REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

PETITION NO. E714 OF 2025

IN THE MATTER OF CONSTITUTIONAL VALIDITY OF PRIVATIZATION ACT, 2025

AND

IN THE MATTER OF SOVEREIGNTY OF THE PEOPLE, SUPREMACY OF THE CONSTITUTION, RULE OF LAW, LEGITIMATE EXPECTATIONS, CONSTITUTIONALISM, ULTRA VIRES AND VOID, AB INITIO

BETWEEN

ELIUD KARANJA MATINDI ..... PETITIONER

VERSUS

THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

THE SENATE ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. What falls for determination before this Court is a Constitutional Petition dated 31st October 2025, together with a Notice of Motion of even date, instituted by Eliud Karanja Matindi, a citizen of the Republic of Kenya, who approaches the Court in the public interest pursuant to Articles 22 and 258 of

the Constitution. The Petition challenges the constitutional validity of the Privatization Act, 2025, impugning both the legislative process culminating in its enactment and the constitutionality of certain substantive provisions therein. The Petitioner seeks declaratory relief that the Act is unconstitutional, null and void ab initio, together with appropriate ancillary and consequential orders.

2. The gravamen of the Petition is that the Act was enacted in violation of the bicameral architecture of Parliament established under Articles 93 and 94 of the Constitution, and contrary to the legislative procedure prescribed by Articles 109, 115 and 116. It is the Petitioner's case that the subject matter of the statute concerns and affects county governments within the meaning of Article 96, in so far as it provides for the privatization of public entities holding public land and other public assets. Accordingly, he contends that the participation of the Senate was constitutionally obligatory, and that its exclusion from the legislative process rendered the enactment procedurally unconstitutional and therefore null and void ab initio.

3. The Petition is strenuously opposed by the 1st Respondent, the National Assembly, and the 3rd Respondent, the Honourable Attorney General, each of whom has filed responses urging the Court to uphold the constitutionality of the impugned statute. Although duly served with the pleadings, the 2nd Respondent, the Senate, neither entered appearance nor filed any response to the Petition

BACKGROUND

4. The factual substratum giving rise to the present dispute is, in all material respects, not contested. It merits setting out at some length, for context is often determinative in constitutional adjudication. For nearly two decades, the privatization of state corporations and public entities in Kenya was governed by the Privatization Act, 2005. Following the promulgation of the Constitution of Kenya, 2010, and the entrenchment of a more exacting constitutional framework for public finance, governance and accountability, concerns arose as to whether the 2005 statute sufficiently aligned with the letter and spirit of the Constitution. These considerations culminated in the enactment of the Privatization Act, 2023.

5. The constitutional tenure of the 2023 statute was, however, short-lived. In ***Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others***, this Court, in a judgment delivered on 24th September 2024, declared the entire Act unconstitutional. The gravamen of that decision lay in the National Assembly's failure to undertake reasonable, meaningful, adequate and effective public participation prior to enactment. The Court underscored that public participation is not a perfunctory procedural ritual but a substantive constitutional imperative. The statute was accordingly invalidated in its entirety, with the legal position reverting to the regime established under the 2005 Act.

6. In the aftermath of that judgment, and in ostensible discharge of its legislative mandate under Articles 94 and 95 of the Constitution, the National Assembly initiated a fresh legislative process. The Privatization Bill, 2025 was published in the Kenya Gazette Supplement on 16th July 2025 as National Assembly Bill No. 36 of 2025. Its stated objective was to repeal and re-enact a comprehensive regulatory framework governing the privatization of public entities, with the overarching aim of enhancing efficiency, accountability and transparency in the management of public assets.

7. The Bill proceeded through the stages prescribed within the National Assembly. It was read a First Time and committed to the relevant Departmental and Select Committees, which undertook a public participation process comprising nationwide advertisements, invitations for written memoranda and public hearings conducted across twenty-four counties. The Committees received and considered representations from members of the public and stakeholders, proposed amendments arising therefrom, and tabled their reports before the House. The Bill was thereafter debated, considered clause by clause at the Committee of the Whole House, read a Third Time, and passed on 9th October 2025. It received Presidential Assent on 15th October 2025 and commenced operation on 4th November 2025 as the Privatization Act, 2025.

8. The impugned statute is described in its long title as an Act to provide a regulatory framework for the privatization of public entities, to establish the

Privatization Authority, and for connected purposes. Section 2 defines "privatization" as a transaction resulting in the transfer of assets, liabilities or shares of a public entity to a non-public entity, and defines "public entity" to include national government-linked corporations and state corporations. Of particular significance is section 4(f), which expressly excludes from the ambit of the Act the sale or transfer of shares by a county government. Section 71 further provides that the privatization of entities listed in Gazette Notice No. 8739 of 14th August 2009 shall be finalized in accordance with the Act.

