



## Justice be our Shield and Defender

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT No. ACEC ..... OF 2023**

**-BETWEEN-**

- 1. S. GICHUKI WAIGWA**
- 2. LUCY W. NZOLA**
- 3. GODFREY P. OKUTOYI.....PLAINTIFFS**

**-AND-**

- 1. SAFARICOM PLC**
- 2. VODAFONE GROUP PLC**
- 3. VODAFONE KENYA LIMITED**
- 4. M-PESA HOLDING COMPANY LIMITED**
- 5. VODAFONE INTERNATIONAL HOLDINGS B.V.**
- 6. MICHAEL JOSEPH**
- 7. HAMISH KEITH**
- 8. MARTIN DAVID SPINK**
- 9. LES BAILLIE**
- 10. JOHN NGUMI**
- 11. JOSEPH OGUTU**
- 12. M-PESA FOUNDATION CHARITABLE TRUST**
- 13. SAFARICOM FOUNDATION CHARITABLE TRUST**
- 14. CAREPAY LIMITED**
- 15. DALY INAMDAR LLP ADVOCATES**
- 16. COULSON HARNEY LLP ADVOCATES**
- 17. PRICEWATERHOUSECOOPERS LLP**
- 18. ERNST & YOUNG**
- 19. CENTRAL BANK OF KENYA**
- 20. COMMUNICATIONS AUTHORITY OF KENYA**

**21. THE HONOURABLE THE ATTORNEY GENERAL.....DEFENDANTS**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22(1) AND (2), 23(1) AND (3), 24, 159(1) AND (2)(a), (b), (d) AND (e), 165(3)(a), (b), (d)(i) AND (ii), (e) AND 165(4), AND 258(1) AND (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010 ("THE CONSTITUTION") AND THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**-AND-**

**IN THE MATTER OF: THE DENIAL, VIOLATION AND INFRINGEMENT OF THE PROTECTION OF THE FUNDAMENTAL RIGHT TO PROPERTY AND IN PARTICULAR THE FUNDAMENTAL RIGHT TO ACQUIRE AND OWN PROPERTY AS GUARANTEED IN ARTICLES 40(1)(a), (2)(a) AND (3)(b)(i) AND (ii) OF THE CONSTITUTION**

**-AND-**

**IN THE MATTER OF: SECTIONS 70(c) AND 75(6)(b)(iv) AS READ WITH SECTION 84(6) OF THE REPEALED CONSTITUTION OF THE REPUBLIC OF KENYA GUARANTEEING AGAINST DEPRIVATION OF PROPERTY, AS FURTHER READ WITH ARTICLE 262 AND SECTIONS 6, 7, 19 AND 33 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF: THE DENIAL, VIOLATION AND INFRINGEMENT BY THE DEFENDANTS OF THE PLAINTIFFS' CONSUMER**

RIGHTS AS A FUNDAMENTAL RIGHT, AND IN PARTICULAR THE RIGHT TO INFORMATION NECESSARY FOR THEM TO GAIN FULL BENEFIT FROM GOODS OR SERVICES, THE RIGHT TO PROTECTION OF THEIR ECONOMIC INTERESTS, AND THE RIGHT TO COMPENSATION FOR LOSS OR INJURY ARISING FROM DEFECTS IN GOODS OR SERVICES AS GUARANTEED IN ARTICLE 46(1)(a), (b), (c) AND (d) AS READ WITH ARTICLE 27(4)) OF THE CONSTITUTION

-AND-

IN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION BY THE DEFENDANTS OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE SET OUT IN ARTICLE 10 OF THE CONSTITUTION OF KENYA, AND IN PARTICULAR THE VALUES AND PRINCIPLES AS TO THE RULE OF LAW, DEMOCRACY AND PARTICIPATION OF THE PEOPLE, GOOD GOVERNANCE, INTEGRITY, TRANSPARENCY AND ACCOUNTABILITY, HUMAN DIGNITY, EQUITY, SOCIAL JUSTICE, INCLUSIVENESS, EQUALITY, HUMAN RIGHTS, NON-DISCRIMINATION AND PROTECTION OF THE MARGINALISED

-AND-

IN THE MATTER OF: THE RECOGNITION BY THE PEOPLE OF KENYA OF THE ASPIRATIONS OF ALL KENYANS FOR A GOVERNMENT BASED ON THE ESSENTIAL VALUES OF HUMAN RIGHTS, EQUALITY, FREEDOM, DEMOCRACY, SOCIAL JUSTICE AND THE RULE OF LAW, AND THE COMMITMENT OF THE PEOPLE TO NURTURING AND PROTECTING THE WELL-BEING OF

**THE INDIVIDUAL, THE FAMILY, COMMUNITIES AND  
THE NATION AS EXPRESSED IN THE PREAMBLE TO  
THE CONSTITUTION OF KENYA 2010**

**-AND-**

**IN THE MATTER OF: SECTION 3(1) OF THE JUDICATURE ACT (CHAPTER 8  
OF THE LAWS OF KENYA) AS TO THE EXERCISE OF  
THE JURISDICTION OF THE HIGH COURT IN  
CONFORMITY WITH THE CONSTITUTION, OTHER  
WRITTEN LAWS (INCLUDING CERTAIN ACTS OF  
PARLIAMENT OF THE UNITED KINGDOM), THE  
SUBSTANCE OF THE COMMON LAW, THE  
DOCTRINES OF EQUITY AND THE STATUTES OF  
GENERAL APPLICATION IN FORCE IN ENGLAND ON  
THE 12TH AUGUST, 1897, AND THE PROCEDURE AND  
PRACTICE OBSERVED IN COURTS OF JUSTICE IN  
ENGLAND AT THAT DATE**

**-AND-**

**IN THE MATTER OF: VARIOUS DOCUMENTS PURPORTING TO CREATE  
VALID TRUSTS IN FAVOUR OF ALL M-PESA  
ACCOUNT HOLDERS OF SAFARICOM LIMITED  
(SAFARICOM PLC), NAMELY:**

- 1. A DOCUMENT TITLED 'DECLARATION OF TRUST IN  
FAVOUR OF ALL M-PESA ACCOUNT HOLDERS OF  
SAFARICOM LIMITED' DATED 23<sup>RD</sup> FEBRUARY 2007  
SEALED WITH THE COMMON SEAL OF M-PESA  
HOLDING COMPANY LIMITED, AND DELIVERED IN  
THE PRESENCE OF A DIRECTOR AND THE COMPANY  
SECRETARY OF THE COMPANY, AND ENDORSED  
WITH THE NAME AND ADDRESS OF MESSRS. DALY &  
FIGGIS ADVOCATES AS DRAWER;**

2. A DOCUMENT TITLED 'AMENDMENT DEED TO THE DECLARATION OF TRUST IN FAVOUR OF ALL M-PESA ACCOUNT HOLDERS OF SAFARICOM LIMITED' DATED 19<sup>TH</sup> JUNE 2008 PURPORTED TO HAVE BEEN SEALED WITH THE COMMON SEAL OF M-PESA HOLDING COMPANY LIMITED (AND SIGNED BY A DIRECTOR OF THE COMPANY AND BY ANOTHER UNIDENTIFIED PERSON) AND ALSO PURPORTED TO HAVE BEEN SEALED WITH THE COMMON SEAL OF SAFARICOM LIMITED (AND SIGNED BY THE SECRETARY OF THE COMPANY AND BY ANOTHER UNIDENTIFIED PERSON) BUT WITHOUT BEING ENDORSED WITH THE NAME AND ADDRESS OF THE DRAWER; AND
3. A DOCUMENT TITLED 'SECOND AMENDMENT DEED TO THE DECLARATION OF TRUST ON FAVOUR (SIC) OF ALL M-PESA ACCOUNT HOLDERS OF SAFARICOM LIMITED DATED 23<sup>RD</sup> FEBRUARY 2007 (AS AMENDED BY THE DEED OF AMENDMENT DATED 19<sup>TH</sup> JUNE 2008)' DATED 20<sup>TH</sup> JULY 2020 SEALED WITH THE COMMON SEAL OF M-PESA HOLDING COMPANY LIMITED, AND DELIVERED IN THE PRESENCE OF TWO DIRECTORS OF THE COMPANY, AND ALSO SEALED WITH THE COMMON SEAL OF SAFARICOM LIMITED, AND DELIVERED IN THE PRESENCE OF A DIRECTOR AND A DIRECTOR/SECRETARY OF THE COMPANY, AND ENDORSED WITH THE NAME AND ADDRESS OF MESSRS. COULSON HARNEY LLP ADVOCATES AS DRAWER.

-AND-

**IN THE MATTER OF:      SECTIONS 3, 4, 5, 42(1), 43, 44, 56, 57(1) AND (2), 58, 59, 65  
AND 66 OF THE TRUSTEE ACT**

**-AND-**

**IN THE MATTER OF:      SECTIONS 3B(1), 3B(2)(c), 3B(2)(d), 3C(2)(a), 3F(2)(a), (c)  
AND (e), 3F(4), 3I(1) AND (2), OF THE TRUSTEE  
(PERPETUAL SUCCESSION) ACT**

**-AND-**

**IN THE MATTER OF:      SECTIONS 1A(1) AND (2), 1B, 3, 3A, 62(a), (b), (c), (d), (e),  
(f), (g) AND (h) OF THE CIVIL PROCEDURE ACT AND  
ORDER 1 RULE 8, ORDER 20 RULES 1, 3 AND 4, AND  
ORDER 40 RULE 11, OF THE CIVIL PROCEDURE RULES,  
2010**

**-AND-**

**IN THE MATTER OF:      SECTIONS 4, 4A AND 50 OF THE CENTRAL BANK OF  
KENYA ACT**

**-AND-**

**IN THE MATTER OF:      SECTIONS 2(1), 3(1), 4(1), 5(1) AND 16(1) OF THE  
BANKING ACT**

**-AND-**

**IN THE MATTER OF:      SECTION 4 OF THE NATIONAL PAYMENT SYSTEM  
ACT, 2011 AND REGULATIONS 4, 25, 26 AND 45 OF THE  
NATIONAL PAYMENT SYSTEM REGULATIONS, 2014**

**-AND-**

**IN THE MATTER OF:      SECTIONS 23 AND 83C OF THE KENYA INFORMATION AND COMMUNICATIONS ACT, 1998 AND THE KENYA INFORMATION AND COMMUNICATIONS (FAIR COMPETITION AND EQUALITY OF TREATMENT) REGULATIONS, 2010**

**-AND-**

**IN THE MATTER OF:      SECTIONS 4, 12, 13, 15 AND 84 OF THE CONSUMER PROTECTION ACT**

**-AND-**

**IN THE MATTER OF:      SECTIONS 140, 143, 144, 145, 146, 168 AND 1002 OF THE COMPANIES ACT AS TO DIRECTOR'S DUTIES AND FRAUDULENT TRADING**

**-AND-**

**IN THE MATTER OF:      SECTIONS 23, 24, 50, 55(b)(v), 56 AND 57 OF THE COMPETITION ACT**

**-AND-**

**IN THE MATTER OF:      SECTIONS 32F AND 32G OF THE CAPITAL MARKETS ACT, AND THE CODE OF CORPORATE GOVERNANCE PRACTICES FOR ISSUERS OF SECURITIES TO THE PUBLIC ISSUED PURSUANT TO SECTION 11(3)(v) OF THE ACT**

**-AND-**

**IN THE MATTER OF:      SECTION 37 OF THE DATA PROTECTION ACT**



**-AND-**

**IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT**

**-AND-**

**IN THE MATTER OF: THE INCOME TAX ACT**

**-AND-**

**IN THE MATTER OF: THE TAX PROCEDURES ACT**

**-AND-**

**IN THE MATTER OF: SECTIONS 2 AND 3 OF THE PREVENTION OF  
ORGANISED CRIMES ACT**

**-AND-**

**IN THE MATTER OF: SECTIONS 3, 4, 5 AND 7 OF THE PROCEEDS OF CRIME  
AND ANTI-MONEY LAUNDERING ACT**

**-AND-**

**IN THE MATTER OF: THE PERSONS WITH DISABILITIES ACT**

**-AND-**

**IN THE MATTER OF: SECTIONS 2, 3, 20, 26, 12, 13, 15 AND 84 OF THE  
LIMITATION OF ACTIONS ACT**

**PLAINT (MULTI TRACK)**

***A. DESCRIPTION OF THE PARTIES:***

1. The Plaintiffs are adults residing and working for gain at Nairobi and elsewhere in the Republic of Kenya, suing on their own behalf and on behalf of and for the benefit of all M-PESA Accountholders, totalling over 52,400,000 accounts, including over 31,200,000 monthly *active* M-PESA customers as at February 2023. The 1<sup>st</sup> Plaintiff also sues on his own behalf as a shareholder of Safaricom Plc and on behalf of and for the benefit of all other shareholders of Safaricom Plc. The Plaintiffs' respective telephone numbers are 072XXXXX50, 072XXXXX27 and 072XXXXX58, and their address for service for the purpose of this suit shall be care of Messrs. Nderitu & Partners Advocates, No. 7, Kügeria Maisonettes, 12 Ralph Bunche Road, *next to Upper Hill Medical Centre*, P.O. Box 22048 Nairobi 00400.
2. The 1<sup>st</sup> Defendant is Safaricom Plc (hereinafter "Safaricom"), Company No. C.8/2002, a public limited liability company incorporated in the Republic of Kenya on 3<sup>rd</sup> April 1997 and having its registered office at Nairobi aforesaid. Service of court process upon Safaricom shall be effected through the Plaintiffs' Advocates' office.
3. The 2<sup>nd</sup> Defendant is Vodafone Group Plc (hereinafter "the Vodafone Group"), Company No. 01833679, a British multinational telecommunications public limited liability company incorporated in the United Kingdom on 17<sup>th</sup> July 1984 and having its registered office at Vodafone House, The Connection, Newbury, Berkshire RG14 2FN England. Service of court process upon the Vodafone Group shall be effected through the Plaintiffs' Advocates' office.
4. The 3<sup>rd</sup> Defendant is Vodafone Kenya Limited (hereinafter "Vodafone Kenya"), Company No. C.79550, a private limited liability company incorporated in the Republic of Kenya on 3<sup>rd</sup> February 1998 and owned jointly by Vodafone International Holdings B.V. (a 100% owned subsidiary of the Vodafone Group) and Vodacom Group Limited (also a subsidiary of the Vodafone Group). Vodafone Kenya is sued by reason of being the company (a wholly owned subsidiary of the Vodafone Group) through which the Group has an indirect interest in Safaricom, and has its registered office located at the offices of Messrs. CMS Daly Inamdar Advocates (the 15<sup>th</sup> Defendant) on 6<sup>th</sup> Floor, ABC Towers, ABC Place, Waiyaki Way, Westlands, Nairobi

aforesaid. Service of court process upon Vodafone Kenya shall be effected through the Plaintiffs' Advocates' office.

5. The 4<sup>th</sup> Defendant is M-Pesa Holding Company Limited (hereinafter "M-Pesa Holding"), Company No. C.128199, a limited liability company incorporated in the Republic of Kenya on 11<sup>th</sup> September 2006 with its registered office located at the offices of Messrs. CMS Daly Inamdar Advocates (the 15<sup>th</sup> Defendant) on 6<sup>th</sup> Floor, ABC Towers, ABC Place, Waiyaki Way, Westlands, Nairobi. M-Pesa Holding's equity shares are 100% owned by the Vodafone Group through its 100% owned subsidiary, Vodafone International Holdings B.V. Service of court process upon M-Pesa Holding shall be effected through the Plaintiffs' Advocates' office.
6. The 5<sup>th</sup> Defendant is Vodafone International Holdings B.V. (hereinafter "Vodafone International Holdings"), a fully owned subsidiary of the Vodafone Group incorporated in The Netherlands as a private company on 16<sup>th</sup> February 1993 and registered with the Dutch Chamber of Commerce as No. 24235177. Its address is P.O. Box Rivium Quadrant, 173-177 2909 LC Capelle aan den IJssel, The Netherlands. Service of court process upon Vodafone International Holdings shall be effected through the Plaintiffs' Advocates' office.
7. The 6<sup>th</sup> Defendant is Michael Joseph (hereinafter "Mr. Joseph"), a male adult reported to have U.K., U.S., South African and Irish nationalities and working for gain at Nairobi aforesaid and elsewhere within and outside the Republic of Kenya who served as Chief Executive Officer of Safaricom from July 2000 to November 2010 and again from 2<sup>nd</sup> July 2019 to 31<sup>st</sup> March 2020. He is a Director of M-Pesa Holding and was also the Director of Mobile Money at the Vodafone Group (through Vodafone Group Services Limited ("Vodafone Group Services") from 2011 until September 2017 (and was a Director of Vodafone Sales & Services Limited ("Vodafone Sales & Services"), a 100% owned subsidiary of the Vodafone Group) from 6<sup>th</sup> February 2012 to 18<sup>th</sup> September 2017. He is also the Chair of the M-Pesa Foundation and of the M-Pesa Foundation Academy and was the Chair of Safaricom from 1<sup>st</sup> August 2020 to 31<sup>st</sup> July 2022, and has been a member of the Safaricom Board from 8<sup>th</sup> September 2008 to date. Service of court process upon Mr. Joseph shall be effected through the Plaintiffs' Advocates' office.

8. The 7<sup>th</sup> Defendant is Hamish Keith (hereinafter “Mr. Keith”), a male adult working for gain at Nairobi and elsewhere within and outside the Republic of Kenya as an Advocate of the High Court of Kenya. Mr. Keith was formerly a Senior Partner at Messrs. Daly & Figgis Advocates and is currently a Senior Partner at Messrs. Daly Inamdar LLP Advocates (located at 6<sup>th</sup> Floor, ABC Towers, ABC Place, Waiyaki Way, Westlands, Nairobi). Mr. Keith is currently a Director of Vodafone Kenya and of M-Pesa Holding as well as a Trustee of the M-Pesa Foundation Charitable Trust (who has been described in one of the Foundation’s Annual Reports as a “long time legal advisor to both Vodafone (i.e., the Vodafone Group) and Safaricom”). Mr. Keith was named by investigators Kroll Associates in a UK graft probe report presented in 2007 to the Kenyan Government as one of the Directors of Mobitelea Ventures Limited, (a shell company dissolved by voluntary liquidation on 3<sup>rd</sup> October 2019, but which was previously registered in Guernsey Island, an offshore tax haven, and which sold its 5% stake in Safaricom to the Vodafone Group upon Safaricom’s listing on the Nairobi Securities Exchange). Service of court process upon Mr. Keith shall be effected through the Plaintiffs’ Advocates’ office.
9. The 8<sup>th</sup> Defendant is Martin David Spink (hereinafter “Mr. Spink”), a male adult working for gain in Berkshire, England and elsewhere and was from 1<sup>st</sup> March 2018 until 18<sup>th</sup> July 2022 a Director of Vodafone Sales & Services, and is also a former Group Commercial Finance Director of the Vodafone Group. He is a Director of M-Pesa Holding and currently also the Finance Director of the Europe Cluster of the Vodafone Group. Service of court process upon Mr. Spink shall be effected through the Plaintiffs’ Advocates’ office.
10. The 9<sup>th</sup> Defendant is Les Baillie (hereinafter “Mr. Baillie”), a male adult residing and working for gain at Nairobi aforesaid and elsewhere within the Republic of Kenya as the Chief Executive Officer of the M-Pesa Foundation Academy. Mr. Baillie was Safaricom’s Chief Financial Officer from a date before 6<sup>th</sup> March 2007 when the M-Pesa E-Money Service (hereinafter “the M-Pesa Service”, “the M-Pesa E-Money Service” or “the Service”) was launched, and was appointed its Chief Investor Relations Officer in June 2008 when Safaricom was listed on the Nairobi Stock Exchange (now Nairobi Securities Exchange), and was subsequently a Director of

Safaricom on 5<sup>th</sup> December 2009 until his resignation on 17<sup>th</sup> January 2011. By virtue of being a Trustee of the M-Pesa Foundation Charitable Trust, he represents the Foundation on the Board of Carepay Limited. Service of court process upon Mr. Baillie shall be effected through the Plaintiffs' Advocates' office.

11. The 10<sup>th</sup> Defendant is John Ngumi (hereinafter "Mr. Ngumi"), a male adult working for gain at Nairobi aforesaid and elsewhere within and outside the Republic of Kenya who was the Chair of the Safaricom Board of Directors from 1<sup>st</sup> August 2022 to 22<sup>nd</sup> December 2022. Since July 2017 up to the time of filing this suit, he is the Chair and a Director of Carepay Limited (Company No. CPR/2014/149158), a company associated with Safaricom providing a smart health payment distribution platform known as M-Tiba, and which acknowledges having been "first established in Kenya with an initial investment from the M-PESA Foundation (funded by M-Pesa, the hugely popular mobile payment system launched by Safaricom/Vodafone) and the Investment Funds for Health in Africa (IFHA)". Mr. Ngumi is also the Chair of the Industrial and Commercial Development Corporation (ICDC) since 7<sup>th</sup> August 2020, a Non-Executive Director of Kenya Airways Plc, and is also a former Chair of Kenya Pipeline Company. Service of court process upon Mr. Ngumi shall be effected through the Plaintiffs' Advocates' office.
12. The 11<sup>th</sup> Defendant is Joseph Ogutu (hereinafter "Mr. Ogutu"), a male adult residing at Nairobi aforesaid who was until 30<sup>th</sup> April 2022 working for gain as the Chief Special Projects Officer of Safaricom. Mr. Ogutu is a Director of M-Pesa Holding as well as the Chairman and a Trustee of the Safaricom Foundation Charitable Trust. Service of court process upon Mr. Ogutu shall be effected through the Plaintiffs' Advocates' office.
13. The 12<sup>th</sup> Defendant is the M-Pesa Foundation Charitable Trust, a Trust reportedly founded as an irrevocable public charitable trust by M-PESA Holding on 23<sup>rd</sup> March 2010 and incorporated in the Republic of Kenya, with an office at Nairobi aforesaid (hereinafter "the M-Pesa Foundation"). Service of court process upon the M-Pesa Foundation shall be effected through the Plaintiffs' Advocates' office.

14. The 13<sup>th</sup> Defendant is the Safaricom Foundation Charitable Trust (hereinafter “the Safaricom Foundation”), a Trust reportedly founded by Safaricom as an irrevocable public charitable trust on 14<sup>th</sup> August 2003 and incorporated in the Republic of Kenya, with an office at Nairobi aforesaid. Service of court process upon the Safaricom Foundation shall be effected through the Plaintiffs’ Advocates’ office.
15. The 14<sup>th</sup> Defendant is Carepay Limited (hereinafter “Carepay”), Company No. CPR/2014/149158, a private limited liability company incorporated in the Republic of Kenya on 27<sup>th</sup> June 2014 and having its registered office at Nairobi. Carepay provides a smart health payment distribution platform known as M-Tiba and, according to its website, acknowledges having been “first established in Kenya with an initial investment from the M-PESA Foundation (funded by M-Pesa, the hugely popular mobile payment system launched by Safaricom/Vodafone) and the Investment Funds for Health in Africa (IFHA)”. According to official records, Carepay comprises 157,467 ordinary shares of KShs. 1/= each, of which 73,296 are owned by Trustees of the M-Pesa Foundation and 77,171 by Carepay International B.V. (making a total of 150,467 shares), with no indication in the records as to who owns the remainder of 7,000 shares, or how the shares have been accounted for. Service of court process upon Carepay shall be effected through the Plaintiffs’ Advocates’ office.
16. The 15<sup>th</sup> Defendant is Daly Inamdar LLP Advocates, also referred to as CMS Daly Inamdar Advocates or Daly & Inamdar Advocates (hereinafter “Daly Inamdar Advocates”), a firm formed following the merger of Messrs. Daly & Figgis Advocates and Messrs. Inamdar & Inamdar Advocates and having its place of business on 6<sup>th</sup> Floor, ABC Towers, ABC Place, Waiyaki Way, Westlands, Nairobi aforesaid. The firm states on its website that it “is well known for its Corporate/M&A and Commercial practice”, and its “partners include some of the most experienced in their fields of practice in Kenya and have handled many substantial, groundbreaking and noteworthy commercial transactions”, and that it “provides legal services in Banking and Finance..., Consumer Products, Dispute Resolution..., Funds..., Private Equity, Public Procurement..., and TMC” (Technology, Media and Communications). The firm is regulated by the Law Society of Kenya Act and the Advocates Act, and where the context so requires or demands, reference to “Daly Inamdar Advocates” shall

include a reference to Messrs. Daly & Figgis Advocates. Service of court process upon Daly Inamdar Advocates shall be effected through the Plaintiffs' Advocates' office.

17. The 16<sup>th</sup> Defendant is Coulson Harney LLP Advocates (hereinafter "Coulson Harney Advocates"), a firm having a place of business at Nairobi aforesaid and regulated by the Law Society of Kenya Act and the Advocates Act. According to its website, the firm advises "a wide spectrum of clients in the private sector, institutional and multinational organizations, foreign investors and governmental institutions". Its Advocates "practice Kenyan law" but the firm also has "foreign-law expertise especially in English law banking and finance matters and corporate/commercial transactions", as well as "tech-law..., capital markets, investigations and corporate services". Service of court process upon Coulson Harney Advocates shall be effected through the Plaintiffs' Advocates' office.
18. The 17<sup>th</sup> Defendant is PricewaterhouseCoopers LLP (hereinafter "PwC"), a firm having a place of business at Nairobi aforesaid providing advisory, tax, audit and assurance services and whose standards of professional practice, including accounting and auditing standards, in the preparation, verification and auditing of financial statements are regulated by the Accountants Act. From at least the year 2007 or thereabouts until the year 2020, PwC was engaged by Safaricom as the audit firm (initially on behalf of the Controller and Auditor General but subsequently in its own right) to carry out an independent audit of Safaricom's annual financial statements. During significant periods of time in the course of the period stated above, PwC whose stated purpose is "to build trust in society and solve important problems" also carried out similar audits for the M-Pesa Foundation and the Safaricom Foundation. Service of court process upon PwC shall be effected through the Plaintiffs' Advocates' office.
19. The 18<sup>th</sup> Defendant is Ernst & Young (hereinafter "EY"), a firm having a place of business at Nairobi aforesaid providing advisory, tax, audit and assurance services and whose standards of professional practice, including accounting and auditing standards, in the preparation, verification and auditing of financial statements are also regulated by the Accountants Act, and a member firm of Ernst & Young Global Limited. In the year 2020, EY replaced PwC as the audit firm to carry out an

independent audit of the annual financial statements of Safaricom. Service of court process upon EY shall be effected through the Plaintiffs' Advocates' office.

20. The 19<sup>th</sup> Defendant is the Central Bank of Kenya (hereinafter "the Central Bank") established under Article 231(1) of the Constitution of Kenya, 2010 ("the 2010 Constitution", or "the Constitution") and having responsibility for, *inter alia*, formulating monetary policy, promoting price stability, issuing currency and with such powers, functions and operations as may be conferred on it by, *inter alia*, the Central Bank of Kenya Act (Chapter 491 of the Laws of Kenya) and the National Payment System Act (No. 39 of 2011) including regulating, licensing and supervising authorized dealers and payment (remittance) services, as well as establishing, regulating and supervising efficient and effective payment, clearing and settlement systems and acting advisor to, and fiscal agent of, the Government. Service of court process upon the Central Bank shall be effected through the Plaintiffs' Advocates' office.
21. The 20<sup>th</sup> Defendant is the Communications Authority of Kenya (formerly the Communications Commission of Kenya (CCK) and hereinafter "the Communications Authority" or, where the context so requires or admits, "the Communications Commission") established under Section 3 of the Kenya Information and Communications Act, 1998 ("the Communications Act") and having the object and purpose of licensing and regulating postal, information and communication services in accordance with the provisions of the Act. Service of court process upon the Communications Authority shall be effected through the Plaintiffs' Advocates' office.
22. The 21<sup>st</sup> Defendant is the Honourable the Attorney General of the Republic of Kenya (hereinafter "the Attorney General") whose office is established under Article 156 of the Constitution as the principal legal adviser to the Government and with a duty to uphold the rule of law and to defend the public interest. The office of the Attorney General was previously established under Section 26 of the repealed Constitution of Kenya ("the repealed Constitution") as an office in the public service and charged with the responsibility of being the principal legal adviser to the Government. The Attorney General is sued on behalf of the Government of the Republic of Kenya, the



Ministry of Finance, and named officers of the Government. Service of court process upon the Attorney General shall be effected through the Plaintiffs' Advocates' office.

23. In addition to the descriptions of Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu (the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants respectively) as detailed above, the said Defendants currently hold, or have at some time in the past held, various paid positions or jobs in one or more of the Defendant companies/entities/firms or in companies controlling the Defendant companies, or in companies/entities/firms that are business partners, affiliates or associates of the Defendant companies. The particulars below are a non-conclusive list of the paid positions or jobs currently or formerly held by the said Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu:

Name of Defendant	Safaricom	M-Pesa Holding	M-Pesa Foundation	Safaricom Foundation	M-Pesa Foundation Academy	Other
<b>Mr. Joseph</b>	<b>Chairman of the Board of Directors:-</b> 1 <sup>st</sup> Aug. 2020 to 31 <sup>st</sup> July 2022  <b>Director:-</b> Sept. 2008 to date  <b>Chief Executive Officer:-</b> July 2000 to November 2010; July 2019 to March 2020	<b>Director</b> (currently)	<b>Chairman of the Board of Trustees</b> since inception  <b>Trustee</b> since inception	<b>Founder</b>	(at some point) <b>Chairman of the Board of Governors</b>	<b>Vodafone Group Services:</b> (formerly) <b>Director of Mobile Money</b>  <b>The Vodacom Group:-</b> (formerly) <b>Director</b>
<b>Mr. Keith</b>	<b>[Long-Term Legal Advisor]</b>	<b>Director</b> since inception	<b>Trustee</b> (currently)	-	?	<b>The Vodafone Group:</b> <b>[Long-Term Legal Advisor]</b>

						<b>Vodafone Kenya: Director</b> (currently)  <b>Daly Inamdar Advocates: Advocate and Senior Partner</b>
<b>Mr. Spink</b>	-	<b>Director</b> (currently)	-	-	-	<b>The Vodafone Group:</b> (currently) <b>Group Finance Director of the Europe Cluster</b>  (formerly) <b>Group Commercial Director</b>  <b>Vodafone Sales &amp; Services:-</b> (formerly) <b>Director</b>
<b>Mr. Baillie</b>	(formerly) <b>Chief Investor Relations Officer;</b>  (formerly) <b>Chief Financial Officer</b>	-	<b>Executive Director/ Chief Executive Officer</b>	(formerly) <b>Chairman of the Board of Trustees:-</b> Oct. 2003 to May 2012	(formerly) <b>Executive Director/ Chief Executive Officer</b>	<b>The Vodafone Group:-</b> <b>Financial Director</b> Aug. 1986 to June 2000  <b>Carepay:-</b> <b>Board Director (as M-Pesa Foundation's representative on the Board)</b>
<b>Mr. Ngumi</b>	<b>Chairman of the Board of Directors:-</b>	-	-	-	-	<b>Carepay:-</b> <b>Chairman of the Board of</b>

	1 <sup>st</sup> Aug. 2022 to 22 <sup>nd</sup> Dec. 2022					<b>Directors</b> July 2017 to date
<b>Mr. Ogut</b>	(formerly) <b>Director, Strategy and Innovation;</b>  (formerly) <b>Director, Resources Division</b>  (formerly) <b>Chief Human Resource Officer</b>  (formerly) <b>Chief Corporate Affairs Officer</b>	<b>Director</b> (currently)	?	<b>Chairman of the Board of Trustees:-</b> May 2012 to date  <b>Trustee:-</b> 2007/2008 to date	<b>Chairman of the Board of Governors</b> (currently)	-

**1. Mr. Joseph:**

i. Safaricom (1<sup>st</sup> Defendant):

**A.** Chairman and Director (1<sup>st</sup> August 2020 to 31<sup>st</sup> July 2022);

**B.** Director (September 2008 to date);

**C.** Chief Executive Officer (July 2000 to November 2010; July 2019 to March 2020);

ii. M-Pesa Holding (4<sup>th</sup> Defendant):

**A.** Director (current)

iii. M-Pesa Foundation (12<sup>th</sup> Defendant):

**A.** Chairman of the Board of Trustees (since inception)

**B.** Trustee (since inception)

iv. Safaricom Foundation (13<sup>th</sup> Defendant):

**A.** Founder

v. M-Pesa Foundation Academy:

- A. (At some point) Chairman of the Board of Governors
- vi. The Vodafone Group (2<sup>nd</sup> Defendant):
  - A. Director of Mobile Money (former)
- vii. The Vodacom Group:
  - A. Director of Mobile Money, Vodafone Group Services Limited (former)
  - B. Director of Vodafone Sales & Services Limited (former)

**2. Mr. Keith:**

- i. Safaricom (1<sup>st</sup> Defendant):
  - A. Long-Term Legal Advisor
- ii. M-Pesa Holding (4<sup>th</sup> Defendant):
  - A. Director (since inception)
- iii. M-Pesa Foundation (12<sup>th</sup> Defendant):
  - A. Trustee; and
- iv. Daly Inamdar Advocates:
  - A. Advocate and Partner

**3. Mr. Spink:**

- i. M-Pesa Holding (4<sup>th</sup> Defendant):
  - A. Director
- ii. The Vodafone Group
  - A. Group Finance Director of the Europe Cluster (current)
  - B. Group Commercial Director (former)
  - C. Director, Vodafone Sales and Services (Former)

**4. Mr. Baillie:**

- i. Safaricom (1<sup>st</sup> Defendant):
  - A. Board Director (December 2009-January 2011)
  - B. Chief Investor Relations Officer (June 2008-August 2009)
  - C. Chief Financial Officer (July 2000-June 2008)
- ii. M-Pesa Foundation (12<sup>th</sup> Defendant):
  - A. Executive Director (August 2012 to 2020)
- iii. Safaricom Foundation (13<sup>th</sup> Defendant):

- A. Chairman of the Board of Trustees (former)
  - iv. M-Pesa Foundation Academy:
    - A. Chief Executive Officer (2016-2020)
  - v. Carepay:
    - A. Board Member (M-Pesa Foundation's representative on the Board)
- 5. **Mr. Ngumi:**
  - i. Safaricom (1<sup>st</sup> Defendant):
    - A. Chairman of the Board of Directors (former)
  - ii. Carepay
    - A. Chairman of the Board of Directors (current)
- 6. **Mr. Ogutu:**
  - i. Safaricom (1<sup>st</sup> Defendant):
    - A. Director, Strategy and Innovation (former)
    - B. Director, Resources Division (former)
    - C. Chief Special Projects Officer (former)
    - D. Chief Human Resource Officer (former)
    - E. Chief Corporate Affairs Officer (former)
  - ii. M-Pesa Holding (4<sup>th</sup> Defendant):
    - A. Director (current)
  - iii. Safaricom Foundation (13<sup>th</sup> Defendant):
    - A. Chairman of the Board of Trustees (current)
    - B. Trustee
  - iv. M-Pesa Foundation Academy:
    - A. Chairman of the Board of Governors (at some point)

24. As at 26<sup>th</sup> May 2021, Safaricom had a **nominal share capital of Kenya Shillings Six Billion (KShs. 6,000,000,000/=)** divided into **119,999,999,600 Ordinary Shares of KShs. 0/05 (Five (5) Kenya cents) each (totalling KShs. 5,999,999,980/=)** and **5 Redeemable Shares of KShs. 4/= each (totalling KShs. 20/=)**, with 40% of the current shareholding being held by two foreign companies, the Vodafone Group (5%), and Vodacom Group Limited ("Vodacom"), incorporated in the Republic of South Africa

(35%). As at 31<sup>st</sup> March 2022, Safaricom's issued share capital comprised 40,065,428,000 shares, each with a par value of KShs.0/05 (Five (5) Kenya cents).

