



**Republic v Privatisation Authority & another; Civil Society Reference Group (Ex parte)
(Application E035 of 2024) [2025] KEHC 4 (KLR) (Judicial Review) (8 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 4 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E035 OF 2024
J NGAAH, J
JANUARY 8, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE PRIVATISATION AUTHORITY 1ST RESPONDENT

THE CABINET 2ND RESPONDENT

AND

CIVIL SOCIETY REFERENCE GROUP EX PARTE

JUDGMENT

1. The applicant,s application is a motion dated 11 April 2024 expressed to be brought under sections 8 and 9 of the Law Reform Act, cap. 26 and Order 53 Rule 1 (1), (2), (3) & (4), 3 (1) of the Civil Procedure Rules. The applicant seeks the following orders:

“

- “ 1. That the Honourable court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision by the 2nd Respondent, its agents, employees and/or servants contained in the despatch from Cabinet dated 14th February, 2024 authorizing the privatization of the Development Bank of Kenya (DBK).
- 2. That the Honourable court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 2nd Respondent, its agents, employees and/or servants



contained in the despatch from Cabinet dated 14th February, 2024 authorizing the divestures of Kenya Safari Lodges and Hotels Limited (incorporating Mombasa Beach Hotel, Ngulia Safari Lodge, and Voi Safari Lodge), Golf Hotel Limited, Sunset Hotel Limited, Mt. Elgon Lodge Limited and Kabarnet Hotel Limited.

3. That the Honourable court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent, its agents, employees and/or servants to put up on its website a Tender on a “Request for Proposal Document for the Provision of Consultancy Services On The Privatization Of Development Bank Of Kenya (DBK) – Implementation Phase”, as contained in Tender No: PC/08/2023 – 2024, dated 22nd March 2024.
4. That the Honourable court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent, its agents, employees and/or servants to put up on its website an Invitation For Expression Of Interest in Acquisition Of Government Shareholding In KWA Holdings (E.A) Limited (KHEAL) and Kenya Wine Agencies Limited (KWAL).
5. That the Honourable court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent, its agents, employees and/or servants to put up a tender on its website on a Request For Proposal Document For The Provision Of Consultancy Services On The Privatisation of KDC Controlled Hotels (Implementation Phase) as contained in Tender No: PC/06/2023 – 2024 and dated 12th March 2024.
6. That the Honourable court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent, its agents, employees and/or servants to put up on page 28 of the Standard Newspaper of 28th March 2024 an Invitation For Expression Of Interest in Acquisition Of Government Shareholding In Kenya Hotel Properties Limited
7. That the Honourable court be pleased and do hereby grant judicial review order of prohibition to remove into this Honourable Court and prohibit the 1st Respondent from implementing and/or completing the privatization of Development Bank of Kenya (DBK) in the manner contemplated both under the Cabinet Despatch dated 14th February 2024 and in the 1st Respondent’s Tender No: PC/08/2023 – 2024, dated 22nd March 2024.
8. That the Honourable court be pleased and do hereby grant judicial review order of prohibition to remove into this Honourable Court and prohibit the 1st Respondent from implementing and/or completing the privatization of Government Shareholding In KWA Holdings (E.A) Limited (KHEAL) and Kenya Wine Agencies Limited (KWAL) as contemplated in the 1st Respondent’s Invitation for Expression of Interest that closes on the 5th of April, 2024.



9. That the honourable court be pleased and do hereby grant judicial review order of prohibition to remove into this Honourable Court and prohibit the 1st Respondent from implementing and/or completing the privatization of Kenya Development Corporation (KDC) Controlled Hotels in the manner contemplated both under the Cabinet despatch dated 14th February 2024 and in the 1st Respondent's Tender No: PC/06/2023 – 2024, dated 12th March 2024.
10. That the honourable court be pleased and do hereby grant judicial review order of prohibition to remove into this Honourable Court and prohibit the 1st Respondent from implementing and/or completing the privatization of Kenya Hotel Properties Limited in the manner contemplated under the Invitation For Expression Of Interest in Acquisition Of Government Shareholding In Kenya Hotel Properties Limited that was put up by the 1st Respondent on page 28 of the Standard Newspaper of 28th March 2024.
11. That the Leave so granted by this Honourable Court on 5th April, 2024 do operate as a stay of the ongoing privatization of the public entities listed herein below:
 - i. The Development Bank of Kenya (DBK);
 - ii. KWA Holdings (E.A) Limited (KHEAL);
 - iii. Kenya Wine Agencies Limited (KWAL);
 - iv. Kenya Development Corporation (KDC) Controlled Hotels, that is, Kenya Safari Lodges and Hotels Limited (incorporating Mombasa Beach Hotel, Ngulia Safari Lodge, and Voi Safari Lodge), Golf Hotel Limited, Sunset Hotel Limited, Mt. Elgon Lodge Limited & Kabarnet Hotel Limited; and
 - v. Kenya Hotel Properties Limited.”