9. Concomitantly, the Petitioner had moved the Court by Notice of Motion seeking conservatory orders suspending the implementation of the Act pending the hearing and determination of both the Application and the Petition. He contended that the statute facilitated the imminent privatization of public entities listed in Gazette Notice No. 8739 of 2009, including Kenya Pipeline Company Limited, thereby posing a real and immediate risk of irreversible constitutional injury. It was his position that interim relief was necessary to preserve the substratum of the Petition, safeguard public assets, and vindicate constitutional supremacy, and that a temporary suspension of the Act's operation would not occasion undue prejudice to the Respondents.

THE PETITIONER'S CASE

10. The Petitioner, invoking this Court's jurisdiction under Articles 22, 165(3)(d) and 258 of the Constitution, mounts a two-pronged constitutional challenge

to the impugned statute. His first line of attack is procedural in character. He contends that the Senate was unconstitutionally excluded from the legislative process culminating in the enactment of the Privatization Act, 2025. In his view, the Act constitutes a Bill "concerning county governments" within the meaning of Article 110 of the Constitution, thereby necessitating the participation of the Senate pursuant to Articles 96(2) and 109(3). This central proposition is advanced on several interrelated grounds.

11. First, the Petitioner asserts that the Act contemplates the privatization of public entities holding public land. Relying on Articles 62 and 66 of the Constitution, he submits that land governance is inextricably linked to the devolved system of government and that any legislative framework regulating the disposition or conversion of public land necessarily concerns county governments. Secondly, he places considerable reliance on Gazette Notice No. 8739 of 14th August 2009, referenced in section 71 of the Act, which enumerates entities earmarked for privatization. He avers supported by Gazette Notice No. 2701 of 24th March 2017 that upon the advent of devolution, assets of defunct local authorities, including shareholding in entities such as Mt. Elgon Lodge Limited, Golf Hotel Limited, and Sunset Hotel Limited, vested in the respective county governments. On that basis, he contends that legislation authorizing the privatization of such entities directly implicates county government assets and interests.

12. Thirdly, the Petitioner draws attention to sections 22(2)(d) and 32(3)(b) of the Act, which make reference to national security considerations. He submits

that under Article 238(2)(a) of the Constitution, national security is subject to the authority of "Parliament," which, in his construction, denotes the bicameral Parliament comprising both the National Assembly and the Senate. Fourthly, he points to sections 64 and 66 of the Act, which create criminal offences, the enforcement of which would engage the National Police Service. He argues that by virtue of Article 239(6), legislation touching on the functions of national security organs must involve "Parliament" in its composite constitutional sense.

13. The Petitioner's second line of attack is substantive. He impugns specific provisions of the Act as inconsistent with the Constitution. In particular, he challenges section 6(d), which identifies as one of the purposes of privatization the improvement of efficiency, profitability and accountability of public entities. He contends that, to the extent that the provision facilitates the privatization of entities that are already efficient and profitable, it undermines the constitutional imperatives of equity, social justice, sustainable development, and the equitable sharing of resources between present and future generations as embodied in Articles 10 and 201 of the Constitution.

14. With respect to section 32, which regulates eligibility to participate in privatization processes and permits participation by both citizens and non-citizens subject to restrictions that may be imposed by the Cabinet Secretary, the Petitioner contends that the provision imperils Article 65 of the Constitution. He argues that permitting non-citizens to acquire shares in

entities holding land could, in practical effect, facilitate the circumvention of the constitutional prohibition against non-citizens holding freehold title and the limitation of leasehold interests to a term not exceeding ninety-nine years.

15. The Petitioner further challenges section 54, which provides that proceeds from the sale of a direct National Government shareholding shall be paid into the Consolidated Fund, on grounds of vagueness and opacity. He submits that the phrase “direct National Government shareholding” is undefined and that the provision is silent as to the treatment of proceeds arising from entities with mixed ownership involving county governments. This, he argues, offends the constitutional principles of good governance, transparency and accountability enshrined in Articles 10 and 201. He also assails section 55 and the Third Schedule, which empower the Privatization Authority to review its own decisions, contending that such a framework violates the right to a fair hearing under Article 50(1), the right to fair administrative action under Article 47, and the common law rule against bias encapsulated in the maxim *nemo judex in causa sua*.

16. Finally, the Petitioner impugns section 65 of the Act, which deems information issued to or sought by the Authority to be confidential unless disclosure is approved by the Authority. He contends that this provision constitutes an unreasonable and disproportionate limitation of the right of access to information guaranteed under Article 35 of the Constitution and is inconsistent with the Access to Information Act. In support of this

proposition, he relies on the decision of the Court of Appeal in ***Governor, County Government of Kakamega & 4 others v Omweno & 12 others (Civil Appeal E176, E177 & E179 of 2024 (Consolidated)) [2025] KECA 190 (KLR).***

17. The Petitioner also vigorously contests the Respondents' plea of res judicata. He submits that for such a plea to be sustained, the party asserting it must place before the Court the complete record of the previous proceedings, including pleadings and judgment, so as to enable the opposing party to respond meaningfully. In that regard, he relies on the decision of the Supreme Court in ***John Florence Maritime Services Limited & another v Cabinet Secretary, Transport & Infrastructure & 3 others [2021] KESC 39 (KLR),*** arguing that the Respondents' failure to annex the pleadings and decision in the alleged previous suit by way of affidavit evidence renders the plea untenable. He further distinguishes the 2025 Act from its 2023 predecessor, contending that, by virtue of its transitional provisions and reference to the historic Gazette Notice, the present statute implicates entities in which county governments now have vested interests an alleged factual dimension not present in the earlier litigation.

