REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E683/2024

CONSUMER FEDERATION OF KENYA VS INFORMATION AND COMMUNICATION TECHNOLOGY AUTHORITY AND STATE LAW OFFICE AND 3 OTHERS

JUDGMENT

BEFORE HON. MR. JUSTICE LAWRENCE N. MUGAMBI

Introduction

1. The petition dated 11th December 2024 is supported by the petitioner's affidavit in support of even date and Notice to Produce dated 2nd March 2025.

2. The petition impugns the constitutionality and legality of the procurement process of Tender NO. ICTA/OT/11/2022-2023 for the procurement of Digital Super Highway Last mile and Public wi-fi connectivity on a three-year framework (Framework Contract) in Lots and Tender NO. ICTA/OT/13/2022-2023 for the procurement of digital Super Highway Backbone and Metro (Framework Contract) in Lots.

3. On this premise, the petitioner seeks the following reliefs: -

    a) A declaration be and is hereby issued that the actions of the 1st, 2nd and 3rd respondents in causing the awarding of contracts relating to government's Digital Super Highway Project to the entities linked to the 1st respondent are illegal, unconstitutional, null and void;

b) **A declaration be and is hereby issued that all contracts relating to the Digital Super Highway project awarded to entities linked to the 1st respondent including but not limited to Nightigale Enterprises/Nightigale (EA) Limited are illegal, unconstitutional, null and void.**

c) **An order be and is hereby issued directing the respondents to repay back to the Universal Service Fund all monies paid to entities linked to the 1st respondent, including but not limited to Nightigale Enterprises/Nightigale (EA) in relation to the unlawful and illegal contracts with respect to the Digital Super Highway Contracts.**

d) **A declaration be and is hereby issued that the 1st respondent has grossly violated the Constitution of Kenya 2010.**

e) **Costs of the petition.**

4. In opposition to the petition, the 1st & 2nd respondents filed a Replying Affidavit dated 25th February 2025 and Further Affidavit dated 15th May 2025, the 3rd respondent filed a Replying Affidavit dated 17th March 2025 and the 4th and 5th respondents filed Grounds of Opposition dated 14th February 2024.

The Petitioner's Case

5. According to the petition, the petition stems from non-compliance with the constitutional and statutory principles on leadership and integrity and the sanctity of public trust.

6. The petitions is hinged on the actions of the Communications Authority of Kenya (CAK) and the ICT Authority of Kenya for openly disregarding apparent and manifest conflict of interest in awarding various contracts to entities linked to the 1st respondent who is the Chairperson of the Communication Authority of Kenya. The contracts

are principally relate to execution and implementation of the Kenyan Government's project known as the ***Digital Super Highway Project*** which is a cabinet approved project aiming at strengthening the country's ICT infrastructure by increasing the network coverage across the country; reduce the cost of internet connectivity and enhance the delivery of e-government services, health, agricultural and financial services. The project is implemented and financed from the Universal Service Fund, a fund managed by the CAK, the 2nd respondent.

7. The petitioner contends that a total of over fifteen billion Kenya Shillings will be spent for the implementation of the Digital Super Highway project which is to be done in two phases, with the first phase apportioned at Kshs. Five Billion and the second phase Kshs. Ten Billion.

8. The petitioner asserts that the responsibility of the execution of the Digital Super Highway project lies with the 2nd respondent which has through a purported Technical Corporation Agreement, purportedly transferred functions such as sourcing, procurement and implementation of the project to the 3rd respondent.

9. According to the Petitioner, the public is set to benefit from 100,000kms of fiber cables, 25,000 public hotspots, 1450 Digital Village Smart Hubs and Studios, 3 data centres and data protection and cyber security management all of which are expected to be set up should the project be properly and effectively implemented.

10. The petitioner avers that although the 2nd respondent is mandated to administer the Universal Service Fund, it entered into an arrangement with the 3rd respondent through a Deed of Transfer of Procurement Authority. Under the said arrangement, the 3rd respondent was purportedly assigned the responsibility for facilitation of the rollout of the Optical Fiber Network Connectivity for the Digital Super Highway Project which responsibility includes the sourcing, contracting and implementation of the project. Notwithstanding the purported arrangement, the 2nd respondent retained the critical functionalities and involvement of the project namely the financial responsibility still rested with the 2nd respondent; it remained responsible for approval of budgets and for allocation of funds in respect of the project; it retained the powers to pay the contractors for the project and it was also part of the overall implementation of the project.

11. The petitioner asserts that the 3rd respondent published various invitation to tender in relation to the Digital Super Highway Project which include TENDER NO. ICTA/OT/11/2022-2023 for the procurement of Digital Super Highway Last mile and Public Wi-fi connectivity on a three-year framework (Framework Contract) in Lots as well as TENDER NO. ICTA/OT/13/2022-2023 for the procurement of Digital Super Highway Backbone and Metro (Framework Contract) in Lots. The tender documents were expressly clear and unambiguous on who was eligible and who was not eligible for the tender for example public employees and their close relatives, public officers and their relatives and those in conflict of interest from the tender.

12. Despite that, the petitioner reveals that the 1st, 2nd and 3rd respondents caused the awarded tender to among others, entities which have a direct link to the 1st respondent namely Nightigale Enterprises Limited which is currently known as Nightigale (EA) Limited which was awarded the following contracts; NO. ICTA/OT/11/2022-2023 for the procurement of Digital Super Highway Last mile and Public Wi-fi Connectivity on a three year framework (Framework Contract) in Lots; NO. ICTA/OT/13/2022-2023 for the procurement of Digital Super Highway Backbone and Metro (Framework Contract) in Lots; contract for the provision of OGN OFC Maintenance for Q1 2024-2025 (July – September) for lot 6 Contract No. 2302210 to Nightigale (EA) valued at Kshs. 17,983,440/- signed on 8th October 2024; contract for provision of OGN OFC Maintenance for Q4 2023-2024 lot 6 Contract No. 2240177 to Nightigale (EA) valued at Kshs. 14,383, 440/- signed on 8th July 2024; contract for provision of maintenance services for the one government network infrastructure fibre optic cable on a three year framework contract ICTA/OT/10/2022-2023 awarded to among others Nightigale Enterprises Limited signed on 5th July 2023 and contract for the procurement of digital superhighway fiber optic cable and associated accessories (framework contracting purchaser ICTA/OT/13/2022-2023 Nightigale Enterprises 5/06/2023.

13. The petitioner contends that Nightigale Enterprises Limited is an entity directly linked to the 1st respondent and the said company has had a lot of changes on its records at the company's registry both in terms of its officials and its shareholding as well as to its name. In terms of the name, Nightigale Enterprise Limited has since been changed to Nightigale (EA) Limited, in terms of shareholding, the petitioner avers that the company has undergone multiple changes which contextually

taken, point to an express intention of fraudulent manoeuvre aimed at benefiting from contracts with apparent conflict of interest. The daughter of the 1st respondent, one Evelyn Nyambura Mungai was until 29th May 2024, just before the initial contract were awarded to Nightigale (EA) Limited, a very strong majority shareholder of the company with 70% of the shareholding while one Thomas Muya Njau held a mere 10% and one Ruth Waithira Kinyanjui held a total of 20%.

