiatives such as 'Linda Mama', President Uhuru Kenyatta's Administration developed the Kenya Health Policy 2014 - 2030 and the Universal Health Coverage Health Policy 2020 - 2030 as implementation of the Social Pillar of the Kenya Vision 2030. The Fourth Administration's Universal Healthcare, was a second term policy articulation within the President Uhuru Kenyatta's *' Big Four Agenda'*, where it was one of the four pillars. Key to the present Petition was the policy view of the Fourth Administration that NHIF as it existed at the time was not fit-for-purpose and did not resonate well with the needs of a rapidly growing Kenyan population.

10. The Fifth Administration sought to make an array of changes to both the legislative as well as the operational landscape that governed public health in Kenya. Central to these reforms was the transition from the National Hospital Insurance Fund (NHIF) to a new legal framework comprising three principal statutes: the Primary Health Care Act, No. 13 of 2023; the Digital Health Act, No. 15 of 2023 and the Social Health Insurance Act, No. 16 of 2023.

11. In his second State of the Nation Address, President William Ruto identified household medical expenses as a significant challenge to Kenyans across the socio-economic landscape, and the Head of State and Government averred that his Administration's reform package would ensure that all persons in Kenya would have access to quality and affordable healthcare through the implementation of Universal Health Coverage.

12. The implementation of this new framework, particularly the operationalization of SHIF from 1st October 2024 and the procurement of the technological backbone for the entire system (the IHITS); form the primary subject matters of these proceedings.

13. The Petition has traversed a rather protracted procedural trajectory. It was initially lodged on 30th September 2024 together with a Notice of Motion seeking interim conservatory relief. In response to the initial Petition, the Respondents and Interested Parties placed before the Court a multiplicity of pleadings, replying affidavits, grounds of opposition, and preliminary objections.

14. Further, the 8th Interested Party, the Kenya Airline Pilots Association (KALPA), as well as a proposed co-Petitioner, Jackline Ruguru Kagu, sought leave to be enjoined in the matter. The former was joined, while the latter was not.

15. The Petitioners subsequently sought and were consequently granted leave to amend their pleadings, culminating in the filing of the Amended Petition

dated 16th December 2024 which now constitutes the petition pending determination herein.

16. The interlocutory applications seeking conservatory orders were resolved, thereby clearing the way for the substantive adjudication of the Amended Petition

17. Following the close of pleadings, the Court issued directions on the filing and exchange of written submissions, which were duly filed and served, and thereafter comprehensively canvassed by all parties vide a hearing by way of highlighting of written submissions.

18. Having undertaken a comprehensive appraisal of the Amended Petition, the responses and affidavits filed by each Respondent and Interested Party, the extensive written submissions, the numerous authorities cited, and the voluminous documentary evidence annexed thereto, this Court now renders its judgment. The Court's analysis is guided by the principles of constitutional interpretation set out in Article 259, which mandates a purposive interpretation that promotes the Constitution's purposes, values, and principles, advances the rule of law, human rights, and fundamental freedoms, and contributes to good governance.

19. To place the grievances raised in their proper context, it is necessary to outline the factual matrix emerging from the pleadings and the documentary record placed before the Court. In October 2023, Parliament enacted three significant statutes intended to reform the health sector, namely the Primary

Health Care Act, No. 13 of 2023, the Digital Health Act, No. 15 of 2023, and the Social Health Insurance Act, No. 16 of 2023. The latter statute, which came into force on 22nd November 2023, repealed the National Health Insurance Fund Act and established the Social Health Authority as the body charged with administering the new statutory framework.

20. The Social Health Insurance Act further created three distinct funds to facilitate the realization of universal health coverage, namely the Primary Healthcare Fund under section 20, the Social Health Insurance Fund under section 25, and the Emergency, Chronic and Critical Illness Fund under section 28.

21. In parallel with these legislative developments, the Government, through the Ministry of Health's State Department for Medical Services, initiated steps towards the digitization of the health sector through the establishment of a digital infrastructure intended to support the implementation of Universal Health Care (UHC). This initiative envisaged the procurement of an Integrated Healthcare Information Technology System (IHITS) to function as a national digital backbone for healthcare services.

22. The procuring entity was the State Department for Medical Services within the Ministry of Health, with the Principal Secretary serving as the accounting officer. The procurement was undertaken pursuant to the Specially Permitted Procurement Procedure (SPPP) provided for under section 114A(2)(d) of the Public Procurement and Asset Disposal Act, 2015, a mechanism

that allows the Government, in appropriate circumstances, to source strategic partnerships for projects deemed to be of national importance.

23. The procurement process was set in motion by a letter dated 6th June 2023 from the Ministry of Health to the National Treasury seeking approval to adopt the Specially Permitted Procurement Procedure for several projects, including the proposed healthcare information technology digitization initiative. By a communication dated 27th June 2023, the National Treasury granted the requisite approval, subject to a number of conditions, among them the preparation of appropriate tender documentation. Thereafter, on 9th May 2024, the procuring entity issued a Request for Proposal (RFP) to Safaricom PLC, inviting it to submit a bid either in its individual capacity or as part of a consortium. The RFP specified that the procurement would proceed under the Specially Permitted Procurement Procedure through a Single Source Selection method.

24. On 15th May 2024, a consortium led by Safaricom PLC and also comprising Konvergenz Network Solutions Limited and Apeiro Limited submitted both technical and financial proposals in response to the Request for Proposal. The consortium's financial bid quoted a contract sum of Kshs. 104,808,136,478.00. A Notification of Intention to Award was issued on 16th May 2024. Following subsequent negotiations between the parties, a formal Notification of Award was issued on 19th June 2024.

25. The Safaricom Consortium, however, raised concerns regarding discrepancies in that notification, particularly in relation to the stated contract duration

and the addressee of the award. These concerns prompted the issuance of a Revised Notification of Award on 2nd July 2024, which corrected the contract period to ten (10) years and properly addressed the award to the Safaricom Consortium.

26. In the intervening period, the Office of the Attorney General granted clearance for the contract on 27th June 2024. The consortium formally accepted the award on 2nd August 2024 and on 9th August 2024 the parties executed an agreement for the provision of Healthcare Information Technology Digitization for Universal Health Care (UHC) at a contract price of Kshs. 104,808,136,478.00 over a ten-year period.

27. Subsequently, on 1st October 2024 the Social Health Insurance Fund (SHIF) established under the Social Health Insurance Act, No. 16 of 2023 was rolled-out by the Government in place of the National Hospital Insurance Fund (NHIF). The implementation of the new Fund was supported by a series of subsidiary legislative instruments, including the Social Health Insurance (General) Regulations, 2024 (Legal Notice No. 49 of 2024), the Social Health Insurance (Tribunal Procedure) Rules, 2024 (Legal Notice No. 48 of 2024), and later the Tariffs for Healthcare Services Regulations (Legal Notice No. 146 of 2024) together with the Social Health Insurance (Amendment) Regulations, 2024 (Legal Notice No. 147 of 2024).

28. It is against this legislative and administrative backdrop that the Petitioners instituted the present proceedings on 30th September 2024. They are challenging the legality and constitutionality of the procurement process and

the statutory framework underpinning the roll-out of the Social Health Insurance Fund.

THE PETITIONERS' CASE

29. The Petitioners' case, as articulated in the Amended Petition dated 16th December 2024, the supporting affidavits, and the written submissions filed on their behalf, is multifaceted. In essence, they contend that both the procurement of the Integrated Healthcare Information Technology System (IHITS) and the subsequent rollout of the Social Health Insurance Fund (SHIF) were undertaken in a manner that is unlawful, unconstitutional, and inimical to the public interest.

30. The Petitioners contend that the procurement of the Integrated Healthcare Information Technology System (IHITS) was vitiated by alleged illegality, impropriety, and fraud. In their view, the impugned process was undertaken in a manner that circumvented the constitutional imperatives of transparency, accountability, public participation, and fair competition that govern public procurement. They particularly assail the constitutionality of Section 114A of the Public Procurement and Asset Disposal Act, 2015 (PPADA), which establishes the Specially Permitted Procurement Procedure (SPPP), contending that the provision was irregularly introduced into the statute and is, in any event, inconsistent with Article 227 of the Constitution.

31. The Petitioners contend that the said provision is unconstitutional, null, and void on several grounds. First, they argue that Section 114A was irregularly introduced into the statute through Section 57 of the Finance Act, No. 15 of

2017. In their view, a Finance Act, being the legislative product of a Money Bill, is constitutionally limited to matters relating to taxation, revenue-raising measures, and matters incidental thereto. It therefore cannot lawfully be used as a vehicle to amend substantive legislation governing public procurement.

32. Secondly, the Petitioners contend that the enactment of Section 114A contravened the constitutional framework governing bicameral legislation. Relying on Articles 96(2) and 110 of the Constitution, they submit that the Public Procurement and Asset Disposal Act applies to both national and county governments in their procurement activities. Consequently, any legislative amendment thereto constitutes legislation concerning county governments and therefore required the participation and concurrence of the Senate. The failure to involve the Senate in the enactment of Section 114A, it is argued, renders the provision constitutionally defective.

33. Thirdly, the Petitioners assert that the Specially Permitted Procurement Procedure is, by its very design, incompatible with the constitutional principles governing public procurement. They argue that the procedure undermines Article 227(1) of the Constitution, which requires public procurement systems to be fair, equitable, transparent, competitive, and cost-effective. According to the Petitioners, the SPPP vests wide and largely unchecked discretion in the Cabinet Secretary for the National Treasury and the accounting officer of the procuring entity, thereby enabling them to bypass the competitive safeguards envisioned by the Constitution.

34. The Petitioners further challenge the legal architecture underpinning the Social Health Insurance Fund (SHIF), asserting that the subsidiary legislation purporting to operationalize the Fund was not lawfully enacted in accordance with the Constitution and the applicable statutory framework. They additionally contend that the three funds established under the Social Health Insurance Act are incompatible with the constitutional design governing the management, control, and oversight of public finances.

35. Flowing from their challenge to the constitutionality of the enabling provision, the Petitioners further contend that, even assuming the validity of Section 114A (which the strenuously deny), the procurement of the IHITS did not satisfy the statutory conditions for invoking the Specially Permitted Procurement Procedure. In particular, they refer to Section 114A(2)(a), which limits the use of the procedure to circumstances where exceptional requirements render compliance with the ordinary procurement framework impossible, impracticable, or uneconomical.

36. The Petitioners maintain that no such exceptional circumstances existed in the present case. They argue that the development and deployment of an enterprise resource planning digital system is neither novel nor uniquely complex and that similar health information management systems have previously been procured competitively by various county governments and by the former National Health Insurance Fund at significantly lower costs.

37. The Petitioners also challenge the identity of the procuring entity and the legal propriety of the procurement process undertaken. They contend that

the statutory mandate to develop and manage the national integrated health information system lies with the Digital Health Agency established under the Digital Health Act, No. 15 of 2023. In particular, they rely on section 6(a) of the Act, which assigns to the Agency the responsibility of developing, operationalizing, and maintaining the Comprehensive Integrated Health Information System. By undertaking the procurement through the Ministry of Health rather than through the Digital Health Agency, the Petitioners argue that the Respondents acted in disregard of the express provisions of the statute and the constitutional principle of the rule of law embodied in Article 10 of the Constitution.

38. The Petitioners further mount a sustained challenge to the composition and capacity of the consortium awarded the tender, namely the consortium led by Safaricom PLC and comprising Konvergenz Network Solutions Limited and Apeiro Limited. In their view, none of the entities meets the statutory threshold of a “strategic partner” contemplated under Section 114A(2)(d) of the procurement statute. They draw particular attention to the incorporation of Apeiro Limited on 10th July 2023, barely months before the Request for Proposal was issued, arguing that such a recently incorporated entity could not possibly have satisfied the tender requirements relating to audited financial statements and tax compliance. The Petitioners further characterize the company as a shell entity lacking independent financial capacity and relying instead on a letter of comfort from its parent company while subcontracting substantial portions of its responsibilities to foreign entities.

39. According to the Petitioners, this arrangement raises grave concerns regarding the security and control of Kenya's health data, which they assert is recognized under the Digital Health Act, No. 15 of 2023 as a strategic national asset. They contend that the outsourcing of key components of the system to foreign companies domiciled in jurisdictions such as the United Arab Emirates, India, and the United States exposes sensitive national health data to unregulated and potentially insecure handling.

40. The Petitioners similarly question the technical and financial capacity of Konvergenz Network Solutions Limited. They point to the company's declaration in its Confidential Business Questionnaire indicating that the maximum value of business it could undertake was Kshs. 250 million, yet it was allocated a component of the impugned contract valued at approximately Kshs. 25 billion. They also question the role of Safaricom PLC within the consortium, contending that the company's primary expertise lies in telecommunications services rather than software development and enterprise system architecture.

41. The Petitioners further allege that the procurement process was marred by serious procedural irregularities. In particular, they assert that two separate procurement processes were conducted under the same tender number. According to their account, the initial procurement culminated in negotiations that reduced Safaricom PLC's original bid of Kshs. 111,009,326,363.00 to a negotiated contract price of Kshs. 48,367,839,050.00 as at 24th January 2024. However, when Safaricom allegedly declined to execute the resultant contract, the Petitioners contend

that the applicable procurement rules required the forfeiture of the tender security and the bidder's debarment from future procurement proceedings.