18. On the basis of the foregoing, the Petitioner urges this Court to adopt his interpretation of the Constitution, to find that the impugned Act offends both procedural and substantive constitutional requirements, and to declare the Privatization Act, 2025 unconstitutional, null and void.

1ST RESPONDENT'S CASE

19. The 1st Respondent, the National Assembly, opposes the Petition through a Replying Affidavit sworn on 10th December, 2025 by its Clerk, Mr. Samuel Njoroge, CBS, and comprehensive written submissions. Its opposition is advanced on both procedural and substantive grounds, and it maintains that the Privatization Act, 2025 was validly and constitutionally enacted.

20. On the procedural plane, the 1st Respondent raises a preliminary objection anchored on the doctrine of res judicata. It contends that the question whether legislation regulating privatization requires the participation of the Senate was directly and substantially in issue, heard, and conclusively determined by this Court in ***Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others***. In particular, it relies on paragraphs 145–146 of that judgment, which, in its submission, held unequivocally that the Privatization Act, 2023 was not a Bill concerning county governments. That pronouncement, it argues, constitutes a decision in rem on the legislative character of privatization statutes and is therefore binding in subsequent proceedings involving a successor enactment of substantially similar nature and purpose. To reopen the issue, it contends, would amount to an abuse of the court process.

21. In any event, and on the merits, the 1st Respondent submits that the impugned Act does not concern county governments within the meaning of Article 110 of the Constitution. It argues that the statute regulates the divestiture by the national government of its proprietary interests in national public entities and does not alter, diminish, or affect the functions and

powers of county governments as delineated in the Fourth Schedule. The mere geographical location of an entity within a county, or its engagement in a sector that is devolved, is said to be immaterial to the constitutional characterization of the Bill. In this regard, the 1st Respondent further invokes the test articulated by the Supreme Court in ***Senate & 3 others v Speaker of the National Assembly & 10 others***, submitting that Senate participation is required only where a Bill demonstrably affects the functions and powers of county governments, a threshold it asserts has not been met.

22. Additionally, the 1st Respondent contends that the Act was properly introduced and enacted as a Money Bill within the meaning of Article 114 of the Constitution. It submits that the statute makes provision for the receipt, custody, investment, and remittance of public money, specifically proceeds arising from the sale of national government assets, thereby bringing it within Article 114(3). By virtue of Articles 114(1) and (2), such Bills are, by constitutional design, considered exclusively by the National Assembly, thus excluding Senate participation.

23. With respect to the substantive challenge, the 1st Respondent denies that the Act governs land tenure or effects conversion of public land. It maintains that the statute merely establishes a regulatory framework for the transfer of shares or assets of public entities and does not displace the constitutional and statutory regime governing land under the Constitution and the Land Act. It argues that privatization is not a recognised mode of land allocation under land legislation; that state corporations are distinct legal persons

capable of holding property in their own name; and that transfer of shareholding does not ipso facto alter proprietary interests in land. It further contends that no cogent evidence has been adduced to demonstrate that entities earmarked for privatization hold public land within the meaning of Article 62, and that inclusion of penal provisions or references to national security does not transform the statute into one affecting county functions. In this regard, reliance is placed on ***Coalition for Reform and Democracy (CORD) & 2 others v Republic & another***, as affirmed in ***Coalition for Reforms and Development (CORD) & 2 others v Republic of Kenya & another,*** for the proposition that matters of national security fall within the exclusive mandate of the national government.

24. As regards the impugned provisions, the 1st Respondent defends their constitutional fidelity. Section 6(d) is characterised as a purposive clause articulating statutory objectives rather than a normative command, and it is argued that the Petition fails to meet the precision threshold articulated in ***Anarita Karimi Njeru v Republic***. Section 32, it is submitted, does not confer unfettered eligibility upon non-citizens but vests discretion in the Cabinet Secretary to restrict participation or prescribe minimum Kenyan participation, while expressly preserving the application of other laws giving effect to Article 65 of the Constitution. Section 54, which requires privatization proceeds to be paid into the Consolidated Fund, is said to accord with Article 206, and allegations of potential misuse are dismissed as speculative. In respect of Section 55 and the Third Schedule, the Authority's review power is described as a circumscribed internal administrative

mechanism that does not oust the supervisory or appellate jurisdiction of this Court, particularly in light of the express right of appeal under Section 56. Finally, Section 65 on confidentiality is said to constitute a reasonable and justifiable limitation on the right of access to information under Article 24, aimed at safeguarding commercially sensitive information during privatization processes, and subject to recourse under the Access to Information Act.

25. In sum, the 1st Respondent characterises the Petition as speculative, misconceived, and devoid of constitutional merit, and urges this Court to dismiss it with costs.