The applicant also seeks an order on costs.

2. The application is based on a statutory statement dated 4 April 2024 and an affidavit verifying the facts relied on sworn on even date by Mr. David Calleb Otieno.
3. The applicant is described in the statutory statement as “a coalition of over 200 human rights, social justice and development organisations that, amongst other things, clamors for and advances the cause of Human Rights and fidelity to the rule of law”.
4. In the affidavit verifying the facts relied upon, Mr. Otieno has introduced himself as “the convenor of the applicant”.

According to the statutory statement and the affidavit verifying the facts relied upon, the State is said to have embarked on an ambitious plan to privatize a number of public entities including:

- i. The Development Bank of Kenya (DBK);
- ii. KWA Holdings (E.A) Limited (KHEAL);
- iii. Kenya Wine Agencies Limited (KWAL);



- iv. Kenya Development Corporation (KDC) Controlled Hotels, that is, Kenya Safari Lodges and Hotels Limited (incorporating Mombasa Beach Hotel, Ngulia Safari Lodge, and Voi Safari Lodge), Golf Hotel Limited, Sunset Hotel Limited, Mt. Elgon Lodge Limited & Kabarnet Hotel Limited; and
 - v. Kenya Hotel Properties Limited.
5. The said privatisation processes were kicked off by the 2nd respondent on 14 February 2014 and communicated vide a cabinet despatch of even date. The 1st respondent has, since the despatch, put up a number of tenders inviting parties that may be interested to place their bids to acquire interest in the said public entities or provide consultancy services for such sophisticated transactions. The said entities are amongst about 28 others that had previously been identified for privatization under the Privatisation Act, 2005 and publicized through Gazette Notice No. 8739 of 14th August, 2009.
6. Meanwhile, Parliament passed the Privatisation Act, 2023, which was assented into law on the 9 October 2023 and commenced on the 27 October, 2023, thereby repealing the Privatisation Act, 2005. According to section 68 of the Privatisation Act, 2023, Gazette Notice No. 8739 of 14 August 2009 is said to have lapsed.
7. Mr. Otieno has been advised by his advocates which advice he verily believes to be true that any privatization that purports to emanate from the defunct Gazette Notice No. 8739 of 14 August 2009 and proceeds in accordance with the repealed law is null and void.
8. According to section 19(2)(c) & (d) of the Privatisation Act, 2023, it is the Privatisation Programme that specifies the public entities identified and approved for privatisation and further, it serves as the basis upon which a privatisation shall be undertaken. Gazette Notice No. 8739 of 14 August 2009 having lapsed, means that a new Privatisation Programme needs to be established for there to be a legal basis for any privatisation after the the Privatisation Act, 2023 came into force.
9. Following the enactment of the new law, the Cabinet Secretary, National Treasury & Economic Planning promptly commenced on the formulation of a Privatisation Programme by publishing a proposed programme and inviting stakeholders and members of the public to comment on the same. Eleven entities have been proposed for privatization under the said document but none of the entities impugned in this suit have been mentioned in that proposal.
10. Crucially, the privatization programme is yet to be ratified by the National Assembly, for onward Gazettment, as per the requirements of sections 22 and 23 of the Privatisation Act, 2023. There is, therefore, no valid or legal basis for the purported Privatisation Programme.
11. According to the applicant, the Cabinet and the Privatisation Authority have conspired to identify, determine and proceed with the actual privatisation of the aforementioned entities without the involvement of the Cabinet Secretary, National Treasury & Economic Planning, the specific stakeholders of each entity, the public and the National Assembly, in complete violation of the dictates of sections 21, 22 & 23 of the Privatisation Act, 2023.
12. The 1st respondent's replying affidavit in response to the applicant's application was sworn by Mr. Joseph Koskey who has stated that he is the Managing Director or the Chief Executive Officer of the Privatisation Authority. According to this affidavit, the Privatisation Authority is established under Section 8 of the Privatisation Act, 2023 and is mandated to implement the Privatisation Programme and implement specific privatization proposals in accordance with the Privatisation Programme, amongst other functions. Prior to the Privatisation Act, 2023 there was a preceding Act, Privatisation Act, 2005.