25. AS at 31<sup>st</sup> October 2022, the issued share capital of the Vodafone Group (the 2<sup>nd</sup> Defendant) consisted of **28,818,163,278 ordinary shares of US\$0.20** <sup>20/21</sup> each, of which 1,254,609,472 ordinary shares were held in Treasury.

26. As at 14<sup>th</sup> June 2022, Vodafone Kenya (the 3<sup>rd</sup> Defendant) had a **nominal share capital of KShs. 40,000/= divided into 2,000 Ordinary Shares of KShs. 20/= each**, of which 50 Ordinary Shares were held by Vodafone International Holdings (the 5<sup>th</sup> Defendant) and 350 Ordinary Shares by Vodacom Group Limited, a limited liability company incorporated in the Republic of South Africa. Accordingly, the Plaintiffs state that Vodafone Kenya (the 3<sup>rd</sup> Defendant) is a subsidiary which is partially owned and controlled by the Vodafone Group (the 2<sup>nd</sup> Defendant), and is the company through which the Vodafone Group holds an indirect interest in Safaricom (the 1<sup>st</sup> Defendant).

27. As at 26<sup>th</sup> May 2021, M-Pesa Holding (the 4<sup>th</sup> Defendant), had a **nominal share capital of KShs. 1,000,000/= divided into 50,000 Ordinary Shares of KShs. 20/= each**, all of which were held by Vodafone International Holdings, itself a 100% owned and controlled subsidiary of the Vodafone Group.

#### ***B. FACTS RELIED UPON:***

##### ***i. A History of the Conception and Design of the M-Pesa Service:***

28. From 6<sup>th</sup> March 2007 to date, Safaricom has operated and continues to operate an electronic money service known as "M-PESA", "Pesa" being the Kiswahili word for cash, while the "M" is short for "mobile". The Plaintiffs consider it useful to provide a contextual background to the conception and design of the M-Pesa Service, as they proceed to do hereinbelow.

29. Following the Millennium Summit of the United Nations held in New York in September 2000 and the adoption of the United Nations Millennium Declaration, all 189 United Nations Member States at that time, and at least 22 international organizations, committed to helping achieve the Millennium Development Goals by 2015. One of these goals- (*in fact*, Goal No. 1)- was to **"eradicate extreme poverty and**

**hunger**". Subsequently, the 2002 World Summit for Sustainable Development which took place in Johannesburg, South Africa between 26<sup>th</sup> August and 4<sup>th</sup> September 2002 recognized that:

*"eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries".*

30. As part of the Plan of Implementation of the 2002 World Summit for Sustainable Development, it was agreed, *inter alia*, to:

*"halve, by the year 2015, the proportion of the world's people whose income is less than \$1 a day and the proportion of people who suffer from hunger... and to promote the empowerment of people living in poverty and... enable them to increase access to productive resources, public services and institutions, in particular land, water, employment opportunities, credit, education and health".*

31. In an article titled *"M-PESA: Mobile Money for the "Unbanked" Turning Cellphones into 24-Hour Tellers in Kenya"*, Nick Hughes (a Vodafone executive who claims to have conceived the M-Pesa project in 2003 and who later headed a mobile payments team with the task of growing the business globally) and Susie Lonie (an m-commerce expert) wrote that:

*In March 2007, Kenya's largest mobile network operator, Safaricom (part of the Vodafone Group) launched M-Pesa, an innovative payment service for the unbanked.*

32. According to Hughes and Lonie as reported in the article, it was recognized that the M-Pesa Service needed to:

*"...accommodate the needs of customers who were unbanked, unconnected, often semi-literate, and who faced routine challenges to their physical and financial security."*

33. In the same article, Hughes stated as follows:

*I started my M-PESA journey at the World Summit for Sustainable Development in 2003 (sic). After spending an afternoon contributing to a*

*debate about how private sector organizations are driven by short term goals and thus don't typically address long-term sustainable development, I was approached by a representative of the U.K. government who controlled a challenge fund project set up by the Department for International Development (DFID). Our discussion centered on the following: Private sector organizations such as Vodafone are legally bound to use their shareholders capital to achieve the best returns. But many organizations use internal competition to allocate funds to their projects, and this competition is based on potential returns on investment. As a result, any initiatives that relate to the development agenda usually get squeezed out. Without wishing to overgeneralize, often the only place within an organization where the development agenda can ascend is in departments that are more concerned with stakeholder engagement, government relations, policy debate and corporate reputation. How could firms raise executive-level interest and get funding to develop products that will be non core and long term but do have some sort of sustainable development theme?*

*...What if a firm could use somebody else's capital to overcome the internal competition (one hurdle down) and a compelling proposition could be shaped that would give the company some comfort that the project was addressing a market of potential future value?* (Emphasis (underline) added)

*And so it was in a conference hall in Johannesburg that I first gave serious consideration to using a challenge fund to circumvent the constraints of our new product development processes. I must make it clear, these corporate processes are there for a very good reason—the management framework brings discipline to project development and helps ensure that funds are spent wisely for the shareholders...*

34. Following the conceiving and designing of M-PESA as a means of “banking the unbanked”, Safaricom launched a six-month M-PESA pilot program in Kenya on or about 11<sup>th</sup> October 2005, which was developed cooperatively between a number of



public and private entities. The design and development of the pilot program was realized through investments from the Vodafone Group and DFID in a partnership that involved a number of partnering organizations, with a Kenyan private commercial bank (Commercial Bank of Africa, later known as NCBA Bank following a merger with NIC Bank), managing the escrow account.

35. In the article *“M-PESA: Mobile Money for the “Unbanked” Turning Cellphones into 24-Hour Tellers in Kenya”* (earlier referred to in these pleadings), Lonie, (Hughes’s co-author who was said to be “the m-commerce expert who was brought into Kenya to work through the detailed design phase and project manage the overall delivery of the service from pilot into commercial operation)”, confirmed that the M-Pesa Service was “specifically targeting the unbanked”. In her own words:

*...We were specifically targeting the unbanked. So whatever we designed would need to operate in the absence of a consumer bank account. Therefore we needed to hold whatever real money was in the system in a bank somewhere on the customers’ behalf.* (Emphasis (underline) added)

*The e-money must always exactly match the real money or we could find ourselves in the unfortunate situation of creating currency. We partnered with CBA (Commercial Bank of Africa) in Kenya to provide whatever conventional banking services were required. The platform issues e-money to mirror real money in that bank account...*

36. Accordingly, based on the said article, Safaricom was well aware, right from the inception of the M-Pesa Service (and even during the pilot phase) that whatever real money was held by it was to be held in a bank in trust for the M-Pesa customers i.e., the M-Pesa Accountholders.

37. Lonie had this to say about the pilot phase of the M-Pesa Service:

*We also had to tackle any number of administrative requirements. Safaricom and Vodafone have formal, structured procedures that any new service introduction must follow, but for the pilot we had blithely ignored all but the most pressing of these with a view to getting the job done without drowning in bureaucracy. This was marginally acceptable for a*

*small pilot, but for a full commercial launch we had to resume playing by the rules. It took about four months to get the paperwork sufficiently buttoned down for a corporate launch.*

*Neither Safaricom nor Vodafone has a banking license. This means that management of the legal and regulatory structure of the business was a delicate matter. Many rounds of discussions with Kenyan and English lawyers, many straw men, and many heated debates later, we came out with a complex legal structure appropriate to running the M-PESA service in Kenya – operated locally by Safaricom, but owned, hosted, and developed by Vodafone. A new trust company was created.* (Emphasis (underline) added)

38. From the above passage, the Plaintiffs contend that:

- i. It was admitted that “neither Safaricom nor Vodafone” had a banking licence;
- ii. It was also admitted by Safaricom and Vodafone that “management of the legal and regulatory structure of the business was a delicate matter”.
- iii. Safaricom and Vodafone were aware that they had come out “with a complex legal structure appropriate to running the M-Pesa service in Kenya...”;
- iv. Both Safaricom and Vodafone admitted that the M-Pesa service was “operated locally by Safaricom, but owned, hosted, and developed by Vodafone”;
- v. Safaricom and Vodafone both acknowledged that “a new trust company was created”; and
- vi. Given that the initial Declaration of Trust - later described in these pleadings as the “2007 Trust” and demonstrated to have been a *sham* Trust- was drawn by Mr. Keith, he was fully aware of the nature of the

“complex legal structure appropriate to running the M-PESA service in Kenya” that resulted in the creation of the “new trust company” (i.e., M-Pesa Holding).

39. On the basis of paragraph 38(vi) of these pleadings, the Plaintiffs contend that Mr. Keith is placed squarely at the heart of all issues relating to the creation of the “complex legal structure” relation to the sham 2007 Trust, the sham 2008 Trust, the sham 2020 Trust and to M-Pesa Holding.

40. In the same article (*“M-PESA: Mobile Money for the “Unbanked” Turning Cellphones into 24-Hour Tellers in Kenya”*), Lonie made the following other observations regarding the M-Pesa Service:

*The Central Bank of Kenya clearly needed to be engaged regarding financial service regulation. We had met with the bank a few times during the pilot, although the numbers and consequent small risk made it of little interest to them. When we approached the Central Bank regarding the national launch, it was quite another matter. There followed a series of product demonstrations, requests for documentation, compilation of information, more questions, meetings of clarification, submission of a formal legal opinion, and so forth. E-money products such as M-PESA are new to Kenya so there is no clear regulation yet in place. Nevertheless, it was impressive how quickly the bankers’ questions progressed from fairly basic to insightful and quite tricky. But we had done our homework and eventually the bank confirmed that it had no objection to the service launching. Ten days after receiving this letter, we launched.* (Emphasis (underline) added)

*It is clear that regulation of services such as M-PESA will happen sooner rather than later. This is no bad thing for either consumers or service providers as long as the regulation protects the consumer against the risks involved. The better the regulator understands the capabilities and limitations of services like M-PESA, the better and more appropriate the regulation will be. It is our intention to work with the Central Bank to provide the information required to make informed decisions as formal controls are introduced.* (Emphasis (underline) added)

41. Based on the above article, it must also be understood to be the position of the Vodafone Group, Safaricom and the Central Bank:

- i. That the M-Pesa Service primarily targetted the “unbanked”, i.e., people who did not use or who did not have access to any traditional financial services, including consumer bank savings accounts, credit cards, or personal cheques, and who were physically and financially insecure, illiterate or semi-illiterate, extremely poor or otherwise socioeconomically marginalized.

(Within the Kenyan context, the term “unbanked” is understood to mean people who metaphorically or literally keep and hide their cash under the mattress either due to general unaffordability of banking services, inadequacy of the funds at disposal for the purpose of banking, lack of minimum knowledge or awareness as to how to bank, physical or other inaccessibility of banking services, etc.);

- ii. That in the design of the M-Pesa service both the Vodafone Group and Safaricom had clearly contemplated that upon the launch of the service, “real money” (i.e., actual money) paid by the M-PESA Accountholders to Safaricom’s M-Pesa Agents from time to time would be held in trust for the Accountholders;

- iii. That both the Vodafone Group and Safaricom knew or ought reasonably to have known that they were providing services which amounted to banking and/or financial business based on the definition of “banking business” and “financial business” in Section 2(1) of the Banking Act, and that they were therefore providing services which were regulated by the Central Bank;

- iv. That rather than the Central Bank, as regulator, providing “a formal legal opinion” on the M-Pesa service from Safaricom, it was comfortable instead with asking Safaricom- the entity to be regulated- for the “submission of a formal legal opinion” and relying on Safaricom’s opinion instead, despite knowing fully well:

- i. That as part of its regulatory duties and functions it had a legal duty to render the requisite opinion by itself and without recourse to any other authority or person except the Communications Authority and/or the Attorney General;
  - ii. That an opinion by Safaricom *ipso facto* lacked the independence and impartiality that the execution of the Central Bank's mandate as regulator called for; and
- v. That despite all the foregoing factual circumstances, the Central Bank confirmed that it "had no objection to the service launching".

42. Following the end of the pilot phase, Safaricom in partnership with the Vodafone Group ultimately launched M-PESA on 6<sup>th</sup> March 2007 as "an innovative payment service for the unbanked", with the tagline "Send Money Home". The service was allegedly aimed at making financial transactions faster, cheaper and more secure and, according to those who developed the service, it was deliberately targetted at people with low incomes, who did not feel comfortable interacting with commercial banks that typically target middle and upper income customers and which were typically geographically remote from them. The Plaintiffs contend that service was therefore designed to reduce the high cost of banking and instead develop an efficient, affordable banking infrastructure, thereby mitigating the persistence of poverty in rural Kenya.

43. Within the first month of the M-PESA E-Money Service (March 2007), Safaricom had registered over 20,000 M-PESA customers, well ahead of the targetted business plan. By 1<sup>st</sup> November 2007, it had registered 1,041,522 mobile active M-PESA users, and this number had grown to 22,600,000 Million active customers by March 2019.

***ii. The Central Bank's Regulatory Oversight Role in Relation to Safaricom in General, and the M-Pesa Service in Particular:***

44. The Central Bank was aware, right from the outset, that the M-Pesa Service model envisaged that upon receiving real money from M-Pesa Accountholders through M-Pesa Agents, Safaricom would in return give to the M-Pesa Accountholders electronic money or "E-Money" (i.e., money existing in banking computer systems primarily for

facilitating electronic transactions, and whose value would be backed by fiat currency and exchangeable, when need arose, into a physical, tangible form).

45. Given that Safaricom was not (and is not) a deposit-taking institution, it was also contemplated *in law and in fact*:

i. That the real money that would be paid to Safaricom by M-Pesa Accountholders from time to time would be held in trust for them as Beneficiaries; and

ii. That Safaricom as the legal owner of the real money would establish or, alternatively, appoint a legal entity in the form of a (genuine) Trust company to hold the M-Pesa Accountholders' real money in trust for their benefit as the beneficial owners of the real money.

46. The Central Bank was by law required to provide sufficient regulatory oversight in order to ensure that the M-Pesa Accountholders' funds were safeguarded at all times. The Central Bank wilfully and knowingly however 'turned a blind eye' to the fact that the said funds were being indiscriminately transferred between Safaricom and M-Pesa Holding and other associated entities including the Vodafone Group in circumstances where the Accountholders' funds were subjected to a real risk of not being backed by fiat currency, and not being exchangeable into real money as and when the Accountholders required to call in their funds.

47. In regard to the above, the Plaintiffs contend that the Central Bank had, *inter alia*, the following specific regulatory functions in relation to Safaricom and generally in relation to the M-Pesa Service as part of its (the Central Bank's) object to foster the liquidity, solvency and proper functioning of a stable market-based financial system and to support the Government's objectives for growth and employment:

i. Ensuring that M-Pesa Accountholders funds were at all times safeguarded and kept separately from money used in Safaricom's ordinary operations;

ii. Prudentially regulating Safaricom and the M-Pesa Service through, *inter alia*, requiring it to control risks by overseeing and ensuring that its

reporting and public disclosures requirements were met, and by reviewing the content of such reporting and disclosures;

- iii. Ensuring that Safaricom did not operate as a banking institution; and
- iv. Generally supervising and controlling Safaricom's processes so far as the M-Pesa Service was concerned.

iii. *State Capture of the Central Bank and the Ministry of Finance:*

(a) *The Well-Orchestrated and Synchronized Appointment of Professor Njuguna Ndung'u as Central Bank Governor as an Aspect of State Capture:*

48. The Plaintiffs aver that certain special interest groups as well as business and political elite positioned themselves by, *inter alia*, illegitimately influencing decision-making processes such as the appointment of Prof. Ndung'u, and by also frustrating the enactment of appropriate laws, policies and regulations, with a view to illegitimately facilitating Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding, Vodafone International Holdings, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ogutu, the M-Pesa Foundation and the Safaricom Foundation, to benefit themselves financially from the M-Pesa Service at the expense of M-Pesa Accountholders alongside select commercial banks including NCBA Bank Limited ("NCBA") and KCB Bank Kenya Limited ("KCB"), formerly known as Kenya Commercial Bank Limited.
49. The Plaintiffs contend that it is material and relevant for the purpose of this suit to note, and that it is not a coincidence, that Prof. Ndung'u was first appointed as Governor of the Central Bank by the then President Mwai Kibaki with effect from Sunday, 4<sup>th</sup> March 2007 (*vide*. Gazette Notice No. 1901 contained in Vol. CIX—No. 21 of the *Kenya Gazette* which was published on 2<sup>nd</sup> March 2007), and that the appointment took effect only one (1) working day before the launch of the M-Pesa Service on Tuesday, 6<sup>th</sup> March 2007.

***(b) The “Whitewashing” and “Window Dressing” of a Risk Assessment Audit of the M-Pesa Service Ordered by the Hon. Mr. John Michuki, Ag. Minister for Finance, as an Aspect of State Capture:***

50. The Plaintiffs contend that in December 2008, one (1) year and nine (9) months after the launch of the M-Pesa Service, the Government through the then Acting Minister for Finance the Hon. John Michuki raised serious concerns over the Service in relation to the safety of M-Pesa Accountholders’ funds, absence of a legal and regulatory framework to supervise M-Pesa operations, and possible money laundering.
51. On its part, the banking industry put up pressure against the Central Bank for the freezing of the financial activities of mobile money firms, also citing the absence of a legal framework. In this regard, the industry was particularly concerned about the probability of unfair competition between the M-Pesa Service and the banks, as well as the problematic question of how the owners of monies employed in the mobile money transfers business would be compensated in case there were financial losses.
52. Consequently, the Minister directed that the Service be subjected to a risk assessment audit by the Central Bank.
53. The Plaintiffs state that the fact that ordering of the auditing of the Service was at the Minister’s prompting rather than through an initiative of the Central Bank was *ipso facto* evidence of the Central Bank’s gross wilful neglect of and/or complicity in not carrying out its regulatory role.
54. The Plaintiffs further state that it is material and relevant for the purpose of this suit to note, and it is not a coincidence, that on Friday, 23<sup>rd</sup> January 2009, one and a half (1½) months after the Hon. Mr. Michuki had ordered the risk assessment audit of the M-Pesa Service and at a time when the outcome of the audit report had not been announced, President Kibaki abruptly transferred him from the Ministry of Finance to the Ministry of Environment and Natural Resources and replaced him with Mr. Uhuru Kenyatta.

***(c) State-Sanctioned Patronage of the M-Pesa Service by the Ministry of Finance as an Aspect of State Capture:***



55. On the following day, Saturday, 24<sup>th</sup> January 2009, the then Permanent Secretary in the Ministry of Finance, Mr. Joseph Kinyua, said in a statement that an audit by the Central Bank had found the M-Pesa Service to be “safe and reliable”.
56. The Plaintiffs contend that the timing of Mr. Kenyatta’s appointment as Minister for Finance on Friday, 23<sup>rd</sup> January 2009 as well as the making of the above statement by Mr. Kinyua barely a day later are material and relevant facts in relation to the Hon. Mr. Michuki’s removal from the Ministry of Finance and, more particularly, in view of his (the Hon. Mr. Michuki’s) order for the risk assessment audit of the M-Pesa Service in December 2008, just slightly over one month earlier.
57. The Plaintiffs state that Mr. Kinyua’s statement was carried in full-page articles in newspapers on Sunday, 25<sup>th</sup> January 2009 titled **“M-PESA MONEY TRANSFER SERVICES”**, although the whereabouts and contents of the actual Report of the audit remain unknown to the public to date.
58. The Plaintiffs reproduce hereinbelow the following excerpts from the said statement which they consider to be material and relevant for the purposes of this suit:

**REPUBLIC OF KENYA**  
**MINISTRY OF FINANCE**  
**M-PESA MONEY TRANSFER SERVICES**

1. *Since its inception in 2007, M-Pesa has rapidly developed to become one of the most dynamic innovations for delivery of financial services using modern Information and Communications Technology (ICT). This innovation makes Kenya a world leader in the use of mobile phones to transfer money. To appreciate its rapid growth in popularity, it is important to note that the number of registered Kenyan (sic) using the M-Pesa service regularly has grown rapidly to reach close to 5 million persons last year.*
2. *However, the adoption and growth of M-Pesa services has not only continued to draw public attention but has also generated a lot of debate as to the safety and reliability of these kinds of payments and transfer systems and what the*

*Government is doing about it. Among the questions in the minds of many Kenyans are: How does the M-Pesa money transfer service really operate and is it safe and reliable? Does M-Pesa compete with commercial banks? Should it be regulated?*

3. *It is for this reason that it has become necessary for the Treasury to provide an audit of the M-Pesa system in order to clear any doubts in the minds of the public regarding its safety and reliability, and provide information about its effectiveness as well as the soundness of the operating platform for M-Pesa and other similar services wishing to enter the market.*
4. *The purpose of this note is to therefore, provide insights as to how this innovative money transfer service has developed, how it has enabled the transfer of funds to the unbanked and how the Central Bank of Kenya (CBK) continues to oversee its operations in order to ensure their safety and efficiency.*
  - 
  - 
  -
5. *...One clear advantage of M-Pesa is that it offers the prospect of providing money transfer services to people who are not in a position to open a bank account... In this way, the M-Pesa service has been able to reach the unbanked Kenyans including those in the marginalized areas where formal banking services are non-existent.*
6. *Today, many Kenyans are using the M-Pesa service to conveniently (sic) transfer money safely, efficiently and effectively...*
7. *Prior to the launch of M-Pesa services in Kenya, Safaricom sought authorization from the Central Bank of Kenya (CBK) to undertake the money transfer service. In evaluating the proposal, the CBK considered the request on the basis of safety, reliability and efficiency of the service. In addition, precautionary measures were put in place to ensure that the services did not*

*infringe upon the banking services regulatory framework as provided for under Section 2(1) of the Banking Act. The M-Pesa service therefore does not:*

- i. *Accept from members of the public money or deposits that are repayable on demand or at the expiry of a fixed period or after notice;*
  - ii. *Accept from members of the public money for current account purposes that is used for payment and acceptance of cheques; and*
  - iii. *Employ money held or any part of the money for purposes of lending and investment or in any other manner for the account and at the risk of the person so employing the money.*
8. *In M-Pesa, money collected by agents is deposited in a trust account in one of the leading commercial banks in Kenya. This trust account provides the legal protection for the beneficiaries. The money in this trust account is not under the control of Safaricom and cannot be employed for purposes such as lending, investing or in any other manner for the account and at the risk of Safaricom as per Section 2(1) of the Banking Act. Legal protection of the money in the trust account is provided for in the trustee (sic) deed. Various legal instruments pertaining to this service, including the trustee (sic) deed have been presented to the Central Bank and reviewed accordingly. Further to this, funds in the trust account deposited in the designated commercial bank are regulated by the Central Bank of Kenya under the Banking Act.*
9. *The Trustee holds funds on behalf of all M-Pesa System participants under a Declaration of Trust (the Trust Deed). Highlights of the Trust Deed are:*
  - i. *The Trustee holds all amounts which constitute the Trust Fund on trust for the System Participants.*
  - ii. *The beneficial entitlement of each System Participant to the Trust Fund at any time shall be to such amount of the Trust Fund in conventional money as is equal to the amount of e-Money in the M-Pesa Account of such System Participant at such time.*
  - iii. *.....*

- iv. *The amounts constituting the Trust Fund shall be held by the Trustee in a reputable commercial bank.*
  - v. ....
  - vi. ....
10. *A number of critical issues and risks that have been reviewed include: liquidity management, settlement risks, the reliability of the system, the registration of users, system audit trail, anti-money laundering measures and consumer protection issues that could compromise the safety, efficiency, integrity and effectiveness of the M-Pesa system. These risks have been mitigated through a number of measures which the Central Bank and the Communications Commission of Kenya (CCK) monitors regularly.*
  11. *For example, there is no credit risk... Moreover, Safaricom is part of the Vodafone group, an international and reputable multinational in the provision of mobile phone services. The M-Pesa product benefits from the research and development of Vodafone and as such, the operational risks are minimal if not non-existent.*
  12. *The Central Bank of Kenya has continued to oversee the service in line with its Oversight Policy Framework document on payment systems in Kenya...*
  13. *To further provide a sound legal basis for payment systems in Kenya, the CBK and the Treasury have been refining several legal and regulatory measures aimed at promoting safety, efficiency and effectiveness of payment systems in Kenya. One such effort is the review of the Central Bank Act in the year 2003 to include Section 4A1(D) that mandates the CBK to promote such policies as to best promote the establishment, regulation and supervision of efficient and effective payment, clearing and payment systems. Currently the Bank has proposed and formulated the enactment of the National Payment System Bill that will strengthen the above mandate by inter alia expressly providing for the oversight of all Payment systems including money transfer services. The Bill will soon be tabled in Parliament for enactment into Law.*

14. *It is also noteworthy that the recently enacted Kenya Communications (Amendment) Act 2008 expanded the functions of the CCK in relation to electronic transactions and provides legal recognition of electronic transactions. The Act not only legalizes electronic transactions but it also enables the CBK and CCK to work together and support this system including other such products that may come in future to the market.*
15. *With respect to competition with the commercial banks, there is no evidence to support such an allegation. In any case, there is nothing wrong with competition as long as it is underpinned by a level playing field. According to a study funded by the Department for International Development (DFID) of the UK, while 55 percent of adult Kenyans have access to a mobile phone, only 19 percent are banked. There is therefore a huge market that has access to mobile phones but financial services and M-Pesa is helping fill this gap. It is also laudable to note that some commercial banks and other service providers are now partnering with M-Pesa with a view to complementing each other and leveraging on the M-Pesa outreach.*
16. *This audit by the Central Bank on M-Pesa system provides comfort to the Treasury and I would like to assure Kenyans that this innovative idea of money transfer through mobile phones is safe and reliable. I wish therefore, to reiterate that the Treasury and the Central Bank of Kenya are committed to promoting safe and efficient innovations that enhance access to financial services thereby addressing the challenge of financial exclusion occasioned by infrastructural constraints to formal banking services. At the same time, the Treasury and the Central Bank will continue to oversee its safety and reliability as the innovations in the system and outreach progresses.*

*Joseph Kinyua  
Permanent Secretary  
Treasury.*

*January 24, 2009*

**PARTICULARS OF FRAUDULENT MISREPRESENTATION AND MATERIAL NON-DISCLOSURE OF FACTS BY THE GOVERNMENT OF KENYA THROUGH THE THEN PERMANENT SECRETARY, MINISTRY OF FINANCE (“TREASURY”), MR. JOSEPH KINYUA, IN RELATION TO THE RISK ASSESSMENT AUDIT ON THE M-PESA SERVICE:**

59. The Government of Kenya through Mr. Kinyua as the then Permanent Secretary in the Ministry of Finance (“Treasury”) was guilty of fraudulent misrepresentation and material non-disclosure of facts in relation to the risk assessment audit ordered by the Hon. Mr. Michuki as Acting Minister for Finance in:

- a. Falsely stating or causing to be stated that the M-Pesa Service was sound, safe and reliable when they knew that the Service was unsafe and unreliable in that funds belonging to M-Pesa Accountholders were invested by Safaricom, M-Pesa Holding and other entities in circumstances which amounted to unjust enrichment and in breach of the law of trusts, with a view to falsely persuading the public in general, and M-Pesa Accountholders and Safaricom shareholders of the soundness, safety and reliability of the Service;
- b. Falsely stating or causing to be stated that the M-Pesa Service was not in competition with commercial banks, when the Service *in fact* (and, at any rate, through the *Fuliza* service) undertook banking business and financial business as defined in Section 2 of the Banking Act and infringed upon the banking services regulatory framework, in particular the employing of money by lending, investment and in other ways for Safaricom’s account and at its risk;
- c. Suggesting that no need arose for the regulation of the M-Pesa Service when there was, *in fact*, dire need for regulation in order to protect the rights of the marginalized, and in particular the “unbanked” M-Pesa Accountholders;
- d. Deliberately giving the false impression that the M-Pesa Service had lawfully and safely enabled the transfer of funds to the “unbanked”, while in actual fact the transfer of funds was effected in a milieu of illegality and unlawfulness, through the investment of M-Pesa Accountholders’ funds at the expense of the Accountholders by Safaricom, M-Pesa Holding, the Vodafone Group and other associated Defendants in this suit;