14. The petitioner reveals that the said shareholding changed particularly in the period following the company's award of the Digital Superhighway contracts. Currently, the 1st respondent's daughter is no longer a part of the company's shareholders instead Ruth Waithira Kinyanjui holds 90% of the company's shareholding. The petitioner argues that the alteration of Nightigale (EA) Limited shareholding structure to omit the 1st respondent's daughter only happened in the period after submission of the bids for the Digital Super Highway tender. Thus, a conclusion is drawn that the shareholding structure was engineered to conceal the real beneficial owners set to benefit following the company's winning the tenders for the Digital Super Highway project which is the 1st respondent through her daughter Evelyne Nyambura Wanjiru. Further, the said Ruth Waithira Kinyanjui is only a proxy of the 1st respondent and her daughter Evelyn Nyambura Mungai. Evelyne Nyambura Mungai and Ruth Waithira Kinyanjui are not strangers to each other but close business associates/partners/proxies for instance, apart from Nightigale (EA) they also carry out business through Nightigale Construction Limited where Evelyne holds 70% and Ruth holds 15% of the shares. Despite the glaring and apparent conflict of interest, the 2nd and 3rd respondents proceeded to award contracts with respect to the project to Nightigale (EA) Limited, a company directly linked to the 1st respondent. Consequently, the Kenyan public stands to immensely suffer and stands to loose billions of public funds out of the actions of the respondents. Further, the public stands to suffer from the consequences of failed implementation of the Digital Super Highway project whose intentions were for the immense benefit of the public.

The 1st and 2nd Respondents' Case.

15. The affidavit was sworn by David Mugonyi, the Director General or Chief Executive Officer of the 2nd respondent and he avers that the 1st respondent was appointed on 1st December 2022 as the Board

Chairperson of the Communications Authority Kenya vide Gazette Notice No. 1483 of 2nd December 2022. The deponent avers that on 11th December 2022, the 2nd respondent and the 3rd respondent entered into a Memorandum of Understanding (MOU) for purposes of enhancing coordination, cooperation, collaboration and understanding between the parties in the implementation of projects and programmes under Government Digital Transformation Agenda in the context of the respective mandates of the parties. The Government Digital Transformation Agenda is a broad initiative aimed at building a digital superhighway and digitization of at least 80% of government records.

16. Further to the MOU, the deponent states that on 17th April 2023, CA and the 3rd respondent entered into a Technical Cooperation Agreement to facilitate the implementation of the Digital Superhighway Project. The span of the optical fiber network to be rolled out was approximately 2500 km and was estimated to cost Kshs Five Billion.

17. It was a further agreed that CA may apply not more than 3% of the costs towards project management activities subject to necessary approvals.

18. The deponent avers that the role of the 3rd respondent involved the following key responsibilities: facilitate the development and approval of the specific Project Concept Note in line with the Public Investment Management Guidelines under the Public Finance Management act, 2012; develop a detailed project design for the rollout of the fiber infrastructure ad establishment of connectivity to the identified beneficiary institutions; develop the detailed terms of reference and specifications among other requirements necessary to facilitate sourcing or procurement processes; execute the deed of transfer of procuring responsibility under the Public Procurement and Disposal Act; undertake procurement of the project components in full compliance with the Public Procurement and Disposal Act 2015 and the attendant regulations; establish relevant committees under the Procurement Act for the implementation of the project. While the obligations of the 2nd respondent included; allocate financial resources from the Universal Service Fund and approve the budget to meet the project cost as outlined in the agreement; make payments against delivery of agreed project milestones as identified in the contractual

arrangements with the contractors under the project; facilitate the requisite internal project related approvals; transfer procurement responsibility for the main component of the project to ICTA in order to achieve efficiency and participate in overall implementation of the project as per the project governance framework indicated in the agreement. The deponent stresses that the roles of the 2nd and 3rd respondents were distinct, particularly in relation to procurement which was solely the responsibility of the 3rd respondent, the 2nd respondent had no involvement in the procurement process.

19. The deponent states that pursuant to the Deed of Transfer of Procurement Responsibility in accordance with Section 52 of the Public Procurement and Asset Disposal Act and Regulation 39 of the Public Procurement and Asset Disposal Regulations 2020, the 2nd respondent assigned the 3rd respondent with the procuring responsibility for the facilitation of the rollout of the optical fiber network connectivity for institutions within ministries, counties, departments and agencies with a focus on health facilities, police stations, courts and schools in unserved and undeserved areas. In order to ensure compliance with Regulation 39(2) of the Public Procurement and Asset Disposal Regulations, 2020 it was a provision that the 3rd respondent will submit duly certified invoices, signed contracts and local purchase orders issued, inspection and acceptance reports and Milestone or Completion certificates as appropriate to facilitate payments under the Deed of Transfer.

20. The deponent states that Tender No. ICTA/OT/11/2022-2023 for the procurement of Digital Super Highway Last Mile and Public Wifi connectivity on a three year (Framework Contract) in Lots and Tender No. ICTA/OT/13/2022-2023 for the procurement of Digital Super Highway Backbone and Metro (Framework Contract) in Lots were issued using open national tendering method. He further avers that the designated address for the submission of tenders was the offices of the 3rd respondent and it was stipulated that the tenders would be publicly opened in the presence of candidates or their duly authorized representatives who opted to attend the tender opening session at the said offices. Upon the award of tenders, the contract were executed exclusively between the 3rd respondent and the respective contractors. The deponent stresses that at no point did the 1st and 2nd respondents participate in the procurement process.

21. Vide letter dated 10th September 2024, the 2nd respondent requested the Office of the Attorney General for an advisory opinion on conflict of interest in the procurement process of Digital Superhighway Backbone and Metro (Framework Contract) to which the Solicitor General responded and stated that by the time of submitting the award, the 1st respondent had already tendered her resignation as Director and Shareholder of Nightigale Enterprises Limited and taken up her appointment as the 2nd respondent's Chairperson. From the records provided by the Business Registration Service, the 1st respondent ceased being a director and relinquished and transferred her shares on 5th December 2022. Further, that although conflict of interest may involve legitimate personal affiliations and associations as well as family interests, those interests must be seen or established, to have unreasonably occasioned improper influence in a person's performance of their official duty. From the documents provided, the Solicitor General rightly concluded that the 1st respondent never participated or took part in the procurement proceedings or participated in any decision making with regard to the procurement or award thereof as to warrant a conflict of interest. Additionally, at the time of execution of the contract between the 3rd respondent and Nightigale Enterprises Limited, both the 1st respondent and her daughter were not directors or shareholders of Nightigale Enterprises and further from the resignation letters to the Registrar of Companies, they have no claims against the company monetarily.