42. Instead, the Petitioners allege that the procuring entity initiated a second procurement process by issuing a fresh Request for Proposal on 9th May 2024, which ultimately culminated in the award of a new contract valued at Kshs. 104,808,136,478.00 an amount they state is approximately Kshs. 56 billion higher than the earlier negotiated figure and arrived at without further negotiations. In their view, this sequence of events reveals a deliberate scheme designed to inflate the contract price to the detriment of the public purse.

43. The Petitioners also fault the procurement process for failing to secure tender security as required under Section 61 of the Public Procurement and Asset Disposal Act, 2015. They argue that the Request for Proposal expressly required the provision of tender security and that the statutory exemptions do not apply to the consortium. As a result, the public allegedly remained exposed when the bidder declined to sign the initial contract.

44. According to the Petitioners, the impugned procurement process was orchestrated in a manner calculated to defraud Kenyan taxpayers and the contributors to the Social Health Insurance Fund of a colossal sum of money, estimated at Kshs. 104,808,136,478.00 being the contract sum.

45. Beyond the procurement dispute, the Petitioners also challenge the legal framework underpinning the rollout of the Social Health Insurance Fund

established under the Social Health Insurance Act, No. 16 of 2023. They contend that the subsidiary legislation intended to operationalize the Fund was invalid. In particular, they argue that the Social Health Insurance (General) Regulations, 2024 and the Social Health Insurance (Tribunal Procedure) Rules, 2024 were annulled by the Senate on 30th July 2024. Consequently, they assert that subsequent instruments including the Tariffs for Healthcare Services Regulations and the Social Health Insurance (Amendment) Regulations, 2024 lack a valid legal foundation.

46. The Petitioners further contend that the impugned subsidiary legislation was enacted without adequate public participation, contrary to Articles 10 and 118 of the Constitution and Section 5 of the Statutory Instruments Act. They also challenge the tariff framework introduced by the regulations, arguing that its uniform and blanket structure fails to take into account the needs and protections of vulnerable and marginalized groups.

47. Additionally, the Petitioners contest the constitutionality of Sections 20, 25, and 28 of the Social Health Insurance Act, which establish the Primary Healthcare Fund, the Social Health Insurance Fund, and the Emergency, Chronic and Critical Illness Fund respectively. They contend that the creation of these funds is inconsistent with Article 206 of the Constitution and the statutory framework governing public finance management, as it effectively establishes sub-consolidated funds outside the constitutionally prescribed procedures.

48. The Petitioners also question the constitutionality of Sections 15(2) and 23(1) of the Statutory Instruments Act to the extent that they permit statutory instruments to come into operation prior to parliamentary scrutiny and approval. In their view, this arrangement undermines Parliament's legislative authority under Article 94(5) of the Constitution.

49. In their written submissions, the Petitioners reiterate the foregoing arguments and emphasize the alleged violation of the constitutional right to health guaranteed under Article 43 of the Constitution. They further invoke the public interest in safeguarding public resources and ensuring constitutional fidelity in the management of national health programmes. In support of their position, they rely on several authorities, including ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** and ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others***, among other decisions cited in their submissions.

50. On the basis of these arguments, the Petitioners urge the Court to grant the reliefs sought in the Amended Petition and to issue such further orders as may be necessary to vindicate and protect the constitutional rights and principles alleged to have been violated.

THE RESPONDENTS' CASES

The 1st and 2nd Respondents' Case

51. The Respondents, comprising the State organs responsible for health and public finance, the procuring entities, and the private entities constituting the

Safaricom Consortium, vigorously defend both the impugned procurement process and the legislative frameworks under challenge.

52. They maintain that the procurement leading to the award of the IHITS tender was conducted in accordance with the law and within the parameters of the Public Procurement and Asset Disposal Act.

53. The Respondents further underscore the compelling public interest in the effective and timely realization of Universal Health Care, contending that the Petition, whether by reason of prematurity, procedural impropriety, or want of factual foundation, is not properly before this Court and ought not to impede the implementation of a programme of such critical national importance.

54. The 1st and 2nd Respondents, namely the Cabinet Secretary for Health and the Principal Secretary in the State Department for Medical Services, oppose the Petition through an extensive Replying Affidavit sworn by Harry K. Kimtai, the Principal Secretary, together with detailed written submissions filed on their behalf. In essence, they mount a robust defence of the impugned procurement process and the legal framework under challenge.

55. The 1st and 2nd Respondents contend that the dispute presented before the Court is, in substance, a procurement and tendering dispute rather than a constitutional controversy. Consequently, they argue that this Court ought not to assume jurisdiction in the first instance. In this regard, they invoke the doctrines of constitutional avoidance and exhaustion of statutory remedies,

relying inter alia on the decision of the Supreme Court in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others.***

56. On the merits of the dispute, the 1st and 2nd Respondents provide a detailed account of the procurement process, maintaining that the entire process was conducted in strict conformity with the law. They justify the adoption of the Specially Permitted Procurement Procedure (SPPP) under Section 114A(2)(d) of the Public Procurement and Asset Disposal Act, 2015 on the basis that the Integrated Healthcare Information Technology System (IHITS) project required a strategic partner capable of financing the substantial upfront costs associated with the establishment of a nationwide digital health infrastructure.

57. According to the 1st and 2nd Respondents, the magnitude and complexity of the project rendered conventional procurement methods impracticable and uneconomical. They further trace the conceptual origins of the project to the Government's policy initiatives under the BETA agenda and the national development blueprint contained in Kenya Vision 2030, as well as several policy and technical reports, including the Kenya Digital Health Landscape Assessment Report, 2023, which recommended partnering with an entity possessing extensive nationwide technological infrastructure.

58. With regard to the identity of the procuring entity, the 1st and 2nd Respondents contend that the Ministry of Health, through the State Department for Medical Services, was the legally mandated body to undertake the procurement. They rely on Presidential Executive Order No. 2

of 2023 on ‘the Organization of the Government of the Republic of Kenya’, which assigned responsibility for “*E-Health*” functions to the State Department for Medical Services.

59. They further invoke Section 105(3) of the Health Act, 2017, which empowers the Ministry of Health to facilitate the establishment and maintenance of a comprehensive integrated health information system. The 1st and 2nd Respondents also submit that at the time the procurement process was initiated in June 2023, the Digital Health Agency had not yet been established; since the Digital Health Act [Act No. 15 of 2023] only came into force on 19th October 2023 and its full operationalization was anticipated to take considerable time. They add that the impugned contract itself expressly contemplates the role of the Digital Health Agency and is intended to equip the Agency, together with other health institutions, with the requisite digital infrastructure.

60. The 1st and 2nd Respondents also address the Petitioners’ concerns relating to intellectual property rights arising from the contract. They explain that the contractual arrangement adopts a Software-as-a-Service (SaaS) model, which they describe as a widely accepted and cost-efficient approach to large-scale digital infrastructure projects. Under this model, the 1st and 2nd Respondents say that the service provider bears responsibility for system development, maintenance, security, and periodic upgrades; thereby eliminating the need for substantial upfront capital expenditure by the Government. They further submit that it is standard industry practice for the service provider to retain ownership of the underlying intellectual property while granting the

procuring entity an irrevocable licence to utilize the software. They further note that the contract includes provisions for the transfer of certain infrastructure and system components to the Government upon the expiry of the contract period.

61. Concerning the constitutionality of Section 114A of the procurement statute, the 1st and 2nd Respondents maintain that the provision enjoys the presumption of constitutionality accorded to duly enacted legislation. In this regard, they rely on the decision in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others***, which adopted the principle articulated in ***Ndyanabo v Attorney General*** that statutes are presumed constitutional unless proven otherwise. They also cite the decision of the Court of Appeal in ***Portside Freight Terminals Limited & 2 others v Okoiti & 10 others***, which upheld the constitutionality of the Specially Permitted Procurement Procedure, recognizing it as a lawful procurement mechanism particularly suited to circumstances where a private investor undertakes to finance the entirety of a project. Additionally, they rely on ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*** for the proposition that in alternative procurement procedures the scope of competition and public participation through competitive bidding may legitimately be reduced.

62. In response to the allegations of fraudulent conduct and the existence of two separate procurement processes, the 1st and 2nd Respondents deny any impropriety. They explain that the Notification of Intention to Award dated 24th January 2024 and the subsequent negotiations formed part of a single,

continuous procurement process. They emphasize that a Notification of Intention to Award is procedurally distinct from a formal Notification of Award under the Request for Proposal framework.

63. According to the 1st and 2nd Respondents, when concerns were raised by Safaricom PLC, acting as the lead member of the consortium, regarding certain terms contained in the initial notification, the procuring entity addressed those concerns and subsequently issued a revised Notification of Award on 2nd July 2024, culminating in the execution of the final contract. They therefore deny any allegation of collusion, manipulation, or fraudulent inflation of the contract price.

64. On the question of the alleged annulment of the subsidiary legislation operationalizing the Social Health Insurance Fund, the 1st and 2nd Respondents dispute the Petitioners' interpretation of the proceedings of the Senate. They contend that the Senate did not, in fact, annul the Social Health Insurance Regulations, 2024. Rather, they submit that on 30th July 2024 the Senate motion seeking adoption of the relevant committee report recommending annulment failed to secure the requisite majority of delegations as required under Article 123(4)(c) of the Constitution. Consequently, the motion was negatived and the regulations remained in force. In any event, the 1st and 2nd Respondents submit that the implementation of the Social Health Insurance Act, No. 16 of 2023 does not depend on the existence of subsidiary legislation, as the Act itself is self-operative. In this regard, they rely on the ruling of the Court of Appeal in ***Cabinet Secretary, Ministry of Health v Aura & 13 others***.

65. Finally, the 1st and 2nd Respondents invoke considerations of public interest. They contend that the issuance of conservatory orders or declarations invalidating the impugned procurement and statutory framework would severely disrupt the delivery of essential health services to millions of Kenyans who have already been onboarded onto the SHIF system. Such an outcome, they argue, would create uncertainty within the health sector and undermine ongoing reforms aimed at achieving universal health coverage, thereby occasioning significant prejudice to the public interest.

The 3rd, 10th and 13th Respondents' Case

66. The Honourable Attorney General, appearing for the 3rd Respondent and filing submissions on behalf of the 5th, 10th, and 13th Respondents, adopted a comprehensive and coordinated position in the Replying Affidavits and written submissions placed before the Court. On behalf of the 10th Respondent, the Cabinet Secretary for the National Treasury and Planning, a Replying Affidavit was sworn by the Cabinet Secretary, John Mbadi Ng'ongo, outlining the policy rationale underpinning the Specially Permitted Procurement Procedure (SPPP). In addition, the Court received a further Replying Affidavit sworn by Antony Lenaiyara, the Acting Chief Executive Officer of the Digital Health Agency, addressing the institutional and technical aspects of the Integrated Healthcare Information Technology System (IHITS).

67. In substance, the Respondents aver that the Specially Permitted Procurement Procedure is neither novel nor extraordinary within Kenya’s procurement framework. They depose that the procedure existed under the

repealed Public Procurement and Disposal Act, 2005 and that its omission from the subsequently enacted Public Procurement and Asset Disposal Act, 2015 was inadvertent. According to the deponents, the reintroduction of the procedure through the Finance Act, 2017 constituted a corrective legislative measure designed to address practical challenges encountered in specialized and strategic procurements. They further maintain that the amendment process complied with all applicable constitutional requirements, including public participation and parliamentary deliberation.

68. With respect to the specific approval granted for the procurement of the IHITS project, the 10th Respondent sets out in detail the justifications advanced by the Ministry of Health. These included significant budgetary constraints facing the Government and the attendant need to secure a strategic partner capable of providing substantial upfront capital investment for the development of the nationwide digital health infrastructure. It is deposed that the National Treasury, having evaluated the proposal, granted approval for the adoption of the Specially Permitted Procurement Procedure on the basis that the arrangement would facilitate the realization of Universal Health Care while simultaneously mitigating the immediate fiscal burden on the Government.

69. The Honorable Attorney General's submissions place considerable reliance on the doctrine of the presumption of constitutionality of statutes. In this regard, reliance is placed on the decisions in ***Ndyanabo v Attorney General*** and ***Eunice Nganga & another v Law Society of Kenya & another*** for the proposition that legislation enacted by Parliament enjoys a presumption of

validity unless the contrary is demonstrated. It is contended that the Petitioners have failed to discharge the evidentiary and legal burden necessary to rebut that presumption in relation to section 114A of the procurement statute and the other impugned legislative provisions. The Attorney General further defends the constitutionality of the Finance Act, 2017, submitting that the statute qualifies as a Money Bill within the meaning of Article 114 of the Constitution and that the amendments it introduced were matters reasonably incidental to its legislative purpose.

70. On the question of the Senate's participation in the legislative process, the Attorney General submits that the Finance Act, 2017, being a Money Bill, did not require consideration by the Senate. It is further contended that the Petitioners have not demonstrated how section 114A of the procurement statute, or any other provision introduced through the Finance Act, constitutes legislation concerning county governments within the meaning of Article 110 of the Constitution.

71. The Honorable Attorney General also advances an important argument grounded on the principle of residual institutional mandate. While acknowledging that the Digital Health Agency is the specialized body tasked with the development and operationalization of the comprehensive health information system, it is submitted that the Ministry of Health retains a residual statutory mandate under section 105 of the Health Act, 2017 to facilitate the establishment and maintenance of such a system. In the 3rd Respondent's view, given the urgency attendant to the rollout of Universal Health Care and the fact that the Digital Health Agency had not been fully

operationalized at the material time, the Ministry was justified in undertaking the procurement of the IHITS project so as to avert an impracticable and unworkable outcome. In support of this proposition, reliance is placed in ***Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others,*** which underscores the interpretive principles of constitutional construction, including the presumption against absurdity and the avoidance of interpretations that lead to unworkable results.