3RD RESPONDENT'S CASE

26. The 3rd Respondent, the Honourable Attorney-General, opposes the Petition through a Replying Affidavit sworn on 12th January, 2026 by Hon. FCPA John Mbadi Ng'ongo, Cabinet Secretary for the National Treasury and Economic Planning, and through separate written submissions. While substantially aligning himself with the position taken by the National Assembly, he places particular emphasis on the preliminary objection founded on res judicata, as well as on the fiscal and macroeconomic policy considerations underpinning the impugned statute.

27. On the preliminary issue, the 3rd Respondent urges the Court to find that the Petition is barred by the doctrine of *res judicata* and constitutes an abuse of the court process. Reliance is placed on ***Wamunyinyi v Cabinet Secretary,***

Ministry of Treasury & Economic Planning & 3 others; Manyonge & 3 (Interested Parties) for the proposition that where a court renders a determination on the constitutionality of a process of national import, such decision operates *in rem* and transcends the immediate parties. It is contended that this Court's pronouncement in ***Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others*** to the effect that a privatization statute of that character does not concern county governments constitutes such a binding determination and cannot be reopened by a court of coordinate jurisdiction. In that regard, reliance is also placed on ***Kenya Hotel Properties Limited v Attorney General & 5 others*** for the settled principle that a court of concurrent jurisdiction cannot sit on appeal over the decision of another.

28. On the question of Senate participation, the 3rd Respondent reiterates that the Privatization Act, 2025 is confined, by its long title and operative provisions particularly section 4(f)—to national government-linked entities, and expressly excludes the sale or transfer of shares by county governments. Section 71, which references Gazette Notice No. 8739 of 14th August 2009, is characterised as a transitional mechanism ensuring continuity of pre-existing processes rather than an enlargement of the Act's scope. It is further contended that no cogent evidence has been tendered to demonstrate that the entities listed in the 2009 Gazette Notice were lawfully vested in county governments pursuant to the transition framework. The 3rd Respondent also submits that national security, referenced in certain provisions, is under the

Fourth Schedule a function of the national government, and its inclusion does not convert the statute into a Bill concerning counties.

29. In defence of the impugned provisions, the 3rd Respondent supplements the legal arguments with an exposition of fiscal and economic policy. He avers that privatization is a legitimate macroeconomic instrument for revenue mobilisation, public debt management, capital market deepening, and enhancement of operational efficiency in formerly state-owned enterprises. By way of illustration, reference is made to the privatization and public listing of Safaricom as a precedent demonstrating expanded share ownership, employment generation, and contribution to national revenue. Section 6(d) is described as declaratory of legislative purpose; section 32 as preserving existing restrictions on non-citizen participation, including those grounded in Article 65; section 54 as consistent with Article 206 in requiring proceeds to be paid into the Consolidated Fund; section 55 and the Third Schedule as establishing a limited internal review mechanism distinct from an appeal and preserving recourse to the High Court; and section 65 as a constitutionally permissible limitation on access to information, consonant with Article 24 and section 6(1)(d) of the Access to Information Act.

30. The 3rd Respondent maintains that the Petition is predicated upon a misapprehension of the legislative history, constitutional framework, and legal effect of the statute; that the Act is procedurally and substantively sound; and that the proceedings are barred by res judicata and otherwise

devoid of merit. He accordingly urges the Court to dismiss the Petition in its entirety.

ANALYSIS AND DETERMINATION

31. Having carefully considered the Petition, the affidavits, the annexures thereto, the submissions of the parties, and the authorities cited in support of their rival positions, this Court is of the considered view that the following issues arise determination:

    i. ***Whether the doctrines of res judicata and/or abuse of the court process bar the instant Petition.***
    ii. ***Whether the Privatization Act, 2025 was a Bill concerning county governments within the meaning of Article 110 of the Constitution, thereby rendering its enactment by the National Assembly alone unconstitutional.***
    iii. ***Whether the specific provisions of the Privatization Act, 2025- Sections 6(d), 32, 54, 55 (together with the Third Schedule), and 65 are inconsistent with the Constitution and therefore unconstitutional.***

Whether the doctrines of res judicata and/or abuse of the court process bar the instant Petition.

32. The Respondents urge this Court to arrest the Petition at the threshold on the ground that the principal constitutional question namely, whether the Senate ought to have been involved in the enactment of a statute governing privatisation was conclusively determined by this Court in prior proceedings.

The Petitioner resists both the competence of the plea and its substantive merit.

33. The doctrine of *res judicata*, now codified in section 7 of the Civil Procedure Act, occupies a cardinal place in our jurisprudence. It secures the salutary objectives of finality in litigation, the conservation of scarce judicial resources, and the protection of litigants from vexatious and repetitive exercises. It is not a mere technical bar; it is a substantive principle of law deeply rooted in public policy and the need for certainty and stability in the administration of justice.

34. In ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (supra)***, the Supreme Court of Kenya authoritatively restated the constituent elements of res judicata as follows:

> "For res judicata to be invoked in a civil matter the following elements must be demonstrated:
> (a) There is a former judgment or order which was final;
> (b) The judgment or order was on merit;
> (c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
> (d) There must be between the first and the second action identical parties, subject matter and cause of action.
> (See ***Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR***)."