22. The deponent avers that the 2nd respondent's board's approval of the procurement budget was within its statutory mandate and it did not in any way constitute an attempt to influence or distort the procurement process. As such, there is no evidence of irregularities or improper conduct that could suggest any undue influence by the 1st and 2nd respondents in awarding the contract. The deponent maintains that neither the 1st or 2nd respondents were engaged at any juncture during the procurement process, nor participated in any decision making with regard to the procurement or award thereof as to warrant a conflict of interest, consequently, they could have not exercised or exerted undue influence over the allocation of tenders to various contractors.

The 3rd Respondent's Case.

23. The affidavit was sworn by Stanley Mutahi Kamaguya, the Chief Executive of the 3rd respondent and he avers that the Constitution mandates that whenever a state organ or a public entity contracts for goods and services, the same should be done in a manner that aligns with Article 227 of the Constitution. He contends that the tender was advertised on MyGov newspapers on 7th February 2023 and uploaded on their website and the government portal (Public Procurement Information Portal) with the deadline set for 28th February 2023. They received 75 bids in response to the advertised tender and the 3rd respondent then appointed a committee that held an evaluation exercise. The said committee made recommendations for the award of the tender for a total of 18 firms. The firms awarded the tenders included Egypro East Africa Limited; Alternative Communication Limited, Konvergence Network Solutions limited, Adrian Kenya Limited, Quavatel Limited, Nubly Technologies Limited, Professional Digital systems Limited, Smart Cloud Africa Limited, Soulco Kenya Limited, Soliton Telmec, Visibility Technology Service Limited, Optimax Group Limited, Dynamo Solutions Limited, Baran Telecom Networks, Tech Source Point Limited, Nightigale Enterprises Limited, Com Twenty One Limited and A-Z Technologies Limited in respective orders of their lots.

24. The deponent avers that the bidding parties were fairly and equitably evaluated and due diligence conducted on all bidders that were proposed for the award. He further avers that for contract ICTA/OT/11 and 013/2022-2023, Nightigale Enterprises Limited was recommended for the award under lot 6 for Kshs. 14,794,486/- and Kshs. 54,095,430/- respectively. Further for contract ICTA/OT/011 the tender price was below the estimated market value of Kshs. 31,825,677/- as was indicated in the framework contract and that was saving the public funds. On the issue of the violation of values and principles of good governance under Article 10 of the Constitution, the deponent avers that the 3rd respondent followed the due procedure. The 3rd Respondent further states that equal opportunity was accorded to all that showed interest and due procedure was followed during the bidding process and only the qualified were awarded the contracts. Further the deponent states that at the time of bidding and awarding of the Digital Super Highway Project, the Chairperson of the CAK was not a named shareholder or a director of Nightigale Enterprises Limited and Nightigale (EA) Limited.

25. The deponent states that the 2nd respondent sought an advisory opinion from the office of the 5th respondent on the question of conflict of interest of the 1st respondent and through a letter dated 1st October 2024, the Attorney General recused the 1st respondent of all the accusations of conflict of interest. Additionally, the 1st respondent was neither a director nor a shareholder of Nightigale Limited as at 19th June 2023, thus the 1st respondent or her issue were not party to the management and shareholding of the company prior to the execution of the tender awarding and acceptance.

The 4th and 5th Respondents' Case.

26. The respondents aver that the petition does not demonstrate any cause of action against them, sought any reliefs or shown any infractions of the constitution by them. Further, the petitioner has not disclosed why it has not availed of the statutory mechanism for dealing with its grievance which provides in the first instance that a complaint is made with the Public Procurement Oversight Authority before approaching the court. Further the petitioner has not lodged a complaint with the Ethics and Anti Corruption Commission before instituting the present proceedings rendering the same premature. Thus, if the court were to exercise first instance jurisdiction over the subject matter of the proceedings it would undermine the statutory and constitutional mandates of public institutions specifically established to investigate and provide effective remedy to the same contrary to the doctrine of separation of powers.

27. The petition was disposed of by way of written submissions.

Petitioner's Submissions

28. The petitioner identified five issues for determination as follows:

- **whether the court has jurisdiction to determine the matter;**
- **whether the procurement process for the government's Digital Super Highway Project violated the constitutional principles of transparency, fairness and accountability under Article 227 of the Constitution;**
- **Whether the actions of the 1st respondent amount to a conflict of interest and breach of leadership integrity as contemplated**

under Articles 73 and 75 of the Constitution;

- **whether the ongoing implementation of contracts tainted by conflict of interest violates public finance principles under Article 210 of the Constitution and amounts to misapplication of public resources, and**

- **whether the petitioner's rights and public's interest in fair and transparent procurement processes were violated under Articles 10, 22 and 258 of the Constitution**.

29. On the issue of jurisdiction, the petitioner submitted that the court has jurisdiction to determine the matters raised in the petition which concern the violation of constitutional rights, particularly the principles of fairness, transparency and accountability in the procurement process. The issues at stake are constitutional in nature and the petitioner asserted that they cannot solely be resolved by administrative bodies such as the PPOA or EACC. Thus, the petition is properly before the court.

30. On the second issue, the petitioner submitted that it is trite law that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective. To buttress that point reliance was placed in the case of **Law Society of Kenya vs Attorney General & Another; Kenya Broadcasting Corporation (Interested Party) [2025] KEHC 3439 (KLR).**

31. To that effect, Parliament enacted the Public Procurement and Asset Disposal Act, 2015 as the main statutory provision on procurement processes in Kenya and a legislative mechanism to enhance Article 227 of the Constitution. It is therefore the petitioner's argument that the procurement process was illegal because it violated Article 227 of the Constitution on principles of transparency and fairness; it violated various sections of the Public Procurement and Disposal Act, 2015 and it violated the integrity clause under the tender documents.

32. Pursuant to the violation of Article 227 of the Constitution, the respondents facilitated the award of multiple contracts to Nightigale (EA) Limited which is directly or indirectly connected to the 1st respondent in circumstances that concealed the true beneficial ownership of the company and evaded competitive safeguards

through corporate restructuring and proxy arrangements. Reliance was placed in the case of **Law Society of Kenya vs Attorney General & Another; Kenya Broadcasting Corporation (Interested Party) [2025] KEHC 3439 (KLR)** where the court stated that ***'Further, it is the considered opinion of this court that the memo perpetuates a policy of discriminative exclusion in procurement of public goods and services hence does not promote principle of transparency and competitiveness in procurement of public services as provided for under Article 227(1) to ensure there is value for money***. Similar reliance was placed in the case of **Revital Health (Epz) Limited vs Public Procurement Oversight Authority & 6 Others Constitutional petition No. 75 of 2012**, the court stated:-

> **Procurement conducted outside the provisions of the Public Procurement Asset Disposal Act was not necessarily unconstitutional. Constitutionality of a procurement process is to be assessed on the basis of Article 227 of the Constitution. Article 227 provided that procurement by a state organ or public entity was to accord to a system that was fair, equitable, transparent, competitive and cost effective.**

33. The petitioner further submitted that the respondents violated the said principles by awarding contracts to the 1st respondent which created a conflict of interest and compromised the fairness and transparency of the procurement process. Additionally, the respondents failed to follow the statutory procedures laid out in the Public Procurement and Assets Disposal Act (PPADA) which further undermines the legitimacy of the process.