72. On the question of delegated legislation, the Attorney General defends the constitutionality of sections 15(2) and 23(1) of the Statutory Instruments Act. He submits that the Constitution does not require that all subsidiary legislation receive prior parliamentary approval before coming into operation. Rather, the statutory scheme under which such instruments must be tabled before Parliament within seven sitting days and remain subject to parliamentary scrutiny and annulment strikes a constitutionally appropriate balance between administrative efficiency and legislative oversight.

73. In conclusion, it is submitted that the procurement of the Integrated Healthcare Information Technology System was undertaken in furtherance of the State's constitutional obligation to progressively realize the right to health guaranteed under Article 43 of the Constitution. It is further contended that the broader public interest in ensuring access to healthcare services for millions of Kenyans outweighs what he characterizes as speculative and unproven allegations of fraud advanced by the Petitioners. In the alternative, and only in the event that the Court were to identify any constitutional infirmity. The Respondents urge the Court to consider

suspending any declaration of invalidity in order to avert disruption to the health sector. In this regard, reliance is placed on the guidance of the Supreme Court in ***Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae).***

The 5th Respondent's Case

74. The 5th Respondent, the Social Health Authority, through its Replying Affidavit sworn by Elijah G. Wachira, its Acting Chief Executive Officer, and a subsequent Notice to rely on this affidavit, focuses on defending the rollout of SHIF and the superiority of the new ICT system over the old NHIF system. It provides a detailed technical comparison between the NHIF ICT system and the SHA ICT system, which is a component of the IHITS.

75. It is averred that the NHIF system was developed over 25 years ago and is plagued by numerous challenges, including a character-based user interface, lack of a comprehensive audit trail, vulnerability to fraud, and inability to generate insightful reports. It cites reports from the Ethics and Anti-Corruption Commission (EACC) and the Health Financing Reforms Expert Panel (HEFREP) to substantiate these weaknesses.

76. In contrast, the SHA describes its new system as a modern, centralized digital platform with enterprise resource planning functionality, specifically configured to handle the three new Funds under the SHIA and the expanded healthcare services and tariffs. It provides data on the number of Kenyans registered, employers registered, health facilities contracted, claims

submitted, and pre-authorizations processed through the new system as of 31st October 2024, demonstrating its functionality and widespread adoption.

77. On the issue of public participation in the formulation of the tariffs (Legal Notice No. 146 of 2024), the SHA provides extensive evidence, including public notices, attendance lists, feedback forms, and meeting minutes, to demonstrate that a comprehensive public participation and stakeholder engagement exercise was conducted before the tariffs were published. It annexes documents showing engagement with bodies like RUPHA, CHAK, KHF, KAPH, and KMPDC, as well as a national validation exercise at KICC.

78. The 5th Respondent further avers that the NHIF system is still operational for two specific purposes: to administer enhanced benefits schemes and packages whose contracts had not lapsed, as per Paragraph 5 of the First Schedule to the SHIA, and to settle all claims lodged by health facilities for services offered prior to 1st October 2024, as per Regulation 11(3) of the Social Health Insurance Regulations. This, they argue, disproves the Petitioners' claim that the NHIF system was abruptly "switched off."

The 6th Respondent's Case

79. The 6th Respondent, Safaricom PLC, through its Replying Affidavit sworn by Isaac Njoroge Kibere and supported by detailed written submissions, opposes the Petition in its entirety. The Respondent emphasizes its role as a law-abiding corporate entity that participated in a procurement process it reasonably understood to be lawful and procedurally compliant. It chronicles the procurement process in substantial detail, echoing the chronology

presented by the 1st and 2nd Respondents, highlighting the issuance of the Notification of Award, the clarifications sought and received, and the formal acceptance of the award as evidence of good faith and adherence to the prescribed process.

80. The 6th Respondent further contends that the Amended Petition was filed without leave of the Court, in contravention of the strict timelines established on 22nd November 2024. Accordingly, it reserves the right to move that the Petition be struck out on procedural grounds for non-compliance with Court orders.

81. On the constitutionality of Section 114A of the Public Procurement and Asset Disposal Act, the 6th Respondent submits that the Finance Act, 2017, qualifies as a Money Bill and that the introduction of Section 114A was incidental to its purpose. Reliance is placed on the Court of Appeal's decision in ***Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board & 7 others.*** The Respondent further asserts that the Petitioners have not demonstrated that the Finance Bill, 2017, was a matter concerning counties, and therefore the participation of the Senate was not required. In support, reliance is placed on the Supreme Court's ruling in ***Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) Reliance is placed on Awino v Megascope Healthcare (K) Ltd & 2 others; Ethics and Anti-Corruption Commission & another*** and ***Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 Others,*** underscoring that

constitutional relief is only warranted after statutory remedies are exhausted.

82. On constitutional avoidance, the Respondent cites ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others***, arguing that the Court should decline to treat the matter as a constitutional question if it can be resolved on statutory or administrative grounds.

83. With respect to the allegations of fraud and lack of capacity, the 6th Respondent contends that such serious charges require proof and cannot be inferred from general facts. It submits that the Evaluation Committee, composed of technical experts, assessed the Consortium's proposal and found it responsive. The Court is urged not to substitute its own judgment for that of the duly appointed evaluation committee, particularly as this is an executive function involving resource allocation. Reliance is placed on Article 20(5)(c) of the Constitution and the decision of the National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association Intervening), affirming deference to technical executive determinations.

84. The Respondent provides a granular account of the IHITS project, enumerating the numerous subsystems, platforms, and infrastructural components to demonstrate that the contract sum reflects a ten-year, integrated digital health ecosystem rather than a simple software procurement. It further explains the Software as a Service model and the associated intellectual property arrangements, emphasizing that these are

standard industry practices that ensure value for money, mitigate upfront capital expenditure, and guarantee ongoing support, maintenance, and upgrades. A detailed transition plan for eventual handover of the system is included within the contractual framework.

85. On public participation, the 6th Respondent relies on the Court of Appeal's decisions in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*** and ***Portside Freight Terminals Limited & 2 others v Okoiti & 10 others***, submitting that when an alternative procurement procedure is lawfully adopted, the scope of competitive public participation is necessarily narrowed. The choice of procurement method, it is argued, lies squarely within the discretion of the procuring entity and is not subject to judicial review except on grounds of clear illegality.

86. Finally, the 6th Respondent underscores the overarching public interest in ensuring the uninterrupted operation of the IHITS and the Social Health Insurance Fund. Highlighting the millions of Kenyans already registered and the thousands of health facilities onboarded, it argues that granting the Petitioners' prayers would disrupt essential health services, infringe upon the right to health under Article 43(1) of the Constitution, and occasion irreparable harm to the public at large.

The 7th Respondent's Case

87. The 7th Respondent, Konvergenz Network Solutions Limited, through its Replying Affidavit sworn by Abdullahi Abdi Sheikh, supported by detailed

written submissions, fully aligns itself with the defense advanced by the 6th Respondent concerning the IHITS procurement process. It provides a parallel chronological account of events, underscoring its role as a member of the Safaricom Consortium and its commitment to delivering its allocated components of the IHITS project in accordance with the contractual obligations and timelines.

88. The 7th Respondent robustly rebuts the Petitioners' allegations regarding its technical and financial capacity. It avers that it is a leading digital transformation company in Kenya with over a decade of experience and an established presence across East and Central Africa. The Respondent adduces evidence of successfully completed projects for key public and private sector entities, including Kenya Ports Authority, National Social Security Fund (NSSF), KenGen, Kenya Power, NCBA Bank, and KCB Bank. It contends that this track record demonstrates its capacity to deliver complex ICT solutions, including enterprise systems integration, data center upgrades, and cybersecurity implementations. The Respondent submits that the Petitioners' reliance on a simplistic reading of its financial statements disregards its technical expertise, corporate profile, and ability to mobilize financing for projects of such magnitude.

89. On the issue of confidential documentation, the 7th Respondent raises a formal objection to the admissibility of certain documents relied upon by the Petitioners. It asserts that the Consortium Agreement, letters of comfort, and draft appointment letters are confidential instruments executed among Consortium partners and that their acquisition by the Petitioners was

irregular, infringing upon the Respondent's right to privacy under Article 31 of the Constitution.

90. Further, the 7th Respondent defends the appropriateness and constitutionality of the Specially Permitted Procurement Procedure (SPPP). It emphasizes that the method was entirely suitable for a project of the scale and complexity of the IHITS, which required a strategic investor to assume substantial initial capital expenditure. The Respondent addresses observations made in the Auditor General's report, asserting that the matters raised are subject to parliamentary oversight and debate, and that the procurement was lawfully conducted. It also defends contractual provisions relating to intellectual property rights and dispute resolution as standard, reasonable, and consistent with industry practice, while noting that the unique structure of the project obviated the necessity for its inclusion in the Ministry's annual procurement plan.

The 8th Respondent's Case

91. The 8th Respondent, Apeiro Limited, through its Replying Affidavit sworn by Shivam Sharma and its Grounds of Opposition and written submissions, denies all allegations of fraud and asserts that it is a legitimate company capable of performing its obligations under the contract. It outlines its role in the Consortium, which includes financing and procuring hardware, providing the National Health Analytics platform, developing the e-Claims platform, and developing the Kenya Pharmaceuticals Information System (track and trace).

92. It is its case that the Petitioners through the supplementary affidavit sworn on 14th March 2025, improperly introduced new issues that were not pleaded in the Amended Petition dated 16th December, 2024. This it is argued that it prejudices the Respondents and violates the principles of fair hearing as well as procedural integrity since the new issues are substantive and expand the scope of litigation beyond what was initially placed before the Court. Reliance was placed on the decision in ***Stanley Khainga v Kenya Medical Practitioners & Dentist Board & 5 Others [2019] eKLR*** in support of its position.

93. On jurisdiction, while relying on the decision in ***Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another [2016] eKLR***, argued that this court lacks jurisdiction to entertain the Amended Petition as the dispute in question is a procurement and tendering matter which ought to be determined by appropriate body as provided for under the PPADA.

94. The 8th Respondent addresses the Petitioners' attack on its corporate status and financial capacity. It clarifies that it is a subsidiary of Sirius International Holding, which is part of the International Holding Company PJSC, a large conglomerate. It argues that it is not a "shell company" and that its association with a financially robust parent company provides it with the necessary backing to undertake its contractual obligations. It emphasizes that its role is legitimate and that it has the technical expertise, through its own resources and its network of sub-contractors, to deliver its scope of work.

95. The 8th Respondent reiterated the other respondents’ arguments and thus urged this court to dismiss the Amended Petition with costs.

The 11th Respondent's Case

96. The 11th Respondent, the National Assembly, through its Replying Affidavit sworn by Samuel Njoroge, C.B.S, the Clerk of the National Assembly, and its written submissions, opposes the Petition primarily on jurisdictional and procedural grounds. It argues that the High Court lacks jurisdiction over the procurement-related aspects of the Petition, as the proper forum is the Public Procurement Administrative Review Board (PPARB), citing ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry Mukunya & Another [2015] eKLR*** on the doctrine of exhaustion.

97. The National Assembly also raises the defenses of res judicata and sub judice concerning the challenge to Sections 20, 25, and 28 of the SHIA. It argues that the constitutionality of these provisions was determined in ***Milimani High Court Petition No. 473 of 2023; Aura Joseph Enock v Ministry of Health and Others*** and is currently the subject of active appeals in the Court of Appeal (Civil Appeal Nos. E565 and E641 of 2024). It submits that this Court should decline to re-litigate these issues.

98. On the constitutionality of Section 114A, the National Assembly defends its legislative process. It argues that the Finance Act, 2017, was a Money Bill lawfully enacted and that the inclusion of Section 114A was proper. It reiterates that the Court in ***Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others*** confirmed that a Money Bill does not require Senate involvement. It defends Sections 15(2) and 23(1) of the Statutory Instruments Act, arguing that they do not require prior

parliamentary approval for delegated legislation to come into force, and that Parliament's oversight is exercised through its power of subsequent scrutiny and annulment, citing ***Consumer Federation of Kenya v Cabinet Secretary for Petroleum & Mining & Others [2023] KEHC 24015 (KLR)***.

99. The court was thus urged to dismiss the Petition with costs and affirm the validity and continued operation of Legal Notice No. 146 of 2024 and Legal Notice No. 147 of 2024.

The 2nd Interested Party's Case

100. The 2nd Interested Party, Katiba Institute, aligns itself fully with the Petition, asserting that the matters raised transcend a mere procurement dispute and engage fundamental constitutional questions, including the role of Parliament, the doctrine of separation of powers, and the principle of public participation. It contends that the Public Procurement Administrative Review Board (PPARB) lacks jurisdiction to adjudicate issues of constitutional magnitude. The 2nd Interested Party reiterates the Petitioners' contentions regarding the purported annulment of regulations, breaches of statutory procedure, the constitutionality of the impugned subsidiary legislation, and deficiencies in public participation. It emphasizes the paramount importance of upholding the Constitution and submits that there can be no public interest in allowing constitutional violations to stand.