35. Crucially, the doctrine extends beyond cause-of-action estoppel to encompass issue estoppel, which precludes the re-litigation of an issue of fact or law that was necessarily and finally determined in earlier proceedings between the same parties or their privies, even where a subsequent suit is founded upon a different cause of action. As the Supreme Court explained in ***John Florence Maritime Services Limited (supra)*****,** with approval of Halsbury's Laws of England, Volume 12A, 5th Edition (2015):

"... res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving different cause of action to which the same issue is relevant... The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abuse and duplicative litigation... it is unjust for a man to be vexed twice with litigation on the same subject matter..."

36. The previous suit relied upon by the Respondents is ***Orange Democratic Movement Party & 4 others v Speaker of National Assembly & 5 others (supra).*** A careful reading of that judgment discloses that although the Court invalidated the Privatization Act, 2023 on the ground of inadequate public participation, it expressly addressed and rejected the contention that the Senate ought to have participated in its enactment. In paragraphs 145 and 146, the Court held:

"145. The petitioners again take issue with the fact that the Senate was not involved in the legislative process despite the fact that most of the entities to be privatised are domiciled in the counties... Article 110 requires that the Senate's concurrence be sought in any legislation that affects counties.

146. It is clear from both the long title to the Act and section 6, that the Act deals with privatisation of public entities belonging to the national government and not county governments... The fact that some, if not all the entities, are domiciled within counties... what is to be privatised is ownership and not functions. I, therefore, see no reason for faulting the legislative process in excluding the Senate's concurrence."

37. This was a clear, reasoned, and final determination on a substantive point of constitutional law: whether a statute of this character constitutes a Bill concerning county governments for the purposes of Article 110 of the Constitution.

38. The Petitioner's attempted distinction between the Privatization Act, 2025 and its 2023 predecessor, resting principally on the inclusion of Section 71 and reference to Gazette Notice No. 8739 of 2009, is unpersuasive. The transitional provision does not alter the fundamental character of the legislation as a national law governing the divestiture by the national government of its ownership interests in national government entities. Section 4(f) of the Act explicitly confirms its non-applicability to county

government share sales. The transitional clause in Section 71 merely provides for completion of ongoing privatization processes under the new statutory framework and cannot, as a matter of legal substance, expand the scope of the Act to encompass county-owned assets.

39. Moreover, although the litigants in the earlier suit are not the identical individuals before this Court, they are litigating in identical juridical capacities. The Petitioner acting as a citizen in public-interest litigation, and the Respondents as state organs defending the validity of national legislation. The subject matter and the gravamen of the procedural challenge the alleged unconstitutional exclusion of the Senate are the same. The earlier Court was properly seized of jurisdiction and its determination on this point was final.

40. The Petitioner's procedural objection that the Respondents did not annex the pleadings from the 2023 case, while technically correct as a matter of forensic practice, does not vitiate the plea. The judgment itself, which is before this Court, comprehensively delineates the issues that were canvassed and resolved, including the Senate participation question. No prejudice has been shown. In any event, courts routinely take judicial notice of their own records and prior decisions without formal annexure, particularly where the judgment shows clearly the matters in issue. To permit re-litigation of a settled constitutional issue merely because the title of the statute bears a different year would undermine the very finality that res judicata embodies. In this regard, the Supreme Court's admonition in ***Kenya Hotel Properties Limited v Attorney General & 5 others [2022] KESC 62 (KLR),*** cautioning

against courts of coordinate jurisdiction reopening decisions of their peers, is particularly apposite.

41. In light of the foregoing, I find and hold that the Petitioner's challenge to the enactment process of the Privatization Act, 2025 on the basis of the exclusion of the Senate is barred by issue estoppel, a species of *res judicata*. Accordingly, the Respondents' preliminary objection succeeds insofar as it pertains to the alleged procedural infirmity under Article 110 of the Constitution.
42. This finding, however, is strictly confined to the question of whether a privatisation statute of this character constitutes a Bill concerning county governments. It does not extend to the Petitioner's distinct substantive challenges to the constitutionality of sections 6(d), 32, 54, 55, and 65 of the Act. Those impugnments are directed at the content of the legislation and were not the subject of a final determination in the earlier proceedings; accordingly, they will be examined and determined on their merits.

Whether the Privatization Act, 2025 was a Bill concerning county governments within the meaning of Article 110 of the Constitution.

43. Notwithstanding the finding on res judicata, and in the interests of completeness, I proceed to consider the substantive merits of the Petitioner's challenge. The constitutional framework delineating the legislative roles of the National Assembly and the Senate is set out in Articles 109 to 114 of the Constitution. Article 109(3) is pellucid: "A Bill not concerning county government is considered only in the National Assembly,

and passed in accordance with Article 122 and the Standing Orders of the Assembly".

44. Article 110(1) defines a "Bill concerning county government" as one that contains provisions (a) affecting the functions and powers of county governments set out in the Fourth Schedule; (b) relating to the election of members of a county assembly or executive; or (c) affecting county finances under Chapter Twelve. Article 96(2) states the Senate participates in law-making "by considering, debating and approving Bills concerning counties."