34. The petitioner argued that the respondents violated Section 59 of the PPADA as the 1st respondent is the chairperson of the 2nd respondent and she has an affiliation to Nightigale EA Limited, an entity that was awarded several contracts in relation to the Digital Super Highway project, a fact that has not been disputed by the respondents. Furthermore, the drastic corporate restructure done to Nightigale EA Limited before the award of the various tenders by the 3rd respondent paints a glaringly bad and malevolent picture of the respondents intending to personally benefit from a project advanced as a public venture. Additionally, the respondents have alluded in their responses that the 1st respondent need not have disclosed her direct or indirect affiliation to Nightigale EA Limited, which

contradicts Section 59(3) of the Act. Accordingly, the petitioner argued that these are not mere speculations but cogent proof which indicates that the tendering process violated the law and thereby meeting the burden of proof as elucidated in the case of **Peesam Limited vs Public Procurement Administrative Review Board & 2 Others; Hannaneli Suppliers Limited (Interested Party) [2025] KEHC 7277 (KLR)**.

35. Pursuant to Section 83(1) of the Act, an evaluation committee may after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. The petitioner submitted that sufficient evidence has been put forth to show that the restructuring that occurred during the procurement window was clearly engineered to obscure the beneficial owner of the contracting entity and circumvent the disqualification clauses. That established that fact that the respondents were not too keen in conducting their due diligence to establish that the 1st respondent has strong affiliate to Nightingale EA Limited thereby violating the various provisions of the PPADA.

36. The petitioner submitted that the tender documents expressly provided ineligible persons to apply for the respective tenders particularly clause 3.1 of the tender documents where it stated *"Public employees and their close relatives(spouses, children, brothers, sisters, uncles and aunts) are not eligible to participate in the tenders."* It is not in dispute that the 1st respondent held shares at Nightigale EA Limited and thereafter transferred the shares to her daughter, Evelyne Nyambura Mungai who after the entity had been awarded the contract effected the transfer of her shares to Ruth Waithira Kinyanjui her own proxy who assumed 90% ownership. Evidence of their joint business interests exist through their co-ownership of Nightigale Construction Limited.

37. On the third issue, the petitioner cited Article 73 of the Constitution which places an obligation upon the state and public officers to conduct themselves in a manner that is ethical, earns public confidence and trust and does not in any way bring disrepute to the office they occupy. Reliance was placed in the decision of the Court

of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] KECA 445 (KLR)** where the court stated:-

> **We wish to reiterate, having disposed of the issue of separation of powers, that leadership and integrity are broad and majestic normative ideas. They are genius of our constitutional fabric. However, their open textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience not merely the abstract philosophy or ideology that may underlie them.**

38. The petitioner asserted that the concealed beneficial interest in Nightigale EA Limited via family and proxies amounts to a clear conflict of interest based on the fact that the mischievous restructure just before the award of the tenders conflates both personal and professional interests for the 1st respondent which goes against the sanctity of her office as a state officer under the constitution. Further, the 1st respondent's actions in overseeing the procurement process and awarding contracts to linked the said entities constitutes a breach of the public trust and leadership standards required by the Constitution.

39. Whilst citing Article 201 of the Constitution, the petitioner maintained that the provided principles which guide public finance in Kenya impose binding fiscal duties on all public entities and officers involved in procurement, expenditure and oversight of public funds. In reiterating that point, the court in the case of **Republic vs Public Procurement Administrative Review Board ex parte Kenya Power & Lighting Company Limited & Another [2017] KEHC 9237 (KLR)** stated that under Article 201 of the Constitution, public money must be used in a prudent and responsible way while Article 227 requires procurement processes for goods or services by public entities to be inter alia competitive and cost effective. The petitioner argued that the Universal Service Fund is established under Section 84W of the Kenya Information and Communications Act and exists to promote equitable access to ICT services in undeserved areas. The 2nd respondent is charged with its administration, including approval of disbursements and oversight of funded projects. Thus public funds from the said specialized pool must be strictly used for the intended

purpose and in line with Article 201. However, the disbursement of the said funds to Nightigale EA Limited despite clear conflict of interest links to the 1st respondent, breaches the intended purpose principle and also, the equitable use and fiscal prudence principles under Article 201(b) and (d) of the Constitution. Further, while the 3rd respondent formally conducted procurement, the 2nd respondent retained control over budget approvals, payment processing and strategic governance, which meant that the 2nd respondent had an ongoing duty to review contract performance and financial integrity, hence, its silence in the face of tainted beneficial ownership amounts to constructive abdication of fiscal stewardship. The petitioner maintained that the said conduct offends both procurement transparency under Article 201(a) and responsible financial management under Article 201(e) of the Constitution. It further undermines constitutional expectations of fiscal discipline and fair competition rendering continued implementation unlawful.

40. The petitioner submitted that the actions of the respondents including the unlawful procurements processes associated with the Digital Super Highway Project are in direct violation of Articles 10, 22, 227 and 258 of the Constitution. The procurement process for the Digital Super Highway Project was tainted by improper procedures, lack of transparency and failure to adhere to constitutional values.

41. Further, the lack of due diligence and failure to disclose conflict of interest in the restructuring of the company during the procurement window further compromised the fairness and transparency of the process. The disregard for competitive fairness alongside concealment of ownership directly undermines the integrity of the procurement process to the detriment of public interest. Additionally, the unlawful procurement practices involved in the said project not only violated individual rights but undermined the public's interest in the proper use of public funds. The integrity of public procurement, essential for ensuring equitable and responsible use of tax-payers money, was severely compromised by the respondents' actions.

The 1st & 2nd Respondents' Submissions.

42. The respondents identified three issues for determination as follows:

- *whether the 1st and 2nd respondents had any role in or* *exercised any influence over the procurement processes relating to the Digital Super Highway Project;*

- *whether the 1st respondent's prior association with Nightigale Enterprises Limited constituted a conflict of interest or a breach of Article 73 and 75 of the Constitution, and;*

- *whether the procurement process undertaken by ICTA complied with Articles 10, 201 and 227 of the Constitution and the Public Procurement and Asset Disposal Act.*

43. On the first issue, the respondents submitted that Section 52 of the PPADA permits the transfer of procurement responsibility between public entities which is the case herein between the 2nd and 3rd respondents, whereby the 3rd respondent was mandated to undertake all the procurement related functions for the Digital Super Highway Project. The respondents maintained that the 2nd respondent's role was limited to allocating financial resources from the Universal Service Fund. The respondents referred to the case of the Supreme Court in **Kenya Railways Corporation & 2 Others vs Okiya Omtatah Okoiti & 3 Others (Petition No. 13 & 18) (E019) OF 2020** where the court stressed that the binding nature of Memorandum of Understandings are to be drawn from the intent of the parties when it held that:-

> ***From the above definition, an MOU is preliminary to a contract and or agreement between parties and is characterized as non binding and unintended to create any contractual obligations on either party. This does not mean that courts are not faced with the question of establishing the binding nature of an MOU. When that happens, a court considers the wording and the apparent intention of the parties……In establishing the intent of the parties, we are further persuaded by the Supreme Court of the United Kingdom in RTS Flexible Systems vs Molkerei Alois Muller GmbH & Co. KG [2010] UKSC 14 & 38 where it expressed itself as follows: The general principles are not in doubt. Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms which they regarded or the law requires as essential for the formation of legally binding***

relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.