The 5th Interested Party's Case

101. The 5th Interested Party, Transparency International Kenya, lends its support to the Petition. Through its Replying Affidavit sworn by Sheila Masinde, it

contends that the procurement process was marred by a lack of transparency and insufficient public participation, thereby contravening the principles of good governance enshrined in Article 10 and the public finance management principles under Article 201(a) of the Constitution. The 5th Interested Party further challenges the choice of the Ministry of Health as the procuring entity, asserting that this usurped the statutory mandate of the Digital Health Agency and undermined the legal framework established for the development and management of the comprehensive health information system.

The 6th Interested Party's Case

102. The 6th Interested Party, Senate of Kenya, initially opposed the Petitioners' application for conservatory orders. However, in its subsequently filed Replying Affidavit sworn by Jeremiah Nyegenye, the Senate furnishes a detailed account of the legislative history of the impugned regulations. It outlines the process of tabling, committee scrutiny, and voting on the motion to annul Legal Notices Nos. 48 and 49 of 2024, clarifying that the motion to adopt the Committee's report recommending annulment was negatived on 30th July 2024, failing to secure the requisite majority of all delegations. Accordingly, the Senate maintains that the regulations were not annulled. The affidavit further provides documentary evidence concerning the tabling and scrutiny of other statutory instruments, underscoring the procedural compliance of the legislative process.

The 7th Interested Party's Case

103. The 7th Interested Party, Privacy International Kenya, fully supports the Petition, with its case focusing primarily on the sensitivity and protection of personal health data. It contends that under Section 42 of the Data Protection Act, the Respondents are obliged to engage data processors that guarantee adequate security measures, fully compliant with the statutory requirements. The 7th Interested Party emphasizes that the Respondents should furnish the Court with the contracts of the service providers, enabling an assessment of the specific duties and obligations relating to the collection, storage, sharing, and analysis of personal health data.

104. It is further averred that the adoption of the new healthcare information system presents potential risks which must be carefully managed, with particular attention to data privacy, protection, and user-centric engagement that enhances healthcare delivery while ensuring robust regulatory oversight. In light of these considerations, the 7th Interested Party submits that the Respondents have failed to comply with the established legal principles and procedures, thereby exposing the fundamental rights and freedoms of Kenyans to significant risk. The Court is accordingly urged to grant such orders as it deems appropriate to safeguard these rights.

The 8th Interested Party's Case

105. The 8th Interested Party, Kenya Airline Pilots Association (KALPA), joined to these proceedings to represent the interests of workers, fully aligns itself with the Petition. Its case centers on the impact of the SHIF rollout on employees, contending that there was no meaningful public participation prior to implementation a matter of profound consequence for households

nationwide. KALPA submits that the uncapped 2.75% deduction from gross salaries, when aggregated with other statutory deductions, risks exceeding the one-third limit prescribed under employment law, thereby straining workers' livelihoods and exposing them to poverty. It argues that this undermines the right to human dignity guaranteed under Articles 10 and 28 of the Constitution. KALPA further contends that the flawed rollout contravenes public policy and results in irreparable harm. In support, it invokes the Supreme Court's decision in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others (supra),*** affirming that there is no injustice that the Constitution is powerless to remedy.

ANALYSIS AND DETERMINATION

106. Having considered the exhaustive pleadings, the extensive affidavit evidence, and the comprehensive written submissions of all parties, this Court finds that the following issues commend themselves for determination:

  i. ***Whether this Court has jurisdiction to entertain the Petition in light of the doctrines of exhaustion of remedies and constitutional avoidance.***
  ii. ***Whether the Petition, or any part thereof, is res judicata or sub judice in view of the previous litigation and pending appeals concerning the Social Health Insurance Act.***
  iii. ***Whether Section 114A of the Public Procurement and Asset Disposal Act, 2015, is unconstitutional for want of proper legislative procedure and for violating Article 227 of the Constitution.***
  iv. ***Whether the procurement process for the Integrated Healthcare Information Technology System (IHITS) for Universal Health Care***

(UHC) under Tender No. MOH/SDMS/ADM/SPPP/005/2023-2024 was lawful, transparent, and in compliance with constitutional and statutory procurement principles.

v. ***Whether the Ministry of Health acted within its residual mandate in procuring the IHITS, considering the statutory role of the Digital Health Agency, and whether procedural shortcomings in the procurement process require corrective oversight.***

vi. ***Whether the roll-out of the Social Health Insurance Fund (SHIF) was based on legally valid subsidiary legislation, and whether Sections 15(2) and 23(1) of the Statutory Instruments Act are unconstitutional.***

vii. ***Whether the establishment of the three Funds under Sections 20, 25, and 28 of the Social Health Insurance Act violates Article 206(1)(a) of the Constitution and the Public Finance Management Act.***

viii. ***Whether the implementation and rollout of the Social Health Insurance Fund (SHIF) complied with constitutional requirements, and whether operational and procedural shortcomings require corrective oversight to protect the rights of Kenyans***

Whether this Court has jurisdiction to entertain the Petition in light of the doctrines of exhaustion of remedies and constitutional avoidance.

107. Jurisdiction is the bedrock upon which any judicial proceedings are founded. As the Court of Appeal famously stated in the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR***, without jurisdiction, a court must down its tools. The 1st, 2nd, 6th, and 11th Respondents have raised objections challenging this Court's jurisdiction to entertain the Petition. They

contend that the dispute is, at its core, a procurement and tendering dispute that ought to have been first addressed by the Public Procurement Regulatory Authority (PPRA) and/or the Public Procurement Administrative Review Board (PPARB) in accordance with the Public Procurement and Asset Disposal Act, (PPADA).

108. They further invoke the principle of constitutional avoidance, arguing that where a matter can be decided on another basis, the Court should decline to resolve it as a constitutional issue.

109. The doctrine of exhaustion of remedies is a well-established principle of law. It was perhaps most famously articulated by the Court of Appeal in ***Speaker of the National Assembly v Karume [1992] eKLR***, where the court held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. This principle was reaffirmed and given constitutional underpinning by the Supreme Court in ***Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others [2019] eKLR***, where the Court stated that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint and give deference to those bodies. The rationale is to promote alternative dispute resolution mechanisms, as encouraged by Article 159(2)(c) of the Constitution, and to allow specialized bodies to apply their expertise in the first instance.

110. The doctrine, however, is not without limitation. In ***Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others***, a five judge bench of this Court delineated the exceptions to its application. The Court held that the doctrine does not apply where the alternative mechanism fails to safeguard the values enshrined in the Constitution, or where a party is denied adequate opportunity to be heard before the alternative forum. Significantly, the Court further observed that where a claim is primarily directed at enforcing fundamental rights and freedoms, and it is demonstrated that the alleged constitutional violations are substantive rather than mere “bootstraps” or artifices framed in Bill of Rights terminology to secure access to the Court, the suit is not barred by the doctrine of exhaustion. This principle is underscored by the fact that the determination and enforcement of fundamental rights and freedoms fall exclusively within the jurisdiction of this Court.

111. In the instant Petition, while the Petitioners do challenge the procurement process for the IHITS, their grievances are far from being "mere bootstraps" or a simple procurement dispute. The Petitioners have raised profound constitutional questions that strike at the very heart of the legislative process, the separation of powers, and the protection of fundamental rights. They challenge the constitutionality of a provision of an Act of Parliament (Section 114A of the PPADA) and several sections of other Acts. They further challenge the validity of subsidiary legislation (Legal Notices Nos. 48, 49, 146, and 147 of 2024) on grounds of procedural impropriety and lack of public participation.

112. The Petitioner's allege that the establishment of public funds under the SHIA violated the Constitution and the Public Finance Management Act. These are not issues that lie within the jurisdiction of the PPARB or the PPRA. Bodies like the PPARB do not have jurisdiction to entertain issues such as the constitutionality of a decision or a law. Only the High Court, under Article 165(3)(d) of the Constitution, has the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.

113. The Petitioners' challenge is multifaceted and transcends a mere inquiry into procedural compliance in the award of a tender. At its core, it questions the constitutional validity of the legal framework that authorized the procurement method. It probes whether the project, which constitutes the technological foundation of a new national health insurance scheme, was initiated by the proper constitutional and statutory authority. It further scrutinizes whether the rollout of the scheme itself was premised upon laws that were duly enacted. Each of these considerations raises fundamental constitutional questions, the resolution of which lies squarely within the mandate of this Court.

114. Moreover, the Petitioners lack the requisite standing to challenge the procurement process before the Public Procurement Administrative Review Board (PPARB). Section 167(1) of the PPADA confines the right to seek administrative review to a candidate or tenderer in the relevant procurement. The Petitioners, having participated neither as candidates nor as tenderers in the impugned procurement, fall outside the class of persons entitled to invoke the Board's jurisdiction.

115. Turning to the principle of constitutional avoidance, this rule, as articulated by the Supreme Court in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra)***, entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. In this case, the constitutional issues are not peripheral, they are central to the dispute. The "other basis" proposed by the Respondents a challenge before the PPARB or the PPRA cannot decide the core constitutional questions. The PPARB cannot strike down Section 114A of the PPADA. The PPRA cannot declare Legal Notice No. 146 of 2024 unconstitutional for want of public participation. Accordingly, the doctrine of constitutional avoidance is inapplicable in the present matter. As held by the Court of Appeal in ***Al Ghurair Printing and Publishing LLC v Coalition For Reforms And Democracy & another; Public Procurement Administrative Review Board (Interested Party),*** where certain issues fall outside the jurisdiction of a specialized tribunal, it is the High Court alone that possesses the competence to adjudicate them.

116. Consequently, this Court finds and holds that it has jurisdiction to hear and determine this Petition. The objections based on the doctrines of exhaustion and constitutional avoidance are hereby overruled. The constitutional nature of the core grievances is not a mere disguise but is the substance of the Petitioners' case, properly invoking this Court's jurisdiction under Article 165(3)(d).

Whether the Petition, or any part thereof, is res judicata or sub judice.

117. The doctrines of res judicata and sub judice are crucial for ensuring the finality of litigation and preventing the abuse of the court process through multiplicity of suits.

118. The 11th Respondent has raised these defenses, particularly in relation to the challenge to Sections 20, 25, and 28 of the SHIA, arguing that these issues were determined in **Milimani High Court Petition No. 473 of 2023 (the Aura Case)** and are now pending on appeal.

119. Res judicata is codified in Section 7 of the Civil Procedure Act. For the plea of res judicata to succeed, the matter in issue must be directly and substantially in issue in a former suit between the same parties, or parties under whom they claim, litigating under the same title, and must have been heard and finally decided by a court of competent jurisdiction. The Supreme Court in ***John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)*** reiterated that the doctrine applies not only to issues actually determined but also to those which properly ought to have been raised and decided in the earlier proceedings.

120. The **Aura Case (Petition E473 of 2023)** was a constitutional petition challenging the constitutionality of the Social Health Insurance Act, the Primary Health Care Act, and the Digital Health Act on several grounds, including lack of public participation, failure to consult the Commission on Revenue Allocation, and breach of legislative procedure. A three-judge bench delivered a judgment on 12th July 2024, declaring the three Acts

unconstitutional and suspending that declaration for 120 days to allow Parliament to cure the defects. The court also made specific findings on Sections 26(5), 27(4), and 38 of the SHIA.

121. A careful examination of the **Aura Case**, however demonstrates, that the precise constitutional challenge presently advanced against Sections 20, 25, and 28 of the SHIA which establish the three Funds was not the principal issue adjudicated. While the **Aura Case** assessed the constitutionality of the Acts in their entirety, including the Funds as part of the SHIA, its principal findings focused on the legislative process and the failure to consult the CRA. The Petitioners' current argument, namely that the establishment of the three Funds contravenes Article 206(1)(a) of the Constitution read with the PFMA, constitutes a distinct legal contention that was neither argued nor determined in the Aura Case. The doctrine of res judicata, moreover, applies only to issues actually decided, not to every conceivable argument that might be advanced in relation to a statute. Additionally, the parties in the **Aura Case** are not identical to those before this Court, while the Attorney General was a Respondent in both matters, the Petitioners herein are different, and the 11th Respondent (National Assembly) did not appear in the Aura Case in the same capacity.

122. More importantly, the decision in the Aura Case is currently under appeal before the Court of Appeal in Civil Appeal No. E565 of 2024. As clarified by this Court in ***Kimemia v Ileshkumar & another***, for the doctrine of res judicata to operate, the prior proceedings must have been finally determined. A decision that remains subject to appeal does not constitute a

final determination. Consequently, the matters addressed in the **Aura Case** cannot operate as res judicata in the present Petition.

123. The principle of sub judice, on the other hand, applies when a matter in issue in a suit is also directly and substantially in issue in a previously instituted suit between the same parties pending before the same or another court. Section 6 of the Civil Procedure Act mandates that a court shall not proceed with the trial of a suit in which the matter in issue is directly and substantially in issue in a previously instituted suit. The purpose is to avoid conflicting decisions and multiplicity of proceedings.

124. It is true that the constitutionality of the SHIA is pending before the Court of Appeal. However, as with res judicata, the doctrine of sub judice requires that the parties in the two suits be the same or litigating under the same title. The parties in this Petition are far more extensive than those in the appeal. Furthermore, this Petition raises a host of new issues that were not the subject of the **Aura Case** and are not before the Court of Appeal, particularly the detailed challenge to the IHITS procurement and the constitutional validity of the specific subsidiary legislation. As the Supreme Court held in ***Kenya Commercial Bank Ltd & another v Muiri Cofee Estate Ltd & 3 others [2016] KESC 6 (KLR)***, the matters in issue must be substantially similar. While the underlying statutes are the same, the specific grounds of challenge in this Petition are distinct and more expansive, focusing on the implementation and specific provisions of the Acts and regulations. This Court is therefore not barred from considering these distinct issues.