13. Under the Privatisation Act, 2005, there was a Privatisation Commission established under Section 5 of the Act whose functions were to, inter alia, formulate, manage and implement the Privatisation Programme. Pursuant to Section 17 of the Privatisation Act, 2005, there was a Privatisation Programme that was gazetted in Gazette Notice No. 8739 of 11 August 2009. The notice was in Kenya Gazette Vol. CXI- No. 70 of 14th August 2009. According to that notice, the Privatization Authority proceeded with the privatisation of the following entities:
- i. KWA Holdings (E.A) Limited (KHEAL) and Kenya Wine Agencies Limited;
 - ii. Development Bank of Kenya Limited;
 - iii. KOC-Controlled Companies:
 - a. Golf Hotel, Limited;
 - b. Sunset Hotel Limited;
 - c. Mt. Elgon Lodge Limited;
 - d. Kabarnet Hotel Limited; and
 - e. Kenya Safari Lodges & Hotels Limited.
 - iv. Kenya Hotel Properties Limited.
14. The Privatisation Act, 2005 was repealed by the Privatisation Act, 2023 which came into force on 27 October 2023. According to Section 65 (1) and (2) of the Privatisation Act, 2023, the Privatisation Commission established under the repealed Act was succeeded by the Privatisation Authority. Under Section 67 (1) of the new Act, the rights and obligations of the defunct Privatisation Commission vested in the Privatisation Authority.
15. Mr. Koskey has been advised by his counsel, which advice he verily believes to be true, that the applicant has misconstrued the purpose and intent of the provisions of Section 68 (1) and (2) of the Privatisation Act, 2023 and that the effect of the proviso in section 68(2) is to save any ongoing privatisations under the repealed Act including ongoing privatisations under Gazette Notice No. 8739 of 14 August 2009 as long as the process had commenced at the time the Privatisation Act, 2023 came into force on 27 October 2023.
16. To be precise, the privatisation process in respect of the entities below were underway as at the time the Privatisation Act, 2023 came into effect and that the privatisation process commenced under the previous Act was saved by dint of Section 68(2) of the Privatisation Act, 2023:
- i. KWA Holdings (E.A) Limited (KHEAL) and Kenya Wine Agencies Limited;
 - ii. Development Bank of Kenya Limited;
 - iii. KOC-Controlled Companies:
 - a. Golf Hotel, Limited;
 - b. Sunset Hotel Limited;
 - c. Mt. Elgon Lodge Limited;
 - d. Kabarnet Hotel Limited; and
 - e. Kenya Safari Lodges & Hotels Limited. iv. Kenya Hotel Properties Limited.



17. According to Mr. Koskey, it is not true that the privatisation in respect to the entities listed above had lapsed and, therefore, it was not necessary for the Cabinet Secretary, National Treasury & Economic Planning to commence formulation of the Privatisation Programme afresh by publishing the Programme and inviting stakeholders and members of the public as suggested by the applicant.
18. Again, it was not necessary for the National Assembly to ratify the said Privatisation Programme for gazettment. Mr Koskey has also sworn that the applicant has failed to appreciate that privatisation of Kenya Pipeline Company Limited, New Kenya Co-operative Creameries & Numerical Machining Complex were not ongoing at the time the Privatisation Act, 2023 came into force and were, therefore, not saved by the dint of Section 68(2) of the Act.
19. Finally. Mr. Koskey has sworn that he has been advised by his counsel on record that the current suit is not only premature but is contrary to the statutory dispute resolution mechanism provided under Part VII of the Privatisation Act, 2023 and is, therefore, barred in law.
20. Before considering the submissions filed by the parties, my attention has been drawn to a supplementary affidavit sworn 24 April 2024 by Mr. Otieno intimating the existence another suit in which the legality or constitutionality of the Privatisation Act, 2023 has been questioned and in which, apparently, the state had been barred from privatising state corporations pending the determination of that suit. In the pertinent paragraphs Mr. Otieno has sworn as follows:

- “ 18. That I strongly believe that the reason why the Respondents decided, through the Cabinet Despatch dated 14th February 2024 and the subsequent impugned tenders issued, to proceed with the privatization of the entities in contention in this suit outside a valid privatization programme was because they were quite aware that the Cabinet Secretary National Treasury & Economic Planning had by then had his hands tied by a Court Order issued in HCCHRPET/E491/2023, Orange Democratic Movement & 4 Others Vs The Speaker Of The National Assembly & 5 Others suspending implementation of section 21(1) of the Privatization Act 2023 and or any decisions made pursuant to that section, until 6th February 2024.
19. The said order was on the 6th of February 2024 extended till the hearing and determination of the Petition which challenges the constitutionality of various sections of the Privatisation Act, 2023. The matter is due for hearing on 2nd May, 2024. (Annexed hereto and marked as "D0-3(a) & "D0-3(b)" are the said two Court orders respectively.)
20. That the said court orders meant that no matter how much the Respondents wanted to privatize the entities in contention in this suit, the Cabinet Secretary who initiates the process of privatization under the new law could not identify and determine the entitles to be included in a fresh privatisation programme. The Court Orders go ahead to suspend any decision made pursuant to that section, that is the approval process of Cabinet under section 19(2)(a) of the Privatisation Act, 2023, the decision to ratify the programme or not under section 22 of the same law and even the implementation process from section 26 of the Act onwards.



21. That the Respondents' impugned actions were therefore simply an ingenious way to try and circumvent a valid court order and avoid the robust oversight and participatory elements enacted by the new law.”
21. It is apparent from these depositions that by 6 February 2024 a court order had been made in HCCHRPET/E491/2023, Orange Democratic Movement & 4 Others Vs The Speaker Of The National Assembly & 5 Others “suspending implementation of section 21(1) of the Privatization Act 2023 and or any decisions made pursuant to that section”.
22. Section 21 of the Privatisation Act to which reference has been made reads as follows:
21. Identification of entities for the programme
- (1) The Cabinet Secretary shall identify and determine the entities to be included in the privatisation programme.
 - (2) Without prejudice to the generality of subsection (1), the Cabinet Secretary shall, in the identification and determination of entities for privatisation, take into consideration—
 - (a) the relevant government policies in respect of privatisation;
 - (b) the strategic priorities and policy goals to be achieved by the privatisation;
 - (c) the strategic nature of the public entity to be privatised;
 - (d) the need to avoid a privatisation that may result in an unregulated monopoly;
 - (e) the need to avoid a privatisation that may accord the new owners' special protection or access to credit on concessionary terms as a result of the National Government's sovereign status;
 - (f) the extent of regulatory adjustments required;
 - (g) the need to reduce budget drain on government resources;
 - (h) the expected benefits to be gained from a proposed privatisation; and
 - (i) any other relevant consideration.
23. It follows that any decision or decisions made towards implementation of section 21(1) of the Act would, of course, include the implementation of the decision contained in the despatch from Cabinet dated 14 February, 2024 purporting to authorise the privatisation of the Development Bank of Kenya (DBK); KWA Holdings (E.A) Limited (KHEAL); Kenya Wine Agencies Limited (KWAL); Kenya Development Corporation (KDC) Controlled Hotels, that is, Kenya Safari Lodges and Hotels Limited (incorporating Mombasa Beach Hotel, Ngulia Safari Lodge, and Voi Safari Lodge), Golf Hotel Limited, Sunset Hotel Limited, Mt. Elgon Lodge Limited & Kabarnet Hotel Limited; and, Kenya Hotel Properties Limited.
24. This being the case, the question of privatisation of the state corporations generally, and privatisation of the state corporations enumerated in the applicant's motion, in particular, could properly be determined in Petition No. E491 of 2023. No doubt, going by the depositions made by Mr. Otieno, the applicant was not just aware of the pre-existing suit but it was also aware that the issues raised in the instant suit could and ought to have been disposed of in that particular suit.
25. As a matter of fact, and this I gather from the case tracking system portal in respect of Petition No. E491 of 2023, the firm of advocates on record for the applicant in the instant suit is the same firm



that was on record in one of the petitions consolidated with Petition No. E491 of 2023 in which the constitutionality of certain provisions of the Privatisation Act and, indeed the entire Act was questioned. In the petition, registered as petition no. 10 of 2024, in which applicant's learned counsel represented the petitioner, the petitioner pleaded, inter alia, as follows:

- “46. Despite the role of Parliament been as muted as it was under the repealed Privatisation Act, 2005, the National Assembly has recently passed the Privatisation Act, 2023 which inter alia further diminishes the role of Parliament while at the same time disproportionately enhancing the role of the Cabinet Secretary, National Treasury & Economic Planning in the privatisation process. The defunct Privatisation commission, now the Privatisation Authority now simply implements the decisions of the Cabinet Secretary with respect to which public entity is identified for privatisation.
47. The Privatisation Act, 2023 defies the doctrine of separation of powers, undermines the oversight role of Parliament and arrogates the Cabinet Secretary and by extension the Cabinet, arbitrary powers in a process as significant to the nation as the sale of its strategic assets.
48. The economic policy itself (sale of a nation's strategic assets) is not grounded on the Bill of rights, amounts to a dereliction of duty by the State to provide essential services to its people and is a betrayal to future generations that will certainly require the assets for the fulfilment of the aspiration to build an equitable society as encapsulated in the preamble of *the Constitution* of Kenya, 2010.
49. Unless this Honourable Court puts a halt to this law, the nation will witness, on a massive scale, another cycle of opaque, imprudent and unaccountable transactions that will disenfranchise both existing and future generations by literally obliterating the asset-base of this country in a manner that may well never be redeemed.”
26. The court was persuaded by the applicant's case and in a judgment delivered on 24 September 2024, it determined, inter alia, as follows:
- “2. A declaration is hereby issued that the National Assembly did not conduct reasonable, meaningful, adequate and or and effective public participation before passing the Privatisation Act, 2023. The entire Privatisation Act, 2023 is, therefore, unconstitutional, null and void”.
27. Despite being aware of the existence of the prior suit in which the constitutionality of the Privatisation Act, 2023 was questioned, and which Act was eventually invalidated, the applicant filed the instant suit in which it is effectively seeking to enforce the same Act that has been invalidated. As far as I understand the applicant's case, privatisation of state corporations must be done in accordance with the Privatisation Act, 2023 and its qualm with the respondents is that the purported dispatch from the cabinet with respect to privatisation of certain state entities and the purported privatisation program together with the ongoing privatisations, are all contrary to the provisions of the Privatisation Act.



28. Against this background, the applicant's suit is untenable. It is untenable because, first, as at the time it was filed, it was sub judice. Section 6 of the Civil Procedure Act cap.21, which embraces this doctrine reads:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

29. I am minded that the applicant in this application was not among the petitioners in any of the petitions consolidated with petition no. 491 of 2023 but I also note that in that petition, there were three civil societies named as petitioners. These are Katiba Institute, Institute of Social Accountability and African Centre for Open Governance. As noted, the applicant in this suit has been described as "a coalition of over 200 human rights, social justice and development organisations that, amongst other things, clamors for and advances the cause of Human Rights and fidelity to the rule of law". The 200 organisations that constitute the applicant have not been identified but the possibility that Katiba Institute, Institute of Social Accountability and African Centre for Open Governance could be members of this group cannot be ruled out. Nevertheless, whether they are members of the applicant or not, it has been demonstrated that the applicant was very much aware of the existing petitions filed prior to this application and in which the issues raised in this application could be determined or ought to have been determined.

30. The reason that the suit is sub judice in the sense contemplated in section 6 of the Civil Procedure Act points to the second reason why the suit is untenable. It is untenable because this Honourable Court has pronounced itself on the issues raised in the applicant's application with particular reference to the question whether any privatisation can be done under the cover of the Privatisation Act, 2023. The court has ruled that the Act is unconstitutional and, therefore, the question whether the Act has been complied with in the privatisations that the state set in motion and which are the subject of this application has turned out to be moot. The wisdom in the doctrine is easy to see: if I was to allow the applicant's application and hold that the certain provisions of the Privatisation Act, 2003 have not been complied with I will be giving a contradictory judgment to that given in petition no. 491 of 2023 over the same issue.

31. I am conscious of the fact that the decision invalidating the Privatisation Act, 2023 is by a court of coordinate jurisdiction; however, I note that there are appeals that have been filed against it, including one by the learned counsel for the applicant. If the Court of Appeal is now seized of the same question or questions that the applicant wants this Honourable Court to answer, the appropriate course would be to yield and submit to the jurisdiction of the Court of Appeal. Subject to any right to appeal to the apex court, the Court of Appeal will have the last word on the questions raised by the applicant.

32. In the ultimate, I find the applicant's application to be misconceived and an abuse of the due process of this Honourable Court. It is hereby struck out. I make no orders as to costs. Orders accordingly.

DATED, SIGNED AND UPLOADED ON THE CTS ON 8 JANUARY 2025

Ngaah Jairus

JUDGE