45. This Court's task is to determine whether the Privatization Act, 2025 falls within this definition. This requires a purposive and holistic interpretation of the Constitution, as mandated by Article 259(1), and the application of the test formulated by the Supreme Court in ***Senate & 3 others v Speaker of the National Assembly & 10 others [2025] KESC 11 (KLR),*** which assesses the extent to which the provisions of a Bill materially affect the functions and powers of county governments under the Fourth Schedule.

46. Applying this test, the Act does not meet the threshold of a Bill concerning county governments. First, the Act's personal and territorial scope is expressly limited. Section 2 defines the entities subject to privatization as national government-linked corporations, their subsidiaries, and state corporations, while Section 4(f) carves out sale or transfer of shares by a county government. The Supreme Court in ***Senate & 3 others v Speaker of the National Assembly & 10 others (supra)*** emphasized that the substantive

effect of legislation determines its classification. Here, the Act's effect is on the national government's ownership portfolio. County governments retain full discretion over their own functions and assets; the Act imposes no obligation on them to privatize, manage, or transfer property.

47. The Petitioner's argument that the Act deals with public land and therefore trenches on a devolved function (land, under Item 2 of Part 2 of the Fourth Schedule) is based on a conflation of concepts. It is true that the Act provides for the transfer of assets of a public entity, which could include land. However, the regulation of land use and planning is devolved in that the ownership and disposition of national government land is a national function. More fundamentally, the Act is not a land law. It does not prescribe methods for converting land from public to private tenure; that is exhaustively governed by the Land Act and the Land Registration Act, enacted pursuant to Article 68(c)(ii) of the Constitution. The Privatization Act merely facilitates a commercial transaction (sale of shares or assets) of a corporate entity. If that entity owns land, the change in the entity's shareholding does not, in law, equate to a conversion of the land itself. The land remains registered in the name of the corporate entity, which is a separate legal person. The Petitioner's fear that the Act silently permits the conversion of public land to freehold is speculative and finds no basis in the Act's text. Any disposition of land held by a privatized entity would still have to comply with the dedicated land legislation, which contains its own safeguards.

48. The Petitioner's reliance on Gazette Notice No. 8739 of 2009 and Gazette Notice No. 2701 of 2017 is similarly misplaced. Assuming without conceding that the assets of defunct local authorities vested in county governments, the Petitioner has not demonstrated that the specific corporate shares in entities like Mt. Elgon Lodge were part of that vesting, or that county governments are currently the registered shareholders of record in these entities. The burden of proof lies on him. Even if they were, Section 4(f) of the Act acts as a clear ouster: the Act does not apply to sales by county governments. Therefore, if a county government wished to sell its shares in such an entity, it would not use this Act. The fact that the Act mentions finalizing processes from the 2009 Gazette Notice does not mean it applies to county-owned shares; it merely provides a legal framework for concluding transactions where the national government is the selling shareholder. This interpretation is consistent with the Act's overall outline.

49. Regarding the arguments on national security and the National Police Service, the Petitioner misinterprets the term "Parliament" in Articles 238 and 239. It is a cardinal principle of constitutional interpretation that the Constitution must be read as an integrated whole. While certain articles vest authority in "Parliament," the specific procedural requirements for different types of Bills are detailed in Chapter Eight. The mere mention of "Parliament" does not automatically summon the Senate for every related bill. National security is unequivocally a function of the national government. This Court and the Court of Appeal have previously held that legislation with national security implications is not thereby rendered a "bill concerning counties."

(See ***Coalition for Reform and Democracy (CORD) & 2 others v Republic & another; Director of Public Prosecution & 6 others (Interested Parties); Law Society of Kenya & another (Amicus Curiae) [2015] KEHC 7074 (KLR)*** *and* ***Coalition for Reforms and Development (CORD) & 2 others v Republic of Kenya & another [2024] KECA 1955 (KLR)).*** The inclusion of penal provisions in a statute is a common legislative technique and does not alter the character of the parent legislation.

50. The 1st Respondent's alternative argument that the Act is a Money Bill under Article 114 is compelling. Article 114(3) defines a Money Bill to include a Bill that deals with the appropriation, receipt, custody, investment or issue of public money. The Privatization Act, 2025 establishes a framework for the "receipt" of proceeds from the sale of national assets and their payment into the "custody" of the Consolidated Fund. It also provides for the use of public funds to establish and run the Privatization Authority. These provisions squarely engage with the receipt and custody of public money. Article 114(1) and (2) are explicit.

51. Article 114 (2) provides that:

"If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of "a money Bill", the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance."

52. This provides an independent and solid constitutional basis for the Senate's non-involvement in the passage of this Act.