125. In light of the foregoing, this Court finds that the defenses of res judicata and sub judice do not lie to bar the determination of this Petition. The issues in the **Aura Case** and the pending appeal are not identical to the multifaceted constitutional questions raised herein. This finding is without prejudice to the principle of judicial comity, this Court will be mindful of the concurrent jurisdiction of the Court of Appeal and will ensure its reasoning does not conflict with any final determination from the appellate court. The analysis will, however, proceed on the distinct and specific grounds of challenge raised in this Amended Petition.

Whether Section 114A of the Public Procurement and Asset Disposal Act, 2015, is unconstitutional for want of proper legislative procedure and for violating Article 227 of the Constitution

126. The Petitioners' challenge to section 114A of the Public Procurement and Asset Disposal Act, 2015 (PPADA) is their lynchpin against the procurement process that culminated in the award of the Integrated Healthcare Information Technology System (IHITS). Their argument proceeds on three principal fronts. First, they contend that the impugned provision was irregularly introduced through the Finance Act, 2017, which they assert is a Money Bill incapable of amending substantive procurement legislation. Secondly, they argue that the enactment of the provision without the participation of the Senate violated the bicameral legislative framework established under the Constitution. Thirdly, they maintain that the provision itself is substantively unconstitutional as it allegedly undermines Article 227 of the Constitution by permitting a non-competitive procurement process based on the discretion of the Cabinet Secretary for the National Treasury.

127. The starting point in resolving this issue is the question of legislative procedure. It is not disputed that section 114A was introduced into the PPADA through section 57 of the Finance Act, No. 15 of 2017. The Petitioners characterize this legislative route as a constitutional impropriety, arguing that a Finance Act, being the legislative product of a Money Bill, cannot be used to amend legislation that does not deal with taxation or matters incidental to it. Article 114(3) of the Constitution defines a Money Bill as a Bill that contains provisions dealing with taxes; the imposition, variation or repeal of charges on a public fund; the appropriation, receipt, custody, investment or issue of public money, the raising or guaranteeing of any loan or its repayment; or matters incidental to any of those matters.

128. The critical question therefore becomes whether an amendment to the statutory framework governing public procurement falls within the category of matters incidental to the management of public finances. In the Court's view, the answer must be in the affirmative. Public procurement is the primary mechanism through which public funds are expended in the acquisition of goods, works, and services required for the discharge of governmental functions. In resolving this question, it is necessary to appreciate the intrinsic relationship between public procurement and the architecture of public finance. Public procurement is the principal mechanism through which public funds are expended for the acquisition of goods, works, and services necessary for the discharge of governmental functions. The rules governing procurement methods, procedures, and contracting modalities are therefore not merely administrative instruments but are

integral to the manner in which public money is issued, committed, and ultimately expended. It follows that legislation regulating procurement processes bears a direct nexus to the management and control of public finances as contemplated under Articles 201 and 206 of the Constitution. In that sense, the creation of an additional procurement modality capable of facilitating strategic partnerships or credit-financed projects inevitably affects the manner in which public resources are mobilized, committed, and disbursed. Such a measure cannot reasonably be regarded as extraneous to the fiscal framework of the State.

129. This Court finds considerable guidance in the reasoning adopted in the decision of the Court of Appeal in ***Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board & 7 others***, where the Court applied the pith and substance test in determining whether certain amendments contained in the Finance Act were properly included in a Money Bill. The Court of Appeal observed that the power to levy taxes and determine the rate thereof is constitutionally vested in the National Assembly under Article 95, and that legislation enacted pursuant to that mandate enjoys a presumption of constitutionality unless demonstrated otherwise. In that decision the Court stated:

"Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so

perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution."

130. The Court of Appeal has consistently cautioned that courts must resist invitations to encroach upon matters of national economic policy or to supplant the judgment of constitutionally mandated organs possessing specialized expertise in such domains. Applying that reasoning to the present matter, the inclusion of section 114A in the Finance Act cannot be regarded as extraneous to the legislative purpose of the statute. On the contrary, it constitutes a measure incidental to, and in furtherance of, the broader framework governing the management of public financial resources.

131. Section 114A's inclusion in the Finance Act is therefore neither extraneous nor unrelated to the fiscal objectives of the statute. Procurement frameworks directly affect the manner in which public funds are committed, expended, and accounted for. In this regard, amendments altering procurement modalities bear a sufficiently proximate connection to matters of public finance to fall squarely within the legislative competence of a Finance Act.

132. Closely related to this argument is the Petitioners' contention that the enactment of section 114A without participation by the Senate violated the constitutional design governing bicameral legislation. The Petitioners submit that, because the PPADA applies to both national and county governments, any amendment thereto necessarily constitutes legislation "concerning counties" within the meaning of Articles 96 and 110 of the Constitution.

While this submission carries superficial appeal, it does not withstand careful constitutional scrutiny. The determinative question is not whether the parent statute applies to counties, but whether the specific amendment introduced constitutes legislation affecting the functions or powers of county governments.

133. Whether legislation concerns county governments must be assessed in accordance with Article 110(1) of the Constitution, which defines a Bill concerning counties as one whose provisions materially affect the functions and powers of county governments as set out in the Fourth Schedule. On this basis, section 114A, in its substantive effect, does not alter or interfere with the functions or powers of county governments and therefore cannot be classified as legislation concerning counties.

134. The Finance Act, 2017 was enacted as a Money Bill. Article 114(4) expressly provides that for the purposes of Article 114, the terms "tax," "public money," and "loan" do not include taxes, public money, or loans raised by a county government. The constitutional design therefore expressly excludes county fiscal matters from the definition of a Money Bill. The Supreme Court addressed this question directly in ***Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae)*** where it stated:

"In particular, we find that the Bill underwent the concurrence process under Article 110(3) of the Constitution; the Bill being a Money Bill did not require consideration by the Senate; and the Bill was subjected to public

participation which was adequate and satisfactory taking into account the circumstances of enacting a Finance Act."

135. The Supreme Court thus affirmed that where legislation qualifies as a Money Bill, Senate participation is not constitutionally required. The character of the Bill must be determined by its pith and substance. In the present case, the pith and substance of the Finance Act, 2017 was to amend laws relating to taxation and other fiscal measures and matters incidental thereto. The fact that it introduced an amendment to a statute that has application to counties does not transform the Finance Act into legislation concerning county governments. Consequently, the absence of Senate participation in the enactment of section 114A does not render the provision constitutionally infirm.

136. Having addressed the procedural challenge, the Court must now consider the substantive constitutionality of section 114A. The Petitioners argue that the provision undermines Article 227(1) of the Constitution which requires that public procurement be conducted through a system that is fair, equitable, transparent, competitive and cost-effective. According to them, the provision allows procurement to proceed outside the competitive framework and vests unfettered discretion in the Cabinet Secretary.

137. Section 114A establishes what is termed the Specially Permitted Procurement Procedure. The provision allows the National Treasury, upon request by a procuring entity, to approve the use of a specially permitted procurement procedure where the application of the ordinary procurement

methods would be impracticable or inappropriate. The statute specifies circumstances under which such approval may be granted, including situations where exceptional requirements make it impossible or impracticable to comply with the Act, where market conditions limit the effective application of the procurement framework, where specialized requirements governed by international standards are involved, where strategic partnership sourcing is necessary, or where credit-financed procurement is proposed.

138. The provision therefore does not confer an unfettered or arbitrary discretion Rather, it sets out defined statutory circumstances that must exist before the procedure may be invoked. The exercise of that discretion is further circumscribed by the regulatory framework established under the Public Procurement and Asset Disposal Regulations, particularly Regulation 107, which requires a procuring entity to provide a written justification demonstrating the necessity for the specially permitted procedure before approval can be granted.

139. The Court of Appeal recently undertook a comprehensive examination of the constitutionality of this procurement modality in ***Portside Freight Terminals Limited & 2 others v Okoiti & 10 others***. In that decision, the Court held that Article 227(1) establishes the general principles governing procurement but Article 227(2) expressly authorizes Parliament to enact legislation prescribing procurement procedures that give effect to those principles. The Court of Appeal observed that:

"Article 227(2) contemplates that Parliament may enact legislation providing for procurement procedures and preferences. The specially permitted procurement procedure is one such statutory mechanism that allows departure from open competition where the circumstances of the procurement so require."

140. The Court further held that where a project involves private investors who undertake the financial burden of financing the project, such arrangements may legitimately fall within the scope of strategic partnership sourcing contemplated under section 114A.

141. This Court is bound by the doctrine of *stare decisis* to follow the pronouncements of the Court of Appeal unless compelling reasons exist to depart from them. No such reasons have been demonstrated. Indeed, the Petitioners' argument that previous decisions on alternative procurement procedures were rendered per incuriam does not meet the stringent threshold articulated by the Supreme Court in ***Senate & 2 Others v Council of County Governors & 8 Others***, where the Court held that a decision can only be regarded as per incuriam where it was rendered in ignorance of a binding constitutional or statutory provision.

142. Viewed holistically, section 114A represents Parliament's attempt to introduce flexibility within the procurement framework in circumstances where conventional procurement processes may be impracticable or incapable of delivering complex or capital-intensive projects. Such flexibility is not inconsistent with Article 227. Rather, it reflects the legislative authority

granted under Article 227(2) to prescribe procurement procedures capable of giving effect to the constitutional principles governing public procurement.

143. Accordingly, and bearing in mind the presumption of constitutionality that attaches to statutes enacted by Parliament, this Court is not persuaded that section 114A of the Public Procurement and Asset Disposal Act violates the Constitution. The Petitioners have not demonstrated either procedural irregularity in its enactment or substantive inconsistency with the constitutional framework governing public procurement. The challenge to the constitutionality of section 114A must therefore fail.

Whether the procurement process for the Integrated Healthcare Information Technology System (IHITS) was lawful, transparent, and in compliance with constitutional and statutory procurement principles

144. Having found that section 114A of the Public Procurement and Asset Disposal Act constitutes a valid legislative foundation for the Specially Permitted Procurement Procedure (SPPP), the Court must now turn to the second limb of the Petitioners' challenge, whether the procurement process that culminated in the award of the Integrated Healthcare Information Technology System (IHITS) contract was conducted in a manner consistent with the Constitution and the governing statutory framework.

145. The Petitioners' challenge to the procurement process for the Integrated Healthcare Information Technology System must be examined against the factual matrix placed before the Court and the governing statutory framework. Having already determined that section 114A of the Public

Procurement and Asset Disposal Act provides a constitutionally valid legal basis for the invocation of the Specially Permitted Procurement Procedure, the Court must now interrogate whether the actual process undertaken pursuant to that statutory framework complied with the principles of legality, transparency, accountability and fairness embodied in Articles 10, 201 and 227 of the Constitution.

146. The evidence placed before this Court demonstrates that the procurement of the Integrated Healthcare Information Technology System (IHITS) was undertaken pursuant to Section 114A of the Public Procurement and Asset Disposal Act, which provides for a specially permitted procurement procedure where the National Treasury has granted approval. The Respondents produced documentation showing that such approval was indeed obtained and that the project was framed as a strategic partnership intended to support the technological backbone of the Universal Health Coverage programme. The Court accepts that the nature, scale, and technical complexity of a national digital health infrastructure may justify the use of a procurement method that departs from ordinary open tendering, provided that the fundamental constitutional principles governing public procurement transparency, fairness, accountability, and value for money as articulated under Article 227 of the Constitution remain respected.

147. However, the Court cannot ignore certain procedural concerns raised by the Petitioners regarding the manner in which the procurement process unfolded. The record indicates that the Request for Proposal was issued to a limited pool of potential partners and ultimately resulted in the engagement

of a single consortium. While such an approach is not per se unlawful under a specially permitted procurement framework, the Court is not persuaded that the process fully reflected the degree of openness and demonstrable competitive benchmarking ordinarily expected in procurements of such magnitude. Questions were also raised regarding procurement planning, the nature of the tender security requirements, and the extent to which alternative technological providers were meaningfully considered. These matters reveal procedural shortcomings which, although not conclusively establishing illegality, demonstrate that the procurement did not fully adhere to the best practices contemplated under the Public Procurement and Asset Disposal Act and the constitutional values of transparency and accountability.

148. Notwithstanding these concerns, the Court must also consider the nature of the remedy sought and the broader constitutional context in which the impugned procurement exists. The IHITS platform forms the technological infrastructure upon which the Social Health Insurance Fund and the broader Universal Health Coverage framework now depend. Evidence placed before the Court indicates that the system has already been partially implemented and is currently supporting the administration of health coverage for millions of Kenyans. To nullify the procurement contract at this stage would not merely affect a commercial arrangement between the State and a private consortium, it would dismantle the operational backbone of a nationwide public health financing system, thereby creating a regulatory and administrative vacuum with immediate and severe consequences for access to healthcare. Constitutional remedies must therefore be fashioned with due regard to the principle of proportionality and the need to avoid remedies

whose disruptive consequences would outweigh the constitutional injury identified.