- e. Creating the false impression that the Central Bank oversaw the operations of the M-Pesa Service on a sustained and effective basis, when *in fact* such oversight amounted to no more than a token show and was without any regard for the safety and efficiency of the Service;
- f. Falsely misrepresenting that prior to the launch of the M-Pesa Services, Safaricom had sought and obtained authorization from the Central Bank to undertake the money transfer service after complying with the various preconditions which the Central Bank had set, when *in fact* Safaricom had not complied with certain preconditions, in particular:
  - (i) Putting in place appropriate measures to protect customers against fraud and loss of money;
  - (ii) Providing adequate measures to guard against money laundering and related crimes;
  - (iii) Keeping and making available proper records to regulatory authorities; and
  - (iv) Ensuring that the M-Pesa Service observed all existing laws governing its relationship with its agents and customers.
- g. Falsely misrepresenting that the “trust account in one of the leading commercial banks” into which money collected by M-Pesa agents was deposited was a “trust account” as known in the law of trusts, when in fact the so-called “trust account” amounted to a sham trust;
- h. Falsely stating that the money in the alleged trust account was “not under the control of Safaricom” and could not “be employed for purposes such as lending, investing or in any other manner for the account and at the risk of Safaricom as per Section 2(1) of the Banking Act”, when *in fact* the money or income derived from such money was ultimately so lent and on-lent, without amending the law to allow Safaricom to engage in banking services and financial services;

- i. Further falsely stating that the money in the alleged trust account was “not under the control of Safaricom” and could not “be employed for purposes such as lending, investing or in any other manner for the account and at the risk of Safaricom as per Section 2(1) of the Banking Act”, when *in fact* the part of the money or income derived from such money was ultimately paid to Safaricom’s related companies and entities in the form of “donations”, in clear contravention of the law;
- j. Also falsely stating that the money in the alleged trust account was “not under the control of Safaricom” when *in fact* through a sham trust dated the 19<sup>th</sup> June 2008, it had been provided that M-Pesa Holding (which was supposed to hold the money as Trustee) “...shall enter into a management agreement with Safaricom (“the Management Agreement” appointing Safaricom...” as its agent for the purposes of, *inter alia*, “...operating the commercial bank accounts maintained” by M-Pesa Holding, and that “authorized Safaricom personnel” would be “named as signatories on the bank mandates for such accounts”, in clear negation of the principle of ‘arm’s length’ dealings between an Appointor and a Trustee in the law of trusts;
- k. Misrepresenting the highlights of the Trust Deed referred to at paragraph 9 of his Statement, and fraudulently failing to disclose the Statement that the so-called “Trust Deed” or “Declaration of Trust” presented to the Central Bank for review had been found not to pass the test in terms of adequately safeguarding and legally protecting M-Pesa Accountholders’ funds;
- l. Fraudulently misrepresenting that funds belonging to M-Pesa Accountholders’ which were deposited in the so-called the trust account in the designated commercial bank were the subject of sustained and meaningful regulation by the Central Bank of Kenya under the Banking Act;
- m. Further fraudulently misrepresenting that the said funds were held by a “Trustee” on behalf of all M-Pesa System participants under a (valid) Declaration of Trust, when the Government and Mr. Kinyua knew or ought reasonably to have known that the so-called Trust amounted to a *sham trust* in



- which M-Pesa Accountholders' funds were liable to intermeddling and commingling and were invested by Safaricom and the so-called Trustee at the expense and to the gross detriment of the Accountholders;
- n. Falsely misrepresenting that various critical issues and risks that could compromise the safety, efficiency, integrity and effectiveness of the M-Pesa Service- in particular liquidity management, the reliability of the system, the registration of users, system audit trail, anti-money laundering measures and consumer protection issues- had been adequately addressed and were regularly monitored, when *in fact* they had not been so addressed and were not monitored regularly or at all by the Central Bank and/or the Communications Authority;
  - o. Further falsely misrepresenting that the Central bank provided meaningful oversight of the M-Pesa Service through the Bank's Oversight Policy Framework document on payment systems;
  - p. Falsely misrepresenting that there was no credit risk in the M-Pesa Service when there *in fact* was a real credit risk by virtue of the fact that the funds to which M-Pesa Accountholders were entitled included the investment income and interest derived from such funds which were routinely being diverted by Safaricom and M-Pesa Holding to associated entities including the Vodafone Group, a fact which the Ministry for Finance and Mr. Kinyua knew or ought reasonably to have known;
  - q. Falsely and fraudulently misrepresenting Safaricom as 'infallible' by the mere fact that it was part of the Vodafone Group and, by extension, falsely and fraudulently misrepresenting the Vodafone Group as "an international and reputable multinational in the provision of mobile phone services", when Mr. Kinyua and the Ministry for Finance had information that the Vodafone Group was the ultimate recipient of investment income and interest derived from monies paid into the M-Pesa Service by M-Pesa Accountholders, most of whom were the "unbanked";

- r. Falsely and fraudulently misrepresenting that the operational risks of the M-Pesa Service “are minimal if not non-existent” by virtue of the mere fact that the Service benefitted from the research and development of Vodafone Group;
- s. Making believe that the Central Bank had “...formulated the enactment of the National Payment System Bill” with a view to providing for the oversight of all payment systems including money transfer services, when the Bill was *in fact* a “pipe dream” as at the date of making the statement;
- t. Falsely misrepresenting that there was no competition between the M-Pesa Service and commercial banks, and that there was no evidence to support an argument about the existence of such competition;
- u. Dishonestly and selectively drumming up support for some commercial banks and other service providers who were partnering with M-Pesa at the expense of the entire banking industry;
- v. Fraudulently misrepresenting that the so-called audit by the Central Bank on M-Pesa Service had provided “comfort to the Treasury” and that the Service was “safe and reliable” when both Mr. Kinyua and the Ministry of Finance knew or ought reasonably to have known that M-Pesa Accountholders’ funds were being used to generate investment income and interest for the benefit of Safaricom, the Vodafone Group and M-Pesa Holding at the expense of the Accountholders and in criminal circumstances;
- w. Knowingly and falsely misrepresenting that the Treasury and the Central Bank had effectively addressed the challenge of financial exclusion when it was reasonably foreseeable that the M-Pesa Service would result in more financial exclusion for the “unbanked”, and that it did *in fact* ultimately result in such exclusion through predatory lending, liberalization of gambling, and the theft of investment income and interest derived from M-Pesa Accountholders’ funds by Safaricom, the Vodafone Group and M-Pesa Holding; and

- x. Failing to disqualify himself from giving “the Government’s statement” on the safety and reliability of the M-Pesa Service in view of the fact that he stood in a position of clear and actual conflict of interest, being himself at the time a sitting Director of Safaricom.

60. Accordingly, the Plaintiffs further contend that Mr. Kinyua’s statement was well-choreographed and orchestrated to surreptitiously produce a desired effect, namely to make the public in general, and the unbanked in particular, to believe that the M-Pesa Service was, in effect, absolutely risk-free, safe and reliable.

***(d) State-Sanctioned Patronage of the M-Pesa Service by the Central Bank as an Aspect of State Capture:***

61. Barely three (3) days later, on Tuesday, 27<sup>th</sup> January 2009, the Central Bank under the Governorship of Prof. Ndung’u published full-page statements in the daily newspapers in which the Bank’s cross-cutting theme was, like that of the Ministry of Finance, about its duty in relation to the “safety”, “reliability”, “effectiveness” and “efficiency” of new financial services products. The Plaintiffs state that this was also a well-choreographed and orchestrated statement made with the intention of validating Mr. Kinyua’s statement that the Central Bank had found the M-Pesa Service to be absolutely risk-free, “safe and reliable”.

62. The Plaintiffs reproduce hereinbelow the statement by the Central Bank, which they consider to be material and relevant for the purposes of this suit:

**BANK  
KUU YA  
KENYA**

**CENTRAL  
BANK OF  
KENYA**

**MOBILE PHONE SERVICES IN KENYA**

1. *It has become necessary for the Central Bank of Kenya to issue a statement on mobile phone financial services in view of the continued media and public attention this issue is drawing. At the onset, the Central Bank welcomes innovation that has been introduced in Kenya’s financial sector through the use of mobile telephony. Whereas this interest in mobile phone financial*

*services is welcome, the Central Bank considers it necessary to shed more light on assertions being made in the media on its role in licensing mobile financial services products.*

- 2. At the very outset, it is important to note that the Central Bank of Kenya currently has regulatory oversight over banks, non-bank financial institutions, mortgage finance institutions licensed under the Banking Act and Foreign Exchange Bureaus licensed under the Central Bank of Kenya Act. The Bank also since May 2008 has had regulatory oversight over Deposit Taking Microfinance Institutions. The Central Bank therefore has no regulatory oversight role over mobile service providers, licensed by the Communications Commission of Kenya (CCK). The Central Bank's point of interaction with mobile phone providers (sic) is through its licensee commercial banks who offer a platform for mobile phone financial services.*
- 3. It is also important at this juncture to trace the genesis of mobile phone banking in Kenya. In 2005, a development agency requested for proposals from interested parties on the cost effective ways of deepening Kenya's financial sector through enhanced access to financial services and products. Safaricom, a mobile service provider in collaboration with Vodafone U.K., one regulated commercial bank and two microfinance institutions submitted a proposal based on the use of mobile phones to transfer money.*
- 4. The development agency found the proposal to be successful and a pilot of the mobile money transfer system was conducted in 2005/6. Before the pilot run, the regulated commercial bank requested the Central Bank for a go-ahead. The Central Bank agreed to the pilot run after discussions with the concerned commercial bank and a review of the proposed product. The pilot run was successful and the Central Bank was then approached in August 2006 with a proposal for a commercial launch of the product, "M-Pesa".*
- 5. The product was subjected to a thorough due diligence from August 2006 to March 2007 when it was launched. The due diligence focused on the requisite legal and regulatory framework, product feasibility, customer identification*

*procedures and product/customer/Agent security. However the principal concern of CBK related to the need for an enabling legal and regulatory framework for mobile banking to protect the interest of consumers and ensure sustainability of the product. An enabling regulatory framework for mobile banking should also incorporate a legal framework for oversight of payment systems, electronic contracting, money laundering, consumer protection and Information and Communication Technology (ICT).*

- 6. It is however noteworthy that regulation generally lags behind innovation and a pragmatic approach was adopted with regard to the review of M-Pesa. The Central Bank, therefore, required that safeguards be put in place to address money laundering, consumer protection, product and agent security concerns before the product was launched.*
- 7. Coming to the present, there have been reports in the media linked to the proposed launch of a mobile banking solution by Zain in partnership with regulated commercial banks. The Central Bank has noted the unfortunate media reports implying that it is denying or delaying the issuance of a license to Zain. We once again underscore that CBK has no direct relationship whatsoever with Zain or licensing the services it wishes to launch.*
- 8. The application under consideration by the Central Bank is from a commercial bank that proposes to partner with Zain in providing a mobile banking and payment solution. The application has already been reviewed in accordance with statutory and prudential requirements governing licensed banks. A similar due diligence process as was applied with M-Pesa has also been undertaken. Matters requiring to be addressed have already been brought to the attention of the applicant bank. The Central Bank has a cardinal duty to ensure that products introduced by banks are safe, efficient and that the public interest is protected.*
- 9. It is therefore very unfortunate that issues that are purely of a regulatory nature are being distorted and used to smear the credibility of the Central Bank or to create a marketing platform via sympathy. The Bank will not waver in*

*safeguarding the public interest by ensuring the stability, safety, efficiency and reliability of the banking sector.*

10. *The Central Bank will also continue working with relevant players in the ongoing development of a comprehensive legal framework covering oversight of payment systems, electronic contracting, money laundering, consumer protection and Information and Communication Technology (ICT). This framework will further bolster the development of payment systems that leverage on technology to enhance access of Kenyans to financial services. The Central Bank, therefore, welcomes the introduction of such products in the Kenyan market and will ensure that the necessary safeguards to protect the interests of Kenyans are put in place before they are launched.*

**CENTRAL BANK OF KENYA**

**27<sup>TH</sup> JANUARY 2009**

63. The Plaintiffs state that various acts of **impropriety and other culpable conduct** were knowingly committed by the Central Bank in the administration of its regulatory role with a view to deliberately assisting Safaricom, the “concerned commercial bank” with which Safaricom had partnered, and the M-Pesa Service in the commission of financial crimes and other tortious conduct against the M-Pesa Accountholders.
64. The acts of impropriety and other culpable conduct on the part of the Central Bank amounted to a violation of the national values and principles of governance set out in Article 10 of the 2010 Constitution. Although the said values and principles were only written into the Constitution in the year 2010, they predated the 2010 Constitution and existed as a set of unwritten constitutional rules, values and principles derived from a general or common practice even during the regime of the repealed Constitution.

**ACTS OF IMPROPRIETY AND OTHER CULPABLE CONDUCT AMOUNTING TO A VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ON THE PART OF THE CENTRAL BANK:**

65. From the outset, the statement by the Central Bank on mobile phone financial services was issued (as admitted in the statement itself) only as a result of “the continued media and public attention” that the issue had drawn. This reactive issuance of the statement was a violation of the principle of the rule of law, and was intended to exclude other players in the mobile phone financial services domain and to perpetrate social injustice, inequality, and discrimination.
66. Absent the media and public attention that the issue had generated- based on genuine and serious concerns (namely, the safety of M-Pesa Accountholders’ funds, the absence of a legal and regulatory framework to supervise M-Pesa operations, and possible money laundering)- it is reasonable to presume that the Central Bank would not have issued the statement in question.
67. The Central Bank’s failure to address the concerns raised by the Hon. Mr. Michuki- in particular issues relating to the necessity for the taking of measures to prevent money laundering and the need to protect consumers of the M-Pesa Service- was an affront to the national values and principles of governance relating to good governance, integrity, transparency and accountability.
68. The Plaintiffs also contend that without the media and public attention, the Central Bank’s approval of Zain to provide a money transfer service in competition with Safaricom would have been long in coming, or would have been denied altogether.
69. Further to the foregoing, the Plaintiffs state that the statement by the Central Bank on mobile phone services in Kenya was improper and intended to portray Safaricom, the M-Pesa Service and the commercial bank with which Safaricom was dealing as “safe”, “reliable”, “effective” and “efficient” at the expense of Zain and other mobile telephone service providers, in conjunction with other willing commercial banks. The ultimate objective was to put paid attempts by all other e-money service providers and the commercial banks associating with them from introducing and providing similar financial services and products, thereby effectively creating a monopoly for Safaricom, its associated commercial bank, and the M-Pesa Service.

70. Taking at face value the assertion (as admitted by the Central Bank in its own statement) that the Bank did not have a “regulatory oversight role over mobile service providers” as at January 2009, close to two (2) years after the M-Pesa Service was launched, the Plaintiffs contend that such lack of regulatory oversight was deliberate. The Plaintiffs further contend the lack of oversight was calculated to further create an enabling environment for Safaricom, NCBA as its associated commercial bank, and the M-Pesa Service to carry on their monopolistic exploits in a classical Kenyan rendition of the Japanese aphorism “see no evil, hear no evil, speak no evil”.
71. Without prejudice to the foregoing and in the alternative the Plaintiffs contend, contrary to the Central Bank’s assertion, that it did *in fact* have a regulatory oversight role to play in relation to mobile phone financial service providers. In this regard the Plaintiffs contend that the existence of such a regulatory oversight role was, by necessary implication, the basis upon which the Central Bank stated that it had conducted a “thorough due diligence” focusing, *inter alia*, on “the requisite legal and regulatory framework” and ultimately gave Safaricom a “letter of no objection” (subject to certain conditions) prior to Safaricom launching the M-Pesa Service, and that the oversight role was a shared responsibility between the Central Bank and the Communications Commission. The Plaintiffs contend that the Central Bank failed to conduct the “thorough due diligence” which it claimed to have conducted and which had in the first place been instigated by Mr. Michuki rather than by Central Bank itself. The Plaintiffs state that the so-called “thorough due diligence” amounted to no more than mere lip service, and that the Central Bank wilfully failed and/or neglected to effectively play its oversight role.
72. It is curious, in the above regard, that the Communications Commission did not issue any statement in respect of its regulatory oversight role regarding mobile phone financial service providers coterminously with the issuance of the Central Bank’s statement.
73. The Plaintiffs contend that the Central Bank’s reference to a “regulated commercial bank” as having partnered with Safaricom in the development and ultimate launch of mobile financial services and products without naming the “concerned commercial bank” was a mischievous attempt to hide the identity of the commercial bank. This is



particularly so given the fact that as at the date of the Central Bank's statement, the commercial bank in question had been in partnership with Safaricom in providing the mobile financial services and products for close to two (2) years, exclusive of the pilot phase.

74. Accordingly, it is inferred that the intention of hiding the identity of NCBA as Safaricom's associated commercial bank was to shield the bank from negative publicity and possible loss of profits in connection with its partnership with Safaricom in the M-Pesa business.
75. While it is true that "regulation generally lags behind innovation", the Central Bank wilfully defaulted and/or grossly neglected to effectively discharge its constitutional and statutory obligations by failing to take measures for the timely putting in place of an effective legal and regulatory framework with a view to ensuring, *inter alia*, appropriate customer protection measures against fraud, loss of money, money laundering, and the like.
76. Despite the Central Bank's claim that it would "continue working with relevant players in the ongoing development of a comprehensive legal framework...", there was no meaningful development and enforcement of such a framework in relation to oversight of payment systems, money laundering and consumer protection. The result of such failure was that the "unbanked" who were the primary target of the M-Pesa Service were marginalized and pushed further to the brink, as the Plaintiffs demonstrate further below in these pleadings.
77. Accordingly, the Plaintiffs contend that the Central Bank was in breach of its statutory duty under Section 50 of the Central Bank of Kenya Act in failing to advise the Minister for Finance on the questions of safety of M-Pesa Accountholders' funds, the absence of a legal and regulatory framework to supervise M-Pesa operations, and possible money laundering, being matters in which in the Central Bank was concerned and which, viewed objectively, were in the Central Bank's opinion likely to affect the achievement of its principal objects. The Central Bank's failure was deliberate and further intended to unfairly assist and give undue advantage to

Safaricom, the “concerned regulated bank” with which Safaricom partnered, and the M-Pesa Service.

78. Among these principal objects on which the Central Bank failed to advise the Minister for Finance was the impact of the M-Pesa Service in relation to the formulation and implementation of a monetary policy directed to achieving and maintaining stability in the general level of prices and the fostering of liquidity. The Central Bank also failed to advise the Minister on solvency and the proper functioning of a stable market-based financial system, as well as on support for the Government’s economic policy, including its objectives for growth and employment.
79. Accordingly, the Plaintiffs contend that the Central Bank, through its then Governor Prof. Njuguna Ndung’u, abdicated its regulatory role by showing open and unbridled support for the M-Pesa Service without providing any corresponding regulation or oversight in respect of the Service, and in total disregard of the plight of the “unbanked”. The Plaintiffs reiterate that it is particularly noteworthy that as at the date of the Central Bank’s statement in January 2009, the M-Pesa Service had been fully operational for close to two (2) years without any legislation or other regulatory framework in place. This is also noteworthy when viewed against the fact that the Central Bank had not made any push for regulation of the mobile phone financial services sector.
80. Against the background of this unregulated business environment, Safaricom was emboldened to claim in a document by Ms. Betty Mwangi (then Chief Officer- New Products Division at Safaricom) dated September 2009 and titled “***M-Pesa: Transforming the Lives of Kenyans***”, *inter alia*, that “CBK provides an oversight of M-Pesa” and that CBK was “consulted from pilot stage to full commercial launch”. The reference to “CBK” was understood to be a reference to the Central Bank, the 19<sup>th</sup> Defendant in this suit.
81. The claim that the Central Bank provided “oversight of M-Pesa” *in fact* amounted to no more than deceit and trickery of the general public, which was being touted at the behest of Safaricom. On its part, the Central Bank as the regulator played along and merely paid lip service to the claim that it was providing “oversight of M-Pesa”, as

part of a well-choreographed State-sanctioned patronage. It is therefore a false proposition for Safaricom to claim that the Central Bank provided any meaningful oversight of the M-Pesa Service whatsoever during the said period, or even for a considerable number of years following the launch of the M-Pesa Service.

***(e) The Reappointment of Prof. Ndung'u to the Office of Governor of the Central Bank for a Second Term as an Aspect of State Capture:***

82. From the outset, it is material and relevant for the purpose of this suit to note, and it is not a coincidence, that Prof. Ndung'u's reappointment as Governor of the Central Bank by President Kibaki in March 2011 for a further term of (4) years received approval from the Government through strong personal praise by the then Minister for Finance Uhuru Kenyatta.
83. Prof. Ndung'u's reappointment process was *in fact* challenged in the Kenyan National Assembly due to the failure of President Kibaki (as the appointing authority) to construe Section 13 of the Central Bank of Kenya Act with the alterations, adaptations, qualifications and exceptions that were necessary to include transparency and competition as national values and principles of governance and of public service in the reappointment process, as contemplated in Article 10(1) and (2)(c) and Article 232(f) and (g) as read with Section 7(1) of the Sixth Schedule of the 2010 Constitution.
84. Prof. Ndung'u's reappointment was strongly opposed in the National Assembly, including by the Constitutional Implementation Oversight Committee. The reappointment was however vigorously supported by several Members of Parliament including the then Assistant Minister for Finance Oburu Odinga. Ultimately, Prof. Ndung'u was reappointed to serve a second four (4) year term as Governor of the Central Bank, until March 2015.
85. Against this background, the National Assembly nevertheless pushed for amendments to the Central Bank of Kenya Act in order to expressly provide for a transparent and competitive process and parliamentary approval in the appointment of the Governor of the Central Bank. This push for legislative reforms eventually bore fruit through the enactment of the Finance Act, 2012 (No. 4 of 2012) and the Central Bank of Kenya (Amendment) Act, 2012 (No. 36 of 2012), during the tenure of the Hon.

Njeru Githae as Minister for Finance who succeeded the Hon. Uhuru Kenyatta following the latter's resignation from the position in January 2012.

86. Even following the end of his tenure at the Central Bank in March 2015, Prof. Ndung'u continued to show open and unbridled support for the M-Pesa Service, consistently maintaining a 'gatekeeping' or 'apologist' role in support of the service; metaphorically speaking, playing the pipe to the tune. For instance:

- i. In July 2017, in a policy memo titled "*M-Pesa – A Success Story of Digital Financial Inclusion*", he claimed that the results of dramatic change in financial development and inclusion in Kenya could be seen from 2009;
- ii. In the same memo, he falsely stated that "*M-Pesa as a payments and money transfer platform was developed jointly by Safaricom, a telco company, and the Commercial Bank of Africa*";
- iii. He further made a false representation, as shall be demonstrated later in these pleadings, to the effect that the law of trusts was invoked in the development of a Trust Account when *in fact* the development of the Account was antithetical to the law of trusts;
- iv. Additionally, he falsely represented that the Trust Account was "under the custody of trustees" when, under his watch, *sham* Trust instruments were signed between Safaricom and M-Pesa Holding which contained clawback clauses relating to Trustees' powers, which were 'donated' back to Safaricom. To quote Prof. Ndung'u's own words in the policy memo:

*"the CBK, provided two forward looking propositions and actions. First, a team of legal experts from the Central Bank developed a Trust Account invoking the Trust Law. This allowed the M-Pesa product to take off and the trust account became the technological transactions platform..."*

*The supervisory authorities decided to operate the payments platform as a trust account at the commercial bank, subject to regulation by the CBK and the stipulations of the Trust Law. Once*

*the electronic money was stored in the SIM card, it was simultaneously loaded into the trust account at the Commercial Bank of Africa and this account was under the custody of trustees. In other words, the trust account was not a Safaricom business account. Safaricom could not access the funds and the trust account is not part of Safaricom's balance sheet. So if (sic) the case of a Safaricom bankruptcy, the funds would still be protected from any Safaricom creditors. The use of a trust account connects the payments system platform to a commercial bank, thus separating regulatory issues and providing the market with confidence";*

- v. In a presentation to the Bank of Korea in November 2018 titled "*M-Pesa- An Instrument of Financial Inclusion, Digitization and The Emergence of Fintechs*", he strongly rooted for M-Pesa as an important instrument for financial inclusion in Kenya; and
- vi. Subsequently in a policy brief in February 2019 (titled "*Could Taxation of Mobile Banking in Africa Stall Financial Inclusion?*"), and again in another policy brief in August of the same year (titled "*Taxing Mobile Phone Transactions in Africa: Lessons from Kenya*"), he also argued against the taxing of mobile phone transactions, saying that doing so was likely to reverse the gains on retail electronic payments and financial inclusion.

***iv. The Making of a Conspiracy by Safaricom, the Vodafone Group, Vodafone International Holdings and M-Pesa Holding to Steal M-Pesa Accountholders' Money, Interest and Investment Income and to Hide the Identity of the Persons Ultimately Benefitting from the Stolen Wealth:***

87. Only Safaricom, as the "legal owner" of the real money paid to it by M-Pesa Accountholders (the phrase "legal owner" here being used in the sense of *the legal person holding title to real money which however belonged to, and was supposed to be held for the benefit of, M-Pesa Accountholders, in contradistinction to "beneficial owner"*) could *in law* properly establish a Trust as Settlor and appoint a Trustee or Trustees in favour of the M-Pesa Accountholders as Beneficiaries. The only other alternative way for the

real money paid to Safaricom by the M-Pesa Accountholders to be lawfully held was for Safaricom to constitute *itself* Trustee of such money.

88. The Plaintiffs however contend that on 11<sup>th</sup> September 2006 (approximately 6 months before the launch of the M-Pesa Service), M-Pesa Holding was incorporated ostensibly as a “Trust company”. In reality, however, the clear intention of M-Pesa Holding’s incorporation as a “Trust company” was to ultimately steal real money belonging to, and interest and investment income accruing to, M-Pesa Accountholders once the M-Pesa Service was launched through the creation of *sham trusts* as the Plaintiffs demonstrate further in these pleadings.
89. The Plaintiffs further contend that the incorporation of M-Pesa Holding was at all times material to this suit intended and calculated to hide the identity of the real persons who would ultimately benefit from such stolen wealth.
90. From the outset, the Plaintiffs therefore contend that from the circumstances set out below, there are substantial grounds for lifting the corporate veil in respect of M-Pesa Holding, Safaricom, the Vodafone Group and other associated corporations and legal entities, and consequently holding their Directors personally liable for the companies’ actions. Such liability is without any prejudice whatsoever to the liability of the other Defendants in this suit.
91. In addition to the foregoing, the Plaintiffs contend that M-Pesa Holding’s liability to them is imputable to Vodafone International Holdings (which owns 100% of the shares of M-Pesa Holding) and ultimately to the Vodafone Group (which owns 100% of the shares of Vodafone International Holdings).

*v. M-Pesa Holding Co. Ltd, the “Declaration of Trust in Favour of all M-PESA Accountholders of Safaricom Limited” Dated 23<sup>rd</sup> February 2007 (“the 2007 Trust”), and the Sham Nature of the Trust Thereby Purportedly Established, as an Aspect of the Conspiracy of Theft of M-Pesa Accountholders’ Funds Referred to in (iv), Above:*

92. On or about 23<sup>rd</sup> February 2007, eleven (11) days prior to the launch of the M-PESA payment service by Safaricom, M-Pesa Holding *unilaterally* made and executed a

document purported to be a Declaration of Trust and titled “*Declaration of Trust in favour of all M-PESA Accountholders of Safaricom Limited*” by which it purported to declare that it held “all amounts of cash received by the Trustee from or on behalf of an M-Pesa Accountholder plus or minus as the case may be any Transactions” upon Trust for each Beneficiary to the extent of the Credit Balances standing to the credit of their respective M-Pesa accounts. (The said purported Declaration of Trust is hereinafter referred to as “the 2007 Trust”, and the Plaintiffs will refer to the same for its full purport, tenor and effect.)

93. M-Pesa Holding was incorporated on 11<sup>th</sup> September 2006 with Mr. Keith (the 7<sup>th</sup> Defendant) as one of its promoters, and one of its first Directors. Mr. Keith caused the incorporation of M-Pesa Holding by using confidential information regarding the piloting and imminent launch of the M-Pesa Service which was received by him as Principal Partner in the firm of Daly & Figgis Advocates who were then Safaricom’s lawyers.
94. The use by Mr. Keith of information received from Safaricom for the purpose of incorporating M-Pesa Holding as a Trust company which would then receive monies from Safaricom and invest them for the exclusive benefit of Safaricom, Vodafone International Holdings and, by extension, the Vodafone Group, was an unlawful, improper and fraudulent use of the information.
95. The Plaintiffs contend that the 2007 Trust executed by Mr. Keith as Director (together with a yet-unknown person as Company Secretary) of M-Pesa Holding and purportedly declared by M-Pesa Holding amounted *in law* to a *sham trust* within the meaning of the phrase in the doctrine of sham trusts and was void to all intents and purposes in that Mr. Keith purported to have established the 2007 Trust “in favour of all M-Pesa Accountholders” when he, the unnamed Company Secretary, M-Pesa Holding and Safaricom (and, by extension, the Vodafone Group, Vodafone Kenya and Vodafone International Holdings) intended that what was created would not and did not have its purported legal effect.
96. In this regard, the Plaintiffs contend that although outwardly presented as a Self-Declaration of Trust, the 2007 Trust was *in truth* a *sham trust* declared by M-Pesa

Holding in conspiracy, connivance or collusion with and/or with the condonation of Mr. Joseph, Mr. Keith, Mr. Ogutu, Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding and Vodafone International Holdings and other Defendants named in this suit who were Directors of the said companies.

97. The Defendants referred to in the preceding paragraph *in fact* intended that the acts done pursuant to the 2007 Trust would give to the M-Pesa Accountholders, to third parties, and to the world at large the appearance of creating between Safaricom, M-Pesa Holding and M-Pesa Accountholders' legal rights and obligations different from the actual rights and obligations (if any) which Safaricom and M-Pesa Holding (and, by extension, the Vodafone Group) intended to create.
98. Further to the foregoing, the Plaintiffs contend that Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie and Mr. Ogutu (the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> Defendants) as Directors of, or as persons otherwise associated with, Safaricom and M-Pesa Holding (and/or the Vodafone Group, Vodafone Kenya, Vodafone International Holdings and Safaricom's lawyers, Messrs. Daly & Figgis Advocates) had a clear common and fraudulent intention that the 2007 Trust was not to create the legal rights and obligations which it gave the appearance of creating.
99. The Plaintiffs further contend that the said Defendants contemplated, and effectuated, the common intention not to create the legal rights and obligations which the 2007 Trust had given the appearance of creating. This was mischievously intended to exploit the fact that the intended consumers of the M-Pesa Service were largely the aged, illiterate or semi-literate persons and persons who were ignorant of fact or of the law, persons who were unable to understand the language of the relevant legal agreement and other documents between them as M-Pesa Accountholder(s) and Safaricom, as well as persons suffering extreme poverty or socioeconomic marginalization and/or persons with various forms of disability.
100. From the nature and amount of powers reserved to Safaricom by M-Pesa Holding's Self-Declaration of the 2007 Trust, even if the Trust had been regular on its face (although it is contended that it is not), a Trust valid in law (and, therefore, a trust relationship) cannot be said to have been established in this case. This is due to the



fact that the intention of both M-Pesa Holding and Safaricom in this case was for Safaricom to not only remain the effective legal owner but to also control and administer the Trust property.

101. Ultimately, this conspiracy was centred on control of the Trust property for the benefit of individual Defendants in this suit, M-Pesa Holding, Safaricom, Vodafone Kenya, Vodafone International Holdings, other entities such as the M-Pesa Foundation and the Safaricom Foundation, the Vodafone Group as well as companies or other entities that would be incorporated in future, controlled by the individual Defendants and/or by bodies corporate which are Defendants in this suit.
102. Without prejudice to the contention that M-Pesa Holding was incapable of self-declaring a Trust in respect of real money to which the M-Pesa Accountholders were beneficially entitled, the Plaintiffs state that Safaricom retained so much control of the 2007 Trust right from the outset that it can hardly be said that it relinquished any proprietary interest to M-Pesa Holding at all. The Plaintiffs contend that this is a further demonstration of the *sham* nature of the Trust.
103. Further and without prejudice to the foregoing, the Plaintiffs state that as persons currently or previously holding Directorships, Trusteeships or senior positions in entities associated with Safaricom as indicated against their names, the said Mr. Joseph (Safaricom, the Vodafone Group, M-Pesa Holding, the M-Pesa Foundation, the M-Pesa Foundation Academy), Mr. Keith (Safaricom, the Vodafone Group, M-Pesa Holding, Vodafone Kenya, the M-Pesa Foundation), Mr. Spink (the Vodafone Group, M-Pesa Holding), Mr. Baillie (Safaricom, the M-Pesa Foundation, the M-Pesa Foundation Academy) and Mr. Ogutu (Safaricom, the Safaricom Foundation) also jointly and severally dishonestly assisted Safaricom as primary holder or fiduciary of the M-Pesa Accountholders' real money to commit breaches of trust and/or breaches of fiduciary duty in relation to the money.
104. In the above regard, the Plaintiffs contend that Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding, Vodafone International Holdings, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie and Mr. Ogutu were aware that the circumstances

surrounding the failure to invest the M-Pesa Accountholders' real money and to declare the income earned to their benefit from time to time was suspicious.