44. Similar reliance was placed in **Sil Co-operative Savings and Credit Society Limited vs Co-operative Bank of Kenya Limited [2025] KEHC 12777 (KLR)** where the court held that:-

> **The Court is persuaded that this MOU was not a gentleman's agreement and refuses to treat it as such. It created valid legal obligations that flowed from the document. The parties acted upon those legal obligations creating corresponding duties and obligations that could be enforced. The Court follows the decision of H.K Chemitei J in Brisma Africa Limited Vs. Hubei Hongyuan Power Engineering Limited [2025] KEHC 18857 KLR at paragraph 25 the Court stated as follows;**
>
> > **"Was the Memorandum of Understanding binding on the parties.? In my humble view, yes. I state so because it was signed by all the parties and whether it was to secure an extension of the Bid Bond from Family bank or not the terms were well spelt out. The addition by pen by the defendant stating "only for the family bank bid bond" in my view appears cheeky and suspicious. This is for the simple reason that it appears an afterthought and such a serious contract cannot have some insertion without the input of the rest of the parties"**

45. The respondents argued that the intention of the MOU was to give clear separation roles between the two parties. The separation was a deliberate move to ensure operational efficiency in the completion of the project. The said separation of roles is further reinforced by the Deed of Transfer of Procurement Responsibility executed pursuant to Section 52 of the PPADA and Regulation 39 of the Public procurement and Asset Disposal Regulations, 2020. The said deed legally transferred procurement duties to the 3rd respondent mandating it to undertake all procurement processes in compliance with the law. The respondents further submitted that the legal effect of a lawful transfer of procuring responsibility is well settled in the case of **Republic vs Public Procurement Administrative Review Board and Others *ex parte* Peter Jumah Kuria t/a Scope Designs Systems [2015] eKLR** where the court stated:-

From the material placed before the court, can one say the decision of the Board was unreasonable? I have reviewed the letters exchanged between the applicant, the Ministry and ICDC and it is clear that the procurement in question was initiated and concluded by the Ministry. It was only after the tender had been awarded that ICDC was roped in. The predicament of the Ministry was clearly brought out in the letter dated 19th November 2014 addressed to the Attorney General by the Principal Secretary, Dr. Wilson Songa. That letter states, inter alia:

Preparations for the development of the park were initiated in the financial year 2011/2012. As the Ministry required land on which to develop the park, it preferred Industrial and Commercial Development Corporation (ICDC) as a strategic partner as the former is the registered owner of 135 acres of land in Eldoret, Uasin Gishu County. It is worth to note that no Memorandum of Understanding was executed between the parties. The Board of Directors also did not give the requisite authority through board resolution to the parties to undertake the project.

From that letter, and the other letters before the court, it is clear that ICDC was not a party to the procurement. The Board was therefore correct in finding that ICDC was not the procuring entity. There was no valid transfer of procurement responsibility as envisaged by Section 27(6) of the PPADA and Rule 18 of the PPAD Regulations 2006. The transfer of procurement responsibility was done after the tender process had been concluded and the tender awarded to the applicant by the Ministry.

46. The respondents submitted that in the present case, procurement responsibility was transferred to the 3rd respondent pursuant to the Deed of Transfer of Procurement Responsibility. They further argued that the petitioner's allegations that the 1st and 2nd respondents took part in the procurement process arise solely from the fact that the 1st respondent is the chairperson of the Communications Authority. However, the same is a mere assumption devoid of any factual or evidential basis. The petitioner has not produced ***any minutes, emails, internal memorandum, instruction, board resolution, evaluation reports or communication*** indicating that either the 1st or 2nd respondents participated in or directed ***tender design, evaluation***, or ***award decisions*** nor that they interfered with ***ICTA's committees***. Whilst relying on the case of **David Thuo vs Attorney General & Another (2021) eKLR** the court reiterated the obligation for a petitioner to prove its case when it comes to a constitutional

petition. The court stated:-

Decision on violation of the constitution should not and must not be made in a factual vacuum. To attempt to do so would trivialise the constitution an inevitable result is ill considered opinions. The presentation of clear evidence in support of violation of constitutional right is not a mere technicality, rather, it is essential to a proper consideration of constitutional issues. Decision on violation of constitutional rights cannot be based upon the unsupported hypothesis.

47. Similar reliance was placed in the case of **Nyatete Nyakundi Justin & 17 Others vs Pyrethrum Processing Company of Kenya Limited [2022] KEELC 683 (KLR)** where the court stated:-

The petition as drawn clearly does not plead which provisions of the constitution were breached or violated and how the same had been violated. In the absence of such specificity the respondent would not be in a position to answer to the allegations of breach of the constitution. The petition as pleaded is deficient and cannot satisfy the requisite constitutional threshold necessary for a constitutional petition. It can never be enough to merely enumerate various constitutional provisions alleged to have been violated in the heading of the petition and leave it at that. The pleadings should set out the particulars of the alleged violations relating the same to the constitutional provisions said to have been violated.

48. In the absence of any documentary or testimonial evidence linking the 1st or 2nd respondents to the impugned procurement decisions, the respondents urged the court to find that procuring responsibility for the Digital Super Highway Project was lawfully transferred to ICTA and exercised solely by ICTA officials.

49. On the second issue, the respondents submitted that the 1st respondent formally resigned as director and shareholder of Nightigale Enterprises Limited on 5th December 2022 thereby divesting her legal and beneficial interests. The 1st respondent's involvement in the company's affairs terminated before the tender process for the impugned contracts commenced and before her appointment as Communication Authority's Board Chairperson. The legal effect of such resignation was addressed in **Simon Charles Barkas vs Ol Jogi Limited & 4 Others (2009) eKLR** where the court held as follows:-

I think the directorship was attached to his position to enable him perform his duties effectively but in every and all other respects, he was purely an employee of the Company. Consequently, I am satisfied that the position that has been taken by the defendants is the correct one. Barkas is not even a shareholder in the company and once his employment therein comes to an end, he has no right to claim a seat on the Board.