149. In the circumstances, the Court finds that although aspects of the procurement process reveal procedural deficiencies and could have been conducted with greater transparency and competitive safeguards, the Petitioners have not demonstrated fraud, corruption, bad faith, or such fundamental illegality as would justify the drastic remedy of nullifying the entire procurement. The appropriate course is therefore not to invalidate the IHITS contract but to subject the implementation of the system to enhanced constitutional scrutiny and corrective oversight. This approach preserves the continuity of the national health system while ensuring that the State remains accountable for addressing the governance, transparency, and operational concerns identified in this judgment, consistent with the Court's remedial powers under Article 23(3) of the Constitution.

150. The evidence before the Court demonstrates that the procurement process commenced with the request dated 6th June 2023 from the Ministry of Health to the Cabinet Secretary for the National Treasury seeking authorization to employ the Specially Permitted Procurement Procedure on the basis of strategic partnership sourcing. The justification advanced in that request centered on the substantial capital investment required for the development of a comprehensive national digital health ecosystem capable of supporting the Government's Universal Health Coverage agenda and the broader Bottom-Up Economic Transformation Agenda. The request emphasized that the project required a strategic technology partner capable

not only of providing technical expertise but also of mobilizing significant upfront financing for the infrastructure necessary to operationalize a nationwide digital health platform. On 27th June 2023, the National Treasury granted the requested approval, subject to specified conditions including the preparation of tender documentation and adherence to the regulatory requirements governing specially permitted procurement procedures. This approval constituted the statutory gateway through which the procuring entity was permitted to depart from the ordinary competitive procurement methods prescribed under the Act.

151. Following that approval, the procuring entity proceeded to the next phase of the procurement process through the issuance of a Request for Proposal (RFP) dated 9th May 2024 addressed to Safaricom PLC. The Petitioners contend that the issuance of an RFP to a single entity amounted to unlawful single sourcing. That contention, however, overlooks the statutory design of section 114A which expressly contemplates circumstances in which open competitive procurement may be impracticable. The Court of Appeal in ***Portside Freight Terminals Limited & 2 others v Okoiti & 10 others (supra)*** clarified that alternative procurement procedures lawfully enacted by Parliament may legitimately permit departure from open competitive tendering where the nature of the project so requires. In that decision the Court observed that Article 227(2) expressly authorizes Parliament to enact legislation prescribing procurement procedures capable of accommodating circumstances in which ordinary competitive bidding may not be feasible. Within that statutory framework, the issuance of an RFP to a single strategic partner does not in itself constitute illegality provided the procuring entity

can demonstrate a rational basis for the identification of the proposed partner.

152. In the present petition, the Respondents have explained that Safaricom PLC was identified as the initial recipient of the Request for Proposal based on its extensive nationwide digital infrastructure, proven capacity in systems integration, and demonstrated ability to deploy large-scale digital platforms capable of supporting national public service systems. These considerations were informed by the Kenya Digital Health Landscape Assessment Report of 2023, which underscored the need for a technologically capable partner able to integrate multiple digital health subsystems across the country.

153. In the Court's view, these factors provide a rational policy and technical basis for the selection of Safaricom within the framework of a strategic partnership procurement model. While the Petitioners contend that issuing the Request for Proposal to a single entity limited competition, it is important to note that the specially permitted procurement framework expressly contemplates circumstances in which a strategic partner may be identified on the basis of demonstrable technical capacity and infrastructure. The determinative question, therefore, is not whether multiple bidders were invited, but whether the identification of the proposed partner was rational, transparent, and aligned with the objectives of the procurement.

154. The Petitioners have also advanced a serious allegation that the procurement process was tainted by fraud arising from what they describe as the existence of two different contracts reflecting substantially different contract

values. This allegation warrants careful scrutiny of the documentary evidence placed before the Court. The Petitioners rely principally on the minutes of a negotiation meeting held on 24th January 2024 which record a proposed cost of Kshs.48,367,839,050.00 and contrast that figure with the Notification of Award issued on 19th June 2024 indicating a contract sum of Kshs.104,808,136,478.00. From this disparity they invite the Court to infer the existence of a fraudulent inflation of the contract price.

155. A closer examination of the procurement documentation, however, reveals that the interpretation advanced by the Petitioners does not fully capture the procedural context within which those figures arose. The Respondents have explained, and the documentary record supports, that the negotiations reflected in the minutes of 24th January 2024 were conducted during a preliminary phase of the procurement process contemplated under Clause 31 of the Request for Proposal. That clause provides for the issuance of a "Notification of Intention to Award" following preliminary negotiations with the preferred bidder, subject to the successful conclusion of further negotiations and clarification of contractual terms. The minutes of the meeting held on 24th January 2024 therefore reflect discussions undertaken during this preliminary negotiation phase and not the conclusion of a finalized procurement agreement.

156. Equally significant is the correspondence dated 22nd June 2024 from Safaricom PLC responding to the initial Notification of Award issued on 19th June 2024. In that communication, Safaricom expressly identified several discrepancies in the award documentation, including the specification of a

contract period of twelve years instead of the ten-year period contemplated in the proposal, and the fact that the Notification of Award had been addressed to Safaricom PLC alone rather than to the Safaricom Consortium which had participated in the procurement. Safaricom accordingly requested amendments to address those issues and explicitly indicated that, “given the matters outstanding on the contract, we cannot have unconditional acceptance.” This communication is particularly instructive because it demonstrates that negotiations remained ongoing and that the procurement process had not yet culminated in a finalized contractual agreement. Far from evidencing a fraudulent abandonment of an earlier agreement, the correspondence illustrates the normal iterative process through which complex public procurement contracts are negotiated and refined before final execution.

157. The record further shows that the Principal Secretary subsequently issued a revised Notification of Award on 2nd July 2024 addressing the award to the Safaricom Consortium and correcting the contractual period to ten years. The final contractual documentation executed on 9th August 2024 reflected the Consortium’s financial proposal as submitted in the course of the procurement process. Importantly, the Petitioners have not placed before the Court any executed agreement reflecting a finalized contract at the earlier figure of Kshs.48,367,839,050.00. In the absence of such evidence, the Court is unable to accept the proposition that two separate contracts existed. The material before the Court instead reveals a single procurement process involving multiple stages of negotiation, clarification, and revision prior to the execution of the final contract.

158. The Petitioners have also questioned the technical and financial capacity of the consortium entities participating in the project. While such scrutiny is understandable in a project of this magnitude, the Court must remain mindful of the statutory allocation of responsibilities within the procurement framework. Under section 46 of the PPADA, the evaluation of bids and the determination of bidder responsiveness is entrusted to an evaluation committee composed of individuals possessing the requisite technical and financial expertise. Courts exercising judicial review jurisdiction must therefore exercise restraint in substituting their own technical assessment for that of the specialized committees mandated by statute.

159. This principle was emphasized in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited*** where the Court observed that procurement evaluation involves technical and commercial judgments which courts are generally ill-equipped to undertake and should not interfere with unless clear illegality or irrationality is demonstrated.

160. In the present case, the record demonstrates that the Consortium's proposal was evaluated and found responsive in the Tender Evaluation Report dated 24th January 2024. The 7th Respondent has provided documentary evidence of completed projects for major institutions including the Kenya Ports Authority, the National Social Security Fund, KenGen and leading financial institutions. In addition, the Consortium produced certifications and partnership documentation with established global technology providers

including Dell, Huawei and Avaya. With respect to the 8th Respondent, evidence was presented regarding its relationship with Sirius International Holding, a corporate entity forming part of a larger international conglomerate. The procuring entity was therefore entitled to evaluate the overall capacity of the consortium collectively rather than assessing each entity in isolation. The consortium agreement further imposes joint and several liability upon its members, thereby providing additional assurance regarding performance of contractual obligations.

161. The Petitioners also raised concerns regarding the absence of a monetary tender security as contemplated under section 61 of the PPADA. The record shows that the Consortium executed a Tender Securing Declaration Form included within the RFP documentation. While section 61(5) specifically provides exemptions for certain categories of bidders from furnishing monetary tender securities, the procuring entity accepted the executed declaration form in this instance. Although the propriety of that approach may be open to debate, the Petitioners have not demonstrated that the acceptance of the declaration form was motivated by fraud, collusion, or corrupt intent. In the absence of such evidence, the Court is unable to conclude that this issue alone invalidates the procurement.

162. Finally, the Petitioners argue that the procurement process lacked public participation contrary to Articles 10, 201 and 227 of the Constitution. The Court of Appeal addressed the relationship between public participation and procurement procedures in ***Independent Electoral and Boundaries Commission v National Super Alliance (NASA) Kenya & 6 others***, observing

that the extent and form of public participation may vary depending on the statutory procedure adopted. Where alternative procurement procedures are lawfully invoked, the scope of competitive participation may necessarily be limited.

163. In the context of a strategic partnership procurement undertaken under section 114A, the legislative framework itself contemplates a process that differs from ordinary open tendering. The policy decision to establish a national digital health infrastructure in support of Universal Health Coverage had already been subjected to public participation through the legislative and budgetary processes underpinning the health sector reforms. Requiring a separate public participation process for the identification of a strategic technology partner would undermine the practical operation of the specially permitted procurement framework established by Parliament.

164. Having carefully considered the totality of the evidence placed before it, the Court is not persuaded that the Petitioners have discharged the burden of demonstrating fraud, collusion or illegality sufficient to vitiate the procurement process.

165. It is well established that allegations of fraud must not only be specifically pleaded but must also be strictly proved. In ***R.G. Patel v Lalji Makanji (1957) EA 314,*** the Court emphasized that mere suspicion, inference, or disparity in figures cannot suffice to establish fraud, the burden lies squarely on the party alleging it to present cogent and admissible evidence demonstrating deliberate dishonesty, bad faith, or intentional circumvention of statutory

requirements. Applying this principle to the present case, the Petitioners' reliance on differences between preliminary negotiation figures and the final contract sum, without producing an executed agreement reflecting the earlier amount, is insufficient to discharge the heavy evidentiary burden required to impugn the procurement process.

166. In weighing the totality of the evidence placed before it, this Court finds that although aspects of the procurement process reveal procedural deficiencies, the Petitioners have not discharged the heavy evidentiary burden required to establish fraud, collusion, or a fundamental breach of the procurement framework that would warrant the drastic remedy of nullifying the impugned contract. Allegations of fraud, by their very nature, must not only be specifically pleaded but must also be strictly proved. The Petitioners have not placed before this Court cogent material capable of demonstrating that the procurement process was tainted by dishonesty, bad faith, or deliberate circumvention of the law. To the contrary, the record demonstrates that the procuring entity invoked the Specially Permitted Procurement Procedure in accordance with the statutory framework established under section 114A of the Public Procurement and Asset Disposal Act, having first obtained the requisite approval from the National Treasury. The subsequent stages of the procurement process including the issuance of the Request for Proposal, the evaluation of the proposal received, the negotiations undertaken with the prospective partner, and the eventual execution of the contract following review by the Attorney General reveal a process that, though unconventional in comparison to ordinary competitive tendering, substantially adhered to the procedure prescribed by law.

167. The Petitioners' assertions regarding the alleged incapacity of the Consortium members are, upon closer scrutiny, largely speculative and insufficient to displace the technical findings of the evaluation committee constituted under the statute. The evidence placed before the Court demonstrates that the Consortium members possess demonstrable experience in complex ICT deployments and that their proposal was evaluated and found responsive within the meaning of the procurement framework. While legitimate concerns may arise from the relative youth of certain consortium entities or the reliance on subcontracting arrangements, such concerns, without more, cannot be elevated into proof of illegality. These matters are more appropriately addressed through robust contractual supervision and oversight by the procuring entity during the implementation phase of the project. In the absence of evidence of fraud, collusion, or manifest irrationality in the procurement decision, this Court must exercise judicial restraint and refrain from substituting its own commercial or technical judgment for that of the specialized bodies entrusted by statute with the evaluation of procurement proposals.

168. Equally, the alleged violations of Articles 10, 201 and 227 of the Constitution must be assessed within the context of the procurement model lawfully adopted. A strategic partnership procurement model particularly one involving substantial private sector investment in national digital infrastructure inevitably differs from conventional competitive procurement processes. Such arrangements prioritize long-term technological capability, innovation, and the sharing of financial and operational risk between the

public and private sectors. The constitutional principles of transparency, accountability, and cost-effectiveness must therefore be interpreted in a manner that is sensitive to the operational realities of such procurement models. The Constitution does not mandate a rigid or uniform procurement procedure for all circumstances rather, Article 227(2) expressly contemplates that Parliament may enact legislation prescribing procurement procedures suited to particular contexts. Where, as in this case, Parliament has established a statutory framework permitting specially permitted procurement procedures, the Court must assess compliance within that framework and not through the lens of an ordinary open tender.

169. Having considered the totality of the evidence and legal arguments, the Court concludes that the procurement process, though procedurally imperfect, does not demonstrate fraud, bad faith, or fundamental illegality. The appropriate remedy is not nullification of the contract but corrective oversight measures within the broader remedial framework that this Court will outline later in this judgment.

Whether the Ministry of Health acted within its residual mandate in procuring the IHITS, considering the statutory role of the Digital Health Agency, and whether procedural shortcomings in the procurement process require corrective oversight

170. The Petitioners contend that the Digital Health Agency (DHA), established under the Digital Health Act, 2023, holds the exclusive mandate to develop the Integrated Healthcare Information Technology System (IHITS), and that

the Ministry of Health acted unconstitutionally by bypassing the DHA, thereby violating the rule of law and principles of good governance under Article 10 of the Constitution. The Court is therefore tasked with interpreting the interplay between the Digital Health Act, 2023, and the Health Act, No. 21 of 2017.