105. The said Defendants knew that the non-investment of funds for the benefit of M-Pesa Accountholders, and the non-disclosure of such non-investment, were such as to call for inquiry as to whether the failure was legitimate and/or innocent, or whether there was a substantial chance that it was part of a fraud committed by Safaricom and M-Pesa Holding through other named Defendants by depriving the Plaintiffs and other M-Pesa Accountholders of income otherwise due to them on account of the fraudulent investment of their real-money, to their gross detriment.

106. With a view to demonstrating the immense illegal and unlawful powers that Safaricom had under the unlawfully established 2007 Trust, the Plaintiffs set out below the nature and extent of the powers (and, where applicable, the Clause number concerned) from which a *sham trust* may individually or cumulatively be inferred, as follows:

**PARTICULARS OF THE SHAM NATURE OF THE 2007 TRUST AND OF A FRAUDULENT INTENTION ON THE PART OF SAFARICOM AND M-PESA HOLDING:**

1. *The self-declaration by M-Pesa Holding was possible only through, and was facilitated by, a common intention with Safaricom to unlawfully and irregularly share and exchange (and continue sharing and exchanging in perpetuity) data relating to the identities and account balances of M-Pesa Accountholders once the M-Pesa payment service was launched;*
2. *The self-declaration occurred when Safaricom knew that M-Pesa Holding had not acquired any real money paid to Safaricom by M-Pesa Accountholders as at the date of the self-declaration, as no such money had in fact been paid to Safaricom as at that date. M-Pesa Holding also did not therefore have any legal and/or equitable ownership of any real money in respect of which M-Pesa Accountholders were the beneficial owners as at the date of the self-declaration, and which would then have comprised the Trust property;*

3. **Clause 2(i)** provided that M-Pesa Holding would deal with the Credit Balances of the M-Pesa Accountholders “as the Trustee shall from time to time be *deemed* to have been directed by the Beneficiary...”. *This situation was clearly contrary to the law of trusts*, and was calculated to defraud the M-Pesa Accountholders, given that:
  - i. M-Pesa Holding could only have lawfully dealt with real money beneficially owned by the Accountholders through a Trust established by Safaricom (and not through a (*unilateral*) self-declaration by M-Pesa Holding); and
  - ii. The manner in which the Credit Balances would have been dealt with could not have been a matter of “*deeming*”, but would necessarily have had to be in accordance with the express terms of the Trust that would have been established by Safaricom;
4. **Clause 2(ii)** *excluded, without any lawful justification*, M-Pesa Accountholders in respect of the communication of directions to M-Pesa Holding by Safaricom for the debiting or crediting of Beneficiaries’ M-PESA Accounts;
5. **Clause 2(ii)** declared the communication of directions to M-Pesa Holding by Safaricom for the debiting or crediting of Beneficiaries’ M-PESA Accounts to be subject to the M-Pesa Customer Agreement. This was *despite the fact that the M-Pesa Customer Agreement was extraneous to any Trustee/Beneficiary relationship*;
6. **Clause 2(ii)** *provided that M-Pesa Holding was entitled to rely exclusively upon all instructions received from Safaricom as if they had been given directly by the Beneficiary and, further, that no Beneficiary would have any claim against M-Pesa Holding for implementing any transaction whatsoever that could be effected by M-Pesa Holding pursuant to an instruction received from Safaricom. This was a fettering or extinguishment of the Beneficiaries’ participatory rights, in violation of the law of trusts*;
7. **Clause 2(ii)** provided for the Beneficiaries to indemnify M-Pesa Holding “against all liabilities” which it could incur “by reason of complying with any

authorized transaction”, the “authorized transaction” being understood in the context of the said Clause to be any transaction authorized by Safaricom. This was a *further fettering or extinguishing of the Beneficiaries’ legal rights, in violation of the law of trusts*;

8. **Clause 3** disallowed the transferring, assigning, charging or otherwise disposing by a Beneficiary of any interest in the Credit Balance standing to the Beneficiary’s M-Pesa Account otherwise than through a Transaction to be notified to M-Pesa Holding by Safaricom, *again further fettering or extinguishing the Beneficiaries’ legal rights, in violation of the law of trusts*;
9. **Clause 4** provided that the Trust Fund maintained by M-Pesa Holding would be held to the immediate order of each Beneficiary according to their respective interest, and further provided that it was “expressly agreed” that no interest or other income would accrue to any Beneficiary on any Credit Balances held for any Beneficiary’s M-Pesa Account. This provision existed *despite the fact that there was no agreement (express or other) between M-Pesa Holding and M-Pesa Accountholders, or between M-Pesa Holding and Safaricom*;
10. **Clause 5** provided that the Trust Fund would be held by M-Pesa Holding in commercial bank accounts and such Government of Kenya securities as M-Pesa Holding would in its absolute discretion determine. *This provision was in violation of Section 4 of the Trustee Act, Chapter 167 of the Laws of Kenya which sets out which investments are authorized.*
11. **Clause 5** was to the effect that it was “expressly agreed that any interest received in respect thereof” would be retained by M-Pesa Holding “for its own account to defray the costs of administering the Trust Fund and operating the M-Pesa Accounts and for such other purposes as” M-Pesa Holding would in its sole discretion determine. *This provision existed notwithstanding (i) the absence of any agreement (express or other) between M-Pesa Holding and M-Pesa Accountholders, or between M-Pesa Holding and Safaricom; (ii) the fact that allowing M-Pesa Holding to retain interest earned on Beneficiaries’ real money would amount to unjust enrichment; and (iii) the fact that giving M-Pesa Holding the “sole*

*discretion” to determine the purposes to which such income would be applied is a violation of the law of trusts;*

12. **Clause 6** provided that no person dealing or proposing to deal with M-Pesa Holding would be concerned or entitled to enquire as to its title to make any appointment or as to the validity of any appointment or removal of any Trustee, *which, again, is a violation of the law of trusts and in particular the legal rights of Beneficiaries;*
13. **Clause 8** was to the effect that in the execution of the Trusts contained in the 2007 Trust or by law conferred, no Trustee would be liable for any loss to the Trust Fund arising in consequence of any decision made in good faith or by reason of any mistake or omission made in good faith or any other matter or thing except for wilful fraud and wrong doing or bad faith on the part of M-Pesa Holding. *This was also a fetter on the Beneficiaries’ legal rights, in violation of the law of trusts, by reason of the sham nature of the 2007 Trust;*
14. **Clause 9** provided that M-Pesa Holding would cause the accounts of the Trust Fund to be audited annually or at such other intervals as M-Pesa Holding would think fit by such suitably qualified accountants as it may appoint for that purpose. *Despite this, M-Pesa Holding is to date (more than 16 years since its incorporation in the year 2006) yet to publish its audited accounts and to make them available to the general public or, at the very least, to M-Pesa Accountholders;*
15. **Clause 10** was to the effect that if at any time M-Pesa Holding decided that it was expedient to discontinue the Trust then the Trust Fund would be paid to the Beneficiaries entitled thereto. The “Trust Fund” was however defined in the 2007 Trust to be “all amounts of cash received by the Trustee from or on behalf of an M-Pesa Accountholder plus or minus as the case may be any Transactions”. *This therefore necessarily implied that the money ultimately due to Beneficiaries as contemplated by the 2007 Trust excluded all interest earned on their money, and by further necessary implication, that M-Pesa Holding would in such event unjustly enrich itself, in breach of the law of trusts;*

16. **Clause 12(ii)** provided that any dispute arising out of or in connection with the 2007 Trust or the determination of the entitlement of any Beneficiary would be referred to Arbitration. *This was despite the fact that there was no agreement between M-Pesa Holding and M-Pesa Accountholders, or between M-Pesa Holding and Safaricom, for the referral of any dispute to Arbitration; and*

17. *The 2007 Trust was sealed with the Common Seal of M-Pesa Holding in the presence of Mr. Keith as Director of the Company, and of a person whose identity was not disclosed (and has never been disclosed), who signed as Company Secretary of M-Pesa Holding. This further renders the 2007 Trust suspect.*

vi. *The “Amendment Deed to the Declaration of Trust in Favour of all M-Pesa Accountholders of Safaricom Limited” Dated 19<sup>th</sup> June 2008 (“the 2008 Trust”), and the Sham Nature of the Trust Thereby Purportedly Established, as a Further Aspect of the Conspiracy of Theft of M-Pesa Accountholders’ Funds Referred to in (iv), Above:*

107. On 19<sup>th</sup> June 2008, a document purported to be an Amendment Deed to a Declaration of Trust and titled *“Amendment Deed to the Declaration of Trust in Favour of all M-Pesa Accountholders of Safaricom Limited”* (hereinafter “the 2008 Trust”) was executed on behalf of M-Pesa Holding and Safaricom Limited. The 2008 Trust was signed on behalf of M-Pesa Holding by Mr. Keith as Director, with an additional signature by a person whose identity is incapable of ascertainment. The 2008 Trust was signed on Safaricom’s behalf by John L.G. Maonga as Company Secretary, with an additional signature by Mr. Joseph (the 6<sup>th</sup> Defendant), who was then the Chief Executive Officer and a Director of Safaricom.

108. While the 2008 Trust was, like the 2007 Trust, outwardly presented purportedly as a genuine Trust, the 2008 Trust was *in truth* and *in law* also a *sham trust* within the meaning of the phrase in the doctrine of sham trusts, and was void for all purposes. Further, the 2008 Trust was also prepared and executed in conspiracy, connivance or collusion with and/or with the condonation of Mr. Keith, Mr. Joseph, Safaricom, the Vodafone Group, Vodafone Kenya and Vodafone International Holdings and other Defendants named in this suit who were Directors of, or otherwise associated with, the said companies.

109. The Plaintiffs set out below the factual and other circumstances (and, where applicable, the Clause number concerned) from which a *sham trust* may individually or cumulatively be inferred in respect of the 2008 Trust, as follows:

**PARTICULARS OF THE SHAM NATURE OF THE 2008 TRUST AND OF A FRAUDULENT INTENTION ON THE PART OF SAFARICOM AND M-PESA HOLDING:**

1. From the outset, the 2008 Trust was *in law incapable of being an Amendment Deed between M-Pesa Holding and Safaricom in that Safaricom was not a party to the 2007 Trust* which was purportedly being amended by the 2008 Trust;
2. Arising from the fact that M-Pesa Holding's physical and postal address was given as "8<sup>th</sup> Floor, Lonrho House, P.O. Box 40034 Nairobi 00100", the same address as for the office of Messrs. Daly & Figgis Advocates who had drawn up the 2007 Trust, *it can be inferred the 2008 Trust was also drawn by Mr. Keith (against whom there already are allegations of establishing the 2007 Trust as a sham trust);*
3. **At (B), in the *habendum* ("WHEREAS" Clause),** *the drawer of the 2008 Trust falsely and knowingly provided that M-Pesa Holding and Safaricom had entered into a Declaration of Trust dated the 23<sup>rd</sup> day of February 2007;*
4. **At (C), in the *habendum* ("WHEREAS" Clause),** it is indicated that M-Pesa Holding and Safaricom entered into the 2008 Trust "with the intention to wholly replace" the 2007 Trust.

*This was an unlawful and fraudulent attempt by Safaricom to establish a Trust, as it was not a party to the 2007 Trust, of which M-Pesa Holding was the only party (through its own unlawful self-declaration of Trust). Further to the foregoing, an "intention to wholly replace" the 2007 Trust necessarily meant that by the 2008 Trust, the 2007 Trust stood revoked, yet the 2007 Trust was referred to as an existing Trust Deed in a subsequent Deed dated 20<sup>th</sup> July 2020;*

5. **At (E), in the *habendum* (“WHEREAS” Clause),** “Trust Fund” was defined as the (net) amount in conventional money paid in respect of the creation of E-Money and payable to M-Pesa Holding less all amounts paid out by M-Pesa Holding in the redemption of E-Money.

*The definition of “Trust Fund” was unlawful as it excluded all interest and income from the investment of real money belonging to M-Pesa Accountholders and paid by them to Safaricom and subsequently unlawfully paid over by Safaricom to M-Pesa Holding, in violation of the law of trusts;*

6. **At Clause 1 of the “NOW THIS DEED WITNESSETH...” part,** the 2008 Trust provided that M-Pesa Holding “shall hold all amounts which constitute the Trust Fund on trust for the System Participants (i.e., participants in the M-Pesa Service, who included the M-Pesa Accountholders). However, further down at **Clause 7.1** of the 2008 Trust, it was provided that M-Pesa Holding “...shall enter into a management agreement with Safaricom (“the Management Agreement” appointing Safaricom...” as M-Pesa Holding’s agent for the purposes of, *inter alia*, “...operating the commercial bank accounts maintained by...” M-Pesa Holding “...for the purposes of holding the Trust Fund... Authorized Safaricom personnel shall, for these purposes, be named as signatories on the bank mandates for such accounts”.

*The appointment of Safaricom as agent by M-Pesa Holding was an absolute negation of the principle of ‘arm’s length’ dealings between an Appointor and a Trustee in non-discretionary Trusts, and of the entire Trust relationship in such Trusts as contemplated in the law of trusts;*

7. **At Clause 3.2 of the “NOW THIS DEED WITNESSETH...” part,** the 2008 Trust provided that M-Pesa Holding was entitled to review written requests from Safaricom for redemption of E-Money in order “to confirm that the amount of E-Money to be redeemed has been received by Safaricom in respect of services performed by it for other System Participants”.



In a trust relationship complying with the law of trusts, *a Trustee would have no right to review the amount of money to be redeemed (whether E-Money or real money) by the Appointor, except in the case of commingling of funds, which ipso facto connotes non-compliance with the law of trusts;*

8. **Clause 4.1** of the 2008 Trust provided that M-Pesa Holding was under “no obligation to any System Participant in respect of such System Participant’s beneficial interest in the Trust Fund other than by way of paying the System Participant... an equivalent amount of E-Money...”.

*One of the primary duties of a Trustee is the duty to invest Trust funds for the benefit of beneficiaries, and the retention by M-Pesa Holding for its own purposes of income derived from the investment of funds belonging to M-Pesa Accountholders and failure to account to them for the income ipso facto made the 2008 Trust a sham trust, amounted to a flagrant violation of the law of trusts, and resulted in the unjust enrichment of M-Pesa Holding, Safaricom, Vodafone International Holdings and ultimately the Vodafone Group and other individual Defendants;*

9. **Clause 4.2** of the 2008 Trust provided that *System Participants (and these included M-Pesa Accountholders as participants in the M-Pesa Service who held electronic value accounts with Safaricom) were not entitled “to assign, charge or otherwise transfer or dispose of the whole or part” of their beneficial interest in the Trust Fund. This was a flagrant violation of the law of trusts relating to non-discretionary Trusts;*
10. **Clause 4.2** further provided that despite the prohibition against the assignment, charging or otherwise transferring or disposing M-Pesa Accountholders’ beneficial interest such prohibition did “not restrict the making of transfers of E-Money under the (M-Pesa E-Money) Service which will alter the System Participant’s beneficial interest by altering the M-Pesa Account balance of the relevant System Participant”.

*This, again, was a flagrant violation of the law of trusts relating to non-discretionary Trusts in that it allowed M-Pesa Holding and/or Safaricom to illegally “lock in” and hold in an M-Pesa Accountholder’s account less E-Money than the Accountholder was*

*entitled to, thereby resulting in outright theft of Accountholders' funds, illegal transfer to third party banks, and unjust enrichment of the said two Defendants and, by extension, Vodafone Kenya, Vodafone International Holdings and the Vodafone Group;*

11. **Clause 5** of the 2008 Trust provided that the beneficial entitlement of the System Participants (who included M-Pesa Accountholders) would “be conclusively determined exclusively in accordance with Clause 1” (which recognized an Accountholder’s beneficial entitlement to comprise only “such an amount of the Trust Fund in conventional money as is equal to the amount of E-Money in the M-Pesa Account of such System Participant...”).

*This was a further flagrant violation of the law of trusts relating to non-discretionary Trusts as the so-called Trustee was not at any time entitled to any discretion with regard to the application of interest or income earned from real money belonging to M-Pesa Accountholders' who, as the beneficiaries of such Trusts, were entitled as of right to income from the investment of any monies held on their behalf;*

12. **Clause 5** further provided that the beneficial entitlement would be determined “by reference to the M-Pesa Account records **maintained by Safaricom as they stand from time to time, regardless of any inaccuracy (for whatever reason) in such records**”.

*This was yet another flagrant violation of the law of trusts relating to non-discretionary Trusts and amounted to theft of beneficiaries' funds by Safaricom and M-Pesa Holding;*

13. **Clause 5** also provided that “no System Participant shall have any recourse whatsoever to the Trustee in respect of any alleged inaccuracy”. This provision effectively allowed Safaricom and M-Pesa Holding to steal from the M-Pesa Accountholders, in the name of determining the amount of the Trust Fund to which the Accountholders were individually or collectively beneficially entitled to.

*This was yet another flagrant violation of the law of trusts relating to non-discretionary Trusts and amounted to a conspiracy by Safaricom and M-Pesa Holding to steal beneficiaries' funds, and ultimately resulted in the theft of such funds;*

14. **Clause 6.1** provided that “the amounts constituting the Trust Fund (including interest and income thereon) shall be held by the Trustee in such commercial bank accounts and such Government of Kenya securities as the Trustee shall in its absolute discretion determine...”

This, within the context that the so-called Trustee (M-Pesa Holding) intended to hold the amounts constituting the Trust Fund for itself (as provided in Clause 6.2 of the 2008 Trust), rather than for M-Pesa Accountholders, was violation of the law of trusts relating to non-discretionary Trusts- a fact of which the Central Bank ought reasonably to have been aware- and amounted to theft by Safaricom and M-Pesa Holding of M-Pesa Accountholders' funds and of the interest and income due to them.

The said provision was also in violation of Sections 2 and 4 of the Trustee Act, which define and delineate what investments amount to “authorized investments”;

15. **Clause 6.2** of the 2008 Trust provided any interest or income received in respect of any investment of the Trust Fund was to “be retained by the Trustee for its own account” and it would “not form part of or be credited to the Trust Fund”.

This provision was also violation of the law of trusts relating to non-discretionary Trusts and was calculated to justify theft by Safaricom and M-Pesa Holding of the interest and income due to M-Pesa Accountholders on E-Money paid by them and invested by M-Pesa Holding and Safaricom. Further, this Clause effectively implied that the so-called Trustee was entitled to open a separate account and illegally retain absolutely the interest and investment income due to the Accountholders;

16. **Clause 6.2** further provided that the Trustee would “have no obligation (express or implied, and whether as trustee or in any other capacity) to account to any System Participant for any such interest or income.”

By making itself unaccountable to the M-Pesa Accountholders, they being the beneficiaries whose funds were required to have been safeguarded, M-Pesa Holding as the so-called Trustee became *a law unto itself* and illegally and unjustifiably arrogated to itself the right to deal with interest and income belonging to the M-Pesa Accountholders without any recourse to them whatsoever, an act that amounted to theft of the interest and income;

17. **Clause 6.2** also provided that any interest or income was generally to “be applied first to defray the Trustee's own costs of its role in the Service” but could also “be applied for such other purposes (whether charitable or not) as the Trustee, may in its sole discretion determine.”

The provision to the effect that the interest and income generated could be applied to charitable and non-charitable purposes was a flagrant violation of the law of trusts as the interest or income derived was *in fact* earned from real money owned by the M-Pesa Accountholders.

Additionally, the trust relationship between the M-Pesa Accountholders and any Appointor and/or Trustee being one in the nature of a non-discretionary trust, a Trustee could not have the “sole discretion” to determine how interest or income earned from M-Pesa Accountholders’ real money could be applied.

In essence, this provision allowed the free education of children of the so-called Trustee’s own choosing at the M-Pesa Foundation Academy at the expense of the education of the children of the M-Pesa Accountholders, particularly children of unbanked, illiterate, or otherwise marginalized Accountholders - despite the fact that the interest or income applied towards educating children at the Academy was derived from the M-Pesa Accountholders’ funds;

18. **Clause 6.4** of the 2008 Trust provided that M-Pesa Holding was not under an obligation “to keep its own records of the balances from time to time of E-Money on the M-Pesa Accounts, it being acknowledged that such records shall be maintained only by Safaricom and relied on by the Trustee in accordance with the above provisions”. This provision was unlawful in that it was an attempt to circumvent the legal duties and powers of a Trustee as recognized in the law of trusts and to absolve M-Pesa Holding from the duty to account to M-Pesa Accountholders, with a view to having facilitating Safaricom and M-Pesa Holding (and, by extension, the Vodafone Group, Vodafone International Holdings and Vodafone Kenya) to steal M-Pesa Accountholders’ funds and interest and income derived from such funds;
19. **Clause 7.1** of the 2008 Trust provided for M-Pesa Holding to “enter into a management agreement with Safaricom (the “Management Agreement”) appointing Safaricom as the Trustee’s agent for the purposes of:
- i. Operating the commercial bank accounts maintained by the Trustee (i.e., M-Pesa Holding) for the purposes of holding the Trust Fund in accordance with Clause 6.1 (the “Bank Accounts”), including for the purposes of effecting payments out of such Bank Accounts in respect of the redemption of E-Money. Authorised Safaricom personnel shall, for these purposes, be named as signatories on the bank mandates for such accounts; and
  - ii. Selecting, and causing the Trustee to invest the Trust Fund (including interest or income earned thereon) in, the other investments referred to in Clause 6.1 (**“Alternative Investments”**).”

*This provision was unlawful for the following reasons:*

- (i) *Firstly, by the mere fact that it appointed Safaricom (to which M-Pesa Accountholders paid real money) to be the agent of M-Pesa Holding, the purported Trustee, against the ‘arm’s length’ principle relating to the dealings between an Appointor and a Trustee;*

- (ii) *Secondly, it served to facilitate and sanitize the commingling of M-Pesa Accountholders' funds as between Safaricom and M-Pesa Holding, with Safaricom as the so-called Appointor and M-Pesa Holding as the so-called Trustee under the 2008 Trust; and*
- (iii) *Third, it was a complete negation of the Appointor/Trustee relationship by virtue of the mere fact that it made the Appointor an agent of the Trustee.*

*All these were clear violations of the law of trusts and, in particular, in relation to the Appointor/Trustee relationship, the respective legal duties of an Appointor and a Trustee, and the principle against the commingling of funds;*

20. **Clause 7.2** provided that “Safaricom shall not be liable for any investment of the Trust Fund (including interest or income thereon) where such investment has been made by Safaricom at the specific instruction or direction of the Trustee. Safaricom specifically disclaims any and all liability for any losses arising out of any market loss or other losses of such investments or for any failure to invest or make any Alternative Investment that could enhance the Trust Fund.”

*By this provision, Safaricom essentially attempted to disclaim its own liability for any investment of the Trust Fund notwithstanding that it (Safaricom) had a legal duty in relation to how M-Pesa Holding invested funds belonging to M-Pesa Accountholders. Further, as read together with **Clause 4.1** and **Clause 5** of the 2008 Trust, **Clause 7.2** essentially purported to absolve both Safaricom and M-Pesa Holding from any liability arising from any and all losses incurred by M-Pesa Accountholders on account of the Accountholders paying real money to Safaricom; and*

21. **Clause 8.4** provided that M-Pesa Holding was entitled to discontinue the trusts purportedly created by the 2008 Trust in respect of any or all System Participants (who include M-Pesa Accountholders) if it thought it expedient to do so, and that in such event it could do so by liquidating assets in which the Trust Fund was invested and paying to the relevant System Participant(s) “the

amount of his/her/their beneficial entitlement to the Trust Fund as represented by the sum of E-Money held by such System Participant...”

*This provision was unlawful as it disregarded all interest and income earned through the holding and investment of M-Pesa Accountholders’ funds and due and payable to them, and facilitated the unjust enrichment of Safaricom, M-Pesa Holding, the Vodafone Group, Vodafone International Holdings, Vodafone Kenya and various other Defendants (individuals and entities) in this suit who have been thereby unjustly enriched.*

**vii.      *The 2020 Second Amendment to the 2007 Declaration of Trust Purportedly Entered into Between M-Pesa Holding and Safaricom Dated 20<sup>th</sup> July 2020 (“the 2020 Trust”), and the Sham Nature of the Trust Thereby Purportedly Established, as Yet Another Aspect of the Conspiracy of Theft of M-Pesa Accountholders’ Funds Referred to in (iv), Above:***

110. With a view to concealing and “sanitizing” the *sham* nature of the 2007 Trust and the 2008 Trust, Safaricom and M-Pesa Holding instructed Coulson Harney Advocates to draw a document titled ***“Second Amendment Deed to the Declaration of Trust on (sic) Favour of All M-Pesa Accountholders of Safaricom Limited Dated 23 February 2007 (as Amended by the Deed of Amendment Dated 19<sup>th</sup> June 2008”*** (“the 2020 Trust”) in place of Daly Inamdar Advocates, their previous Advocates.

111. From the outset, the Plaintiffs state that Coulson Harney Advocates held themselves out as having expertise in the Kenyan and foreign law relating to, amongst other fields, banking, finance, corporate/commercial transactions, tax, capital markets and corporate services. It must therefore be presumed that they held and continue to hold such expertise.

112. On their website (<https://bowmanslaw.com/country/kenya/page/2/>), Coulson Harney Advocates state as follows:

*“We advise a wide spectrum of clients in the private sector, institutional and multi-national organizations, foreign investors and governmental institutions.*

*Our advocates practice Kenyan law but we also have foreign-law expertise especially in English law banking and finance matters and corporate/commercial transactions. Other specialist areas include work on intellectual property, tech-law, arbitration, tax, energy, project finance, capital markets, investigations and corporate services.”*

113. Against this background, therefore, the Plaintiffs contend that the 2020 Trust which was drawn by the said Advocates was, just like the 2007 Trust and the 2008 Trust drawn by Daly Inamdar Advocates, itself also a *sham*, and that Coulson Harney Advocates were well aware of this fact. The *sham* nature of the 2020 Trust is demonstrated further below, after giving a contextual background to the circumstances in which it was established.
114. By way of background, the 2020 Trust was executed on behalf of M-Pesa Holding and Safaricom Limited. This particular Trust was, unlike the 2007 and 2008 Trusts, drawn by a different law firm, Coulson Harney Advocates, and signed on behalf of M-Pesa Holding by two of its Directors, namely Mr. Keith and Mr. Ogutu. Mr. Keith is a Partner at Daly Inamdar Advocates, a fact which Coulson Harney Advocates knew or ought reasonably to have known. Mr. Keith was formerly a Senior Partner at Daly & Figgis Advocates who had been long term Legal Advisors of Safaricom and the Vodafone Group, and is still a Director of M-Pesa Holding and a Trustee of the M-Pesa Foundation. On the other hand, Mr. Ogutu is formerly a senior executive at Safaricom and is currently a Director of M-Pesa Holding and also the Chair of the Safaricom Foundation.
115. The 2020 Trust was signed on Safaricom’s behalf by its Chairman at the time, Mr. Nicholas Ng’ang’a, and by Ms. Kathryne Maundu, who signed as Director/Company Secretary. Ms. Maundu is a Partner at Stamford Corporate Services LLP, part of Bowmans Coulson Harney LLP, an affiliate of Coulson Harney Advocates, the 16<sup>th</sup> Defendant.
116. By virtue of current and past positions held by Mr. Keith and Mr. Ogutu in Safaricom and its associated corporations and legal entities, the two could not *in truth*



have been *independent* Directors of M-Pesa Holding as a Trust company, as the Plaintiffs further demonstrate later in these pleadings.

117. Mr. Keith and Mr. Ogutu were at all times each aware of the fact that in holding the position of Director in M-Pesa Holding, they stood in a position of clear conflict of interest in relation to Safaricom as the (alleged) Appointor. More particularly, Mr. Keith and Mr. Ogutu were at all times aware that they stood in a position of conflict of interest vis-à-vis M-Pesa Accountholders as the ultimate Beneficiaries of real money paid by them to Safaricom's M-Pesa Agents from time to time, as well as interest and income derived from such real money, which was required be held in trust for the Accountholders.

118. The Plaintiffs set out below the factual and other circumstances (and, where applicable, the Clause number concerned) from which a *sham trust* may individually or cumulatively further be inferred in respect of the 2020 Trust, as follows:

**PARTICULARS OF THE SHAM NATURE OF THE 2020 TRUST AND OF A FRAUDULENT INTENTION ON THE PART OF SAFARICOM AND M-PESA HOLDING:**

1. From the outset, the 2020 Trust was *in law* incapable of being an *Amendment Deed* between M-Pesa Holding and Safaricom given that it purported to amend the 2008 Trust, *itself a document purporting to amend the 2007 Trust to which Safaricom was not a party*.

In the above regard, the Plaintiffs state that ironically, and as a matter of contradiction, the 2008 Trust itself stated, **at (C), in the habendum ("WHEREAS" Clause)**, that M-Pesa Holding and Safaricom had entered into the 2008 Trust "with the intention to wholly replace" the 2007 Trust.

2. M-Pesa Holding's postal address in the 2020 Trust was given as "P.O. Box 40034 Nairobi 010100 (*sic*)", and it is contended that it was intended to indicate the address as "P.O. Box 40034 Nairobi 00100", being the address for the office of Daly Inamdar Advocates.

The Plaintiffs state that, from the foregoing, it can be inferred that M-Pesa Holding was still under the substantial control of Mr. Keith (as Senior Partner at Daly Inamdar Advocates).

3. **At (B), under the heading “BACKGROUND”**, it was falsely declared that “the Trustee and Safaricom entered into a declaration of trust in favour of all M-PESA Accountholders dated 23<sup>rd</sup> February 2007 (“the Initial Trust Deed”) which was amended by a deed of amendment entered in to by the same parties dated 19<sup>th</sup> June 2008 (“Initial Amendment Deed”).”

The Plaintiffs contend that the 2007 Declaration of Trust was false in that Safaricom was not a party to the 2007 Trust and therefore could not have entered into a declaration of trust in connection with the 2007 Trust.

4. **At (B)**, it was also stated in the 2020 Trust that “the Initial Trust deed, as amended by the Initial Amendment Deed, shall be referred to in this deed together as the “Trust Deed”.

The Plaintiffs contend that the above statement contradicted the statement in the 2008 Trust to the effect that M-Pesa Holding and Safaricom had entered into the 2008 Trust “with the intention to wholly replace” the 2007 Trust as the 2020 expressly recognized the 2007 Trust (therein referred to as the “Initial Trust Deed”).

5. **At Clause 2 of the “THIS DEED WITNESSES...” (under the heading “AMENDMENT AND RESTATEMENT”)**, the 2020 Trust stated that “with effect from the date of this Deed, the Trust Deed is hereby amended and restated by this Deed. Other than as expressly set out in this Deed the terms of the Trust Deed shall be unaltered and remain in full force and effect in accordance with the terms of this Deed.”