50. The respondents contended that by the time Nightigale Enterprises submitted its bid for the tender in question, the 1st respondent had already tendered her resignation as director and shareholder of the said company and taken up her appointment as the 2nd respondent's chairperson. They further submitted that the restructuring of Nightigale Enterprises Limited's shareholding occurred after the 1st respondent's resignation and was subject to thorough evaluation by the 3rd respondent as part of its procurement process. Reliance was placed in the case of **Peesam Limited vs Public Procurement Administrative Review Board & 2 Others; Hannaneli Suppliers Limited (Interested Party) [2025] KEHC 7277 (KLR)** where the court held:-

A bidder who alleges collusion under Section 66 of the Public Procurement and Asset Disposal Act bears the burden of proving such collusion through cogent and credible evidence. Mere allegations, suspicion or conjecture are insufficient to meet the threshold required under the Act, considering that under Section 66(12) of the Act, any person who contravenes the provisions of Section 66 commits an offence. Accordingly, in the instant case, the mere similarity in the names of persons alleged to be affiliated with the two companies that have done business with the procuring entity by being awarded tenders without more, does not amount to conclusive evidence of a conflict of interest or collusion. In other words, there was no proof of collusion as alleged by the ex parte applicant.

51. Similarly, the respondents argued that the mere past connection or familial connection without concrete evidence of undue influence does not suffice or constitute a conflict of interest. Further, an advisory opinion was sought and the opinion provides a compelling corroboration which confirms that the 1st respondent's divestment, her non participation in procurement and absence of any undue influence. Further, the respondents argued that as per Section 66(1)

and (6) of the PPADA, disclosure obligations only arise where conflict is foreseeable, which was not the case herein given the 2nd respondent's non involvement in the procurement of the tender.

52. On the final issue, the respondents cited the case of **Eldo City Limited vs Corn Products Kenya Ltd & Another (2013) eKLR** where the court discussed the legal effect of Memorandum of Understandings and stated:-

> ***As to the question as to whether MOUs are legally binding, I would state that the same is partly a matter of construction of the particular document and partly a question of legal analysis. It is therefore a question of fact whereby the plaintiff has the burden of persuading the court that such an agreement exists and was in the circumstances binding. It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of parties.***

53. Similar reliance was placed in the case of **Jubilee Holdings Limited & Another vs Bupa Insurance Services Limited & Another (Civil Suit 2 of 2016) [2023] KEHC 21840 (KLR) (Commercial and Tax) (25 August 2023) (Judgment)** where the court stated:-

> ***In the case of Rose and Frank Co. vs J. R. Crompton & Bros Ltd (1923) 2 KB 293 Atkin LJ stated that- To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.' Lord Clarke in the case of RTS Flexible Systems Ltd vs Molkerei Aloais Muller GmbH & Co. KG [2010] UKSC 14 & 38 where it expressed itself as follows: The general principles are not in doubt. Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms which they regarded or the law requires as essential for the formation of legally binding relations.***

54. The respondents reiterated that the MOU between the 2nd and 3rd respondents manifests the parties' intention to transfer procurement responsibility for the tender to the 3rd respondent. Thus, the respondents submitted that the procurement process was conducted independently by the 3rd respondent's officials who adhered strictly to the constitutional provisions and the PPADA and its regulations.

The 3rd, 4th and 5th Respondents' Submissions.

55. The respondents identified three issues for determination as follows:

- ***whether the 3rd, 4th and 5th respondents' conduct constitutes a violation and contravention of the constitution;***
- ***whether the petition is premature,***
- ***and whether the honourable court should issue the orders sought in the petition.***

56. On the first issue, the respondents cited the case of **Anarita Karimi Njeru (1976-1980) 1 KLR 1271** and submitted that the petitioner has not cited any commissions or omissions of the Constitution against them. The 3rd respondent has a broad mandate which entails enforcing ICT standards in the government, establishing, developing and maintaining secure ICT infrastructure systems, supervision of electronic communication as well as promoting digital literacy, capacity, innovation and enterprise. The respondents submitted that the 3rd respondent conducted an open tender method of procurement by advertising the tender on MyGov newspapers on 7th February 2023 and uploaded on their website and the Public Procurement Information Portal with the deadline set for 28th February 2023. The tender was closed on the said date and the tender opening committee revealed that the 3rd respondent had received 75 bids. The 3rd respondent's accounting officer appointed an evaluation committee, which held an evaluation exercise and forwarded the report to the Deputy Director, Supply Chain Management. The committee made recommendation for the award of the tender for 18 firms. The committee conducted due diligence on all the bidders that were proposed for award and also confirmed the license of ICT Authority, NCA and CA certificates provided. Pursuant to Section 141 of the PPADA, the tender evaluation committee recommended the award of the tender to the contractors as per the Lots at the calculated prices and it was noted that Nightigale Enterprises was recommended for award under Lot 6 among them being contract number ICTA/OT/13/2022-2023/LT6 at Kshs. 54,304,579/-.

57. The respondents argued hat the procurement process was being undertaken by the 3rd respondent and there would be no expectation that the 1st respondent had any role in the procurement process.

Further, by the time of executing the contract on 26th June 2023, the 1st respondent and her daughter were not directors or shareholders of Nightigale Enterprises Limited. Thus, the petitioner has not demonstrated how the 3rd, 4th and 5th respondents have violated his rights as there was no conflict of interest. Reliance was placed in the case of **Abuya vs Independent Electoral and Boundaries Commission & another [2014] eKLR** where the court held:-

> ***What then should I say about the alleged violations of the petitioner's constitutional rights and freedoms. In submissions, counsel for the 1st respondent correctly stated that a party alleging violation of a constitutional right must demonstrate, with a reasonable degree of precision what provisions of the Constitution have been violated as well as the manner in which they have been violated.***

58. On the second issue, the respondents argued that the petitioner ought to have made a complaint with the EACC instead of filing the present petition. Further the respondents submitted that the petitioner ought to have made a complaint with the Public Procurement Regulatory Authority before approaching the court. Reliance was placed in the case of **SDV Transmi Kenya Limited vs Attorney General & 2 Others (2016)eKLR** where it was held:-

> ***There is a public law duty of the court not to interfere with the constitutional functioning of public bodies traceable to the constitutional doctrine of separation of powers. As a consequence, I respectfully agree that there is a duty not to hamstring public bodies in exercise of their constitutional or statutory mandates.***

59. The respondents maintained that constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue to be resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. Justiciability governs the limitations on the constitutional arguments that the courts will entertain and it encompasses three principles which are standing, ripeness and mootness. Reliance was placed in the case of **Sports and Recreation Commission vs Sagittarius Wrestling Club and Another** (no citation given) where the court stated:-

> ***Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is***

available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the declaration of rights.

60. Similar reliance was placed in the case of **Muema Mativo vs Director of Criminal Investigations & 2 Others; HFC Limited (Interested Party) [2021] eKLR** where the court cautioned constitutional courts to ensure that their mandate is not abused or trivialized and that the mere allegation that a human right or fundamental freedom has been or is likely to be contravened is not in itself sufficient to entitle an applicant to invoke the jurisdiction of the court especially if it is made for the purpose of avoiding applying the normal judicial remedy.