171. Section 6(a) of the Digital Health Act mandates the DHA to "develop, operationalize and maintain the Comprehensive Integrated Health Information System," conferring a specific and specialized function upon the agency. By contrast, Section 105(1) of the Health Act provides that "The Ministry of health shall facilitate the establishment and maintenance of a comprehensive integrated health information system." The term 'facilitate' denotes a supervisory and enabling role, distinct from but complementary to the operational responsibilities of development and maintenance assigned to the Digital Health Agency.

172. The recitals in the impugned Contract of 9th August 2024 reinforce this interpretation. Recital (B) provides:

> "The Digital Health Agency established under the Digital Health Act, 2023 (DHA), is mandated to develop, operationalize, and maintain a comprehensive integrated health information system to manage the core digital systems and the infrastructure required for seamless health information exchange. The Procuring Entity aims to build an integrated healthcare information technology system for universal health care in Kenya to equip the DHA, the Social Health Authority and other health institutions as indicated in the Technical Specifications."

173. The contract explicitly acknowledges the DHA's statutory mandate and clarifies that the Ministry's procurement aimed to equip the DHA to perform its functions a facilitative exercise rather than usurping authority.

174. The DHA's own affidavit, sworn by Antony Lenaiyara, its acting CEO, on 10th February 2025, is dispositive. The agency acknowledged its statutory mandate under Section 6 but stated that it was "not yet operational to undertake its core function due to lack of adequate funding and other material resources, which includes the requisite human capital," and that it was "wholly relying on the parent Ministry of Health for financial and material resource support, which includes human capital provided by a skeletal staff temporarily deployed by the Ministry assisting in the operationalization of the 13th Respondent." This evidence establishes that, at the relevant time, the DHA lacked both the institutional capacity and resources to procure and implement a project of this scale.

175. This Court is guided by the principle articulated by the Court of Appeal in ***Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR***, which cautions against constructions producing absurd or unworkable results. The Court observed:

"The Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance. It must be interpreted broadly, liberally

and purposively to avoid rigid tabulated legalism. Courts should avoid constructions that produce absurd, unworkable, anomalous, illogical, or artificial results, and should strive to serve the public interest.”

176. Requiring that only the non-operational DHA could have procured the IHITS would have led to an absurd and unworkable outcome, effectively halting the rollout of the Universal Health Coverage (UHC) programme, a project of substantial national importance. The right to health under Article 43(1)(a) is a fundamental right, which the State is obliged to “observe, respect, protect, promote and fulfil” under Article 21(1). In this context, the Ministry of Health, as the parent ministry with a residual statutory mandate under Section 105 of the Health Act, was constitutionally and legally justified in undertaking the procurement to prevent an operational vacuum, ensure continuity, and safeguard the progressive realization of the right to health. This approach reflects the principle of necessity, harmonizes the statutory mandates of both the Ministry and the DHA, and avoids an interpretation that would frustrate public policy or undermine the effective implementation of constitutional rights.

177. Moreover, the Ministry’s action did not usurp the DHA’s mandate. The procurement explicitly sought to equip the DHA and related institutions, and the DHA itself participated in the process to the extent possible given its operational limitations. This approach aligns with the broader constitutional principle of facilitation, whereby parent or supervisory bodies may temporarily exercise functions to ensure effective delivery of public services when a specialized agency is not yet capable. This ensures statutory

functions are executed in practice and public interest is protected, while preserving the DHA's future operational authority once fully functional.

178. As noted earlier in this judgment, the procurement process revealed certain procedural shortcomings. The record demonstrates that the Request for Proposal was issued to a limited pool of bidders and that certain competitive safeguards were not fully applied. While these shortcomings do not amount to fraud, corruption, or fundamental illegality, they warrant corrective oversight to ensure transparency, accountability, and adherence to best practices in public procurement. Such oversight may include enhanced reporting, evaluation scrutiny, and compliance checks during the implementation of IHITS.

179. Accordingly, this Court finds that the Ministry of Health, through the 1st and 2nd Respondents, acted within its residual mandate in procuring the IHITS. The procurement was necessary to prevent an operational vacuum and was undertaken to enable the DHA to perform its statutory functions once operational. The decision reflects a pragmatic and legally defensible exercise of authority that harmonizes statutory provisions, upholds the rule of law, and advances the progressive realization of the right to health. At the same time, procedural deficiencies identified warrant a structural interdict and ongoing corrective oversight, consistent with the Court's remedial approach in the preceding issue.

Whether the roll-out of the Social Health Insurance Fund (SHIF) was based on legally valid subsidiary legislation, and whether Sections 15(2) and 23(1) of the Statutory Instruments Act are unconstitutional

180. The Petitioners' challenge to the rollout of the Social Health Insurance Fund (SHIF) is anchored on the alleged invalidity of the subsidiary legislation, particularly Legal Notices Nos. 48, 49, 146, and 147 of 2024. They contend that Legal Notices 48 and 49 were annulled by the Senate on 30th July 2024, and that consequently, Legal Notices 146 and 147, which amend or rely on the earlier notices, are also invalid. Additionally, the Petitioners argue that Sections 15(2) and 23(1) of the Statutory Instruments Act are unconstitutional for permitting statutory instruments to come into force without prior parliamentary approval.

181. The factual premise underlying the Petitioners' argument is incorrect. The 6th Interested Party, the Senate, filed a Replying Affidavit sworn by its Clerk, Jeremiah Nyegenye, on 11th November 2024, providing a detailed account of the legislative process. It confirms that the Social Health Insurance (General) Regulations, 2024 (Legal Notice No. 49) and the Social Health Insurance (Tribunal Procedure) Rules, 2024 (Legal Notice No. 48) were tabled in the Senate on 20th March 2024 and referred to the Select Committee on Delegated Legislation. The Committee's report, recommending annulment, was tabled on 3rd July 2024, and the motion to adopt the report was put to a vote on 30th July 2024.

182. Article 123(4)(c) of the Constitution provides that, unless otherwise stated, a question in either House is passed by a majority of members in that House,

and where the Constitution requires both Houses, by a majority of all members in each House. The Senate's affidavit clarifies that the motion to adopt the Committee's report did not pass: the vote was 21 in favor and 7 against, short of the 24 votes required for a majority of all delegations (the Senate then had 47). Accordingly, the regulations were not annulled and remain valid law until set aside by a competent court.

183. The Petitioners' challenge to the constitutionality of Sections 15(2) and 23(1) of the Statutory Instruments Act also fails. Section 15(2) provides that if a committee does not report on a statutory instrument within twenty-eight sitting days, the instrument shall be deemed to have fully met the committee's considerations. Section 23(1) provides that a statutory instrument comes into operation on the date specified, or upon publication in the Kenya Gazette where no date is specified. These provisions create a clear and constitutionally permissible framework ensuring statutory instruments are not indefinitely delayed.

184. The Petitioners argue that these provisions violate Article 94(5) of the Constitution, which vests law-making power in Parliament, and that allowing statutory instruments to become law without express prior approval constitutes an unconstitutional delegation. This argument conflates primary and delegated legislation. Article 94(5) permits Parliament to delegate law-making authority, and Sections 15(2) and 23(1) operate precisely within that statutory mandate, balancing efficient governance with parliamentary oversight.

185. As held in ***Consumer Federation of Kenya v Cabinet Secretary for Petroleum and Mining & 4 others [2023] KEHC 24015 (KLR)***, the commencement of a statutory instrument is not conditioned on prior parliamentary approval. The scheme of the Act ensures instruments are valid and enforceable upon publication unless annulled. Section 15(2) ensures inaction by a committee does not indefinitely stall regulations, while Section 23(1) operationalizes commencement. This framework preserves Parliament's ultimate supervisory role while facilitating the machinery of government.

186. The Petitioners have not shown that these provisions violate any constitutional requirement. Rather, they constitute a constitutionally valid framework for delegated legislation, allowing statutory instruments to take effect efficiently while retaining Parliament's power of review and annulment.

187. Regarding Legal Notice No. 146 of 2024 (the Tariffs), the 5th Respondent, the Social Health Authority, provided substantial evidence of structured public participation, including public notices, stakeholder meetings with RUPHA, CHAK, KHF, KAPH, and KMPDC, and a national validation exercise at KICC on 30th August 2024. While the Petitioners may challenge the outcome or the inclusivity of participation, the record demonstrates that the process was conducted in good faith and in line with constitutional requirements. Legal Notice No. 147 of 2024, being an amendment to existing valid regulations, was lawfully issued as part of the continuous refinement of the SHIF legal framework and did not necessarily require a separate full-scale public

participation process where the amendments were incremental and closely connected to the already-participated principal regulations.

188. Consequently, this Court finds that the rollout of the Social Health Insurance Fund (SHIF) was founded on legally valid subsidiary legislation. The foundational regulations, Legal Notices 48 and 49 of 2024, were not annulled and remain in force. The subsequent Legal Notices 146 and 147 of 2024 were lawfully made, with Legal Notice 146 having undergone demonstrable public participation. Sections 15(2) and 23(1) of the Statutory Instruments Act provide a constitutionally permissible framework for delegated legislation, ensuring efficient commencement of statutory instruments while safeguarding parliamentary oversight, accountability, and compliance with constitutional principles.

Whether the establishment of the three Funds under Sections 20, 25, and 28 of the Social Health Insurance Act violates Article 206(1)(a) of the Constitution and the Public Finance Management Act

189. The Petitioners contend that the establishment of the Primary Healthcare Fund, the Social Health Insurance Fund, and the Emergency, Chronic and Critical Illness Fund under the Social Health Insurance Act (SHIA) is unconstitutional. They assert that these funds were "sneaked" into the Act in violation of Article 206(1)(a) of the Constitution, which mandates that all money raised or received by the national government be paid into the Consolidated Fund, except money "reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose." The Petitioners further argue that the creation of these

funds did not comply with the procedural requirements of the Public Finance Management Act, 2012 (PFMA).

190. Article 206(1)(a) expressly contemplates the establishment of public funds by an Act of Parliament for specific purposes. Each of the funds under the SHIA has a distinct, well-defined purpose directly aligned with the object of the Act, which is to give effect to the right to health under Article 43 of the Constitution. The Primary Healthcare Fund is tasked with purchasing primary healthcare services, the Social Health Insurance Fund collects contributions and pays for health services for members, and the Emergency, Chronic and Critical Illness Fund covers the costs of managing chronic illnesses and provides for emergency treatments. These purposes clearly justify the exclusion of these monies from the Consolidated Fund as "money reasonably excluded … payable into another public fund established for a specific purpose," precisely as contemplated by the Constitution.

191. The PFMA provides a general framework for establishing and managing public funds, including in Section 24(4), which states: "The Cabinet Secretary may, with the approval of the National Assembly, establish a national government public fund." The Petitioners argue that the SHIA did not follow these PFMA procedures. However, where Parliament itself establishes a fund through a substantive Act, as in the SHIA, the Act itself constitutes the necessary parliamentary approval. To insist that the specific procedural steps of the PFMA must be followed for funds created by an Act would yield an absurd result, effectively undermining Parliament's legislative authority and legislative efficiency. The Constitution and the PFMA must be read

harmoniously. The SHIA is both the “Act of Parliament” and the mechanism that “reasonably excludes” the money from the Consolidated Fund while establishing public funds for specific purposes. The procedural provisions under the PFMA are designed primarily for funds created by the Executive through subsidiary legislation, not those directly created by Parliament.

192. Transitional and winding-up provisions in the SHIA, including paragraph 6(1) of the First Schedule, provide for an orderly wind-up of the National Hospital Insurance Fund (NHIF) within one year, ensuring a smooth transition without disrupting the establishment of the new funds. Section 51 of the SHIA further reinforces the Act’s supremacy, stating that “This Act shall prevail in the case of any inconsistency between this Act and any other legislation on matters related to provision of social health insurance.” These provisions demonstrate that the legislature carefully contemplated practical implementation issues and ensured that the establishment of the funds is consistent with both operational requirements and statutory authority.

193. The Court therefore finds and holds that the establishment of the Primary Healthcare Fund, the Social Health Insurance Fund, and the Emergency, Chronic and Critical Illness Fund under Sections 20, 25, and 28 of the Social Health Insurance Act, No. 16 of 2023, is fully consistent with Article 206(1)(a) of the Constitution and the Public Finance Management Act, 2012. These are public funds established for clearly defined purposes by an Act of Parliament, and the enactment of the SHIA constitutes the requisite parliamentary approval for their creation. The Court further holds that the Petitioners’ reliance on a strict procedural interpretation of the PFMA is untenable, as

such an approach would frustrate legislative intent and undermine the Constitution's framework governing the establishment and management of public funds.

Whether the implementation and rollout of the Social Health Insurance Fund (SHIF) complied with constitutional requirements, and whether operational and procedural shortcomings require corrective oversight to protect the rights of Kenyans

194. The final and perhaps most poignant issue concerns whether the implementation and rollout of the Social Health Insurance Fund (SHIF), irrespective of the validity of its legal framework, complied with constitutional requirements, and whether operational and procedural shortcomings necessitate corrective oversight to protect the rights of Kenyans. The 8th Interested Party, KALPA, highlighted the impact on workers, including the uncapped 2.75% deduction from gross salaries, the strain on livelihoods, and the denial of essential health services during the transition.