The Plaintiffs contend that the above statement in effect recognized the “Trust Deed”, this term being a reference to the 2007 Trust as purportedly amended

by the 2008 Trust, *notwithstanding the fact that the 2008 Trust had itself expressly indicated that its intention was to “wholly replace” the 2007 Trust.*

The Plaintiffs contend that the above statement in the 2020 Trust further validated the “Trust Deed” (i.e., the 2007 Trust as purportedly amended by the 2008 Trust) as being “in full force and effect” *despite the statement in the 2008 Trust that it (the 2008 Trust) had wholly replaced the 2007 Trust.*

6. **At Clause 3 of the “THIS DEED WITNESSES...” (at paragraph (a)(i) under the heading “CHANGES TO SPECIFIC CLAUSES OF THE TRUST DEED”),** the 2020 Trust purportedly amended Clause 5 of the 2008 Trust by removing the words “regardless of any inaccuracy” so that the said Clause would read as follows:

*The beneficial entitlement of the System Participants at any time to the amount of the Trust Fund shall be conclusively determined exclusively in accordance with Clause 1 above by reference to the M-PESA Account records maintained by Safaricom as they stand from time to time, regardless of any inaccuracy (for whatever reason) in such records. The Trustee shall be under no obligation to verify the accuracy of such records and shall have no liability in respect of any inaccuracy in any such records. No System Participant shall have any recourse whatsoever to the Trustee in respect of any alleged inaccuracy.*

The Plaintiffs contend that *the removal of the words “regardless of any inaccuracy” was intended to conceal the existence of intentional inaccuracies and thereby water down the effect of inaccuracies of any nature in determining the beneficial entitlement of System Participants (who included M-Pesa Accountholders).*

The Plaintiffs further contend that *the purpose of the amendment was to justify the disregarding of any inaccuracies, and thus further justify a lack of recourse for M-Pesa Accountholders in the event of inaccuracies, whether intentional or inadvertent, in the determination of their beneficial entitlement.*

7. **At Clause 3 of the “THIS DEED WITNESSES...” (at paragraph (1) under the heading “CHANGES TO SPECIFIC CLAUSES OF THE TRUST DEED”),** the 2020 Trust provided for an amendment to Clause 6.1 of the 2008 Trust in the following manner:

*Clause 6.1 shall be amended by deleting the existing wording and replacing it in entirety with the following wording:*

*“The amounts constituting the Trust Fund (including interest and income thereon) shall be held by the Trustee in such commercial banks and Government of Kenya securities as the Trustee shall determine and as per the requirements of the National Payment Systems (sic) Regulations 2014 or as may be approved by the Central Bank of Kenya”*

By reason of the foregoing, it is contended that the purported amendment to the 2008 Trust in the 2020 Trust was *no more than a mere token show of legal compliance in that the National Payment System Regulations were published on 1<sup>st</sup> August 2014 in a Special Issue of the Kenya Gazette, namely Legal Notice No. 109 of 2014.* The Plaintiffs state that it is noteworthy that *the said purported amendment was made six (6) years, less only twelve (12) days from the date of publication of the Regulations.*

8. **At Clause 3 of the “THIS DEED WITNESSES...” (at paragraph (3)(a)(ii) under the heading “CHANGES TO SPECIFIC CLAUSES OF THE TRUST DEED”),** the 2020 Trust purported to amend Clause 6.2 of the 2008 Trust as follows:

*Clause 6.2 shall be amended by the insertion of the words “Any such interest or income shall be used specifically in accordance with the Trust Legislation and in consultation with the Central Bank of Kenya. First; to defray the Trustee’s own direct costs for its role in providing the service. Secondly, any additional income or interest generated shall, be donated to a public charitable organization for use for public charitable purposes as per the requirements of the National Payment Systems (sic) Regulations 2014 or as approved in consultation with the Central Bank of Kenya” immediately after the words: “to account to any System Participant for any such interest or income”.*

The Plaintiffs contend that Mr. Keith, both as a Director of M-Pesa Holding signing the 2020 Trust and also as the Senior Partner at Daly & Figgis Advocates who had drawn the 2007 Trust and the 2008 Trust, together with M-Pesa Holding and Safaricom, were well aware that any trust relationship that could be created between the M-Pesa Accountholders as Beneficiaries and M-Pesa Holding as Trustee would be in the nature of a non-discretionary trust.

Accordingly, the Plaintiffs state that Mr. Keith, Safaricom and M-Pesa Holding were well aware that that a provision to the effect that income or interest generated from M-Pesa Accountholder's real money be applied towards public charitable purposes would be unconstitutional and unlawful. Mr. Keith, Safaricom, M-Pesa Holding, the Vodafone Group, Vodafone International Holdings, Vodafone Kenya and the M-Pesa Foundation were further aware that beneficiaries of the so-called "public charitable purposes" included the M-Pesa Foundation, a wholly owned subsidiary of the Vodafone Group.

The Plaintiffs further contend that Coulson Harney Advocates who had drawn the 2020 Trust were also well aware that it was unconstitutional and unlawful to provide that income or interest generated from M-Pesa Accountholder's real money be applied towards public charitable purposes without recourse to the Accountholders whose real money had generated the income or interest, given that the 2020 Trust, if it had not been a sham trust, would have been a non-discretionary trust.

9. **At Clause 3 of the "THIS DEED WITNESSES..." (at paragraph 3(a)(iii) under the heading "CHANGES TO SPECIFIC CLAUSES OF THE TRUST DEED"),** the 2020 Trust provided for an amendment to Clause 7.1(b) of the 2008 Trust in the following manner:

*Clause 7.1 (b) shall be amended by deleting the existing wording and replacing it in entirety with the following wording:*

- (1) "selecting and causing the Trustee to invest the Trust Fund (including interest or income earned thereon) in other investments referred to in clause 6.1 ("Alternative Investments") as per the requirements of the National*

*Payment Systems (sic) Regulations 2014 or as approved by the Central Bank of Kenya.”*

With regard to the above, the Plaintiffs contend that Mr. Keith and Coulson Harney Advocates were- by virtue of legal learning, training and experience- well aware that it was unconstitutional and unlawful under trusts law to apply income or interest generated from M-Pesa Accountholders’ real money towards public charitable purposes without recourse to the Accountholders as the relationship between the Accountholders and M-Pesa Holding, if any, would have been one relating to a non-discretionary trust.

Further, the Plaintiffs state that Mr. Keith, Safaricom, the Vodafone Group, Vodafone International Holdings, M-Pesa Holding (a wholly owned subsidiary of Vodafone International Holdings and, by extension, of the Vodafone Group), Vodafone Kenya and the M-Pesa Foundation knew or ought reasonably to have known that beneficiaries of the so-called “public charitable purposes” included the M-Pesa Foundation, which was itself wholly owned by the Vodafone Group.

119. For the avoidance of doubt and without prejudice to any paragraph of these pleadings, it is reiterated that the 2007 Trust, the 2008 Trust and the 2020 Trust were all *sham Trusts* and it is contended that *neither Safaricom nor M-Pesa Holding at any time material to these proceedings acquired, lawfully or otherwise, the respective status of Appointor and Trustee as known and understood in the law of trusts by virtue of the 2007 Trust, the 2008 Trust and/or the 2020 Trust.*

120. From the foregoing, the Plaintiffs further contend that:

1. Safaricom was in essence and in truth the *alter ego* of M-Pesa Holding and, by extension, the *alter ego* of Vodafone International Holdings (the latter being the 100% equity owner of M-Pesa Holding) and, ultimately, the *alter ego* of the Vodafone Group (the latter being the 100% equity owner of Vodafone International Holdings) in the management of M-Pesa Accountholders’ real money;

2. The circumstances in which the said companies took the benefit of the value of the interest and investment income derived from real money belonging to M-Pesa Accountholders amounted to theft, civil fraud and criminal fraud;
3. The 2007 Trust, the 2008 Trust and the 2020 Trust all amounted *in law* to *sham trusts* within the meaning of the phrase in the doctrine of sham trusts, and the said Trusts were void for all purposes as Safaricom and M-Pesa Holding did not at any time intend the said Trusts to create the legal relations they purported to create, and accordingly the said Trusts did not have any legal effect; and
4. Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie and Mr. Ogutu as Directors of, or as persons otherwise associated with, Safaricom and M-Pesa Holding (and/or the Vodafone Group, Vodafone Kenya, Vodafone International Holdings and Safaricom's lawyers, Messrs. Daly & Figgis Advocates, Messrs. Daly Inamdar Advocates and Messrs. Coulson Harney Advocates) had a clear common and fraudulent intention that the 2007 Trust, the 2008 Trust and the 2020 Trust were not to create the legal rights and obligations which they gave the appearance of creating.

*viii. The Creation and Legitimization of an Unlawful and Criminal Trust Relationship by Safaricom and M-Pesa Holding Through "the Safaricom M-Pesa Terms", With the Aim of Stealing M-Pesa Accountholders' Real Money:*

121. From 6<sup>th</sup> March 2007 when the M-Pesa E-Money Service was launched and for an indeterminate period thereafter which has since ceased, Safaricom registered customers including the 1<sup>st</sup> Plaintiff for the M-Pesa Service and required them to execute terms known variously as "*M-Pesa Services Conditions of Use*" or "*Safaricom's Conditions of Use of M-Pesa Services*" or "*Conditions of Use of the M-Pesa Services*", which referred to the 2007 Trust. In March 2012, Safaricom published "*M-Pesa Customer Terms and Conditions*" referring to both the 2007 Trust and the 2008 Trust.

122. Safaricom subsequently published another version of “*M-Pesa Customer Terms and Conditions*” referring to the 2007 Trust, the 2008 Trust and the 2020 Trust “and any further amendments executed by the Trustee and Safaricom constituting the trusts under which the Trustee holds all amounts of cash received on your Account in trust for you upon the terms and conditions herein specified”. (This document and the two (2) other documents referred to in the preceding paragraph are hereinafter individually or collectively referred to as “the Safaricom M-Pesa Terms”).
123. The Safaricom M-Pesa Terms purported that the Registration and Acceptance Form together with the Conditions of Use constituted a binding agreement between Safaricom, M-Pesa Holding and the customers being registered for the M-Pesa Service (i.e., the M-Pesa Accountholders).
124. The Safaricom M-Pesa Terms were not executed by or on behalf of M-Pesa Holding whatsoever. M-Pesa Holding was in any event not a contracting party to the said Terms. The Safaricom M-Pesa Terms therefore did not and could not result in any binding legal relations between the M-Pesa Accountholders and M-Pesa Holding.
125. The contents of the preceding paragraph notwithstanding, on an unascertained date (but during the first few years since the launch of the M-Pesa Service), Safaricom ceased requiring, and as at the time of filing these proceedings it no longer requires, its customers to execute the Safaricom M-Pesa Terms as a condition for registering for, or using or receiving, M-Pesa E-Money Services. (The Plaintiffs however state that in the year 2022, Safaricom demanded that M-Pesa Accountholders do register their SIM cards or have M-Pesa Services discontinued, leading to a dispute which is now the subject of a civil suit before the Commercial and Tax Division of this Honourable Court.)

***ix. The Role of Safaricom, M-Pesa Holding, the Vodafone Group, the M-Pesa Foundation, the Safaricom Foundation, Carepay and Associated Companies and Entities, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi, Mr. Ogutu, Daly Inamdar Advocates, Coulson Harney Advocates and Other Defendants in Aiding and Abetting the Commission of Fraud and Theft of M-Pesa Accountholders’ Real Money:***



126. The Safaricom M-Pesa Terms were part of an elaborate scheme to attempt to legitimize an otherwise unlawful trust relationship and criminal enterprise in all respects, and one that eventually led to the loss of trillions of Kenya Shillings of M-Pesa Accountholders' real money.
127. The loss of trillions of Kenya Shillings in real money belonging to M-Pesa Accountholders through theft of interest and investment income earned from such money was enabled through a well-orchestrated, deliberate and fraudulent plan by Safaricom, M-Pesa Holding, the Vodafone Group, Vodafone International Holdings, Vodafone Kenya, Daly Inamdar Advocates, Coulson Harney Advocates, PwC, EY, the M-Pesa Foundation, the Safaricom Foundation and Carepay, as well as top officers from the said companies, firms or entities.
128. The Plaintiffs state that the officers who were part of the above plan included Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu. It is contended that some of the said officers were or still are in various paid positions as Directors or Executives at Safaricom, and/or at the same time as Directors of M-Pesa Holding and/or Trustees of the M-Pesa Foundation and the Safaricom Foundation and/or as Directors of other associated companies such as Carepay.
129. In above regard, it is further contended that there were legal professionals working as Directors or Trustees or in the employment of the named Defendant companies, firms or entities who ought to have been able to easily detect the loss of trillions of Kenya Shillings in monies belonging to M-Pesa Accountholders. Accordingly, the Plaintiffs contend that the failure to detect the said losses was the result of a deliberate conspiracy of silence.
130. By way of illustration, the M-Pesa Foundation described itself (*vide.*, p. 94 of its own Annual Report for the Year Ended 31<sup>st</sup> March 2018) as having been "founded as an irrevocable public charitable trust on 23 March 2010 by M-PESA Holding Co. Limited, a company incorporated in Kenya (the "Founder") being desirous of making a contribution towards the welfare of the people of Kenya in furtherance of its corporate social responsibility policy." In the said Report (at p. 83), the M-Pesa Foundation disclosed that it was "funded by M-PESA Holding Co. Limited (the

“Founder”) in fulfillment of the Founder’s corporate social responsibility.” The said Annual Report further indicated (at p. 98 and at p. 102) that the Foundation had received donations in the sum of **KShs. 400,000,000/=** in the year 2017, and **KShs. 8,500,000,000/=** in the year 2018 from M-Pesa Holding. It was also reported in the said Annual Report that the M-Pesa Foundation had (in turn) donated to the M-Pesa Foundation Academy **KShs. 2,034,826,000/=** during the year 2017 and **KShs. 1,768,200,000/=** in 2018 (*vide.*, p. 99 and p. 102).

131. The Plaintiffs state that M-Pesa Holding was not lawfully capable of donating money to the M-Pesa Foundation, as the ‘donated’ money could only have been either:

- i. M-Pesa Accountholders’ funds; and/or
- ii. Interest or income derived from such funds.

132. The Plaintiffs reiterate that both the M-Pesa Accountholders’ funds and the interest and income from such funds were supposed to have been held in trust for the M-Pesa Accountholders themselves, and for their benefit.

133. Further, as pleaded elsewhere in these pleadings, the Plaintiffs contend that the Vodafone Group’s Annual Report for the Financial Year Ended on 31<sup>st</sup> March 2016 disclosed that both the M-Pesa Foundation and M-Pesa Holding were 100% owned by the Vodafone Group, itself a “for profit” public limited company. The Plaintiffs state that the logical inferences to be drawn from this are:

- i. That M-Pesa Holding was *in truth* not incorporated with the intention of operating it as a trust company, but was incorporated with the deliberate intention that it would act as a conduit for the illicit transfer of M-Pesa Accountholders’ funds and of interest and income derived from such funds to Vodafone International Holdings and ultimately to the Vodafone Group;
- ii. That the M-Pesa Foundation’s Trustees received monies clothed as “donations” from M-Pesa Holding which they knew they ought not to have received, and that they and the foundation were thus unjustly enriched;

- iii. That the monies thus received by the M-Pesa Foundation were in turn paid out as “donations” to the M-Pesa Foundation Academy in order to ‘whitewash’ the stolen M-Pesa Accountholders’ funds and interest and income derived from such funds as legitimate payments to the Academy; and
- iv. The ultimate beneficiary of the monies so stolen was the Vodafone Group, as well as key officers of the Group, Safaricom, and other associated companies and entities.

134. The so-called “donations” by M-Pesa Holding to the M-Pesa Foundation and the “donations” by the M-Pesa Foundation to the M-Pesa Foundation Academy were and remain movements of money which PwC, as long-term Auditors of Safaricom, the M-Pesa Foundation and the Safaricom Foundation, ought to have routinely (and as a matter of course) detected, noted and red-flagged. The Plaintiffs contend that PwC was grossly negligent in failing to detect and red-flag or, alternatively, it (PwC) was fraudulent by actively knowingly assisting in the fraudulent money movements by Safaricom, M-Pesa Holding, the M-Pesa Foundation and ultimately the Vodafone Group.

135. In this regard, the Plaintiffs state that a Report by PwC titled “*Independent Auditor’s Report to the Trustees of M-PESA Foundation Charitable Trust- Report on the Audit of the Financial Statements*” and published as part of the M-Pesa Foundation’s Annual Report for the Year Ended 31<sup>st</sup> March 2018, is material for the purposes of this suit. The Report (found at pp. 86-88 of the M-Pesa Foundation’s Annual Report), contained an opinion by the Auditor which read, in part, as follows:

***Opinion***

*We have audited the accompanying financial statements of M-PESA Foundation Charitable Trust... which comprise the statement of financial position at 31 March 2018 and the statements of comprehensive income, changes in fund balances and cash flows for the year then ended and the notes to the financial statements, which include a summary of a significant accounting policies.*

*In our opinion, the financial statements give a true and fair view of the financial position of M-Pesa Foundation at 31 March 2018, and its financial performance and cash flows for the year then ended in accordance with International Financial Reporting Standards.* (Underline and bold added)

#### ***Basis for opinion***

We conducted our audit in accordance with International Standards on Auditing (ISAs). Our responsibilities under those standards are further described in the Auditor's responsibilities for the audit of the financial statements section of our report.

We are independent of the Foundation in accordance with the International Ethics Standards Board for Accountants' Code of Ethics for Professional Accountants (IESBA Code) together with the ethical requirements that are relevant to our audit of the financial statements in Kenya, and we have fulfilled our ethical responsibilities in accordance with these requirements and the IESBA Code.

*We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion.* (Underline and bold added)

#### ***Other information***

The Trustees are responsible for the other information...

...In connection with our audit of the financial statements, *our responsibility is to read the other information identified above and, in doing so, consider whether the other information is materially inconsistent with the financial statements or our knowledge obtained in the audit, or otherwise appears to be materially misstated. If, based on the work we have performed on the other information, we conclude that there is a material misstatement of this other information, we are required to report that fact. We have nothing to report in this regard.* (Underline and bold added)

#### ***Auditor's Responsibilities for the Audit of the Financial Statements***

*Our objectives are to obtain reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error, and to issue an auditor's report that includes our opinion. Reasonable assurance is a high level of assurance, but is not a*

guarantee that an audit conducted in accordance with ISAs will always detect a material misstatement when it exists. (Underline and bold added)

Misstatements can arise from fraud or error and are considered material if, individually or in the aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of these financial statements. (Underline and bold added)

As part of an audit in accordance with ISAs, we exercise professional judgement and maintain professional scepticism throughout the audit. We also:

- Identify and assess the risks of material misstatement of the financial statements, whether due to fraud or error, design and perform audit procedures responsive to those risks and obtain audit evidence that is sufficient and appropriate to provide a basis for our opinion. The risk of not detecting a material misstatement resulting from fraud is higher than for one resulting from error, as fraud may involve collusion, forgery, intentional omissions, misrepresentations, or the override of internal control.
- We communicate with the trustees regarding, among other matters, the planned scope and timing of the audit and significant audit findings, including any significant deficiencies in internal control that we identify during our audit.

In our opinion, the information given in the report of the Trustees on page 79 is consistent with the financial statements... (Underline and bold added)

136. It is material that PwC were Safaricom's Auditors in connection with its Annual Reports for the Years Ended 31<sup>st</sup> March 2007 and 31<sup>st</sup> March 2008- at that time on behalf of the Controller and Auditor General- and thereafter in their own right for all

Financial Year Ended 31<sup>st</sup> March 2009 until Safaricom's Annual General Meeting held on 30<sup>th</sup> July 2020.

137. The Plaintiffs therefore contend that at the time of expressing their opinion on the M-Pesa Foundation's Annual Report for the Year Ended 31<sup>st</sup> March 2018, PwC was well aware of the fact that Safaricom and the Safaricom Foundation were also its (PwC's) clients in respect of the provision of audit services.

138. Given that PwC was also aware, from its long-term dealings with Safaricom as its Auditors, that M-Pesa Holding was (ostensibly) the Trustee of M-Pesa Accountholders' funds, then:

- i. PwC ought reasonably to have queried the lawfulness and enormity of the **KShs. 400,000,000/=** and **KShs. 8,500,000,000/=** stated by the Trustees of the M-Pesa Foundation as having been paid by M-Pesa Holding to the Foundation as donations in the Financial Years 2017 and 2018 respectively;
- ii. By the same token, PwC ought reasonably to also have queried how the M-Pesa Foundation (ostensibly a non-profit making entity) had donated to the M-Pesa Foundation Academy **KShs. 2,034,826,000/=** and **KShs. 1,768,200,000/=** in 2017 and 2018 respectively.

139. Accordingly, the Plaintiffs contend that PwC was well aware of the unlawfulness of the "donations" by the M-Pesa Holding, and of the "donations" by the M-Pesa Foundation to the M-Pesa Foundation Academy.

140. Further, the Plaintiffs contend that the Trustees of the M-Pesa Foundation were themselves not only well aware of the unlawfulness of the "donations" by the M-Pesa Foundation, and of the "donations" by the M-Pesa Foundation to the M-Pesa Foundation Academy. Despite this, the Trustees in the said Annual Report falsely and knowingly confirmed as follows:

*...there was, as far as each Trustee is aware, no relevant audit information of which the Foundation's Auditor is unaware; and [that] each Trustee had taken all steps that ought to have been taken as a Trustee so as to be aware of any relevant audit*

*information and to establish that the Foundation's Auditor is aware of that information.*

141. Further, the Plaintiffs state that it is material that despite there being different legal structures for PwC entities worldwide, the individual entities operate in accordance with shared international professional standards of the PricewaterhouseCoopers worldwide organization, and collaborate in many operational aspects. The Plaintiffs therefore contend that given the magnitude and materiality of the amounts transferred from one of the Vodafone Group and/or Safaricom affiliates to another, the fraudulent money movements were capable of easy detection, red-flagging, reporting and, ultimately, whistleblowing.
142. *A fortiori*, the Plaintiffs contend that the admission by the Vodafone Group in its 2021 Annual Report to the effect that there were “*amounts owed to M-Pesa account holders of €1,237 million for FY20 and €1,048 million for FY19*” was sufficient for the UK PwC entity to have questioned the circumstances in which the Group had come to owe the Accountholders monies which were supposed to have been kept separately from the Group’s own monies, and held in trust for the Accountholders by a trust company.
143. The Plaintiffs state that at the time of expressing their opinion on Safaricom’s Annual Reports from year to year for the respective periods when they were its providers of audit services, both PwC and EY knew or ought reasonably to have known that *if there was a trust relationship at all* between Safaricom and M-Pesa Holding, then the relationship was one where, at best, M-Pesa Holding was Trustee in respect of non-discretionary trusts. Accordingly, the Plaintiffs contend that both PwC and EY were at all times aware that M-Pesa Holding could not legally and lawfully donate money to the M-Pesa Foundation, the Safaricom Foundation or any other entity, company or person, as such money belonged to M-Pesa Accountholders and was to be held in trust for them.
144. The Plaintiffs state, in the above regard, that PwC and EY were fraudulent, or negligent, as particularized below:

- (i) They knew or ought reasonably to have known that Safaricom should have placed M-Pesa Accountholders' monies in trust for them;
- (ii) They knew or ought reasonably to have known that M-Pesa Holding was a sham trust company, particularly given the fact that through the 2008 Trust, M-Pesa Holding purported to appoint Safaricom as its agent to operate the commercial bank accounts maintained by M-Pesa Holding for the purposes of holding the (alleged) Trust Fund;
- (iii) They knew or ought reasonably to have known that it was unlawful for Safaricom personnel to be named, and to be authorized to act, as signatories on the bank mandates for such accounts; and
- (iv) They knew or ought reasonably to have known that *significant* amounts of money were paid back to Safaricom by M-Pesa Holding in circumstances that clearly raised suspicion and ought to have put the said audit firms on guard in view of the trust relationship that was supposed to exist between Safaricom and M-Pesa Holding.

***x. The Illegal and Unlawful Conducting of Banking Business and Financial Business Through the Fuliza Constant Overdraft Service Amounting to Misappropriation and Theft of M-Pesa Accountholders' Funds and Predatory Lending, and the Central Bank's Failure to Protect the Banking Industry from Unfair Competition by the Fuliza Service, Together with the Highly Detrimental Consequences of the Service, Including Gambling Addiction, Bankruptcy and a High Incidence of Suicide Cases:***

145. The Plaintiffs state that locally, the misappropriation and theft of M-Pesa Accountholders' real money and interest and investment income earned from such money was perpetrated through select commercial banks including NCBA and KCB, with the complicity (and 'unseeing' eye) of the Central Bank and the Communications Authority as regulators.

146. Against the above background, the Plaintiffs contend that Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi, Mr. Ogutu, the Central Bank and the



Communications Authority have aided and abetted the fraud, and assisted major financial institutions to collect steep fees while ignoring blatant warning signs that M-Pesa Accountholders were being, and continue to be, financially excluded.

147. The Plaintiffs state that apart from the direct financial exclusion of M-Pesa Accountholders through the “donation” of their funds, interest and income, clear warning signs included the impoverishment of a considerable portion of the “unbanked” M-Pesa Accountholders as a result of the Central Bank’s and the Communication Authority’s:

- i. Failure to outlaw the *Fuliza* overdraft service for being contrary to the law due to its illegal and unlawful use of real money belonging to non-borrowing M-Pesa Accountholders;
- ii. Failure to outlaw any form of predatory lending and the application of usurious interest rates, thereby allowing the *Fuliza* overdraft service to continue thriving;
- iii. Failure to establish a proper and effective regulatory framework in order to ensure that the *Fuliza* service did not, whether directly or indirectly, conduct banking business and/or financial business and thereby compete with authorized banks; and
- iv. Failure to actively discourage and/or to take steps against unregulated gambling which was being conducted through the M-Pesa Service, which would ultimately be linked to gambling addiction, bankruptcy and a high incidence of suicide cases especially among Kenyan youth.

148. In the above regard, the Plaintiffs state that Section 2(1) of the Banking Act defines “banking business” and “financial business” respectively as “the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money” and “the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money”.

149. Further, it is instructive that Safaricom has described the *Fuliza* overdraft service (which was introduced in 2019) as “a continuous overdraft service that allows Safaricom's M-Pesa customers to complete their M-Pesa transactions *even when they do not have enough funds in their M-Pesa account*” (*italics added*), and it is therefore contended that the overdraft service is a clear example of how Safaricom, in conjunction with NCBA, has been engaging in banking business and financial business despite not being a bank or a financial institution for the purposes of the Banking Act.
150. Without prejudice to the foregoing, the Plaintiffs however contend that Safaricom fits the description of “financial institution” as defined in Section 2 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009.
151. The Plaintiffs further contend that banking business and financial business are regulated by the Central Bank which is mandated under Section 33 of the Banking Act to, *inter alia*, give advice and make recommendations to an institution with regard to the conduct of its business generally, whenever “the business of an institution is being conducted in a manner contrary to or not in compliance with the requirements of this Act or of any regulations made thereunder or in any manner detrimental to or not in the best interests of its depositors or members of the public”.
152. The Plaintiffs also contend that the Central Bank failed in its statutory mandate in failing to prohibit the on-lending of funds belonging to non-borrowing M-Pesa Accountholders to other M-Pesa Accountholders intending to borrow, through the *Fuliza* continuous overdraft service which “allows Safaricom’s M-PESA customers to complete their M-PESA transactions even when they do not have enough funds in their M-PESA account”.
153. Further, the Plaintiffs state that the only logical inference that can be drawn from the fact that M-Pesa Accountholders who do not have enough funds in their accounts to complete M-Pesa can nevertheless complete M-Pesa transactions through the *Fuliza* overdraft service is that funds belonging to other M-Pesa Accountholders (i.e., funds of those who have a credit balance and who are at the specific point in time not

borrowing- which are held in deposit at NCBA) are routinely stolen and lent to the M-Pesa Accountholders who have a deficit. The interest income and profit earned from such lending is then illegally and unlawfully retained by Safaricom, with the bank facilitating the *Fuliza* overdraft service (NCBA) illegally and unlawfully collecting steep fees from the lending.

***xi. Commingling of M-Pesa Accountholders' Funds with Those of Safaricom and the Vodafone Group, and the Fraudulent, Unlawful and Unregulated Lending by Safaricom Through the Fuliza Service and Investment of the Funds with Third Party Banks:***

154. The lending of money to M-Pesa Accountholders who requested for Safaricom's *Fuliza* service (described by Safaricom itself as "*a continuous overdraft service that allows Safaricom's M-Pesa customers to complete their M-Pesa transactions even when they do not have enough funds in their M-Pesa account*") meant either:

- i. That Safaricom was using its own money to lend to M-Pesa Accountholders; or
- ii. That the funds of other (i.e., non-borrowing) M-Pesa Accountholders were being applied in lending to M-Pesa Accountholders who requested for the service, a situation that was therefore actualized by Safaricom without the consent of the non-borrowing M-Pesa Accountholders and which therefore amounted to outright theft of their funds.

155. Assuming that Safaricom was using its own money this would necessarily mean that its funds were (being) commingled with those of the M-Pesa Accountholders, which would *in se* be a violation of the law of trusts against commingling of third-party monies with funds belonging to beneficiaries.

156. On the other hand, assuming that the funds applied towards lending through the *Fuliza* service were those of non-borrowing M-Pesa Accountholders, this would necessarily mean that the on-lending to other M-Pesa Accountholders was done without the consent of the M-Pesa Accountholders whose funds were applied in

lending, and this therefore amounted to outright theft of the funds that had been so applied.

157. It is a *matter of fact* that no M-Pesa Accountholder's consent was sought by Safaricom prior to lending of any money through the *Fuliza* service.

158. Further to the foregoing and without prejudice to the preceding paragraphs, Safaricom and M-Pesa Holding maintained and have continued to maintain bank accounts at various banks, notably at NCBA and KCB, for a period of up to about sixteen (16) years as at the time of filing this suit, during which the two Defendants (Safaricom and M-Pesa Holding) have collected and paid out to persons other than M-Pesa Accountholders monies running into trillions of Kenya Shillings in interest payments and investment income from real money belonging to M-Pesa Accountholders.

159. The Central Bank was at the epicentre of the fraud perpetrated directly by Safaricom and M-Pesa Holding (the 1<sup>st</sup> and 4<sup>th</sup> Defendants) in tacitly allowing the investing of M-Pesa Accountholders' funds and the resultant generation of interest and investment income for the benefit of the said two Defendants and, by extension, of Vodafone International Holdings (the 5<sup>th</sup> Defendant) and ultimately of the Vodafone Group (the 2<sup>nd</sup> Defendant).

160. In this manner, interest payments and investment income belonging to the M-Pesa Accountholders themselves (who are the owners of the real money *presumably* held by M-Pesa Holding) was stolen and continues to be stolen from them until such time as their monies will be invested for their own benefit in accordance with the law of trusts.

161. The Central Bank was complicit in the theft of M-Pesa Accountholders' funds by failing to create a proper regulatory regime for mobile financial services that protected them as consumers of Safaricom's M-Pesa Service as further detailed in the following paragraph.

162. As a result of the illegal and unlawful appointment of Safaricom as M-Pesa Holding's agent in respect of the holding, management and investment of real money belonging to M-Pesa Accountholders (by virtue of Clause 7.1 of the 2008 Trust), coupled with the lending of real money by Safaricom to its (applying) M-Pesa Accountholders through the *Fuliza* service with the actual or tacit approval of the Central Bank, the Accountholders' real money was commingled with Safaricom's own money without being segregated or transferred to separate accounts and invested as beneficiaries' funds.

*xii. Fraudulent Misrepresentation as to the "Independence" of M-Pesa Holding Directors, and Conflict of Interest:*

163. In furtherance of the scheme to defraud M-Pesa Accountholders, Safaricom's Annual Reports and Accounts right from the inception of the M-Pesa Service invariably *falsely* claimed that M-PESA Holding was controlled by Directors who were independent of Safaricom, and that it acted as the Trustee for M-PESA Accountholders and held all funds from the M-PESA business in trust to ensure that those funds were safeguarded at all times.

164. The "assurance" by Safaricom that M-Pesa Holding was controlled by Directors who were "*independent of Safaricom*" was not only false and fraudulent, but was intended to be acted upon by M-Pesa Accountholders and by Safaricom shareholders, to their detriment.