61. Reliance was also placed on Communication **Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others** where the Supreme Court held that the principle of avoidance means that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

Analysis and Determination

62. Having regard to the pleadings, the affidavit evidence relied upon by the parties including the annexures thereof and the parties' submissions, this Court distils the following to be the issues for determination in this petition:

a) Whether the petition offends the doctrine of constitutional avoidance

b) Whether the procurement of Tender NO. ICTA/OT/11/2022-2023 and ICTA/OT/13/2022-2023 violated Articles 10, 34, 35, 40, 46, 47, 73, 75, 80 and 227 of the Constitution.

c) Whether the petitioner is entitled to the reliefs sought.

Whether the petition offends the doctrine of constitutional avoidance

63. In their submissions, the 3rd, 4th and 5th Respondents argued that the Petition is unsustainable for it offends the doctrine of constitution avoidance.

64. The principle of constitutional avoidance is as self-imposed limitation by the court in which the court, though possessed of jurisdiction, refrains from determining the matter on constitutional grounds where it is demonstrated that there is other legal basis (statutory or regulatory) upon which the dispute can be resolved and adequate remedy obtained without resorting to the Constitution. The approach upholds judicial economy and respect for the separation of powers by ensuring courts do not necessarily intrude into the constitutional or statutory mandates of other organs of government or public bodies except where there is clear constitutional violation by acts or omission thereby requiring judicial intervention.

65. Articulating the doctrine, the Court in ***Lugo Vs. Director of Public Prosecutions (Petition 62 of 2020) 2022 KEHC 10574*** stated as follows:

> ***"…The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with the applicable legislation together with other legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be avoided by doctrine of ripeness and constitutional avoidance. It is borne out of realization that all legislative and common law remedies are part of the legal system…In other words a constitutional issue is not ripe until the determination of constitutional issue is the only course that give the litigant the remedy he seeks. Both Constitutional avoidance and ripeness avert determination of constitutional issues until it becomes necessary to the extent that it is the only course available to assist the litigants cause. The exceptions to the doctrine of constitutional avoidance are:***
>
> ***Where the constitutional violation is so clear and of direct relevance to the matter In the absence of an apparent alternative form of ordinary relief and, Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute…"***

66. Discussing this principle in **KKB v SCM & 5 others [2022] KEHC 289 (KLR)**, the Court observed as follows:

> ***"Constitutional avoidance has been defined as a preference of***

deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.16 The doctrine of avoidance was fortified in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor in which Ebrahim JA said the following: -

…Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

The Constitutional Court of Zimbabwe in Chawira & Ors vs Minister of Justice Legal and Parliamentary Affairs & Ors held:

"As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies."

The court in S v Mhlungu laid out constitutional avoidance as a general principle in the following terms: -

"I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed."

The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved."

67. Correspondingly, the Supreme Court in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** guided as follows:

"[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a

Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936))."

68. In the present case, the court notes that the petition challenges the legality and constitutionality of the award of tender NO. ICTA/OT/11/2022-2023 and NO. ICTA/OT/13/2022-2023 to Nightigale EA Limited. The Petitioner's grievance is hinged on the manner the procurement process was conducted, in particular, the allegation that the Respondents awarded the tender to the1st respondent despite existence of patent conflict of interest.

69. The Respondents sought the legal opinion of the Attorney General. The opinion of the Attorney General was that the 1st Respondent and her daughter had already resigned from the Company that was awarded the tender hence there was no conflict of interest.

70. The petitioner contends that Nightigale Enterprises Limited is an entity directly linked to the 1st respondent (and her daughter) and the said company made multiple changes on its records at the company's registry affecting its officials and shareholding as well as its name. With reference to change in name, Nightigale Enterprise Limited mutated to Nightigale (EA) Limited. On shareholding, the petitioner averred that the company went through multiple changes which when contextually taken, point to a ***fraudulent manoeuvre*** aimed at benefiting from contracts with apparent conflict of interest. According to the Petitioner, the daughter of the 1st respondent, one **Evelyn Nyambura Mungai** was until 29th May 2024, just before the initial contracts were awarded to Nightigale (EA) Limited, on 5/6/2023,

5/7/2023 and 8/7/2023, a very strong majority shareholder of the company with 70% of the shareholding while one Thomas Muya Njau held a mere 10% and one Ruth Waithira Kinyanjui held a total of 20%.

71. The petitioner reveals that the said shareholding changed substantially a shortly before the award of the Digital Superhighway contracts to the Company such that presently, the 1st respondent's daughter is no longer a part of the company's shareholding, instead her former co-shareholder and business associate, Ruth Waithira Kinyanjui holds 90% of the company's shareholding.

72. The petitioner contends that the alteration of Nightigale (EA) Limited shareholding structure to omit the 1st respondent's daughter only happened **after submission of the bids for the Digital Super Highway tender**.

73. Consequently, the Petitioner contends that the shareholding structure was cosmetically **engineered to conceal the real beneficial owners set to benefit following the company's winning the tenders for the Digital Super Highway project, namely the 1st respondent through her daughter Evelyne Nyambura Wanjiru**.

74. Further, the said Ruth Waithira Kinyanjui is merely a proxy of the 1st respondent and her daughter Evelyn Nyambura Mungai. Evelyne Nyambura Mungai and Ruth Waithira Kinyanjui are not strangers to each other but close business associates/partners/proxies who hold shares together in another company, Nightigale Construction Limited where Evelyne holds 70% and Ruth holds 15% of the shares.

75. The Petitioner argued that despite the glaring and apparent conflict of interest, the 2nd and 3rd respondents proceeded to award contracts in respect to the said project to Nightigale (EA) Limited, a company directly linked to the 1st respondent.

76. The petitioner thus argued that the Kenyan public stands to immensely suffer and stands to lose billions of public funds out of the actions of the respondents. Further, the public stands to suffer from the consequences of failed implementation of the Digital Super Highway project whose intentions were for the immense benefit of the public.

77. In reply, the 2nd Respondent asserted that in its letter dated 10th

September 2024, it requested the Office of the Attorney General for an advisory opinion on conflict of interest in the procurement process of Digital Superhighway Backbone and Metro (Framework Contract).

78. The Solicitor General responded and stated that by the time of submitting the award, the 1st respondent had already tendered her resignation as Director and Shareholder of Nightigale Enterprises Limited and taken up her appointment as the 2nd respondent's Chairperson. That from the records provided by the Business Registration Service, the 1st respondent ceased being a director and relinquished and transferred her shares on 5th December 2022.

79. Further, that although conflict of interest may involve legitimate personal affiliations and associations as well as family interests, those interests must be seen or established, to have unreasonably occasioned improper influence in a person's performance of their official duty.

80. Consequently, as per the documents provided, the Solicitor General expressed the view that the 1st respondent never participated or took part in the procurement proceedings or participated in any decision making with regard to the procurement or award thereof as to warrant a conflict of interest. Additionally, at the time of execution of the contract between the 3rd respondent and Nightigale Enterprises Limited, both the 1st respondent and her daughter were not directors or shareholders of Nightigale Enterprises and further from the resignation letters to the Registrar of Companies, they have no claims against the company monetarily.