195. The right to health under Article 43(1)(a) is a socio-economic right, and Article 21(2) obliges the State to take legislative, policy, and other measures to progressively realize this right. The transition from NHIF to SHIF was a large-scale administrative undertaking. Evidence shows significant operational challenges during the rollout, including "hitches and glitches" acknowledged by the 1st and 2nd Respondents. The 2nd Petitioner's Supplementary Affidavit of 7th October 2024, together with a Commission on Administrative Justice (CAJ) statement, confirms that patients were denied

essential health services in the early days, demonstrating a serious operational crisis.

196. Socio-economic rights are not abstract or aspirational "paper rights" they demand tangible, real-world protection. In ***Government of the Republic of South Africa v Grootboom (2000),*** the Constitutional Court held that the State must adopt concrete, reasonable measures to progressively realize these rights, leaving no room for inaction. Similarly, in ***Minister of Health v Treatment Action Campaign (No. 2) (2002)***, a government program that failed to deliver essential medicines was deemed unreasonable and unconstitutional. These precedents underscore that rights to health and dignity must be actively upheld not merely legislated on paper and set the standard against which the SHIF rollout must be measured.

197. Applying this standard, the nationwide rollout of SHIF on 1st October 2024 before the majority of Kenyans were registered and while the digital system remained incomplete was manifestly unreasonable. Evidence demonstrates that patients were immediately denied critical services, including dialysis and cancer treatment. Although subsequent improvements were made, the initial failures inflicted real, preventable harm, resulting in suffering and, in some cases, loss of life. This rollout starkly illustrates that good intentions cannot excuse foreseeable and avoidable violations of constitutional rights.

198. The 2nd Petitioner's evidence, along with admissions from the Social Health Authority that even exempt patients were denied services and forced to pay cash, underscores the foreseeability of these failures. The CAJ's early

intervention confirms that a phased or staged rollout could have mitigated this harm.

199. The State must not enact retrogressive measures that undermine socio-economic rights unless fully justified under Article 24. Shutting down a functional NHIF and replacing it with a system that, at the outset, denied essential healthcare and had the effect of a retrogressive measure during the initial phase of implementation. This transition violated the principle of progressive realization, leaving vulnerable populations worse off a breach the Constitution expressly seeks to prevent.

200. KALPA's concerns regarding the uncapped 2.75% deduction are weighty. While the State may levy contributions under Article 209, this authority must be exercised in a manner consistent with other constitutional rights, including the protection of human dignity and livelihood. The Petitioners raise a valid concern that excessive deductions, especially when compounded by operational failures, risk undermining both financial security and personal dignity.

201. Human dignity is a cornerstone of the Constitution. As affirmed in ***S v Makwanyane (1995) and MWK & Another v Attorney General & 4 others (2017)***, dignity informs the interpretation and application of many other rights. Denying life-saving medical treatment to those who have contributed to the health insurance system constitutes a grave violation of dignity, exposing individuals to unnecessary suffering and preventable death.

202. The Court must strike a careful balance between the public interest in achieving Universal Health Coverage (UHC) and the tangible, foreseeable harm caused by the rollout. While halting SHIF could destabilize the health sector, constitutionalism demands that programs be implemented in a manner that respects the Bill of Rights. Public interest cannot be invoked to justify unnecessary suffering or avoidable infringement of constitutional rights.

203. The Court finds that while the SHIF legislation and the IHITS procurement were legally valid, the initial nationwide rollout of SHIF, relying on IHITS and other operational systems, violated Articles 43 (right to health) and 28 (right to human dignity) due to foreseeable operational failures, in breach of Articles 21(1) and 21(2). Implementing the system on a fixed date, before adequate registration and digital functionality were in place, was unreasonable and therefore partially unconstitutional.

204. Evidence from the 5th Respondent indicates that by 31st January 2025, over 18.7 million Kenyans had been onboarded into SHIF, and claims processing had begun to stabilize. Nullifying the system at this stage would create a catastrophic legal and policy vacuum, depriving millions of health coverage and undermining the broader UHC agenda. This approach aligns with the remedial principles recognized in ***Cabinet Secretary for the National Treasury & 4 Others v Okiya Omtatah Okoiti & 2 Others*** and ***Manitoba Language Rights [1985] 1 SCR 721*** permitting corrective action without dismantling accrued rights.

205. The Court holds that the appropriate remedy is a structural interdict directing the 1st and 2nd Respondents to take immediate corrective measures to safeguard rights and ensure proper implementation of SHIF.

206. These corrective measures include: ensuring that no person is denied emergency or life-saving treatment; implementing fair and effective means-testing for non-salaried persons and establishing clear, publicly accessible mechanisms to address complaints and grievances under SHIF.

207. This remedial framework addresses the constitutional violations identified while preserving the SHIF system and the rights already accrued, consistent with the principles established in ***Okoiti*** and ***Re Manitoba* Language Rights**.

208. This court thus finds that although the SHIF legislation and the IHITS procurement were legally valid, the initial rollout failed to protect the constitutional rights of Kenyans due to operational shortcomings. Immediate corrective oversight is required to ensure the progressive realization of the right to health, protect human dignity, and maintain the integrity of the UHC program.

CONCLUSION

209. This Court has carefully examined the complex constitutional, statutory, and factual matrix presented in this Petition. The Petitioners raised serious concerns regarding both the legality of the Social Health Insurance Fund (SHIF) framework and the procurement of the Integrated Healthcare

Information Technology System (IHITS) under Tender No. MOH/SDMS/ADM/SPPP/005/2023–2024. Their grievances were not abstract. They were grounded in lived experiences public anxiety, operational disruptions, and the undeniable hardship suffered by Kenyans who were unable to access essential healthcare during the transition. In resolving these issues, the Court has been guided by its constitutional duty to safeguard fundamental rights while ensuring that the exercise of judicial power does not inadvertently destabilize critical national systems designed to serve the public good.

210. On the question of the legal framework underpinning SHIF, the Court finds that the statutory and regulatory architecture establishing the system is constitutionally sound. The foundational regulations were not annulled by the Senate, and the subsequent tariff-setting process under Legal Notices Nos. 146 and 147 of 2024 was undertaken following demonstrable public participation. Sections 15(2) and 23(1) of the Statutory Instruments Act provide a constitutionally permissible framework for delegated legislation, balancing administrative efficiency with parliamentary oversight. Likewise, the establishment of the Primary Healthcare Fund, the Social Health Insurance Fund, and the Emergency, Chronic and Critical Illness Fund under the Social Health Insurance Act is consistent with Article 206(1)(a) of the Constitution and falls squarely within Parliament's legislative authority.

211. However, the Court cannot ignore the concerns raised regarding the procurement of the Integrated Healthcare Information Technology System. Section 114A of the Public Procurement and Asset Disposal Act permits

specially permitted procurement where circumstances make standard competitive procedures impracticable. Yet that provision is not a license for opacity. It demands that administrative discretion be exercised transparently, rationally, and with scrupulous regard for accountability. Upon careful scrutiny of the record, the Court finds that while the decision to procure IHITS under this framework may have been driven by legitimate urgency, certain procedural safeguards contemplated by Section 114A were not demonstrated with the level of transparency expected for a project of such magnitude. The justification for limiting competitive procurement was insufficiently documented, and the transparency expected for a project of national importance was not fully demonstrated. These shortcomings do not warrant nullification of the procurement, but they do constitute procedural irregularities requiring corrective oversight.

212. The Court further finds that the nationwide rollout of SHIF on 1st October 2024 occurred before the necessary administrative and technological infrastructure was fully prepared. The evidence shows that, during the early phase of implementation, many Kenyans were unable to access essential and life-saving medical services. In constitutional terms, this was not a mere administrative inconvenience, it was a failure that implicated the State's obligations under Articles 21(1) and 21(2) to respect, protect, promote, and fulfill the right to health guaranteed under Article 43, and it undermined the dignity protected by Article 28. While the legislative framework was valid, the manner in which the system was initially implemented fell short of the standard of reasonableness demanded by the Constitution.

213. At the same time, the Court must remain conscious of the present reality. The SHIF system is now operational and serves millions of Kenyans. Evidence before the Court indicates that by early 2025 more than 18.7 million citizens had been onboarded and claims processing had begun to stabilize. To nullify the system or invalidate the IHITS contract at this stage would risk precipitating a profound disruption in the health sector and jeopardizing the State's efforts to achieve Universal Health Coverage. Constitutional adjudication requires not only fidelity to principle but also prudence in remedy. The Court must therefore craft relief that corrects constitutional violations without dismantling the very system intended to realize the right to health.

214. Accordingly, the Court concludes that structural interdicts provide the most appropriate remedy. The Respondents are directed to take immediate and transparent corrective measures to address the procedural deficiencies identified in the IHITS procurement and to strengthen oversight of SHIF's implementation. In particular, the State must ensure that no person is denied emergency or life-saving medical treatment, that fair and effective means-testing mechanisms are implemented for non-salaried persons, and that a clear and publicly accessible system for lodging complaints and grievances is established. The Constitution demands no less. Universal Health Coverage cannot merely be proclaimed; it must be delivered in a manner that respects the dignity, health, and trust of the people. The success of SHIF will ultimately be measured not by policy ambition, but by whether every Kenyan can access healthcare when they need it most.

215. For the reasons set out above, this Court makes the following orders:

a. **A declaration is hereby issued that Section 114A of the Public Procurement and Asset Disposal Act, 2015, is constitutional.**

b. **A declaration is hereby issued that the procurement of the Integrated Healthcare Information Technology System (IHITS) for Universal Health Coverage (UHC) under Tender No. MOH/SDMS/ADM/SPPP/005/2023-2024 was undertaken within the statutory framework for specially permitted procurements under Section 114A of the Public Procurement and Asset Disposal Act, although the process was attended by procedural deficiencies relating to transparency, documentation, and compliance with the safeguards contemplated under the said provision, but which procedural deficiencies do not warrant quashing of the same.**

c. **A declaration is hereby issued that the Ministry of Health acted within its residual facilitative mandate under Section 105 of the Health Act, No. 21 of 2017, in undertaking procurement for the Integrated Healthcare Information Technology System (IHITS) at a time when the Digital Health Agency was not fully operational, and therefore did not act unconstitutionally in undertaking the procurement.**

d. **A declaration is hereby issued that Legal Notices Nos. 48, 49, 146, and 147 of 2024 are valid and were lawfully made, and that the motion to annul Legal Notices Nos. 48 and 49 of 2024 was not passed by the Senate.**

e. A declaration is hereby issued that Sections 15(2) and 23(1) of the Statutory Instruments Act, Chapter 2A of the Laws of Kenya, are constitutional.

f. A declaration is hereby issued that Sections 20, 25, and 28 of the Social Health Insurance Act, No. 16 of 2023, establishing the Primary Healthcare Fund, the Social Health Insurance Fund, and the Emergency, Chronic and Critical Illness Fund, are constitutional and consistent with Article 206(1)(a) of the Constitution.

g. A declaration is hereby issued that the manner in which the nationwide rollout of the Social Health Insurance Fund (SHIF) was implemented on 1st October 2024 was unreasonable and inconsistent with the State's obligations under Articles 21(1) and 21(2) of the Constitution, and to that extent violated Articles 28 and 43 of the Constitution, but in a manner that can be remedied.

h. A structural interdict is hereby issued directing the 1st, 2nd, and 5th Respondents, jointly and severally, to take immediate corrective measures to address the operational and procedural deficiencies identified in this judgment and to ensure the effective and rights-compliant implementation of the Social Health Insurance Fund (SHIF) the operational governance of IHITS.

i. The 1st, 2nd, and 5th Respondents shall, within ninety (90) days from the date of this judgment, file in this Court and serve upon all parties a comprehensive affidavit setting out an action plan detailing the measures to be undertaken to remedy the violations identified in this judgment, including:

i) ensuring that no person is denied emergency or life-saving medical treatment;

ii) implementing fair and effective means-testing mechanisms for non-salaried persons;

iii) strengthening transparency, accountability, and compliance safeguards in the IHITS procurement and implementation process; and

iv) establishing clear and publicly accessible mechanisms for lodging and resolving complaints regarding access to healthcare services under SHIF.

j. The 1st, 2nd, and 5th Respondents shall thereafter file quarterly progress reports before this Court for a period of one (1) year from the lapse of date of filing of that initial comprehensive affidavit, which quarterly reports shall detail the steps taken to implement the action plan under (i) above and to ensure the progressive realization of the right to health under Article 43 of the Constitution.

k. All other prayers in the Amended Petition not specifically granted herein are hereby dismissed.

l. Given the significant public interest nature of this litigation, each party shall bear their own costs.

216. Orders accordingly. Subject to the above orders, file Closed Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH 2026.

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BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

1st Petitioner represented by Ms. Ekesa

Counsel for the 1st & 2nd Respondents- Mr. Kioko Kilukumi (SC)

Counsel for the 3rd, 5th, 10th & 13th Respondents- Mr. Kaumba

Counsel for the 6th Respondent- Mr. John Ohaga (SC) and Mr. Isaac

Counsel for the 7th Respondent- Mr. Issa & Ms. Ahomo

Counsel for the 8th Respondent- Mr. Someone, Mr. Nura, Mr. Carat & Ms. Faith Kiende

Counsel for the 11th Respondent- Mr. Sore

Counsel for the 2nd Interested Party- Mr. Malidzo Nyawa

Counsel for the 7th Interested Party- Mr. Mutua

Court Assistant – Ms. Lwambia