165. The fraudulent misrepresentation of the alleged *independence* of M-Pesa Holding's Directors was carried in the following terms in Safaricom's Annual Report and Accounts for the Year Ended 31<sup>st</sup> March 2008 (at p. 52):

*To ensure protection of customers' funds, a limited company was established, the M-PESA Holding Company Limited.*

*M-PESA Holding Company Limited is a company whose primary purpose is to open a bank account that can be used to hold the customers' funds in trust and from which the M-PESA accounting software will operated (sic) to enable payments. The creation of this company ensures that the customers' funds at all times remain the property of the customer and are only held on trust by the M-PESA Holding Company.*

166. The “script” in the Annual Report and Accounts for 2009 (at p. 68), 2010 (at p. 81), 2011 (at p. 163), 2012 (at p. 89), 2013 (at p. 90), and 2014 (at p. 118) was in characteristically similar terms, specifically in the following words:

*M-PESA Holding Company Limited, which is controlled by directors who are independent of Safaricom Limited, acts as the trustee for M-PESA customers and holds all funds from the M-PESA business in trust to ensure that those funds are safeguarded at all times.*

167. Safaricom, M-Pesa Holding, the Vodafone Group, Vodafone International Holdings, Vodafone Kenya, PwC, EY, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi, Mr. Ogutu, the Central Bank and the Communications Authority were at all times aware that M-PESA Holding was *not* controlled by Directors who were *independent* of Safaricom, and that real money belonging to M-Pesa Accountholders was at a *real risk* of being dissipated, and that it was *in fact* being so dissipated.

168. The claim by Safaricom in its Annual Report and Accounts for the Financial Year Ending 31<sup>st</sup> March 2008 to the effect that M-PESA Holding was “*a company whose primary purpose is to open a bank account that can be used to hold the customers’ funds in trust and from which the M-PESA accounting software will operated (sic) to enable payments*” was a *patently false* statement. The falsity of this statement can easily be discerned from the following facts:

- i. The sham 2008 Trust expressly allowed the illegal and unlawful appointment of Safaricom as M-Pesa Holding’s agent in relation to the holding, management and investment of real money belonging to M-Pesa Accountholders;
- ii. (As already observed), contrary to being held in trust for the M-Pesa Accountholders, the Accountholders’ funds were commingled with those of Safaricom (the 1<sup>st</sup> Defendant), M-Pesa Holding (the 4<sup>th</sup> Defendant) and NCBA, the bank with which the said two Defendants were working in connection with the *Fuliza* service; and

- iii. It is beyond any reasonable doubt that the so-called M-Pesa accounting software from which M-Pesa Accountholders' funds would be "*operated to enable payments*" was software which was operated by Safaricom rather than by a legitimate Trust company which was independent of Safaricom.

169. Safaricom further *falsely* claimed that it was through the creation of M-Pesa Holding that it would be ensured that M-Pesa Accountholders' funds at all times remained the property of the Accountholders, and that such funds were only held in trust by M-PESA Holding. The falsity of Safaricom's assertion is clear from:

- i. The fact that M-Pesa Accountholders' funds were *in fact* held by Safaricom and not by M-Pesa Holding (and there was therefore no effective trust relationship between the Accountholders and M-Pesa Holding); and
- ii. The on-lending of M-Pesa Accountholders' funds through the *Fuliza* service *ipso facto* meant that those funds illegally ceased to belong to the Accountholders and that they had been appropriated by Safaricom.

170. Accordingly, it was *patently false* for Safaricom to state in its Annual Reports and Accounts that there was in place a system to ensure that M-Pesa Accountholders' funds at all times remained the property of the Accountholders, and that such funds were "only held on trust" by M-PESA Holding.

171. The Plaintiffs provide the following further particulars to demonstrate the falsity and fraudulent nature of the statement that M-Pesa Holding was controlled by Directors who were independent of Safaricom, and that a bank account would be opened in which M-Pesa Accountholders' funds would be held in trust, and from which the M-PESA accounting software would be operated to enable payments:

### **PARTICULARS**

- i. Despite Safaricom's Annual Reports and Accounts for 2012 (p. 89) and 2014 (p. 118) having indicated that M-PESA Holding Company Limited was "*controlled by directors who are independent of Safaricom...*", the same

Annual Reports indicated (at p. 98 and 130 respectively) that Mr. Robert Collymore was the “*Chief Executive Officer and Executive Director*” of Safaricom and “*also a trustee of Holding companies in Kenya and Tanzania for M-PESA, Vodafone’s pioneering money transfer service*”;

- ii. At p. 83 of the M-Pesa Foundation’s Annual Report for the Year Ended 31<sup>st</sup> March 2018, it was reported that the Foundation was funded by M-PESA Holding. At the time, Mr. Joseph was a Director of Safaricom and also the Chairman of the M-Pesa Foundation, while Mr. Collymore was the Chief Executive Officer and Executive Director of Safaricom, and a Trustee of the M-Pesa Foundation;
- iii. According to p. 7 of (the same, i.e., 2018) Annual Report of the M-Pesa Foundation, the initial Trustees of the Foundation were Mr. Collymore (a non-Executive Director of Safaricom at the time of founding the M-Pesa Foundation), Mr. Keith described as a “long time legal advisor to both Vodafone (i.e., the Vodafone Group) and Safaricom”, Mr. Joseph (as Chairman) and Mr. Baillie as Executive Director, while at p. 94 of the Report, it was reported that the Foundation was founded as an irrevocable public charitable trust on 23<sup>rd</sup> March 2010 by M-Pesa Holding;
- iv. Until at least 26<sup>th</sup> May 2021, Mr. Joseph and Mr. Ogutu, who were then the Chairman and Chief Special Projects Officer of Safaricom respectively, were also Directors of M-Pesa Holding alongside Mr. Keith, the “long time legal advisor to both Vodafone (i.e., the Vodafone Group) and Safaricom”;
- v. Vodafone International Holdings, the sole (100%) shareholder of M-Pesa Holding, is itself a 100% subsidiary of the Vodafone Group;
- vi. The Vodafone Group’s Annual Report and Accounts for the Year Ended 31<sup>st</sup> March 2016 indicated that both the M-Pesa Foundation and M-Pesa



Holding were *in fact* 100% owned by the Vodafone Group (the latter through Vodafone International Holdings);

- vii. For M-Pesa Holding to be a lawful and legitimate Trust company, it would have had to be *independent* of Safaricom and the Vodafone Group and companies affiliated to them and all individuals who have been sued in this suit. However, at one point or other some of the Defendants in this suit, including Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie and Mr. Ogutu controlled Safaricom and also controlled M-Pesa Holding, the Vodafone Group and/or Vodafone Kenya as senior officers or Board members;
- viii. 5% of Safaricom is owned by the Vodafone Group, while another 35% of Safaricom is owned by Vodacom. 60.5% of Vodacom is itself owned by the Vodafone Group. This effectively means that 21.175% (i.e., 60.5% of 35%) of Safaricom is owned by the Vodafone Group through Vodacom, bringing the Group's total indirect stake in Safaricom to 26.175% and making the Group a larger shareholder in Safaricom than all other foreign corporate, local corporate, local individual and foreign individual shareholders combined (25%); and
- ix. Clause 7.1(a) of the 2008 Trust provided that the operation of bank accounts maintained by M-Pesa Holding "for the purpose of holding the Trust Fund... including for the purposes of effecting payments out of such Bank Accounts..." was purportedly vested in Safaricom. The Clause further provided that "authorized Safaricom personnel shall, for these purposes, be named as signatories on the bank mandates for such accounts", thereby demonstrating the *falsity* of Safaricom's statement that M-Pesa Holding was a company with the primary purpose of opening a bank account to hold M-Pesa Accountholders' funds in trust and through which the M-PESA accounting software would enable payments due to the Accountholders.

*xiii. Further Commingling and Siphoning off of M-Pesa Accountholders' Funds to the Vodafone Group, Through Mr. Ngumi, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Ogutu, M-Pesa Holding and Vodafone International Holdings:*

172. Despite having made claims as to the independence of M-Pesa Holding Directors vis-à-vis Safaricom and as to the holding of funds belonging to M-Pesa Accountholders in trust for them, Safaricom failed to hold such funds in trust, and further failed to ensure that the funds remained at all times the property of the Accountholders. *On the contrary*, Safaricom allowed the Accountholders' funds to be siphoned off to the Vodafone Group through a well-concerted scheme involving M-Pesa Holding and Vodafone International Holdings in circumstances clearly amounting to illicit financial flows and unjust enrichment.

173. The fact that the Vodafone Group held M-Pesa Accountholders' funds is acknowledged at p. 224 of the Group's Annual Report for the Financial Year Ended 31<sup>st</sup> March 2021 under the heading "Company Statement of Financial Position", where it is stated that:

*Other investments now excludes amounts owed to M-Pesa account holders of €1,237 million for FY20 and €1,048 million for FY19.*

174. The reference to "amounts owed to M-Pesa Accountholders" was, *per se*, an admission that the Vodafone Group had held and was holding M-Pesa Accountholders' funds which were not supposed to ever have been in its possession or within its access or control, as these were funds which were required to be held in trust by independent Trustees. The circumstances in which the funds were held therefore clearly amounted to illicit financial flows and unjust enrichment.

175. The fact that the funds in question were *not* at any time held by independent Trustees is demonstrated by the facts below:

- i. All M-Pesa Holding's Directors at the time of the Vodafone Group's Annual Report who were natural persons (namely, Mr. Joseph, Mr. Keith, Mr. Spink and Mr. Ogutu) were (or still are) Directors or senior officers of Safaricom and/or of the Vodafone Group or of its associated companies or entities, such as the M-Pesa Foundation, the Safaricom Foundation and the M-Pesa Foundation Academy;

- ii. The only artificial person at the time of the Vodafone Group's Annual Report (2021) that was a Director of M-Pesa Holding was Vodafone International Holdings;
- iii. Previous Directors of M-Pesa Holding had included Mr. Collymore (now deceased) when he was the Chief Executive Officer of Safaricom;
- iv. In various Consolidated Financial Statements for the Vodafone Group, including for the Financial Years ended 31<sup>st</sup> March 2016 and 31<sup>st</sup> March 2017, it was reported (at p. 156 and p. 170 respectively) that the Vodafone Group owned 100% of the Ordinary Shares of M-Pesa Holding; and
- v. More importantly:
  - a. In the Vodafone Group's Consolidated Financial Statements for the Financial Year ended 31<sup>st</sup> March 2016, it was also reported that the Vodafone Group owned 100% of the M-Pesa Foundation although the "share class" was stated to be N/A (understood to mean "Not Applicable");
  - b. It was reported in the Consolidated Statements for the Financial Year ended 31<sup>st</sup> March 2017 that the Vodafone Group owned 100% of the Ordinary Shares of the M-Pesa Foundation, thereby raising serious concerns as to whether indeed the status of the Foundation remained that of a "Trust" (although it is emphasized that the Foundation at all times had the character of a *sham* Trust entity and was a mere conduit for 'whitewashing' and facilitating the illicit financial flows of M-Pesa Accountholders' funds);
  - c. The Vodafone Group's Consolidated Financial Statements for all subsequent years up to the time of filing of this suit (i.e., the Financial Year Ending 31<sup>st</sup> March 2018 to the Financial Year Ending 31<sup>st</sup> March 2022, both inclusive) made no mention of whether the M-Pesa

Foundation was still owned by the Vodafone Group and/or as to the nature of such ownership (if it still continued to exist);

- d. The Vodafone Group Annual Report for the Financial Year Ended 31<sup>st</sup> March 2022 has also failed to disclose the “amounts owed to M-Pesa Accountholders”, given that it must be presumed that Vodafone International Holdings (as the sole shareholder of M-Pesa Holding) continues to receive, and presumably to pass on to the Vodafone Group, all interest and investment income earned from the illegal and unlawful application of M-Pesa Accountholders’ funds; and
- e. M-Pesa Holding has not published its Annual Reports and Accounts since its incorporation on 11<sup>th</sup> September 2006.

176. Since the inception of the M-Pesa Service, there has at no time been any contractual or other legal agreement or arrangement between the Vodafone Group and the entire class of M-Pesa Accountholders by virtue of which the Group could be said to have been *lawfully* holding the Accountholders funds. The so-called “owing” of Accountholders funds by the Vodafone Group was therefore *in fact* a mere euphemism for the outright theft of their funds, given that from a legal perspective “owing” is an obligation to pay or repay monies that are *lawfully* in the hands of the person owing.

177. In addition to the foregoing, it the Plaintiffs state that Note 1 on the Return on Capital Employed (‘ROCE’) at p. 224 of the Vodafone Group’s “Company Statement of Financial Position” in its Consolidated Financial Statements for the Financial Year ended 31<sup>st</sup> March 2021 was reported on a Non-GAAP basis (i.e., transactions not reported according to Generally Accepted Accounting Principles). The Plaintiffs contend that this is a further indication that the Vodafone Group was illegally and unlawfully holding M-Pesa Accountholders’ funds. Further, Note 1 is also a clear indication that the Vodafone Group invested funds belonging to the M-Pesa Accountholders for its own benefit, which it did not declare to them. In this manner,

the Vodafone Group employed M-Pesa Accountholders' funds as capital in its ordinary business, and earned a return on the funds.

*xiv. Further Theft by Safaricom and M-Pesa Holding Arising from Dubious Sales and Purchases of Goods/Services Between the Two Companies Through False or Exaggerated Movement of Monies Resulting in Loss of M-Pesa Accountholders' Funds and/or Potential Dividends to Safaricom Shareholders and/or Erosion of Their Shareholder Value:*

178. Apart from any licence fee payable to the Vodafone Group by Safaricom for use of the M-Pesa Service, the only other amount generally deductible from M-Pesa Accountholders' funds would be a reasonable remuneration and disbursements charged by a lawfully established Trust company for its services. As a Trustee would have a duty to invest Beneficiaries' funds, such remuneration and disbursements would typically be raised and paid out of the interest or investment income earned.

179. Assuming the factual correctness and truth of Safaricom's Annual Reports and Accounts (although, for the avoidance of doubt, the Plaintiffs categorically state that they do not authenticate the same), the Plaintiffs draw the following inferences:

- i. It appears that Safaricom did not pay instantaneously for goods or services purchased from M-Pesa Holding despite the fact that the M-Pesa accounting software was supposed to check off such payments;
- ii. It also appears that Safaricom was not paid instantaneously for goods or services sold to M-Pesa Holding despite the existence of the M-Pesa accounting software;
- iii. Further, it would appear that Safaricom did not purchase any goods or services from M-Pesa Holding, nor sell any goods or services to M-Pesa Holding for the period from 6<sup>th</sup> March 2007 (when the M-Pesa E-Money Service was launched) to 31<sup>st</sup> March 2007 (despite the fact that it is beyond doubt that the M-Pesa Service was up and running during the period in question);
- iv. It is apparent that Safaricom published *false* Annual Reports and Accounts. By way of illustration:

- a. At p. 53 of Safaricom's 2008 Annual Report and Accounts it was reported that the sum of KShs. 417,340,000 was due from M-Pesa Holding to Safaricom as at 31<sup>st</sup> March 2008;
- b. At p. 69 of Safaricom's 2009 Report and Accounts, the same amount (KShs. 417,340,000) was also reported as having been due from Vodafone (UK) Limited to Safaricom as at 31<sup>st</sup> March 2008;
- c. At p. 69 of Safaricom's 2009 Report and Accounts, it was reported that there was *no* amount (i.e., a "nil" amount, represented by the symbol "-") due from M-Pesa Holding to Safaricom as at 31<sup>st</sup> March 2008 (notwithstanding that at p. 53 of Safaricom's 2008 Accounts- *see (a), above*- it had been reported that the sum of KShs. 417,340,000/= was due from M-Pesa Holding to Safaricom as at the said date; and
- d. While it was reported at p. 69 of Safaricom's 2009 Accounts that the sum of KShs. 417,340,000 was due from Vodafone (UK) Limited to Safaricom as at 31<sup>st</sup> March 2008, there was no mention whatsoever of any amount at all as having been due from Vodafone (UK) Limited as at the said date in the "*Amounts due from*" column in Safaricom's Accounts for the year 2008; and
- e. Transactions between Safaricom and M-Pesa Holding were commingled with Safaricom's funds, and passed off as transactions between Safaricom and Vodafone (UK) Limited.

180. The Plaintiffs contend that these material amounts escaped the attention of Safaricom's auditors.

***xv. Further Commingling of M-Pesa Accountholders' Funds Directly by the Vodafone Group, and the Central Bank's Breach of Express and Implied Constitutional and Statutory Duty to Protect M-Pesa Accountholders:***

181. Further to the foregoing, the Plaintiffs contend that as a result of the commingling of funds by Safaricom and M-Pesa Holding, the Vodafone Group held and owed M-

Pesa Accountholders the sum of €1,048,000,000.00 and €1,237,000,000.00 (equivalent to KShs. 140,002,320,000.00 and KShs. 165,250,830,000.00 (i.e., a total of €2,285,000,000.00, equivalent to KShs. 305,253,150,000.00 as at 23<sup>rd</sup> February 2023, at a mean rate of €1.00 = KShs. 133.59) for the years ended 31<sup>st</sup> March 2019 and 31<sup>st</sup> March 2020 respectively, being monies that never ought to have come into the hands of the Vodafone Group at all costs.

182. The Plaintiffs aver that the commingling of funds as detailed above was as a result of a serious lapse in the Central Bank's duty to protect the consumer interests of the M-Pesa Accountholders.

183. Further, the Plaintiffs state that the Central Bank, as the primary regulator of Safaricom, failed to tip off the Capital Markets Authority and Safaricom's investors and shareholders of the fact that Safaricom was illegally using M-Pesa Accountholders' funds to illegally and unlawfully generate interest and investment income. The Central Bank instead looked the other way.

*xvi. False Popularization of Safaricom with a View to Obscuring Theft of M-Pesa Accountholders' Funds Through Illicit Transfers to the Vodafone Group, and the Resultant Fraudulent Erosion of Shareholder Value in Safaricom Stocks:*

184. The Central Bank further failed to notify other regulatory agencies that the consistently high profits that Safaricom reported were largely being derived from M-Pesa Accountholders' funds through theft of interest and investment income generated using their monies, in clearly illegal and unlawful circumstances which amounted to unjust enrichment. The Central Bank was at all times well aware that these illegal and unlawful circumstances would ultimately lead to erosion of the shareholder value of Safaricom's shareholders.

185. With the aim of 'legitimizing' and attracting more and more M-Pesa customers and ultimately 'mopping up' more M-Pesa Accountholders' real money for the purpose of illegal investment, Safaricom hatched a scheme through which made aggressive voice and data offers and embarked on a sustained marketing campaign by using mantras, catchphrases and slogans. The mantras, catchphrases and slogans

used in this regard include “Twende Tukiuke” (a *double entendre* phrase that loosely translates to *Let’s Go Beyond* or, *Let’s Contravene*), “Simple. Transparent. Honest FOR YOU”, “This is For You”, “Tuinuane” (loosely translating to *Let’s Lift Each Other*), “Tunukiwa Dabo Dabo” (loosely translating to *Be Rewarded Double Double*), “Jisort na Bonga” (loosely translating to *Sort Yourself With Bonga* (Bonga Points being points earned on Safaricom’s loyalty scheme)), “Nyoosha Shilingi” (loosely, *Stretch the Shilling*) and “Tokea Tunyoooooshe Shilingi” (loosely translating to *Come Out We Strrrretch the Shilling*), among others.

186. In addition to the foregoing the above mantras, offers on reduced voice and data charges were among the other gimmicks applied by Safaricom to *falsely* create a prestigious name and an ostensibly good reputation for Safaricom while fleecing M-Pesa Accountholders and Safaricom shareholders through illegal use and investment of M-Pesa Accountholders’ funds. The Plaintiffs contend that this practice amounted to predatory pricing and discount schemes intended to foreclose a market from competition.

187. As part of the scheme, another way of falsely popularizing Safaricom was for Safaricom to pass off and hold out the M-Pesa Foundation and the Safaricom Foundation as “charitable trusts” while the two entities were *in fact* privately owned special purpose vehicles for Safaricom and the Vodafone Group.

188. In the above regard, it is noteworthy that the M-Pesa Foundation 2017-2018 Annual Report states as follows:

*The M-PESA Foundation Charitable Trust was founded as an irrevocable public charitable trust on 23 March 2010 by M-PESA Holding Co. Limited, a company incorporated in Kenya (the “Founder”) being desirous of making a contribution towards the welfare of the people of Kenya in furtherance of its corporate social responsibility policy. Its principal office of operation is:*

*Safaricom House  
Waiyaki Way - Westlands  
P.O. Box 66827 - 00800  
Nairobi, Kenya*



189. The above situation demonstrates not only *actual* ownership of the M-Pesa Foundation by M-Pesa Holding, but the fact that the Foundation's offices are in the same physical location as those of Safaricom raises serious questions regarding the arm's length principle.
190. Additionally, at p. 83 of the same Annual Report, it is stated that “[t]he Foundation is funded by M-PESA Holding Co. Limited (the “Founder”) in fulfillment of the Founder’s corporate social responsibility”. The necessary implication is that the M-Pesa Foundation’s funding by M-Pesa Holding is through real money and interest and investment income belonging to M-Pesa Accountholders.
191. The Plaintiffs contend that M-Pesa Holding, having been a sham Trust *ab initio* and illegally in possession of M-Pesa Accountholders’ funds, was incapable of funding and gifting the M-Pesa Foundation with such funds for a lawful founding of a charitable trust, as it is a fundamental maxim of the law of equity that equity will not perfect an imperfect gift.
192. Additionally, even if M-Pesa Holding had been a lawfully established Trust company (although it is contended that it was not), it was incapable of founding the M-Pesa Foundation as a charitable trust, which under the law of trusts and also under the Trustee (Perpetual Succession) Act is a discretionary trust. Even if it were to be assumed that M-Pesa Holding was lawfully established as a trust company, its powers extended only to distributing the trust property to the beneficiaries, i.e., the M-Pesa Accountholders but could not distribute trust property to third parties.
193. The Plaintiffs contend that in the theft of interest and investment income due to M-Pesa Accountholders and the inevitable erosion of the value of Safaricom shares, the controlling minds of Safaricom and the Vodafone Group were Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu.
194. In this regard, the sham nature of M-Pesa Holding as a trust, and of the M-Pesa Foundation as a so-called “charitable trust” can be easily discerned from the positions held by the controlling minds of M-Pesa Holding and the M-Pesa Foundation. These included:

- i. Mr. Ngumi: Chair of Safaricom until 22<sup>nd</sup> December 2022; Chair since 2017 to date of Carepay, a private profit-making company affiliated to Safaricom providing a smart health payment distribution platform known as M-Tiba, and in which the M-PESA Foundation owns 73,296 Ordinary shares out of 157,467 shares issued;
  - ii. Mr. Joseph: former Chair of Safaricom, currently a Director of Safaricom and at the same time Chair of the M-Pesa Foundation and Director of M-Pesa Holding; former Director of Mobile Money at the Vodafone Group;
  - iii. Mr. Keith: Director of M-Pesa Holding, Trustee of the M-Pesa Foundation, Director of Vodafone Kenya, and a “long time Legal Advisor to both Vodafone (i.e., the Vodafone Group) and Safaricom”;
  - iv. Mr. Spink: Director of M-Pesa Holding, former Group Commercial Finance Director of the Vodafone Group and currently Finance Director of the Europe Cluster of the Vodafone Group, also formerly a Director of Vodafone Sales & Services;
  - v. Mr. Baillie: currently a Trustee and the Executive Director of the M-Pesa Foundation, formerly Director of Safaricom and also formerly Chief Financial Officer and also Chief Investor Relations Officer of Safaricom; currently M-Pesa Foundation’s representative on the Board of Carepay, and also formerly the Chief Executive Officer of the M-Pesa Foundation Academy;
  - vi. Mr. Ogutu: currently a Director of M-Pesa Holding and at the same time Chair and a Trustee of the Safaricom Foundation, and a former Chief Special Projects Officer of Safaricom.
195. The Plaintiffs state that the M-Pesa Foundation itself is illegally and unlawfully fully funded by M-Pesa Holding using M-Pesa Accountholders’ funds and/or interest and income generated from such funds, all of which are supposed to be held in trust for the Accountholders.

196. Furthermore, although the M-Pesa Foundation routinely earns dividends from Carepay as a shareholder of the company it was, according to its Annual Report for the Year Ended 31<sup>st</sup> March 2018, exempted from payment of income tax for a period of 5 years with effect from 20<sup>th</sup> March 2014. The Plaintiffs contend that as a trading entity, the M-Pesa Foundation has taxable business income, and ought not to have been granted income tax exemption. The Plaintiffs have been unable to ascertain whether, but believe that, the M-Pesa Foundation is still tax-exempt.
197. Further to the foregoing, it was disclosed at p. 156 of the Vodafone Group Annual Report for the Year Ended 31<sup>st</sup> March 2016 that both M-Pesa Holding and the M-Pesa Foundation are owned 100% by the Vodafone Group through Group companies, thereby confirming that they are both *private* entities.
198. The foregoing disclosure further implies that monies received by M-Pesa Holding are ultimately managed and controlled by the Vodafone Group, and that any income generated illegally and unlawfully inures for the benefit of the Group, rather than for the benefit of M-Pesa Accountholders.
199. The ultimate aim of Safaricom's sustained marketing was that more M-Pesa Accountholders' real money would be 'mopped up' into the M-Pesa Service and, *inter alia*, subsequently lent to applying M-Pesa customers through the *Fuliza* overdraft service, with Safaricom retaining the interest charged on such money.
200. The Plaintiffs contend that in so popularizing itself, Safaricom also sought to ensure and has ensured, from 2007 to date, that more and more of M-Pesa Accountholders' real money was invested in ventures that generated investment income which, instead of being paid over to the M-Pesa Accountholders whose real money had been used to generate the income, would instead be illegally earned and retained by Safaricom itself in the first instance.
201. Through this scheme, M-Pesa Accountholders' funds and interest and investment income earned on their money was illicitly transferred to the Vodafone Group through identified subsidiaries such as Vodafone International Holdings.

*xvii. Safaricom and the Vodafone Group's Fraudulent and Manipulated Transfer Pricing, and Tax Evasion:*

202. Additionally, more money was transferred to the Vodafone Group through manipulated and fraudulent transfer pricing between the Group (and its subsidiaries) and Safaricom, contrary to the relevant OECD (Organization for Economic Co-operation and Development) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

203. Although dubbed a “low cost money transfer service” at its inception in 2007, the M-PESA Service was *in fact* an expensive affair for the unbanked M-Pesa Accountholders right from the outset, due to fraudulent and manipulated transfer pricing. For instance:

- i. Following the launch of the M-PESA E-Money Service in March 2007, it was reported by Safaricom in the Annual Report and Accounts for the Years Ended 31<sup>st</sup> March 2008, 2009 and 2010 that the M-Pesa Service had been launched in conjunction with Vodafone Group Services (a 100% owned subsidiary of the Vodafone Group) through (the Luxembourg-based) *Vodafone Marketing SARL (Société à responsabilité limitée)* (hereinafter “Vodafone Marketing”);
- ii. In the said Annual Reports, Safaricom further reported that the Vodafone Group was the owner of the intellectual property in the M-PESA Service, and that the Vodafone Group had assigned rights in its intellectual property to Vodafone Marketing. It was further reported that Safaricom had entered into an M-PESA Managed Services Agreement under which Vodafone Marketing was to provide the M-PESA Service to Safaricom as a managed service, and that Vodafone Marketing had also granted a trademark licence to Safaricom for the use of the M-PESA Trade Mark and Logo under the terms of the Managed Services Agreement;
- iii. In its Annual Report and Accounts for the Year Ended 31<sup>st</sup> March 2011, Safaricom reported that it was Vodafone Sales & Services (*as opposed to Vodafone Group Services*) which owned the M-PESA solution;
- iv. Vodafone Sales & Services was only incorporated on 11<sup>th</sup> March 2009- more than 2 years after the launch of the M-Pesa Service- firstly under the name Vodafone

Group Trading Limited (“Vodafone Group Trading”, an entirely different entity from Vodafone Group Services), before changing to its current name (i.e., Vodafone Sales & Services) on 28<sup>th</sup> September 2009;

- v. The Safaricom Annual Report for the Year Ended 31<sup>st</sup> March 2011 further stated that Vodafone Sales & Services had entered into a Managed Services Agreement with Safaricom under which it had agreed to provide the M-PESA solution to Safaricom for a licence fee;
- vi. According to the said Report, the licence fees were based on the number of active subscribers multiplied by a service fee rate which was graduated depending on the number of subscribers (the service fee rate reducing with increase in number of active subscribers). The fee was payable quarterly and was capped at 25% of the M-Pesa revenue for that quarter with a floor of 10% of revenue per quarter.
- vii. Vodafone Marketing, the payee of the licence fees, was a private limited liability company which was a subsidiary of the Vodafone Group with a nominal share capital of only €13,000, all of which was owned by single shareholder, *Vodafone International 1 Société à responsabilité limitée*, also registered in Luxembourg but itself an entirely different entity and distinct from Vodafone Marketing (i.e., different from the Luxembourg-based *Vodafone Marketing SARL (Société à responsabilité limitée)*). The Plaintiffs state that the said *Vodafone International 1 Société à responsabilité limitée*, the sole shareholder of Vodafone Marketing resolved to dissolve the company, appointed itself liquidator, placed the company in voluntary liquidation and paid itself proceeds of the liquidation between November 2014 and January 2015;

204. The Defendants- in particular Safaricom, M-Pesa Holding, the Vodafone Group and Vodafone International Holdings- achieved the fraudulent transfer pricing, tax evasion and theft of M-Pesa Accountholders funds through, *inter alia*:

- 1. The incorporation of M-Pesa Holding as a *sham Trust* company;
- 2. The unlawful unrestricted movement and commingling of M-Pesa Accountholders’ funds to and from M-Pesa Holding and Safaricom aimed at

legitimizing various agreements for sale or purchase of goods and services between Safaricom and subsidiaries of the Vodafone Group and other associated companies, including Carepay;

3. The incorporation and illegitimate use of shell corporations including M-Pesa Holding itself, Vodafone International Holdings, Vodafone Group Services, Vodafone (UK) Limited (a different company from the Vodafone Group), Vodafone Sales & Services, Vodafone Marketing, *Vodafone International 1 Société à responsabilité limitée* to siphon funds. In this regard, it is noteworthy that *Vodafone International 1 Société à responsabilité limitée* is itself owned by Vodafone Jersey Dollar Holdings Limited, a limited liability company incorporated and existing under the laws of Jersey, and Vodafone Finance UK Limited, a limited liability company incorporated and existing under the laws of England and Wales;
4. The purported change from Vodafone Group Services to Vodafone Sales & Services (originally known as Vodafone Group Trading) as the entity to which the licence fees were payable;
5. The use of other associated companies and entities such as the M-Pesa Foundation and Carepay to siphon funds and/or to unjustly enrich individuals and companies at the expense of M-Pesa Accountholders; and
6. More specifically, the placement into the financial system of monies illicitly derived from M-Pesa Accountholders' funds, in particular through select partnering commercial banks such as NCBA and KCB, the subsequent creation of layers between the illicitly derived monies by engaging in transactions with different entities and jurisdictions in order to make the monies difficult to trace, and ultimately integrating the monies into the British economy through a series of transactions, jurisdictions, and persons, within the grand plan.

205. The doing of the above acts was part of an elaborate scheme by Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding, Vodafone International Holdings, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie and Mr. Ogutu (themselves

aided and abetted by Daly Inamdar Advocates, Coulson Harney Advocates and PwC) to disguise and conceal ownership of the entities related to Safaricom and the Vodafone Group, and to hide the identity of the real persons who ultimately benefited from and have continued to benefit from real money belonging to M-Pesa Accountholders, and to interest and investment income derived from such real money.

206. Further to the foregoing, the Plaintiffs contend that the amount of the licence fees (set to be payable quarterly and capped at 25% of the M-Pesa revenue for that quarter with a floor of 10% of revenue per quarter), were deliberately fixed at an extremely high amount in order to enable Safaricom to not only declare considerably lower profits that were taxable in Kenya, thereby effectively evading tax, and thus deny the Kenyan Exchequer significant amounts of revenue, but at the same time enabling the ‘carting out’ of monies belonging to M-Pesa Accountholders.