53. This court places reliance on the decision of the Supreme Court when it considered the issue of money Bill in ***Senate & 3 others v Speaker of the National Assembly & 10 others (Supra)*** when it stated as follows: -

"[141] Even before examining the nexus, we note that the amendments pertain to the establishment of Sports, Arts and Social Development Fund established and are managed in accordance with the Public Finance Management Act, 2012 and the appropriation of funds for the promotion of and development of sports by the Kenya Academy of Sports. Due to this and in light of our finding on issue (iii) above on money Bills, we are of the considered view that this falls squarely within the four corners of Article 114(3)(c) on the appropriation, receipt, custody, investment and issue of public money. Therefore, as a money Bill, it may only be introduced in and considered by the National Assembly, hence was not required to be considered by the Senate."

54. For all the foregoing reasons, the Privatization Act, 2025 does not constitute a Bill concerning county governments under Article 110 of the Constitution. Its enactment by the National Assembly alone was constitutionally sound, both because it does not affect county functions and, alternatively, because it qualifies as a Money Bill.

Whether the specific provisions of the Privatization Act, 2025 are unconstitutional.

55. The Court now turns to the Petitioner's substantive challenges to specific provisions of the Privatization Act, 2025.

56. The burden of establishing unconstitutionality rests squarely on the Petitioner. The standard is exacting. He must demonstrate not merely a speculative risk of abuse, or a disagreement with the policy objectives of privatization, but that the impugned provisions are in direct conflict with the express provisions or overarching principles of the Constitution, or that they impose limitations on rights which are not reasonable and justifiable in an open and democratic society, as contemplated under Article 24. The Court's mandate is not to assess the prudence or desirability of the privatization policy itself, but to determine whether the legislation complies with the constitutional framework and respects the rights, principles, and procedural safeguards enshrined in the Constitution.

a. Section 6(d)

57. Section 6(d) states that one of the purposes of privatization under the Act is to improve efficiency, profitability and accountability of public entities.

58. The Petitioner contends this offends principles of equity and intergenerational equity. With respect, this argument misunderstands the nature of the provision and the constitutional principles invoked. Section 6(d) is a declaratory statement of purpose, not an operative, coercive rule. It

outlines one of the objectives the legislature hopes to achieve through privatization. It does not mandate the privatization of efficient entities, nor does it prohibit the privatization of inefficient ones. The Petitioner has not shown that the mere articulation of the aspirational goal of privatization constitutes a breach of any specific constitutional duty. The national values enshrined in Article 10, including equity, social justice, and human dignity, serve as guiding principles for the conduct of the State. They are not self-executing legal prohibitions capable of invalidating particular policy instruments, such as the privatization of national government assets. In other words, the invocation of Article 10 does not, by itself, render a policy or statute unconstitutional unless the implementation of that policy directly contravenes a specific constitutional provision or right

59. The Supreme Court in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR)*** cautioned against construing constitutional values and principles as prescriptive rules capable of dictating specific legislative outcomes. In the present case, the Petitioner's challenge under Section 6(d) suffers from the same defect. It is not pleaded with the requisite particularity and precision that constitutional litigation demands as affirmed ***Anarita Karimi Njeru v Republic [2015] eKLR)***. The Petitioner has failed to establish a causal nexus between the aspirational statement in Section 6(d) and an infringement of a specific constitutional right. For these reasons, the challenge is without merit and is hereby dismissed.

b. Section 32

60. Section 32 regulates eligibility to participate in privatization. Subsection (1) provides that any person, whether Kenyan or non-Kenyan, is eligible to participate, subject to the proviso that:

"this section shall not affect the application of any other law imposing restrictions on participation by non-Kenyans."

61. Subsection (2) further empowers the Cabinet Secretary to direct the Authority to limit participation to Kenyans or to ensure a minimum level of Kenyan participation. The Petitioner fears that this provision permits non-citizens to acquire land or assets in a manner that allegedly contravenes Article 65 of the Constitution.

62. This fear is premised on a misinterpretation of the statutory provision. Section 32 does not operate in isolation. The proviso expressly preserves the application of all other laws, including the Land Act and any subsidiary legislation enacted under Article 65, which restrict non-citizen ownership of land. Accordingly, if a public entity holds land and a non-citizen seeks to acquire shares in that entity, such a transaction would remain subject to the existing legal regime governing foreign ownership of land, ensuring that Article 65's restrictions are fully respected. The Privatization Authority, in carrying out any transaction, is expressly bound by the existing legal framework, including the Land Act and Article 65 restrictions on foreign ownership of land. Moreover, subsection (2) confers a discretionary power on the Cabinet Secretary to direct the Authority to limit participation to

Kenyan citizens or ensure a minimum level of Kenyan participation, thereby providing an additional safeguard. When read as a whole, Section 32 is carefully structured to ensure compliance with the Constitution. Accordingly, the provision cannot be regarded as unconstitutional.

c. Section 54

63. Section 54 provides:

"Any proceeds from the sale of a direct National Government shareholding shall be paid into the Consolidated Fund."

64. The Petitioner contends that this provision is vague and fails to address proceeds from entities with mixed ownership.

65. This argument is without merit. In the context of the entire Act, the term "direct National Government shareholding" is sufficiently clear. It refers to shares held directly by the national government in a public entity, as defined under the Act, and is distinct from indirect holdings or shares held by other public bodies.