81. The 2nd respondent thus maintained that its board's approval of the procurement budget was within its statutory mandate and it did not in any way constitute an attempt to influence or distort the procurement process and there is no evidence of irregularities or improper conduct that could suggest any undue influence by the 1st and 2nd respondents in awarding the contract.

82. The central question is whether a conflict of interest in the award of the tenders to Nightigale (E.A) Limited given the alleged corporate links that between the 1st Respondent and her daughter shortly before the award of the tenders in question and the transfer of shareholding to the longstanding shareholder who in the petitioner's

case is the 1st Respondent's proxy.

83. The issues raised engage the national values and principles of governance, under Article 10 (2) (c) of the Constitution which require that in making or implementing public policy decisions, the organs of government, State officers and public officers shall be guided by the principles of good governance, transparency, integrity and accountability. The other relevant principles that are expressly relevant are those under Article 227 of the Constitution which demand that which among others demand that when a state contracts for goods and services, it shall do so it shall do so in accordance with a system **that is fair, equitable, transparent**, competitive and cost-effective. Furthermore, they also engage leadership and integrity principles specifically, under Article 73 (2) (c) of the Constitution particularly the requirement that public interest decision making must be guided by honesty in execution of public duties and declaration of personal interest that may conflict with public duties.

84. The profound issue underpinning the instant petition is whether a conflict of interest in existed in the award of the tender in question. The question raises transparency, accountability and integrity concerns and leads to even to the next one, which is whether the Attorney General was the appropriate authority to pronounce herself upon it having regard to the specific mandate of the Ethics and Anti-Corruption Commission, and whether this Court is at this juncture is equally the appropriate forum to determination of the issue of the existence of conflict of interest in the award of the said tender.

85. The **Constitution in Article 79 provides** for enactment of legislation for establishment of the Ethics and Anti-Corruption Commission (EACC) which shall have the powers and status of a Commission under Chapter 15 for purposes of ensuring compliance with, and enforcement of, provisions of Chapter Six of the Constitution. The preamble to the Ethics and Anti-Corruption Act states ***that it is "An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes."*** Under Section 13 (c), the Commission has among others the power to conduct

investigations on its own initiative or on complaint made by any person.

86. The Ethics and Ant-Corruption Act formerly created the offence of conflict of interest in Section 42, which following repeal of that section is now reposed in the Conflict-of-Interest Act, 2025. Besides, there are other related offences which the Ethics and Anti-Corruption Commission may, as a consequence of an investigation prefer in its enforcement mandate. They Section 42 (3) which relates to wilfully or carelessly failing to comply with applicable procedures relating to procurement and Section 46 makes it an offence for any person to use his/her office improperly to confer a benefit to himself or herself or anyone else. Furthermore, the Leadership and Integrity Act (CAP 185) at Section 16 (5) & (6) which had provisions prohibiting conflict of interest gave the overall mandate for the implementation of the said Act to the Ethics and Anti-Corruption Commission. Section 2 of the Act states that **"Commission"** means the Ethics and Anti-Corruption Commission established under the Ethics and Anti-Corruption Commission Act (Cap. 7H); and Section 4 (2) provides thus:

> ***'The Commission is responsible for overseeing and enforcing the implementation of this Act.'***

87. The Attorney General on being asked to give her opinion on the matter, she went ahead to analyze the facts and, in the letter, dated 1/10/2024 rendered an opinion that absolved the process and the parties of any conflict of interest or integrity breach. By so doing, the Attorney General unconstitutionally usurped the role of EACC which has the mandate of investigating and determining whether the facts disclosed a conflict of interest. The resulting opinion is thus unconstitutional and of no legal effect.

88. Although Article 156 (4) designates the Attorney-General—(a)is the principal legal adviser to the Government; it does not authorize the Attorney General to usurp or trample on the constitutional role of Ethics and Anti-Corruption Commission (EACC). This Court is empowered under Article 165 to determine if anything said to be done under the authority of this Constitution or any law was done in accordance with the Constitution, I find that in the circumstances of this case, the Attorney General's opinion, in so far as it purported to absolve the process of conflict of interest was rendered in violation of

the specific constitutional mandate of Ethics and Anti-Corruption Commission's mandate hence is unconstitutional, null and void.

89. On the same breath, this Court notes that the petitioner rushed to this for constitutional intervention without first invoking the jurisdiction of EACC which is the Investigative Agency to investigate the allegations of conflict of interest and other integrity concerns raised in the instant petition. This Court is of the view that EACC is the appropriate forum to initiate the complaint for in-depth investigation given that it has the necessary investigative tools, and expertise to get into the bottom of the matter and inquire into the alleged shareholding changes, proxy arrangements and beneficial ownership including following a trail of any such finances once paid.

90. In my view, the Petitioner cannot be allowed to bypass Ethics and Anti-Corruption Commission in a matter such as this. It would be premature for the Court to take up such a matter before the investigative body charged with that responsibility constitutionally and legally is given the chance to unearth all the relevant facts as that is a matter falling within its primary mandate.

91. This Court is constitutionally bound to defer to coordinate branches of government or other public institutions by allowing them the latitude to perform their respective legal mandates. The dicta expressed by the Court in **William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR** is thus relevant. The Court stated thus:

> **"In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of the Constitution, that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of the Constitution.**
>
> **49. I hold the view that the Petitioner's contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make**

conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations."

92. Criminal investigation into such matters is not subject to limitation. The Petitioner remains free to lodge a formal complaint with **Ethics and Anti-Corruption Commission** should he wish the same to be investigated.

93. However, for reasons aforesaid, and applying the doctrine of constitutional avoidance, I decline at this stage to proceed to full determination of the question of whether or not the impugned procurement was marred by conflict of interest.

94. Nevertheless, in accordance with Article 23 (3) which empowers this Court to grant any appropriate relief that is just and suitable, the Court finds it just and necessary to grant orders as follows:

a) **The advisory opinion by the Attorney General via the letter Ref. AG/CONF/21/55/4 VOL II. (77) of 1st October, 2024 to the 2nd Respondent purporting to absolve the impugned procurement in relation to award of tender on digital superhighway backbone and metro (framework contract) to Nightgale (EA) Limited from conflict of interest is unconstitutional, null and void as it assumes the specific constitutional and statutory mandate conferred upon the Ethics and Anti-Corruption Commission.**

b) **The Advisory by the Attorney General AG/CONF/21/55/4 VOL. II (77) dated 1st October, 2024 is hereby removed into this Court, and an order certiorari is issued quashing the same.**

c) **The petitioner remains at full liberty to petition Ethics and Anti-Corruption Commission for formal investigation. Alternatively, the Commission may, on its own motion decide to initiate such an investigation.**

d) **As it is public interest litigation, I make no orders as to costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3Rrd DAY OF SEPTEMBER, 2026.

L N MUGAMBI
JUDGE

SIGNED BY: HON. MR. JUSTICE LAWRENCE N. MUGAMBI

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2026-09-03 19:48:06+03