207. In the above regard, the Table below illustrates the extremely high amounts of licence fees that were paid by Safaricom to the Vodafone Group or its subsidiaries through the illegitimate use of shell corporations during the Financial Years 2010 to 2013 when the 10% “floor” and 25% “ceiling” was in place:

<b>Financial Year Ending 31<sup>st</sup> March...</b>	<b>Safaricom M-Pesa Revenue (in KShs.)</b>	<b>10% “Floor” Based on M-Pesa Revenue (in KShs.)</b>	<b>25% “Ceiling” Based on M-Pesa Revenue (in KShs.)</b>	<b>M-Pesa Licence Fees Paid to the Vodafone Group or its Subsidiaries</b>
2010	7,560,000,000.00	756,000,000.00	1,890,000,000.00	1,083,230,000.00
2011	11,780,000,000.00	1,178,000,000.00	2,945,000,000.00	1,406,798,000.00
2012	16,870,000,000.00	1,687,000,000.00	4,217,500,000.00	2,801,965,000.00
2013	21,840,000,000.00	2,184,000,000.00	5,460,000,000.00	3,536,858,000.00
<b>Total M-Pesa Licence Fees Paid for the Years 2010 to 2013</b>				<b>8,828,851,000.00</b>

208. The Plaintiffs contend that in setting the price for the M-Pesa licence fees, Safaricom together with M-Pesa Holding, Vodafone International Holdings, Vodafone Marketing, Vodafone Group Services, Vodafone Sales & Services and the High Court of Kenya at Nairobi (Milimani Law Courts) Anti-Corruption & Economic Crimes Division | Civil Suit No. .... of 2023 | S. Gichuki Waigwa & 2 Others (Plaintiffs) v. Safaricom Plc & 20 Others (Defendants) & The Law Society of Kenya and Another (Interested Parties) | (Plaint)

Vodafone Group failed to observe the “arm’s length” principle which required Safaricom to set prices that were approximate to those set by unrelated parties for comparable goods or services and under comparable circumstances in an open and free market. Safaricom and the related entities instead conspired in the fixing of the transfer price for the licence fees.

209. In furtherance of this scheme, it was intended by Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding, Vodafone International Holdings, Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi, Mr. Ogutu, the M-Pesa Foundation, the Safaricom Foundation, PwC, EY and the Central Bank that M-Pesa Accountholders’ real money and interest and investment income derived therefrom would be illegitimately and illicitly moved into seemingly legitimate sources of income.

210. Through the scheme it was intended, and arranged, that some of the interest and income illegally earned through M-Pesa Accountholders’ funds would be illegitimately, illicitly and illegally moved into so-called “charitable organizations for use for public charitable purposes”. The moving of M-Pesa Accountholders’ funds in this manner was, albeit unlawfully, legitimized through the National Payment System Regulations 2014, made under Section 31(1) of the National Payment System Act, 2011, and which came into force on 1<sup>st</sup> August 2014.

211. The Plaintiffs reiterate that the law of trusts does not contemplate the donation to third parties of monies held on trust, or of interest or income generated from such monies, as such monies ultimately belong to the beneficiaries. The Plaintiffs contend, in this regard, that the Central Bank was at all times aware that the so-called “public charitable purposes” were purposes which the M-Pesa Foundation could not lawfully and properly carry out with funds belonging to M-Pesa Accountholders.

212. In addition to the foregoing, the so-called “public charitable organizations” were *in fact* privately owned entities related to Safaricom and the Vodafone Group and included the M-Pesa Foundation and the Safaricom Foundation. In this way, interest and investment income generated through M-Pesa Accountholders’ funds were both passed off as proceeds of legitimate and legal transactions (e.g., from M-Pesa Holding to the M-Pesa Foundation, then ostensibly “donated” by the M-Pesa Foundation to



the Safaricom Foundation, and then further “donated” by the Safaricom Foundation to third parties under the guise of “corporate social responsibility”). The Plaintiffs contend that the Central Bank at all times knew or reasonably ought to have known of these criminal transactions.

213. In the above regard, the Plaintiffs reiterate that according to the Vodafone Group’s Annual Report and Accounts for the Year Ended 31<sup>st</sup> March 2016, both the M-Pesa Foundation and M-Pesa Holding are *in fact* 100% owned by the Vodafone Group (the latter through Vodafone International Holdings). The Plaintiffs further reiterate that is also a *fact* that the two Foundations are managed and controlled by some of the Defendants in this suit, including Mr. Joseph, Mr. Keith, Mr. Baillie and Mr. Ogutu who, at one point or other, also controlled Safaricom, M-Pesa Holding, the Vodafone Group and Vodafone Kenya as senior officers or Board members.

214. Further to the foregoing, the Plaintiffs contend that the Vodafone Group sold the intellectual property in the M-Pesa E-Money Service to Safaricom and Vodacom in the year 2019/2020 for the sum of **US\$13.4 Million**.

215. The Plaintiffs aver that the sale was at an undervalue given that the annual licence fees payable by Safaricom for use of the M-Pesa E-Money Service in the Financial Year 2011 only (**KShs. 1,406,798,000.00**) was comparable to the outright sale price of **KShs. 1,466,500,000/=** as reported in Safaricom’s Annual Report and Financial Statements for the Year Ended 31<sup>st</sup> March 2021.

216. The reported sale price of **US\$13.4 Million** (going by the Central Bank’s mean rate) was equivalent to approximately **KShs. 1,419,194,000.00** as at 6<sup>th</sup> April 2020, when it was reported that the sale had been effected. This reflected a variance of **KShs. 47,306,000.00**, in comparison to the sale price reported in Safaricom’s Annual Report for the Financial Year Ended 31<sup>st</sup> March 2021.

217. The Plaintiffs further state that the licence fees paid by Safaricom in the **Financial Years 2012 and 2013 (KShs. 2,801,965,000.00 and KShs. 3,536,858,000.00 respectively)** were themselves well in excess of the outright sale price ultimately paid by Safaricom

and Vodacom for the intellectual property in the M-Pesa Service (**approximately 2 times, and 2½ times respectively**).

218. The Plaintiffs plead, as an alternative but entirely without prejudice to the foregoing, that the amount of annual licence fees paid by Safaricom to subsidiaries of the Vodafone Group for the M-Pesa Service were deliberately and grossly exaggerated, having regard to the said amounts vis-à-vis the outright sale price paid for the Service.

219. Either way, the inconsistency in transfer pricing (whether in relation to the licence fees paid annually or to the outright sale) is *ipso facto* further evidence of less than “arm’s length” dealings between the Vodafone Group and Safaricom as required by the Income Tax (Transfer Pricing) Rules, 2006.

220. In the above regard, the Plaintiffs contend that it is material for the purpose of this suit that 40% of Safaricom is owned by Vodacom and the Vodafone Group, with 35% of the company being owned by Vodacom and 5% by the Vodafone Group.

221. The above situation further illustrates and points to the irresistible inference that Safaricom and the Vodafone Group illegally and unlawfully moved monies from Kenya to the United Kingdom clothed as transactions with related companies, while in actual fact the movement was intended to, and did *in fact* understate, the profits made by Safaricom and, by extension, the taxes payable in Kenya to the Kenya Revenue Authority.

222. The Plaintiffs contend that the transfer pricing, “donations” to such entities as the M-Pesa Foundation (which is wholly owned by the Vodafone Group) and the Safaricom Foundation, were some of the ways Safaricom, M-Pesa Holding, Vodafone International Holdings B.V., and ultimately the Vodafone Group, with the aid of, *inter alia*, the M-Pesa Foundation and the Safaricom Foundation to facilitate and enable the pre-layering, placement, layering and finally integration of unlawfully acquired M-Pesa Accountholders’ funds, interest and investment income to the United Kingdom in the first instance, and ultimately to other jurisdictions from which it would be difficult to trace the funds.

223. The Plaintiffs contend that Safaricom and its associated companies should not be used by the Vodafone Group to shift from high tax jurisdictions to low tax jurisdictions monies stolen from M-Pesa Accountholders but clothed as proceeds of legitimate transfer pricing transactions.
224. The overall effect of unlawfully removing monies belonging to M-Pesa Accountholders from circulation in the Kenyan economy and shifting the monies to low tax jurisdictions has been to drastically decrease the collectable tax revenues with the result that Kenya has to borrow more on improving infrastructure, health, education and other key sectors of the economy. This has reduced the Tax-to-GDP ratio and long-term prospects for the Kenyan economy and further increased Kenya's public debt, thereby unnecessarily leading to higher taxes being imposed on taxpayers.
225. The Plaintiffs further contend that given the fact that Safaricom, the Vodafone Group and the related companies have made money in Kenya (in the name of financial inclusion), they should not be allowed to 'cart away' the money out of Kenya but should plough it back into the local economy and thus assist the Central Bank in formulating and implementing a sound monetary policy.
226. The Plaintiffs also contend that as a direct consequence of the 'carting away' of money and shifting of profits out of Kenya, the Central Bank's role in helping to achieve and maintain stability in the general level of prices, and in fostering liquidity, solvency stabilizing a market-based financial system, and supporting economic growth and employment has thereby been very adversely affected.
227. In addition to the foregoing, it is contended the Central Bank's constitutional and statutory roles can only be realized where Safaricom, the Vodafone Group and related companies are not allowed to flout Kenyan revenue, commercial, financial, trade and trusts legislation with impunity.
228. ***Constitutional, Statutory and Other Legal Foundations for Instituting These Proceedings, and the Provisions Violated:***

**C. CONSTITUTIONAL FOUNDATIONS FOR THESE PROCEEDINGS, AND  
THE CONSTITUTIONAL PROVISIONS VIOLATED:**

229. From the outset, the Plaintiffs contend that by virtue of Section 3(1) of the Judicature Act, this Honourable Court and all other courts in Kenya are enjoined to exercise their jurisdiction in conformity with, *inter alia*, the 2010 Constitution.

230. The Plaintiffs have instituted these proceedings pursuant to Article 22(1) and (2), and Article 258(1) and (2) of the 2010 Constitution:

- a. On their own behalf and in their own right and interest as M-PESA Accountholders and (in the case of the 1<sup>st</sup> Plaintiff) Safaricom shareholders;
- b. On behalf and in the interest of other M-PESA Accountholders and Safaricom shareholders who cannot institute this suit on their own or in their own name on account of various reasons including but not limited to:
  - i. Old age;
  - ii. Disability;
  - iii. Being illiterate or semi-literate;
  - iv. Ignorance of fact or of the law;
  - v. Inability to effectively understand the language of the relevant agreement(s) and/or arrangement(s) between them as M-Pesa Accountholder(s) and/or as Safaricom shareholders on the one hand and Safaricom on the other hand, or similar factors;
  - vi. Extreme poverty;
  - vii. Socioeconomic marginalization;
  - viii. Cultural and/or social practices that may discourage the institution of a suit of this nature by the persons concerned;
  - ix. Workplace policies barring or discouraging the institution of a suit of this nature;
  - x. The holding of a State, public or similar office;
  - xi. Employment by any of the Defendants; and
  - xii. Reasonable apprehension or risk of reprisals or retaliation by any of the Defendants or interested third parties; and
- c. In the public interest.

231. In the above regard, the Plaintiffs state that their fundamental right to property and their consumer rights as enshrined under Articles 40 and 46 (as read with Article 27(4)) of the 2010 Constitution contained in the Bill of Rights (in Chapter Four, Part 2) of the 2010 Constitution (as read with Articles 19, 20, 21, 22(1) and (2), 24 and 258(1) and (2) thereof and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) have been denied, violated or infringed, and/or are threatened.

232. The following specific provisions of the Constitution 2010 and their specific corresponding fundamental rights enumerated hereinbelow have been denied, violated and/or infringed and is further threatened to be denied, violated or infringed in relation to them:

1. Articles 40(1)(a) of the 2010 Constitution guaranteeing the fundamental right to acquire and own property of any description;
2. Article 40(2)(a) of the 2010 Constitution guaranteeing that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description, or of any interest in, or right over, such property (through Regulation 25(5)(b) of the National Payment Systems Regulations, 2014- made under Section 31 of the National Payment Systems Act, 2011- providing for the placement of trust funds to “a public charitable organization for use for public charitable purposes”);
3. Article 40(3)(b)(i) and (ii) of the 2010 Constitution guaranteeing that in case of the State depriving a person of property of any description, the deprivation shall be for a public purpose or in the public interest, and carried out in accordance with the Constitution and any Act of Parliament requiring prompt payment in full of just compensation to the person, and allowing any affected person the right of access to a court of law;
4. Article 46(1)(a), (b), (c) and (d) of the 2010 Constitution guaranteeing the Plaintiffs’ consumer rights as a fundamental right, in particular the right to services of reasonable quality, the right to information necessary for the Plaintiffs to gain full benefit from goods or services, the right to protection of

their economic interests, and the right to compensation for loss or injury arising from defects in services; and

5. Article 27(4) of the 2010 Constitution guaranteeing the Plaintiffs the fundamental right not to be discriminated against in the enjoyment of their fundamental rights (in this case their right to property) on the ground of, *inter alia*, social origin, age, or disability.

233. The following fundamental rights as enshrined in Sections 70(c) and 75(6)(b)(iv) (as read with Section 84(6) of the repealed Constitution and as further read with Article 262 and Sections 6, 7, 19 and 33 of the Sixth Schedule of the 2010 Constitution) were also violated in relation to them:

1. The fundamental right to protection of property;
2. The fundamental right not to be deprived of property without compensation;
3. The fundamental right against compulsory possession of property; and
4. The guarantee to the fundamental right that property which is the subject of a Trust may be vested in persons appointed as Trustees under the instrument creating the Trust or by a Court, or by order of a Court, only for the purpose of lawfully giving effect to the Trust.

234. In addition to the violations under the repealed Constitution as outlined above, the Plaintiffs have also instituted these proceedings pursuant to Sections 70(c), 75(6)(b)(iv) and 84(6) of the repealed Constitution as read with Section 19 of the Sixth Schedule to the 2010 Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

235. The following further provisions of the 2010 Constitution and of the repealed Constitution have been violated as against the Plaintiffs, in relation to this suit:

- i. Article 10 of the 2010 Constitution, which requires the Defendants to be bound by the national values and principles of governance whenever they apply or interpret the Constitution or any law. The following

values and principles are specifically relevant to the circumstances of this suit and have been negatively impacted, as demonstrated in earlier paragraphs of these pleadings:

- A. The rule of law;
- B. Democracy and participation of the people;
- C. Good governance;
- D. Integrity;
- E. Transparency and accountability;
- F. Human dignity;
- G. Equity;
- H. Social justice;
- I. Inclusiveness;
- J. Equality;
- K. Human rights;
- L. Non-discrimination; and
- M. Protection of the marginalised.

- ii. The spirit of the Constitution as enunciated in the Preamble to the 2010 Constitution in which the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law, and the commitment of the people to nurturing and protecting the well-being of the individual, the family, communities and the nation; and
- iii. Article 24(1) of the 2010 Constitution, to the effect that any right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right and the nature, extent and importance of the purpose of the limitation.

236. Additionally, the Plaintiffs state that Section 7(1) of the Sixth Schedule to the 2010 Constitution provides that the laws in force immediately before the date when the

2010 Constitution came to force shall be “construed with the alterations, adaptations, qualifications and exceptions necessary to bring the said Sections “into conformity with” the 2010 Constitution. Any statutory provision that does not therefore conform with the provisions of the Constitution, including conformity with Articles 10, 24(1), 27(4), 40 and 46(1) of the Constitution, is unconstitutional to that extent.

237. The Plaintiffs state that the term “property” as applied in the preceding paragraphs refers to real money, interest and investment income earned from such real money (in the case of M-Pesa Accountholders) and contingent assets in the form of bigger dividends and higher market prices for shares (in the case of Safaricom shareholders).

*ii. Statutory Foundations for These Proceedings, and the Statutory Provisions Breached:*

238. Accordingly, in addition to, but without prejudice to the foregoing, the Plaintiffs institute these proceedings for the breach by specific Defendants (as the case may be) of various Acts of Parliament, which have affected the Plaintiffs’ statutory rights, as well as the statutory rights of the entire class of all M-Pesa Accountholders. A **non-exhaustive list** of the relevant statutory provisions breached or otherwise affecting or impacting the Plaintiffs’ statutory rights, or which otherwise amount to an actionable breach of legislation includes the following:

*A. Consumer Protection Act:*

- i. Section 12 as to false representation; and
- ii. Section 13 as to unconscionable representation involving, *inter alia*, representation to persons who are not reasonably able to protect their interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

*B. Companies Act:*

- iii. Section 140 as to a Director’s ongoing duty at common law and in equity requiring the Director, even upon ceasing to be a Director, not to exploit any property, information or opportunity of which he became aware while a Director;



- iv. Section 143 as to Director's duty to act in the way in which the Director considers, *in good faith*, would promote the success of the company for the benefit of its members as a whole, having regard to, *inter alia*:
  - a. The need to act fairly as between the Directors and the members of the company;
  - b. The long term consequences of any decision of the Directors;
  - c. The desirability of the company to maintain a reputation for high standards of business conduct;
  - d. The impact of the operations of the company on the community; and
  - e. The need to foster the company's business relationships with suppliers, customers and others.
- v. Section 144 as to the duty of Directors of a company to exercise independent judgment;
- vi. Section 145 as to the duty of Directors of a company to exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions performed by the Directors in relation to the company;
- vii. Section 146 as to the duty of Directors of a company to avoid a situation in which the Directors have, or can have, a direct or indirect interest that conflicts, or may conflict, with the interests of the company;
- viii. Section 168 as to prohibition of participation in certain arrangements with third parties without the approval of members of the company in which the third parties obtain a benefit from the company or from a body corporate associated with the company;
- ix. Section 1002 as to carrying on the business of a company with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose;

***C. Central Bank of Kenya Act:***

- x. Section 50 as to the duty to advise the Minister for Finance on such questions as the safety of M-Pesa Accountholders' funds, the absence of a legal and regulatory framework to supervise M-Pesa operations, and

possible money laundering, as well as other matters comprising the “principal object” or “other objects” of the Central Bank as stipulated in Sections 4 and 4A of the said Act;

***D. Banking Act:***

- xi. Sections 2(1), 3(1), 4(1), 5(1) and 16(1) in relation to, *inter alia*, the question whether Safaricom could carry out “banking business” and/or “financial business”, whether it was an “institution” for the purposes of the Act, and whether it had applied for a licence, and whether the Minister for Finance had granted it a licence to carry on business;

***E. Competition Act:***

- xii. Sections 23 and 24 as to abuse by Safaricom of a dominant position, being a “dominant undertaking” as defined in the Act;
- xiii. Section 50 as to the Competition Authority’s failure to investigate Safaricom’s unwarranted concentration of economic power despite there being reason to believe that such concentration of economic power was prejudicial to the public interest and had a detrimental effect on the economy, having particular regard to the factors set out in subsection (4)(a) to (e) of the said Section;
- xiv. Section 55(b)(v) as to false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in connection with the 2007, 2008 and 2020 Trusts and the M-Pesa Customer Terms and Conditions;
- xv. Section 56 as to unconscionable conduct;
- xvi. Section 57 as to unconscionable conduct in business transactions;

***F. National Payment System Act, 2011 and the National Payment System Regulations, 2014:***

- xvii. Section 4 as to whether the 2020 Trust was approved by the Central Bank and whether, as a consequence thereof, it had effect as part of the rules governing a designated payment system;
- xviii. Regulation 25 of the National Payment System Regulations, 2014 made under Section 31 of the Act, in relation to compliance with the

- requirement for establishment of effective, transparent and adequate governance arrangements to ensure continued integrity of the services of a payment service provider, having particular regard to the arrangements set out in subregulations (2)(a) to (d), (3)(a) to (f) and (4);
- xix. Regulation 25(5)(a) as to whether income generated from placement of M-Pesa Accountholders' funds was "used in accordance with Trust legislation", and "in consultation with" the Central Bank;
  - xx. Regulation 25(5)(b) as to the constitutionality of a regulation allowing the donation of income generated from the placement of trust funds to "a public charitable organization for use for public charitable purposes" where the funds are not the subject of a discretionary trust;
  - xxi. Regulation 26(1) in relation to compliance with the minimum contents of the Trust Deed;
  - xxii. Regulation 26(2) in relation to compliance with the requirement for submission of proposed changes in a Trust Deed for approval by the Central Bank, and whether in this case such changes were *in fact* so submitted, and approved;
  - xxiii. Regulation 45 as to the legality of the *Fuliza* overdraft service in view of the prohibition against lending and investment activities;
  - xxiv. Regulations 4(2)(i)(i) to (iv), 8(3), 9(1) and 25(2)(a) in relation to the level of actual compliance with the criteria prescribed in the Second Schedule to the Regulations for the assessment of suitability of Trustees, Directors and Senior Managers in control of Safaricom as a payment service provider;

#### ***G. Capital Markets Act:***

- xxv. Sections 32F and 32G as to market manipulation, false trading and market rigging by Safaricom;
- xxvi. Non-compliance with laws, regulations, standards, fiduciary duties of Board Members, and the integrity of the business and financial reporting process as set out in the Capital Markets Authority's Code of Corporate Governance Practices for Issuers of Securities to the Public issued pursuant to Section 11(3)(v) of the Act;

***H. Data Protection Act:***

- xxvii. Section 37 of the Act, in relation to the question whether the use of personal data of M-Pesa Accountholders was authorized by law, and whether the express consent of the data subject was sought and obtained, particularly for the purpose of enabling the *Fuliza* overdraft service;

***I. Kenya Information and Communications Act (and Regulations):***

- xxviii. Sections 23 and 83C of the Act, in relation to the actual level of compliance by the Communications Authority in regulating the provision of telecommunications services and electronic transactions;

***J. Kenya Revenue Authority Act:***

- xxix. In relation generally to all applicable provisions regarding the administration and enforcement of laws relating to revenue;

***K. Income Tax Act:***

- xxx. In relation generally to all applicable provisions against tax evasion, and provisions regulating transfer pricing;

***L. Tax Procedures Act:***

- xxxi. In relation generally to all applicable provisions regarding consistency in the administration of tax laws, tax compliance by taxpayers and the effective and efficient collection of tax;

***M. Prevention of Organized Crimes Act:***

- xxxii. Section 2 of the Act in relation to the question whether the M-Pesa Accountholders' funds, the monies allegedly paid by Safaricom as licence fees to the Vodafone Group (subsidiaries), and the funds applied towards the *Fuliza* service and the income generated therefrom constituted "criminal group funds";
- xxxiii. Sections 3 and 7 of the Act in relation to the question whether the Defendants- in particular the 1<sup>st</sup> to 18<sup>th</sup> Defendants (both inclusive)-

- constituted an “organized criminal group” or persons who had engaged in “organized criminal activities” as understood in Sections 2 and 3;
- xxxiv. Section 6 of the Act in relation to the question whether the Defendants- in particular the 1<sup>st</sup> to 18<sup>th</sup> Defendants (both inclusive)- had aided and abetted any person to commit an offence under the Act;
- xxxv. Section 11 of the Act in relation to the question whether the misstatements in various Annual Reports of Safaricom amounted to false statements under the Act;

***N. Proceeds of Crime and Anti-Money Laundering Act:***

- xxxvi. In relation generally to all applicable provisions with regard to the question whether the acts of Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding, Vodafone International Holdings, the M-Pesa Foundation, the Safaricom Foundation, Carepay and/or their Directors, Trustees and/or Senior Officers- and in particular Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu- and Daly Inamdar, Coulson Harney, PwC, the Central Bank and the Communications Authority’s amount to “money laundering” as defined under any of the provisions of Sections 3, 4 and 7 of the Act;
- xxxvii. In relation generally to Section 5 of the Act regarding the failure by Safaricom, the Vodafone Group, Vodafone Kenya, M-Pesa Holding, Vodafone International Holdings, the M-Pesa Foundation, the Safaricom Foundation, Carepay and/or their Directors, Trustees and/or Senior Officers- and in particular Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu- and Daly Inamdar, Coulson Harney, PwC, the Central Bank and the Communications Authority to report suspicion or knowledge of payment to third parties of M-Pesa Accountholders’ funds and/or investment income and interest earned from such funds as proceeds of crime; and

***O. Trustee Act:***

- xxxviii. Section 4 of the Act as to what comprises “authorized investments”, and whether investment of M-Pesa Accountholders’ funds in NCBA amounted to an “authorized investment”.

239. Further to the foregoing, the Plaintiffs reiterate that the Defendants engaged in conduct which, having regard to some special relationship between all the parties concerned, was an unconscionable thing for any of the Defendants to do towards the Plaintiffs and/or to the general class of M-Pesa Accountholders and/or Safaricom shareholders.

240. The Plaintiffs state that the general class of M-Pesa Accountholders, particularly the “unbanked”, were the primary target of the M-Pesa Service, and that the purchase of shares by the general class of Safaricom shareholders was spurred by the supernormal profits made by Safaricom on account of the M-Pesa Service.

241. For the purpose of enabling this Honourable Court to fully appreciate the enormity of the *financial exclusion* of the “unbanked” (ironically, in the name of “financial inclusion”), the Plaintiffs consider it useful to reproduce below the *Fuliza* tariffs prevailing until 30<sup>th</sup> September 2022 (when the tariffs were reviewed and reduced by up to 50% following a meeting between the President of the Republic of Kenya and top executives of Safaricom, NCBA and KCB):

<b>Band</b>	<b>Tariff</b>	<b>20% Excise Duty</b>	<b>Total Charges</b>
0 -100	One-time fee of Ksh 2	One-time excise duty of 0.4	One-time charge of 2.4sh
101-500	Ksh 5 per day	Ksh 1 per day	Daily charge of Ksh 6
501-1000	Ksh 10 per day	Ksh 2 per day	Daily charge of Ksh 12
1001-1500	Ksh 20 per day	Ksh 4 per day	Daily charge of Ksh 24
1501-2500	Ksh 25 per day	Ksh 5 per day	Daily charge of Ksh 30
2501-70000	Ksh 30 per day	Ksh 6 per day	Daily charge of Ksh 36

(Source: <https://www.safaricom.co.ke>)

242. The Plaintiffs consider it useful, for the purpose of better enabling this Honourable Court to fully appreciate the enormity of the *financial exclusion* of the “unbanked”

before the coming into force of the new tariffs, to reproduce below a graphic representation of the reduced *Fuliza* tariffs:

Reduced Fuliza Rates		
Tariff Band	Old Daily Maintenance Fee	New Daily Maintenance Fee
<b>1 - 100</b>	0.00	0.00
<b>101 - 500</b>	5.00	Free for first 3 days 2.50 after
<b>501 - 1,000</b>	10.00	Free for first 3 days 5.00 after
<b>1,001 - 1500</b>	20.00	18.00
<b>1,501 - 2,500</b>	25.00	20.00
<b>2,501 - 70,000</b>	30.00	25.00

(Source: <https://www.safaricom.co.ke/media-center-landing/press-releases/safaricom-ncba-and-kcb-restructure-fuliza-with-free-daily-fees>)

243. From the tariffs at paragraph 241, the Plaintiffs contend that an overdraft of **KShs. 101/=** (just enough to bet on many of the numerous online gaming platforms available in Kenya) repayable in thirty (30) days would expose the borrower to a repayment of **KShs. 281/=**, made up as follows:

Principal amount borrowed:	KShs. 101/=
Daily tariff (@ KShs. 5/= for 30 days)	KShs. 150/=
20% Excise Duty (@ KShs. 1/= for 30 days)	<u>KShs. 30/=</u>
<b>Total repayable after 30 days:</b>	<b><u>KShs. 281/=</u></b>

244. Quite apart from the fact that the irresistible inference is that the lending of money to M-Pesa Accountholders on the *Fuliza* platform was and is effected through lending of funds belonging to non-borrowing Accountholders, the fact that a borrowing of **KShs. 101/= for 30 days** itself represents a highly extortionate interest rate of **179.20% for the 30 days** clearly demonstrates predatory lending.

245. And the Plaintiffs contend that gambling addiction, bankruptcy and a high suicide rate especially among Kenyan youth were causally linked to the unregulated gambling facilitated by unregulated borrowing, as documented in various medical journals and publications.
246. The Plaintiffs further contend that the general class of M-Pesa Accountholders and Safaricom shareholders (both the “unbanked” as well as those with access to formal banking services) comprises many people with various forms of disability, including physical, sensory, mental or other impairment, including visual, hearing, learning or physical incapability, which impacts adversely on their social, economic or environmental participation.
247. The Plaintiffs contend that many other members of the general class of M-Pesa Accountholders and Safaricom shareholders are illiterate or semi-literate, ignorant of relevant facts or of the law, unable to effectively understand the language of the relevant agreement(s) and/or arrangement(s) between them as M-Pesa Accountholder(s) and/or as Safaricom shareholders on the one hand and Safaricom on the other hand, or similar factors. Yet others are extremely poor or otherwise socioeconomically marginalized.
248. The Plaintiffs contend that the members of the general class of M-Pesa Accountholders and Safaricom shareholders did not, as a result of the disabilities aforesaid, discover the Defendants’ fraud and could not, with reasonable diligence, have discovered it.

*iii. Exercise of the High Court’s Jurisdiction in Conformity with the Substance of Statutes of General Application, the Procedure and Practice Observed in Courts of Justice in England, the Common Law, and Doctrines of Equity:*

249. Further to the foregoing, the Plaintiffs contend that manner in which their legal rights and those of other M-Pesa Accountholders and Safaricom shareholders were violated was not in conformity with the procedure and practice observed in courts of justice in England as at 12<sup>th</sup> August 1897. And the Plaintiffs state that this Honourable



Court has a legal duty to exercise its jurisdiction in conformity with such procedure and practice.

250. The Plaintiffs further contend that the Defendants also violated fundamental principles and doctrines of common law trusts and also of equitable trusts, as it is a cardinal principle of the law of trusts that a Trustee is not entitled to take possession of trust assets so as to obtain any benefit from doing so. In this regard, M-Pesa Holding, the so-called “self-declared” Trustee was not only a *sham Trust*, but misappropriated the property which it claimed to hold in trust (the M-Pesa Accountholders’ funds). M-Pesa Holding further generated interest and investment income from the property and kept such interest and income for its own benefit and/or for the benefit of related entities, rather than for the benefit of the M-Pesa Accountholders as Beneficiaries.

251. The Plaintiffs contend that in unjustly enriching itself and associated companies and entities cited as Defendants in this suit, M-Pesa Holding was aided and abetted by the Central Bank and the Communications Authority (by their failure to effectively regulate the M-Pesa Service), Directors and officers of Safaricom, the Vodafone Group and of the associated companies and entities, as well as by PwC and EY as Auditors of the said companies and entities.

***D. NATURE OF INJURY, LOSS AND DAMAGE CAUSED TO THE PLAINTIFFS AND/OR TO THE CLASS OF PERSONS IN WHOSE NAME THE PLAINTIFFS HAVE INSTITUTED THIS SUIT, AND/OR TO THE PUBLIC AND THE COMMUNITY GENERALLY:***

252. The Plaintiffs state that by reason of the matters complained of against various Defendants, the protection of their fundamental right to property and their fundamental right to consumer protection were violated, and continue to be violated.

253. The Plaintiffs contend that they suffered the following other forms of injury, loss and damage:

- i. In the case of the Plaintiffs as M-Pesa Accountholders, heavy losses of income from March 2007 to date as a result of the unlawful and illegal deriving of investment income and the generating of interest from, and

embezzlement of, their real money by various Defendants including Safaricom, the Vodafone Group, M-Pesa Holding, Vodafone International Holdings, the M-Pesa Foundation, the Safaricom Foundation and Carepay with the complicity of the Central Bank;

- ii. In the case of the 1<sup>st</sup> Plaintiff and other Safaricom shareholders, heavy losses by reason of dubious sales and purchases of goods and services, and false or exaggerated movement of monies between Safaricom and associated companies, as a consequence of which the shareholders received lower dividends than they would otherwise have received from Safaricom with the complicity of the associated companies;
- iii. For the same reason as in (ii) above, the 1<sup>st</sup> Plaintiff and other Safaricom shareholders suffered further heavy losses in shareholder value, in that the market prices for their shares were substantially lower than they would otherwise have been;
- iv. The Plaintiffs, the class of persons in whose names they have instituted this suit, as well as the public at large have had to share a substantially higher public debt and tax burden owing to the fact that huge amounts of the investment income and interest generated unlawfully and illegally from real money belonging to M-Pesa Accountholders was moved to other jurisdictions;
- v. By reason of the matters pleaded in (iv), above, the Plaintiffs and the body politic generally have thereby been subjected to significantly increased poverty, and the Government has been compelled to borrow more on infrastructure, health, education and other key sectors of the economy.