66. More fundamentally, Section 54 is a logical and constitutionally mandated corollary to Article 206(1), which provides that all money raised or received by the national government must be paid into the Consolidated Fund. Section 4 of the Act expressly excludes county governments from its scope. Consequently, Section 54 is logically limited to proceeds arising from sales where the national government is the seller. Where a county government

disposes of shares, such a transaction would be governed under a different statutory framework, including the Public Finance Management Act applicable to counties.

67. Accordingly, there is no constitutional void or vagueness in Section 54. The Petitioner's challenge to this provision is therefore dismissed.

d. Section 55 and the Third Schedule

68. Section 55 provides that a person dissatisfied with a decision of the Privatization Authority regarding the implementation of the privatization programme may apply to the Authority for a review. The review is limited to narrow grounds: either new information that was previously unavailable, or an error apparent on the record. The Third Schedule prescribes the procedure for such review. The Petitioner cries foul, invoking the rule against bias.

69. This challenge conflates distinct concepts in administrative law. Section 55 establishes an internal administrative review mechanism, not a judicial or quasi-judicial appeal. It is a first-tier, informal, and expeditious process enabling the Authority to correct manifest errors or consider new information, potentially avoiding the need for formal litigation. Such internal review mechanisms are common in regulatory statutes and are not inherently unconstitutional.

70. The essential safeguard is contained in Section 56, which confers on an aggrieved person the right to appeal to the High Court, an independent and impartial tribunal. The existence of this external appeal right fundamentally distinguishes the internal review from a process that could impinge on constitutional rights. The internal review does not oust or limit the High Court's jurisdiction; it precedes it.

71. This statutory design is analogous to other legislatively sanctioned frameworks in which an internal review is a prerequisite to an external appeal, a structure repeatedly upheld as constitutionally sound. The Petitioner has not demonstrated that this scheme, viewed in its entirety, infringes the right to a fair hearing under the Constitution. The internal review is procedural and preliminary; the High Court remains the final arbiter. For these reasons, the challenge to Section 55 fails.

e. Section 65

72. Section 65(1) provides:

"Any information issued to or sought by the Authority under this Act is confidential and shall not be disclosed unless with the written approval of the Authority."

73. The Petitioner contends that this provision constitutes an absolute bar contrary to the right of access to information under the Access to Information Act, 2016.

74. The right of access to information under Article 35 of the Constitution is not absolute. It is subject to reasonable and justifiable limitations under Article 24. In the context of privatization, disclosure of sensitive commercial information prematurely could distort the market, prejudice the commercial interests of the entity, and undermine the value received for the public. Section 65 is therefore a confidentiality provision designed to manage this risk during the active privatization process.

75. The discretion conferred on the Authority to grant approval for disclosure is not unfettered; it must be exercised reasonably and in accordance with the objectives of the Act. Furthermore, this provision does not operate in isolation. Section 6(1)(e) and (f) of the Access to Information Act, 2016 expressly permit limitations on access to information where disclosure would substantially prejudice commercial interests or harm the government's ability to manage the economy. Section 65 is thus a specific and proportionate application of these permissible limitations within the specialized domain of privatization.

76. An individual denied access under Section 65 may still invoke the procedures of the Access to Information Act, under which the Authority would be required to justify the refusal in accordance with the statutory tests. Section 65 is therefore a rational, proportionate, and constitutionally permissible limitation on access to information, aimed at protecting legitimate public and commercial interests. It is not unconstitutional.

CONCLUSION

77. In conclusion, the Petitioner's constitutional challenge to the Privatization Act, 2025 fails in its entirety as outlined below: -

a) The challenge to the enactment process premised on the exclusion of the Senate is barred by the doctrine of res judicata, specifically issue estoppel. In any event, the challenge is without substantive merit, as the Privatization Act, 2025 is not a Bill concerning county governments within the meaning of Article 110 of the Constitution, and, alternatively, it was properly enacted as a Money Bill in accordance with Article 114.

b) The substantive challenges to Sections 6(d), 32, 54, 55 (together with the Third Schedule), and 65 of the Act are unfounded. The Petitioner has not discharged the burden of proving unconstitutionality. Each provision falls squarely within the competence of the legislature and reflects a rational policy choice for the governance of privatization. The Act incorporates adequate procedural safeguards and operates in conformity with the overarching principles and values enshrined in the Constitution, including Articles 10, 24, 35, 65, 110, 114, and 206.

78. Accordingly, from the reasons stated above, this court makes the following orders:

i. The Notice of Motion dated 31st October, 2025 and Petition dated 31st October 2025 are hereby dismissed in their entirety.

ii. The Privatization Act, 2025 is declared to be constitutional and valid.

iii. Each party shall bear its own costs.

Orders accordingly. File closed accordingly.

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

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BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Petitioner in person – Mr. Eliud Matindi

Counsel for the 1st Respondent – Ms. Nganyi

Counsel for the 2nd Respondent – No appearance

Counsel for the 3rd Respondent – Mr. Kaumba

Court Assistant -Ms. Lwambia