254. The Plaintiffs further contend that if they had been receiving the income derived from their real money, they would not have had to be borrowing money which was essentially their own, through overdraft or savings and loan service the *Fuliza* Service.

255. The Plaintiffs state that they have been made aware of the probable highly detrimental financial consequences that this suit may have for various Defendants in the suit, in view of the magnitude of the decree that may be passed against them, or some of them. Accordingly, the Plaintiffs aver, without prejudice whatsoever to the foregoing in any respect, that they would at this stage be amenable to exploring an option that is good for all the parties in the suit, such as the conversion of debt to equity.

**Public Interest:**

256. The Plaintiffs state that this suit is of immense public interest due to, *inter alia*, the following reasons:

- a. It raises weighty issues regarding the 2010 Constitution, the repealed Constitution and constitutional principles generally with regard to the interpretation and application of the Constitution, and seeks to provide a benchmark for the proper application of the national values and principles of governance as set out in Article 10 of the 2010 Constitution;
- b. It further raises weighty issues relating to a wide range of domestic legislation, the common law, doctrines of equity, and the rule of law, particularly in relation to the law of trusts as applied in Kenya;
- c. The suit also impacts the curbing of international white-collar and economic crime, as well as the better formulation of more effective policies against illicit financial flows, proceeds of crime, money laundering etc., and policies aimed at better ensuring social justice;
- d. The suit further raises issues having a significant bearing on Kenya's economy and governance;
- e. The suit also impacts various governmental entities including:
  - i. Regulatory agencies such as the Central Bank, the Communications Authority, the Kenya Revenue Authority, the Asset Recovery Agency, the Financial Reporting Centre, and the like; and

- ii. UK regulatory authorities including the Financial Conduct Authority and the Serious Fraud Office;
- f. The suit also impacts multinational corporations and their operations in Kenya vis-à-vis locally registered associated companies and other entities.

***Jurisdiction:***

257. The Plaintiffs state that the various causes of action claimed in this suit arose, wholly or in part, and/or were perfected within the Republic of Kenya. This Honourable Court therefore has jurisdiction to hear and determine the suit.

258. Further, the Plaintiffs state that by virtue of the Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court published as Gazette Notice No. 10623 in Vol. CXVIII – No. 153 published in the *Kenya Gazette* of 9<sup>th</sup> December 2016, this suit is a fit and proper suit for filing in the Anti-Corruption and Economic Crimes Division of the High Court in that the suit:

- (i) Relates to economic crimes filed under the Proceeds of Crime and Anti-Money Laundering Act, the Prevention of Organized Crimes Act, and other enabling provisions of the law;
- (ii) Relates to “disputes touching on or related to the tracing of, freezing of, or confiscation of proceeds related to corruption or money laundering within the definition of the term “corruption” in Section 2 of the Anti-Corruption and Economic Crimes Act and the term “money laundering” in Section 2 (as read with Sections 3, 4 and 7) of the Proceeds of Crime and Anti-Money Laundering Act, 2009;
- (iii) Relates to the payment of compensation of proceeds of “corruption” and “economic crimes” as defined in Section 2 of the Anti-Corruption and Economic Crimes Act (No. 3 of 2003) and/or “proceeds of crime” as defined in Section 2 of the Proceeds of Crime and Anti-Money Laundering Act, 2009; and

- (iv) Relates to proceedings in respect of corruption and economic crimes over which the Magistrates' Anti-Corruption Court has no jurisdiction; and
- (v) Relates to "claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters".

259. The Plaintiffs contend that in view of the fact that these proceedings affect a huge portion of the Kenyan society (and the Kenyan diaspora), totalling more than 52,400,000 M-Pesa Accountholders and thousands of Safaricom shareholders, the overriding objective of the Anti-Corruption and Economic Crimes Division of the High Court to facilitate the just, expeditious, proportionate and accessible adjudication of disputes related to economic crimes and corruption shall be met.

260. The Plaintiffs contend that this suit raises substantial questions of law. The Plaintiffs further contend that- despite the suit primarily relating to economic crimes and proceeds of corruption- numerous other fields and disciplines of the law have been implicated. These include, but are not limited to, the following:

- i. Constitutional and human rights law (particularly on the question of protection of the fundamental right to property, the fundamental right to consumer protection and freedom from discrimination, and on the binding nature of the values and principles of governance);
- ii. Municipal and international criminal law, including international white-collar and economic crime;
- iii. The law of trusts;
- iv. Corporate, commercial and tax law;
- v. Civil law and litigation; and
- vi. Judicial review.

261. For the above reasons, the Plaintiffs pray that this Honourable Court be pleased to certify that this suit raises substantial questions of the Constitution and the law, and that it is an appropriate suit for referral to Her Ladyship the Chief Justice for the

assigning of an uneven number of Judges, being not less than three, to hear and determine the suit as contemplated by Article 165(3)(b), (d) and (4) of the Constitution.

262. In view of the diverse fields and disciplines of the law implicated, the Plaintiffs further pray that the Honourable the Chief Justice do assign a bench of five (5) Judges to hear and determine the suit, drawn as widely as possible from the various divisions of the High Court fairly and fully representing the fields and disciplines of the law implicated in the suit, as set out in paragraph 260 of this Plaint.

263. Accordingly, the Plaintiffs assert claims for unjust enrichment, breach of fiduciary duty, aiding and abetting fraud, and negligence and other relief and Orders as against the Defendants, as further detailed below.

***E. RELIEF SOUGHT:***

**WHEREFORE** the Plaintiffs seek Judgment against the Defendants for the following relief and Orders:

- a. A Declaration that the documents titled *“Declaration of Trust in favour of all M-PESA Accountholders of Safaricom Limited”* dated 23<sup>rd</sup> February 2007, *“Amendment Deed to the Declaration of Trust in Favour of all M-Pesa Accountholders of Safaricom Limited”* dated 19<sup>th</sup> June 2008 and *“Second Amendment Deed to the Declaration of Trust on (sic) Favour of All M-Pesa Accountholders of Safaricom Limited Dated 23 February 2007 (as Amended by the Deed of Amendment Dated 19<sup>th</sup> June 2008”* dated 20<sup>th</sup> July 2020 were insufficient and inappropriate to create a Trust relationship between Safaricom Plc (as Appointor), M-Pesa Holding Company Limited (as Trustee) and the M-Pesa Accountholders (as Beneficiaries), and that all the said documents created sham Trusts which were null, void and of no legal effect *ab initio*.
- b. A finding to the effect that Mr. Hamish Keith failed to observe the *arm’s length* principle in relation to the incorporation of M-Pesa Holding Company Limited, the drawing of the *“Declaration of Trust in favour of all M-PESA Accountholders of Safaricom Limited”* dated 23<sup>rd</sup> February 2007 and the *“Amendment Deed to the Declaration of Trust in Favour of all M-Pesa Accountholders of Safaricom Limited”* dated 19<sup>th</sup> June 2008 and that there was an actual conflict of interest between him, Safaricom Plc, the Vodafone Group Plc, M-Pesa Holding Company

Limited, M-Pesa Foundation Charitable Trust and Vodafone Kenya Limited by reason of insider information he had received by virtue of having been a long term Legal Advisor of Safaricom Plc and the Vodafone Group Plc.

- c. A finding that Mr. Hamish Keith, Daly Inamdar LLP Advocates and Coulson Harney LLP Advocates drew the alleged Trust documents fraudulently and in the knowledge and with the intention that they were to create sham Trusts as between Safaricom Plc and M-Pesa Holding Company Limited, with the further intention of misleading M-Pesa Accountholders and the world at large that Safaricom Plc had transferred the control of M-Pesa Accountholders' funds to M-Pesa Holding Company Limited of such funds as a genuine Trustee when in reality Safaricom Plc and the Vodafone Group Plc (through its 100% owned subsidiary, M-Pesa Holding Company Limited) had retained total control of the funds.
- d. A Declaration that M-Pesa Holding Company Limited was at all times under the Trustee (Perpetual Succession) Act incapable of founding the M-Pesa Foundation Charitable Trust as a charitable trust which, under the law of trusts and also under the Act, is a discretionary trust.
- e. A further Declaration that M-Pesa Holding Company Limited was, *ab initio*, established as a sham Trust company and that even if it had been established as a lawful Trust company it was at all times incapable of distributing any trust property to persons other than the M-Pesa Accountholders, and thus could not lawfully distribute trust property to M-Pesa Foundation Charitable Trust or any other third parties.
- f. A further Declaration that even if M-Pesa Holding Company Limited had been established as a lawful Trust company, it would have been established as a non-discretionary Trust and its Trustees would therefore not have had discretion on whether to pay or to apply income, or to choose to whom trust income would be distributed.

- g. A further Declaration that even if M-Pesa Holding Company Limited had been established as a lawful Trust company, it would have been in breach of Sections 2 and 4 of the Trustee Act by reason of investing trust funds in investments which were not “authorized investments” as contemplated by the said Sections.
- h. A finding to the effect that in all the factual circumstances of this case, Safaricom Plc as the person in law required to make an appointment of trusts in favour of M-Pesa Accountholders and M-Pesa Holding Company Limited (by reason of holding itself as a legitimate Trust company and notwithstanding that it was *in fact* a sham Trust) were in breach of fiduciary duty against the M-Pesa Accountholders.
- i. An Order requiring M-Pesa Holding Company Limited to disclose its Annual Reports and Accounts from the date of its incorporation on 11<sup>th</sup> September 2006 to date.
- j. Damages for breach of fiduciary duty jointly and severally against Safaricom Plc and M-Pesa Holding Company Limited in favour of M-Pesa Accountholders.
- k. A Declaration that Regulation 25 of the National Payment System Regulations 2014 (made under Section 31(1) of the National Payment System Act, 2011) is unconstitutional by reason of the fact that in providing for the donation of income generated from the placement of trust funds to “a public charitable organization for use for public charitable purposes” where the funds are not the subject of a discretionary trust, it violated Article 40 of the Constitution in relation to guaranteeing the fundamental right to protection of M-Pesa Accountholders’ property.
- l. A Declaration that Regulation 45 of the National Payment System Regulations 2014 is also unconstitutional and *ultra vires* Article 231(5) of the Constitution for having legitimized the *Fuliza* overdraft service notwithstanding the prohibition against lending and investment activities except by banks,



- mortgage finance companies, financial institutions, deposit-taking microfinance institutions and other approved bodies, of which Safaricom Plc was not one.
- m. A Declaration that the fundamental right to property and in particular the fundamental right to acquire and own property as guaranteed in Article 40 of the 2010 Constitution and in Sections 70 and 76 of the repealed Constitution was violated in relation to the M-Pesa Accountholders and Safaricom shareholders.
  - n. Damages for the violation of the fundamental right of the M-Pesa Accountholders and Safaricom shareholders to acquire and own property.
  - o. A Declaration that the fundamental right to consumer protection and in particular the fundamental right to information necessary to enable the gaining of full benefit from goods or services, the right to protection of economic interests, and the right to compensation for loss or injury arising from defects in goods or services as guaranteed in Article 46 of the 2010 Constitution were violated in relation to the M-Pesa Accountholders and Safaricom shareholders.
  - p. Damages for the violation of the fundamental right of the M-Pesa Accountholders and Safaricom shareholders to consumer protection.
  - q. A Declaration that the fundamental right to equality and freedom from discrimination as guaranteed in Article 27(4) of the 2010 Constitution (in particular the right not to be discriminated against in the enjoyment of a fundamental right, in this case right to acquire and own property, and the right to consumer protection) was violated in relation to M-Pesa Accountholders on the ground of, *inter alia*, social origin, age, or disability was violated in relation to the M-Pesa Accountholders.
  - r. Damages for the violation of the fundamental right of the M-Pesa Accountholders to freedom from discrimination in the enjoyment of their fundamental right to property and to consumer protection.

- s. A Declaration that the M-Pesa Service as provided by Safaricom Plc and the Vodafone Group Plc amounted to “banking business” and/or “financial business” and was provided in contravention of Section 2(1) of the Banking Act.
- t. A Declaration that the Central Bank of Kenya, as the primary regulator of Safaricom Plc in relation to the M-Pesa Service (including the *Fuliza* overdraft service), was in breach of its statutory duty to supervise, control or otherwise ensure that Safaricom Plc did not engage in banking business or financial business and did not operate as a financial institution in contravention of Section 2(1) of the Banking Act.
- u. A further Declaration that the Central Bank of Kenya was in breach of its statutory duty to develop, provide and execute an enabling and effective regulatory framework in order to ensure that all real money paid by M-Pesa Accountholders to Safaricom in furtherance of the M-Pesa Service was held in Trust for the M-Pesa Accountholders, and safeguarded and invested for their benefit at all times.
- v. A Declaration that the Communications Authority of Kenya as Safaricom Plc’s adjunct regulator in relation to the M-Pesa Service was in breach of its statutory duty to ensure full compliance with its functions regarding the provision of telecommunication services and regulation of electronic transactions, as contemplated by Sections 23 and 83C of the Kenya Information and Communications Act.
- w. A Declaration to the effect that the investment of, and/or the deriving of interest from, M-Pesa Accountholders’ funds by Safaricom, the Vodafone Group, Vodafone Kenya Limited, M-Pesa Holding, Vodafone International Holdings B.V., the M-Pesa Foundation, the Safaricom Foundation, Carepay and/or any other person or entity whatsoever at the expense of the M-Pesa Accountholders amounts to a violation by the said persons and entities of the fundamental right

- of the Plaintiffs and other M-Pesa Accountholders and Safaricom shareholders to protection of their property as guaranteed in Article 40 of the Constitution.
- x. A Declaration that the operation of the M-Pesa Service was effected at the expense of M-Pesa Accountholders through improper allocation and distribution of State power and resources and influence over appointments and removals, manipulation of rules and procedures, deliberate undermining and rendering ineffectual regulatory bodies in order to avoid accountability, assistance of professional service providers such as legal and audit firms, in masking the corrupt nature of the M-Pesa Service and protecting and supporting illicit gains illegal and unethical acts of persons in and outside Government, and disinformation and propaganda, with a view to circumventing the public good and obtaining private and corrupt advantage for the Defendants.
  - y. A finding that Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited, Vodafone International Holdings B.V., the M-Pesa Foundation Charitable Trust, the Safaricom Foundation Charitable Trust and Carepay Limited and/or their Directors, Trustees and/or Senior Officers- and in particular Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu- as well as Daly Inamdar LLP Advocates, Coulson Harney LLP Advocates, PricewaterhouseCoopers LLP, the Central Bank of Kenya and the Communications Authority of Kenya knew or ought reasonably to have known that the manner in which Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited, Vodafone International Holdings B.V., the M-Pesa Foundation Charitable Trust, the Safaricom Foundation Charitable Trust and Carepay Limited dealt with interest generated and investment income derived from M-Pesa Accountholders' funds was criminal, and made such income "proceeds of crime" as defined in Section 2 of the Proceeds of Crime and Anti-Money Laundering Act, and that the factual circumstances of their dealing with the interest and income amounted to offences under the provisions of Sections 3, 4 and 7 of the Act, and further amounted to "money laundering" as defined in Section 2 of the Act.

- z. A finding that the Central Bank of Kenya and the Communications Authority of Kenya wilfully failed to monitor and report the complex, unusual, suspicious, and large transactions by Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited, Vodafone International Holdings B.V., the M-Pesa Foundation Charitable Trust, the Safaricom Foundation Charitable Trust and Carepay Limited.
- aa. A finding that the Directors of Safaricom Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited and Carepay Limited were in breach of Sections 140, 143-146 (both inclusive), 168 and 1002 of the Companies Act (No. 17 of 2015) as to Directors' duties and the prohibition against fraudulent trading.
- bb. A Declaration to the effect that the transfer pricing between Safaricom Plc on the one hand and the Vodafone Group Plc and its subsidiaries on the other hand was fraudulent, contrary to the relevant OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, manipulated, failed to observe the "arm's length" principle as to the setting of prices approximate to those set by unrelated parties for comparable goods or services and under comparable circumstances in an open and free market, and amounted to tax evasion against the Kenya Revenue Authority.
- cc. A finding that M-Pesa Holding Company Limited, Vodafone International Holdings B.V., Vodafone Group Services Limited, Vodafone (UK) Limited, Vodafone Sales & Services Limited, Vodafone Marketing SARL (*Société à responsabilité limitée*), Vodafone International 1 *Société à responsabilité limitée* and, indirectly, Vodafone Jersey Dollar Holdings Limited, and Vodafone Finance UK Limited, among other companies, were shell corporations used by Safaricom Plc and the Vodafone Group Plc to siphon funds to the Vodafone Group Plc through fraudulent and manipulated transfer pricing.
- dd. A specific finding to the effect that the licence fees payable by Safaricom Plc to the Vodafone group Plc for the operation of the M-Pesa Service and pegged at between 10% and 25% of the M-Pesa revenue was deliberately fixed at an

- extremely high amount with a view to enabling Safaricom to declare considerably lower profits that were taxable in Kenya and to thereby effectively evade tax, and to deny the Kenyan Exchequer significant amounts of revenue.
- ee. A further specific finding that the outright sale price of KShs. 1,466,500,000/= of the M-Pesa Service to Safaricom Plc and the Vodacom Group Limited was an undervalue, having regard to the amount of annual licence fees that Safaricom Plc had hitherto paid to the Vodafone Group Plc over the years for the use of the M-Pesa Service.
- ff. A further finding that the sale/purchase price at which the transfer pricing transactions between Safaricom Plc and the Vodafone Group Plc and their associated companies were pegged resulted in a significant diminution and loss of the taxes that were payable locally by Safaricom Plc to the Kenya Revenue Authority.
- gg. An Order for a determination of the appropriate transfer method applied in respect of the transfer pricing transactions between Safaricom Plc and the Vodafone Group Plc and their associated companies and a recomputation of the appropriate respective prices in accordance with the Kenyan Income Tax (Transfer Pricing) Rules, the OECD Guidelines and the “arm’s length” principle.
- hh. An Order that any such overpayment as shall be adjudged to have been made by Safaricom Plc to its associated companies in respect of the purchase of goods and services on account of transfer pricing be recovered from Safaricom Plc and credited and apportioned to M-Pesa Accountholders and Safaricom shareholders on such terms as this Honourable Court shall deem just.
- ii. An Order recommending that the Honourable the Attorney General do refer to the appropriate law enforcement agencies for investigation all such matters pleaded in this Complaint as are ultimately determined by this Honourable Court to amount to criminal acts or breaches of statutory law, with a view to

- prosecuting or taking other appropriate action against the persons and entities implicated in the theft of M-Pesa Accountholders' funds, fraud, loss in Safaricom shareholder value, tax evasion, or the doing of any other unlawful act.
- jj. A Declaration that the Safaricom M-Pesa Terms which purported that the Registration and Acceptance Form together with the Conditions of Use constituted a binding agreement between Safaricom Plc, M-Pesa Holding Co., Ltd and the M-Pesa Accountholders were null, void and of no legal effect *ab initio*.
  - kk. An Order lifting the corporate veil of Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited, Vodafone International Holdings B.V., M-Pesa Foundation Charitable Trust, Safaricom Foundation Charitable Trust and Carepay Limited and a finding that Mr. Joseph, Mr. Keith, Mr. Spink, Mr. Baillie, Mr. Ngumi and Mr. Ogutu are jointly and severally liable for the unlawful actions of the respective companies, firms or entities in which they are, or were at any time material to this suit, Directors, Trustees and/or Senior Officers.
  - ll. A finding that M-Pesa Holding Company Limited, Vodafone International Holdings B.V., M-Pesa Foundation Charitable Trust, Safaricom Foundation Charitable Trust, Carepay Limited and Vodafone Kenya Limited were the *alter ego* of the Vodafone Group Plc and Safaricom Plc, and that the Vodafone Group Plc and Safaricom Plc are ultimately jointly and severally liable for the unlawful actions of the said other companies, firms or entities but entirely without prejudice to the liability of those other companies, firms or entities.
  - mm. A finding that the receipt by M-Pesa Foundation Charitable Trust, Safaricom Foundation Charitable Trust and any other company, firm, entity or individual of any money in the form of donations from M-Pesa Holding Company Limited was illegal and unlawful as M-Pesa Holding Company Limited did not have the capacity to make such donations.

- nn. A Declaration that all money paid to any company, firm, entity or individual as a donation from M-Pesa Holding Company Limited amounted to M-Pesa Accountholders' funds and/or interest or income derived from such funds.
- oo. A Declaration that the claim that M-PESA Holding Company Limited was controlled by Directors who were independent of Safaricom Plc, and the further claim that it acted as the Trustee for M-PESA Accountholders and held all funds from the M-PESA business in trust to ensure that the funds were safeguarded at all times amounted to a false and fraudulent misrepresentation.
- pp. A finding that there has at no time been any contractual or other legal agreement or arrangement between the Vodafone Group Plc and the M-Pesa Accountholders since the inception of the M-Pesa Service by virtue of which the Vodafone Group Plc could be said to have been lawfully holding funds belonging to M-Pesa Accountholders.
- qq. A finding that M-Pesa Accountholders' funds were siphoned off to the Vodafone Group Plc, and commingled with funds belonging to the Vodafone Group Plc, in circumstances amounting to illicit financial flows and unjust enrichment.
- rr. Payment to the Plaintiffs and the entire class of M-Pesa Accountholders by the Vodafone Group Plc of the sum of **€1,048,000,000.00** and **€1,237,000,000.00** (equivalent to KShs. **140,002,320,000.00** and **KShs. 165,250,830,000.00** (i.e., **a total of €2,285,000,000.00 or KShs. 305,253,150,000.00**) at a mean rate of **€1.00 = KShs. 133.59** as at 23<sup>rd</sup> February 2023), being the amount admitted by the Vodafone Group Plc to be due to the M-Pesa Accountholders for the years ended 31<sup>st</sup> March 2019 and 31<sup>st</sup> March 2020 respectively.
- ss. Interest on the said sum of **€1,048,000,000.00** and **€1,237,000,000.00** at court rates from 31<sup>st</sup> March 2019 and 31<sup>st</sup> March 2020 respectively, until payment in full.
- tt. Compensatory damages, jointly and severally, against Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company

Limited and Vodafone International Holdings B.V., to M-Pesa Accountholders for the unlawful and fraudulent deriving of investment income and generation of interest from M-Pesa Accountholders' funds.

uu. Damages in favour of M-Pesa Accountholders against Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited, Vodafone International Holdings B.V., jointly and severally, for unjust enrichment.

vv. An Order for the disclosure by Safaricom Plc and M-Pesa Holding of all bank accounts in which M-Pesa Accountholders' funds have been held at any one time since inception of the M-Pesa Service, and of the names, designations and signing mandates of all signatories to the said accounts.

ww. An Order for the taking of proper accounts with all necessary inquiries and directions usual in such cases as between the entire class of M-Pesa Accountholders on the one hand, and:

- i. Safaricom Plc;
- ii. The Vodafone Group Plc;
- iii. M-Pesa Holding Company Limited;
- iv. The M-Pesa Foundation Charitable Trust;
- v. The Safaricom Foundation Charitable Trust; and
- vi. Any other person who, or company or entity which, has handled, held, received, concealed and/or in any other way used funds belonging to M-Pesa Accountholders, or interest or investment income derived from such funds.

xx. An Order for the refund by Safaricom Plc, M-Pesa Holding Company Limited, the Vodafone Group Plc, the M-Pesa Foundation Charitable Trust, the Safaricom Foundation Charitable Trust of all real money belonging to M-Pesa Accountholders received by or paid to or out of any of the said companies, entities or other associated company or entity in relation to the M-Pesa Service.



- yy. Interest on such amount as shall be adjudged to be refundable to the general class of M-Pesa Accountholders at court rates from the date of filing suit until payment in full.
- zz. A Declaration that M-Pesa Holding Company Limited and M-Pesa Foundation Charitable Trust were wholly owned by the Vodafone Group Plc (either directly or through its subsidiaries), a “for profit” company, and M-Pesa Holding Company Limited was therefore in truth not a Trust company, and M-Pesa Foundation Charitable Trust was also therefore in truth not a public charitable trust.
- aaa. A Declaration that the *Fuliza* overdraft service is an illegal and unlawful service by virtue of the fact that it did not have a proper and effective regulatory framework, leading to predatory lending through the charging of usurious interest rates.
- bbb. A further Declaration that the *Fuliza* overdraft service has since inception on-lent, and continues to on-lend, to M-Pesa Accountholders funds belonging to non-borrowing M-Pesa Accountholders without their consent in contravention of the Data Protection Act.
- ccc. A finding that Safaricom Plc routinely retained M-Pesa Accountholders’ funds and applied the funds towards other subsidiaries of the Vodafone Group Plc which had not played any role in the execution of the M-Pesa Service.
- ddd. A further Declaration that the misappropriation of M-Pesa Accountholders’ funds and the theft of interest and investment income derived from such funds inevitably resulted in the erosion of the value of the shares of Safaricom Plc.
- eee. Compensatory damages in favour of Safaricom shareholders against Safaricom Plc, the Vodafone Group Plc, Vodafone Kenya Limited, M-Pesa Holding Company Limited, Vodafone International Holdings B.V., jointly and severally, for causing or aiding or abetting the erosion in value of their Safaricom shares.

- fff. A Declaration that the opinions given annually by PricewaterhouseCoopers LLP and Ernst & Young from the Financial Year Ended 31<sup>st</sup> March 2007 to date on the financial statements of Safaricom Plc, the Vodafone Group Plc, M-Pesa Foundation Charitable Trust, Safaricom Foundation Charitable Trust and any other associated companies, firms and entities audited by the said audit firms amount to fraudulent misstatements (or, in the alternative, negligent misstatements) to the extent that they claim that the financial statements give a true and fair view of the said companies, firms and entities in relation to the M-Pesa Service, and to the further extent that they failed to identify and/or report on material discrepancies in various Annual Reports of Safaricom Plc.
- ggg. Damages in favour of M-Pesa Accountholders and Safaricom shareholders against PricewaterhouseCoopers LLP and Ernst & Young jointly and severally for loss occasioned on account of the fraudulent misstatements by the said audit firms.
- hhh. In the alternative, damages against PricewaterhouseCoopers LLP and Ernst & Young jointly and severally for loss occasioned to M-Pesa Accountholders on account of negligent misstatements.
- iii. A finding that the statements in January 2009 by the Government of Kenya through the then Permanent Secretary in the Ministry of Finance Mr. Joseph Kinyua, and by the Central Bank of Kenya, stating that the Government and the Central Bank had found the M-Pesa Service to be risk-free, safe and reliable were false statements and were falsely stated with the intention that they would be acted upon by M-Pesa Accountholders and Safaricom shareholders, and that they were so acted upon to the detriment of the Accountholders and the shareholders.
- jjj. Damages in favour of the M-Pesa Accountholders and Safaricom shareholders against the Government of Kenya and the Central Bank of Kenya jointly and severally for loss occasioned on account of their fraudulent misstatements.

kkk. Exemplary/Aggravated damages against all the Defendants jointly and severally for the mental distress and injured feelings caused to and suffered by the M-Pesa Accountholders and Safaricom shareholders on account of the egregious manner in which the Accountholders' funds, interest and income have been stolen and the shareholder value been diminished through the Defendants' direct actions, or through the aiding and abetting of such action by other Defendants.

lll. As an alternative prayer, the conversion to equity by Safaricom Plc, the Vodafone Group Plc, Vodafone International Holdings B.V. and Carepay Limited in favour of M-Pesa Accountholders and Safaricom shareholders of all such monies as shall be adjudged by this Honourable Court to be due to the M-Pesa Accountholders and/or to Safaricom shareholders by reason of theft of the M-Pesa Accountholders' funds and/or interest and investment income derived from such funds or by reason of loss of shareholder value occasioned to Safaricom shareholders respectively (as the case may be).

mmm. Interest on all heads of unascertained damages at court rates from the date of Judgment, until payment in full.

nnn. Costs of the suit plus interest thereon at court rates.

ooo. Such further or other relief or Orders as this Honourable Court may deem fit to grant.

**DATED** at **NAIROBI** this            23<sup>rd</sup>    day of            **February**            2023

*Nderitu & Partners*

**Advocates for the Plaintiffs**

**Drawn & Filed by:-**

Nderitu & Partners, Advocates

Thru' Wilfred Nderitu, SC

[Admission No: P.105/1945/89]

[Practice No. 2023: LSK/2023/03283]

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**To be Served Upon:-**

1. Safaricom Plc
2. Vodafone Group Plc
3. Vodafone Kenya Limited
4. M-Pesa Holding Company Limited
5. Vodafone International Holdings B.V.
6. Mr. Michael Joseph
7. Mr. Hamish Keith
8. Mr. Martin David Spink
9. Mr. Les Baillie
10. Mr. John Ngumi
11. Mr. Joseph Ogutu
12. M-Pesa Foundation Charitable Trust
13. Safaricom Foundation Charitable Trust
14. Carepay Limited
15. Daly Inamdar LLP Advocates
16. Coulson Harney LLP Advocates
17. PricewaterhouseCoopers LLP
18. Ernst & Young
19. Central Bank of Kenya
20. Communications Authority of Kenya
21. The Honourable the Attorney General

(Service of court process on all the Defendants through the Plaintiffs' Advocates' office)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT No. ACEC ..... OF 2023**

**-BETWEEN-**

- 1. S. GICHUKI WAIGWA**
- 2. LUCY W. NZOLA**
- 3. GODFREY P. OKUTOYI.....PLAINTIFFS**

**-AND-**

- 1. SAFARICOM PLC**
- 2. VODAFONE GROUP PLC**
- 3. VODAFONE KENYA LIMITED**
- 4. M-PESA HOLDING COMPANY LIMITED**
- 5. VODAFONE INTERNATIONAL HOLDINGS B.V.**
- 6. MICHAEL JOSEPH**
- 7. HAMISH KEITH**
- 8. MARTIN DAVID SPINK**
- 9. LES BAILLIE**
- 10. JOHN NGUMI**
- 11. JOSEPH OGUTU**
- 12. M-PESA FOUNDATION CHARITABLE TRUST**
- 13. SAFARICOM FOUNDATION CHARITABLE TRUST**
- 14. CAREPAY LIMITED**
- 15. DALY INAMDAR LLP ADVOCATES**
- 16. COULSON HARNEY LLP ADVOCATES**
- 17. PRICEWATERHOUSECOOPERS LLP**
- 18. ERNST & YOUNG**
- 19. CENTRAL BANK OF KENYA**
- 20. COMMUNICATIONS AUTHORITY OF KENYA**

21. THE HONOURABLE THE ATTORNEY GENERAL.....DEFENDANTS

VERIFYING AFFIDAVIT

I, S. GICHUKI WAIGWA, a male adult resident at Nairobi in the Republic of Kenya and of care of Post Office Box Number 49496 Nairobi 00100 hereby MAKE OATH and say as follows:-

1. THAT I am the 1<sup>st</sup> Plaintiff in this suit and I am fully conversant with the facts of the suit and I am therefore competent to make this Affidavit. I have the authority of my co-Plaintiffs to make this Affidavit.
2. THAT I now verify that the averments contained in the Complaint accompanying this Affidavit are true and correct to the best of my knowledge, information and belief.

SWORN by the said S. GICHUKI WAIGWA )  
at NAIROBI this 23<sup>rd</sup> day of February 2023 )  
BEFORE ME )

JOSEPH A. KANIA  
ADVOCATE, COMMISSIONER FOR OATHS,  
NOTARY PUBLIC  
P.O. BOX 14411 - 00800, NAIROBI, KENYA  
P105/2063/90  
PRACTICE NUMBER LSK/2023/05605

COMMISSIONER FOR OATHS )

Drawn & Filed by:-

Nderitu & Partners, Advocates

Thru' Wilfred Nderitu, SC

[Admission No: P.105/1945/89]

[Practice No. 2023: LSK/2023/03283]

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High Court of Kenya at Nairobi (Milimani Law Courts) Anti-Corruption & Economic Crimes Division | Civil Suit  
No. .... of 2023 | S. Gichuki Waigwa & 2 Others (Plaintiffs) v. Safaricom Plc & 20 Others (Defendants) & The  
Law Society of Kenya and Another (Interested Parties) | (Verifying Affidavit)